CGRF

SandBox®

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Code of Conduct for CoC

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CREATE & GROW
RESEARCH FOUNDATION

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ஆக்கம் கருதி முதலிழக்கும் செய்வினை
ஊக்கார் அறிவுடை யார்.

Thirukural: 463
The Wise men will not, in the hopes of profit, undertake works that will consume their principal.

From the Editor's desk

Dear Readers of CGRF SandBox

We are glad to reach the esteemed readers of CGRF SandBox with our August 2021 issue.

The Covid-19 pandemic is seemingly receding in most parts of the country, excepting Kerala, which is a cause of concern. Economy is limping back to normalcy. Schools and colleges are slated to be reopened from September.

Reasonably good rainfall all across the country has brought cheers to the farmers and the industry alike. The festive season around has already kickstarted the buzz and ad spends are reportedly picking up. However, shortages of certain key inputs like electronic chips are hampering the production in automotive sector as well as other electronic gadgets. The travel industry is yet to register growth as the tourists are yet to gain confidence to strap their back-packs. Airlines are battling with severe cash crunch. On the whole, the hues are positive particularly as the vaccination drive is slowly covering the critical mass. We wish the threats of a third wave unleash become untrue.

Shareholders' rights and Corporate Governance

Growing awareness about corporate governance has given birth to shareholder activism. Though the term "activism" might have obtained a negative connotation thanks to it being associated with "agitation", activism actually means "the policy or action of using vigorous campaigning to bring about political or social change". Also, activism could mean "the use of direct and noticeable action to achieve a result, usually a political or social one".

The shareholders in India have long been docile and passive as mainly they were scattered over different places and it was difficult to bring them together particularly in the context of physical meetings like annual general meetings or extraordinary general meetings. Even when things were normal, most of the small shareholders used to collect some sweets or sample products of the company, chat with old-time friends, have a cup of tea and leave the scene while a few souls remain inside the meeting hall to transact serious business agenda.

The advent of technology and the push given by Covid-19 pandemic to go for video conferencing mode to conduct shareholders' meetings and the e-voting facilities have all given a distinct thrust to shareholder activism. Added to this is the role of "proxy advisory firms" which provide advisory services in respect of matters which come up for voting at the shareholders' meetings. The shareholders have now several data and options before them. Perhaps, they are now enjoying the impact of their collective decisions which have rattled even strong promoter-controlled companies. Their indulgence has brought to fore the conflict between the promoter management many a times with minority holdings and the public shareholders.

(Image source: website)

In this issue of SandBox, we carry a few recent instances of shareholder activism and also the immediate reaction by the management. We are sure in the near future, such calls by the shareholders, predominantly the institutional shareholders, will make the promoters to sit up and take notice that there is an elephant in the room which cannot be ignored.

As usual, the judiciary has come out with a lot of interesting and at the same time intriguing decisions. We have compiled some of those decisions for a better understanding by the readers.

Let the festive spirit and cheers take over now while at the same time, the caution be continued for some more time to see that the "tail" of the pandemic goes out for ever. The CGRF team takes great pleasure in wishing the esteemed readers a Happy Vinayaka Chathurthi.

Yours truly
S. Rajendran

Code of Conduct for CoC

CGRF Bureau

Preamble:

India has shown the will to reform the laws relating to business insolvency by enacting Insolvency and Bankruptcy Code in 2016. Effectively, the law is in place since early 2017. In its journey through the labyrinths of the complicated legal systems in India, it has been able to bring in a very good awareness to the erring corporates about the power of debt when the equity fails to meet its commitments.

However, the judicial architecture had to bear the brunt of enormous litigation stemming around applications filed before the adjudicating authority. Number of applications filed also have gone up substantially. Though the Ministry of Corporate Affairs has taken several steps to keep pace with the load on the judiciary, yet, the overhanging burden on the judiciary has always been a drag on the time-lines of resolution or liquidation. When we talk about time-lines under IBC, that is the subject which is most talked about as the hall mark of the new Code. However, the time-lines got blurred and extension of insolvency resolution process became the order of the day, thanks to legal interruptions by way of stay and the Covid-19 lockdowns across the country.

What the bankers feel

The lenders have come under huge stress to recover the bad loans and recycle the capital for further lending. IBC was believed to be a panacea for all the ills prevailing in the recovery scene as the Financial Creditors thought that proving the debt beyond doubt and the existence of the default in paying the debt by the corporate debtor were the only requirement. However, much against the initial hype, the substantial delays in the legal system caused the banks huge loss by way of loss of interest. Also, the cost of getting the case admitted and thereafter running the resolution process had to be funded by them, sort of throwing good money after bad, in the hope that the Code will bring them cheers sooner or later.

The Code brought an amendment that the insolvency resolution process should not, at any cost, go beyond 330 days. However, the Apex Court read it down in its judgement in Essar Steel that under exceptional circumstances, the adjudicating authority can extend the CIRP period. Besides, time and again, the judiciary, through their various judgements brought out the disturbing feature that the timelines under IBC are not mandatory.

While on one side the recovery prospects were waning, the lenders were left with not much options to wrest whatever little was left in the corporate debtor.

The lenders were initially skeptic to approve resolution plans where the liquidation value was higher than the resolution plan value. The fear of watch-dogs (CBI, Central Vigilance Commission, CAG, Enforcement Directorate) was haunting the lenders. After the encouraging hypes about freedom of lenders to decide, the haircuts started spiralling up even reaching levels of 90-95% as could be seen in the recent Videocon insolvency resolution. The commercial wisdom of the committee of creditors was applauded and recognised and the CoC was given a legitimate pedestal which was not to be encroached upon by even the adjudicating authority.

(Image source: website)

Commercial wisdom

At this time, the talks about whether the committee of creditors have unfettered discretion to approve resolution plans with such steep haircuts vis-à-vis the objectives of the Code have emerged. Also, questions are raised whether the Insolvency and Bankruptcy Board of India or the Reserve Bank of India will have the authority to issue a code of conduct to the lenders.

The best thing the Government should do immediately is to bolster the judiciary system by filling up the vacant positions in several benches. This step would make a huge impact on the confidence of the lenders that justice would be delivered sooner than years of struggle and unproductive cost and infructuous outcome. If the lenders could gain this confidence of prompt disposal of matters and the mechanism of appeal process at higher courts, they would not be pushed to take decisions of steep haircuts. It is this philosophy of recovering at least something before even that goes down the drain, the lenders have been forced to take huge haircuts or even accept Section 12A settlements.

In a recent decision in the matter of Siva Industries & Holdings Ltd, the Hon'ble NCLT has rejected the decision of the committee of creditors to approve a settlement plan under Section 12A of the Code, on the grounds that the commercial wisdom of the committee of creditors cannot be ascribed to a settlement plan, it is applicable only to a resolution plan under Sec.31 of IBC.

The plight of the lenders could be seen in another case where they have even approved a settlement scheme by the promoters who were declared as fugitive economic offenders after the corporate debtor was sent for liquidation.

The haplessness to fight the system drives the lenders to take these pragmatic decisions in the interest of recovering something. It is another question how such lending's were made in the first place. But such cases of wilful default and fraudulent cases have to be dealt with as per the existing laws and procedures which have been well laid out.

Conclusion:

The proposed code of conduct for CoCs dwells mainly on elevating the accountability and responsibility for transparency in the functioning of CoC. Some of the suggestions, include deputing representative with sufficient authorisation to take decisions.

Be that as it may, it would be ideal to leave the lenders to take their own calls relating to commercial decisions as they did while extending the finance to the corporate debtor. They are answerable any way to the shareholders. Their decisions on huge haircuts might change once the judicial decision delivery system keeps pace. Until then, let us not meddle with their decisions lest the whole objective of releasing the productive assets could fail again. This could again hurt the financial system of entry and exit on merit.

Note: The views expressed are the personal perspective of the author and not of CGRF.

