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## Invitation for Contributing an Article

Readers are invited to contribute article/s for the Journal. The article should be on a topic of current relevance on Corporate Law, Tax Law, or on any other matter or issue relating to Economic or Commercial Laws. The article should be original and of around 7-8 pages in word file (approx. 2500 words). Send your articles at email id : [articles@vidhimaan.com](mailto:articles@vidhimaan.com) along with your student registration number. The shortlisted articles shall be published in the Journal.

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My cherished students,

It is very pleasant to share that owing to the initiatives taken the Government of India under the able leadership of Hon'ble Prime Minister Narendra Modi, our country has climbed in its rank in Ease of Doing Business Index, 2018 to 100th from 130th in year 2017. It was vision of the Hon'ble Prime Minister as upon assuming charge in the year 2014 wherein he had set the target of placing India in top 50 in the World Bank's ease of doing index, from the erstwhile 142nd rank of India. Several measures were taken to cut red tapism, which obviously seem to pay off, as the World Bank has recognized India as one of the top 10 countries that have made improvement over the past year, besides being only large country to such a paradigm shift.

This realization of this vision was supplemented by the introduction of the new insolvency and bankruptcy resolution process, simplifications in the payment of statutory dues such as provident fund contributions and corporate taxes and easier access to credit are among the key changes that spurred India's most recent ranking. It is also notable that India is now the fourth best placed in the world for minority investors, well ahead of several developed nations.

Though all these developments are quite encouraging, yet, these bring an equal set of responsibilities for the company secretaries too. Through this communication, I call upon my young student professionals to take up their role to place in assisting India to take lead as top 50 in terms of Ease of Doing Business by India by setting up an excellent corporate culture where all compliances are taken care of. While doing this, one must remember this verse from Chapter 3 of Bhagavad Gita:


कर्मणैव हि संसिद्धिमास्थिता जनकादयः।  
लोकसंग्रहमेवापि सम्पश्यन्कर्तुमर्हसि ॥ 3.20 ॥  
यद्यदाचरति श्रेष्ठस्तत्तदेवेतरो जनः ।  
स यत्प्रमाणं कुरुते लोकदस्तदनुवर्तते ॥ 3.21 ॥

**(By performing their prescribed duties, King Janak and others attained perfection. You should also perform your work to set an example for the good of the world. Whatever actions great persons perform, other people follow. Whatever standards they set, all the world pursues.)**

Therefore, let us take up our role in contributing the maximum towards nation building and making India to register as Top 50 countries in this index, by setting an example for the world to follow.

Best wishes

Happy reading

  
सी एस ( डॉ. ) श्याम अग्रवाल  
अध्यक्ष, भारतीय कंपनी सचिव संस्थान  
Date: 6th November, 2017



## CORPORATE INSOLVENCY RESOLUTION PROCESS : A NEW RECOVERY MECHANISM FOR OPERATIONAL CREDITORS

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*This article is intended to give an overview of corporate insolvency resolution process ('CIRP'), a new recovery mechanism for operational creditors. The author further highlights the significance of this process as an alternative yet more effective and speedy recovery process for the corporates.*

### BACKGROUND

The Insolvency and Bankruptcy Code, 2016 ('the Code') provides for a specialized forum to oversee insolvency and liquidation proceedings for individuals, firms and corporates. The Code also recognizes National Company Law Tribunal (NCLT) as the Adjudicating Authority for the purpose of Insolvency and Liquidation of Corporate Persons.

### INSOLVENCY RESOLUTION AND LIQUIDATION OF CORPORATE PERSONS

As per section 4 read with section 6 of the Code, where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor, where the minimum amount of such default is Rs. 1 Lakh. To understand this, it is important to examine few key definitions in section 3 and section 5 of the Code.

#### *Corporate Debtor*

Clause (8) of Section 3 defines a 'corporate debtor' to mean a corporate person who owes a 'debt' to any person. Clause (7) of section 3 defines 'corporate person' as a company defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not

include any financial service provider. Clause (11) of section 3 defines "debt" to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

#### *Financial and Operational Creditors*

Clause (10) of section 3 defines 'creditor' as any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree- holder. Clause (7) of Section 5 defines 'financial creditor' as any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. Clause (8) of section 5 defines 'financial debt' as debt along with interest, if any, which is disbursed against the consideration for the time value of money. Clause (20) of section 5 defines 'operational creditor' as a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. Clause (21) of Section 5 defines 'operational debt' to mean a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

### DEMAND NOTICE FOR INITIATION OF INSOLVENCY RESOLUTION BY AN OPERATIONAL CREDITOR

As per Sec 8 of the Code read with rule 5 of the Insolvency and Bankruptcy (Application to

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Mechanism for Operational Creditors**

Adjudicating Authority) Rules, 2016, in case a default of any payment occurs for an amount equal to or more than Rs. 1 Lakh, the operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor in Form 3 along with copy of an invoice in Form 4 demanding payment of the amount involved in the default to the corporate debtor.

