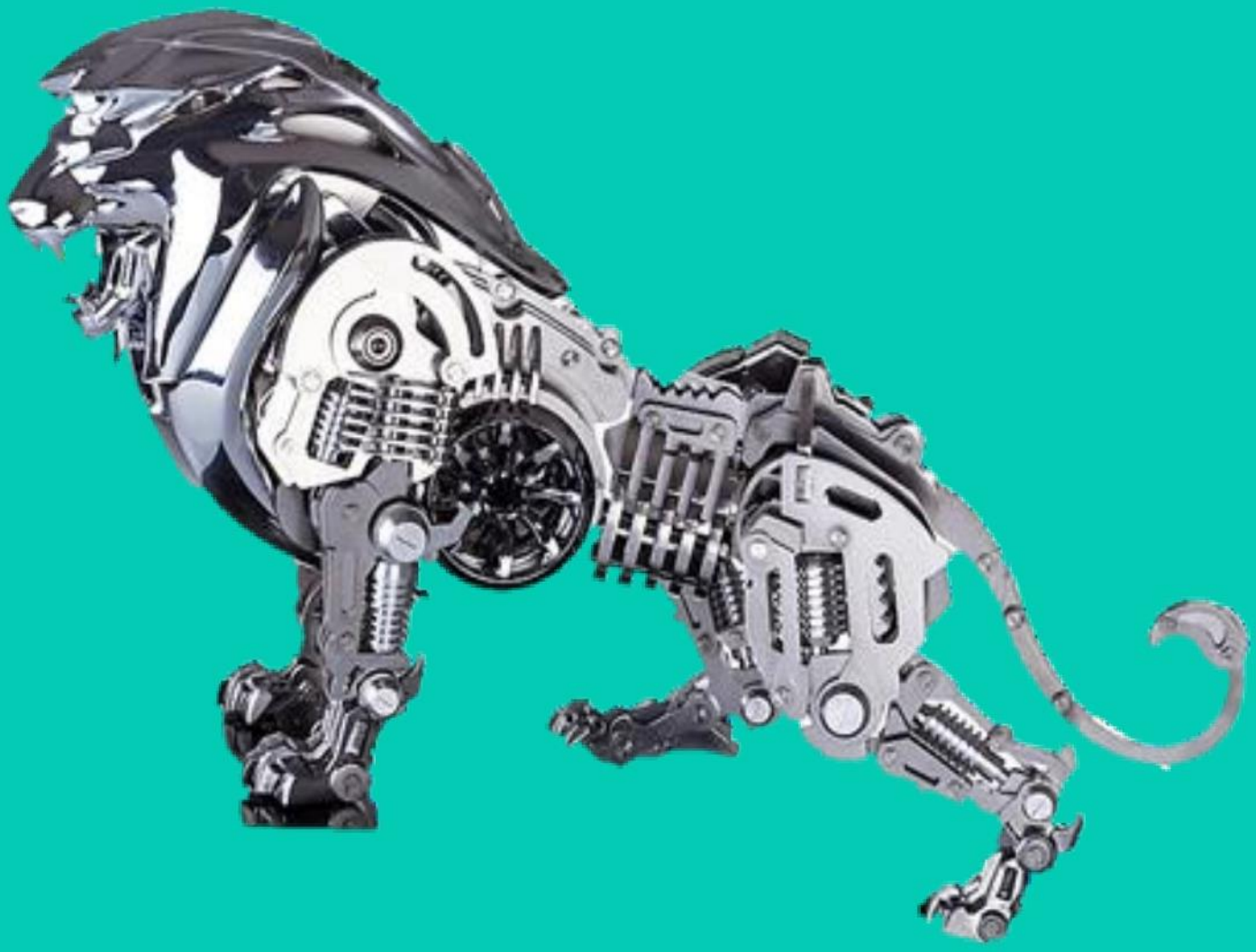
CGRF
SandBox®
July 2021
Volume 2 | Issue 7



Agility in Business – Mantra for Success

[agility: ability to move quickly and easily; ability to think and understand quickly]

CGRF®
CREATE & GROW
RESEARCH FOUNDATION

CREATE & GROW
RESEARCH FOUNDATION

CIN: U73200TN2019NPL132843
(A section 8 Company registered
under Companies Act, 2013)

INDEX

குறள்: 651
துணைநலம் ஆக்கம் தரூஉம் வினைநலம்
வேண்டிய எல்லாம் தரும்.

Thirukural: 651
The efficacy of support will yield (only) wealth; (but) the efficacy of action will yield all that is desired.

From the Editor's desk

Dear Readers of CGRF SandBox

It gives us great pleasure to meet you again through our July issue of CGRF SandBox.

Several positive hues are giving a boost to the economy. In the financial markets, the hugely successful IPO of Zomato has heralded the arrival of new-age unicorns tapping the equity market with substantial offering which has been lapped up by institutional investors in a few hours. Notable again was the success of IPO by GR Infra Ltd. which is into infrastructure space. Further public offering by PayTM, LIC, etc. are in the pipeline which augurs well for small investors as well.

National Asset Reconstruction Company Ltd.

The much-talked about national bad bank has been incorporated in July 2021 with equity participation from several banks. This move by the government is expected to give a fillip to the lenders to off-load stressed assets to NARCL and keep focussing on lending. We have brought out some more information about NARCL elsewhere in this issue.

Business agility

The frequent setbacks to business enterprises in the last few years have once again brought the limelight on agility of the business units to withstand such onslaught by unforeseen and unprecedented havocs. Apart from the Covid-19 pandemic waves which have unsuspectingly pulled down several well-doing ventures. The calamitous situation has pushed down the risk-taking appetite of entrepreneurs. Nevertheless, this perhaps is not the last word for dynamic and unrelenting minds who keep finding new ways to survive such mishaps and emerge stronger.

This thought takes us to spend some time on why business units fail, what takes to the entrepreneur to ring fence his business for a reasonable time and how the agility of a business enterprise can be sustained. A case study on Jet Airways is shared with the readers bringing an insight into the once successful airline which is struggling to take off.

We will be glad to share the wisdom of the veterans in CGRF family who have been lenders for most part of their life or hard-core business enthusiasts from day one or even a mix of the two. Well, it is a conundrum as to where the objectives of the business houses and the lenders meet but nevertheless, there are plenty of real-life examples where a good business can be profitable and sustainable as well duly observing the corporate governance principles.

Get more space

The recent successful space tours by Jeff Bezos and Richard Branson have brought cheers to the animal spirit of mankind to find new areas of adventure and business. It appears Elon Musk will not take it easy now, as his SpaceX is also a formidable player in "space" business. Be that as it may, the spyware news occupying the centre-space in Indian politics is a matter of concern. The unwavering focus should now be on vaccination and protecting the life of the people.

Prepack Scheme for MSME units

CGRF is proud to share that the **"Guide to Bankers on Prepack Scheme"** has been received well by the lenders. MSME units being the prime beneficiary of this new scheme, all applicable provisions having been brought out in a single compendium is expected to give more clarity to the stakeholders. CGRF is glad that it has started working closely with bankers on Prepack scheme which is a "mini IBC" and provides much needed relief from judicial delays.

Like other issues of CGRF SandBox, we are glad that some interesting decisions by NCLT / NCLAT / Supreme Court have been brought out in this issue.

Once again with a fervent request to the readers to observe all caution against Covid-19, particularly as the third wave is expected in the next few months, I would like to sign off.

Yours truly

S. Rajendran

National Asset Reconstruction Company Limited – Takes shape

CGRF Bureau

Introduction

The much talked about "Bad Bank" of the country is finally off the block. NARCL has been incorporated on 7th July 2021. Brief details of the company are given below:

About the Company

National Asset Reconstruction Company Limited (NARCL), as per its MoA, has been incorporated with the object to carry on the business of asset reconstruction company and/or a securitization company as permitted by Reserve Bank of India and/or generally to purchase, acquire, invest, transfer, sell, dispose of or trade-in participation certifications, participation units, securitized debts, asset-backed securities or mortgage-backed securities or asset-backed securitized debt or mortgage-backed securitized debt.

The following further details are found from the records of the Registrar of Companies:

Key Statistics	
Registered Address	6th Floor, World Trade Centre, WTC complex, Cuffe Parade, Mumbai – 400005, Maharashtra
Business Address	6th Floor, World Trade Centre, WTC complex, Cuffe Parade, Mumbai – 400005, Maharashtra
Date of Incorporation	7th July 2021
Type of Entity	Union Government Company
Authorised Capital	Rs. 100.00 Crores
Paid up Capital	Rs. 74.60 Crores
Listing Status	Unlisted
Email	ankur.srivastava@ezylaws.com
CIN	U67100MH2021GOI363511
PAN	AAHCN6975B

Current Directors

Directors Name M/s.	Designation
Padmakumar Madhavan Nair	Managing Director
Sunil Mehta	Director
Ajit Krishnan Nair	Nominee Director
Salee Sukumaran Nair	Nominee Director

Share holding pattern

Sr No.	Name of the shareholder	No. of Equity Shares of Rs.10 each taken by each Subscriber
1.	Bank of Baroda	99,00,000
2.	Punjab National Bank	90,00,000
3.	Bank of India	90,00,000
4.	Bank of Maharashtra	50,00,000
5.	State Bank of India	99,00,000
6.	Union Bank of India	99,00,000
7.	Canara Bank	1,20,00,000
8.	Indian Bank	99,00,000
Total no. of shares		**7,46,00,000**
Total paid up capital		**Rs. 74,60,00,000**

The Main Objects of the Company to be pursed on its Incorporating are:

- To operate as an asset reconstruction and/or securitization company, as approved by the Reserve Bank of India;
- To purchase, acquire, invest, transfer, sell secured as well as unsecured financial assets, receivables, etc., whether movable, immovable, performing or non-performing, impaired or unimpaired, and otherwise;
- To purchase, acquire, invest, transfer, sell, dispose of or trade in or issue to public or private investors securities or instruments or certificates issued;
- To promote, organize and manage funds, investments, financial assets, receivables, debt, or securities on a discretionary or non-discretionary basis on behalf of any person(s), in the private as well as the public sector;
- To serve as agents for any person(s), including financial institutions, banks, non-banking financial institutions, and other lending agencies, in order to recover the debts owed to them;
- To offer advice and consulting services to financial institutions, banks, non-banking financial institutions, and other lending agencies for the purpose of resolving their debts, particularly non-performing financial assets.

