SUPPLEMENT FOR PROFESSIONAL PROGRAMME

CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY

Module-1

Paper - 3

(Relevant for students appearing in December - 2018 Examination)

The students are advised to read their Study Material along with these updates. These academic updates are to facilitate the students to acquaint themselves with the amendments in the Companies Act, 2013, Insolvency and Bankruptcy Code, 2016 and other Rules and Regulations up to 30th June, 2018, applicable for December 2018 Examination. The students are advised to read all the relevant regulatory amendments made and applicable up to 30th June, 2018 along with the study material. In the event of any doubt, students may write to the Institute for clarifications at academics@icsi.edu

The Corporate Restructuring, Valuation and Insolvency Study Material updated up to June, 2017 is available on the website of the Institute. Students are advised to refer the same along with these updates for December, 2018 Examinations. The Study Material is available at:

https://www.icsi.edu/WebModules/Publications/CRVIupdatedtillJune2017.pdf

Students are advised to refer Chartered Secretary for latest articles, legal matters and other updates relevant to the subject. Students are also advised to refer the Companies (Amendment) Act, 2017.

Disclaimer

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**The students may also refer to the E-book on Companies Act, 2013 on the MCA website (http://ebook.mca.gov.in/default.aspx) or ICSI website (http://ebook.mca.gov.in/default.aspx) for the updated Companies Act, 2013 and rules made thereunder. The Students are also advised to visit the Website of ICSI, MCA, IBBI, SEBI, RBI and other regulator for recent updates on the Subject.

Lesson 2

MERGERS AND AMALGAMATIONS – LEGAL AND PROCEDURAL ASPECTS

1. Companies (Restriction on number of layers) Rules, 2017

In exercise of the powers conferred under proviso to clause (87) of section 2, section 450 read with sub-sections (1) and (2) of section 469 of the Companies Act, 2013, the Central Government hereby makes the Companies (Restriction on number of layers) Rules, 2017 w.e.f. 20th September, 2017.

Restriction on number of layers for certain classes of holding companies.

(1) No company, other than a company belonging to a class specified in sub rule (2), shall have more than two layers of subsidiaries:

Provided that the provisions of this sub-rule shall not affect a company from acquiring a company incorporated outside India with subsidiaries beyond two layers as per the laws of such country:

Provided further that for computing the number of layers under this rule, one layer which consists of one or more wholly owned subsidiary or subsidiaries shall not be taken into account.

(2) The provisions of this rule shall not apply to the following classes of companies, namely:

(a) a banking company as defined in clause (c) of section 5 of the Banking Regulation Act 1949;

(b) a non-banking financial company as defined in clause (f) of Section 45_I of the Reserve Bank of India Act, 1934 which is registered with the Reserve Bank of India and considered as systematically important non-banking financial company by the Reserve Bank of India;

(c) an insurance company being a company which carries on the business of insurance in accordance with provisions of the Insurance Act,1938 and the Insurance Regulatory Development Authority Act, 1999;

(d) a Government company referred to in clause (45) of section 2 of the Act.

(3) The provisions of this rule shall not be in derogation of the proviso to sub-section (1) of section 186 of the Act.

(4) Every company other than a company referred to in sub-rule (2) existing on or before the commencement of these rules, which has number of layers of subsidiaries in excess of the layers specified in sub-rule (1) -

(i) shall file, with the Registrar a return in Form CRL- 1 disclosing the details specified therein, within a period of one hundred and fifty days from the date of publication of these rules in the official Gazette;

(ii) shall not, after the date of commencement of these rules, have any additional layer of subsidiaries over and above the layers existing on such date; and

(iii) shall not, in case one or more layers are reduced by it subsequent to the commencement of these rules, have the number of layers beyond the number of layers it has after such reduction or maximum layers allowed in sub-rule (1), whichever is more.

(5) If any company contravenes any provision of these rules the company and every officer of the company who is in default shall be punishable with fine which may extend to ten thousand rupees and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.

http://www.mca.gov.in/Ministry/pdf/CompaniesRestrictionOnNumberofLayersRule_22092017.pdf

2. National Company Law Tribunal (Amendment) Rules, 2017

In exercise of the powers conferred by sub-section (1) and sub-section (2) of section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the National Company Law Tribunal Rules, 2016, namely

In the National Company Law Tribunal Rules, 2016, after rule 87, the following rule shall be inserted, namely,

"Rule 87A. Appeal or application under sub-section (1) and sub-section (3) of section 252.—

(1) An appeal under subsection (1) or an application under sub-section (3) of section 252, may be filed before the Tribunal in Form No. NCLT. 9, with such modifications as may be necessary.

(2) A copy of the appeal or application, shall be served on the Registrar and on such other persons as the Tribunal may direct, not less than fourteen days before the date fixed for hearing of the appeal or application, as the case may be.

(3) Upon hearing the appeal or the application or any adjourned hearing thereof, the Tribunal may pass appropriate order, as it deems fit.

(4) Where the Tribunal makes an order restoring the name of a company in the register of companies, the order shall direct that

(a) the appellant or applicant shall deliver a certified copy to the Registrar of Companies within thirty days from the date of the order;

(b) on such delivery, the Registrar of Companies do, in his official name and seal, publish the order in the Official Gazette;

(c) the appellant or applicant do pay to the Registrar of Companies his costs of, and occasioned by, the appeal or application, unless the Tribunal directs otherwise; and

(d) the company shall file pending financial statements and annual returns with the Registrar and comply with the requirements of the Companies Act, 2013 and rules made thereunder within such time as may be directed by the Tribunal.

(5) An application filed by the Registrar of Companies for restoration of name of a company in the register of companies under second proviso to sub-section (1) of section 252 shall be in Form No. NCLT 9 and upon hearing the application or any adjourned hearing thereof, the Tribunal may pass an appropriate order, as it deems fit."

http://www.mca.gov.in/Ministry/pdf/NationalCompanyLawTribunalAmdtRules_06072017.pdf

3. National Company Law Appellate Tribunal (Amendment) Rules, 2017

In exercise of the powers conferred by sub-section (1) and sub-section (2) of section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the National Company Law Appellate Tribunal Rules, 2016, namely

In the National Company Law Appellate Tribunal Rules, 2016, for rule 63, the following rule shall be substituted, namely

"63. Appearance of authorised representative.-

(1) Subject to provisions of section 432 of the Act, a party to any proceedings or appeal before the Appellate Tribunal may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Appellate Tribunal.

(2) The Central Government, the Regional Director or the Registrar of Companies or Official Liquidator may authorise an officer or an Advocate to represent in the proceedings before the Appellate Tribunal.

(3) The officer authorised by the Central Government or the Regional Director or the Registrar of Companies or the Official Liquidator shall be an officer not below the rank of Junior Time Scale or company prosecutor.".

http://www.mca.gov.in/Ministry/pdf/NCLATAmendmentRules2017_25082017.pdf

4. Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2017.

In the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, after rule 25 the following rule shall be inserted, namely:

"25A. Merger or amalgamation of a foreign company with a Company and vice versa.—(1) A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Act and these rules.

(2) (a) A company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B after obtaining prior approval of the Reserve Bank of India and after complying with provisions of sections 230 to 232 of the Act and these rules.

(b) The transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation. A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval under clause (a) of this sub-rule.

(3) The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining approvals specified in sub-rule (1) and sub-rule (2), as the case may be.

Explanation 1.— For the purposes of this rule the term "company" means a company as defined in clause (20) of section 2 of the Act and the term "foreign company" means a company or body corporate incorporated outside India whether having a place of business in India or not:
Explanation 2.— For the purposes of this rule, it is clarified that no amendment shall be made in this rule without consultation of the Reserve Bank of India."

