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By

SBS and Company LLP
Chartered Accountants

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Dear Readers,

I wish you a merry Christmas. The extension of due date till 31st March 19 for GST audit makes the festive more peaceful and enjoyable both for us and the clients. I request all the Clients to take this extended period as an opportunity and file the annual return diligently.

In this edition, we bring to you certain important articles. The article on 'Alternative Investment Funds – SEBI and FEMA Regulations' will make you understand the other venues for raising funds to carry the business much efficiently. The article on 'NFRA – Will they apply to Body Corporate' is thought provoking and it is important that Ministry of Corporate Affairs release a clarification as to which body corporates the provisions of NFRA rules will apply.

The article on 'Differential Treatment Inter- se Creditors' deals with the recent judgment of Hon'ble NCLAT in the matters of Binani Industries Limited, wherein the Hon'ble NCLAT rejected the resolution plan which discriminated the creditors who are placed similarly. This is an important contribution to the jurisprudence on IBC and it will have significant effect in upcoming resolutions. The journal also deals with key recommendations by Insolvency Committee on Cross Border Insolvency which is to be adopted by India to tackle the issues in cross border insolvency matters.

The article on 'Dematerialisation of Securities by Unlisted Companies' deals with issues and compliance aspects on the said subject. The article on 'Fair Market Value – Not more and Not less' deals with the subject of taxing the amounts received more or less than Fair Market Value under the Income Tax law.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

Thanking You,

Suresh Babu S
Chairman &Managing Partner

FEMA

ALTERNATIVE INVESTMENT FUNDS

Contributed by CA Murali Krishna G & CA Bharani

Background:

Till 2012 Investment Management regulations of SEBI were limited only to Mutual Funds (MF), Collective Investment Schemes (CIS), Venture Capital Funds (VCF) and Portfolio Managers, and were well regulated. In the absence of dedicated regulations, other private pools of capital and investment vehicles like PE Funds (Private Equity), Real Estate Funds, etcused VCF route for investments. This defeated the basic purpose of VCF which was promotion of early stage companies. As the concessions and other benefits generally available to VCFs cannot be extended to other funds, the need was felt to recognize such other funds as "Alternative Investment Funds" as a distinct asset class apart from promoter holdings, creditors and public investors.

Accordingly, SEBI has released a concept paper in August 2011 followed by issuing SEBI (Alternative Investment Funds) Regulations (herein after referred as 'AIF Regulations') in May 2012 and were amended time to time. SEBI (Venture Capital Funds) Regulations, 1996 were repealed and related provisions were subsumed in to AIF Regulations. However, SEBI (Foreign Venture Capital Investor) Regulations are not subsumed and are still governed separately.

Concept:

"Alternative Investment Fund" is a privately pooled investment vehicle which collects funds from investors, whether Indian or foreign, for investing it in accordance with a defined investment policy for the benefit of its investors. AIF can be of different types like Angel Fund, PE Fund, PIPE Fund, Venture Capital Fund, Debt Fund, Infrastructure Equity Fund, Real Estate Fund, SME Fund, Social Venture Fund and Strategy Fund (like hedge fund). AIFs float various schemes for investment based on risk appetite of its investors / unit holders.

The investments of AIF are managed by a person or entity which is called as 'Manager', and such person or team which manages investments shall have enough expertise as stipulated by SEBI. A person or persons who set up an AIF is called as "Sponsor" and includes a promoter in case of a company and designated partner in case of an LLP. A Sponsor can also act as Manager subject to having relevant expertise.

Investible Funds means corpus of AIF net of estimated expenditure for administration and management of the fund.

Eligibility:

AIF can be formed as a company, trust, LLP or a body corporate. However, a family trust, an ESOP trust, an employee welfare trust, funds managed by a securitization company under SARFAESI Act or any other pool of funds which is directly regulated by any other regulator in India, which have functions like AIF, will not be considered as AIF.

Registration

No person or entity shall act as AIF unless it has obtained a certificate of registration from SEBI. Any fund which is already under existence by the time of commencement of AIF Regulations, should get itself registered within six months therefrom. Such existing funds will be allowed to complete their agreed tenure but will not be allowed to raise fresh monies or commitments from investors till registration is granted. Such existing funds need not obtain registration if they do not propose to raise fresh commitments from investors, subject to providing information as required by SEBI.

As VCF regulations are subsumed with AIF Regulations, an existing VCF can seek re-registration as AIF subject to approval by 2/3rd of its investors by value of their investment.