Role of subsequent Board Meeting on Minutes of previous Board Meeting

S.Srinivasan, Senior Partner
SR Srinivasan & Co.

We normally see from the Minutes of a Board Meeting that the Board confirms or approves the minutes or the proceedings of the previous Board Meeting in the succeeding meeting as a matter of routine. Samples of such confirmation or approvals as appearing in the minutes of some Board Meetings are reproduced below {emphasis added}:

(i) Confirmation of previous board meeting held on 19th March 2019

Minutes of previous board meeting held on 19th March 2019 read and **approved**

(ii) Noting of previous meeting held on 21st July 2020

The minutes of third meeting of 2020 of board directors held on 21st July 2020 as circulated to the directors earlier as per secretarial standard **were considered as confirmed** and after discussion it was unanimously

RESOLVED THAT the minutes of third board meeting of 2020 held on Tuesday 21st July 2020 as circulated to members of the board be and hereby noted and confirmed as true record of the proceedings

(iii) Noting of minutes of previous meeting

Minutes of 21st meeting of board of directors held on 18th May 2020 as circulated to directors with agenda papers were considered and after discussion it was unanimously

RESOLVED THAT minute of 21st meeting of board of directors held on 18th May 2020 be and hereby noted and confirmed as to record of proceedings.

(iv) Confirmation of minutes of 123rd meeting of board of directors of the company

The minutes of 120 3rd board meeting held on 16th 10 2020 circulated earlier were discussed and confirmed by passing the following resolution unanimously

Resolved that the minutes of 120 3rd meeting of the board of directors company held on 16 10 2020 place before the board be and hereby by confirmed as to record of the proceedings

Minutes confirmed as afore said was signed by the chairman

(v) The minutes of 150 first board meeting held on 20.05.2020 were discussed and there after the minutes were confirmed by passing the following resolution

Read board note number 3271 and enclosures

Resolved that the minutes of 150 first board meeting held on 22.05.2020 be and hereby **confirmed as a true record of the proceedings**

The minutes confirmed as aforesaid was then signed by chairman of the next meeting

The fundamental question is:

Is there a requirement under law that the minutes of the previous Board Meeting has to be confirmed or approved by the succeeding Board Meeting?

Neither the Companies Act,1956, nor the Companies Act,2013, had/has a provision that the minutes of the previous Board Meeting was/ has to be confirmed by the succeeding Board Meeting. Decisions once arrived at do not need confirmation and the practice that is adopted by the Boards of companies confirming minutes has no legal significance. In fact, the explanation to section to section 193(5) of the Companies Act,1956, and section 118(6) of the Companies Act,2013 have given powers to the Chairman of any Board Meeting to exercise absolute discretion in regard to inclusion or non-inclusion of any matter in the minutes on the ground specified in the respective sections.

There has been a departmental clarification Ref. no. Letter no.8/2 (Misc.)/75-CL-V dated 5-5-75 *inter-alia* and reads as follows:

A……

B. "In the view of the Department the course of confirming the minutes of any board

meeting by the members of the Board at the next board meeting is not contemplated by the law".

The above clarification still holds good as there has been no further clarification from MCA on this subject. The same clarification of the Department states as under:

C. Since as stated the confirmation of minutes of a Board Meeting is not required the question of postponing action on the resolutions already passed by the Board for want of confirmation would not arise. Since such postponement of action, legal consequences are liable to be incurred, it would serve to indicate why the law does not contemplate confirmation of the minutes of any Board meeting as such.

Therefore, since confirmation is not required the question of waiting for the succeeding Board Meeting to confirm the recording of the minutes does not arise and all resolutions passed at the previous Board Meeting can be implemented as soon as the minutes are signed in the prescribed manner by the Chairman of the previous meeting. Similarly, the procedures post passing of the resolution such as filing of the prescribed forms with MCA can be carried out as soon as the minutes are signed by the Chairman of the previous meeting.

One of the purposes of reading the minutes of a previous meeting is to offer an opportunity to make corrections of mis-statements or errors, if any, that may have crept into the record. The Chairman of the succeeding Board Meeting may informally direct the correction of simple mistakes.

Disputes may arise as to the correctness of a statement, motion or resolution recorded in the minutes. In such a case it may be necessary to put the matter to vote in the succeeding Board Meeting in order to determine how the minutes should read. If correction is called for at the discretion of the Chairman of the succeeding Board Meeting the proper procedure is for the minutes of the current meeting to record the corrections so made. In this connection the Department vide its clarification cited earlier has stated as under:

D. Where there is a practice presenting the minutes of a meeting for confirmation by the Board of Directors at the next meeting , it may be noted that if such presumptions contained in section 195{corresponding to section 118(8) of the CA 2013} of the Act and as such it will be possible to have any alteration in the minutes only by way of fresh resolutions of the Board meeting in which the minutes of the meeting in question are discussed. Even if the minutes have not been signed but have been approved by the Chairman of the meeting concerned, the same position as indicated above will prevail. In order that any change in such minutes may be affected, the only way open is to adopt fresh resolutions in modification on the footing the minutes as recorded on the approval of the Chairman stand.

(Image Source:website)

Section 118 (8) of Companies Act,2013, corresponding to section 195 of the Companies Act,1956, makes it amply clear that where the minutes have been kept in accordance with section 118 (1) then, **until the contrary is proved**, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place, and the resolutions passed by postal ballot to have been duly passed and in particular, all appointments of directors, key managerial personnel, auditors or company secretary in practice, shall be deemed to be valid.

The question, therefore, arises as to what is it that the Board confirms or approves in the succeeding Board Meeting? Whether the Board of the succeeding Meeting confirms the contents of the minutes as recorded or confirms the recording of the proceedings?

The succeeding Board Meeting has no authority to confirm the contents of the minutes as recorded. It can confirm only that the recording of the minutes of proceedings *per se* have been properly made, and refrain from saying it *was* true or not. It cannot disapprove the

contents of the minutes partially or fully subject to clause 7.5.3 of SS-I.

The Companies Act, 2013 has not drawn up any specific requirements in Chapter XII dealing with Section 173 to 193 on Meetings of Board and its Powers on this subject. Rule 25 of the Companies (Management and Administration Rules has not addressed the issue under discussion in any manner.

Section 118 of the Companies Act, 2013 though, elaborately discusses the Chairman's authority to include or delete the contents of the minutes as per the proceedings of the Meeting minutes, is also not of any help except that Section 118(10) requires every company to observe Secretarial Standards issued by the Institute of Company Secretaries of India in this regard.

Therefore, the subject under discussion is mainly dealt with reference to Clauses 7.3.5, 7.4, 7.5.3 and 7.6.3 of SS-1 which are reproduced as hereunder:

7.3.5 Minutes of the preceding Meeting shall be noted at a Meeting of the Board held immediately following the date of entry of such Minutes in the Minutes Book.

7.4. Finalisation of Minutes

Within fifteen days from the date of the conclusion of the Meeting of the Board or the Committee, the draft Minutes thereof shall be circulated by hand or by speed post or by registered post or by courier or by e-mail or by any other recognised electronic means to all the members of the Board or the Committee, as on the date of the Meeting, for their comments.

……

……

The Directors, whether present at the Meeting or not, shall communicate their comments, if any, in writing on the draft Minutes within seven days from the date of circulation thereof, so that the Minutes are finalised and entered in the Minutes Book within the specified time limit of thirty days.

If any Director communicates his comments after the expiry of the said period of seven days, the Chairman, if so, authorised by the Board, shall have the discretion to consider such comments.

In the event a Director does not comment on the draft Minutes, the draft Minutes shall be deemed to have been approved by such Director.

……

Clause 7.5.3 and 7.6.3 states as under:

7.5.3 Minutes, once entered in the Minutes Book, shall not be altered. Any alteration in the Minutes as entered shall be made only by way of express approval of the Board at its subsequent Meeting at which the Minutes are noted by the Board and the fact of such alteration shall be recorded in the Minutes of such subsequent Meeting.

7.6.3 Minutes, once signed by the Chairman, shall not be altered, save as mentioned in this Standard.

Therefore, the subsequent Board Meeting has no right to confirm the contents or disapprove the contents of the minutes which is already authenticated by the Chairman of the previous Board Meeting as per the provisions of Rule 25(1)(d) of the Companies (Management and Administration) Rules, 2014. It is the prerogative of that Chairman u/s 118(6) to include or not include items in the minutes of the previous Board Meeting as also the construction of the language in which the minutes are to be drawn up. What the clause 7.3.5 requires is that the Board of the succeeding Board Meeting **shall note** the Minutes of the previous Board Meeting. This could essentially mean that the subsequent Board Meeting has to note that:

(i) Whether the minutes were prepared and kept within 30 days of conclusion of the previous meeting;

(ii) Whether the minutes of the previous Board Meeting was circulated as per clause 7.4 of SS-I within 15 days of the conclusion of the Board Meeting for the directors for their comments;

(iii) Whether the Directors, present at the Meeting or not, have communicated their comments, if any, in writing on the draft Minutes within seven days from the date of circulation thereof, so that the Minutes are

(iv) finalised and entered in the Minutes Book within the specified time limit of thirty days;

and how the Chairman of that meeting dealt with the objections, if any;

(v) Whether any comments from any of the directors were received after the expiry of seven days and whether such comments were entertained by the Chairman; and

(vi) Whether the minutes were recorded within 30 days from the conclusion of the previous Board Meeting.

In the samples of extracts of Board Minutes given above, the wordings used are not in line with the secretarial standards. The ideal minutes should be written as under:

> ***"The Meeting read and noted that the minutes of the proceedings of the previous Board Meeting held on _____ and confirm that they have been properly recorded in the minutes book."***

There is no need to enclose the Agenda Notes with the draft minutes. Nor is there any need to pass a resolution. Decisions once arrived at do not need confirmation. Accordingly, a company can implement its resolutions without waiting for its confirmation at their next meeting. Again, the succeeding Board Meeting has no *locus standi* **to approve or confirm the minutes or say it's the true records** of the previous meeting.

There could exist two situations.