In the principal rules after Annexure A the following Annexure shall be inserted namely:-

Jurisdictions referred to in clause (a) of sub-rule (2) of rule 25A Jurisdictions –

(i) whose securities market regulator is a signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with SEBI, or
(ii) whose central bank is a member of Bank for International Settlements (BIS), and
(iii) a jurisdiction, which is not identified in the public statement of Financial Action Task Force (FATF) as:
(a) a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or
(b) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.".
http://www.mca.gov.in/Ministry/pdf/CompaniesCompromises_14042017.pdf

5. Foreign Exchange Management (Cross Border Merger) Regulations, 2018

RBI has issued the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 under the Foreign Exchange Management Act, 1999 on March 20, 2018 to make provisions for mergers, demergers, amalgamations and arrangements between Indian companies and foreign companies (the "Cross Border Regulations").

Indian companies are permitted to merge with foreign companies incorporated in certain jurisdictions specified in the Rules. Generally, these include jurisdictions: (i) whose securities regulator is a member of the International Organization of Securities Commission's Multilateral Memorandum of Understanding (or a signatory to bilateral Memorandum of Understanding with Securities Exchange of India); or (ii) whose central bank is a member of the Bank for International Settlements (BIS); and (iii) identified in the public statement of the Financial Action Task Force as regards certain specified matters.

VALUATION

The valuation of the Indian company and the foreign company shall be done in accordance with Rule 25A of the Companies (Compromises, Arrangement or Amalgamation) Rules, 2016. A valuer (who must be a member of a recognized professional body in the outbound jurisdiction) must conduct the valuation of the merged entity. Further, such valuation must be in accordance with internationally accepted principals on accounting and valuation and a declaration to this effect is required to be attached with the application made to the RBI seeking approval form the merger.

Prior Approval from the RBI

The National Company Law Tribunal will consider the merger application to give effect to the merger *only* after the company concerned has obtained an approval from the RBI and complied with the provisions of Sections 230 to 232 of the Act and the Rules.

Sections 230 to 232 of the Act sets out the procedural requirements which need to be complied with by the merged entity before a scheme of merger is sanctioned by the National Company Law Tribunal such as the manner of calling a meeting of the creditors, members or debenture holders of the merged entity to obtain their vote to the adoption of the scheme of merger, the details of the information needed to be made available to creditors, members and debenture holders of the merged entity and various governmental authorities such as the RBI, the Securities Exchange Board of India, the Competition Commission of India and such other regulators that may be applicable for making an informed decision in relation to the proposed scheme of merger.

THE CROSS BORDER REGULATIONS

In order to operationalize Section 234 of the Act, the RBI issued Cross Border Regulations in order to make provisions for the acquisition or transfer of any security or asset or debt by an Indian resident or non-resident in a cross border merger, demerger, amalgamation, or rearrangement. The Cross Border Regulations stipulate conditions that should be adhered to by companies involved in a scheme of merger, demerger, amalgamation, or rearrangement and we set out those conditions below.

Inbound Mergers

In the context of inbound mergers, the Cross Border Regulations stipulate the following:

(a) Any issue or transfer of security to a non-resident by the resultant Indian Company shall be in accordance with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017.

(b) An office outside India of the foreign company, pursuant to the sanction of the Scheme of cross border merger shall be deemed to be the branch/office outside India of the resultant company in accordance with the Foreign Exchange Management (Foreign Currency Account by a person resident in India) Regulations, 2015. Accordingly, the resultant company may undertake any transaction as permitted to a branch/office under the aforesaid Regulations.

(c) The guarantees or outstanding borrowings of the foreign company from overseas sources which become the borrowing of the resultant company or any borrowing from overseas sources entering into the books of resultant company shall conform, within a period of two years, to the External Commercial Borrowing norms or Trade Credit norms or other foreign borrowing norms, as laid down under Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 or Foreign Exchange Management (Borrowing or Lending in Rupees) Regulations, 2000 or Foreign Exchange Management (Guarantee) Regulations, 2000, as applicable. Provided that no remittance for repayment of such liability is made from India within such period of two years;

Provided further that the conditions with respect to end use shall not apply.

(d) The resultant company may acquire and hold any asset outside India which an Indian company is permitted to acquire under the provisions of the Act, rules or regulations framed thereunder. Such assets can be transferred in any manner for undertaking a transaction permissible under the Act or rules or regulations framed thereunder.

(e) Where the asset or security outside India is not permitted to be acquired or held by the resultant company under the Act, rules or regulations, the resultant company shall sell such asset or security within a period of two years from the date of sanction of the Scheme by NCLT and the sale proceeds shall be repatriated to India immediately through banking channels. Where any liability outside India is not permitted to be held by the resultant company, the same may be extinguished from the sale proceeds of such overseas assets within the period of two years.

(f) The resultant company may open a bank account in foreign currency in the overseas jurisdiction for the purpose of putting through transactions incidental to the cross border merger for a maximum period of two years from the date of sanction of the Scheme by NCLT.

Outbound mergers

In the context of outbound mergers, the Cross Border Regulations stipulate the following:

1) a person resident in India may acquire or hold securities of the resultant company in accordance with the Foreign Exchange Management (Transfer or issue of any Foreign Security) Regulations, 2004.

(2) a resident individual may acquire securities outside India provided that the fair market value of such securities is within the limits prescribed under the Liberalized Remittance Scheme laid down in the Act or rules or regulations framed thereunder.

(3) An office in India of the Indian company, pursuant to sanction of the Scheme of cross border merger, may be deemed to be a branch office in India of the resultant company in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016. Accordingly, the resultant company may undertake any transaction as permitted to a branch office under the aforesaid Regulations.

(4) The guarantees or outstanding borrowings of the Indian company which become the liabilities of the resultant company shall be repaid as per the Scheme sanctioned by the NCLT in terms of the Companies (Compromises, Arrangement or Amalgamation) Rules, 2016.

Provided that the resultant company shall not acquire any liability payable towards a lender in India in Rupees which is not in conformity with the Act or rules or regulations framed thereunder.

Provided further that a no-objection certificate to this effect should be obtained from the lenders in India of the Indian company.

(5) The resultant company may acquire and hold any asset in India which a foreign company is permitted to acquire under the provisions of the Act, rules or regulations framed thereunder. Such assets can be transferred in any manner for undertaking a transaction permissible under the Act or rules or regulations framed thereunder.

(6) Where the asset or security in India cannot be acquired or held by the resultant company under the Act, rules or regulations, the resultant company shall sell such asset or security within a period of two years from the date of sanction of the Scheme by NCLT and the sale proceeds shall be repatriated outside India immediately through banking channels. Repayment of Indian liabilities from sale proceeds of such assets or securities within the period of two years shall be permissible.

(7) The resultant company may open a Special Non-Resident Rupee Account (SNRR Account) in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016 for the purpose of putting through transactions under these Regulations. The account shall run for a maximum period of two years from the date of sanction of the Scheme by NCLT.

Reporting requirements

Cross border merger transactions are required to be reported to the RBI in the same manner required under the Foreign Exchange Management Act, 1999, rules or regulations (including the filing of Form FC-TRS, Form FC-GPR and Form ECB). The Indian company and the foreign company involved in the cross border merger are also required to provide reports as may be prescribed by the RBI from time to time.

Deemed approval

Any transaction on account of a cross border merger undertaken in accordance with these Regulations shall be deemed to have prior approval of the Reserve Bank as required under Rule 25A of the Companies (Compromises, Arrangement and Amalgamations) Rules, 2016.

A certificate from the Managing Director/Whole Time Director and Company Secretary, if available, of the company (ies) concerned ensuring compliance to these Regulations shall be furnished along with the application made to the NCLT under the Companies (Compromises, Arrangement or Amalgamation) Rules, 2016.

https://www.rbi.org.in/SCRIPTs/NotificationUser.aspx?Id=11235&Mode=0

6. SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2017 dated 15th February, 2017

The revised regulation 37 is as under:

Draft Scheme of Arrangement and Scheme of Arrangement.