In total 12889 shell companies were struck off u/s.248 of Companies Act, 2013 in FY 2020-21.
[Source: PIB Delhi]

Evolution of Credit Bureau in India and need for alternative Credit Scoring

Chandramohan. G
Assistant Vice President
IDFC FIRST BANK LTD

Introduction to Credit Bureau:

In earlier times when someone approached lenders for any credit there was only a basis to judge the person's personal approach, which can be biased and not appropriate. Merchants were migrating in nature and lenders were unable to judge the persons to whom to lend. As a solution for this, local merchants had decided to maintain a list. This practice started in mid 1860s for individuals. Merchants started sharing their list who were credit risky or with risky profile to other merchants, and this is how first non-official credit bureau came onto existence.

When the population began to grow, and more and more people started shifting from one place to other businesses needed to have information about a wider range of individuals especially those from outside of their geographical location thus resulted in regional level sharing. Slowly regional and national level credit bureaus started functioning.

In 1899, the first credit company was established by two brothers, Cator and Guy Woolford with the name "Retail Credit Company" which is now known as Equifax Inc. India took almost 101 years to have its first credit bureau which is CIBIL (Credit Information Bureau India Limited), founded in the year 2000.

In India credit bureaus are licenced and regulated by RBI and are empowered under the Credit Information Companies Regulations Act 2005. Currently, India has 4 credit bureaus.

Credit Information Company (CIC) also known as Credit Bureau, is a central repository that collates and maintains credit and loan related information of individuals and commercial institutions.

How Credit Bureau Works in India:

As per the mandate of RBI, financial institutions, i.e. all commercial banks, rural banks, housing finance companies, cooperative banks and NBFCs with an asset base of Rs. 100 crore - are required to become members of at least one Credit Bureau. By being a member, the financial institution is bound to report to the credit bureau about the actions of their customers in relation to their credit activities. The reporting is done in a unified format as suggested by an expert committee.

This report contains a person's personal information, payment history, number of accounts in default (if any), credit transactions and outstanding loan amount.
Based on this report and analysis of financial data, credit score is given to an individual which helps the lenders to check on an individual's credit worthiness.

TransUnion CIBIL:

This is the oldest and first Credit Bureau of India that started operations way back in 2000. Being the oldest, CIBIL has about 950 members subscribing to their services. Other than retail/ individual credit scoring, CIBIL also provides credit scoring for Commercial Institutions and Micro Finance Institutions.
In addition, services like analytics, consulting, fraud detection, collections and portfolio management are also provided by CIBIL.

(Image source: website)

Equifax:

Headquartered in Atlanta, USA, Equifax is the oldest credit bureau in the world. It provides Credit Information Services across many countries in addition to USA. It commenced its operations in 2010 in India and since then has been providing credit scores of individuals and commercial institutions. It maintains credit information on over 800 million individual consumers and more than 88 million businesses world-wide.

It also provides value-added services related to debt management and customer acquisition to businesses.

Experian:

This Credit Information Company is headquartered at Dublin, Ireland and provides credit information and other analytical services to companies in 37 countries including India. Experian also has the distinction of being named the "World's Most Innovative Companies" by Forbes magazine for the 4th consecutive year. It began its operations in India in the year 2010.

As like the other credit bureaus, Experian too not only provides credit scores for individuals, but also extends its services to other areas like analytics and other decision enabling services for businesses.

CRIF High Mark:

High Mark started its operations in the year 2011 as a start-up credit bureau with a vision to be the most comprehensive and inclusive credit bureau in India. Subsequently, a major stake in the company was taken by CRIF, a global Credit Information Service christening the credit bureau as CRIF High Mark.

In India, CRIF is the pioneer in establishing a Microfinance Bureau database, which now is world's largest Microfinance Bureau Database.

Current Credit Scoring Methodology:

Though various countries across the world have different ranges of scores given out by different bureaus, for the sake of easy interpretation, personal credit scores in India are given in the range of 300-900 by all credit bureaus as mandated by RBI.

However, each credit bureau has their own methods, algorithms and attach different weights to various factors to arrive at a particular score with each score meaning different levels of creditworthiness. The banks and financial institutions are equipped with knowledge of these ranges and hence, interpret it accordingly.

Need for Alternate Credit Scoring Methodology:

While credit has evolved, credit scoring continues to be an area of focus for fintech companies and conventional lenders. Fintech and digital lenders have the need to monitor performance over shorter tenors and innovative online credit products such as ones with daily repayments. Alternative data such as utility payments or rent payments or Point of sale usage or subscriptions etc., has to be included as part of the credit underwriting framework.

It is no longer sufficient to predict probability of default over 6 or 12 months and across lenders. In the age of BNPL (Buy Now Pay Later) and offering of instant credit lines, this is the time to look for alternative credit scoring.

Credit bureaus continue to offer the basic vanilla "pay per pull" bureau report service to the retail customer, and there is no real value-added service available. Credit bureaus can evolve and provide some differentiated offering to consumers as well to Lenders.

In summary, credit bureaus so far have played a pivotal role in bringing the credit seeker and provider to a common platform. Given the times, they have a larger role to play, on the lender's as well as the customer's sides and this is the time to change the methodology of credit score. As the world and the finance and credit industry continue to evolve, it's only a matter of time for everyone to adopt digitization and innovation.

FAQs on Corporate Social Responsibility (CSR)

Section 135 read with Schedule VII of the Companies Act, 2013, Companies (CSR Policy) Rules, 2014 and the clarifications issued by Ministry of Corporate Affairs from time to time on various issues concerning CSR, provides a broad framework on Corporate Social Responsibility.

Ministry of Corporate Affairs vide its Circular dated 25th August 2021 has issued a set of FAQs along with response of the Ministry for better understanding and facilitating effective implementation of CSR.
The said FAQs is available in the following link:

https://www.mca.gov.in/Ministry/pdf/FAQ_CSR.pdf

Latest amendments on Independent Directors - Notified by SEBI under SEBI (LODR) Regulations, 2015

Prof R. Balakrishnan FCS, Pune

Latest amendment brought out by Security Exchange Board of India on Independent Directors

The Securities and Exchange of Board of India vide its notification no. SEBI / LAD –NRO /GN / 2021 / 35 dated 3rd August 2021, amended the existing SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 with significant changes in respect of independent directors.

Effective date of the notification

As per the notification issued on 3rd August 2021, the amendments would come into force as on the date of its publication in the Official Gazette vide corrigendum dated 6th August 2021, SEBI has deferred the effective date of applicability of the amendments to 1st January 2022.

Therefore, the effective date of this notification is from 1st January 2022.

(Image source: website)

Amendments and its effects

The following are the gist of the amendments:

S. no	Regulation	Effect of the amendment
1	Regulation 16(1)(b)(iv) Definition of Independent Director	An Independent Director means a non-executive director, other than a nominee director of the listed entity who apart from receiving director's remuneration, has or had no material pecuniary relationship with the listed entity, its holding, subsidiary or associate company, or their promoters, or directors, during the three immediately preceding financial years or during the current financial year. (prior to this amendment, two immediately preceding financials were prescribed and now it is changed to three years.)
2	Regulation 16(1)(b)(v) Pecuniary relationship	Sub-clause (v) in total substituted with a new clause completely revamping the earlier one. The amended provision is as under: - the words and symbols "has or had pecuniary relationship or transaction with the listed entity, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed from time to time, whichever is lower, during the two immediately preceding financial years or during the current financial year" shall be substituted with the following namely: - "(A) Is holding securities of or interest in the listed entity, its holding, subsidiary or associate company during the three immediately preceding financial years or during the current financial year of face value in excess of fifty lakh rupees or two percent of the paid-up capital of the listed entity, its holding, subsidiary or associate company, respectively, or such higher sum as may be specified. (B) is indebted to the listed entity, it holding, subsidiary or associate company or their promoters or directors, in excess of such amount as may be specified during the three immediately preceding financial years or during the current financial year; (C) has given a guarantee or provided any security in connection with the indebtedness of any third person to the listed entity, its holding, subsidiary or associate company or their promoters or directors, for such amount as may be specified during the three immediately preceding financial years or during the current financial year; or (D) has any other pecuniary transaction or relationship with the listed entity, its holding, subsidiary or associate company amounting to two percent or more of its gross turnover or total income: Provided that the pecuniary relationship or transaction with the listed entity, its holding, subsidiary or associate company or their promoters, or directors in relation to points (A) to (D) above shall not exceed two percent of its gross turnover or total income or fifty lakh rupees or such higher amount as may be specified from time to time, whichever is lower'
3	Regulation 16(1)(b)(vi) Determination of independency	In the Regulation under (ii) Point A stands as below after amendment: - (A) holds or has held the position of a key managerial personnel or is or has been an employee of the listed entity or its holding, subsidiary or associate