Situation 1**:**

Where the Chairman Succeeding Meeting is the same as the Chairman of Previous Meeting

In this case**,** the Chairman would have ensured that the process of noting as stated above has been observed in letter and spirit. It is illogical to think that he will object or will allow any objections from the directors of the succeeding meeting to the contents or process of noting. It has to be borne in mind that the directors, whether they were present at that meeting or not, had the opportunity to raise objections for seven days from the circulation of the minutes and as per clause 7.4 of SS-1, in the event a Director does not comment on the draft Minutes, the draft Minutes shall be deemed to have been approved by such Director. At the succeeding Board Meeting, the director(s) has/have no right to raise any objections on the contents, if has already not raised earlier, and the Chairman has a right not to entertain such objections. Therefore, any objections raised by any director at the succeeding Board Meeting has to be overruled if the process of noting had been observed. If they were not, then the Chairman has to entertain such objections and deal with the same on merit. Any challenge to the decision by the Chairman in the matter can only be made to an appropriate court of law or alternatively the succeeding Board Meeting must deal with the matter on merits.

(Image Source: website)

Situation 2**:**

Where the Chairman Succeeding Meeting is not the same as the Chairman of Previous Meeting

If the Chairman and the directors of the subsequent Board Meeting are satisfied with the recording of the previous Board Meeting as per secretarial standards 7.4, the Board has to just note the same as per the process indicated above.

It is possible that the Chairman of the previous Board Meeting has authenticated the minutes of the Meeting which is not acceptable to the Directors of the succeeding Board Meeting and objections were raised by one or some or all the directors during the seven days which were available to them. In that case the Chairman of the succeeding Meeting has to only ensure that the Chairman of the previous Board Meeting had dealt with the objections objectively and then had signed the minutes and if so, he has to overrule the objections. It was for the Chairman of the previous meeting who had the discretion to consider such objections and, therefore, the Chairman of the subsequent Board Meeting will not have any say on the veracity of the Minutes authenticated by the previous Chairman. It is not open to the Chairman of the succeeding meeting to reopen the objections if he was satisfied by the actions of the earlier Chairman.

In case, in the wisdom of the Chairman of succeeding meeting, the objections were not dealt with by the earlier Chairman in an objective manner, he may entertain queries from the directors of the present Board who were members of the Board on the date of the previous Board Meeting and deal with them as a separate sub-item not

listed in the agenda. It has to be borne in mind that the composition of Board might have changed. There could be new directors in the subsequent Board Meeting who had not attended the previous Board Meeting and has no right to raise any objections or vote on the proposals of decision to be taken by the present Chairman in this matter.

The Chairman of the succeeding meeting has to take a stand in a judicial manner, whether the objections are frivolous or not. If they were frivolous, he can rule that that the objections being frivolous cannot be entertained. If the objections had merit, and the earlier Chairman had not entertained such objections, it appears that he can take recourse to Clause 7.5.3 and 7.6.3 of the Secretarial Standard-1 relevant extract of which has been reproduced above. In order that any change in such minutes may be affected, the only way open is to adopt fresh resolutions in modification on the footing the minutes as recorded on the approval of the Chairman of the succeeding Board Meeting stand.

(Image Source: website)

Whether the minutes of the previous Board Meeting can be altered?

Technically it appears that the succeeding Board Meeting has a right to alter the previous minutes by virtue of Clause 7.5.3 and 7.6.3 of the Secretarial Standard-1. But it is only conditional. Any alteration in the Minutes as entered shall be made only by way of express approval of the Board at its subsequent Meeting at which the Minutes are noted by the Board and the fact of such alteration shall be recorded in the Minutes of such subsequent Meeting. The subsequent meeting has seemingly all the powers to alter the earlier Minutes authenticated by the previous Chairman, if in the wisdom of the Chairman of the subsequent meeting, it needs to be altered and such alteration has to be approved by the majority of the directors present at the next Board Meeting.

The author's humble view is that there should be no blanket power to be vested with the subsequent Board Meeting for making any alteration. Clause 7.5.3 of SS-1 has to be modified to include the word "***material***" before the word "**alteration**" so that the power vested under this clause should not be misused by the subsequent Board Meeting.

Recent changes relating to Independent Directors brought by SEBI

Prof R. Balakrishnan
FCS, Pune

Introduction

Independent Director is a Director other than a Managing Director or a Whole time Director or a Nominee Director who fulfills all criteria as given in Section 149(6) of the Companies Act 2013 along with Rule 4 and Rule 5 of the Companies (Appointment and qualification of Directors) Rules 2014. In general sense, an independent director is a non-executive director of a company who helps the company in improving corporate credibility and governance standards. He does not have any kind of relationship with the company that may affect the independence of his judgment.

Significant of Independent Directors

Independent Directors play crucial roles in the governance of their companies. They bring invaluable, independent, and objective judgements, views, and opinions to the board, raise important questions on the functioning of the company and seek appropriate answers. They are presumed to keep the management vigilant and make them follow the best governance practices in the best interest of the company and in the public interest.

On 29th of July SEBI approved certain amendments to the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR Regulations) pertaining to regulatory provisions related to Independent Directors (IDs). The important changes brought about by SEBI are as under: -

1	Effective date of amendment	The amendments introduced by SEBI shall be made applicable with effect from Jan 01, 2022.
2	Appointment / reappointment and removal of Independent Directors	Appointment / reappointment and removal of Independent Directors shall have to be through a special resolution of shareholders for all listed entities.

3	Shareholder's approval for the appointment Directors	Shareholder approval for appointment of all directors including Independent Directors shall have to be taken at the next general meeting, or within three months of the appointment on the board, whichever is earlier.
4	Changes in the Nomination and Remuneration Committee	The composition of Nomination and Remuneration Committee has been modified to include 2/3 Independent Directors instead of existing requirement of majority of Independent Directors.
		The process to be followed by Nomination and Remuneration Committee (NRC), while selecting candidates for appointment as Independent Directors, has been elaborated and made more transparent including enhanced disclosures, regarding the skills required for appointment as an Independent Director and how the proposed candidate fits into that skillset.
5	Eligibility requirement for KMP / their relatives / employees of promoter group	A cooling off period of three years has been introduced for Key Managerial Personnel and their relatives or employees of the promoter group companies, for appointment as an Independent Directors.
6	Disclosure requirements at resignation by Independent Directors	The resignation letter of an Independent Director shall have to be disclosed along with a list of her/his present directorships and membership in board committees.
7	Audit Committee	At least two / third of the members of the Audit Committee shall be independent directors as against the current provisions of majority members to be independent.
8	Approval of related party transactions	All related party transactions shall be approved by only Independent Directors on the Audit Committee.
9	Directors and officers insurance	The requirement of undertaking directors and officers insurance has been extended to the top 1000 companies by market capitalization.

Conclusion

The recent amendments brought out by the Security Exchanges Board of India are progressive as well as in line with the enhancement of corporate governance. These changes would bring out more accountable and self-disciplining for the greater public good and in days to come, Indian corporates would excel in achieving better corporate governance in line with the world best practices.

KIND ATTENTION!!

Articles are Invited!

We would be delighted to have you in our panel of writers to contribute articles / snippets / write-ups to add value to CGRF SandBox. This will go a long way in enhancing the quality of CGRF SandBox which is expected to have wide readership amongst top bankers, corporates, and professionals.

Your materials for publishing may please be sent to

createandgrowresearch@gmail.com

in 'MS Word'.

The Rise and Fall of Jet Airways – Case Analysis

Sushmita Ramkumar,BBA LLB(Hons.)
CGRF Team

Introduction

Jet Airways is a limited liability company that was founded by Mr. Naresh Goyal in the year 1992. Though it was initially established as an air tax operator, they eventually delved into the aviation sector in 1995. In due time, a massive hindrance effaced for Jet Airways in the form of the competitors who enabled the middle-class customers to experience what used to be an upper-class privilege, which led to the airline's first downfall. The most fruitful time for the company was in the year 2005, when an Initial Public Offering (IPO) was made, offering 20% of the stock to the public. Given the fact that the airline had created a name for itself by this time, the public investors had begun investing for oversubscription tranches. This resulted in the company raising about USD 276 million, hence making Mr. Naresh Goyal a billionaire, and a strong competitor in the Aviation market. Wanting to multiply this flow of income, Jet Airways acquired Air Sahara in 2007 and rechristened it as 'Jet Lite', which seemingly worked in their favour. However, the dark phase of the airlines' life came when it collaborated with Kingfisher Airlines, which eventually fell prey to bankruptcy. Post this, the airlines had to enter into a price war with established companies like IndiGo and Spice jet, but nothing could stop the company's stock from plummeting. Apart from this, the company had to lay off around 1900 employees as well, while having to deal with the rise in crude oil prices and the fall in the value of the rupee. Though the airline has been rather popular for its service, the company was at its worst when it inevitably had to cease operations in April 2019, and when Mr. Naresh Goyal and his wife Ms. Anitha Goyal chose to step down from positions.

What went Down?

The airlines by 2018, had amassed a debt of around USD 1 billion, and was unable to pay the creditors, salaries or even the loans that it had taken from banks. The lenders by then, had refused to pump funds into Jet Airways any further due to which it turned out to be insolvent. In fact, it was the first company belonging to the aviation sector that had to go through restructuring under the Insolvency and Bankruptcy Code (hereinafter referred to as 'IBC').

Two months after ceasing all operations, the lead banker of Jet Airways, the State Bank of India (SBI) met with 26 of its lenders and finalized after due deliberations that they want to seek resolution under the IBC and filed an insolvency plea under Section 7 of the Insolvency and Bankruptcy Code, 2016.

Section 7 of the IBC basically gives the financial creditors or the authority to file an application for initiating Corporate Insolvency Resolution Process (hereinafter referred to as 'CIRP') against a corporate debtor. Though an operational debtor or the corporate debtor themselves can initiate the proceedings under Section 8 and Section 10 of the Insolvency and Bankruptcy Code, 2016 respectively, the financial creditors, especially the Public Sector Banks, given the fact that they were worst hit, chose to file the application as a consortium.