Regulation 37. (1) Without prejudice to provisions of regulation 11, the listed entity desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, shall file the draft scheme of arrangement, proposed to be filed before any Court or Tribunal under sections 391-394 and 101 of the Companies Act, 1956 or under Sections 230- 234 and Section 66 of Companies Act, 2013, whichever applicable, with the stock exchange(s) for obtaining Observation Letter or No-objection letter, before filing such scheme with any Court or Tribunal, in terms of requirements specified by the Board or stock exchange(s) from time to time.

(2)The listed entity shall not file any scheme of arrangement under sections 391-394 and 101 of the Companies Act, 1956 or under Sections 230-234 and Section 66 of Companies Act, 2013 ,whichever applicable, with any Court or Tribunal unless it has obtained observation letter or No-objection letter from the stock exchange(s).

(3)The listed entity shall place the Observation letter or No-objection letter of the stock exchange(s) before the Court or Tribunal at the time of seeking approval of the scheme of arrangement: Provided that the validity of the 'Observation Letter' or No-objection letter of stock exchanges shall be six months from the date of issuance, within which the draft scheme of arrangement shall be submitted to the Court or Tribunal.

(4)The listed entity shall ensure compliance with the other requirements as may be prescribed by the Board from time to time.

(5)Upon sanction of the Scheme by the Court or Tribunal, the listed entity shall submit the documents, to the stock exchange(s), as prescribed by the Board and/or stock exchange(s) from time to time.

(6) Nothing contained in this regulation shall apply to draft schemes which solely provide for merger of a wholly owned subsidiary with its holding company:
Provided that such draft schemes shall be filed with the stock exchanges for the purpose of disclosures.

https://www.sebi.gov.in/legal/regulations/feb-2017/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-amendment-regulations-2017_34224.html

**Student are advised to go through the SEBI Circular on Schemes of Arrangement by Listed Entities and (ii) Relaxation under Sub-rule (7) of rule 19 of the Securities Contracts (Regulation) Rules, 1957 at the link https://www.sebi.gov.in/legal/circulars/jan-2018/circular-on-schemes-of-arrangement-by-listed-entities-and-ii-relaxation-under-sub-rule-7-of-rule-19-of-the-securities-contracts-regulation-rules-1957-_37265.html*

The SEBI Circular dated 10th March, 2017 is available at the following link:

https://www.nseindia.com/content/equities/SEBI_Circ_10032017.pdf

**Section 230 (11) and 230 (12) relating to power to Compromise or Make Arrangements with Creditors and Members are yet to be notified.*

In case of Government Company - In Sections 230-232 for the word "Tribunal" the words "Central Government" shall be substituted.

Lesson 3

ECONOMIC AND COMPETITION LAW ASPECTS OF MERGERS AND AMALGAMATIONS

1 THE COMPETITION COMMISSION OF INDIA (LESSER PENALTY) AMENDMENT REGULATIONS, 2009 dated 08th August, 2017.

Section 46 of the Indian Competition Act, 2002 (**Act**) and the Lesser Penalty Regulations give the Competition Commission of India (**CCI**) power to impose lesser penalties on an entity that:

(a) makes a *'vital disclosure'* by submitting evidence of a cartel; or,

(b) in the case of subsequent leniency applicants, provides *'significant added value'* to the evidence already in possession of the CCI.

Further, the leniency regime previously recognised the provision of 'markers' to only three leniency applicants, in order of priority. The first leniency applicant could receive up to 100% immunity from penalty, the second leniency applicant up to 50% reduction in penalty and the third leniency applicant up to 30% reduction in penalty.

The CCI, in *Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans (Suo Moto Case No. 03 of 2013),* published its first leniency decision granting a 75% reduction in penalty to a leniency applicant who came forward after the CCI commenced investigation of the anti-competitive conduct.

With the Amended Lesser Penalty Regulation, now the CCI would recognize markers beyond the first three markers, i.e., now more than three applicants can apply for leniency. Such subsequent applicants (after the third applicant), will also be eligible for reduction in penalties of up to 30% now, provided they assist in giving 'significant added value' to the evidence already in the possession of the CCI.

The Amended Lesser Penalty Regulations bring clarity to the existing leniency regime in India and provide incentives for companies and individuals to pro-actively assist in cartel enforcement.

The CCI has also amended provision relating to Access to File, Confidentiality, Definitions of 'Applicant' and 'Party', Role of Individuals, Application for 100% lesser penalty to be considered even if already granted to another applicant, and also for the Timelines for marking of priority status by applicant.

http://www.cci.gov.in/sites/default/files/regulation_pdf/178210.pdf

2 EXEMPTION NOTIFICATIONS UNDER COMPETITION ACT, 2002

2.1 Exemption of combinations under section 5 and 6 of the Act involving the Central Public Sector Enterprises

The Central Government through notification dated 22 November, 2017 exempted all cases of combinations under section 5 of the Act involving the Central Public Sector Enterprises (CPSEs) operating in the Oil and Gas Sectors under the Petroleum Act, 1934 and the rules made thereunder or under the Oilfields (Regulation and Development) Act, 1948 and the rules made thereunder, along with their wholly or partly owned subsidiaries operating in the Oil and Gas Sectors, from the application of the provisions of sections 5 and 6 of the Act, for a period of five years.

http://mca.gov.in/Ministry/pdf/Notification_27112017.pdf

2.2 Exemption of Nationalized Banking Companies from 5 and 6 of the Act

The Central Government through notification dated 30 August, 2017 exempted, all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, from the application of provisions of Sections 5 and 6 of the Competition Act, 2002 for a period of ten years.

http://mca.gov.in/Ministry/pdf/Notification_31082017.pdf

2.3 Exemption of Regional Rural Banks from Section 5 and 6 of the Act

The Central Government through notification dated 10th August, 2017, exempted the Regional Rural Banks in respect of which the Central Government has issued a notification under sub-section (1) of section 23A of the Regional Rural Banks Act, 1976, from the application of provisions of sections 5 and 6 of the Competition Act, 2002 for a period of five years.

http://mca.gov.in/Ministry/pdf/Notification2561(E)_21082017.pdf

2.4 Exemption from notifying a combination in Section 6(2) of the Competition Act, 2002

The Central Government through notification dated 29th June, 2017, exempted every person or enterprise who is a party to a combination as referred to in section 5 of the Act from giving notice within thirty days mentioned in sub-section (2) of section 6 of the Act, subject to the provisions of sub-section (2A) of section 6 and section 43A of the Act, for a period of five years.

http://mca.gov.in/Ministry/pdf/Notification_30062017.pdf

2.5. Notification regarding (a) de minimis exemption (b) relevant assets and turnover in case a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise.

In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the enterprises being parties to —

(a) any acquisition referred to in clause (a) of section 5 of the Competition Act;
(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, referred to in clause (b) of section 5 of the Competition Act; and
(c) any merger or amalgamation, referred to in clause (c) of section 5 of the Competition Act,

where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India, from the provisions of section 5 of the said Act for a period of five years from the date of publication of this notification in the official gazette.

2. Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. The value of the said portion or division or business shall be determined by taking the book value of the assets as shown, in the audited books of accounts of the enterprise or as per statutory auditor's report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layoutdesign or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

http://www.cci.gov.in/sites/default/files/notification/S.O.%20988%20%28E%29%20and%20S.O.%20989%28E%29.pdf

LESSON 9
TAKEOVERS

SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2017 dated 14th August, 2017

The revised Regulation 10 after this amendment shall be as under:

General exemptions.

