CGRF SANDBOX

APRIL – 2020

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CGRF

CREATE & GROW
RESEARCH FOUNDATION

From Chairman's Desk:

Dear readers and well-wishers,

It gives me immense pleasure to release the inaugural issue of our monthly Newsletter ***"CGRF SandBox"*** at a time when our entire nation, nay, the entire world is gripped with fear, anxiety, curiosity, hopes and a new confidence to face the crisis unleashed by COVID-19.

As far as India is concerned, it has actually given a new meaning and direction to our Prime Minister's call for a **"*Swachh Bharath*"** and **"*Make in India"*** campaign. The positive side of COVID-19 has explained, by events, the need for cleanliness and the need to be self-reliant.

It has given a new hope to countless youngsters of our nation to look forward for a jubilant India where innovation pays and where opportunities to get massive employment is on the cards since the world will look to India to be the new player for establishing manufacturing hubs away from China.

COVID-19 has also brought along with it the economic destruction to pave way for a new model of economic growth. Of course, it will take some time for the governments of the world to change gears and re-orient themselves to the new economic order.

It is predicted that COVID-19, when it ends, will also result in massive global food shortage. Here is a great opportunity for those who love to be part of nature, to shed their present employment and profession, where they now see a bleak future, to take to farming as a lucrative profession.

There will be ready markets for their products. Are the NRIs listening? Of course, the Government has to step in to create that ambience and conducive atmosphere which is very imperative to encourage agriculture and horticulture in a big way.

COVID-19 has also made professionals such as Company Secretaries, Chartered Accountants, Cost Accountants, Lawyers, management consultants, and the like who are in practice to sit up, shed their present mode of working and look out for innovative models of deliveries. ***"Work from Home"*** culture has been forced on these professionals as a result of prolonged lockdowns and, which in a way should be looked at as a blessing in disguise.

New realizations have dawned on these professionals. No need to travel, no driving tensions, no need to spend on large office premises, work at leisure from home, be with the family and at the same time attend to work in the same effective way as they have been doing-- all these have woken up professionals to ask themselves ***"Why Not?".*** As a corollary, these professionals will find enough time to read at home and hone their professional skills.

CGRF is looking forward to be the catalyst in this venture. CGRF hopes to feed these professionals with the latest information available on the subjects of their liking through its innovative Newsletter. ***"CGRF SandBox"*** has geared up to fulfil this need by engaging the requisite manpower to trail blaze the adventure of working from home.

"CGRF SandBox" is expected to be filled up with articles, snippets, notifications from government, etc. which are hot topical subjects of interest with renowned professionals giving the required inputs. I wish the editor of ***"CGRF SandBox"*** and his proficient team a thumping success in its noble venture!!

Let the Almighty Shower his blessings on this new venture!!! All the best.

Happy Reading!!!

Yours truly,
S. Srinivasan

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S. Rajendran
Director - CGRF

Importance of Board's Report as part of the Audited Financial Statements of a company – From a banker's perspective:

Sec.2 (40) of the Companies Act 2013-defines financial statement as follows:

"Financial statement" **in relation to a company, includes ---**

1. *A balance sheet as at the end of the financial year;*
2. *A profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;*
3. *Cash flow statement for the financial year;*
4. *A statement of changes in equity, if applicable; and*
5. *Any explanatory note annexed to, or forming part of, any document referred to in sub clause (I) to sub clause (iv);*

Provided that the financial statement with respect to One Person Company, small company and dormant company, may not include the cash flow statement."

From a Banker's View:

From a corporate lender's perspective, most of the companies borrowing funds would have to provide all the above-stated documents, collectively called the *"financial statement"* or *"financial statements* "to the bankers as per the covenants of the sanction letter or loan documents.

When it comes to the question of tracking a company's performance, the lenders usually call for the provisional statements sometime in June/July and audited financial statements by

Around September of a year when the corporates are expected to finalize the audited financials as of 31st March and get the accounts approved by the shareholders in an annual general meeting. Most of the bankers seem to be satisfied when a company provides a set of audited financial statements and auditor's report.

A cash flow statement and statement of changes in equity normally find a place within the financial statements which are basically a P&L Statement and Balance Sheet for the relevant year. But another critical document which gets missed out by the bankers is Board's report or the directors' report.

Board's Report:

Sec.134 of Companies Act 2013- "Financial statement, Board's report, etc."

The very title of this section puts together financial statement and board's report. This section mandates that the financial statement shall be approved by the board of directors and that auditor's report shall be attached to the financial statements. Very importantly, it also provides that,

"There shall be attached to statements laid before a company in general meeting, a report by its Board of directors…"

Why a Directors' Report is Very Important?

The board's report has been intended to be a very comprehensive document covering varied aspects of the state of the company's affairs, number of board meetings held, directors' responsibility statement which includes internal financial controls laid down, disclosures, explanations on the qualifications of the auditors, various governance issues like corporate social responsibility, related party transactions, material fraud, If any, declaration by independent directors, declaration of dividend if any, material changes affecting the financial position of the company which have occurred after the end of the financial year, risk management policy for the company, whether the directors have devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively, etc.

The Board's report should give a ringside view of the business. ***Take a long breath!!*** What is stated above is only a gist of the requirements. If one goes through the provisions deeper, the

entire gamut of the business operations would get mapped in the directors' report.

The Board's report and any annexures thereto shall be signed by the chairman of the company or two directors one of whom shall be a managing director.

A signed copy of every financial statement shall be issued, circulated or published along with a copy of any notes annexed to or forming part of such financial statement, the auditors' report and the Board's report.

From the above discussion, it is amply clear that every financial statement of a company should go together with a copy of the notes annexed to such statement and more importantly the auditors' report and the Board's report.

Penalty for Contravention:

To drive home the importance of board's report and to ensure compliance, the Companies Act 2013 prescribes stiff penalty provisions.

A company contravening the above provisions shall be punishable with fine between Rs.50, 000/= and Rs.25 lakhs. Also, every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 3 years or with fine which shall be between Rs.50,000/= and Rs.5 lakhs or with both.

Conclusion:

The financial statements are the only authentic evidence of the company's performance. Lenders have to keep a vigilant oversight on the performance to see early signs of distress or liquidity crunch.

In many cases, reading of the directors' report and auditors' report will give a hint of any attempt by the corporate to sweep things below the carpet.

The mandatory requirements of Companies Act are overlooked by many corporates. A scrupulous banker would point out such aspects to the companies and insist on proper explanation.

This would surely go a long way to help the bankers to smell things going wrong in the initial stages itself and take appropriate remedial measures. We are sure, bankers will now take a special liking to read the board's report of their borrowers.

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Do you know?

Lesser penalties for OPC and Small Companies

As per Sec.446B of Companies Act, 2013, if a One Person Company or a small company fails to comply with

- ✓ ***Submission of Annual Return (Sec.92(5))***
- ✓ ***Filing of MGT-14 for special resolutions or other documents (Sec.117(2))***
- ✓ ***Filing of AOC-4 Audited Financial accounts (Sec.137(3)),***

Such company and officer in default of such company shall be liable to a penalty which shall not be more than one-half of the penalty specified in such sections.

MCA has vide its order dated 24th March 2020 announced that CARO 2020 will apply, for the financial years commencing on or after the 1st April, 2020 instead of financial years commencing on or after the 1st April, 2019. Decision has been taken considering recent outbreak of Corona Virus.

S. Srinivasan
Chairman-CGRF
Along with CS. Pavithra & CS. Harsha
(Under-studies)

Is the employed company secretary responsible for the compliance of all other applicable laws also?

The Company Secretary of a Company being a Key Managerial Person has certain functions mandated by the Companies Act,2013, which was conspicuously absent in the Companies Act,1956. *Section 205 of the Companies Act, 2013,* has categorically stated in sub-section (1) (a) that the functions of the company secretary *inter alia* includes:

"*To report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company*". {Emphasis Added}

Therefore as an "*Employed Company Secretary (ECS)"* he has a definite duty to ensure compliance of the provisions of the Companies Act, 2013, and its Rules since the functions of such compliance comes directly under his knowledge domain. Now the question whether the ECS should also be held responsible for the compliances of all other applicable laws appears, however, debatable.

The ECS may contend that section 205(1) of the Companies Act, 2013 (the Act) which spells out his functions, has merely cast in sub-section (1) (a) An obligation on his part *"to report (adverb) to the Board"* inter alia on the compliance of other laws applicable to the company and not *"to ensure"* compliance of the provisions of other applicable laws which do not come directly under his knowledge domain.

"Reporting" on the compliance of the provisions of other applicable laws is only a function as the heading to the section itself suggests and does not cast upon him a duty to ensure compliance of the provisions of such other applicable laws. Again, in contrast sub-section (2) (b) has used the words *"to ensure"* as reproduced hereunder: 205(1) (b) to ensure that the company complies with the applicable secretarial standards;

Therefore, the ECS may hold a view that there is a difference between *"reporting"* and *"ensuring".* If the intention of the legislature was to cast a duty on the ECS to ensure compliance of the provisions of other applicable laws, it would have used the words *"to ensure"* in subsection (1) (a) as has been used in subsection (1) (b) Since most of the other laws which are applicable to the company are laws which originate at the factory, and the plant head, who is responsible for the compliance, addresses his report (noun) to the Board and the function of the ECS is only to place such a report to the Board along with the Agenda Papers at the Board Meetings, his responsibility ends there.

He may also contend that he is not responsible for the compliance of the provisions of other applicable laws which originate from the factory since

(i) one cannot expect him to be physically present at the factory to ensure compliance and

(ii) He is not an expert on those laws such as the labor laws, environment laws, etc.

He may also strengthen his case by citing section 205(1) (c) of the Act which clearly states that he should *"discharge such other duties as may be prescribed*" in contrast to the words "*to report*" used in subsection (1) (a).

"Such other duties" of the ECS have been prescribed under Rule 10 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules which is reproduced for the sake of convenience hereunder:

The Company Secretary shall also discharge, the following duties, namely:-

(1) To provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers;

(2) To facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings;

(3) To obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act;

(4) To represent before various regulators, and other authorities under the Act in connection with discharge of various duties under the Act;

(5) To assist the Board in the conduct of the affairs of the company;

(6) To assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices; and

(7) To discharge such other duties as have been specified under the Act or rules; and

(8) Such other duties as may be assigned by the Board from time to time.

Conclusion:

Therefore, the ECS may absolve his responsibility stating that his role is restricted only to ensure compliances of the provisions of the Companies Act, 2013, the rules made thereunder, and the Secretarial Standards and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (in case of listed companies) and to discharge such other duties as prescribed in the rules above and finally to report to the Board thereof.

His duty does not extend to ensuring compliance of the provisions of other applicable laws but is confined to reporting on the compliance by the person responsible by placing the latter's report before the Board at its meetings.

Nevertheless, as a matter of good corporate governance, the appointment letter issued to the ECS must describe any other duties that the ECS is assigned with, which may also include *"ensuring"* compliance with the provisions of all other laws that are applicable to the company in which case the ECS cannot take shelter that he cannot be held responsible for ensuring compliance of the provisions of other applicable laws as state above.