Though Etihad and Hinduja Airlines' consortium had previously displayed interest in increasing their stakes in the company, they backed out eventually due to the cash crisis and most importantly because Naresh Goyal refused to step down from the management. At this point, the airline was an asset as a mere legal entity and nothing more, with its liabilities outweighing the assets. Before the insolvency plea, 12 of the lending banks had actually put Jet Airways on sale and offered around 33-75% of the stake of the company to any interested party. It did initially receive preliminary bids from some private players. However, none of them actually submitted final bids, understandably. The petition filed by the consortium of lenders was admitted by the National Company Law Tribunal (NCLT) on June 20, 2019.

This is when the company went into a moratorium, as per Section 14 of the IBC. At this point, powers of the Board of Directors will be suspended, and the assets of the airline shall be frozen, and they cannot be sold or taken back by the owner, and any recovery or enforcement of a security interest cannot be done with respect to the property.

By the end of June 2019, Jet Airways' lenders consortium collectively decided that Mr. Ashish Chhawchharia of Grant Thornton, India, a man was registered with the Insolvency and Bankruptcy Board of India (IBBI), should be the resolution professional for airlines. He would help the airlines on their lookout for a potential buyer and would contemplate a way to attain the outstanding dues for the lenders. SBI Capital Markets was appointed as their process advisor and the consortium's legal advisor was Cyril Amarchand Mangaldas. In a sense, the resolution professional becomes the CEO of the airline during the course of the CIRP. The committee of creditors that essentially consists of all the financial creditors of the airline technically acts as the Board of Directors and make the decisions that the Board would generally have to make.

After this, an information memorandum consisting of the history of the company and all the other relevant details was formulated by the resolution professional, as per Section 29 of the IBC.

The National Company Law Tribunal heard the matter and decided that a 90-day timeline for the resolution of this matter of 'national importance' would be appropriate. It also required for the Insolvency Resolution Professionals to file a fortnightly report on the resolution progress. By this time, the creditors had started to become rather agitated and began to lay claims on the assets of the airlines to realize their dues. This issue was taken to the NCLT where the insolvency professionals contended that the de-registration of the asset would not end up being fruitful for the process, and that the moratorium period of the insolvency process had ensued due to which these assets could not be touched for the time being, to which the Tribunal agreed.

By March 2020, around 20,680 claims adding up to a total of USD 5.1 billion had arisen, most of which came from employees, much to the perturbation of the insolvency professionals and to the surprise of the lenders' consortium. However, USD 2.85 billion worth claims were rejected.

Then, around September 2019, a bid from Synergy Group, a company based in South America had surfaced. Their contention or caveat, however, was that some of the lenders would have to waive their dues and that the debt would have to be converted to equity, much to the dismay of the lenders' consortium. Therefore, the bid fell through.

By March 2020, Jet Airways had completed around nine months with the National Company Law Tribunal but did not receive a cogent and substantial bid from any entity. Due to this, another extension was sought for by the insolvency professionals which was granted, hence actually exceeding the maximum time limit of 330 days that would be granted for the resolution process, as per Section 12. During this time is when the pandemic had struck the entire world, bringing everything to a halt. Due to this, the NCLT declared that the lockdown period would not be counted within the resolution process, much to the elation of the stakeholders of Jet Airways.

During this time, given the fact that the airlines was not able to afford the planes that were on lease, especially the ones that were on a financial lease and were to be eventually bought by them, these planes were taken back by the lessors. Out of these, six Boeing 777-300ER planes, which would eventually be owned by Jet Airways after the remaining cash would be paid for them were also stuck. But a silver lining that the stakeholders were provided with during this time was the NCLT decision that allowed for the airline's premises in Bandra to be sold. Not only were some of the creditors' dues realized due to this, six of Jet Airways' aircrafts, which are basically core assets, were protected.

(Image Source: website)

Due to the pandemic and the deterioration of the economy, the demand and the number of bids that emerged had begun to drastically decimate. Despite this, there were two consortiums that emerged. One of the consortiums was the one that consisted of the UAE based businessman Murari Lal Jalan, and the UK based firm Kalrock Capital, and the other consisted of Imperial Capital Investments LLC and the Flight Simulation Technique Centre of India. The bids between the two consortiums were relatively close to one another, but the Committee of Creditors, noting that there was a delay in

the bid proposed by the Imperial-FSTC consortium, approved Jalan-Kalrock's resolution plan, as it was in consonance with Section 30, and because 66% of the Committee of Creditors voted for it, as required under Section 30(4). The resolution plan was then submitted to the NCLT. In June, the Tribunal, given the fact that the consortium had raised a demand for the airline's slots to be restored, had received an affidavit from the Directorate General of Civil Aviation (DGCA) where they denied any assurance on the slots for Jet Airways, while the Civil Aviation Ministry had affirmed that the airlines did not qualify for slots merely based on its precedence.

Finally, after two years from the initiation of the process, the NCLT approved the resolution plan of the Jalan-Kalrock consortium on June 23rd, 2021 and had issued a written order in pursuance of the same, as per Section 31. The airlines made history as the first airlines to have seen resolution under the Insolvency and Bankruptcy Code. The consortium was granted a period of 90 days to restart the airline while conforming with all the permission requirements, but the Tribunal also allowed for an extension for the same. In pursuance to Section 31(3), the moratorium ceases to exist, given the fact that the resolution plan was approved.

As on June 25th, 2021, Mr. Ashish Chhawachharia had ceased to be the resolution professional for Jet Airways as the Corporate Insolvency Resolution Process (CIRP) had concluded by then. In furtherance to the resolution plan, a seven-member committee was established to properly implement the resolution plan that had been approved. The Jalan-Kalrock consortium has currently agreed to infuse a total of Rs. 1,375 Cr into the airline, while the lenders' consortium had to unfortunately undergo a relative steep haircut of 95% with respect to their claims of around Rs. 7,800 Cr. Around Rs. 900 Cr would go into the working capital needs and the capital expenditure of the airline, while the remaining would be set aside for the creditors, while excluding the Corporate Insolvency Resolution Process costs that were incurred. While a part of the Rs. 1,375 Cr would be given up front to the lenders, the remaining will be paid through the issuance of zero-coupon bonds. Apart from this, the financial creditors have been offered a 9.5% stake in the airlines. Post its investment, the consortium's equity stake in the company would come up to 89.79%, while reduced the public shareholding by 0.21%. In order to remedy this, apart from proposing a rights issue of 1 equity share for every 100 shares that the existing public shareholders hold, the consortium plans to enable a Further Public Offer (FPO), in order to ensure that the minimum public shareholding requirement of 25% is complied with. SEBI, much to the satisfaction of the consortium the airline, had amended its norms in December 2020 and had mentioned that any listed company that is undergoing CIRP would be granted one year to attain a public shareholding of 10% and 3 years to achieve the minimum public shareholding requirement of 25%. All of the equity and preferential shares that were held by the former promoters have now been extinguished completely, while the workmen have now been given a 0.5% share in the airline in accordance with the approved resolution plan.

It was further announced that that it is necessary for 95% of the employees to approved of the resolution plan given the fact that they are also significant stakeholders who deserve to have a say in the process of revival of the Airways. They are to receive cash payment Rs. 11,000 to 22,800 each, apart from the 0.5% stake and some other perks. Further, according to the plan, only 50 of the employees shall still be a part of the airline, while the rest shall be pushed to handling the subsidiary companies.

Reasons Behind the Downfall

There were essentially several reasons behind the downfall of Jet Airways. They are:

The Acquisitions

The airlines had merged with or acquired several airlines like Air Deccan and the Indian Airlines. The most prominent acquisition that failed would seemingly be the one with Sahara Airlines, where it was rebranded as 'Jet Lite'. The airline was acquired by Jet Airways for around USD 500 million, while its actual worth may have been much lower. Though this could have been looked past at, the fact that this acquisition did not necessarily bring any value to the airlines, and the fact that the rebranding of an airlines with a relatively popular name led to Jet Lite losing its patronizing customers stood as hindrances.

Mismanagement

Mr. Naresh Goyal though did initially lead the airlines to the great heights that it reached, his eventual mismanagement in the form of several unwarranted acquisitions while in debt, the incessant loan availing, etc., played a major role in the downfall of the airline. Though Etihad Airways, who used to be a shareholder at Jet Airways, wanted to invest further into the

deteriorating airlines in 2019, they took back their offer when Mr. Naresh Goyal, as a promoter with his promoter group owned 52% of the stake, refused to step down as the Chairman of Jet Airways. Apart from this, he had also been involved in a case regarding misappropriation of funds.

The Future of Jet Airways

The consortium had recently made a statement that if all goes according to the resolution plan, the operations shall begin by the end of 2021. The most ideal scenario for the consortium, where they will be able to attain the profits that they expect, would be achieved when all the historic slots of Jet Airways become operational, and when international transit begins. However, the claim for the historic slots has been denied, which puts them in a relatively uncertain territory. The consortium also apparently plans to shift focus to cargo operations, given the fact that the country's current position as the 'leading centre for global vaccine manufacture' would assist in regaining the brand name that Jet Airways used to have under the leadership of Mr. Naresh Goyal.

The Debt

As stated previously, the lenders' consortium had to undergo a rather substantial haircut of about 95% for now. The operational creditors and the workmen and employees had around Rs. 7000 Cr of debt admitted by the resolution professional. Though the exact haircut that the lenders would have to undergo in the future cannot be quantified as of now, it has been stated that the lenders would be provided with up to Rs. 1000 Cr over the course of five years through non-convertible debentures. India in itself seemingly has quite an unfortunate bad debt ratio. According to a data collected by Macquarie Capital, the recovery rate for creditors in resolved insolvency cases has plummeted to 39% of the total dues, from 46% in the preceding year. The creditors' recovery rate, especially in the past few years has been rather abysmal. These statistics seem to be rather disappointing and a cause for concern for the lenders of the airline. Though the lenders can be hopeful, it has been noted that the creditors would be required to write off a substantial portion of their debt even if the resolution plan is to be followed to the word. One benefit that arises is possibly the fact that all the financial creditors have been granted around 10% equity stake in the airlines, which could be fruitful to them in the future if the resolution plan is implemented successfully.

Another very concerning factor is the substantial haircut that the lenders, especially the Public Sector Banks (PSBs) like the State Bank of India and the Punjab National bank have had to undergo.