10.(1) The following acquisitions shall be exempt from the obligation to make an open offer under regulation 3 and regulation 4 subject to fulfillment of the conditions stipulated therefor,—

(a) acquisition pursuant to inter se transfer of shares amongst qualifying persons, being,—

(i) immediate relatives;

(ii) persons named as promoters in the shareholding pattern filed by the target company in terms of the listing agreement or these regulations for not less than three years prior to the proposed acquisition;

iii) a company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than fifty per cent of the equity shares of such company, other companies in which such persons hold not less than fifty per cent of the equity shares, and their subsidiaries subject to control over such qualifying persons being exclusively held by the same persons;

(iv) persons acting in concert for not less than three years prior to the proposed acquisition, and disclosed as such pursuant to filings under the listing agreement;

(v) shareholders of a target company who have been persons acting in concert for a period of not less than three years prior to the proposed acquisition and are disclosed as such pursuant to filings under the listing agreement, and any company in which the entire equity share capital is owned by such shareholders in the same proportion as their holdings in the target company without any differential entitlement to exercise voting rights in such company:

Provided that for purposes of availing of the exemption under this clause,—

(i) If the shares of the target company are frequently traded, the acquisition price per share shall not be higher by more than twenty-five per cent of the volume-weighted average market price for a period of sixty trading days preceding the date of issuance of notice for the proposed inter se transfer under sub-regulation (5), as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, and if the shares of the target company are infrequently traded, the acquisition price shall not be higher by more than twenty-five

percent of the price determined in terms of clause (e) of sub-regulation (2) of regulation 8; and

(ii) the transferor and the transferee shall have complied with applicable disclosure requirements set out in Chapter V.

(b) acquisition in the ordinary course of business by,—

(i) an underwriter registered with the Board by way of allotment pursuant to an underwriting agreement in terms of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

(ii) a stock broker registered with the Board on behalf of his client in exercise of lien over the shares purchased on behalf of the client under the bye-laws of the stock exchange where such stock broker is a member;

(iii) a merchant banker registered with the Board or a nominated investor in the process of market making or subscription to the unsubscribed portion of issue in terms of Chapter XB of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

(iv) any person acquiring shares pursuant to a scheme of safety net in terms of regulation 44 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

(v) a merchant banker registered with the Board acting as a stabilising agent or by the promoter or pre-issue shareholder in terms of regulation 45 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

(vi) by a registered market-maker of a stock exchange in respect of shares for which he is the market maker during the course of market making;

vii) a Scheduled Commercial Bank, acting as an escrow agent; and

(viii) invocation of pledge by Scheduled Commercial Banks or Public Financial Institutions as a pledgee.

(c) acquisitions at subsequent stages, by an acquirer who has made a public announcement of an open offer for acquiring shares pursuant to an agreement of disinvestment, as contemplated in such agreement:

Provided that,—

(i) both the acquirer and the seller are the same at all the stages of acquisition; and

(ii) full disclosures of all the subsequent stages of acquisition, if any, have been made in the public announcement of the open offer and in the letter of offer.

(d) acquisition pursuant to a scheme,—

(i) made under section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) or any statutory modification or re-enactment thereto;

(ii) of arrangement involving the target company as a transferor company or as a transferee company, or reconstruction of the target company, including amalgamation, merger or demerger, pursuant to an order of a court [or a tribunal] or a competent authority under any law or regulation, Indian or foreign; or

(iii) of arrangement not directly involving the target company as a transferor company or as a transferee company, or reconstruction not involving the target company's undertaking, including amalgamation, merger or demerger, pursuant to an order of a court or a tribunal or a competent authority under any law or regulation, Indian or foreign, subject to,—

(A) the component of cash and cash equivalents in the consideration paid being less than twenty-five per cent of the consideration paid under the scheme; and

(B) where after implementation of the scheme of arrangement, persons directly or indirectly holding at least thirty-three per cent of the voting rights in the combined entity are the same as the persons who held the entire voting rights before the implementation of the scheme.

(da) acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016;

(e) acquisition pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(f) acquisition pursuant to the provisions of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009;

(g) acquisition by way of transmission, succession or inheritance;

(h) acquisition of voting rights or preference shares carrying voting rights arising out of the operation of sub-section (2) of section 87 of the Companies Act, 1956

(i) Acquisition of shares by the lenders pursuant to conversion of their debt as part of a debt restructuring scheme implemented in accordance with the guidelines specified by the Reserve Bank of India:

Provided that the conditions specified under sub-regulation (5) of regulation 70 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 are complied with.

(ia) Acquisition of shares by the person(s), by way of allotment by the target company or purchase from the lenders at the time of lenders selling their shareholding or enforcing change in ownership in favour of such person(s), pursuant to a debt restructuring scheme implemented in accordance with the guidelines specified by the Reserve Bank of India:

Provided that in respect of acquisition by persons by way of allotment by the target company, the conditions specified under sub-regulation (6) of regulation 70 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 are complied with:

Provided further that in respect of acquisition by way of purchase of shares from the lenders, the acquisition shall be exempted subject to the compliance with the following conditions:

(a) the guidelines for determining the purchase price have been specified by the Reserve Bank of India and that the purchase price has been determined in accordance with such guidelines;

(b) the purchase price shall be certified by two independent qualified valuers, and for this purpose 'valuer' shall be a person who is registered under section 247 of the Companies Act, 2013 and the relevant Rules framed thereunder:

Provided that till such date on which section 247 of the Companies Act, 2013 and the relevant Rules come into force, valuer shall mean an independent merchant banker registered with the Board or an independent chartered accountant in practice having a minimum experience of ten years;

(c) the specified securities so purchased shall be locked-in for a period of at least three years from the date of purchase;

(d) the lock-in of equity shares acquired pursuant to conversion of convertible securities purchased from the lenders shall be reduced to the extent the convertible securities have already been locked-in;

(e) a special resolution has been passed by shareholders of the issuer before the purchase;

(f) the issuer shall, in addition to the disclosures required under the Companies Act, 2013 or any other applicable law, disclose the following information pertaining to the proposed acquirer(s) in the explanatory statement to the notice for the general meeting proposed for passing special resolution as stipulated at clause (e) of this sub-regulation:

a. the identity including of the natural persons who are the ultimate beneficial owners of the shares proposed to be purchased and/ or who ultimately control the proposed acquirer(s);

b. the business model;

c. a statement on growth of business over the period of time;

d. summary of audited financials of previous three financial years;

e. track record in turning around companies, if any;

f. the proposed roadmap for effecting turnaround of the issuer.

(g) applicable provisions of the Companies Act, 2013 are complied with.

(j) increase in voting rights arising out of the operation of sub-section (1) of section 106 of the Companies Act, 2013 or pursuant to a forfeiture of shares by the target company, undertaken in compliance with the provisions of the Companies Act, 2013 and its articles of association.

(2) The acquisition of shares of a target company, not involving a change of control over such target company, pursuant to a scheme of corporate debt restructuring in terms of the Corporate Debt Restructuring Scheme notified by the Reserve Bank of India vide circular no. B.P.BC 15/21.04, 114/2001 dated August 23, 2001, or any modification or re-notification thereto provided such scheme has been authorised by shareholders by way of a special resolution passed by postal ballot, shall be exempted from the obligation to make an open offer under regulation 3.

(3) An increase in voting rights in a target company of any shareholder beyond the limit attracting an obligation to make an open offer under sub-regulation (1) of regulation 3, pursuant to buy-back of shares by the target company shall be exempt from the obligation to make an open offer provided such shareholder reduces his shareholding such that his voting rights fall to below the threshold referred to in sub-regulation(1) of regulation 3 within ninety days from the date of the closure of the said buy-back offer.