However, the ECS has a responsibility towards the Secretarial Auditor in that he being the pivot to address all queries raised by the Secretarial Auditor, the ECS would do well in appraising himself on the compliance or otherwise of the provisions of all other laws which are applicable to the company, whether he is responsible for ensuring such compliance or not, since the *"Practicing Company Secretary (PCS)"* has a duty to report on any non-compliance, if any, in his report in Form MR3 to the members.

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What is a

"SandBox"

A SandBox is a 'safe space' to test, play with, anything. For example, a regulatory SandBox is a safe space in which businesses can test innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in the activity in question.

The "CGRF SandBox" aims to provide the right ambience for innovative ideas to emerge in the corporate law regime.

Waiver of some charges for delayed Payment Interest rate is reduced at 9 per cent instead of 12 per cent/18 per cent per annum for delayed payments of advance tax, self-assessment tax, Regular tax, Tax Deducted at Source (TDS), Tax Collected at Source (TCS), Equalization Levy, STT, and CTT made between 20 March and 30 June 2020. Further no late fee/penalty shall be charged for delay relating to this period.

N. NAGESWARAN,
Insolvency Professional

Covid-19 and Foreign Direct Investments:

It is nothing new as even a country like USA, which is perceived as the strongest, used to tweak the provisions of the investment laws affecting inflow of foreign direct investment into the nation's assets including the ones which are traded in the stock, currency and commodity markets.

Most of the times, the orders of such intervention will be camouflaged as directions issued in the interest of national security.

Sometimes it will be investments from across the globe or from a particular foreign country or region.

Fearing such a situation that post Covid-19, the country's health care and critical infrastructure industries could face hostile take overs through cross border investments, after identifying some of the transactions that happened, a spate of European countries flagged down such investments by putting additional precautions in allowing such transactions.

During the Covid-19 pandemic, the first such news item was the one which featured USA offering huge investment in one healthcare industrial unit belonging to Germany which was working on a vaccine for Covid-19 with a condition that the unit should sell its entire production to USA only.

Though this news was promptly denied later by both the countries, Germany went ahead with framing a legislation through which the regulatory authorities were empowered to review any transaction of foreign direct investment into Germany by any country if the transaction was viewed to create even impairment of public order or security, leave alone posing a real threat or not. Subsequently, for the first time, the European Commission, in the last week of March 2020 issued guidelines to its members that they should review and upgrade their mechanisms of screening Foreign Direct Investment into the country.

They also suggested that if any member was not having such a mechanism, they should put one in place so that they ensure that any Foreign Direct Investment would not create any security risk both for the country and the EU as a whole. In the month of April, many members of EU complied with the guidelines and the most prominent amongst them were Spain and Italy, the epicenters of Covid-19 in Europe.

In both the countries the measures introduced were stringent to the extent that Non-EU investors who were to acquire 10% or more or acquire management control of any unit needed to get prior governmental clearance.

Similar control measures were introduced in Australia as well as in Japan during the same period.

The writing on the wall was very clear that all these new sets of instructions were having in mind the flow of FDI from China as the market buzz was that major global investment bankers had in their list names of the Chinese fund houses as people looking for strategic investment opportunity in all parts of the globe amidst the sharp drop in valuations.

The Indian Story:

An innocuous news item got published on 13th April 2020, which was based on a routine reporting process which takes place day in and day out whereby somebody ends up buying and holding more than 1% of the of a public limited company.

The news was that a Chinese banker ended up holding more than 1% of the shares of HDFC Bank.

The news triggered lot of discussion and finally ended up in a legislation barring such of the countries which share their border with India not being eligible to avail the automatic investment approval which is in vogue.

This culminated in a problem of investments from China drying out, affecting many startups and small time pharma manufacturers. The knee jerk reaction by the Government was akin to throwing baby along with bath water.

It is true that bringing in controls in getting FDI was not a bad idea, but doing it just to fall in line with some other country bringing in such controls does not bring in the value it is expected to.

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M. Sri Durga, CGRF

Company Fresh Start Scheme, 2020

(Source MCA notification Circular dated 30th march 2020)

Introduction:

The Ministry of Corporate Affairs (MCA) issued a Circular 12/2020 dated 30th March, 2020, in order to facilitate the companies registered in India to make a fresh start.

The Companies Act, 2013 requires all companies to make annual statutory compliance by filing the Annual Return and Financial Statements. Apart from this, various other statements, documents, returns, etc. are required to be filed on the MCA21 electronic registry within prescribed time limits. Filing fees for filing such statements, documents, returns, etc. is governed by section 403 of the Companies Act, 2013 read with Companies (Registration Offices and Fees) Rules 2014.

Companies Fresh Start Scheme, 2020

In order to give an opportunity to the defaulting companies and to enable them to file the belated documents in the MCA-21 registry, the Central Government in exercise of powers conferred under section 460 read with section 403 of the Companies Act, 2013 has decided to introduce a Scheme namely *"Companies Fresh Start Scheme, 2020 (CFSS-2020)"*The scheme gives an opportunity to inactive companies to get their companies declared as *'Dormant Company'* under section 455 of the Act by filing a simple application at a normal fee.

The said provision enables inactive companies to remain on the register of the companies with minimal compliance requirements.

Objective of the Scheme:

The MCA in pursuance of the Government of India's efforts to provide relief to law abiding companies in the wake of COVID 19, has introduced the *"Companies Fresh Start Scheme, 2020"* (CFSS-2020) to provide a first of its kind opportunity to companies to make good any filing related defaults, irrespective of duration of default, and make a fresh start as a fully compliant entity.

The Fresh Start scheme incentivizes compliance and reduce compliance burden during the unprecedented public health situation caused by COVID-19.

(Image Source Website)

Time Period of the Scheme:

The scheme is a one-time waiver of additional filing fees for delayed filings by the companies with the Registrar of Companies during the currency of the Schemes, i.e. during the period starting from 1st April, 2020 and ending on 30th September, 2020 (both days inclusive).

Applicability of the Scheme:

The Scheme shall be applicable on any 'defaulting company' *(which has made a default in filing of any documents, statements, returns, etc. including annual statutory documents on the MCA -21 registry)* is permitted to file belated documents which were due for filing on any given date in accordance with the provision of this Scheme.

The manner of Payment of Fees for filing of belated documents and seeking immunity:

Under the scheme, every defaulting company shall be required to pay normal fees as prescribed under the Companies (Registration Offices and Fees) Rules, 2014 on the date of filing of each belated document and no additional fee shall be payable.

Immunity from the launch of prosecution or proceedings for imposing penalty shall be provided only to the extent such prosecution or

The proceeding for imposing penalty under the companies Act pertain to any delay associated with the filings of belated documents.

Defaults not covered under Immunity under the Scheme:

Excepting proceedings following from delay in filings of documents, any other consequential proceedings, including any proceedings involving interests of any shareholder or any other person qua the company for its directors or key managerial personnel would not be covered by such Immunity.

The defaulting company is required to withdraw the appeal against any prosecution launched or the proceedings for imposing penalties initiated:

The defaulting Company, with respect to any Statutory filing under the Act or its officer in default as the case may be, has filed any appeal against any notice issued or compliant filed or an order passed by a court or by an adjudicating authority under the Act, before any competent court or authority for any violation of the provisions under Companies Act 1956/2013.

In respect of which an application is filed under this scheme, then it shall first withdraw such appeal and furnish proof of withdrawal for the filing the application for issue of immunity certificate under the scheme.

Special measures for cases where the order of the adjudicating authority has been passed but the appeal could not be filed:

In all the cases where due to delay associated in filing of any document, statement or return, etc.

In the MCA-21 registry, penalties were imposed by an adjudicating officer under the Act, and no appeal has been preferred by the concerned company or its officer before the Regional Director under Section 454 (6) as on date of commencement of scheme, the following would apply:

- Where the last date for filing the appeal against the order of the adjudicating authority under Section 454(6) falls between the 1st March, to 31st May, 2020 (both days inclusive)
- A period of 120 additional days shall be allowed from the last date to all companies and their officers for filing the appeal before the Concerned Regional Directors.

Due date for electronically filing Form CFSS- 2020:

Form – CFSS-2020 shall be filed within 6 months of the expiry of the Scheme. The Scheme expires on 30th September, 2020.

Thus the Form can be filed within six months from 30th September, 2020. There shall not be any fees payable on this form.

This Scheme shall not apply to the following companies:

- To companies against which action for final notice for striking off u/s 248 of the Act previously Section 560 of the Companies Act 1956) has already been initiated by the Designated Authority
- Where any application has already been filed by the companies for action of striking off the name of the company from the register of companies.
- To companies which have amalgamated under a scheme of arrangement or compromise under the Act;
- Where applications have already been filed for obtaining Dormant Status under Section 455 of the Act before his Scheme.
- Vanishing Companies
- Where an increase in the authorised capital is involved (Form SH-7) and also charge related documents (CHG-1, CHG-4, CHG-8 and CHG-9)

Conclusion:

The Designated Authority shall take necessary action under the Act against the companies who have not availed this Scheme and are in default in filing of documents in a timely manner.

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E. Gunaseelan
SR Srinivasan & Co. LLP

Unique Document Identification Number (UDIN) - Relevance and Importance

Source icsi guidelines

All the three professional institutes (ICAI, ICSI, ICAI-Cost) have issued guidelines for mandatory requirement of generating and mentioning "*Unique Document Identification Number (UDIN)"* in Reports/ Certificates along with Certificate of Practice Number.

In particular, ICSI has mandated UDIN for the following major services rendered by a Practising Company Secretary w.e.f. 1st Oct. 2019:

(i) Certification of Annual Return in Form MGT-8 under Section 92(2) of the Companies Act, 2013 and Rules made thereunder

(ii) Issuance of Secretarial Audit Report in terms of Section 204 of the Companies Act, 2013.

(iii) Issuance of Secretarial Audit Report to material unlisted subsidiaries of listed entities (whose equity shares are listed) Regulation 24A of SEBI (LODR) Regulations, 2015.

(iv) Issuance of Annual Secretarial Compliance Report to Listed entities (whose equity shares are listed) under *SEBI Circular No.CIR/CFD/CMD1/27/ 2019 dated 8th February, 2019.*

(v) Certification under SEBI (Listing Obligations & Disclosure Requirements) Regulations, 2015 that none of the directors on the board of the company have been debarred or disqualified from being appointed or continuing as directors of companies by the Board/Ministry of Corporate Affairs or any such statutory authority under Schedule V, Part C, Clause(10)(i).

(vi) Certification under Regulation 40(9) of SEBI (LODR) Regulations, 2015 certifying that all certificates have been issued within thirty days of the date of lodgment for transfer, sub-division,consolidation, renewal, exchange or endorsement of calls/allotment monies.

(vii) Conduct of Internal Audit of Operations of the Depository Participants registered with NSDL and CDSL under the Bye Laws issued by NSDL and CDSL.

(viii) Certification under Regulation 76 of SEBI (Depositories and Participants) Regulations, 2018 for Reconciliation of Share Capital Audit.