		company or any company belonging to the promoter group of the listed entity in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed; (the regulators now added any company belonging to the promoter group of the listed entity which was not there earlier) (B) the following new proviso added under (iii) under the point (A) Provided that in case of a relative, who is an employee other than key managerial personnel, the restriction under this clause shall not apply for his / her employment.
4	After Regulation 17(1B) Approval of members for the appointment of director on the board	A new clause (1C) has been inserted which reads as under:- (1C) The listed entity shall ensure that approval of shareholders for appointment of a person on the Board of Directors is taken at the next general meeting or within a time period of three months from the date of appointment, whichever is earlier.
5	Regulation 18(1)(b) Clarification on Audit Committee composition	The amendment brought now clarifies that in an Audit Committee, at least 2/3rd members shall be Independent Directors.
6	Regulation 19(1)(c) Composition of Nomination and Remuneration Committee	This amendment provides that in a Nomination and Remuneration Committee, at least 2/3rd members shall be Independent Directors. (earlier this was 50 percent)
7	Regulation 23(2) proviso Approval of related party transactions	By adding a new proviso, SEBI bought a big change that the related party transactions can be approved only by independent directors. The relevant proviso is as under:- Provided that only those members of the audit committee, who are independent directors, shall approve related party transactions.
8	Regulation 25(2) Independent director's appointment / re-appointment / removal to be made only by special resolutions	The appointment, re-appointment or removal of an independent director of a listed entity, shall be subject to the approval of shareholders by way of a special resolution by virtue of insertion of new clause 2A which is as under:- (2A) The appointment, re-appointment or removal of an independent director of a listed entity, shall be subject to the approval of shareholders by way of a special resolution
9	Regulation 25(6) Time limit for filling up the vacancy of independent directors	As per the amendment the requirement now in case of resignation by or removal of an ID, he/she shall be replaced by a new ID within 3 months from the date of such vacancy.
10	Regulation 25(10)	As per the substituted clause on this Regulations, with effect from 1st January 2022, the top thousand listed entities by market capitalization calculated as on March 31 of the preceding financial year, is required to ensure that the company

		take the Directors and Officers insurance ('D & O insurance policy') for all their independent directors of such quantum and for such risks as may be determined by its board of directors.
11	Regulation 25(10) .	A new clause (11) has been inserted and by virtue of the new clause a cooling period has been introduced for taking up new position by independent directors upon his resignation. The newly inserted section (11) is as below: - (11) No independent director, who resigns from a listed entity, shall be appointed as an executive / whole time director on the board of the listed entity, its holding, subsidiary or associate company or on the board of a company belonging to its promoter group, unless a period of one year has elapsed from the date of resignation as an independent director
12	Regulation 36(3)(d)	In case of the appointment of a new director or re-appointment of a director the shareholders must be provided with the names of listed entities in which the person also holds the directorship and the membership of Committees of the board along with listed entities from which the person has resigned in the past three (3) years.
13	Regulation 36(3)(e) additional disclosure	A new clause (f) is inserted by which additional disclosure of information to shareholders in case of appointment/ re-appointment of independent director is required to be made:- Newly inserted clause (f) (f) In case of independent directors, the skills and capabilities required for the role and the manner in which the proposed person meets such requirements.
14	Schedule II, in Part D, in Para A, after clause (1) Role of Nomination and Remuneration Committee	Clause 1A is added in the regulation by which, the role of Nomination and Remuneration Committee is enhanced in its role for the appointment and remuneration matters of independent directors. The newly inserted clause is as under:- (1A) For every appointment of an independent director, the Nomination and Remuneration Committee shall evaluate the balance of skills, knowledge and experience on the Board and on the basis of such evaluation, prepare a description of the role and capabilities required of an independent director. The person recommended to the Board for appointment as an independent director shall have the capabilities identified in such description. For the purpose of identifying suitable candidates, the Committee may: a) use the services of an external agencies, if required; b) consider candidates from a wide range of backgrounds, having due regard to diversity; and c) consider the time commitments of the candidates.
15	Schedule III, in Part A, in Para A, in clause (7B) sub-clause (i) Disclosure of resignation letter of independent director along with reasons	The listed companies are required to disclose the detailed reasons (as provided by the independent director) of resignation of independent director along with the letter of resignation. Amended sub-sections of (i), (ii) and (iii) is as under:- "The letter of resignation along with the detailed reasons as given by the independent director to be disclosed to the stock exchanges"

16	Schedule III, in Part A, in Para A, in clause (7B) after sub-clause (i) Additional disclosures in respect of independent directors upon resignation	Additional disclosure is required to be made by listed companied as per SEBI to the Stock Exchanges in case of resignation by an ID. The insertion (1a) added is as under:- (ia) Names of listed entities in which the resigning director holds directorships, indicating the category of directorship and membership of board committees, if any

Conclusion

The recent amendment brought out by SEBI are very crucial and significant in nature. The listed companies are required to ensure enhanced compliances, over and above the Companies Act 2013, in cases of overriding powers given to LODR Regulations since the companies have to comply with the LODR Regulations in entirety by virtue of the listing agreement entered by the companies with the stock exchange (s). Corporate governance practices would get greatly impacted in the listed companies due to certain provisions which are based on market capitalization of the listed companies. In forthcoming years, companies would excel in better corporate governance practices with enhanced transparent disclosures as envisaged by the regulators and it will bring greater confidence amongst the stakeholders.

Exemptions given to Foreign Companies offering their securities for subscription in IFSCs

The Central Government vide Notification No.S.O.3156E, dated 5th August 2021 has exempted foreign companies and companies incorporated or to be incorporated outside India from the applicability of the provisions of sections 387 to 392 (both inclusive), with respect to the prospectus, and all matters incidental thereto in the International Financial Services Centres (IFSCs) set up under Section 18 of the Special Economic Zones Act, 2005.

IBC Help Line

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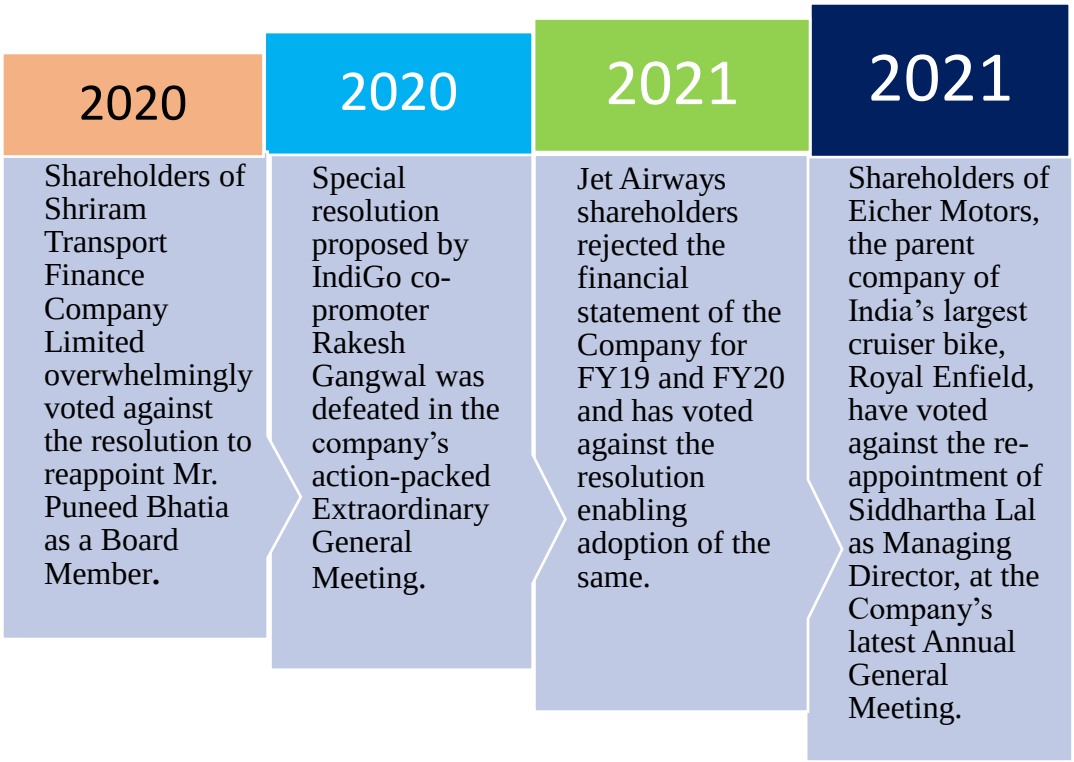
Please feel free to drop a mail for any query in IBC. Information shared will be kept confidential. CGRF team will respond within 24 hours.