Further, a part of the stakeholders who have received the haircut are the employees. Due to this, it was essential for them to have a say in the resolution plan of Kalrock-Jalan, which they have been granted. They are expected to vote in favour of resolution by the 4th of August, 2021 in order for the resolution plan for be implemented, which is evidently a good move, given the fact that they are also a part of the list of parties who have been at the receiving end of the haircut. They will evidently not be paid the same salaries as they were in 2019, and most of them will be laid off, and this is precisely why it was essential for them to receive some perks.

The Consortium

According to one of the members of Kalrock, the intention of the consortium is to tap into the aviation sector of India through Jet Airways. They have analysed the fact that India has the third-largest domestic aviation sector in the world, and have concluded that a prioritized investment made in the cargo operations of Jet Airways can result in profitability. They also want to focus on making Jet a full-service airline rather than a mere budget airline, which will evidently require a lot of funds and time. Kalrock's partner Jalan is an Indian businessman who is based in the UAE, and was brought in to provide inputs with their Indian business expertise.

Another notable fact is that neither Kalrock nor Jalan have any experience with the aviation sector categorically. As per the resolution professional, Jet Airways, which used to thrive in its earlier years, used to operate 12 aircrafts and employed around 8,800 people. An aviation expert has noted that in order for the resolution plan and the goals of the consortium to be fruitful, and to attain the approvals and certificates needed, the consortium will have to invest another Rs. 10,000 Cr in addition to what has been negotiated with the SBI essentially. Apart from that, they will have to infuse another Rs. 15,000 Cr as working capital to effectively restore the operations. More importantly, it will take a considerable amount of time to regain the trust of the employees, the stakeholders and the potential public investors, considering the fact that an FPO is being made to maintain the minimum public shareholding requirement.

The Way Forward

Jet Airways' case was an anomaly at that time, given the fact that it was the first airline to go into the Corporate Insolvency Resolution Process as per the IBC. The airline used to have bilateral flying rights and extremely attractive slots that were placed at the most significant locations in the country, and internationally. Given the fact that historic rights over the slots have been denied by the NCLT, it could consider leasing these slots for the time being, as the prime slots that they used to possess was essentially what gave them an advantage over the other competitors. More importantly, it is essential for the airline to rebuild the confidence of its customers, especially the categorically patronizing ones. For this, they would have to create a robust system which would enable frequent yet cost effective flying for its customers. Prioritizing this would be relatively fruitful in comparison to aiming directly to be a full-service airline right at the initial stage. It is essential to build the trust of the creditors, potential investors, especially the public investors and the customers primarily.

Conclusion

Though the resolution has been approved, and though the Kalrock-Jalan consortium seems to be having a clear vision regarding the future based on the resolution plan that they have submitted, the road ahead is relatively uncertain. The consortium's plan is to make is to make Jet Airways a full-service airline, but this could be a risky bet to make, given the fact that the only other full-service airline in India is Air India, which has a relatively better and stable reputation in comparison to Jet Airways. The restarting of operations would also be difficult especially because the historic slots have not been allotted to the airline, and because attaining the permissions and certificates required, while still under debt, could be rather difficult. The airline is expected to restart operations by the end of the year, and at this point, the lenders, especially the Public Sector Banks, can only be hopeful that the airlines will eventually take-off effectively through the heavy headwinds they will encounter in the future.

Do you know?

Cap on number of IBC assignments handled by an Insolvency Professional

Code of Conduct for Insolvency Professionals

First Schedule
(under Regulation 7(2)(h)
of
The IBBI (Insolvency Professionals) Regulations 2016)

"Occupation, employability and restrictions

22. An insolvency professional must refrain from accepting too many assignments if he is unlikely to be able to devote adequate time to each of his assignments".

IBBI has amended the First Schedule on July 22nd, 2021, by adding the following clarification to Clause 22:

"*An Insolvency Professional may, at any point of time, not have more than ten assignments as resolution professional in CIRP, of which not more than three shall have admitted claims exceeding one thousand crore rupees each*".

It appears that the above cap on CIRP assignments shall not be applicable for liquidation assignments and services post approval of Resolution Plan by NCLT as Head of Monitoring Committee as in both the cases, the CIRP has already attained finality.

Section 8 Companies and Corporate Insolvency Resolution Process – Is there a middle ground?

S.R. Aadhi Sree, BA LLB(Hons.)
CGRF Team

Companies with benevolent aims, such as the promotion of art, science, commerce, sports, charity, social welfare, environmental protection, and so on, are classified as Section 8 Companies. Companies defined under Section 2(20) of the Companies Act, 2013 (hereinafter referred to as "The Act") can be covered under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") as a corporate person, as defined in Section 3(7) of the same.

The IBC specifies that the revival of the corporate person is the first and foremost option, and that if that fails, liquidation is the next best alternative. In the case of a Section 8 company's revival/resolution, there is no opportunity for monetary returns to members, and there can be no dividend distribution in the long run. If it goes through Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP"), the company's public interest will be diluted, and it will be forced to be converted into a for-profit company. On the other hand, liquidation would destroy the company's organisational capital as well as its asset worth. It would further jeopardise the public interest by destroying the Section 8 company's intangible assets.

The Act provides for alternatives through which the object of the Section 8 company can be preserved. A Section 8 company can be amalgamated with another Section 8 company with similar objects under Section 8(7) of the Act. In terms of winding up, the Section 8 company's residual assets can be transferred to another Section 8 company with a similar object, or the proceeds of the same may be transferred to the Insolvency and Bankruptcy Fund formed under Section 224 of the IBC.

The object of a Section 8 company and that of IBC appear to be at odds, as the former concentrates on social welfare rather than economic benefits to its members, and the latter aims to maximise the value of a distressed firm. The only option is to use the Company Voluntary Agreement (hereinafter referred to as "CVA") Model, which is available in the United Kingdom. The CVA Model calls for the company's board to propose an arrangement to its creditors for the repayment of the company's debts. The board of directors would next appoint an insolvency practitioner, who would have 28 days to provide a report to the court determining whether the arrangement has a reasonable chance of being approved and implemented. On court's order, the CVA is discussed and voted by the company's creditors, and if approved it goes for final court's approval. The Insolvency Practitioner then oversees the CVA's implementation, after which the control of the company goes back to the directors. In the United Kingdom the provision for CVA is only an addition to the winding-up provisions.

(Image Source: website)

A CVA not only saves a Section 8 company from the rigours of CIRP, but also satisfies its debts by preserving it. If the same fails, the creditors can turn to the CIRP. When compared to CIRP, CVA is faster and more certain. Furthermore, implementing a CVA provides for early resolution and is in the public interest. In the case of Section 8 companies, it is proposed that CVA be favoured and CIRP be used only as a last resort.

Court Orders

CGRF Legal team

Lalit Kumar Jain vs Union of India and Ors.

(Supreme Court of India)

Order dated 21.05.2021

The common question that arose in a batch of writ petitions and ultimately transferred to the Hon'ble Supreme Court for its consideration was the challenge to the vires and validity of a notification dated 15.11.2019 issued by the Central Government concerning the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. Likewise, the validity of regulations challenged by the Insolvency and Bankruptcy Board of India on 20.11.2019 were also the subject matter of challenge. However, submissions of the parties were confined to the impugned notification dated 15th November 2019.

The writ petitions challenged the impugned notification as having been issued in excess of the authority conferred upon the Union of India (Ministry of Corporate Affairs). The petitioners contended that the power conferred upon the Ministry of Corporate Affairs under Section 1(3) of the I&B Code, 2016 could not have been applied to extend the provisions of the Code only to the personal guarantors of corporate debtors. It was also contended that it was not possible to apply the provisions only in relation to personal guarantors to corporate debtors in such a limited manner. The Central Governments move to enforce Sections 78, 79, 94 to 187, etc. only in relation to personal guarantors to corporate debtors was contended as an exercise of legislative power wholly impermissible in law and amounting to an unconstitutional usurpation of legislative power by the executive.

The impugned notification was attacked on the ground that it suffers from non-application of mind, and the Central Government was criticized for having failed to bring into effect Section 243 of the Code, which would have repealed the Presidency Towns Insolvency Act, 1909 (PTI Act hereafter) and the Provincial Insolvency Act, 1920 (PIA hereafter) as even after enactment of the I&B Code, insolvency proceedings against personal guarantors to corporate debtors would lie before the Adjudicating Authority, in terms of Section 60 of the Code, although they would still be governed by the said two Acts.

The petitions further impressed that not bringing into force the operation of Section 243 of the Code has an illogical effect of creating two self-contradictory legal regimes for insolvency proceedings against personal guarantors to corporate debtor.

The Attorney General (AG) arguing for the Central Government stated that 'the executive has the power to bring into force any one provision of a statute at different times for different purposes, and that the government can exercise this power to commence a provision for one purpose on one day and for the remaining purposes on a later date.'

The AG relied upon two Constitution bench decisions of the Hon'ble Court in *Basant Kumar Sarkar v. Eagle Rolling Mills Ltd*. and *Bishwambhar Singh v. State of Orissa*, where the power exercised by the Central Government, to bring into force legislation in phases, were permissible.

It was argued on behalf of the Central Government that the impact a new legislation may have needs to be studied as it would benefit all if a stage by stage or region by region implementation is adopted as the discretion exercised by the executive government is not unfettered.

The Court held that, "when Section 60(2) alludes to insolvency resolution or bankruptcy, or liquidation of three categories, i.e. corporate debtors, corporate guarantors (to corporate debtors) and personal guarantors (to corporate debtors) they apply distributively, i.e. that insolvency resolution, or liquidation processes apply to corporate debtors and their corporate guarantors, whereas insolvency resolution and bankruptcy processes apply to personal guarantors, (to corporate debtors) who cannot be subjected to liquidation".

The Court took note of the report of the Working Group, which noted the close proximity of personal guarantors with corporate debtors, as opposed to individuals and partnership firms. The Court opined that there was sufficient legislative guidance for the Central Government, before the amendment of 2018 was made effective, to distinguish and classify personal guarantors separately from other individuals.

It is held that, "the impugned notification is not an instance of legislative exercise or amounting to impermissible and selective application of provisions of the Code. There is no compulsion in the Code that it should, at the same time, be made applicable to all individuals, (including personal guarantors) or not at all. There is sufficient indication in the Code by Section 2(e), Section 5(22), Section 60 and Section 179 indicating that personal guarantors, though forming part of the larger grouping of individuals, were to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through the same adjudicatory process and by the same forum (though not insolvency provisions) as such corporate debtors".