(ix) Diligence reporting for Banks in case of multiple banking/consortium lending arrangements in terms of the circular issued by RBI.

(x) Issuance of Certificate in case of the Indian company accepting the investment from a foreign investor, thereby confirming compliance of Companies Act, 2013 and Foreign Exchange Management Act, 1999.

UDIN may be generated for any other form including any eForm and document(s) which are not listed above and not mandatory as per these guidelines on voluntary basis.

Advantages:

Authenticity for the users of the Certificates. For example, a banker may check the annual return certification by a company secretary as to when it was done and whether such UDIN has been created or not. Similarly, for a corporate lender, the due diligence report needs to be certified with a UDIN.

Back-dated certifications are avoided by this electronic document identification creation and the date of such authentication.

This system brings in transparency in the certification process and makes the professional more responsible for his certifications.

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MCA notifications and Circulars:

(Image Source Website)

MCA General Circular No. 15/2020 dated 10th April 2020.

Clarification of FAQs on eligibility of CSR expenditure related to COVID-19 activities:

- Contribution made to 'PM CARES Fund' shall qualify as CSR expenditure under item no (viii) of Schedule VII of the Companies Act, 2013 and it has been further clarified vide Office memorandum F. No. CSR-05/1/2020-CSR-MCA dated 28th March, 2020.

- 'Chief Minister's Relief Fund' or 'State Relief Fund for COVID-19' is not included in Schedule VII of the Companies Act, 2013 and therefore any contribution to such funds shall not qualify as admissible CSR expenditure**.**

- Contribution made to State Disaster Management Authority to combat COVID-19 shall qualify as CSR expenditure under item no (xii) of Schedule VII of the 2013 and clarified vide general circular No. 10/2020 dated 23rd March, 2020**.**

- Ministry vide general circular No. 10/2020 dated 23rd March, 2020 has clarified that spending CSR funds for COVID-19 related activities shall qualify as CSR expenditure.

- It is further clarified that funds may be spent for various activities related to COVID-19 under items nos. (i) and (xii) of Schedule VII relating to promotion of health care including preventive health care and sanitation, and disaster management.

- Further, as per general circular No. 21/2014 dated 18.06.2014, items in Schedule VII are broad based and may be interpreted liberally for this purpose. Payment of salary/ wages in normal circumstances is a contractual and statutory obligation of the company.

- Similarly, payment of salary/ wages to employees and workers even during the lockdown period is a moral obligation of the employers, as they have no alternative source of employment or livelihood during this period.

- Thus, payment of salary/ wages to employees and workers during the lockdown period (including imposition of other social distancing requirements) shall not qualify as admissible CSR expenditure.

- Payment of wages to temporary or casual or daily wage workers during the lockdown period is part of the moral/ humanitarian/ contractual obligations of the company and is applicable to all companies irrespective of whether they have any legal obligation for CSR contribution under section 135 of the Companies Act 2013. Hence, payment of wages to temporary or casual or daily wage workers during the lockdown period shall not count towards CSR expenditure.

- If any ex-gratia payment is made to temporary / casual workers/ daily wage workers over and above the disbursement of wages, specifically for the purpose of fighting COVID 19, the same shall be admissible towards CSR expenditure as a onetime exception provided there is an explicit declaration to that effect by the Board of the company, which is duly certified by the statutory auditor.

MCA General Circular No. 16/2020 dated 13th April 2020

Filing under section 124 and 125 of the Companies Act 2013 r/w IEPFA *(Accounting, Audit, Transfer and Refund)* Rules 2016 in view of emerging situation due to outbreak of COVID 19.

MCA has already allowed filing in MCA-21 registry without additional fees till 30th September, 2020 through General Circular No. 11/2020 dated 24th March 2020 and 12/2020 dated 30th March 2020.

Therefore, the necessary relaxation, insofar as filing of various other IEPF e-forms (IEPF-1, IEPF-1A, IEPF-2, IEPF-3, IEPF-4, IEPF-7) and e-verification of claims filed IEPF-5, is concerned , the same has already been provided. Therefore the Stakeholders may plan other concomitant actions accordingly.

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(Image Source Website)

MCA General Circular 14/2020 dated 8th April 2020 and 17/2020 dated 13th April 2020

Clarification on passing of ordinary and special resolutions by companies under the Companies Act, 2013 and rules made thereunder on account of the threat posed by Covid-19.

The Act does not contain any specific provision for allowing conduct of members meetings through "*Video Conferencing (VC"* or the "*Other Audio Visual Means (OAVM)"*.

However, in case holding of an "*Extraordinary General Meeting (EGM)"* by any company is considered unavoidable, the following procedure needs to be adopted for conducting such a meeting on or before 30.06.2020, in addition to any other requirement provided in the Act or the rules made thereunder:

- EGM, wherever unavoidable, may be held through VC or OAVM and the recorded transcript of the same shall be maintained in safe custody by the company.
- In case of a public company, the recorded transcript of the meeting, shall as soon as possible, be also made available on the website of the company.
- Convenience of different persons positioned in different time zones shall be kept in mind before scheduling the meeting.
- All care must be taken to ensure that such meeting through VC or OAVM facility allows two way teleconferencing or WebEx for the ease of participation of the members and the participants are allowed to pose questions concurrently or given time to submit question in avoidance on the email address of the company.
- Such facility must have a capacity to allow at least 500 members or members equal to the total number of members of the company to participate on a first - come - first -served basis.
- The large shareholders, promoters, institutional investors, directors, key managerial personnel, the chairperson of the audit committee, nomination and remuneration committee and stakeholders relationship committee, auditor, etc.
- May be allowed to attend the meeting without restriction on account of first -come -first -served principle.
- The facility for joining the meeting shall be kept open at least 15 minutes before the time scheduled to start the meeting and shall not be closed till the expiry of 15 minutes after such scheduled time.
- A proxy is allowed to be appointed under section 105 of the Act to attend and vote at general meeting on behalf of a member who is not able to attend personality.
- Since general meeting under this framework will be held through VC or OAVM , their physical attendance of members in any case has been dispensed with, there is no requirement of appointment of proxies.
- Accordingly, the facility of appointment of proxies by members will not be available for such meetings. However, in pursuance of *section 112 and section 113* of the Act, representative of the members may be appointed for the purpose of voting through remote e-voting or for participation and voting in the meeting held through VC or OAVM.
- Atleast one independent director (where the company is required to appoint one), and the auditor or his authorized to be the

auditor shall attend such meeting VC or OAVM.

- Where institutional investors are members of a company, they must be encouraged to attend and vote in the said meeting through VC or OAVM.

- The chairman of the meeting shall satisfy himself and cause to record the same before considering the business in the meeting that all efforts feasible under the circumstances have indeed been made by the company to enable members participate and vote on the items being considered in the meeting.

1. For Companies which are required to provide the facility of e-voting under the Act, or any other company which has opted for such facility:

- The notice to members may be given only through e-mails registered with the company or with the depositary participant/depository.

- Before the actual date of the meeting, the facility of remote e-voting shall be provided in accordance with the Act and the rules.

- Attendance of members through VC or OAVM shall be counted for the purpose of reckoning the quorum under section 103 of the Act.

- Only those members, who are present in the meeting through VC or OAVM facility and have not cast their vote on resolutions through remote e-voting and are otherwise not barred from doing so, shall be allowed to vote through e- voting system or by a show of hands in the meeting.

- Unless the articles of the company require any specific person to be appointed as a Chairman for the meeting, the Chairman for the meeting shall be appointed in the following manner

➢ *(a)Where there are less than 50 members present at the meeting, the Chairman shall be appointed in accordance with section 104.*

➢ *In all other cases, the Chairman shall be appointed by a poll conducted through the e-voting system during the meeting.*

- The Chairman present at the meeting shall ensure that the facility of e -voting system is available for the purpose of conducting a poll during the meeting held through VC or OAVM. Depending on the number of members present in such meeting, the voting shall be conducted in the following manner

➢ Where there are less than 50 members present at the meeting, the voting may be conducted either through the e-voting system or by a show of hands, unless a demand for poll is made in accordance with section 109 of the Act, in which case, the voting shall be conducted through the e-voting system;

➢ In all other cases, the voting shall be conducted through e-voting system.

- The notice for the general meeting shall make disclosure with regard to the manner in which framework provided in this circular shall be available for use by the members and also contains clear instructions on how to access and participate in the meeting.

- The company shall also provide a helpline number through the registrar and transfer agent, technology provider, or otherwise, for those shareholders who need assistance with using the technology before or during the meeting.

- A copy of the meeting notice shall also be prominently displayed on the website of the company and due intimation may be made to the exchanges in case of a listed company.

- In case a notice for meeting has been served prior to the date of this circular, the framework propose din this circular may be adopted for the meeting, in case the consent from members has been obtained in accordance with section 101(1) of the Act and a fresh notice of shorter duration with due disclosures in consonance with this circular is issued consequently.

- All resolutions passed in accordance with this mechanism shall be field with the Registrar of Companies within 60 days of

the meeting, clearly indicating therein that the mechanism provided herein along with other provisions of the Act rules were duly complied with during such meeting.

- While publishing the public notice as required under rule 20(4)(v) of the rules shall state a statement that the EGM has been convened through VC or OAVM in compliance with applicable provisions of the Act read with General Circulars 14/2020 and 17/2020;The date and time of the EGM through VC or OAVM;

- Availability of notice of the meeting on the website of the company and The stock exchange; the manner in which the members who are holding shares in physical form or who have not registered their email addresses with the company can cast their vote through remote e-voting or through the e-voting system during the meeting; the manner in which the members who have not registered their email addresses with the company can get the same registered with the company; any other detail considered necessary by the company.

2. For Companies which are not required to provide the facility of e-voting under the Act:

- Attendance of members through VC or OAVM shall be counted for the purpose of reckoning the quorum under section 103 of the Act.

- Unless the articles of the company require any specific person to be appointed as a chairman for the meeting. The chairman for the meeting shall be appointed in the following manner

➢ *Where there are less than 50 members present at the meeting, the chairman shall be appointed in accordance with section 104;*

➢ *In all other cases, the chairman shall be appointed by a poll conducted in a manner provided in succeeding sub-paragraphs.*

- The notices to members may be given only through e-mail registered With the company or with the depository participant.

- A copy of the notice shall also be prominently displayed on the website. If any of the company. In order to ensure that all members are aware that a general meeting is Proposed to be conducted in compliance with applicable provisions of the Act Read with General Circular No. 14/2020. Dated 8th April, 2020, the company Shall

➢ Contact all those members whose e-mail addresses are not registered with the company over telephone or any other mode of communication for registration of their e-mail addresses before sending the notice for meeting to all its members; or

➢ Where the contact details of any of members are not available with the company or could not be obtained as per above. It shall cause a public notice by way of advertisement to be published immediately atleast once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated and having a wide circulation in that district. and at least once in English language in an English newspaper having a wide circulation in that district.

- The company shall provide a designed email address to all members at the time of sending the notice of meeting so that the members can convey their vote, when a poll is required to be taken during the meeting on any resolution, at such designated email address.