An AIF shall seek registration in one the categories mentioned hereunder:

Category I AIF: It includes such funds which are perceived to have positive spill over effects on the economy, and for which SEBI or Government or other regulators in India might consider providing incentives or concessions. Funds like Angel Fund, SME Fund, Social Venture Fund, VCF or similar funds which invest in early start up or early stage ventures (including social ventures) or sectors / areas which the government considers as socially or economically desirable fall under this category. Such funds shall be close ended.

Category II AIF: It includes such funds which do not fall under Category I and Category III AIF mentioned herein. Funds like PE or debt funds for which no specific incentives or concessions are given by government fall under this category. Such funds shall be close ended.

Category III AIF: It includes such funds which employ diverse or complex trading strategies and may employ leverage including through investment in listedor unlisted derivatives. Typical Hedge funds fall under this category. These funds can be either close ended or open ended, and no concessions or incentives are provided by government.

Once registered, an AIF cannot change its category except with approval of SEBI. Only such AIF which has not raised funds from investors can apply for change in category, along with fresh application fee as mentioned below. There shall be no registration fee for change in category.

Tenure of Category I and II AIF, being close ended, shall be minimum of three years. An extension can be permitted up to 2 years subject to approval of 2/3rd investors by value. In the absence of such approval, AIF shall fully liquidate itself within one year from end of fund tenure or extended tenure.

Application for grant of certificate shall be made in Form A provided in First Schedule of AIF Regulations, and shall be accompanied by a non-refundable fee as mentioned below:

Particulars	Amount INR
Application Fee	100,000
Registration Fee (Other than Angel Funds)	500,000
Scheme Fee (Other than Angel Funds)	100,000
Re-registration Fee	100,000
Registration Fee for Angel Funds	200,000

Information Memorandum

An AIF shall raise monies from investors (by issuing units) for each scheme under it through a placement memorandum / information memorandum. Such memorandum typically contains details of strategy, purpose and methodology of investment, details of manager, targeted investors and size of fund, tenure of AIF or scheme, risk management tools, manner of winding up, and such other information as may be necessary for the investor to take informed decision on investing in AIF. Any alteration to such placement memorandum shall be made with the consent of 2/3rd of investors in value. AIF may launch an investment scheme subject to filing of information memorandum with SEBI at least 30 days prior to its launch along with fees mentioned above.

General Investment Conditions and Restrictions for AIF:

i. Each scheme of AIF shall have a corpus of at least INR 20 Cr
ii. Maximum number of investors per scheme shall be 1000, subject to provisions of Companies Act governing members in case AIF is a company
iii. Minimum value of investment by each investor shall be INR 1 Cr. In case of investors who are employees or directors of AIF or its manager, the minimum value of investment shall be INR 25 Lacs.
iv. The manager or sponsor shall have a continuing interest of not less than 2.5% or INR 5 Cr whichever is less. In case of Category III AIF, the same shall be 5% or 10 Cr respectively. And this interest shall not be through waiver of their management fee.
v. An AIF shall not solicit or collect funds except by way of private placement
vi. Category I and II AIF shall invest not more than 25% of its investible funds in one investee company. In case of Category III AIF, it shall be not more than 10% of its investible funds.
vii. Uninvested portion of AIF funds, if any, can be invested in short term liquid assets of high quality like treasury bills, commercial papers, etc till their deployment as per investment objective
viii. The units of a close ended AIF may be listed on any stock exchange subject to a minimum tradable lot of INR 1 Cr.

Category Wise Additional Conditions

Category I AIF:

i. It shall primarily invest in investee companies or venture capital undertakings (VCU) as specified in AIF Regulations
ii. It may invest in units of another Category I AIF of same sub-category (like SME Fund, Infrastructure Fund, etc)but not in units of Fund of Funds. This is considering the benefits that may be available to Category I AIF.
iii. It shall not borrow funds directly or indirectly or engage in any leverage except for meeting temporary funding requirements for not more than thirty days, on not more than four occasions in a year and not more than 10% of the investible funds.
iv. Conditions specific to sub-category of Category I AIF are as below:

Sub-Category	Additional Conditions
Venture Capital Fund (VCF)	a. At least 2/3rd of investible funds shall be invested in unlisted equity or equity instruments of a VCU or companies listed or proposed to be listed on SME exchange or SME segment of an exchange b. Not more than 1/3rd of investible funds can be invested in IPO of a VCU proposed to be listed, or in debt instruments of VCU in which investment is already made, or preferential allotment of a listed company subject to lock in of one year,or equity / equity linked instruments of a financially weak company or a sick industrial company whose shares are listed
SME Funds	a. At least 75% of investible funds shall be invested in unlisted equity or equity instruments of a venture capital undertaking (VCU) or companies listed or proposed to be listed on SME Exchange or SME Segment of an exchange
Social Venture Funds	a. At least 75% of the investible funds shall be invested in unlisted securities or partnership interest of social ventures. b. May accept grants towards such social ventures from any person which shall be minimum of INR 25 Lacs, subject to condition that no profits or gains shall accrue to such grantor c. Can provide grants to social ventures, subject to disclosure in placement memorandum
Infrastructure Funds	a. At least 75% of the investible funds shall be invested in unlisted securities or units or partnership interest of VCU or investee companies or special purpose vehicles which are into operating, developing or holding infrastructure projects b. In addition, can invest in listed securitized debt instruments or listed debt securities of investee companies or special purpose vehicles, which are engaged in or formed for the purpose of operating, developing or holding infrastructure projects.

v. A VCF or SME Fund may enter in to agreement with merchant banker for subscribing under-subscribed portion of an issue or to receive or deliver securities in the process of market making under SEBI ICDR Regulations

Category II AIF

i. It shall invest primarily in unlisted investee companies.
ii. Unlike Category I AIF, Category II AIF may invest in units of any Category I or Category II AIF, but not in units of other Fund of Funds.
iii. It shall not borrow funds directly or indirectly or engage in any leverage except for meeting temporary funding requirements for not more than thirty days, on not more than four occasions in a year and not more than 10% of the investible funds.
iv. It may enter in to agreement with merchant banker for subscribing under-subscribed portion of the issue or to receive or deliver securities in the process of market making under SEBI ICDR Regulations
v. It may engage in hedging subject to guidelines of SEBI

Category III AIF

i. It may invest in securities of listed or unlisted investee companies or derivatives or complex or structured products.
ii. Apart from above, it may invest in units of Category I or Category II AIFs, but not any Category III AIF or in units of other Fund of Funds.
iii. It may engage in leverage or borrow subject to consent from the its investors and subject to a maximum limit, as may be specified by SEBI. And shall disclose required information in this regard to SEBI on a periodical basis.
iv. It shall also be regulated through issuance of additional directions by SEBI

ANGEL FUNDS:

An Angel Fund is a sub-category of Category I AIF that raises funds from Angel Investors and invests as per investment objectives specified in placement memorandum. All the regulations and conditions as applicable to Category I AIF are also applicable to Angel Funds subject to few changes which are provided in subsequent paragraphs.

Angel Investor means any person who proposes to invest in an angel fund and satisfies oneof the following conditions, namely,
(a) an individual investor who has net tangible assets of at least INR 2 Cr excluding value of his principal residence, and whohas early stage investment experience (in investing in start-up or other early stage ventures) orwho has experience as a serial entrepreneur (i.e., promoter of more than one start-up venture) orwho is a senior management professional with at least 10 years of experience;or
(b) a body corporate with a net worth of at least INR 10 Cr; or
(c) any AIF registered under AIF Regulations or a VCF registered under erstwhile SEBI (Venture Capital Funds) Regulations, 1996.

An AIF which is already registered under AIF Regulations can be converted in to an Angel Fund only if it has not made any investments, subject to such conditions as apply to a fresh AIF registration.

Investment Conditions and Restrictions for Angel Funds:

i. An Angel fund shall only raise funds by way of issue of units to angel investors.
ii. It shall have a corpus of at least INR 10 Cr.
iii. It shall accept, up to a maximum period of three years, an investment of not less INR 25 Lacs from an angel investor.
iv. It shall raise funds through private placement only by issue of information memorandum or placement memorandum
v. It may launch an investment scheme subject to filing of information memorandum with SEBI at least 10 days prior to its launch. Scheme fee is not applicable to angel funds.
vi. No scheme of angel fund shall have more than 200 angel investors (previously restricted to 49), subject to provision of Companies Act governing members in case Angel Investor is a company
vii. It shall invest in VCUs which comply with age criteria specified by DIPP from time to time, which have a turnover of less than INR 5 Cr and which are not promoted or sponsored by or related to an industrial group whose group turnover exceeds INR 300 Cr
viii. Its investment in any VCU shall not be less than INR 25 Lacs and shall not exceed INR 5 Cr, and such investment shall be locked in for a period of 1 year
ix. It shall not invest in associates
x. It shall not invest more than 25% of the total investments under all its schemes in one VCU
xi. The Manger or Sponsor of angel fund shall have continuing interest of not less than 2.5% or INR 50 Lacs whichever is lower, and it shall not be through waiver of management fee.
xii. Units of angel fund shall not be listed on any stock exchange.
xiii. An Angel Fund is not permitted to invest in overseas companies