Shareholder Activism in India

CGRF Bureau

Snapshot



The recent developments in Indian law have inter-alia led to increased corporate governance standards, creation of new shareholder remedies and improvement in appliance of shareholders' rights. Due to the ease of exercising, and enforcement of shareholders' rights, shareholders are now more willing to voice their opinion, resulting in increased shareholder activism.

Shareholder activism encompasses the efforts of the shareholders to bring about the preferred change or influence the management in governing the company and protect the interest of the shareholders. Even though Shareholder Activism is not of a recent origin in India, it has gained momentum in the near past.

The Companies Act is the main source of law relating to shareholder activism in India. With the enactment of the Companies Act, 2013 and subsequent developments, the law has been updated to further facilitate shareholder activism in India.

SEBI Regulations

In addition, regulations framed by the Securities and Exchange Board of India (SEBI) has also provide additional rights and remedies to the shareholders of companies which have listed its securities. Under SEBI regulations, listed companies are required to constitute a stakeholders' relationship committee to provide a mechanism for redressal of shareholder grievances and to provide facilities for electronic voting etc. While these developments giving rights to the shareholders would help achieve the purpose of shareholder activism, on one hand, enforcing such rights as duties will help enhance the process.

Proxy Advisory Firms

Proxy Advisory Firms (PAFs) regulated by SEBI has also contributed enormously to the growth of shareholder activism in India. A proxy advisor is any person who provides advice through any means to an institutional investor or shareholder of a company on how to exercise their rights in the company. They provide analysis and voting recommendations to the shareholders of listed companies. In recent days, recommendations by PAFs have proved to be influential in determining the voting pattern of shareholders.

The earliest form of shareholder activism first emerged in the USA, with the rise of corporate raiders. These raiders emerged as a counter-force in 1970s, when managements ran conglomerates like their personal fiefdoms. These managements often ruined themselves with huge pay packages and hasty expansion proposals. Over time, these raiders managed to create an activist shareholder image. Despite the criticism aimed at them, several studies show that these activist shareholders brought in financial discipline and purged management excesses in American corporations.

(Image source: website)

But shareholder activism in India has been relatively rare. Most listed companies in India are run by Promoter Group. These Promoter Group own a majority stake and look over the operations.

It helps these companies to pass controversial resolutions unhindered because of their majority shareholding. Nevertheless, minority shareholders in India, especially institutions, backed by PAFs have taken up the initiative to make Indian promoters answerable and more accountable now-a-days.

Though this has happened in the past as highlighted in the snapshot, recently the issue of shareholder activism came into focus when the 10 % hike in salary of the CEO of Eicher Motors, Siddhartha Lal, was opposed by minority shareholders. This pushback by shareholders came amid the criticism of several automakers whose managements have also been taking salary hikes despite having been impacted by the pandemic.

Though Companies Act 2013 limits the overall managerial remuneration to certain percentage of the company's net earnings, quite often, the related managerial personnel take home a much higher pay, without the consent of the Shareholders/Central Government. Some promoters often use shady tactics to take home a higher pay without having to face objections from shareholders.

In recent years, PAF that focus on corporate governance have also become an important part of the ecosystem. The rise in shareholder activism is an extremely important step in making companies more accountable to shareholders.

Unfortunately, most of shareholder activism and research has been focused on larger companies. Smaller companies do not have a strong institutional presence, making it quite difficult for minority investors to oppose the management.

SEBI extends the applicability of the amendments to LODR Regulations

SEBI amended the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 vide Notification dated 3rd August 2021, which inter-alia focused on the criteria for determining the independence of independent directors. The same came into effect from the date of publication in the Official Gazette i.e., on 3rd August 2021.

However, SEBI vide Corrigendum, dated 6th August 2021 has extended the applicability of the said amendments to LODR Regulations with effect from 1st January 2022.

IBBI amends the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons Regulation, 2016

The IBBI notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2016 on 14th July 2021. The amendment regulations enhance the discipline, transparency, and accountability in Corporate Insolvency Resolution Process.

Court Orders

CGRF Legal Team

M/S Orator Marketing Pvt. Ltd.
vs
M/S Samtex Desinz Pvt. Ltd.
Civil Appeal No. 2231 Of 2021
(Supreme Court of India)

The issue for consideration before the Hon'ble Apex Court was whether a term loan given by a person to a Corporate Person, without interest, on account of its working capital requirements is a financial debt and whether such person is entitled to initiate Section 7 proceedings under the I&B Code?

The Adjudicating Authority had dismissed an application filed by the financial creditor under Section 7 of the I&B Code, holding that it is not a financial debt. The said order was confirmed on appeal by the Appellate Authority, where the appeal was dismissed. The Adjudicating Authority held that mere granting of a term loan ipso facto will not make the lender a financial creditor under Section 5(8) of the I&B Code., as the requirement is to show that there is a debt along with interest, and that money has been disbursed against consideration for time value of money. The NCLT noted that the loan agreement had no provision regarding payment of interest and therefore there was no consideration for time value of money.

Reversing the concurrent findings of both the Courts below, the Hon'ble Apex Court observed that both NCLT and the NCLAT have patently flawed in dismissing the case and that they have misconstrued the definition of financial debt under Section 5(8) of the I&B Code.]

While on this point, the Apex Court observed thus, "In construing and/or interpreting any statutory provision, one must look into the legislative intent of the statute. The intention of the statute has to be found in the words used by the legislature itself. In case of doubt, it is always safe to look into the object and purpose of the statute or the reason and spirit behind it. Each word, phrase or sentence has to be construed in the light of the general purpose of the Act itself, as observed by *Mukherjea, J. in Poppatlal Shah Vs. State of Madras*, and a plethora of other judgments of this Court. To quote Krishna Iyer, J, the interpretative effort 'must be illumined by the goal, though guided by the words."

The Apex Court also relied on some judgements such as *Innovative Industries Ltd. Vs. ICICI Bank Ltd; Swiss Ribbons Pvt. Ltd. And Anr. Vs. Union of India* and Others; *Pioneer Urban Land and Infrastructure Ltd. Vs. Union of India,* while deciding the issue.

(Image source: website)

Allowing the appeal, the Hon'ble Supreme Court held that the Courts below ought not to have overlooked the words "if any" which could not have been intended to be otiose. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt, the Hon'ble Apex Court held. Observing that 'financial debt' as per Clause (f) of Section 5(8) of the I&B Code includes any amount raised under any other transaction, having the commercial effect of borrowing.

Recent judgment of the Supreme Court in *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. V. Axis Bank Ltd.*, was relied on where various precedents on restrictive and expansive interpretation of words and phrases used in a statute, particularly, the words 'means' and 'includes' were analysed.

As on 30th June 2021, 4540 companies admitted into CIRP; 394 Companies stand resolved with 36% realization of claims by FCs under IBC

394 Companies were resolved till 30th June 2021, wherein FCs had total claims amounting to Rs.6.80 lakh crore, out of which Rs.2.45 lakh crore have been realized, which is 36% of their claims. *[Source: PIB, New Delhi]*

Harish Taneja (RP of Perfact Color Digital Prints Pvt Ltd)
Vs
Dakshin Haryana Bijli Vitran Nigam
CA (AT) (Insolvency) No.562 of 2021
NCLAT New Delhi Order dated 5th August 2021

Electricity for running the business of the Corporate Debtor gets protection of Moratorium u/s.14 of Code, only if it is not a direct input to the output produced.