- The confidentiality of the password and other privacy issues associated with the designated email address shall be strictly maintained by the company at all times. Due safeguards with regard to authenticity of email address(es) and other details of the members shall also be taken by the company.

- During the meeting held through VC OR OAVM facility, where a poll on any item is required, the members shall cast their vote on the resolutions only by sending

emails through their email addresses which are registered with the company.

- The said emails shall only be sent to the designated email address circulated by the company in advance. where less than 50 members are present in a meeting. The Chairman may decide to conduct a vote by show of hands, unless a demand for poll is made by any member in accordance with section 109 of the Act. Once such demand is made, the procedure provided in the preceding sub-paragraphs shall be followed. In case the counting of votes requires time, the said meeting may be adjourned and called later to declare the result.

- The notice for the general meeting shall make disclosures with regard to the manner in which framework provided in this Circular shall be available for use by the members and also contain clear instruction on how to access and participate in the meeting.

- The company should also provide a helpline number through the register & transfer agent. Technology provider, or otherwise, for those shareholders who need assistance with using the technology before or during the meeting. A copy of the notice shall also be prominently displayed on the website of the company.

- In case a notice for meeting has been served prior to the date of this Circular, the framework proposed in this circular may be adopted for the meeting in case the consent from members has been obtained in accordance with Section 101(1) of the Act, and a fresh notice of shorter duration with due disclosures in consonance with this Circular is issued consequently.

- All resolutions passed in accordance with this mechanism shall be filed with the Registrar of companies within 60 days of the meeting clearly indicating therein that the mechanism provided herein along with other provisions of the Act and rules were duty complied with.

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(Image Source Website)

MCA General Circular No. 18/2020 dated 21st April 2020

Holding of annual general meeting by companies whose financial year has ended on 31st December, 2019.

On account of difficulties due to Covid 19 related social distancing norms and consequential restrictions linked thereto, it is hereby clarified that if the companies whose financial year (other than first financial year) has ended on 31st December, 2019, hold their AGM for such financial year within a period of nine months from the closure of the financial year (i.e. by 30th September, 2020), the same shall not be viewed as a violation.

The references to due date of AGM or the date by which the AGM should have been held under the Act or the rules made thereunder will be construed accordingly.

Do You Know?

With effect from 1st April 2020,

- **Every private company which has a paid up share capital of Rs.10 crores or more shall have a whole-time company secretary. (Prior to this, the threshold for every company was Rs.5 crores.)**
- **Every company having outstanding loans or borrowings from banks or public financial institutions of one hundred crore rupees or more is required to get a Secretarial Audit conducted.(Prior to this, only public companies having paid up share capital of Rs.50 crores OR public companies having turnover of Rs.250 crores were required to undergo Secretarial Audit.)**

Period/Days of Extension for Names Reserved and Resubmission of Forms

Names reserved for 20 days for new company incorporation. SPICe+ Part B needs to be filed within 20 days of name reservation.	Name expiring any day between 15th March 2020 to 3rd May would be extended by 20 days Beyond 3rd May 2020.
Names reserved for 60 days for change of name of company. INC-24 needs to be filed within 60 days of name reservation.	Names expiring any day between 15th March 2020 to 3rd May would be extended by 20 days beyond 3rd May 2020.
Extension of RSUB validity for companies	SRNs where last date of Resubmission (RSUB) falls between 15th March 2020 to 3rd May 2020, additional 15 days beyond 3rd May 2020 would be allowed. However, for SRNs already marked under NTBR, extension would be provided on case to case basis.
Names reserved for 90 days for new LLP incorporation/change of name. FiLLiP/Form 5 needs to be filed within 90 days of name reservation.	Names expiring any day between 15th March 2020 to 3rd May would be extended by 20 days beyond 3rd May 2020.
RSUB validity extension for LLPs	SRNs where last date of resubmission (RSUB) falls between 15th March 2020 to 3rd May 2020, additional 15 days would be allowed from 3rd May 2020 for resubmission. However, for SRNs already marked under NTBR, extension would be provided on case to case basis.

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Other Regulators:

(Image Source :Website)

RBI Press Release dated 27th April 2020

- Heightened volatility in capital markets in reaction to COVID-19 has imposed liquidity strains on *Mutual Funds (MFs),* which have intensified in the wake of redemption pressures related to closure of some debt MFs and potential contagious effects therefrom. The stress is, however, confined to the high-risk debt MF segment at this stage; the larger industry remains liquid.

- The RBI has stated that it remains vigilant and will take whatever steps are necessary to mitigate the economic impact of COVID-19 and preserve financial stability. With a view to easing liquidity pressures on MFs, it has been decided to open a special liquidity facility for mutual funds of ₹ 50,000 crore.

- Under the SLF-MF, the RBI shall conduct repo operations of 90 days tenor at the fixed repo rate. The SLF-MF is on-tap and open-ended, and banks can submit their bids to avail funding on any day from Monday to Friday (excluding holidays).

- The scheme is available from today i.e., April 27, 2020 till May 11, 2020 or up to utilization of the allocated amount, whichever is earlier.

- Funds availed under the SLF-MF shall be used by banks exclusively for meeting the liquidity requirements of MFs by (1) extending loans, and (2) undertaking outright purchase of and/or repos against the collateral of investment grade corporate bonds, commercial papers (CPs), debentures and certificates of Deposit (CDs) held by MFs.

- Liquidity support availed under the SLF-MF would be eligible to be classified as "*Held to Maturity (HTM)"* even in excess of 25 per cent of total investment permitted to be included in the HTM portfolio. Exposures under this facility will not be reckoned under the *"Large Exposure Framework (LEF)"*.

- The face value of securities acquired under the SLF-MF and kept in the HTM category will not be reckoned for computation of adjusted non-food bank credit (ANBC) for the purpose of determining priority sector targets/sub-targets.

- Support extended to MFs under the SLF-MF shall be exempted from banks' capital market exposure limits.

Reserve Bank of India Circular RBI/2019-20/219 DOR.No.BP.BC.62/21.04.048/2019-20 dated 17th April, 2020

COVID19 Regulatory Package – Review of Resolution Timelines under the Prudential Framework on Resolution of Stressed Assets.

The Governor's Statement of certain additional regulatory measures aimed at alleviating the lingering impact of Covid19 on businesses and financial institutions in India, consistent with the globally coordinated action committed by the Basel Committee on Banking Supervision.

In this regard, the detailed instructions relating to extension of resolution timelines under the Prudential Framework on Resolution of Stressed Assets dated June 7, 2019 ('Prudential Framework') are as under:

- In terms of paragraph 11 of the Prudential Framework, lenders are required to implement a resolution plan in respect of entities in default within 180 days from the end of Review Period of 30 days.

- On a review, it has been decided that in respect of accounts which were within the Review Period as on March 1, 2020, the period from March 1, 2020 to May 31, 2020 shall be excluded from the calculation of the 30-day timeline for the Review Period.

- In respect of all such accounts, the residual Review Period shall resume from June 1, 2020, upon expiry of which the lenders shall have the usual 180 days for resolution.

- In respect of accounts where the Review Period was over, but the 180-day resolution period had not expired as on March 1, 2020, the timeline for resolution shall get

extended by 90 days from the date on which the 180-day period was originally set to expire.

- Consequently, the requirement of making additional provisions specified in paragraph 17 of the Prudential Framework shall be triggered as and when the extended resolution period, as stated above, expires.

- In respect of all other accounts, the provisions of the Prudential Framework shall be in force without any modifications.

Reserve Bank of India Circular RBI/2019-20/224FIDD.CO.FSD.BC.No.24/05.02.001/2019-20 dated 21th April 2020

"Interest Subvention (IS)" and "*Prompt Repayment Incentive (PRI)"* for Short Term Crop Loans during the years 2018-19 and 2019-20: Extended Period on account of Covid-19

- In the wake of the nationwide lockdown due to outbreak of Covid -19 pandemic and the resultant restrictions imposed on movement of people, many farmers are not able to travel to bank branches for payment of their short term crop loan dues. As per RBI circular dated March 27, 2020 regarding Covid-29 Regulatory Package, moratorium has been granted for three months on payment of installments falling due between March 1, 2020 and May 31, 2020 in respect of all term loans including short term crop loans.

- Accordingly, to ensure that farmers do not have to pay penal interest and at the same time continue getting the benefits of interest subvention scheme, Government has decided to continue the availability of *2% IS and 3% PRI* to farmers for the extended period of repayment upto 31.05.2020 or date of repayment, whichever is earlier, for short term crop loans upto ₹3 lakh per farmer which have become due between March 01, 2020and May 31, 2020.

- Banks are therefore advised to extend the benefit of IS of 2% and PRI of 3% for short term crop loans upto ₹ 3 lakh to farmers whose accounts have become due or shall become due between March 1, 2020 and May 31, 2020.

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(Image Source Website)

SEBI Circular SEBI/HO/CFD/CMD1/CIR/P/2020/71 dated 23th April 2020

Relaxation in relation to Regulation 44(5) of the SEBI *(Listing Obligations and Disclosure Requirements) Regulations, 2015 ('LODR')* on holding of Annual General Meeting (AGM) by top 100 listed entities by market capitalization, due to the COVID –19 pandemic

- Regulation 44(5) of the LODR requires top 100 listed entities by market capitalization to hold their "*Annual General Meeting (AGM)"* within a period of five months from the date of closing of the financial year. SEBI vide Circular dated March 26, 2020 **(SEBI/HO/CFD/CMD1/CIR/P/2020/48)** had relaxed this requirement by one

month for listed entities whose financial year ends on March 31, 2020.

- Subsequently, the "*Ministry of Corporate Affairs (MCA)"* vide Circular No.18/2020 dated April 21, 2020 has clarified that "…if the companies whose financial year (other than the first financial year) has ended on December 31, 2019 hold their AGM for such financial year within a period of nine months from the closure of the financial year (i.e., by September 30, 2020), the same will not be treated as a violation."

Accordingly, regulation 44(5) of the LODR is relaxed whereby the top 100 listed entities by market capitalization whose financial year ended on December 31, 2019 may hold their AGM within a period of nine months from the closure of the financial year (i.e., by September 30, 2020).

SEBI Circular SEBI/HO/CFD/DCR2/CIR/P/ 2020/69 dated 23rd April 2020

Relaxation in Regulation 24(i)(f) of the SEBI (Buy-back of Securities) Regulations, 2018 due to the COVID 19 pandemic.

- Considering the developments relating to the COVID 19 pandemic, SEBI has received a number of suggestions for relaxation of conditions with respect to raising of funds from the securities market**.**

- Currently, regulation 24(i)(f) of SEBI (Buy-back of Securities) Regulations, 2018 ("Buyback Regulations") provides a restriction that the companies shall not raise further capital for a period of one year from the expiry of buyback period, except in discharge of their subsisting obligations.

- It has been represented that the said period of one year may be reduced to six months, which would be in line with section 68(8) of the Companies Act, 2013. To enable relatively quicker access to capital, it has been decided to temporarily relax the period of restriction provided in Regulation 24(i)(f) of the Buy-back Regulations.

- Accordingly the words *"one year"* shall be read as *"six months"* in the said regulation. This relaxation will be applicable till 31st December 2020.