4) The following acquisitions shall be exempt from the obligation to make an open offer under sub-regulation (2) of regulation 3,—

(a) acquisition of shares by any shareholder of a target company, upto his entitlement, pursuant to a rights issue;

(b) acquisition of shares by any shareholder of a target company, beyond his entitlement, pursuant to a rights issue, subject to fulfillment of the following conditions,—

(i) the acquirer has not renounced any of his entitlements in such rights issue; and

(ii) the price at which the rights issue is made is not higher than the ex-rights price of the shares of the target company, being the sum of,—

(A) the volume weighted average market price of the shares of the target company during a period of sixty trading days ending on the day prior to the date of determination of the rights issue price, multiplied by the number of shares outstanding prior to the rights issue, divided by the total number of shares outstanding after allotment under the rights issue:

Provided that such volume weighted average market price shall be determined on the basis of trading on the stock exchange where the maximum volume of trading in the shares of such target company is recorded during such period; and

(B) the price at which the shares are offered in the rights issue, multiplied by the number of shares so offered in the rights issue divided by the total number of shares outstanding after allotment under the rights issue

(c) increase in voting rights in a target company of any shareholder pursuant to buy-back of shares: Providedthat,—

(i) such shareholder has not voted in favour of the resolution authorising the buy-back of securities under section 77A of the Companies Act, 1956;

(ii) in the case of a shareholder resolution, voting is by way of postal ballot;

(iii) where a resolution of shareholders is not required for the buy-back, such shareholder, in his capacity as a director, or any other interested director has not voted in favour of the resolution of the board of directors of the target company authorising the buy-back of securities under section 77A of the Companies Act, 1956 ; and

(iv) the increase in voting rights does not result in an acquisition of control by such shareholder over the target company:

Provided further that where the aforesaid conditions are not met, in the event such shareholder reduces his shareholding such that his voting rights fall below the level at which the obligation to make an open offer would be attracted under sub-regulation (2) of regulation 3,within ninety days from the date of closure of the buy-back offer by the target company, the shareholder shall be exempt from the obligation to make an open offer;

(d) acquisition of shares in a target company by any person in exchange for shares of another target company tendered pursuant to an open offer for acquiring shares under these regulations;

(e) acquisition of shares in a target company from state-level financial institutions or their subsidiaries or companies promoted by them, by promoters of the target company pursuant to an agreement between such transferors and such promoter;

(f) acquisition of shares in a target company from a venture capital fund or category I Alternative Investment Fund or a foreign venture capital investor registered with the Board,by promoters of the target company pursuant to an agreement between such venture capital fund or category I Alternative Investment Fund or foreign venture capital investor and such promoters.

(5) In respect of acquisitions under clause (a) of sub-regulation (1), and clauses (e) and (f) of sub-regulation (4), the acquirer shall intimate the stock exchanges wherethe shares of the target company are listed, the details of the proposed acquisition in such form as may be specified, at least fourworkingdays prior to the proposed acquisition, and the stock exchange shall forthwith disseminate such information to thepublic

.(6) In respect of any acquisition made pursuant to exemption provided for in this regulation, the acquirer shall file a report with the stock exchanges where the shares of the target company are listed, in such form as may be specified not later than four workingdays from the acquisition, and the stock exchange shall forthwith disseminate such information to the public.

(7) In respect of any acquisition of or increase in voting rightspursuant to exemption provided for in clause (a) of sub-regulation (1), sub-clause (iii) of clause (d) of sub-regulation (1), clause (h) of sub-regulation (1), sub-regulation (2), sub-regulation (3) and clause (c) of sub-regulation (4), clauses (a), (b) and (f) of sub-regulation (4), the acquirer shall, within twenty-one workingdays of the date of acquisition, submit a report in such form as may be specified along with supporting documents to the Board giving all details in respect of acquisitions, along with a non-refundable fee of rupees one lakh fifty thousand by way of direct credit in the bank account through NEFT/RTGS/IMPS or

any other mode allowed by RBI or] by way of a banker's cheque or demand draft payable in Mumbai in favour of the Board.

Explanation.—For the purposes of sub-regulation (5), sub-regulation (6) and sub-regulation (7) in the case of convertible securities, the date of the acquisition shall be the date of conversion of such securities.

https://www.sebi.gov.in/legal/regulations/aug-2017/securities-and-exchange-board-of-india-substantial-acquisition-of-shares-and-takeovers-amendment-regulations-2017_35634.html

Lesson 15

REGULATORY ASPECTS OF VALUATION WITH REFERENCE TO CORPORATE STRATEGIES

1. COMPANIES (REGISTERED VALUERS AND VALUATION) RULES, 2017

In exercise of the powers conferred by section 247 read with sections 458, 459 and 469 of the Companies Act, 2013, the Central Government notified the Companies (Registered Valuers and Valuation) Rules, 2017 w.e.f. 18th October, 2017

ELIGIBILITY, QUALIFICATIONS AND REGISTRATION OF VALUERS

Eligibility for registered valuers.— (1) A person shall be eligible to be a registered valuer if he

(a) is a valuer member of a registered valuers organisation;

Explanation.— For the purposes of this clause, "a valuer member" is a member of a registered valuers organisation who possesses the requisite educational qualifications and experience for being registered as a valuer;

(b) is recommended by the registered valuers organisation of which he is a valuer member for registration as a valuer;

(c) has passed the valuation examination under rule 5 within three years preceding the date of making an application for registration under rule 6;

(d) possesses the qualifications and experience as specified in rule 4; (e)

is not a minor;

(f) has not been declared to be of unsound mind;

(g) is not an undischarged bankrupt, or has not applied to be adjudicated as a bankrupt;

(h) is a person resident in India;

Explanation.— For the purposes of these rules 'person resident in India' shall have the same meaning as defined in clause (v) of section 2 of the Foreign Exchange Management Act, 1999 as far as it is applicable to an individual;

(i) has not been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude, and a period of five years has not elapsed from the date of expiry of the sentence:

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be registered;
(j) has not been levied a penalty under section 271J of Income-tax Act, 1961 and time limit for filing appeal before Commissioner of Income-tax (Appeals) or Income-tax Appellate Tribunal, as the case may be has expired, or such penalty has been confirmed by Income- tax Appellate Tribunal, and five years have not elapsed after levy of such penalty; and

(k) is a fit and proper person:

Explanation.─ For determining whether an individual is a fit and proper person under these rules, the authority may take account of any relevant consideration, including but not limited to the following criteria(i) integrity, reputation and character,

(ii) absence of convictions and restraint orders, and

(iii) competence and financial solvency.

(2) No partnership entity or company shall be eligible to be a registered valuer if

(a) it has been set up for objects other than for rendering professional or financial services, including valuation services and that in the case of a company, it is not a subsidiary, joint venture or associate ofanother company or body corporate;

(b) it is undergoing an insolvency resolution or is an undischarged bankrupt;

(c) all the partners or directors, as the case may be, are not ineligible under clauses (c), (d), (e), (g), (h), (i), (j) and (k) of sub-rule (1);

(d) three or all the partners or directors, whichever is lower, of the partnership entity or company, as the case may be, are not registered valuers; or

(e) none of its partners or directors, as the case may be, is a registered valuer for the asset class, for the valuation of which it seeks to be a registered valuer.

Qualifications and experience.─ An individual shall have the following qualifications and experience to be eligible for registration under rule 3, namely:-

(a) post-graduate degree or post-graduate diploma, in the specified discipline, from a University or Institute established, recognised or incorporated by law in India and at least three years of experience in the specified discipline thereafter; or

(b) a Bachelor's degree or equivalent, in the specified discipline, from a University or Institute established, recognised or incorporated by law in India and at least five years of experience in the specified discipline thereafter; or

(c) membership of a professional institute established by an Act of Parliament enacted for the purpose of regulation of a profession with at least three years' experience after such membership and having qualification mentioned at clause (a) or (b).