Clause 12 of Section 3 defines 'default' as non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be. The demand notice or the copy of the invoice demanding payment shall be filed with an information utility and may be delivered to the corporate debtor -

- (a) at the registered office by hand, registered post or speed post with acknowledgement due; or
- (b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

It may be noted that there is no timeline prescribed for sending this demand notice and copy of the invoice. In *Neelkanth Township & Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd.* [2017] 140 CLA 235 (NCLAT), the National Company Law Appellate Tribunal ("NCLAT") has recently ruled that the Limitation Act, 1963 is not applicable to the Code, 2016. The NCLAT held that in the absence of any provision in the Code, the Limitation Act, 1963 would not be applicable to initiation of corporate insolvency resolution process. The NCLAT further observed "If there is a debt which includes interest and there is default of debt and having continuous course

of action, the argument that the claim of money by respondent is barred by limitation cannot be accepted." Therefore, NCLAT has treated the cause of action arising from non-payment of debt which includes interest, as a continuing cause of action, thereby holding that limitation period cannot be said to have expired. The NCLT has not referred to section 433 of the Companies Act, 2013 in its judgment which makes the Tribunals subject to the Limitation Act. It is still recommended to file insolvency proceedings within the limitation period, specially for operational debt to avoid any ambiguities.

**DISPUTE BY CORPORATE DEBTOR**

As per sub-section (2) of section 8 of IBC, the corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor –

- (a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute; or
- (b) the repayment of unpaid operational debt by sending an attested copy of the record of electronic transfer or cheque of the unpaid amount received from the corporate debtor.

It may be noted that the term 'dispute' is defined in clause (6) of section 5 as dispute includes a suit or arbitration proceedings relating to : (a) the existence of the amount of debt, (b) quality of goods or service; or (c) the breach of a representation or warranty. The question that emerges from the above is whether pendency of a suit or arbitration is a must in order for the corporate debtor to satisfy the condition of existence of a dispute.

The Supreme Court on Existence of Dispute in

*Corporate Insolvency Resolution Process : A New Recovery  
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Mobilox Innovations (P) Ltd. v Kirusa Software (P) Ltd. [2017] 140 CLA 123 has finally settled the widely debated question of what constitutes “existence of a dispute” in the context of applications filed by operational creditors for initiation of corporate insolvency resolution process (CIRP) of corporate debtors under the Insolvency and Bankruptcy Code, 2016 (IBC). The Court has held as follows:

- **The word “and” occurring in clause (a) of sub-section (2) of section 8 must be read as “or”**

The word “and” in that clause suggests that a dispute between the operational creditor and the corporate debtor will be in existence only if a suit or an arbitration proceeding on the dispute is pending before receipt of demand notice that such an interpretation would lead to a great hardship and anomalous situations as the corporate debtor would then be able to stave off the bankruptcy process only if a dispute is already pending in a suit or arbitration proceedings and not otherwise. The Supreme Court cited an example that in case of a dispute that arises a few days before triggering of the CIRP, there would be no time to approach either an arbitral tribunal or a court even though a dispute may exist.

- **Dispute must be “pre-existing”**

The existence of the dispute and/or the suit or arbitration proceeding must be “pre-existing”, i.e., it must exist before the receipt of the demand notice.

- **Formulation of a new 'plausible contention' test**

The test for 'existence of a dispute' would be if without going into the merits of the dispute, a plausible contention is raised

requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The dispute must not be spurious, mere bluster, plainly frivolous or vexatious. A dispute should truly exist in fact between the parties, which may or may not ultimately succeed and must not be vague and motivated to evade liability.

Therefore, a dispute in the payments, existing before the receipt of demand notice, even if the same is not a part of any suit or arbitration proceeding, would disqualify the debt from being adjudicated under the CIRP.

**APPLICATION FOR INITIATION OF  
CORPORATE INSOLVENCY  
RESOLUTION PROCESS (CIRP) BY  
OPERATIONAL CREDITOR**

As per section 9 of the Code, after the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section 1 of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under section 8(2), the operational creditor may file an application before the NCLT for initiating a CIRP in Form 5 along with requisite documents. The operational creditor shall, along with the application furnish-

- (a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
- (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

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(d) such other information as may be specified.

**APPOINTMENT OF INTERIM  
RESOLUTION PROFESSIONAL**

An operational creditor initiating a corporate insolvency resolution process under section 9, may propose a resolution professional to act as an interim resolution professional. The Adjudicating Authority shall, within fourteen days of the receipt of the application, by an order—(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

- (a) the application is complete;
- (b) there is no repayment of the unpaid operational debt;
- (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;
- (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and
- (e) there is no disciplinary proceeding pending against any resolution professional proposed.

As per Section 17 of the Code, from the date of appointment of the interim resolution professional the management of the affairs of the corporate debtor shall vest in the interim resolution professional and the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional. The officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution

professional. This gives wide sweeping powers to the interim resolution professionals.

**TIME-LIMIT FOR COMPLETION OF  
INSOLVENCY RESOLUTION PROCESS**

As per section 12 of the Code, the corporate insolvency resolution process is to be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process unless extended by NCLT on the application of the Insolvency Professional.

**CONCLUSION**

It may be noted that in case of operational creditors, there is a very thin line difference between civil suits for recovery of money *vis-a-vis* the CIRP. It may be said that subject to the satisfaction of other conditions as provided in the Code, the admissibility or non-admissibility of the petition by the operational creditor would primarily hinge on the fact whether there is a pre-existing dispute or not. In case of petitions by operational creditors under the Code, if the petitions are admitted and the interim resolution professional appointed, it has been observed that the corporate debtors (specially the ones who are solvent and where the operational debt is very small compared to the size of the Company) choose in favour of settling the matter rather than giving reins of their company to a resolution professional who will sit above the Board of directors and call the shots. In view of the above, the CIRP may practically be said to be an alternative recovery mechanism with a much more effective and speedy recovery, despite denial by the Tribunals time and again that it is not a recovery forum.