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Court Orders:
(Source IBBI)

Supreme Court:

(Image Source Website)

Suo Moto writ petition (Civil) No. 3/2020 dated 23th March 2020

Cognizance for extension of Limitation: Irrespective of the Limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f 15th March 2020 till further order/s passed by this court in present proceeding.

High Court

Ultra Tech Cement Ltd Vs Union Of India dated 7th April 2020

The operational creditors i.e. the Commercial Taxes Department of Govt. of Rajasthan as well as the respondent Commissioner of Goods and Service Tax assailed the resolution plan by filing appeals before Hon'ble the Supreme Court with a specific plea that their dues have not been accounted for by the COC in the resolution plan. Therefore, we are of the firm opinion that the respondents would be acting in a totally illegal and arbitrary manner while pressing for demands raised vide the notices which are impugned in this writ petition.

Shakuntla Educational & Welfare Society vs Punjab & Sind Bank dated 13th April 2020

The petitioner seeks a direction to the respondent not to declare its pending loan accounts as NPA and also grant of moratorium of three months to it in terms of circular issued by the ***"Reserve Bank of India (RBI)"***. Any classification of the petitioner's accounts as NPA would certainly amount to altering the position as existing on 01.03.2020 and, therefore, grave and irreparable loss will be caused to the petitioner, in case its accounts are declared as NPA, only on account of its failure to pay the instalments, which were admittedly payable on or before 31.03.2020.

NCLAT

(Image Source Website)

NBCC (India) Ltd. Vs ICICI Bank Ltd & Ors dated 22nd April 2020

The Interim Resolution Professional is continuing and managing the affairs of the *'Corporate Debtor'*. The Resolution Professional, who would be constituent of the *'Interim Monitoring Committee'* shall continue to be paid as may be deemed reasonable by the *'Interim Monitoring Committee'* from the date of this order.

If any fee is outstanding for the past services rendered by the Resolution Professional during the *'Corporate Insolvency Resolution Process'*, the same shall be paid as per the decision of the *'Committee of Creditors'*. These directions will last till the disposal of this Appeal. List the matter for 'admission after notice' on 15th May, 2020.

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Sec 56 of the Companies Act: Transfer of shares refers to voluntary transfer of title by one shareholder to another (i.e.) inter vivos. Transmission of shares refers to devolution of title by operation of law like insolvency, death or lunacy of members.

S. RAJENDRAN
Insolvency Professional

Does NCLT-approved Resolution Plan bind the Statutory Authorities?

Analysis of recent decision of Jharkhand High Court on 1st May 2020 in the matter of Electro steels Steel Limited Vs. The State of Jharkhand

A. Preamble:

Sec.31 of IBC speaks about approval of resolution plan. In order to ensure that the NCLT-approved resolution plan takes effect without further litigation, the law-makers provided originally that the resolution plan, once approved by the Adjudicating Authority, shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

Later on, when the NCLT-approved resolution plan was being challenged by statutory authorities that their dues have precedence and priority over other claims.

Courts were also taking a view that contractual obligations already entered into between the corporate debtor and other creditors shall have to be honoured and the resolution plan cannot just wish away such contractual obligations.

Even the provisions of Sec.238 which give IBC an overriding aura of being supreme over all other laws for the time being in force was of no avail.

The sanctity of the IBC provisions and a successful resolution plan were being tested. In the above circumstances, the Government came out with an amendment to Sec.31 (1)

With effect from 16th August 2019 elaborating the stakeholders a little more and including

"The Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed".

Therefore, the amended Sec.31 (1) took a much more powerful avatar to protect the interests of the resolution applicant. For a quick reference, Sec.31 (1) is reproduced herein below:

"*If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan."*

B. Quick summary of the case:

- SBI had filed a Company Petition before the NCLT, Kolkata Bench, under the provisions of IBC for initiating CIRP against Electro steel Steels Ltd. (ESL).

- ESL's registered office was in Ranchi and principal place of business at Siyaljori, Bokaro District, Jharkhand and Corporate office in Kolkata. The application was admitted by the NCLT-Kolkata on 21st July 2017.

- The resolution plan submitted by Vedanta Ltd. was approved by the NCLT-Kolkata by order dated 17.04.2018.

- The resolution plan was also approved by the NCLAT, New Delhi, on 10.8.2018. Upon approval of the Resolution Plan, Vedanta Ltd. took over the management of the petitioner Company on 04.06.2018.

- The Dy. Commissioner of Commercial Taxes, Bokaro issued re-assessment orders dated 17th August 2018 and based on this, a garnishee order dated 21.11.2019 was issued by him to SBI, asking it to pay into the Government Treasury, the sum of Rs.37.41 crores on account of tax/penalty due under the JVAT Act which ESL failed to deposit from 2011-12 & 2012-13.

- ESL challenged the garnishee order before the Jharkhand High Court under Article 226 of the Constitution of India by way of a Writ Petition.

Arguments of ESL (petitioner):

- Counsel for ESL submitted that since no claim was made by the State Government as regards the aforesaid tax liability in the CIRP, the claim of the Government is now barred under Section 31 of the Code, and the amount cannot be realised by the State Government, as the State Government shall also be deemed to be the operational creditor under Section 5 (20) of the IB Code.

- ESL also pleaded that once the resolution plan was approved, the tax liability of the petitioner Company which was not claimed by the State Government during the CIRP, stood completely barred under Section 31 of the Code.

- ESL also pointed out that the statement government will also come under the meaning of operational creditor and since no claim was made by the state government during the CIRP, upon the approval of the resolution plan by NCLT, any claim of the state government stood barred under Sec.31 of IBC.

- ESL stressed upon the resolution plan terms which stated that that all the claims of taxes and liabilities whether admitted or not, due or contingent, whether or not set out in the provisional balance sheet, shall stand extinguished by virtue of the order of the NCLT, approving the resolution plan, and the Company shall not be liable to pay any tax against such dues, and such liabilities shall stand extinguished and be considered as not payable by the Company by virtue of the order of the NCLT, approving the resolution plan.

- As the resolution plan of the company now stood approved up to the Hon'ble Apex Court, by virtue of the order dated 27.11.2019 passed in Civil Appeal Nos.1133-9081 of 2019, the ESL counsel reiterated that the taxes, even if accrued in the years 2011-12 and 2012-13, can no more be realized from ESL after approval of the resolution plan by the NCLT.

- ESL also pressed that by virtue of Sec.238 of IBC, the Code has an over-riding effect on all other laws for the time being in force.

Arguments of the State of Jharkhand:

- The Counsel for State of Jharkhand argued that ESL had collected the tax from its purchasers / customers in the name of VAT, but has not deposited the same in the State Exchequer, thus, amounting criminal misappropriation of the Government money entrusted to the petitioner Company by its purchasers / customers, and has thus

committed the offence of criminal breach of trust.

- The CIRP was started on 21.07.2017. The right of the State Government to recover the tax from the petitioner Company accrued in the years 2011-12 & 2012-13.

- The Code itself was enacted in the year 2016 and accordingly, the tax liability of the petitioner, which the petitioner Company ought to have discharged in the years 2011-12 and 2012-13, cannot be said to be affected by the Code.

- The Counsel for State further argued that Section 31 of the Code clearly states that the approved resolution plan shall be binding on the stake-holders involved in the resolution plan, but the State Government was never involved in the resolution process and there was a valid reason for the same, inasmuch as, the notice required to be issued under Section 13 of the Code, which ought to have been issued in the State of Jharkhand, where the petitioner Company is having its registered office as well as the principal place of business, but the said notice was never published in the State of Jharkhand.

- The notice was published only in the Kolkata Edition of Business Standard on 24.07.2017. Since the notice was never published in the State of Jharkhand, the State authorities had no knowledge of any such CIRP and accordingly, the State Government was deprived from making any claim in the CIRP.

C. Decisions of the High Court:

- The State Government shall fall within the definition of 'operational creditor', and the taxes payable by the petitioner shall fall within the definition of 'operational debt'.

- The re-assessment VAT orders were passed on 17.08.2018 by which date the resolution plan was already approved by the NCLT on 17.04.2018, but the same was never brought to the knowledge of the Commercial Tax officials by the Company, even though the petitioner Company was given a hearing by the Assessing Authority before passing the re-assessment orders.

- A conjoint reading of Section 13(1) (b) of the Code read with CIRP Regulation 6, clearly shows that the public announcement had to be made in the newspapers with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor.

- The registered office of ESL is at Ranchi, and its principal place of business is in the District of Bokaro, both of which are situated in the State of Jharkhand, but no public announcement of CIRP was made in the State of Jharkhand.

- The Hon'ble High Court of Jharkhand observed that "we are conscious of the fact that since the resolution plan is approved by the NCLT, and not interfered with even by the Hon'ble Apex Court as pointed out above, we are not required to look into the legality or otherwise of the resolution process, but the fact remains that due to non-publication of the public announcement of the CIRP in the State of Jharkhand, the authorities of the Commercial Taxes Department had no occasion to have any knowledge about the CIRP of the Company, and they were deprived of making their claim before the interim resolution professional.

- Since the State Government was not involved in the resolution process, the resolution plan cannot be said to be binding on the State Government under Section 31 of the Code as stated.

"*It shall by order approve the resolution plan which shall be binding on and other stakeholders involved in the resolution plan*;"

Writ filed by original company instead of the resolution applicant company:

- The High Court also remarked that "we also find from the record that though it is the specific case of the petitioner that the management of the petitioner company has been taken over by M/s Vedanta Limited on 04.06.2018, but the fact remains that M/s. Vedanta Limited is not the petitioner before us, rather it is the original Company which had the tax liabilities to be discharged in the years 2011-12 and 2012-13, after having realized the amount from its customers, is only the petitioner before us. We are of the clear view that the petitioner Company has not approached this Court with clean hands."

Amendment in Sec. 31(1) approved resolution plan binding on the Government Authorities, is prospective in nature:

- The Hon'ble High Court held that Section 31(1) of the Code, 2016 was amended vide IBC (Amendment) Act, 2019, with effect from 16th August 2019 to make the approved resolution plan binding on the Government Authorities in relation to the statutory dues.

- It is pursuant to this amendment that the rights of the Government Authorities for statutory dues were affected and such right was made subject to the approved resolution plan.

- The said amendment was prospective in nature, and no express retrospective effect was given to the said amendment.

- "The said amendment takes away a substantive right of the Government Authorities in relation to the statutory dues and thus any interpretation, which shall give a retrospective effect to the said amendment, would be unreasonable and unjust."

- In the present case the resolution plan of the petitioner Company was approved by the NCLT vide its order dated 17.04.2018 which is much prior to the aforesaid amendment.

- Accordingly, the said amendment in Section 31(1) of the IB Code, 2016 shall not apply to the resolution plan of the petitioner Company.

- Therefore, the assessment order dated 17.08.2018 which was passed by the respondent Commercial Tax Authorities, cannot be made subject to the approved resolution plan of the petitioner Company.