Conduct of Valuation.— (1) The registered valuer shall, while conducting a valuation, comply with the valuation standards as notified or modified under rule 18:

Provided that until the valuation standards are notified or modified by the Central Government, a valuer shall make valuations as per

(a) internationally accepted valuation standards;

(b) valuation standards adopted by any registered valuers organisation.

(2) The registered valuer may obtain inputs for his valuation report or get a separate valuation for an asset class conducted from another registered valuer, in which case he shall fully disclose the details of the inputs and the particulars etc. of the other registered valuer in his report and the liabilities against the resultant valuation, irrespective of the nature of inputs or valuation by the other registered valuer, shall remain of the first mentioned registered valuer.

(3) The valuer shall, in his report, state the following:-

(a) background information of the asset being valued;
(b) purpose of valuation and appointing authority;
(c) identity of the valuer and any other experts involved in the valuation;
(d) disclosure of valuer interest or conflict, if any;
e) date of appointment, valuation date and date of report;
(f) inspections and/or investigations undertaken;
(g) nature and sources of the information used or relied upon;
(h) procedures adopted in carrying out the valuation and valuation standards followed; (i) restrictions on use of the report, if any;
(j) major factors that were taken into account during the valuation; (k) conclusion; and
(l) caveats, limitations and disclaimers to the extent they explain or elucidate the limitations faced by valuer, which shall not be for the purpose of limiting his responsibility for the valuation report.

Registered Valuers Organisation (RVO)

An organisation that meets requirements under sub-rule (2) may be recognised as a registered valuers organisation for valuation of a specific asset class or asset classes if —

(i) it has been registered under section 25 of the Companies Act, 1956 (1 of 1956) or section 8 of the Companies Act, 2013 (18 of 2013) with the sole object of dealing with matters relating to regulation of valuers of an asset class or asset classes and has in its bye laws the requirements specified in Annexure-III;

(ii) a professional institute established by an Act of Parliament enacted for the purpose of regulation of a profession;

(iii) the organisations may also be recognised as a registered valuers organisation for valuation of a specific asset class or asset classes even if they are: (a) an organisation registered as a society under the Societies Registration Act, 1860 or any relevant state law, or; (b) an organisation set up as a trust governed by the Indian Trust Act, 1882 provided that they convert into a company under section 8 of the companies act, 2013 and include the prescribed requirements of the model bye laws within one year from the date of commencement of these rules.

The RVO shall be recognised if it conducts educational courses in valuation and which includes practical training, grants membership or certificate of practice in respect of valuation of asset class, conducts training before certificate of practice is issued, lays down and enforces a code of conduct, provides continuing education, monitors and reviews the functioning including quality of service, has a mechanism to addressing grievances and conducting disciplinary proceedings against valuers who are its members.

Valuation Examination

The authority shall, either on its own or through a designated agency, conduct valuation examination for one or more asset classes, for individuals, who possess the qualifications and experience as specified in rule 4, and have completed their educational courses as member of a registered valuers organisation, to test their professional knowledge, skills, values and ethics in respect of valuation.

The students are advised to read the Companies (Registered Valuers and Valuation) Rules, 2017 at http://www.mca.gov.in/Ministry/pdf/RegisteredValues_19102017.pdf

Note: Central government has delegated powers and functions under section 247 of the Companies Act, 2013 to the Insolvency and Bankruptcy Board of India (IBBI) w.e.f. 23rd October, 2017.

2. Companies (Registered Valuers and Valuation) Amendment Rules, 2018.

In the Companies (Registered Valuers and Valuation) Rules, 2017 in rule 11 for the figures, letters and word "31st March, 2018" occurring at both the places 'the figures' letters and word "30th September, 2018" shall be substituted.

3. Circular - Enrolment as Valuer Member by Registered Valuers Organisation and Registration as Registered Valuer by the Authority

Recognised RVOs are advised to admit only those individuals, who possess the necessary educational qualifications and experience and meet other eligibility requirements, as valuer members. They are also advised to recommend only those valuer members, who have completed the recognised educational course and passed valuation examination of the relevant asset class, to the Authority for registration.

LESSON 17
CORPORATE INSOLVENCY RESOLUTION PROCESS

1. Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 w.e.f. 6th June, 2018

IBC, 2016 provides for insolvency resolution of corporate persons in a time bound manner for maximization of value of assets of such persons. In order to balance the interests of various stakeholders in the Code and promoting resolution over liquidation of corporate debtor by lowering the voting threshold of committee of creditors and streamlining provisions relating to eligibility of resolution applicants, President of India promulgated this Ordinance as the parliament was not in session. Students may take note of changes brought in IBC Code by this Ordinance:

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Jun/186195_2018-06-06%2021:08:49.pdf

2. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2018

In exercise of the powers conferred by clause (t) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby made the regulations further to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Text can be accessed at:

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Apr/Gazette%20CIRP%20Regulations%202018_2018-04-05%2010:19:13.pdf

3. Clarification regarding approval of resolution plans under section 30 and 31 of Insolvency and Bankruptcy Code, 2016

Clarification has been sought by stakeholders as to whether approval of shareholders/members of the corporate debtor/company is required for a resolution plan at any stage during the process for its consideration and approval as laid down under sections 30 and 31 of the Insolvency and Bankruptcy Code, 2016 (the Code) and after approval during its implementation, for any actions contained in the resolution plan which would normally require specific approval of shareholders/members under provisions of Companies Act, 2013 or any other law. The clarification is sought in view of the requirement under section 30(2)(e) of the Code for the resolution professional to confirm that each resolution plan received by him does not contravene any of the provisions of the law for the time being in force.

The matter has been examined in the Ministry in the light of provisions of sections 30 and 31 of the Code which provide a detailed procedure from the time of receipt of resolution plan by the resolution professional to its approval by the Adjudicating Authority and there is no requirement for obtaining approval of shareholders/members of the corporate debtor during this process.

It is understood that the requirement of section 30(2)(e) of the Code is to ensure that the resolution plan(s) considered and approved by the Committee of Creditors and the Adjudicating Authority is compliant with the provisions of the applicable laws and therefore is legally implementable. For example, a resolution plan must not contemplate 100% foreign investment in a corporate debtor if the FDI policy/relevant foreign exchange laws permit foreign investment only up to 75% in the relevant sector of the industry; it should be compliant with requirements such as restrictions on an Indian entity to issue securities to a person resident outside India under Foreign Exchange Management Act, 1999, etc. The purpose is to prevent approval of resolution plans, which are not legally implementable.

Section 31(1) of the Code further provides that a resolution plan 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. The notes to clauses appended to the Insolvency and Bankruptcy Code, 2015 (Bill) in respect of such clause explains: "Therefore, if a plan requires stakeholders to do or not do certain actions for the successful implementation of a plan, it shall be binding on all the affected parties who shall be bound to undertake the actions set out in the pian".

In view of above, it is also clarified that the approval of shareholders/members of the corporate debtor/company for a particular action required in the resolution plan for its implementation, which would have been required under the Companies Act, 2013 or any other law if the resolution plan of the company was not being considered under the Code, is deemed to have been given on its approval by the Adjudicating Authority.

http://ibbi.gov.in/webadmin/pdf/legalframwork/2017/Oct/Clarification%20regarding%20resolution%20plan_2017-10-26%2004:08:34.pdf

4. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Fourth Amendment) Regulations, 2017 dated 14th August, 2017.

The revised Regulation 70 is as under:

Non Applicability of Regulation 70 of SEBI (ICDR) Regulations, 2009

70. (1) The provisions of this Chapter shall not apply where the preferential issue of equity shares is made:
(a) pursuant to conversion of loan or option attached to convertible debt instruments in terms of sub-sections (3) and (4) of sections 81 of the Companies Act, 1956 or sub-section (3) and (4) of section 62 of the Companies Act, 2013, whichever applicable;

(b) pursuant to a scheme approved by a High Court under section 391 to 394 of the Companies Act, 1956 or a Tribunal under sections 230 to 234 of the Companies Act, 2013, whichever applicable.