The other question which was urged by the parties before the court was that the impugned notification, took away the protection afforded by law, by applying the Code to personal guarantors only. Sections 128, 133 and 140 of the Contract Act was referred. The argument in the petition was that once a resolution plan is accepted, the corporate debtor is discharged of liability. As a consequence, the guarantor whose liability is co-extensive with the principal debtor, i.e., the corporate debtor, too is discharged of all liabilities. It was urged therefore, that the impugned notification which has the effect of allowing proceedings before the NCLT by applying provisions of Part III of the Code, deprives the guarantors of their valuable substantive rights.

It was held by the Court that, "the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantors liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself". However, the Court indicated, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability.

It observed that an act of approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of their liabilities under the contract of guarantee. The involuntary release or discharge of a principal borrower from the debt owed by it to its creditor, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of their liability, which arises out of an independent contract, the Court held. For the foregoing reasons, it held that the impugned notification is legal and valid. It also held that approval of a resolution plan relating to a corporate debtor does not operate so as to discharge the liabilities of personal guarantors (to corporate debtors). The writ petitions transferred cases and transfer petitions were accordingly dismissed.

Dreams Infra India Pvt. Ltd Vs. The Competent Authority, Dreamz Infra India Pvt. Ltd., and Other Allied Companies/Entities
WRIT PETITION NO.13477/2020(GM-RES)

High Court of Karnataka, Bengaluru Order dated 24.05.2021

"IBC has overriding effect over State Acts: Karnataka High Court quashed parallel proceedings by State Govt authority"

(Image source:website)

The facts of the case are that the petitioner (M/S. Dreams Infra India Pvt. Ltd) a real estate Company involved in the development of various housing and apartment projects. The petitioner had executed Agreement of Sale and MoU with many homebuyers for sale of apartments in its construction projects.

After collection of certain amount as advance money to book apartments, the apartments were not handed over to the home buyers.

The respondent is a Constituted Authority, appointed by the Government of Karnataka under Section 5(1) of the Karnataka Protection of Interest of Depositors in Financial Establishment Act, 2004 (for short 'the Act, 2004') dated 20.06.2019. Consequently, the respondent has initiated Section 7(1) of the Act, 2004 against the petitioner and the same has been admitted by the Principal City Civil and Sessions Judge (Special Judge), Metropolitan Area, Bengaluru on 09.01.2020.

The petitioner has accepted the deposits from 3668 depositors. It is further alleged that the petitioner has failed to repay the amount.

It is also contended that in this background of various complaints lodged against the Company, three homebuyers being aggrieved by the actions of the petitioner- Company moved a petition before the Hon'ble National Company Law Tribunal under Section 7 of the Insolvency and Bankruptcy Act, 2016 seeking to declare the petitioner Company as insolvent. The NCLT admitted this petition on 20.08.2019 and CIRP as contemplated under IBC Act, 2016 was directed to commenced. Sri. Ashok Kriplani was appointed as Interim Resolution Professional to overlook the activities of the petitioner Company and was confirmed as Resolution Professional on 17.12.2019.

It is contended that in view of the admission of the petition before the NCLT, period of moratorium parallelly commenced, whereby as per Section 14, no suit or proceedings can either be filed against the petitioner Company or can any pending proceedings be including execution continued against the petitioner-Company. As per the provisions of the Insolvency and Bankruptcy Act, 2016, all assets pertaining to petitioner-Company shall be handed over to IRP to ensure the smooth resolution plan to all home buyers. The respondent was informed about the said proceedings that due to Section 14 of IBC, 2016 the proceeding against the petitioner has been stayed.

However, the respondent has acted unilaterally showing no due regard to the interest of the various parties involved. The properties were not handed over as per law.

Respondent initiating action is non-est and illegal in view of Sections 14 and 238 of the IBC Act, 2016. Inspite of such attachment and holding the custody of the properties, have allowed the sale transactions and Court transfers without restrictions, leading to loss of prime properties in the hands of few self-centred people. Hence, without alternative, the petitioner-Company have approached this Court by filing this petition.

The provisions of Sections 14 and 238 of the IBC has overriding effect and as such the said provisions would prevail over the State Act. Learned counsel also would vehemently contend that an order has been passed by the NCLT and moratorium has been commenced. When the moratorium is in force, the present proceeding has been initiated against the petitioner herein. There cannot be two parallel proceedings against the petitioner herein when the matter is ceased of before the NCLT.

Learned Counsel also brought to the notice of this Court to Section 238 of the Code, which overrides the other law. The learned High Court Government Pleader appearing for the respondent-State would vehemently contend that this petition is filed seeking the relief of quashing of the proceedings initiated under Section 7 of the Act, 2004. In the case on hand, the learned High Court Government Pleader would vehemently contend that an amount of Rs.385 Crores was collected by the petitioner herein and not allotted any flats. Hence, the State has attached the properties and the notice is also issued against the petitioner under Section 12 of the Act, 2004. The very petition itself is not maintainable.

The learned High Court Government Pleader would vehemently contend that if any order has been passed invoking Section 12 of the said Act, an appeal lies under Section 16 of the Act, before this Court. This is an alternative remedy provided to the persons, who suffered at the hands of the petitioner and the matter is still pending before this Court regarding which, the Act will prevail. Hence, there cannot be any quashing of the proceedings.

It is important to note that, Sections 14 and Section 238 of the Code in respect of the moratorium which has got overriding effect over other laws. In the case on hand, already the matter has been seized before the NCLT before initiating the present proceedings. There cannot be any other civil proceedings when the matter has been ceased and already some homebuyers have approached the NCLT and so also the Resolution Professional was also appointed. Under these circumstances, the High Court is of the opinion that there is a force in the contention of the petitioner's counsel that the provision of the IBC is having overriding effect over other laws and the same would prevail in view of Section 238 of the Code. Hence, the petitioner has made out grounds to quash the proceedings initiated against the petitioner under Section 7(1) of the Act, 2004.

Dwarkadhish Sakhar Karkhana Ltd. Vs. Pankaj Joshi, RP of KGS Sugar & Infra Corporation Ltd

Company Appeal (AT)(Insolvency) No. 233 of 2021

NCLAT Order dated 28.06.2021

"The decision taken by the CoC to allow a party to file EOI after due date is not a commercial decision of COC"

An appeal was preferred against impugned order dated 01.03.2021 passed by the NCLT, Special Bench, Mumbai wherein NCLT allowed the Application of Gangamai Industries and Constructions Ltd. (GIACL) and the decision of CoC accepting the Expression of Interest of Dwarkadhish Sakhar Karkhana Ltd. (DSKL) after due date, was set aside and deprecated the conduct of Resolution Professional (RP) Pankaj Joshi.

Resolution Professional (Mr. Shetty) published the invitation of expression (EOI) on 18.01.2020, wherein the last date for submission of EOI was 10.02.2020 and for submission of Resolution Plan, it was 05.04.2020. Pursuant to the EOI, the RP received EOIs from 14 Prospective Resolution Applicants, out of which only four including GIACL met the eligibility criteria. Subsequently, by email dated 12.03.2020, DSKL submitted its EOI. On the same day, RP informed DSKL that EOI was received after last date of submissions, therefore, it cannot be considered. Thereafter, on 23.03.2020, DSKL sent an email to the CoC Members to allow DSKL to submit EOI. The Adjudicating Authority, on 27.05.2020, at the recommendation of the CoC, replaced Mr. B S Shetty with Mr. Pankaj Joshi as RP and Pankaj Joshi. After deliberation, the CoC permitted DSKL to submit EOI. Thereafter, GIACL who has already filed EOI and was in the list of Prospective Resolution Applicant, being aggrieved with the decision of the CoC, which is taken in favour of DSKL, has filed an Application (I.A No. 1029 of 2020) against the RP before the Adjudicating Authority.

Ld. Adjudicating Authority, vide impugned order dated 01.03.2021, allowed the Application and resultantly the CoC decision in accepting the EOI of DSKL after due date and including it in the list of Prospective Resolution Applicants is set aside and the list of Prospective Resolution Applicants prepared by RP on 06.03.2020 is held to be valid and deprecated the conduct of Resolution Professional (RP) Pankaj Joshi. Therefore, they have filed these Appeals assailing the order. Both the Appeals are disposed of.

Martin S.K Golla Vs. Wig Associates Pvt. Ltd. and Ors.

Company Appeal (AT) (Ins.) No. 121 of 2019

NCLAT Order dated 04.06.2021

"NCLAT rejected the resolution plan approved by NCLT and held that Sec 29A will be applicable Retrospectively"

An Appeal was preferred by Resolution Professional of Corporate Debtor against the impugned order dated 24th August 2019 wherein the resolution plan submitted by Mr. Wig was approved. The resolution plan was proposed by related party of CD and the same was approved by NCLT. The issue arose was that whether sec 29A is applicable retrospectively or not.

(Image source:website)

The CIRP application was filed by the Corporate Debtor – M/s. Wig Associates Pvt. Ltd. under Section 10 of IBC against itself as there was debt of Rs. 4,85,14,000 of Bank of Baroda and the same was admitted on 24.08.2017. After the CIRP started, there was a COC comprising only of one Financial Creditor, that is, Bank of Baroda. The sole Financial Creditor in third COC meeting held on 6th April 2018 informed the Resolution Professional that it had sanctioned "One Time Settlement (OTS) Offer" issued by Mr. Mahendra Wig. The Bank asked the Resolution Professional the option of treating OTS Offer as Resolution Plan. The Resolution Professional placed such Resolution Plan before COC on 20.04.2018 and the Resolution Plan was approved, and it was placed before the Adjudicating Authority which approved the same.

The Impugned Order shows that Adjudicating Authority was aware of the Ordinance enacted by the Central Government on 23rd November 2017 (Ordinance - in short). The Ordinance inswerted in Section 29A of IBC laying down law with regard to persons not eligible to be Resolution Applicants. The Ordinance later on took shape of Amendment in 2018 (Amendment- in short) was passed. The AA was aware that the amendment provided

that the amended Act shall be deemed to have come into force on 23rd November 2017 (date of Ordinance). AA recorded that as per Section 29A of IBC, Mr. Wig would fall in the category of the "connected persons" under Section 29A of IBC, still AA went to examine the Resolution Plan which was basically OTS and to accept the same. The Impugned Order was passed accordingly.