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## GST – BOON OR BANE TO BUSINESS

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*GST will have a significant impact on diverse businesses and/or transactions. In this article, an attempt has been made to cover the potential GST impact on some corporate transactions including business transfer, merger and acquisition, joint venture, and transaction pertaining to Securities and Joint Development Agreements*

### BACKGROUND

The implementation of goods and services tax (GST) to subsume the various central and state taxes in India, lately has led to creation of a tax efficient and organized economy. Moreover, GST will mitigate the cascading effect or double taxation in a major way and pave the way for a common national market. Furthermore, it will also facilitate easy administration of taxes because of the transparent nature of the legislation.

### BUSINESS TRANSFERS

We know that business transfers can take place either by a share sale or an asset sale. An asset sale can further take place through either a slump sale or an itemised sale.

The transfer of the whole or a unit of business division was neither taxable under VAT and nor is taxable under GST. This is because the sale of whole business or a unit or an undertaking of a business cannot be equated to sale of moveable goods. Additionally, a notification<sup>1</sup> has also been issued in this respect which exempts services by way of transfer of a going concern, either as whole or a part thereof.

Conversely, in case of an itemised sale where the assets (more particularly goods) are being transferred, GST shall be applicable. The rationale is that individual assets being transferred in an asset sale are covered within the ambit of the definition of goods and the specific values of such goods can be determined accordingly.

### TRANSACTION IN SECURITIES

Notably, 'securities' do not fall within the definition of either goods or services and have a distinct definition under GST. Securities have been ascribed the same meaning as provided under Section 2(h) (i) of the Securities Contracts (Regulation) Act, 1956. Any transaction in securities have been explicitly excluded from being taxed either as goods or as services under GST and consequently GST shall not be applicable on transactions namely buy back of shares and share swap. Having said that, any bank charges, commission, brokerage etc. which may accompany a transaction in securities will be taxable under GST because while such bank charges, brokerage, commission etc. may facilitate the transaction in securities, the exclusion under GST is limited to securities and not to any other supplies made in relation to such securities.

1. Notification No. 12/2017 Central Tax (Rate), dated 28th June, 2017.



## GST - Boon or Bane to Business

### **BARTER TRANSACTIONS**

Under VAT, barter transactions involving exchange of goods were not taxable whereas barter transactions involving exchange of services were taxable. Now with GST, all barter transactions whether involving exchange of goods or services or both are taxable and therefore every transaction of exchange needs to be examined closely.

*Illustration: Be exchanges his old cell phone at a store XYZ for a new cell phone.*

*The important question to be addressed here is the valuation of the barter transaction. It needs to be ascertained whether the taxable amount in the transactions should be the value of the new cell phone or old cell phone.*

### **LIABILITY IN CASE OF MERGER AND ACQUISITION**

In all routine transactions of merger and acquisition, there is no major impact of GST. This is because in routine transactions there is no output tax liability attracted and therefore business shall be able to utilize their input tax credit in the usual manner. Here, based on the concept of the dual GST model, a single entity is split into distinct persons depending upon the number of states in which the entity has its businesses. Therefore, in such a transaction the decision relating to the choice and structure of the transaction whether as a slump sale, amalgamation or an itemised sale becomes critical.

### **IMMOVEABLE PROPERTIES**

Immoveable properties are excluded from the ambit of 'goods' as defined under GST. However, the definition of 'service' being inclusive in nature, allows inclusion of immoveable properties as well. Notably however, the sale of land and building (other than under construction flats or units) has been excluded from taxability under GST.

### **JOINT DEVELOPMENT AGREEMENTS**

In a Joint Development Agreement entered between a landowner and a developer there is an exchange of services between a landowner and a developer and vice-versa (JDA). In a JDA the landowner and developer jointly agree to develop the land owned by the landowner into a complex or an agreed number of flats. It is to be noted that for the services provided by the developer to the landowner, the landowner would not make any monetary payment to the developer but only grant development rights concomitant to the land. The developer would then be entitled to develop a complex or an agreed number of flats on such land and be entitled to sell his proportionate undivided share of land, retaining the proceeds from such sale. Thus, JDA is merely a compound version of a simple barter transaction. It is, therefore, important to ascertain the value which is to be assumed and adopted by the developer in relation to the services provided by the developer to the landowner in accordance with the JDA.

### GST - Boon or Bane to Business

Another important aspect in case of a JDA is to ascertain the point of supply (or the incidence of taxation). This aspect remains a legal quandary. Whether the point of supply is where the development rights are received by the developer from the landowner or where the JDA is executed.

#### *Joint Ventures*

A joint venture is a business undertaken by two or more persons engaged in a single defined project. The necessary elements of a joint venture<sup>2</sup> includes presence of (a) an express or implied agreement, (b) a common purpose intended to be carried out, (c) shared profits and losses; and (d) each member's equal voice in controlling the project.

The pivotal question that needs to be addressed at the very outset itself is whether an arrangement, constitutes an “association of persons” or not. To answer this, the concept of association of persons needs to be understood in the light of various judicial pronouncements, and consequently apply the tests laid down in such judicial pronouncements to the case at hand.

Basis these judicial pronouncements<sup>3</sup>, a joint venture is where (i) two or more persons get together to form an association, (ii) there is a voluntary combination, (iii) the persons associate for a common purpose or action, with an object to produce profit or gain, (iv) there is a combination in joint enterprise, *i.e.*, the persons undertake collective efforts to earn income, (v)

there is some scheme of joint or common management, *i.e.*, the work being carried out is managed in a joint or collective manner.