Provided that the pricing provisions of this Chapter shall apply to the issuance of shares under schemes mentioned in clause (b) in case of allotment of shares only to a select group of shareholders or shareholders of unlisted companies pursuant to such schemes;

(c) in terms of the rehabilitation scheme approved by the Board of Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 or [the resolution plan approved by] the Tribunal under the Insolvency and Bankruptcy Code, 2016, whichever applicable:

Provided that the lock-in provisions of this Chapter shall apply to preferential issue of equity shares mentioned in clause (c).

(2) The provisions of this Chapter relating to pricing and lock-in shall not apply to equity shares allotted to any financial institution within the meaning of sub-clauses (ia) and (ii) of clause (h) of section 2 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993.

(3) The provisions of regulation 73 and regulation 76 shall not apply to a preferential issue of equity shares and compulsorily convertible debt instruments, whether fully or partly, where the Board has granted relaxation to the issuer in terms of regulation 29A of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 or regulation 11 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, whichever applicable], if adequate disclosures about the plan and process proposed to be followed for identifying the allottees are given in the explanatory statement to notice for the general meeting of shareholders.

(4) The provisions of sub-regulation (2) of regulation 72 and sub-regulation (6) of regulation 78 shall not apply to a preferential issue of specified securities where the proposed allottee is a Mutual Fund registered with the Board or Insurance Company registered with Insurance Regulatory and Development Authority of India or a Scheduled Bank listed under the Second Schedule of the Reserve Bank of India Act, 1934 or a Public Financial Institution as defined in clause 72 of section 2 of the Companies Act, 2013.

(5) The provisions of this Chapter shall not apply where the preferential issue of specified securities is made to the lenders pursuant to conversion of their debt, as part of a debt restructuring scheme implemented in accordance with the guidelines specified by the Reserve Bank of India, subject to the following conditions:

(a) the guidelines for determining the conversion price have been specified by the Reserve Bank of India in accordance with which the conversion price shall be determined and which shall be in compliance with the applicable provisions of the Companies Act, 2013;

(b) the conversion price shall be certified by two independent qualified valuers, and for this purpose ‘valuer’ shall be a person who is registered under section 247 of the Companies Act, 2013 and the relevant Rules framed thereunder:

Provided that till such date on which section 247 of the Companies Act, 2013 and the relevant Rules come into force, valuer shall mean an independent merchant banker registered with the Board or an independent chartered accountant in practice having a minimum experience of ten years;

(c) specified securities so allotted shall be locked-in for a period of one year from the date of their allotment:

Provided that for the purpose of transferring the control, the lenders may transfer the specified securities allotted to them before completion of the lock-in period subject to continuation of the lock-in on such securities for the remaining period,with the transferee;

(d)the lock-in of equity shares allotted pursuant to conversion of convertible securities issued on preferential basis shall be reduced to the extent the convertible securities have already been locked-in;

(e)the applicable provisions of the Companies Act, 2013 are complied with, including the requirement of special resolution.

(6) The provisions of this Chapter shall not apply where the preferential issue, if any, of specified securities is made to person(s) at the time of lenders selling their holding of specified securities or enforcing change in ownership in favour of such person(s) pursuant to a debt restructuring scheme implemented in accordance with the guidelines specified by the Reserve Bank of India, subject to the following conditions:
(a)the guidelines for determining the issue price have been specified by the Reserve Bank of India in accordance with which the issue price shall be determined and which shall be in compliance with the applicable provisions of the Companies Act, 2013;

(b) the issue price shall be certified by two independent qualified valuers, and for this purpose 'valuer' shall be a person who is registered under section 247 of the Companies Act, 2013 and the relevant Rules framed thereunder:

Provided that till such date on which section 247 of the Companies Act, 2013 and the relevant Rules come into force, valuer shall mean an independent merchant banker registered with the Board or an independent chartered accountant in practice having a minimum experience of ten years;

(c) the specified securities so allotted shall be locked-in for a period of at least three years from the date of their allotment;

(d) the lock-in of equity shares allotted pursuant to conversion of convertible securities issued on preferential basis shall be reduced to the extent the convertible securities have already been locked-in;

(e) a special resolution has been passed by shareholders of the issuer before the preferential issue;

(f) the issuer shall, in addition to the disclosures required under the Companies Act, 2013 or any other applicable law, disclose the following information pertaining to the proposed allottee(s) in the explanatory statement to the notice for the general meeting proposed for passing the special resolution as stipulated at clause (e) of this sub-regulation:

a. the identity including that of the natural persons who are the ultimate beneficial owners of the shares proposed to be allotted and/ or who ultimately control the proposed allottee(s);
b. the business model;
c. a statement on growth of business overthe period of time;
d. summary of audited financials of previous three financial years;
e. track record in turning around companies, if any;
f. the proposed roadmap for effecting turnaround of the issuer.

(g) the applicable provisions of the Companies Act, 2013 are complied with.

http://ibbi.gov.in/webadmin/pdf/legalframwork/2017/Aug/(A)_2017-08-29%2018:25:05.pdf

5. The Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 dated 14.6.2017

In exercise of the powers conferred under sections 196, 217, 218, 219, 220 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India made these regulations. Text can be accessed at:

http://www.mca.gov.in/Ministry/pdf/IBBIInspectionandInvestigationRegulations2017.pdf

6. Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017

In exercise of the powers conferred under sections 58, 196 and 208 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India made these Regulations. Text can be accessed at:

http://ibbi.gov.in/webadmin/pdf/legalframwork/2017/Jul/Insolvency_and_Bankruptcy_Board_of_India_Fast_TrackInsolvency_Resolution_Process_for_Corporate_Persons_Regulations_2017.pdf

7. Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018

In exercise of the powers conferred by clause (t) of sub-section (1) of Section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India made the regulations to amend the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017. Text can be accessed at:

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Feb/182680_2018-02-09%2020:19:50.pdf

8. Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) (Amendment) Regulations, 2018

In exercise of the powers conferred by clause (t) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby made the regulations to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Text can be accessed at:

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Feb/182631_2018-02-07%2019:06:40.pdf

9. Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017

In exercise of the powers conferred under sections 196, 217, read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India made these Regulations. Text can be accessed at:

http://ibbi.gov.in/webadmin/pdf/legalframwork/2017/Dec/180723_2017-12-09%2009:59:43.pdf

10. Insolvency Professionals to act as Interim Resolution Professionals or Liquidators (Recommendation) Guidelines, 2018

Section 16(3)(a) of the Insolvency and Bankruptcy Code, 2016 (Code) requires the Adjudicating Authority (AA) to make a reference to the Insolvency and Bankruptcy Board of India (Board) for recommendation of an insolvency professional (IP) who may act as an interim resolution professional (IRP) in case an operational creditor has made an application for corporate insolvency resolution process (CIRP) and has not proposed an IRP. The Board, within ten days of the receipt of the reference from the AA, is required under section 16(4) of the Code to recommend the name of an IP to AA against whom no disciplinary proceedings are pending.