D. Final decision:

- The High Court of Jharkhand dismissed the Writ Petitions filed by ESL for the simple reason that it was never brought to the knowledge of the Commercial Tax authorities of the State of Jharkhand that the CIRP had been initiated against the petitioner Company, and no public announcement of the CIRP was made in the State of Jharkhand.

- Section 31 of the Code clearly lays down that the approved resolution plan shall be binding only on those stakeholders who were involved in the resolution plan. Admittedly, the State Government was never involved in the CIRP, and as such, the resolution plan cannot be said to be binding on it.

E. Moot points arising out of this Jharkhand High Court decision:

- Whether the non-publication of Public announcement as required under Sec.13 of IBC read with Regulation 6 of IBBI (IRPCP) Regulations 2016 is a curable defect? For the fault of the IRP, why the successful resolution applicant should be forced to carry the cross?

- Whether the IRP / RP could have written to the VAT authorities in Jharkhand State requesting them to file their claims, if any, particularly when some demands were in different stages of adjudication? This could have saved the day for the resolution applicant. *"The amount of tax collected but not paid being a criminal misappropriation of the Government money by the company, the State Government is entitled to realise it with penalties thereon."* This was the remark made by the High Court.

- In all fairness, should this liability not go to the erstwhile directors? (Sec.32A Liability towards prior offences)… Why the corporate debtor being taken over by the successful resolution applicant should suffer from day one? Would it not make the revival plans go for a toss?

- When the VAT authorities were aware of the resolution plan approval (which is a public document) on 17th April 2018 and by NCLAT on 10th August 2018, along with passing re-assessment orders on 17th August 2018, they could have appealed against the NCLT / NCLAT orders. In contrast to the above, the amendment of bringing in Sec.32A of IBC relating to "Liability for prior offences" has much more clarity.

- This section talks about liability relating to the period prior to commencement of CIRP. This amendment was introduced w.e.f. 28th Dec. 2019 when the Essar Steel Ltd. was in the thick of litigation before NCLT, NCLAT and Supreme Court.

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Do You Know?

Mens rea and actus reus

- **Under the traditional common law, the guilt or innocence of a person relied upon whether he had committed the crime (actus reus), and whether he intended to commit the crime (mens rea).**

- **Mens rea, or criminal intent, is the essential mental element considered in court proceedings to determine whether criminal guilt is present, while actus reus functions as the essential physical element.**

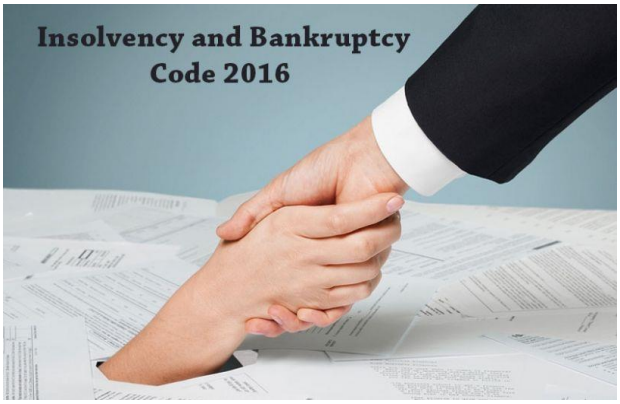
NP VIJAY KUMAR
Advocate

Role of RP and Committee of Creditors (COC) for Successful Resolution

What is constant is change and matter in inertia will be eliminated or transformed. That is law of nature and IBC is the change maker.

Even COVID 19 is a lesson in that direction. IBC is the much needed change. This change did not transform the existing machinery but replaced it with different machinery which is expected to be more transparent, more efficient and above all function with utmost integrity.

The underlying objective has now changed from winding up companies to restructure companies. This can also be called as 'scheme of restructuring in insolvency'.



(Image Source Website)

Resolution Professional is the new profession. Professionals have been roped into be part of this change and they are expected to change the system and bring about 'resolution' of Companies in distress. What is this 'resolution'?

It is a mechanism by which the debt stress of the Company is phased out and third parties who have the capital and business acumen are introduced to take over the businesses and therefore the Companies.

So that non-performing promoters are given an exit and business/employment and assets are protected with fresh capital and intellectual resources.

This is the sum and substance of IBC and it is this essence which needs to be achieved by professionals like RP. upon petition being admitted by NCLT, RP takes over the Companies and acts under the supervision of Committee of Creditors, supreme decision making body in the Company. The Role of RP in this process is vast in nature which can be categorized into following –

a. Administrative role
b. Co-ordinating Role
c. Investigative Role

Under the Administrative Role, the RP performs the following functions –

a. Control and Custody of Fixed assets and properties of the Company;

b. Control and custody of Books of accounts of the Company;

c. Ensuring the going concern nature of business

Under the Co-ordinating role, the RP broadly performs the following functions –

a. Convening and chairing meeting of COC

b. Taking steps to identify Resolution Applicants who are interested in the Company

c. Providing all information that is necessary to COC and to Resolution

Applicants to bring about a satisfactory and legally compliant Resolution Plant

d. Apply to Tribunal for determination of claims and for approval of resolution plan

e. Implement the plan and ensure smooth handing over of business

Under the Investigative Role, the RP performs the following functions –

a. Identifies the assets of the Company that have been diverted fraudulently by promoters

b. Identifying preferential and avoidable transactions that have taken place during the look back period.

c. Apply to the Tribunal to trace these assets and get these assets back to the Company;

RP performs the role under supervision and control of COC. The COC is the supreme decision making body and it is held by the Hon'ble Supreme Court as having commercial wisdom to take decisions in the interest of the Company.

The combined role played by RP and COC in a time bound manner brings about resolution for assets under distress.

RP is expected to be proactive in his role by ensuring sufficient publicity of "*Expression of Interest (EOI)"* and in inviting prospective Resolution Applicants to provide resolution plan proposals (RFRP).

RP needs to have knowledge of commerce, accounts, finance, law and business sense to run the business, analyze the resolution plans and apply to Tribunals to eliminate road blocks In identifying satisfactory Resolution Applicants.

The COC is expected to represent all the stakeholders of the Company. Since the finance commitment of members of COC is the highest, it was believed that decision making powers may be given to COC members so that they would take decisions which would be in the interest larger group of creditors.

The COC while taking decisions needs to consult with RP on evaluation of Resolution Plans and must make a considered commercial decision about feasibility of plan and the implementation of Resolution Plan.

The COC ought to consider the financial health of incoming Resolution Applicant, resources available to implement the plan, past experience in the business of the Company, time frame over which plan is intended to be implemented and above all the extent to which existing creditors have been provided for in the resolution plan.

All these aspects reflect the considered view of COC when approving or rejecting resolution plan.

RP should co-ordinate collating the above data to enable COC make informed decision.

Apart from the above, RP must also trace and bring back to the Company, assets that have been removed fraudulently from the Company so that value of the Company is maximized and Fraudulent promoters do not get benefit of their own wrong.

Last but not the least, all these acts need to be completed in a time bound manner as time is the essence and early cure would prevent further spread of the cancer.

The role of RP and COC has been explained by Hon'ble Supreme Court which is summarized below:

Swiss Ribbons case 2019 (4) SCC 17–

a. RP has no adjudicatory role. However RP has to vet and verify the claims and submit these claims to Tribunal

b. RP has to make application to NCLT to set aside transactions under Section 43, 45, 50 and 66.

c. RP has administrative powers as opposed to quasi-judicial powers.

Essar Steel's case 2019 SCC Online 1478–

a. The Supreme Court, in the most eloquent manner, has again thrown its weight behind the COC and its commercial wisdom with respect to the feasibility and viability of a resolution plan and the manner in which distribution is to be made under it.

b. The Supreme Court has cautioned that though the ultimate discretion of what to pay and how much to pay each class of creditors is with the COC, the Deci OC has taken into account the above-mentioned soon must reflect the fact that the C factors.

"The Committee of Creditors does not act in any fiduciary capacity to any group of creditors. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissentient creditors."

Arcelor Mittal (vs) Satish Gupta 2019 (2) SCC (1)

All these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors.

The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it.

The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time-being in force, including Section 29A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened.

Section 30(2) (e) does not empower the Resolution Professional to "decide" whether the resolution plan does or does not contravene the provisions of law.

The role of RP and COC is ever evolving given the changing business requirements and the roadblocks caused by ex-promoters in approving a successful resolution plan.

The law is young, the profession is young and they would be part of dynamic environment. Professionals who are practicing as RP need to be focused and updated with latest developments and changes.

COC needs to improve its speed and methods of decision making to make the system efficient and the resolution process a success.

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Savitha Devi Mahadevan
Advocate

Analysis of the IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020

Amendment in the form of a special provision relating to time-lines under Regulation 40C to the IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020 was notified w.e.f. 29.03.2020 and Regulation 47A to the IBBI (Liquidation Process) (Second Amendment) Regulations, 2020 hereinafter referred to as the Liquidation Process Regulations 2020 was notified w.e.f. 17.04.2020. These Amendments aim to exclude the period of lockdown imposed by the Central Government in the aftermath of the Covid-19 pandemic for the purpose of calculating the time period for any procedure that could not be completed owing to such lockdown in relation to the CIRP or liquidation process of a corporate debtor.

The Amended regulations also say that the exclusion of lockdown period is subject to the provisions of the Code. Does this mean that the time-lines in the Regulations are relaxed only to the extent that such time-lines specified in the Code are conformed with? Can the time-lines under the Regulations be relaxed without a proportional relaxation of the time-lines under the Code?

Let us take the Code for a moment, there are several time lines mentioned in the Code starting from the number of days within which an application under Sections 7, 9 and 10 has to be admitted or rejected by the Adjudicating

Authority, the number of days before which an application under Section 9 of the Code can be filed before the Adjudicating Authority after notice to the corporate debtor, the maximum number of days for completing the "*Corporate Insolvency Resolution Process (CIRP)"*, number of days within which an "*Interim Resolution Professional (IRP)"* is to be appointed by the Adjudicating Authority, period within which the Board has to make a recommendation on reference from the Adjudicating Authority for appointment of an IRP, number of days within which the first "*Committee of Creditors (COC)"* meeting is to be conducted, number of days after which the Adjudicating Authority can direct the IRP to continue as the Resolution Professional, etc. Are a few instances among many significant aspects of time-lines that the Code stipulates?

Some of the time-lines that the CIRP Regulations lay down are the number of days within which a public announcement is to be made by the IRP, period within which claims are to be verified, the number of days within which the COC constitution report is to be filed before the Adjudicating Authority, time for notice to COC members calling for a meeting, period within which registered values are to be appointed and so on and so forth.

While the Code concentrates on aspects, ***inter alia,*** time-lines prior to the commencement of the CIRP and the overall timelines within which the process is to completed, the Regulations, *inter alia*, focus on the time-lines within which certain activities are to be carried out immediately on the commencement of and during the CIRP.

Although the regulations are regulatory in nature and as seen from a catena of legal cases, it becomes evident that these time-lines are sometimes relaxed and not expected to be mandatorily followed in exceptional circumstances / cases.