Thus, from a taxability perspective, we note that, where (i) a joint venture entity (unincorporated) qualifies as an 'association of persons', the joint venture entity shall be treated distinct from its members and consequently any transaction between the joint venture entity and its members shall be taxable under GST; and (ii) a joint venture entity (unincorporated) does not qualify as an 'association of persons', the transaction shall be treated as a self-supply and shall not be taxable under GST.

#### THE WAY FORWARD

With this paradigm shift in the taxation sphere in India, there will be a far-reaching impact on almost all business operations in the nation. Whilst there are numerous aspects which are yet to be cryptanalyzed, the most regular transactions or businesses will certainly be impacted by GST in some or the other way. Therefore, it is imperative that we attempt to understand how GST can impact the relevant industry or sector, prior to undertaking any transaction(s) pertaining to the same.

■ ■ ■

2. Garner, Ryan. A; Editor-in-chief; Black's Law Dictionary, 1999, 7th edn., p. 843

3. G. Murugesan & Bros v. CIT [1973] 88 ITR 432 (SC); Smt. Jaswant Kaur Sehgal v. CIT [2004] 271 ITR 475 CIT v Shiv Sagar Estates [1993] 201 ITR 953; Linde AG, v. DDIT (2014) 361 ITR 1 (Delhi)

# COMPETITION COMMISSION OF INDIA (LESSER PENALTY) (AMENDMENT) REGULATIONS, 2017 : A CONCISE VIEW

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*The recent amendments to the Leniency Regulations has strengthened certain provisions of the Competition Act so that its purpose is attained in a smooth, effectual and clear manner. This article shed light on the Competition Commission of India and its role and the recently incorporate CCI (Lesser Penalty) (Amendment) Regulations, 2017.*

## COMPETITION ACT, 2002

The Competition Act, 2002 has replaced the antiquated Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP Act') which was felt not to be in line with the major economic changes introduced in the country, viz, liberalization, privatization and globalization. The Act paved the way for free and fair competition, provision of best of products and services at competitive prices, and lesser government intervention. *The positive aspect of competition in a business scenario is it helps you to be more alert and innovative.* In times when the world is moving at a fast pace, there is an urgent need to remove the "shield against competition" that materialized in the form of passing of the Act.

### Competition Commission of India

Competition Commission of India ('CCI') is a statutory body (anti-trust authority) set up by the Central Government under section 7 of the Act to fulfill the objectives laid down in the Act, which are as follows:

- To prevent practices having adverse effect on competition
- To protect the interest of consumers to ensure freedom of trade carried on by other participants in the market.

Since its formation, CCI has taken a pro-active role as a competition advocate by conducting seminars, giving opinion on Bills which have bearing on the business and trade, like draft Shipping Trade Practices Bill, 2007 and draft Petroleum and Natural Gas Regulatory Bill,

2005, apart from performing its function for the enforcement of the provisions of the Act.

## LENIENCY REGULATIONS

The Commission, for the effectual implementation of the provisions of the Act has brought about regulations from time-to-time. In the year 2009, the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('Leniency Regulations') came into force to give a boost to section 46 of the Act which empowers Commission to incentivize the enterprises and individuals who self-report about the cartels they are involved in, by allowing them to pay penalty lesser than what is provided in the statute.

Section 46 of the Act provides that the Commission may, if it is satisfied that the producer, seller, distributor, trader or service provider involved in the cartel has made complete and candor disclosure which is vital in respect of the alleged violations under section 3, grant lesser penalty than leviable under the Act. However, the benefit is not provided in case where the report of investigation directed under section 26 has been received before making of such disclosure.

The entity is required to co-operate with the Commission throughout the course of proceedings, and, the Commission may try for the offence with respect to which lesser penalty was imposed and impose penalty for which such person has been liable if such person has done following acts:

Competition Commission of India (Lesser Penalty)  
(Amendment) Regulations, 2017 : A Concise View

- Non-compliance with the conditions on which lesser penalty was imposed by the Commission
- Given false evidence
- Disclosed information which is not vital

**Anti-competitive Agreements**

Section 3 in Chapter-III of the Act prohibits the anti-competitive agreements. Such agreements are entered into among enterprises or association of enterprise, persons or association of person pertaining to the business activity – trade in goods or provision of services, which **cause** or **likely to cause** an appreciable adverse effect on competition. According to Section 3 of the Act, the anti-competitive agreements can take the following forms:

- Determination of price of purchase or sale of goods.
- Limit or control the production, supply, markets, technical development, investment or provision of services.
- Sharing the market or source of production or provision of services.
- Bid-rigging or collusive bidding.

**Cartel** is one such form of anti-competitive agreements. It is defined under clause (c) of section 2 of the Act as follows:

*"(c) cartel includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services."*

It is one of the detrimental devices to hamper competition. Such an agreement to not to compete on price, product (including goods and services) or customers is with the objective to artificially increase or decrease the demand or supply of goods or services so that there is an

increase in the price above the competitive levels. Consequently, the customers are injured and the growth of the economy is thwarted.

The European Union in its XXXIInd Report on Competition Policy – 2002 stated that the cartels diminish social welfare, create allocative inefficiency and transfer wealth from consumers to the participants in the cartel by modifying output and/or prices in comparison with market – driven levels. Cartels are harmful also over the long run. Engaging in cartels to avoid the rigours of competition can result in the creation of artificial, uneconomic and unstable industry structures, lower productivity gains or fewer technological improvements and sustained higher prices. Furthermore, the weakening of competition leads to a loss of competitiveness and threatens the sustainable employment opportunities.