Perfact Color Digital Prints Private Limited (Corporate Debtor) was admitted into CIRP by an Order dated 9th December 2019 of NCLT, New Delhi. During CIRP, the electricity supply to the Corporate Debtor was disconnected by the "Dakshin Haryana Bijli Vitran Nigam" (Respondent) for the reason that an amount Rs.7,18,647 has not been paid by the Corporate Debtor, since initiation of CIRP.

RP filed an application with NCLT stating that there are no sufficient funds to the pay the dues and further seeking protection under Section 14 of the IBC read with Regulation 32 of IBBI (Resolution Process for Corporate Persons) Regulations, 2016. During the course of the hearing, it was brought to the notice of the NCLT that there were no outstanding dues against the electricity supply prior to initiation of CIRP and the entire dues amounting to Rs.7,18,647 arose during the CIRP period. NCLT without going into the merits of the case, directed RP to pay Rs.150,000/- out of the total outstanding dues within one week and if the amount is paid, Respondent was directed to restore the electricity connection.

Aggrieved by the decision of NCLT, RP preferred an appeal before Hon'ble NCLAT.

The Learned Counsel for the RP submitted that the electricity supply to the Corporate Debtor was disconnected by the Respondent while the CIRP was still pending. It was stated that considering the provisions of Section 14(2) of IBC and Regulation 32 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, electricity being essential service, the supply should not have been disconnected, in moratorium. He also submitted that there is no money in the corpus of the Corporate Debtor as the Financial Creditor is not contributing during CIRP.

Hon'ble NCLAT observed that supply of essential services as provided in Section 14(2) of IBC is to be read with Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. It is clear therefrom that the words 'essential goods or services' as used in Section 14(2) have been given a particular meaning to which moratorium applies. The illustration provided under Regulation 32 makes the position clear.

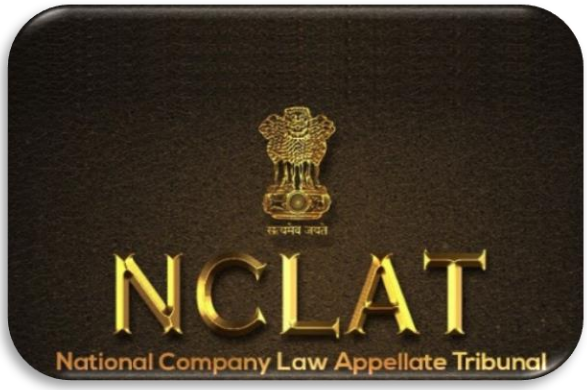
Going by the illustration, use of electricity by the Corporate Debtor in CIRP would be essential supply to the extent it is not a direct input to the output produced or supplied by the Corporate Debtor. However, use of electricity in the present case for running the printing business of the Corporate Debtor cannot get protection as essential supply.

For the reasons stated above, the Hon'ble NCLAT dismissed the appeal of RP. However, observed that RP may seek relief with NCLT, with specific particulars relating to the electricity supply required which would not be direct input to the output produced by the Corporate Debtor and the NCLT would be at liberty to modify its order.

In Insolvency cases under IBC in real estate sector, 8 resolved, 65 settled and 23 ordered for liquidation

In a written reply to the question in Lok Sabha on 2nd August 2021, the Union Minister of State for Corporate Affairs has stated that in the insolvency of real estate companies, 212 applications were admitted into CIRP, of these 8 cases were resolved, 65 cases have been settled or withdrawn and 23 cases were ordered for liquidation and for the rest, process is ongoing.

[Source: PIB Delhi]



(Image source: website)

Mukul Kumar (RP of KST Infrastructure Ltd)
vs
M/s RPS Infrastructure Ltd
CA (AT) (Insolvency) No.1050 of 2020
NCLAT New Delhi Order dated 30th July 2021

After 90 days of the insolvency commencement date the IRP / RP is not obliged to accept the claim

Application under Section 7 of IBC against KST Infrastructure Limited (Corporate Debtor) was admitted by NCLT vide order dated 27.03.2019 and Mr. Sandeep Chandna was appointed as IRP. IRP issued public announcement on 30.03.2019 about the commencement of CIRP and invited claims from its creditors. CoC was constituted on 06.11.2019. As RP was not appointed by CoC, IRP continued to function as the RP. Expression of Interest invited, Information Memorandum and RFRP were issued by IRP.

On 18.06.2020 on the recommendation of CoC, Mr. Mukul Kumar was appointed as RP in place of IRP. Resolution Plans received from resolution applicants was discussed by the CoC and the Resolution Plan submitted by KST Whispering Heights Resident Welfare Association was approved by CoC by a majority vote of 80.74% on 17.07.2020. Thereafter, an application for approval of the Resolution Plan was filed on 08.09.2020 with NCLT.

In the meantime, on 19.08.2020 M/s. RPS Infrastructure Ltd (the Respondent) through email submitted its claim amounting to Rs.35.67 crores to RP, based on the arbitral award dated 01.08.2016, which was also confirmed by the Addl. District Judge Gurgaon. RP rejected the claim of the Respondent stating that the Resolution Plan of the CD has already been approved by CoC on 17.07.2020. The Respondent filed an application before NCLT seeking direction to RP to consider the claim and accordingly the NCLT vide its order dated 03.11.2020 directed RP to consider the claim on merits.

Aggrieved by the Order of the NCLT, RP filed an appeal with Hon'ble NCLAT.

Ld. Counsel for the RP submitted that the claim was submitted by the Respondent, after a period of more than a year from the date of public announcement (i.e, 30.03.2019) inviting claims was made. The extended time for submission of claims was 90 days from commencement of CIRP, which period also expired on 06.11.2019. He further submitted that since the Resolution Plan was approved by CoC, any interruption in the CIRP at this state by including a delayed claim would set the clock back by sending the matter again to CoC and further if claim is accepted at this belated stage there could be other applicants who would demand accommodation of claims on the same ground allowing late submission of their claims.

After hearing the Counsels for the parties, Hon'ble NCLAT observed that the NCLT has allowed the Respondent's application on the following grounds:

a) For inviting claims, service through paper publication is not proper service.
b) The RP has not made necessary efforts to get the records from ex-management.
c) The RP has not gathered information about the creditors of Corporate Debtor.
d) The RP has hurriedly wrapped up the company with a Resolution Plan.
e) The RP should not have summarily rejected the claim of the Respondent on the ground that claim has not been filed within time and the Resolution Plan has already been approved by the CoC.

Hon'ble NCLAT examined the finding of the NCLT in detailed and observed that there is no provision in the Regulations that for inviting claims, the IRP / RP is required to effect personal services and further of the view that whenever any claim is filed after extended period provided in Regulation 12(2) of the CIRP Regulations, the RP should reject the claim. ***The Legislation had not provided any discretion to RP for admitting the claim after the extended period*** *(emphasis added)*. Hon'ble NCLAT also recalled that it has dealt with similar situations in the matter of "*Office of the Assistance State Tax Commissioner State*

Tax Department, Govt. of Maharashtra Vs. Shri Parthiv Parikh & Others.

CA(AT) (Ins.)No.583 of 2020 and in "*Harish Polymer Product Vs. Mr. George Samuel, RP for Jason Dekor Pvt. Ltd. CA (AT) (Ins) No. 420 of 2021*".

Hon'ble NCLAT was of the view that when the Resolution Plan has already been approved by the CoC and it is pending before the NCLT for approval, if new claims are entertained the CIRP would be jeopardized, and the Resolution Process may become more difficult. Keeping in view the object of the IBC which is resolution of Corporate Debtor in time bound manner to maximize the value, if such request of claimant is accepted the purpose of IBC would be defeated.

Hon'ble NCLAT set aside the order of NCLT and observed that NCLT has erroneously directed the RP to consider the claim of the Respondent which is apparently filed after a delay of 287 days, and that to after the approval of Resolution Plan by CoC.