The Code and Regulations are interconnected and go hand in hand and, therefore, a relaxation in compliance of a time-line laid down in the Regulation will have a direct impact on the overall time period specified under the Code. ***For example:***

The IRP is required under Regulation 17 of the IBBI *(Insolvency Resolution Process for Corporate Persons)* Regulations, 2016 to file a report before the Adjudicating Authority certifying the constitution of the COC within 2 days of verification of claims.

Regulation 19 requires the IRP to give a 5 days' notice to the members of the COC for convening a COC meeting unless otherwise agreed upon by the COC members. But this would mean that there would be a 5 days' mandatory notice period for the 1st COC Meeting. Section 22(1) of the Code stipulates that the 1st COC meeting shall be mandatorily held within 7 days from the constitution of the COC.

The above regulations 17 and 19 are in furtherance of achieving the purpose of Section 22(1) of the Code. It can be seen that these Regulations are only a means to achieve an end

(Resolution/ Liquidation) and therefore, relaxations in the time-lines of the Regulations mean going easy on the time-lines under the Code. After all, the Regulations and the Code are nothing more than two pieces of fabric woven from the same thread!!

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S. RAJENDRAN
Insolvency Professional

The IBC rejig

It has been in news that the enforcement of three Sections of IBC will be put on hold for a period of six months or so in order to protect the industries from the onslaught of the Covid-19 virus.

Sec.7, 9 and 10, under which applications filed by a financial creditor or an operational creditor or the corporate debtor can be admitted by NCLT, are the three sections through which the defaulting companies find their way into NCLT proceedings for insolvency resolution.

In some quarters, the news being spread is that the ban on these three sections of IBC can be even for a period of one year.

However, it appears that after the Cabinet has cleared the move, some apprehensions have been raised on the efficacy of this amendment as to whether it would come to the aid of genuine business failures or it would shield cases of mismanagement and deliberate attempts to milk the banking system.

While one has to wait and see the ordinance to be issued by the Government for its contents and the manner in which the suspension of the relevant sections of IBC will be brought into force.

It would be prudent for the Government to provide necessary credit support through the banking channels and allow the units to perform or perish rather than protecting blindly all business failures by meddling with the rights of an unpaid creditor.

Already the Government raised the threshold for debt default from Rs.1 lakh to Rs.100 lakhs.

This should give considerable relief to the MSME units in corporate sector coming under pressure for payments to its creditors.

It is felt that providing a blanket ban on the rights of the creditors under IBC would remove the fear and pressure for credit discipline by the corporates.

Further, suspending the three sections for the current period would actually block a chronic defaulter from being brought under insolvency resolution while the Covid-19 has nothing to do with its cause of failure.

Therefore, the intention to shield a commercial venture from the corona tsunami might actually prevent a good candidate from finding an insolvency resolution.

It is quite common knowledge that an application under any of these sections takes more than six months to one year for getting admitted by NCLT.

In these times of pandemic debris, there would surely be casualties as already seen in the mutual funds segment. Let the skeletons tumble out, let the dust settle down.

Let's allow the IBC to carry on its time-bound work. If some of the companies come into IBC thanks to Covid-19, it would be too fast to get there and in all probabilities the decay wouldn't be deeper and therefore a cure could be found sooner.

Note: At this point of time, the Finance Minister has announced on 17th May 2020 that fresh cases shall not be admitted for a period of one year. Details are yet to be seen.

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M SRI DURGA, CGRF

National e-Governance Services Ltd. – An Information Utility:

(Image Source Website)

Introduction:

An information utility is an entity which is registered so under Section 210 of the Code, is authorized to carry on the business of IU and is governed and regulated by IBBI as per the provisions of IBBI subject to conditions specifically provided under the Code.

A "*Certificate of Registration (CoR)*" is a prerequisite to establish an IU.

Stakeholders in Insolvency Resolution Process like the resolution professional and creditors have access to enable them to make the proper decision based on the information. Information important for time-bound resolution is made available.

Services of Information Utility:

IUs provide the core services and other services under IU Regulations in accordance with IBC Code. *Section 3(9) "Core services"* means services rendered by an information utility for-

1. Accept electronic submission of financial information.

2. Safe and accurate recording of financial information.

3. Authenticating and verifying the financial information submitted by a person.

4. Providing access to information stored with the information utility to persons as may be specified.

National e-Governance Services Ltd:

NeSL is an incorporate Union Government Company with the authorized paid-up capital of ₹ 30 Crores. It is owned by leading public financial institutions.

It was incorporated to augment the information infrastructure in India.

It offers digital services and optimizes governance services. It is the first and the only Information Utility till date.

Submission of Financial Information:

Any person may submit financial information to the information utility or access the information from the information utility on payment of requisite fee in Form C Data Input File Format prescribed & published by NeSL Web-site.

Before submitting the financial information, the person / entity has to enroll itself as a User with the Information Utility by declaring its identity and producing the identity documents like- Aadhaar, PAN, CIN etc.

Benefits of IU

Advantages to Stakeholders

- Authenticated information as evidence
- Reduction of asymmetry of information
- Reduction of information-collection time
- Reduction of delays in legal process
- Debts of Operational Creditors are filed digitally for easy retrieval and alerts

Enhancing digital India by providing facilities of,

- Paperless execution of contracts (Digitally-Authenticated Contracts as per IT Act)
- Digital Signature or Aadhaar E-sign PAN/CIN Validation from Income Tax department and MCA
- Secure, Safe, Next-Gen Security Measures and Robust internal Operational IT Systems
- Step-by-Step Guided Email and SMS Communication System
- Online Retrieval of data by NCLT/DRT

Rules Governing Utilities:

Rules and Laws governing the information utilities are laid down in IBC 2016 and IBBI (Information Utilities) Regulations 2017.

Conclusion:

The creation of the Information Utility is a step towards making information easily accessible at anytime from anywhere, empowering the creditors and lenders to make informed choices and providing all the essential information for an insolvency resolution process.

The central server is located in India and hence shall be subject to Indian rules and regulations. It provides all the financial information at the disposal of Authorised Person.

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B. MEKALA
Insolvency Professional

The key recommendations of Insolvency Law Committee – 2020

(Source webinar on the subject)

- Default Threshold of Rs. One Crore-RS. 50 Lakhs Recommended.
- Initiation of CIRP by class of Creditors: An amendment to section 7(1) to provide that for a class of creditors falling within clause (a) or (b) of Section 21(6A).
- Introduction of Interim Moratorium for CIRP: Shall not exceed 60 days.
- Continuation of License etc. granted by Government authorities during the moratorium period.
- By way of an amendment to Section 14(1) regarding termination or suspension of grants on account of non-insolvency reasons.
- Liability of corporate debtor for offences committed prior to initiation of CIRP: Those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence.
- Continuation of Critical Supplies during the Moratorium period: IRP/RP to decide about the critical supplies depending upon the case.
- Fresh Start Process: it may be appropriate to designate IBBI as supervisory authority for fresh start process, also need to develop a broad cadre.
- Initiation of CIRP against CD and Corporate Guarantor simultaneously: Prevent multiple proceedings.
- Treatment of profit during CIRP: who is entitled?
- Schemes of Arrangement: Recourse to Section 230 of the Companies Act, 2013.
- Appointment of Official Liquidator as a Liquidator under the Code:
- Investigation of Avoidable Transactions and Improper Trading: primary responsibility for investigation of these transactions should be on the insolvency professional.
- Out of Court Settlement Process: A court led formal process be replaced with the informal process, a debt settlement, mediation and debt counselling process may be started.

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S. RAJENDRAN
Director-CGRF

"First Who....Then What"

You feel very happy to read a success story... All of us are hard-wired to feel good when you see a good thing happening or when you read an inspiring real-life story.

Well, this being so, history is replete with several instances of failures or debacles or misadventures too. When you happen to read them, you wonder, "OH... this guy didn't even know this?" Sadly, one becomes wiser only after the event and in hindsight all things become clear and you would only wish to have a rewind to make the right move. From an organisation building perspective, what I found amazingly interesting is the concept of "First who...Then what..." It was very interesting to read this concept from the book "Good to Great" written by Jim Collins.

It has been intriguing me for quite some time. Should it not be *"First what, then who?"* Borrowing his words, the good companies which went on to become great, first got the right people on the bus.

Then they got the wrong people off the bus. And then, the right people in the right seats. And then, they figured out where to drive the bus.

Jim Collins goes on to say that the often-repeated corporate jargon *"People are your most important asset"* turns out to be wrong. People are *not* your most important asset. The right people are.

Well, how to find the right people? Is it so easy? Is there any tool to find the right person you want for your organisation? Sorry, there are no straight answers for these questions.

True, a lot of scientific tools are in place like tests for aptitude, attitude, role play, general awareness, case study, etc. But when you meet a candidate, the tick-the-box approach alone is not going to help.

Allowing the aspirant to express her strengths, passion and aim or her fairy-tale stories you let get to know a little more. Is this enough to assess a candidate? No, not at all.

Then what else is required? Well, a host of factors would determine the suitability of a person for an organisation. Like, is she a team player or a lone ranger? What kind of ego she carries? Does she love her work so much to wait for the day to dawn or every morning it is a pain to think of the boss? Honestly, it may take some time for anyone to come to terms with the job on hand and start contributing. Therefore, giving an elbow room to an employee to blossom is a good option.

When things go hard and you see a dip in enthusiasm, shuffling him into another role could be tried. Knowledge, skills, culture of discipline, good work habits, self-motivation and rigorous pursuit of tasks are the traits which make a person grow along with the organisation. Together, they make her a contributing-team -member, competent manager and effective leader.

Then comes the paradoxical blend of personal humility and professional will with which the effective leader builds an enduring greatness. I am sure each one of us has the traits.

How much we want to push the traits to the fore is the question. But I am getting more convinced that there is some good sense in saying *"First Who and Then What"*.

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N. Nageswaran
Insolvency Professional

Webinars:

Thanks to COVID19, lot of new terms started getting more prominence. One such word is "Webinar". What is this "Webinar"? As usual I turned to Wikipedia and it says "The term "webinar" is a portmanteau of web and seminar, meaning a presentation, lecture, or workshop that is transmitted over the web. Webinar was included on the Lake Superior University 2008 List of Banished Words but was included in the Merriam-Webster dictionary that same year.

This term seems to be in use prior to 1998 since a patent for this word – "WEBinar" was filed in USA in the year 1998. So much so that in the history of the term "webinar" which is now the most important tool in the umbrella term "Web Conferencing" includes webcasting, video chat etc.

During the lockdown to fight the spread of Covid 19, this tool became very handy, particularly when the words "stay home, stay safe" became the mantra.

The use of (or abuse of?) the tool webinar can be judged by the following statistics of webinars that were conducted.

Institution	No of Webinars
IIP ICAI	4
IPA ICMAI	18
IIP ICSI	9

Apart from the above, to name a few, ETCFO (Economic Times), Assocham, Madras Chamber of Commerce, Madras Law Chambers, Resurgent India etc have also organized webinars on the subjects relating to Companies Act, Secretarial Standards and IB Code. No doubt that the position of the receiver of such invites, after attending some of them ended as under!!!!