**Penalty in Cartel**

The Commission is empowered under clause (b) of section 27 to impose upon each person or enterprise included in the cartel, penalty of upto three times its profit for each year of continuance of such agreement or 10 per-cent of its total turnover for each year of the continuance of such agreement, whichever is higher.

**What Necessitated the Introduction of  
Leniency Regime in India?**

Although the Commission is bestowed with sufficient powers to enquire into the existence of cartel, issuing appropriate directions, imposing penalty and take other suitable action under the Act, the procedure in itself was not considered sufficient because of the fact that it is majorly a one-way method (from the part of commission), and did not encourage those involved in the cartels to report their



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activities voluntarily as there was a sense of fear of paying heavy penalty. On the other hand, it has been felt by the Commission that it has been an inexpedient and onerous process to crack down and prove cartels. Thus, a mechanism was much required wherein the enterprises and individuals come forward and blow the whistle against the cartels and be safeguarded from action. As a result, Leniency Regulations, 2009 came into force in the year 2009 which is supplementary to section 46.

**SIGNIFICANT AMENDMENTS TO  
LENIENCY REGULATIONS**

The recent amendments to the Regulations *vide* Competition Commission of India (Lesser Penalty) (Amendment) Regulations, 2017 ('Amendment Regulations') has brought about significant changes to address the issues in the implementation of the regulations. The key highlights of the amendment are as follows:

***Definition of 'Applicant' changed***

Prior to the amendment, only an enterprise that is or was a member of the cartel or any enterprise on behalf of such member - enterprise was eligible to apply. Now, the individuals are also included in the definition which has paved the way for officers, directors, etc. of the enterprise to come forward and disclose the information about the involvement and take the benefit of lesser penalty. This is undoubtedly a welcome change since the detailed information about the cartel entered into by enterprise is generally in possession of the officers, etc.

***Definition of 'Party' included***

Clause (ga) has been added to sub-regulation (1) of regulation 2 of Leniency Regulations which provides the inclusive definition of 'party'. Party against whom the proceedings have been instituted include the 'enterprise' or 'person' as defined in the Act. The Government

(Central/State) or the statutory authority and the person permitted to join the proceedings shall come under the definition.

***Benefit of Lesser Penalty Applicable to the Applicant even if it has been Availed by other Applicant(s)***

The deletion of second proviso to regulation 4 of the Leniency Regulations is a welcome change as this has opened doors to the applicants to come forth and unfold the information about the cartels and avail the benefit of lesser penalty in spite of the fact that the other applicant (s) has/have already applied if, according to the Commission, the information adds value to the evidence already in possession of Commission or Director General to establish the existence of cartel.

***No Restraint on the Number of Applicants***

As against the status as to number of applicants prior to amendment, there is no cap on the number of applicants for reduction in monetary penalty now. The first applicant may get the benefit of reduction in penalty up to hundred per cent, second applicant up to fifty per cent and the subsequent applicants may get the reduction in penalty upto thirty per cent of the total penalty leviable.

***Confidentiality***

In order to protect the interests of the applicants, the confidentiality has been extended to documents and evidence furnished by the applicant. Earlier, only the information provided was protected.

***Contents of the Application***

In the contents of the application as provided in the schedule, the estimated volume of business affected **in India** by the alleged cartel is to be disclosed.

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## AROUSING SELF CONFIDENCE

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*The author lists out mantras that arouse self-confidence which is a very intrinsic quality that comes from within.*

### LIFE IS NOT JUST WINNING

Remember the very first Rocky film? What happened at the end? Stallone's character wins the fight, beats his opponent, becomes the boxing champion of the world and takes home all the riches and glory, right? Wrong. Most people don't remember that in the first Rocky movie, Rocky doesn't win the final fight. He goes the full 15 rounds and ends the fight with a draw. The film concludes with him and Adrian expressing their love for each other and we almost instantly forget about the fight. So what can we learn? Life's not just about winning, commonly defined. It's about giving it your all, setting a goal and persevering in the face of all opposition, and doing the very best that you can do. You may not always win, but if you gave it everything you have and leave it all, then you can live regret free. And that's the real winning formula. You Don't Always Have to Win to Win. However, in the age of competition winning has come to be equated with result consciousness. But reflecting back over your childhood for a moment, do you remember a time when nothing seemed impossible and you believed you could do or be anything? Do you also remember when this started to change? Most likely, things changed for you when you began to grow up, became more conscious and maybe someone you cared about made a statement that shattered your ambition. They were only speaking from their experiences and subconscious mind, without any intention of stealing your confidence, yet the impact on you was profound. We are not

placed on this Earth to lay our abilities into another's hands. Don't let your source of self-confidence come from someone else. If that person decided tomorrow that you're not as great as they believed, does that make you less great? The true and only source for personal power comes from within. Self-confidence is a very intrinsic quality of a person that comes from within. Using external methods like dressing smart or walking faster may help to some extent, but the real self-confidence comes from within that does not require any external attire for its enhancement. A trust in your ability to do a particular task with ease is self-confidence. Now when I say task it can be any task; it can be a small task of riding a bicycle, or using keyboard in a computer. Or it can be big task of passing an exam, clearing an interview or managing your entire life and making it successful. No matter how smaller or bigger is the task, we must have trust in our abilities to accomplish that task.