Other Information– all AIFs:

a. All AIFs shall have internal policies and procedures for conduct of its business and shall review them on periodical basis to ensure continued appropriateness.
b. If the corpus of AIF is more than INR 500 Cr, such AIF shall appoint a custodian for safekeeping of its securities. In case of Category III AIF, appointment of custodian is mandatory irrespective of corpus size.
c. Any change in sponsor or manager shall be informed to SEBI. Prior approval of SEBI is required in case of change in control of AIF.
d. Sponsors and managers shall establish and implement policies and procedures to ensure avoidance of conflict of interest, and ensure such conflicts are resolved in the interest of investors
e. All AIFs shall ensure transparency in the conduct of their business by disclosing required information to investors on financial & risk management, operations, legal actions, fee ascribed to Manager / Sponsor, or any other material liability affecting AIF.
f. The manager and sponsor shall maintain records in respect of assets under the scheme / fund, valuation policies and practices, investment strategy, etc for a period of five years after the winding up of the scheme / fund.
g. All AIFs shall file such reports as may be required by SEBI in respect of its activities
h. SEBI may suo moto or up on receipt of compliant or information cause inspection of books of account or any other record / document of AIF, and such AIF shall cooperate with the inspecting authorities.
i. All AIFs shall strictly adhere to disclosure, operational, prudential and reporting norms stipulated by SEBI time to time

FEMA Regulations

1. RBI vide its AP Dir Series Circular No. 49, dated April 30, 2007, has permitted Indian VCFs to invest only in equity and equity linked instruments of offshore VCUs, subject to overall limit of USD 500 Mn.
2. Accordingly, VCFs registered under erstwhile VCF Regulations were permitted to invest in Offshore VCUs having an Indian connection, subject to condition that the maximum investment can be up to 15% of investible funds of VCF (increased to 25% w.e.f October 1, 2015) and that they shall not invest in joint ventures / wholly owned subsidiaries while investing overseas.
3. An Indian VCF desirous of investing abroad shall approach SEBI, and SEBI shall approve such applications on first come first serve basis within the overall limit specified by RBI (USD 500 Mn at that time).
4. Though AIFs (except Angel Funds) are permitted to invest in securities of companies incorporated outside India as per Regulation 15(1)(a) of AIF Regulations 2012, RBI permitted AIFs to invest abroad only vide its AP Dir Series Circular No. 48, dated December 9, 2014.
5. Based on such RBI guidelines, SEBI issued circular on October 1, 2015 permitting AIFs to invest abroad within USD 500 Mn (combined for both AIF and VCF).
6. As like VCFs, AIFs desirous of investing abroad shall approach SEBI, and SEBI shall approve such applications within the overall limit of USD 500 Mn. No separate approval of RBI is required for such investments.
7. Such approval is valid for 6 months, and in case AIF doesn't invest abroad within 6 months, the approval shall lapse, and SEBI can allot such limit to next applicant.
8. The above mentioned USD 500 Mn was increased to USD 750 Mn by SEBI (vide its circular dated July 3, 2018) in consultation with RBI. Vide same circular SEBI mandated the AIFs to disclose their utilization of approved overseas investment limits within 5 working days of its utilization.

This article is contributed by CA Murali Krishna G, Partner of SBS and Company LLP, Chartered Accountants.
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COMPANIES ACT 2013

DEMATERIALISATION OF SECURITIES

Contributed by CS D V K Phanindra

This article is an attempt to list out the provisions/compliances of the rules notified in connection with the Dematerialization of Securities by Unlisted Public Companies.

Vide the Companies (Prospectus and Allotment of Securities) Third Amendment Rules, 2018, Dt: 10.09.2018, notified to be effective from **02.10.2018**, the Ministry has mandated that an Unlisted Public Company shall:

- ➔ issue of Securities in Dematerialised form only; and
- ➔ facilitate dematerialisation of all its existing Securities.

in accordance with the provisions of Depositories Act, 1996 and Regulations made there under.