(Image source: website)

Insta Capital Private Limited Vs Ketan Vinod Kumar Shah
NCLT, Mumbai Bench-IV
CP(IB)/1365/MB-IV/2020 dated 10th August 2021

Application for insolvency for resolution against Personal guarantor is not maintainable in NCLT, unless CIRP / Liquidation is ongoing against the Corporate Debtor.

S K Products LLP *[Corporate Debtor (CD)]* had availed a loan from Insta Capital Pvt Ltd *[Financial Creditor (FC)]* during the year 2018 and a total amount of Rs.31.52 lakhs including interest was due, and default was occurred on 12.04.2019.

FC filed an application against Mr. Ketan Vinod Kumar Shah (PG to CD) under section 95 of the Insolvency and Bankruptcy Code, 2016 (Code) for initiation of Insolvency Resolution Process. FC relied upon the judgement of Hon'ble NCLAT in "State Bank of India Vs Athena Energy Ventures Pvt Ltd, in which it is held that CIRP can be initiated against both the CD as well as Personal Guarantor (PG) simultaneously for the same set of debt and default.

PG raised preliminary objections against the maintainability of the application u/s.95 on the following grounds that the jurisdiction to entertain Insolvency and Bankruptcy proceedings against the individual will vest in the NCLT only on the following conditions:

a) the individual is a personal guarantor to the debt availed by the corporate debtor;
b) an Insolvency Resolution Proceedings with respect to said Corporate Debtor is pending before the said NCLT; or
c) liquidation proceeding with respect to corporate debtor is pending before NCLT.

Unless the aforesaid connections are met, NCLT shall not have jurisdiction for the insolvency qua the individuals as the said jurisdiction is specifically vested with the Debts Recovery Tribunals at part 3 of the Code.

Hon'ble NCLT opined that though it is settled law that the liability of principal borrower and guarantor is coextensive as enunciated u/s 128 of the Contract Act, 1872, and the Creditor may proceed against the principal borrower or the guarantor simultaneously, the judgment of Hon'ble NCLAT in State Bank of India Vs. Athena Energy Ventures Pvt Ltd, clarified that CIRP can be initiated against the principal borrower and the guarantor. However, the issue for consideration here is "*whether a FC can initiate CIRP against the PG in the absence of any resolution process/liquidation process against the corporate debtor" (emphasis added)*.

Hon'ble NCLT observed that upon conjoined reading of Section 60 of the Code r/w Section 128 of the Contract Act, 1872, it is clear that the CIRP can be initiated against the CD as well as corporate guarantor. But however, in the instant case, section 60(2) of the

Code contains a non-obstante clause which specifies that only where a CIRP process or liquidation process of a CD is pending before NCLT, an application initiating Insolvency Resolution Process against the PG, of such CD shall be filed before such NCLT. Further, the code also provides the definition of PG which includes the surety in a contract of guarantee to a CD which means that FC can initiate proceedings of CIRP against the PG of CD. It further observed that while Section 7 petition can be filed by the FC against the CD and Corporate Guarantor, Section 95 of the Code can be filed by FC only against PG of a CD, which is already been undergoing CIRP or is in Liquidation.

Hon'ble NCLT dismissed the application, with the observation that an application for insolvency for resolution against the PG is not maintainable in NCLT, unless CIRP/Liquidation process is ongoing against the CD. NCLT also observed that filing of applications with NCLT seeking resolution of PG without the CD undergoing CIRP would tantamount to vesting of jurisdiction on two course one is NCLT and another is the DRT.

Actori Incumbit Onus Probandi:

This means the burden of proof is on the plaintiff.

Plaintiff to a legal action must prove their case to win the lawsuit against the Defendant ie., the person has to support their allegations with strong evidence to convince the court about the obligations of the defendant.

This further goes to say that the plaintiff's case has to stand on its own legs and the plaintiff cannot claim his claim to be established on account of the weakness of the defendant's case.

Abhijit Guhathakurta - Resolution Professional of Siva Industries and Holdings Ltd

NCLT Chennai Bench,
Order dated 12th August 2021

Once CIRP is triggered, whether the Corporate Debtor is required to be wriggled out of the CIRP is to be decided by Adjudicating Authority by exercising its "Judicial Wisdom" and cannot be carried away by the "Commercial Wisdom" of CoC

IDBI Bank Limited (Financial Creditor) filed an application under Section 7 of the Code against Siva Industries and Holdings Limited (Corporate Debtor) and the same was admitted by NCLT Chennai Bench on 04.07.2019.

Pursuant to the public announcement, claims received from Financial Creditors' to the extent of Rs.4863 crores and Operational Creditors' amounting to Rs.461 crores were admitted. During the CIRP, 2 EOIs from prospective resolution applicants were received and subsequently withdrawn by both the EOI applicants. Thereafter, Royal Partners Investment Fund Limited (RPIFL) evinced interest in submitting the resolution plan and accordingly the CoC extended the last date for submission of EOI. In line with the same, RPIFL submitted its Resolution Plan. However, the Resolution Plan submitted by RPIFL was unsuccessful, as it failed to get the 66% vote of CoC. Accordingly, the RP moved an application seeking initiation of liquidation process of the Corporate Debtor.

In the meantime, one shareholder of the Corporate Debtor filed an application u/s.60(5) of the Code, seeking necessary directions for consideration by the CoC on a proposed One Time Settlement Offer. NCLT vide its order dated 05.10.2020 directed RP to convene a meeting of COC to consider the proposal submitted by the shareholder. In the interim, shareholders of the Corporate Debtor on 14.12.2020 submitted a detailed Settlement Plan before the COC and also submitted an Addendum to the Settlement Plan. In view of the same, COC at its meeting held on 18.01.2021 discussed the matter of withdrawal of CIRP under Section 12A of Code, in tune with the proposal given by the shareholders and the same was put to vote by CoC. The voting results disclosed that only 70.63% of the COC have voted in favour of the proposal for withdrawal of CIRP and thus the withdrawal proposal also failed.

However, subsequently, RP received a letter from one of the FCs, vis IARCL on 05.03.2021 wherein they have stated that they have decided to change its vote which was casted as "AGAINST" to now "APPROVE". RP immediately brought the fact to the knowledge of COC and an application seeking necessary directions from NCLT was also filed. NCLT vide its interim order dated 29.03.2021 directed RP to place the request of IARCL before the CoC for its consideration and that the CoC shall accord their approval or rejection specifically in the meeting.

Thus, CoC meeting was convened on 01.04.2021 and the agenda for withdrawal of CIRP in relation to Corporate Debtor as per Section 12A of the Code was once again put to vote by the COC and the COC approved the proposal by 94.23% vote. Thereafter, an application was filed by the RP under Section 12A of the Code read with Regulation 30A of the CIRP Regulations seeking withdrawal of CIRP of the Corporate Debtor.

NCLT heard the submission made by the Lr. Senior Counsel for the parties and observed that the Settlement Proposal which was considered by the COC shows that all the 9 FCs in relation to the Corporate Debtor have agreed to receive a sum of Rs.328.21 crore as their settlement amount as against their total admitted claim amount of Rs.4863.88 crores.

NCLT further observed that the Settlement Proposal as given by the promoters of the Corporate Debtor appears to be more like a Corporate Restructuring and Resolution Plan or a Business Restructuring Plan rather than a settlement simpliciter under section 12A of the Code.

Further, NCLT opined that the ratio as laid down by the Supreme Court in respect of a Resolution Plan postulating that the Commercial Wisdom of the CoC cannot be a subject matter of appeal before the Adjudicating Authority, cannot *mutatis mutandis* apply to an application filed under Section 12A of the Code. Adjudicating Authority (AA) is required to be more vigilant in considering the settlement plan under section 12A of the Code and is only required to permit unprejudiced settlement plan to succeed. There is always a system of constant checks and balances where there must not be a capricious or arbitrary power given in the hands of CoC to accept or reject settlements.

NCLT viewed that the "collective commercial wisdom" of the CoC cannot be called in question by this Adjudicating Authority only when the said decision has been taken by the CoC in conformity within the framework of the Code. ***Thus, now a question arises for consideration before this AA that whether based upon a Business Restructuring Plan submitted by the promoters of the CD, can this AA allow for the withdrawal of the CIRP***.