### BE HONEST WITH YOURSELF



So, the first building block in this process is to accept yourself honestly and totally. Be honest with yourself. If you are bad at something, accept it. If you are good in something, accept it. Don't try to evaluate yourself from the eyes of others. If you have been a coward till now, accept it. If you are not true to your conscience, accept it. No matter who you are, how morally corrupt you have

## *Arousing Self Confidence*

become, the only way to come out from this is to be honest with yourself. We can deceive everybody but we cannot deceive ourselves. Once we make an honest evaluation of ourselves, we recognize all our weakness and strengths. We no longer live in dark. We become brave and take all of our responsibility on ourselves.

Secondly, thinking positive. One of the things I have learned over time; how you can actually change thoughts, and by doing so make things happen. So when you check the outflow of unnecessary thoughts and aligning positivity to it, you are clearer and more focused. And obviously when you have clarity about things, confidence is easy.

### **KILL NEGATIVE THOUGHTS**

Negative thoughts go hand-in-hand with the honesty, but it's so important to separate them. You have to learn to be aware of your self-talk, the thoughts you have about yourself and what you're doing. Sometimes when I used to run, my mind would start to say, "This is enough. I need a break. I want to stop and go watch TV." Well, I soon learned to recognize this negative self-talk, and soon I learned a trick that changed everything in my life: I would imagine that a negative thought was a bug, and I would vigilantly be on the lookout for these bugs. When I caught one, I would nip it in the bud. It originates mentally, so kill it there. Then replace it with a positive one; as simple as 'I can do it.'

### **GET TO KNOW YOURSELF**

When going into battle, the wisest general learns to know his enemy very, very well. You can't defeat the enemy without knowing him. And when you're trying to overcome a negative self-image and replace it with self-confidence, your enemy is yourself. Get to

know yourself well. Start listening to your thoughts. Start writing about yourself, and about the thoughts you have about yourself, and analyzing why you have such negative thoughts. And then think about the good things about yourself, the things you can do well, the things you like. Start thinking about your limitations, and whether they're real limitations or just ones you've allowed to be placed there, artificially. Dig deep within yourself, and you'll come out eventually with even greater self-confidence. To quote, "know yourself and you will win all battles," **Sun Tzu**.

### **ACT POSITIVE**

More than just thinking positive, you have to put it into action. Action, actually, is the key to developing self-confidence. It's one thing to learn to think positive, but when you start acting on it, you change yourself, one action at a time. You are what you do, and so if you change what you do, you change what you are. Act in a positive way, take action instead of telling yourself you can't, be positive. Talk to people in a positive way, put energy into your actions. You'll soon start to notice a difference.

### **GET PREPARED**

It's hard to be confident in yourself if you don't think you'll do well at something. Beat that feeling by preparing yourself as much as possible. Think about taking an exam: if you haven't studied, you won't have much confidence in your abilities to do well on the exam. But if you studied your butt off, you're prepared, and you'll be much more confidence. Hard work cannot be replaced, ever.

### **SET A SMALL GOAL AND ACHIEVE IT**

People often make the mistake of shooting for the moon, and then when they fail, they get discouraged. Instead, shoot for something much more achievable. Set a goal you *know* you

### Arousing Self Confidence



can achieve, and then achieve it. You'll feel good about that. Now set another small goal and achieve that. The more you achieve small goals, the better you'll be at it, and the better you'll feel. Soon you'll be setting bigger but still achievable goals and achieving those too.

#### **CHANGE A SMALL HABIT**

Not big ones that might take a lifetime! Just a small one, like waking up 10 minutes earlier or as simple as drinking a glass of water when you wake up. Something small that you know you can do. Do it for a month. When you've accomplished it, you'll feel like a million bucks.

#### **FOCUS ON SOLUTIONS**

If you are a complainer, or focus on problems, change your focus now. Focusing on solutions instead of problems is one of the best things you can do for your confidence and your career. "I am lazy!" So how can I solve that? "But I can't motivate myself!" So how can you solve that? "But I have no energy!" So what's the solution? Problems are problems because we don't consider solutions. Our focus on the problem area is way too greater than our interest to find solutions.

#### **EMPOWER YOURSELF WITH KNOWLEDGE**

Empowering yourself, in general, is one of the best strategies for building self-confidence. You can do that in many ways, but one of the surest ways to empower yourself is through knowledge. This is along the same vein as building competence and getting prepared ... by becoming more knowledgeable, you'll be more confident ... and you become more knowledgeable by doing research and studying.

When we sum up the above mentioned simple

strategies we can understand that there is a need to practice everything. We need to be constant and the simplest way to get that into our system is to start with spiritual intervention. Most people think that it is religion. Not even close! At the risk of scaring you off, I would like to refer to what some people call God. I am not a religious person, but I am spiritual. Religion is man-made, spirituality is God given. What that means to me, is knowing that there is a Creator, an Energy and Intelligence that is responsible for the planet and all things in it. I believe it is perfect. And everything happens for a reason, there is larger scheme to things than we see. To accept this is to surrender yourself to the master plan and anyway, we cannot control situations and factors that are external to us. However, what we can control or change is what is in our hands; our thoughts, actions and reactions. If our behaviour and manifestation is in our control; we will never lack self confidence. Developing self-confidence and a healthy self-esteem begins with a regular meditation practice.