The reasons recorded by the AA to stretch the interpretations to hold that once CIRP is commenced, provisions as existing on the day of admission of the

Petition would continue to apply even in the face of amendment brought about the way of Section 29A, the reasons cannot be maintained.

The question before the Appellate Tribunal is that whether Section 29A of IBC will be applicable with retrospective effect in Section 10 proceedings which were initiated prior to Section 29A coming into force and to decide the issue and any other question of law. NCLAT held that:

It is now settled law that ineligibility attaches at the time when the Resolution Plan is submitted by Resolution Applicant.

It had already approved the OTS of Mr. Wig on 27.03.2017. It also appears that Mr. Wig had already paid Rs.103 Lakhs to the Bank. Thus, what appears is that the OTS was already approved by the Respondent No.2 Bank, which was the only Financial Creditor and thus the actions taken on 05.04.2018 in third COC and 20.04.2018 were only completion of formalities. The subsequent introduction of Section 240A of IBC and subsequent taking of certificate of being MSME will not cure the ineligibility at the time of submitting OTS-cum-Resolution Plan which was not permissible.

Considering the provisions of law and the fact as appearing from the record, we find that the said Resolution Plan submitted by Mr. Wig could not have been acted upon and the Appellant erred in presenting the same before COC.

Hon'ble NCLAT allowed the appeal with following observations:

"The Appeal is allowed. The impugned order approving resolution plan is quashed and set aside. The alleged Resolution Plan submitted by Mr. Mahendra Wig is rejected. The matter is remitted back to the Adjudicating Authority. The Adjudicating Authority is required to pass orders of liquidation of the corporate debtor under section 33 of the IBC".

Alok Kumar Kuchhal Erstwhile IRP Vs. Charming Apparels Pvt. Ltd. & Ors

Company Appeal (AT) (Ins.) No. 638 of 2020

NCLAT Order dated 03.06.2021.

"NCLAT directed RP to pay the remaining professional fees of Erstwhile RP from the contingency funds of the Resolution Plan"

Erstwhile RP had filed this Appeal as professional fees fixed, has not been paid yet.

(Image source:website)

In compliance of the direction issued by 'NCLT' New Delhi Bench dated 18th February 2019 in C.A. No. (IB)348 (ND)/2017 in the matter of 'M/s. Rachna Sarees' Vs. 'Charming Apparels Pvt. Ltd' had passed the following directions in Clause 18: Thus, in view of the above and considering the lapses on the part of both IRP/RP and CoC as stated above, and the volume of activities carried by IP as IRP during the first 30 days from 17th July 2018 and thereafter till 26th November 2018 (total period being four and half month approx.), AA considered Rs. 5 lakhs for the first month of IRP and thereafter, Rs. 1 lakh per month as RP by Mr Kuchhal, for a period of three and a half months, a total of Rs. 8.5 lakhs as reasonable professional fee. Accordingly, total amount of Rs. 8.5 lakhs are considered as full and final settlement of the IRP's fees in compliance of the directions of the AA in its order dated 18th February 2019 and the same shall form part of the insolvency resolution process cost."

Ld. Counsel appearing on behalf of the Respondent No. 6 (RP) submits that there is no specific direction for paying the remaining professional fees therefore, they could not pay the same. NCLAT directed that the remaining professional fees of Rs. 3.5 lakhs be paid to the Appellant by RP within 15 days from the contingency funds of the Resolution Plan. In case, the RP fails to pay the amount within 15 days then they have to pay interest @ of 8% from the date of this order till realization.

Provisions of newly introduced Sec. 194Q of Income Tax Act, 1961

CA Priyanka Lunkar

TDS ON PAYMENT OF CERTAIN SUM FOR PURCHASE OF GOODS

Date of Applicability

This provision will be applicable with effect from 1st July 2021.

Applicable to

- The buyer is responsible for making payment
- of a sum to the resident seller; and
- Such payment is to be done for the purchase of goods
- of the value/ aggregate of the value exceeding INR 50 Lakhs.

Time of tax deduction

TDS on purchase of goods is to be deducted by the buyer

- At the time of credit of the sum into the account of the seller; or
- At the time of payment of the sum thereof, Which-ever is earlier.

Rate of TDS

Buyer of all goods will be liable to deduct tax at source

- @ 0.1% of sale consideration
- exceeding INR 50 Lakhs in a Financial Year Tax to be deducted @ 5%
- if the seller does not provide PAN/Aadhar

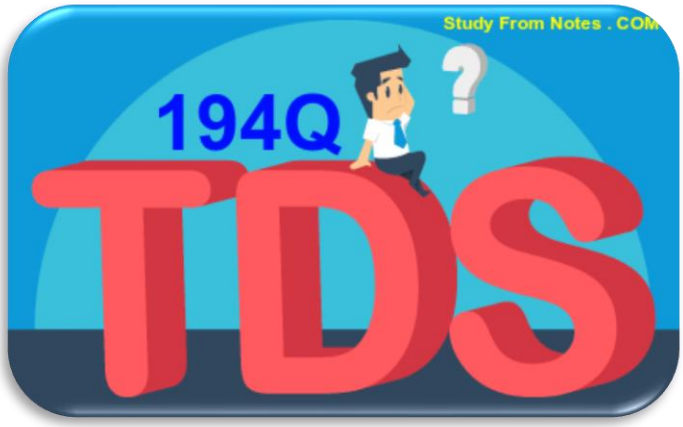
This Section shall not apply to

- Transactions on Which *Tax Is Deductible Under any of the Provisions of This Act*
- Tax Is Collectible Under the Provisions of Section 206C Other than a Transaction to which Sub-Section (1H) of Section 206C

Calculation of threshold for section 194Q for FY 2021-22

Accordingly, section 194Q will not become applicable on any sum paid or credited before 1st July 2021.

Also, the threshold of Rs.50 lakh in a year to be calculated starting from 1st April 2021. Hence, if a buyer has paid Rs.50 lakh or more up to 30th June 2021.TDS under section 194Q will apply to all the payments made after 1st July.



(Image Source: website)

Adjustment for purchase return or GST

Where the GST amount is mentioned separately in the invoice, TDS is to be deducted on the net amount without including GST.

However, TDS would be deducted on the entire amount if it is impossible to identify the amount of GST component to be invoiced in the future.

Also, for tax collection under section 206C(1H), no adjustment of GST is required as the TCS is to be deducted from the total sale consideration.

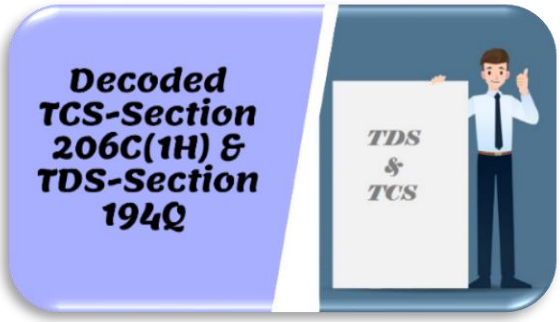
In case of purchase return where the seller returns the money, the tax deducted may be adjusted against the next purchase against the same seller. Whereas in case the purchase return is replaced by goods, no adjustment is required to be made.

DIFFERENCE BETWEEN SEC. 194Q & SEC. 206C(1H) OF INCOME TAX ACT, 1961

S No.	Particulars	194Q	206C(1H)
1	With Effect From	01-Jul-21	01-Oct-20
2	When to Deduct	Date of Payment or Date of Credit, whichever is earlier	At the time of receipt
3	Type of Tax	Tax Deducted at Source	Tax Collected at Source
4	Applicable to	Buyer Turnover/Gross Receipts/Sales from the business of BUYER should exceed Rs.10cr during previous year (Excluding GST)	Seller Turnover/Gross Receipts/Sales from the business of SELLER should exceed Rs.10cr during previous year (Excluding GST)
5	Rate	0.1%	0.1% (0.075% for FY 2020-21)
6	Rate if PAN not available	5%	1%
7	Rate if 2 Years ITR not filed	5%	5%
8	Point to Taxation	Purchase of goods of aggregate value exceeding Rs.50Lakhs in P.Y. (Including GST)	Sale consideration received exceeds Rs.50Lakhs in P.Y. (Including GST)
9	Quarterly statement to be filed in Form	Form 26Q	Form 27EQ
10	Certificate to be issued to seller/buyer	FORM 16A	FORM 27D
11	Exemptions	• Applies to payment to resident. • By implication import payment to NR are out of the scope • Purchase from entities specified in section196 exempt: • Government • RBI • Corporation established by or under Central Act which is exempt under Income Tax Act • Conversely, TDS on purchase by above agency is not exempt	• Export of good out of India • Central Government, State Government, an embassy, High • Commission, legation, consulate, trade representative of foreign State • A local authority as defined in Explanation to section 10(20) • A person importing goods into India

Practical Challenges / Difficulties

- Both Buyer and Seller deducts/collects TDS/TCS conservatively being unaware about another person specified threshold
- Seller is not exonerated from TCS if buyer fails to deduct TDS
- TCS is on receipt basis and TDS is on accrual basis
- Obtaining self-declaration and mapping with system
- How would the buyer deduct the TDS of Public Sector Companies.



(Image source: website)

Example

Steel Authority of India Ltd. (SAIL).

- SAIL is collecting the TCS in their 'Sale Bills'.
- Now, after introduction of Sec 194Q, in case when buyer would become liable to TDS U/s. 194Q, then how would the buyer deduct TDS and make balance payment to SAIL.?
- In most probable situation, SAIL would ask the buyers to deposit the TDS first and thereafter claim reimbursement from SAIL on the basis of form 16A.

Example

DISCOMs of the various states are collecting TCS in their Electricity bills as 'Electricity' is treated as goods. How would the DISCOMs be accepting the amount 'Net of TDS' payment? They may also follow the same route as in SAIL.

Feedback Matters

Your coverage is excellent. The articles are well written giving a comprehensive analysis of the issues. I would like to see an article on the status of statutory dues in successful resolution in IBC.

- Mr. Pranit Joshi
Regional P.F. Commissioner-II

Glad to receive the latest issues, let me place on record all my appreciations to you, Shri Srinivasan and to the entire TEAM for the wonderful efforts to bring out the latest developments. BRAVO keep rocking

-Mr. Bhaskar Ramamurti
Chief Manager, Retired, SBI
(SARB Branch, chennai)

Sincerely you are able to bring out each month. Its really great to sustain quality articles.