NCLT also opined that the powers of this AA cannot be circumscribed on the ground that "Commercial Wisdom" of the CoC would prevail over any other provisions of the Code and to be borne in mind that this AA is not a mere stamping authority so as to endorse the decision of the CoC and is required to examine whether such decision is falling within the contours of the Code.

NCLT pointed out that once the CIRP is triggered in relation to a CD, the same is an order in *rem* and not in *personam* and that whether the CD is required to be wriggled out of the CIRP is to be decided by this AA by exercising its "judicial wisdom" and cannot be carried away by the "Commercial Wisdom" of the CoC. It observed that the RP has prayed for the Liquidation of the CD in case of the failure of the terms of the settlement proposal given by the promoter of the CD and stated that the prayer as sought for by the RP transcends beyond the scope of the Code. NCLT further observed that if such a settlement proposal as given by the promoters of the CD under Section 12A of the Code is approved by NCLT, especially when as on date no money has been paid to the FCs of the CD, then this NCLT would be left in lurch when there arises any default on the part of the promoters of the CD, since it would be uncertain as to how to proceed thereon when the CD is out of the CIRP and hence there arises a legal quagmire.

Also, there is no final offer by the promoters and the acceptance by the COC and there is no finality reached between the Promoters and the CoC.

Thus, NCLT rejected the withdrawal application filed by RP under Section 12A of the Code and stated that a settlement simpliciter under Section 12A of the Code, is different from a Resolution Plan given under Section 30 and 31 of the Code. In the present case, the promoters of the CD who is ineligible to submit a Resolution Plan is trying to provide a Settlement Proposal, which is similar to Resolution Plan under Section 12A of the Code.

IBBI Discussion Paper—Strengthening Regulatory Framework of CIRP and Liquidation

The Insolvency and Bankruptcy Board of India regulates the services of insolvency professionals, Registered Valuers, Information Utilities etc. Committee of Creditors consisting of Financial Creditors who have a large role in bringing a Resolution Plan for the Corporate Debtor in the Corporate Insolvency Resolution Process are unregulated by the IBBI. IBBI in its discussion paper dated 27th August 2021 has proposed some suggestions on CIRP and Liquidation process for public comments.

Discussion paper on CIRP—To eliminate issues relating to CIRP

S.No.	Details	Remarks
1	Part A	Code of Conduct for Committee of Creditors- The proposed code aims at elevating the accountability and responsibility of CoC to ensure transparency in the functioning of a CoC. The proposal includes not appropriating CD's assets during CIRP period, deputing representative with sufficient authorization to take decisions, not to include CoC expenses as insolvency process cost and to extend interim finance to the extent required for completion of the process, etc..
2	Part B	Revision of Resolution plan, delay in process and introduction of Swiss Challenge in CIRP
3	Part C	Bank Guarantees and Line of Credit to be shown as Liability for the Resolution Applicant and included as a claim to the Resolution Professional.

Discussion paper on Liquidation--- To strengthen the regulatory framework of liquidation process

S.No.	Details	Remarks
1	Part A	Scope and Constitution of Stakeholders Consultation Committee
2	Part B	Issues in relation to Sale of Assets
3	Part C	Relinquishment of Security Interest

IBBI has invited suggestions to be submitted electronically by 17th September 2021 from the Professionals and Bankers. Please find attached the discussion paper in the below link:

1. https://www.ibbi.gov.in/uploads/whatsnew/fbe59358a8c440d001f3b950be4a1c67.pdf
2. https://www.ibbi.gov.in/uploads/whatsnew/5a329903ead7ae33c84a14f24d5c53c1.pdf

Claw Back Provisions

CGRF Bureau

What the Recovery Man ought to know!

Introduction

Lending to corporate borrowers is fairly easy as compared to recovery of moneys lent. The Recovery Man in a commercial bank or a financial institution would endorse this statement as he alone knows the travails he undergoes trying to wash off the inadvertent misdeeds of his colleagues *(no offence meant to the credit manager)* seated at the credit department. The recovery department the last place any bank officer who is involved in corporate finance would like to be posted since he is neither liked by the customer since he becomes a 'nuisance' day in and day out nor the management since he does not recover the money as fast as the management expects. But being posted in the Asser Recovery Management department he comes to know of the games the erring corporates play to delay and deny the repayments. As compared to the Credit Manager, he inter acts more with the lawyer and law even as he may not have any legal background whatsoever. Therefore, a prudent Recovery Officer would like to equip himself with the rudimentary aspects of the recovery laws and, of course, with the relevant provisions of the Company Law to gain the respect of the lawyer, the official liquidator and the courts. In this direction this article proposes to share with the Recovery Officer some knowledge of certain provisions in the Company Law which may come in handy to him while briefing his empanelled lawyer.

We have all heard of the word *"claw"*. It is the curved pointed horny nail on digit of the foot in birds, insects and in some mammals. So once it pounces on its prey, it drags the prey to itself seeming to say *that "you don't deserve to be alive"* and then devours the prey partly or fully. Therefore, we say it claws back the prey. Synonymous to this we come across the term *"claw- back provisions"* in financial and legal documents.

The term has several meanings in the context in which it is used. For example, in a financial or business setting, "clawback" may refer to a provision in a contract that allows money or benefits to be taken back if special circumstances arise. A common example is where insurance premia can be refunded or "clawed back" if the insurance policy is cancelled within a given time period. Some securities are linked to taxable benefits that depend on holding period for the security. If the investment is sold before it reaches maturity, the benefits can be subject Clawback

Clawback provision is generally a special contractual clause typically included in employment contracts. The term initially gained importance in relation to executive pay and incentives in companies, the compulsory repayment of cash, or transfer of shares or other assets previously paid or delivered to an employee or director, especially in the form of a bonus or share incentive award, Contracts included clawback clauses because the supposedly good performance. which the original payment was made could be reassessed if the performance of the business had deteriorated severely after the payment. or the executive misbehaved thereafter in some way. What started as a check on the performance going awry in a company and a deterrent on the errant employee found its way into corporate laws.

(Image source: website)

The Sarbanes-Oxley Act of 2002 requires the U.S. Securities and Exchange Commission (SEC) to pursue the repayment of incentive compensation from senior executives who are involved in a fraud. Section 304 empowers the SEC to force CEOs and CFOs of public companies to reimburse their company for certain compensation received in years for which the issuer undertook an accounting restatement due to issuer's 'material noncompliance with any financial reporting requirement under the securities law----a clawback.

Nearer home we have Section199 of the Companies Act,2013, which states that:

> *"…… Where a company is required to re-state its financial statements due to fraud of non-compliance With any requirement under this Act and the rules made thereunder, the company shall recover from past or present managing director or whole time director or manager or CEO (by whatever name called) who, during the period for which the financial statements are required to be re-stated, received the remuneration including stock option) in excess of what would have*

been parable to him as per restatement of financial statements"

--a clear Clawback provision.

Now that the appetizer above having been given to the Recovery Manager, he could look forward to learn more about clawback provisions in the Companies Act which relates to winding up of companies because that is where his heart lies. Clawback provision is not new to Companies Act though the word "clawback" has not been used in the Act. We have several sections in Companies Act, 1956, which are still in force as far as winding up provisions are concerned, and which effectively means clawing back

Commencement of Winding up:

Till the IBC,2016 came into force, the High Courts of each State in India have the competent authorities to issue orders for winding up of companies depending upon the location of the registered office of the companies. A winding up petition triggered the winding up process then but the date of the Court's Order was not the date of commencement of the winding up. As per Section 441 (corresponding to section 357 of the Companies Act, 2013)., in a voluntary winding up, the winding up commenced on the date of passing of the resolution by members to wind up and in all other cases it was the date of presentation of the petition, Therefore, even though the date of the order could have been much later, the winding up could be said to be a claw back to the date of the aforesaid resolution or the date of presentation of the petition.

Fraudulent Preference

Under the provisions of the Companies Act, any payment or disposition of property made within 6 (six) months prior to the commencement of the winding up (i.e., the date of filing of the winding up petition) with the intention of giving a creditor (or his surety) a preference over the other creditors constitutes a fraudulent preference.