#### **RIGHT MEDITATION, RIGHT THOUGHTS AND RIGHT ACTIONS**

Meditation allows us to begin seeing things as they truly are. Meditation focuses on the 3Rs: Right Meditation, Right Thought, and Right Action. Our self-esteem and confidence grow allowing us to take consistent right action in the face of uncertainty and fear. When beginning a meditation we notice very quickly that our emotions calm, fear diminishes, awareness expands, confidence and esteem





### Arousing Self Confidence

blossom. We learn to expand our awareness beyond the limits of our physical senses and experiences, we embrace our spiritual nature. It's our spiritual awareness that allows us to detach from fear, lack of confidence and low self-esteem, we begin to see life in its proper context. We experience oneness, perfection, peace of mind, and freedom. In addition to a meditation practice, affirmations help bring about confidence and esteem. Affirmations are an effective way to displace limiting perceptions with consciously chosen thoughts, the seeds of your future. As we progress with a regular meditation practice, our awareness expands, we become grounded. Fear, worry, and anxiety diminish and our confidence and esteem increases. It becomes less difficult to take the right actions to bring about the life you want. You start living life abundantly with an experience of freedom and choose to do what you really want to do.

#### **SELF-CONFIDENCE**

It's important to have self-confidence. It's even more important to have *spiritual* self-confidence. Spiritual confidence is that unique sense of absolute conviction that cannot be affected by external or internal fluctuations. It's being absolutely sure. It's the highest gift and blessing that comes only from the deepest insight into the true nature of things. It can also be the most precious jewel that is freely transmitted from the awakened heart and mind of a true spiritual master to any and all who would receive it. Absolute conviction destroys existential doubt and frees the human soul.

#### **SPIRITUAL CONFIDENCE**

Spiritual confidence gives you the highest self confidence which is the heaviest anchor in the midst of the unending storm that is life and death. It is an unshakable confidence in the

inherent rightness of *being here* — confidence in the rightness of finding oneself in the very middle of the life process, even in all its chaos and complexity. Having this kind of confidence is of the utmost importance for anyone who is convinced that they deeply care about the way things are — and even more so for the bold and courageous warrior who wants to create something truly new, who would dare to be the one to step forward, to stand for and bear witness to that which is higher. It's especially important to have this kind of confidence in times like these when there is so much turbulence and individual and collective insecurity about survival. Without this kind of confidence as a constant reference point, we may find ourselves at times without the emotional, psychological, or spiritual resources to fight the good fight.

#### **LIST OUT TEN BEST THINGS YOU HAVE ACHIEVED**

Finally, we have all achieved something in life and got so far. So far, so good. So for a while, let's think about your life so far, and list the ten best things you've achieved in an "Achievement Log." Perhaps you came top in an important test or exam, played a key role in an important team, did something really good to your partner, did something that made a key difference in someone else's life, or delivered a project that meant a lot for your classmates. Put these into a smartly formatted document, which you can look at often. And then spend a few minutes each week enjoying the success you've already had! You don't have to be James Bond; to have self-confidence; Indiana Jones can give competition any day, in his own way. It is just about how we focus on our strengths and utilise them. Isn't it?

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## KNOWLEDGE UPDATES

### COMPANY LAW

#### **Due date for transfer of shares under sub-section (5) of section 124 is 31st October, 2017**

The Ministry of Corporate Affairs vide circular no. 12/2017 dated 16th October, 2017 has clarified that pursuant to second proviso to rule 6 of the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016 ('Rules') as amended from time-to-time, wherein the seven years period provided under sub-section (5) of section 124 is completed for unpaid / unclaimed dividends during 7th September, 2016 to 31st October, 2017, the due date for transfer of shares is 31st October, 2017.

#### **Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules amended**

Ministries of Corporate Affairs, vide Notification No. G.S.R. 1267(E) dated 13<sup>th</sup> October, 2017, has amended the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016 by the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) (Second Amendment) Rules, 2016 with effect from 13<sup>th</sup> October, 2017. The key amendments are as follows:

- In case where period of seven years provided under sub-section (5) of section 124 of the Companies Act, 2013 has been completed or being completed during the period from 7th September, 2017 to 31st October, 2017, the due date of the transfer of shares shall be 31st October, 2017
- Such transfer of shares shall be deemed to be transmission of shares, and the procedure with respect to the transmission of shares shall be followed with respect to such transfer.
- Clause (d) of sub-rule (3) of rule 6 has been substituted to provide as follows:
  - ❖ The Company Secretary or the person authorised by the Board to make an application for issue of anew share certificate

- ❖ A new share certificate, on receipt of an application under clause (a), to be issued on the face of which should be written- "Issued in lieu of share certificate No for the purpose of transfer to IEPF" and the same to be recorded in the register
- ❖ Particulars of share certificate to be in Form No. SH-1 as specified in the Companies (Share Capital and Debentures) Rules, 2014
- ❖ On the issuance of a new share certificate, the company shall inform the depository by way of corporate action to convert the share certificates into DEMAT form and transfer in favour of the Authority

- Any amount to be credited under sub-rules (10), (11) and (12) shall be remitted to the specified account of the IEPF Authority maintained in the Punjab National Bank.
- Sub-rule 2A has been inserted in rule 7 which mandates the company which has deposited amount to the Fund to nominate a Nodal Officer for the purpose of coordination with IEPF Authority, and provide its details like her designation, postal address, telephone number and company details to the IEPF Authority.

Provisos have been added to sub-rules (3) and (7) which state that in case of non-receipt of documents or rectified documents, as the case may be, by the authority after the expiry of ninety days from the date of filing of form IEPF-5, the Authority may reject the Form after giving an opportunity of being heard within 30 days from the date of rejection of the such documents/rectified documents.