Section 34(4) of the Code requires the AA to replace the resolution professional, if (a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or (b) the Board recommends the replacement of a resolution professional to the AA for reasons to be recorded in writing. In such cases, the AA may direct the Board under section 34(5) of the Code to propose the name of another IP to be appointed as a liquidator. The Board is required under section 34(6) to propose the name of another IP within ten days of the direction issued by the AA. Text can be accessed at:

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/May/31st%20May%202018%20Insolvency%20Professionals%20to%20act%20as%20Interim%20Resolution%20Professionals%20or%20Liquidators%20(Recommendation)%20Guidelines%202018_2018-05-31%2011:16:13.pdf

11. Circular - Insolvency professional not to outsource his responsibilities.

The Insolvency and Bankruptcy Code, 2016 (Code) read with regulations made thereunder cast specific duties and responsibilities on an insolvency professional. An insolvency professional is required to perform certain tasks under the Code while acting as an Interim Resolution Professional, a Resolution Professional, a Liquidator or a Bankruptcy Trustee for various processes. For example, an insolvency professional is required to manage the operations of the corporate debtor as a going concern. He is also required to invite resolution plans, examine them and present to the committee of creditors for its approval such resolution plans which comply with the provisions of the Code. To assist him in carrying out his responsibilities, the Code read with regulations allow an insolvency professional to appoint accountants, legal or other professionals, as may be necessary.

2. It has been observed that a few insolvency professionals are advising the prospective resolution applicants to submit a certificate from another person to the effect that they are eligible to be resolution applicants. This requirement amounts to outsourcing responsibilities of an insolvency professional to another person. Further, this adds to cost of the resolution applicant and delays submission of resolution plans. The Code read with regulations do not envisage such a certification from a third person.

3. It is hereby directed that an insolvency resolution professional shall not outsource any of his duties and responsibilities under the Code. He shall not require any certificate from another person certifying eligibility of a resolution applicant.

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Jan/CIRP%203_2018-01-03%2018:42:38.pdf

12. Circular - Disclosures by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes.

In the interest of transparency, it has been decided that an insolvency professional and every other professional appointed by the insolvency professional for a resolution process shall make disclosures as specified in Para 3 to 5 of the Circular in the attached file below:

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Jan/Disclosures-Circular-12.01.2018%20(1)-_2018-01-16%2018:26:45.pdf

13. Circular - Commencement of Disciplinary Proceeding

The Insolvency and Bankruptcy Code, 2016 (Code) envisages that an insolvency professional may be appointed as interim resolution professional, resolution professional, liquidator, or a bankruptcy trustee if no disciplinary proceeding is pending against him. The circular in this regard is attached in file below:

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Apr/Disciplinary%20Proceeding_2018-04-24%2010:34:13.pdf

14. Notification - Commencement of sections 227 to 229 w.e.f. 1st May, 2018

In exercise of the powers conferred by sub-section (3) of Section 1 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby appoints the 1st day of May, 2018 as the date on which the provisions of Section 227 to Section 229 (both inclusive) of the said Code shall come into force.

15. Relaxation in the provisions relating to levy of MAT in case of companies against whom an application for CIRP has been admitted under the IBC, 2016. The text can be accessed at

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Jan/CBDT_MAT_2018-01-6%2023:31:56.pdf

16. RBI – Submission of Financial Information to Information Utilities

According to Section 215 of Insolvency and Bankruptcy Code (IBC), 2016, a financial creditor shall submit financial information and information relating to assets in relation to which any security interest has been created, to an information utility (IU) in such form and manner as may be specified by regulations. Chapter V of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, which has come into force with effect from April 1, 2017, has specified the form and manner in which financial creditors are to submit this information to IUs. Further, as per Section 238 of the IBC, 2016 the provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

2. The Insolvency and Bankruptcy Board of India (IBBI) has registered National e-Governance Services Limited (NeSL) as the first IU under the IBBI (IUs) Regulations, 2017 on September 25, 2017.

17. Banking Regulation (Amendment) Act, 2017

In the Banking Regulation Act, 1949 (hereinafter referred to as the principal Act), after section 35A, the following sections shall be inserted, namely

'35AA. The Central Government may, by order, authorise the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016.

Explanation.—For the purposes of this section, "default" has the same meaning assigned to it in clause (12) of section 3 of the Insolvency and Bankruptcy Code, 2016.

35AB. (1) Without prejudice to the provisions of section 35A, the Reserve Bank may, from time to time, issue directions to any banking company or banking companies for resolution of stressed assets.

(2) The Reserve Bank may specify one or more authorities or committees with such members as the Reserve Bank may appoint or approve for appointment to advise any banking company or banking companies on resolution of stressed assets.'.

In section 51 of the principal Act, in sub-section (1), after the figures and letter "35A,", the figures and letters "35AA, 35AB," shall be inserted.

4. (1) The Banking Regulation (Amendment) Ordinance, 2017 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Banking Regulation Act, 1949 as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the said Act, as amended by this Act.

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Apr/Banking%20Regulation%20(Amendment)%20Act,%202017_2018-04-06%2016:34:52.pdf

18. RBI - Resolution of Stressed Assets – Revised Framework

The Reserve Bank of India has issued various instructions aimed at resolution of stressed assets in the economy, including introduction of certain specific schemes at different points of time. In view of the enactment of the Insolvency and Bankruptcy Code, 2016 (IBC), it has been decided to substitute the existing guidelines with a harmonised and simplified generic framework for resolution of stressed assets. The details of the revised framework is available at

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Feb/Resolution%20of%20Stressed%20Assets%20%E2%80%93%20Revised%20Framework_2018-02-13%2010:22:39.pdf

19. Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2018

In exercise of the powers conferred by section 11, sub-section (2) of section 11A and section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) read with section 31 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India made the following regulations to further amend the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015. Text can be accessed at:

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Jun/186130_2018-06-05%2023:29:05.pdf

20. Securities and Exchange Board of India (Delisting of Equity Shares) (Amendment) Regulations, 2018.

In exercise of the powers conferred by section 31 read with section 21A of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), sub-section (1) of section 11, sub section (2) of section 11A and section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) the Securities and Exchange Board of India made these regulations to further amend the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009. Text can be accessed at:

http://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Jun/186087%20(1)_2018-06-05%2023:26:28.pdf

21. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2018

In the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011,-

In regulation 3, in sub-regulation (2), after the proviso and before the explanation to sub-regulation (2), the following proviso shall be inserted, namely,-

"Provided further that, acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016 [No. 31 of 2016] shall be exempt from the obligation under the proviso to the sub-regulation (2) of regulation 3."

22. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2018

In the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, -

I. in regulation 70, in sub-regulation (1),-

A. clause (c) shall be omitted; and

B. the proviso to sub-regulation (1) shall be omitted.

II. in regulation 70, after sub-regulation (1) and before sub-regulation (2), the following sub-regulation shall be inserted, namely,-

"(1A) The provisions of this Chapter, except the lock-in provisions, shall not apply where the preferential issue of specified securities is made in terms of the rehabilitation scheme approved by the Board of Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 [1 of 1986] or the resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016 [No. 31 of 2016] whichever applicable."

Lesson 20
WINDING-UP

1. Companies (Transfer of Pending Proceedings) Second Amendment Rules, 2017

In the Companies (Transfer of Pending Proceedings) Rules, 2016 (hereafter referred to as principal rules), for rule 4, the following rule shall be substituted, namely:-

"**4. Pending proceeding relating to voluntary winding up**.- All proceedings relating to voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of section 485 of the Act but the company has not been dissolved before the 1st day of April, 2017 shall continue to be dealt with in accordance with provisions of the Act.'.

In the principal rules, for rule 5, the following rule shall be substituted and shall be deemed to have been substituted with effect from the 16rh day of June, 2017, namely:

"**5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts**.- (l) All petitions relating to winding up of a company under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Companies Act, 2013 exercising tenitorial jurisdiction to be dealt with in accordance with Part ll of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions shall, after the 1Stn day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent."

http://mca.gov.in/Ministry/pdf/CompaniesTransferofPendingProceedingsSecondAmdtRules.pdf

2. Companies (Removal of Difficulties) Order, 2017

In the Companies Act, 2013, in section 434, in sub-section (1), in clause (c),-

(a) in the third proviso, for “Provided further that-”, the following shall be substituted, namely:-

“Provided also that-”;

(b) after the third proviso, the following proviso shall be inserted, namely:-

“Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959.”.

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