- CA B.Ethirajulu

I have just gone through the SandBox June edition. Yet another resourceful edition which will benefit all the users. Hearty Kudos to your good self and your team sir for giving such wonderful articles.

-Mr. Srinivasalu
AGM Indian Bank SAM Branch, Chennai

Legal Maxims

Double Jeopardy

The act of putting a person through a second trial of an offence for which he or she has already been prosecuted or convicted. This means that if a person is prosecuted or convicted ones cannot be punished again for that criminal act.

Legal Maxims

Locus Standi

locus standi is a condition that a party seeking a legal remedy must show they have by demonstrating to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case.

IBC Help Line

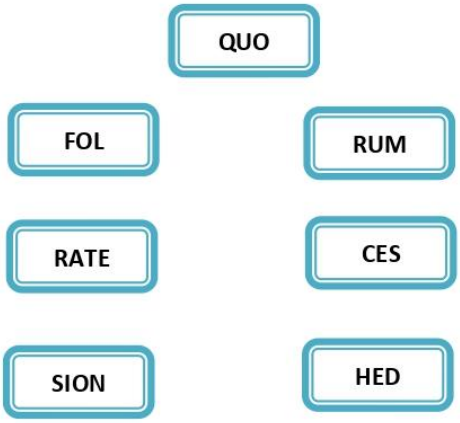
CGRF is Proud to Launch

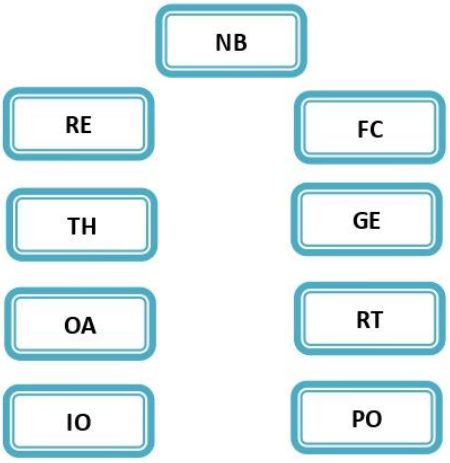
cgrfibchelpline@gmail.com

Please feel free to drop a mail for any query in IBC. Information shared will be kept confidential. CGRF team will respond within 24 hours.

Find the words!!

CLUES	WORDS
1. Minimum number of persons required to be present in order to transact at a meeting	
2. To swear to the truth of a statement	
3. A condition of the economy of a company under which business is conducted at a reduced level	
4. The rate at which commercial banks borrow money by selling their securities to the RBI	
5. List of securities owned by an institution or a person	
6. A financial institution that does not have a full banking license and cannot accept deposits from the public	
7. Reducing risk by taking a position which offsets an existing or anticipated exposure in financial operations	





Answers:

1. Quorum 2. Oath 3. Recession 4. Repo Rate 5. Portfolio 6. NBFC (Non-Banking Financial Company) 7. Hedger

CGRF offers online/class-room Awareness/Training sessions on Corporate Laws, IBC and other Commercial Laws

We are glad to share with you that CREATE & GROW RESEARCH FOUNDATION (CGRF) is a premier, not-for-profit research organization established as a Section 8 Company under the Companies Act, 2013. CGRF has been organizing seminars and Awareness programs on IBC and various other corporate laws to bankers, corporate professionals, faculty members of Universities, Colleges, Legal Professionals, Students, Government Organizations like EPFO, ESIC, Income Tax, GST, etc.

Training capsules are exclusively designed meeting specific client requirements on following domains:

- Companies Act 2013
- Insolvency & Bankruptcy Code 2016
- Intellectual Property Laws
- Competitions Laws
- Labour Laws
- Excellence in Management
- Contract management
- Proxy Advisory Services for Institutional shareholders

We have rich expertise on the abovesaid commercial laws with practical exposure in several industries. Our association with all the major banks gives an edge to provide professional training on practical aspects. We also provide classroom training for students on latest developments in business environment, regulatory domain and challenges faced, etc. Online sessions are also available for 2 hours / 4 hours.

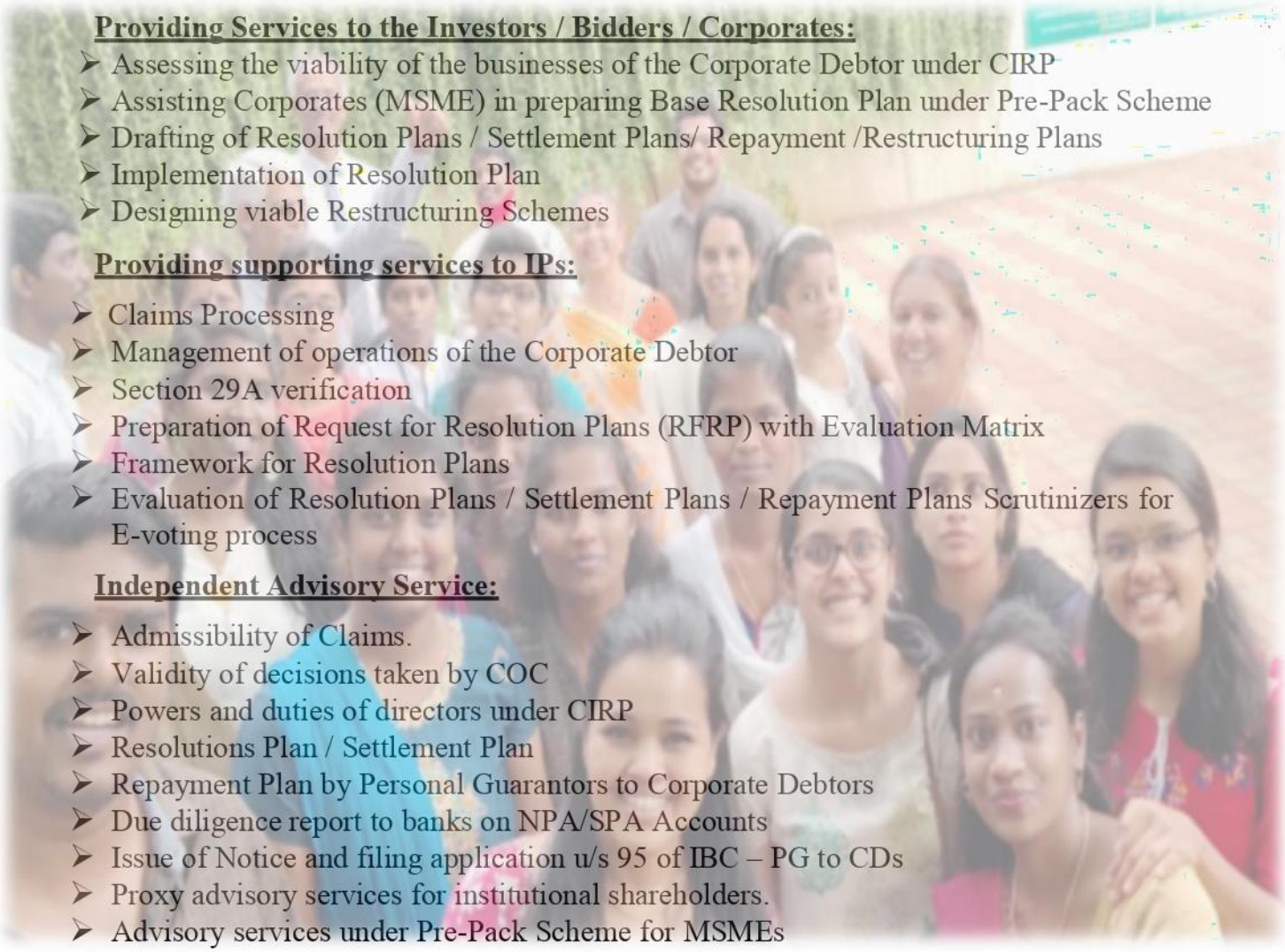
Our training sessions to various educational institutions, bankers and Government departments have been received well with appreciable improvement in recognizing importance of updating knowledge in relevant fields.

Call for more information: Ms. Priya Karthick - Contact No: 044 - 2814 1604

CREATE & GROW RESEARCH FOUNDATION
2nd Floor, Evalappan Mansion, No.188/87,
Habibullah Road, T.Nagar, Chennai - 600 017
(Near Kodambakkam Railway Station)
Phone: 044 2814 1604 | Mobile: 94446 48589 / 98410 92661
Email: create.and.grow.research@gmail.com
Website: createandgrowresearch.org

*****Well-informed is well-armed*****

Our Services



Providing Services to the Investors / Bidders / Corporates:

- Assessing the viability of the businesses of the Corporate Debtor under CIRP
- Assisting Corporates (MSME) in preparing Base Resolution Plan under Pre-Pack Scheme
- Drafting of Resolution Plans / Settlement Plans/ Repayment /Restructuring Plans
- Implementation of Resolution Plan
- Designing viable Restructuring Schemes

Providing supporting services to IPs:

- Claims Processing
- Management of operations of the Corporate Debtor
- Section 29A verification
- Preparation of Request for Resolution Plans (RFRP) with Evaluation Matrix
- Framework for Resolution Plans
- Evaluation of Resolution Plans / Settlement Plans / Repayment Plans Scrutinizers for E-voting process

Independent Advisory Service:

- Admissibility of Claims.
- Validity of decisions taken by COC
- Powers and duties of directors under CIRP
- Resolutions Plan / Settlement Plan
- Repayment Plan by Personal Guarantors to Corporate Debtors
- Due diligence report to banks on NPA/SPA Accounts
- Issue of Notice and filing application u/s 95 of IBC – PG to CDs
- Proxy advisory services for institutional shareholders.
- Advisory services under Pre-Pack Scheme for MSMEs

Registered Office:

CREATE & GROW RESEARCH FOUNDATION

2nd Floor, Evalappan Mansion, No.188/87, Habibullah Road,
T.Nagar, Chennai - 600 017. (Near Kodambakkam Railway Station)
Phone: 044 2814 1604 | Mob: 94446 48589 / 98410 92661
Email: createandgrowresearch@gmail.com
Website: www.createandgrowresearch.org