To render a transfer or disposition as void on this ground it is essential that:

(i) It is made with the deliberate intention of and results in giving a particular creditor preference over the other creditors; and

(ii) It is a voluntary act.

Further, any transfer of property, movable or immovable, or any delivery of goods made by the company, not being:

(i) a transfer made in the ordinary course of its business; or

(ii) in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up or passing of a resolution for the winding up of the company is void as against the liquidator.

The law further provides that in the case of a fraudulent preference as stated above, the person preferred will be subject to the same liability and have the same right as he or she had undertaken to be personally liable as surety for the debt to the extent of the mortgage or charge on the property, or the value of the interest, whichever is less.

Additionally, a floating charge created 12 (twelve) months immediately preceding the commencement of the winding up will be void and have no effect unless it is proved that the company was solvent immediately after the creation of the charge.

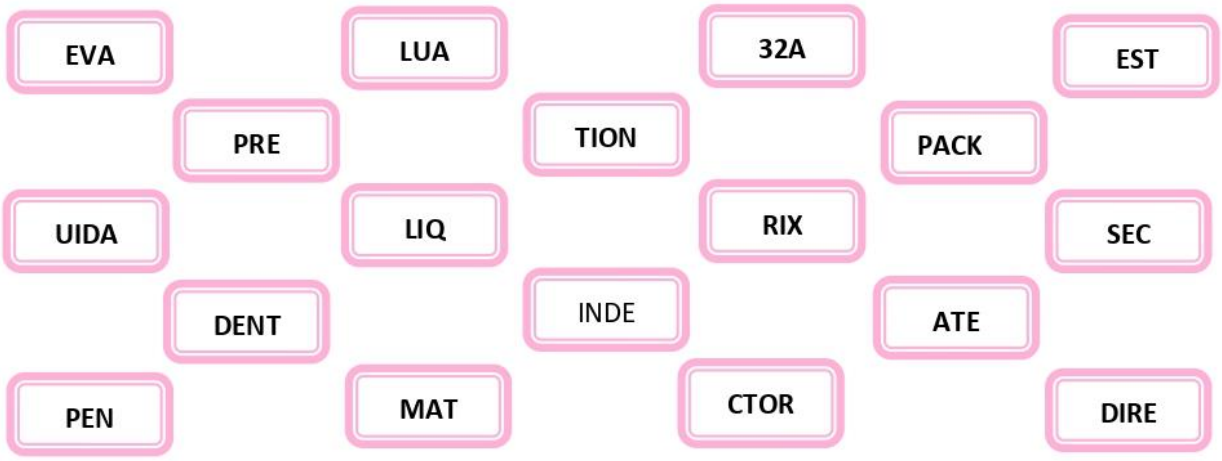
The Companies Act further stipulates that any disposition of property (including actionable claims) of the company, made after the commencement of winding up will, unless otherwise ordered by the court, be void. However, on a review of the various judgements passed by different courts in India, it clearly emerges that bonafide transactions entered into and completed in the ordinary course of business would ordinarily be protected and upheld by the court though the court has to rule that such transactions are not void

The law further provides that in the case of voluntary winding up, any transfer of shares within the company made without the sanction of a liquidator or any alteration of status of the member of the company made after the commencement of the winding up will also be void. Similarly, in the case of a winding up by the court, any disposition of property or actionable claims of the company and any transfer of the shares in the company or alternation in the status of its members made after the commencement of its winding up will, unless the court orders otherwise, be void.

All these above provisions can be termed as" clawback provisions" on winding up and the Recovery Manager would do well to investigate into the transactions cited before he presents his case for winding up his bank's constituent company before any court of law.

Find the words !!

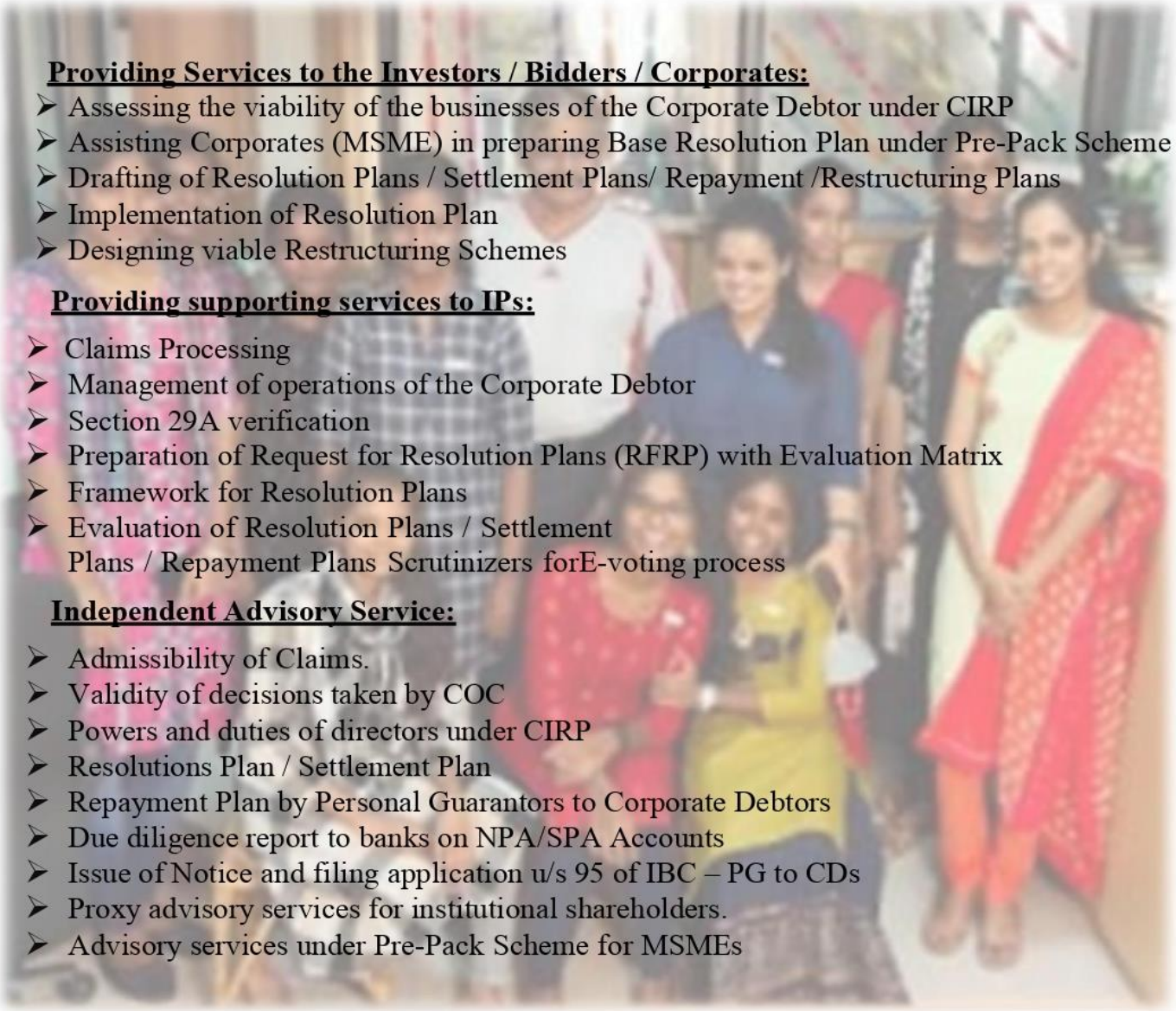
CLUES	WORDS
1. An insolvency resolution process introduced by the Govt. in April 21 for MSME corporates.	
2. The method by which resolution plans are evaluated by the RP & COC	
3. This Section under IBC gives immunity for prior offences to the corporate debtor where the resolution plan approved by the adjudicating authority results in change in management.	
4. At the time of liquidation of a corporate debtor, this is formed by the liquidator who shall hold it as a fiduciary for the benefit of all the creditors.	
5. An IRP or RP shall be considered independent of the corporate debtor if he is eligible to be appointed in this position in the corporate debtor.	



Answers

1.Prepack 2.Evaluation Matrix 3.Section 32A 4.Liquidation Estate 5.Independent Director

Our Service



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 forE-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

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