(Image Source Whatsapp Message)

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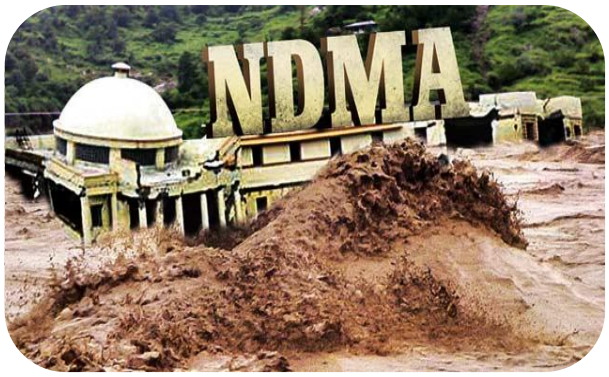
Last date for filing Income-Tax Return for Financial Year 2018-19 has been extended from 31 March to 30 June 2020. (Source: Press Information Bureau dated 24th March 2020)

N. Nageswaran
Insolvency Professional

NATIONAL DISASTER MANAGEMENT ACT, 2005



Many of us were not aware, till Government of India invoked the provisions of the National Disaster Management Act, 2005 during the current Covid-19 pandemic that such an Act is in the shelves of the Government. Of course, there are so many other Acts which the Government of India, sometime back we heard, was busy dusting them.

The following are the special provisions which have been enshrined in the Act for effective management of any disaster:

- This is one of the very few Acts which is applicable all over India (Many Acts exclude J&K)
- The Act calls for establishment of the National Disaster Management Authority (NDMA) with the Prime Minister as the Chairperson. The maximum number of other members the NDMA can have is only 9 including the Vice-Chairperson.
- NDMA is directly responsible for laying down the policies, plans and guidelines for Disaster Management to ensure timely and effective response to disaster.
- NDMA will be assisted by a National Executive Committee in the performance of its functions.
- The Committee plays a pivotal role in implementing the policies and plans of the NDMA.
- The ACT itself provides for the formation of State Disaster Management Authority, District Disaster Management Authority and the NDMA is responsible for laying down guidelines to be followed by State Authorities.
- A National Executive Committee with the Home Secretary to Government of India as Chairperson and the Secretaries of all Government Departments and the Chief of Defense Staff as members will assist the NDMA.
- The model stated above for NDMA is repeated for the State Disaster Management Authority and District Disaster Management Authority.
- All the above results in effective communication up to the community level by the NDMA directly as well as through the State and District Disaster Management Authority.
- The Act also provides for constituting a National Disaster Response Force for the purpose of specialist response to a threatening disaster situation or disaster, under a Director General to be appointed by the Central Government.
- The Act, to make the preparations to take on any Disaster, has the provision for establishing a National Disaster Management Institute.

Last but not the least, the Act provides for establishment of a Fund at all three levels, National, State and the District Level.

- The contributions to the Fund should be from every department whose secretaries are members of the Executive Committee which assist Disaster Management Authority both at the central and state Level.

- The secret of success of the Act in managing the present disaster so effectively, leaving margins for certain actions and inactions in a country with so much of population in which sizeable proportion falls in *"Below the Poverty Line (BPL)"* can be scripted to the following:

  - The 'top down', approach that gave the central, state, and district authorities sweeping powers.

  - The implementation of the Act fostered a hierarchical, bureaucratic, command and control.

  - The Non-Governmental Organizations (NGOs), the elected local representatives of all levels, local communities and civic group were asked to step back.

  - The Delegation of Authority was commensurate with the responsibility in fighting the disaster with a unified goal.

The following Penal provisions built into the Act also in a way are responsible for the successful implementation of the Act:

- Punishment up to one year of Imprisonment or fine or both for obstruction and / or non-compliance of the directions given by the Central, State and District Administration.

- If the act of disruption results in loss of life, then the quantum of punishment will double.

- Two year's imprisonment with fine for false claim for obtaining relief, assistance, etc.

- Two year's imprisonment with fine for misappropriation of money or materials meant for distribution to the people affected by disaster.

- Punishment of one year's imprisonment for creating false warning.

- In case of offence by the government department, the head of the department will be held guilty, unless otherwise it is proved that the offence was committed by any other official.

- One year imprisonment for refusal to perform any duty by any government official and One year imprisonment or fine or both for contravention of any order issued under the Act.

Also, certain other provisions like Section 24 of the Act which helps the National Disaster Management Authority with the sweeping powers to directly deal with the lower most local administration but at the same time built in such a way that the powers cannot be misused are the hall mark of this piece of legislation.

Overall, the knowledge and understanding of the National Disaster Management Act 2005 by every responsible citizen of India will go a long way in fighting with success any disaster at any time. Recent tragedy in Vizag due to gas leak from a polymer manufacturing company strengthens this point.

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YAJURA R V
Advocate

The Zero tolerance stand-The Epidemic Diseases (Amendment) Ordinance, 2020

Preamble:

On 22nd April, 2020 the Central Government issued The Epidemic Diseases (Amendment) Ordinance, 2020 addressing to the instances of attacks targeted on the healthcare service personnel obstructing them from doing their duty during the current pandemic – COVID -19 (Corona Virus).

The Epidemic Diseases (Amendment) Ordinance, 2020 is the 5th Ordinance in the year promulgated by the President of India in response to COVID – 19.

The Ordinance is an amendment in furtherance to the Epidemic Diseases Act, 1897 so as to necessitate the cooperation and support from society to the healthcare service personnel who are duty bound to serve.

On the background, the Epidemic Diseases Act, 1897 was first enacted during the British era in India to tackle the ***"bubonic plague".***

It is interesting to note that the Act itself had only 4 Sections, additionally 2A was inserted later in 1920, while this Ordinance had to be brought in with 7 Sections, to tackle the contumacious situation increasing in the country.

What the Ordinance says: (Key features)

- Protection to healthcare service personnel.

➢ **Healthcare service personnel:** A person who is at risk of contracting the epidemic disease while carrying out duties related to the epidemic including public and clinical healthcare providers such as doctors and nurses, any person empowered under the Act to take measures to prevent the outbreak of the disease, other persons declared as such by the state government.

The Amendment, vide Section 2B prohibits any act of violence against a healthcare service personnel or cause any damage or loss to any property during an epidemic.

➢ **Act of violence:** Harassment, harm, injury, hurt, intimidation danger to life, obstruction or hindrances to discharge of his duties, loss or damage to the property or documents of the healthcare service personnel.

➢ **Property:** Clinical establishment, quarantine facility, mobile medical unit, other property in which healthcare service personnel has direct interest, in relation to the epidemic.

The offenders can be punished with an imprisonment for a term of three months to five years, and with fine of Rs.50,000/- to Rs.2,00,000/-.

For offences in the nature of "serious hurt" (Section 320 of IPC) can lead one to face imprisonment for a minimum period of 6 months and maximum of 7 years, with penalty ranging from Rs 1 lakh to 5lakh.

The offender shall also be liable to pay compensation to the victim and in case of damage to property or loss caused, twice the fair market value for damage of property.

- Further the offence under this Act has been made cognizable and non - bail able offence.

- Cognizable offences are those offences which are serious in nature wherein the Police officer may execute a lawful arrest without a warrant

- A non-bail able offence is one in which the grant of bail is not a matter of right to the accused and maybe the discretion of the Court

- **Timely Relief**:

  - Investigation by the Police to be completed within 30 Days from the date of registering the FIR

  - In every inquiry or trial the proceedings shall be held as expeditiously as possible. Examination of witnesses once begun, to be on day today.

  - For the purpose of court proceedings (inquiry or trial), the timeline provided is 1 year, if not completed, for reasons recorded by the judge may extend to a period not exceeding 6months.

- **Oneness of proof:** Lies on the accused until the Court while prosecuting shall presume that such person has committed an offence.

- **Immunity provided by the Act**: No suit or other legal proceeding shall lie against any person for anything done or in good faith intended to be done under this Act.

What lead to issuance of the Ordinance?

While the entire nation combats the pandemic, the healthcare service personnel faced unimaginable hardship being the most vulnerable, as they may come in direct contact with the virus infected persons while they are duty bound to serve without discrimination.

The nation saw increasing attacks on them by the miscreants thereby obstructing them from doing their duty.

Several instances were being reported such as public spat on police personnel while they were taking measures to prevent the outbreak of the Covid -19, stones pelted on doctors and nurses while on duty, forced by their landlords to vacate houses and several other attacks.

The nation saw increasing stigmatization and ostraciz ation, acts of unwarranted violence and harassment.

A mob of locals caused hindrance to personnel as they were preparing the burial of a Doctor who died while performing his duty, was affected by the Covid-19.

This incident happened to be *"the last straw"* to the tolerance of the nation leading to the immediate Ordinance.

Conclusion:

An Ordinance can be promulgated when the Parliament is not in session and when the president is satisfied that circumstances exist which render it necessary to take immediate action. An Ordinance is valid for 6 weeks unless the Parliament sessions and approves it. Unprecedented situations could drive the society to conduct themselves in such ways leading to attacks, law and order situations.

[Like the antagonist character "the Joker" from Christopher Nolan's movie "The Dark Night" rightly says, -*"They're only as good as the world allows them to be.... When the chips are down, these... these civilized people, they'll eat each other"* Referring to the society!]. Therefore the law makers are forced to issue such stringent provisions in order to control such situation.

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Wishing "CGRF SandBox" a great beginning!!
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I wish "CGRF SandBox" a Great success!!

B. MEKALA, Insolvency Professional
IBBI Regn. No. IBBI/IPA-002/IP-N00675/2018-19/12416

It's a matter of pride for me to be associated with
"CGRF SandBox"
May this venture grow further to be of immense use to all!!

N. NAGESWARAN, Insolvency Professional
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The proud CGRF Team thanks you!!

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M. Devi, J. Rajeswari and
G. Vinith

We are glad to take your feedback
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CREATE & GROW RESEARCH FOUNDATION

CREATE & GROW Research Foundation (CGRF) is a Not-for-Profit organization established as a Section 8 Company under the provisions of Companies Act, 2013.

CREATE signifies *"Corporate Research Advisory and Training Enterprise"* & GROW signifies *"Governance Role of Women"*.

The founders of CGRF, viz., Mr. S. Srinivasan and Mr. S. Rajendran have been in the forefront of Corporate Law, Corporate Governance, Compliance and Advisory Services for long.

They realized that there is a compelling need to establish a great platform to encourage research, impart advanced training and disseminate knowledge and provide advisory services to all the stakeholders in the expansive realm of corporate laws including IBC.

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- Management of operations of the Corporate Debtor
- Section 29A verification
- Preparation of Request for Resolution Plans (RFRP) with Evaluation Matrix
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- Evaluation of Resolution Plans / Settlement Plans / Repayment Plans
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- Designing viable Restructuring Schemes

"CGRF Event on 4th Jan 2020, CGRF team with Chief Guests Hon'ble Mr. Justice Krishnan Ramasamy, Madras High Court; Key Note Speaker Mr. K K. Balu, Former Vice Chairman, Company Law Board, Chennai; Dr. Binoy J. Kattadiyil, MD, ICSI IIP, Delhi".