#### **Section 247 of the Companies Act, 2013 to come into force with effect from 18th October, 2017**

The Central Government has appointed 18<sup>th</sup> October, 2017 as the date of commencement of section 247 which provides for the valuation by registered valuers.

## Knowledge Updates

### **INSOLVENCY LAW**

#### **Insolvency and Bankruptcy Board of India (Second Amendment) Regulations, 2017, dated 05th October, 2017**

The Insolvency and Bankruptcy Board of India has amended the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 by inserting sub-regulation (1A) of regulation 38 and sub-regulation (1A) to regulation 37 which provide that a resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtors.

### **SEBI LAW**

#### **The limit of Investment by Foreign Portfolio Investors (FPI) in government securities revised**

The SEBI vide Circular No. IMD/FPIC/CIR/P/2017/113 dated 4<sup>th</sup> October, 2017 has revised the limit for investment by FPIs in government securities for the October–December, 2017 quarter. The revised limits can be checked at [www.sebi.gov.in](http://www.sebi.gov.in).

#### **SEBI Circular rationalized and categorized the mutual fund schemes**

In order to bring uniformity and standardization in the characteristics of similar type of schemes launched by different mutual fund companies, and to facilitate the investors in taking an informed decision based on proper evaluation of different schemes available to them, the SEBI vide Circular No. SEBI/HO/IMD/DF3/CIR/P/2017/114 dated 6<sup>th</sup> October, 2017 has brought about much desired changes by broadly categorizing these into equity schemes, debt schemes, hybrid schemes, solution oriented schemes and other Schemes. The details of each scheme have been provided in the Annexure in the Circular. Apart from that, the terms 'large cap', 'mid cap' and 'small cap' have been defined. This circular is applicable to the following:

- ❖ All existing open-ended schemes of all mutual funds

- ❖ All such open-ended schemes where SEBI has issued final observations but have not yet been launched
- ❖ All open-ended schemes in respect of which draft scheme documents have been filed with SEBI as on date
- ❖ All open-ended schemes for which a mutual fund would file draft scheme document.

#### **Action for non-compliance with the minimum public shareholding (MPS) requirements by listed entities**

In order to bring consistency and uniformity of approach in the enforcement of minimum public shareholding (MPS) norms as specified in regulation 38 of the Listing Regulations read with rules 19(2) and 19A of the Securities Contracts (Regulation) Rules, 1957, SEBI, vide Circular No. CFD/CMD/CIR/P/2017/115 dated 10th October, 2017, has specified the procedure to be followed by the recognized stock exchange or depositories, as the case may be, with respect to non-compliant entities, their promoters and directors. The key highlights of the circular are as follows:-

- The recognized stock exchange is mandated to issue notices to the entities within 15 days of observation of non-compliance
- Imposition of fine of INR 5000 per day till the date of compliance by such listed entity
- Intimation to the depositories to freeze the entire shareholding of the promoter and promoter group of the listed entity till the date of compliance
- Debarring the promoters, promoter group and directors of the listed entity to hold a new position as a director in any other listed entity
- In the case of continuation of the non-compliance for a period of more than a year, the fine shall be increased to INR 10,000 per day from INR 5000 per day till the date of compliance by such listed entity, and the intimation to the depositories to freeze all the securities held

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### Knowledge Updates

in the demat account of the promoters and promoter group.

- The recognized stock exchange may consider compulsory delisting of the non-compliant listed entity in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956, the Securities Contracts (Regulations) Rules, 1957 and the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations 2009 as amended from time-to-time.
- Reference of cases to SEBI when the listed entity has adopted a method for complying with MPS requirement which is not prescribed by SEBI under sub (i) to (iv) of clause (2) of SEBI Circular No. CIR/CFD/CMD/14/2015 dated 30th November, 2015 and the approval of the same has not been obtained from SEBI under sub-clause (vii) of clause (2)
- Fine collected shall be credited to the "investor protection fund" of the concerned stock exchange
- Disclosure of the details like name, amount of fine imposed, status of compliance, etc. by the recognized stock exchange on its website
- The provisions of the circular are not applicable where the orders have already been passed by SEBI under provisions of Securities and Exchange Board of India Act, 1992 or Securities Contracts (Regulation) Act, 1956 in relation to non-compliance with MPS requirements.

#### **Guidelines for deciding appropriate settlement mode for commodity derivatives framed**

In view of the need to effectively discharge the hedging functions of the commodity derivative contracts, the SEBI, in consultation with the Commodity Derivatives Advisory Committee (CDAC), vide circular no. SEBI/HO/CDMRD/DMP/2017/116, dated 16th October, 2017 has specified the guidelines for deciding appropriate settlement mode, which

are as follows:

- The first preference of settlement type shall always be by way of physical delivery.
- Any exemption from the above i.e. cash settlement of commodity derivatives contract, may be considered only in following cases, subject to proper justifiable reasons – difficulty in physical delivery due to any reason including its intangibility or difficulty in storage due to low shelf life or inadequate storage infrastructure or inadequate logistics and transport infrastructure or when there is availability of reliable benchmark price of the commodity which can be used as a reference for settlement price.

#### **Amendment to Securities and Exchange Board of India (International Financial Services Centres) Guidelines, 2015**

In order to further streamline the operations at IFSC, based on the internal discussions and consultations held with the stakeholders, it has been decided to further amend Guidelines 8 (2) which shall now read as follows :-

"8 (2) Any entity based in India or in a foreign jurisdiction may form a company in IFSC to act as a trading member of a stock exchange and/or a clearing corporation in IFSC."

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