It would be not out of place to mention that in respect of listed entities, SEBI had mandated that except in case of transmission or transposition of securities, requests for effecting transfer of securities shall not be processed unless the securities are held in the dematerialized form with a depository. The due date before which dematerialization was to be done was initially fixed as 05.12.2018, and now the same has been extended, to be effective from **01.04.2019.**

Compliances as mandated under the Companies (Prospectus and Allotment of Securities) Third Amendment Rules, 2018:

- ➔ Every Unlisted Public Company:

a) Shall facilitate Dematerialisation of all its existing securities; and shall obtain International Security Identification Number (ISIN) for each type of security and shall inform all its existing security holders about such facility;

b) Making any offer for issue of any securities or buy-back of securities or issue of shares or rights offer shall ensure that before making such offer, entire holding of securities of its promoters, directors, KMP has been dematerialised in accordance with the provisions of Depositories Act, 1996 and regulations made there under.

c) Ensure timely payment of fees to the Depository, Registrar and Share Transfer Agent in accordance with the agreement executed between the parties;

d) Maintenance of Security Deposit at all times of not less than 2 years fees with the Depository, Registrar and Share Transfer Agent in such form as may be agreed between the parties;

e) Ensure compliance with the regulations or directions or guidelines or circulars, if any, issued by the SEBI or Depository from time to time with respect to dematerialisation of shares of unlisted Public Companies and matters incidental or related thereto.

f) Shall not make offer of any securities or buy-back of its securities or any bonus or rights shares till the payments to the Depositories or RTAs, are made.

g) Ensure compliance of the provisions of the Depositories Act, 1996, the [1]Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 and the Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993, as amended, shall apply mutatis mutandis to dematerialization of securities of Unlisted Public Companies.

h) Shall submit Audit Report i.e., Reconciliation of Share Capital Audit Report, as required under Regulation 55A of the [2]Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996, read with SEBI Circular Dated: 31.12.2002, with the Registrar of Companies concerned, on a **half-yearly basis.**

➔ Every holder of Securities of an Unlisted Public Company:

a) Who intends to transfer securities on or after 02.10.2018, shall get all such securities dematerialised before transfer;

b) Who subscribes to any securities of an unlisted Public Company (whether by way of Private Placement or Bonus Shares or Rights offer) on or after 02.10.2018, shall ensure that all his existing securities are held in Dematerialised form before such subscription

➔ The grievances, if any of the Security holders shall be filed with Investor Education and Protection Fund Authority.

➔ The Investor Education and Protection Fund Authority shall initiate any action against a Depository or RTA after prior consultation with SEBI.

Issues:

There should have been a threshold limit, as to either Share capital or Turnover or Borrowings, for making the dematerialisation applicable to such unlisted Public Companies, the lack of which is putting a Company with Share capital of 5 lakhs; and nominal turnover, and a Company with a capital of 10 Crores; and a turnover of 100 Crores at the same level.

The adherence of the provisions, and the cost of compliance, will rise, and accordingly, closely held/family held Public Companies will be those, which severally effected of the increased cost of compliance.

[1]Now replaced with Securities and Exchange Board of India (Depositories and Participants) Regulations, 2018, Dated: 03.10.2018.

[2]Regulation 76 of the Securities and Exchange Board of India (Depositories and Participants) Regulations, 2018, Dated: 03.10.2018.

On a positive note, the compliance has opened-up a new window of services to the Professionals, as the Reconciliation of Share Capital Audit, can be issued by a Chartered Accountant, Company Secretary and Cost Accountant in practice.

With reference to the submission of the Reconciliation of Share Capital Audit, the same is to be prepared for the **half year ended02.10.2018 to 31.03.2019,** and filed with the Registrar of Companies concerned, on or before **30.04.2019.**

This article is contributed by CS D V K Phanindra, The author can be reached at phanindra@sbsandco.com

COMPANIES ACT 2013

NFRA RULES - WILL THEY APPLY TO LLP

Contributed by CS D V K Phanindra

This article is an attempt to list out the provisions/compliances by the applicable entities, in respect of the provisions of National Financial Reporting Authority, constituted under provisions of Section 132 of the Companies Act, 2013.

A specific thrust is put-in to see as to which type of entities, will come under the scope "**Bodies Corporate (Other than Companies)".**

The National Financial Reporting Authority [NFRA], was constituted with effect from 01.10.2018, and working provisions, functions, have been notified vide NFRA Rules, Dt: 13.11.2018.

Need of NFRA:

- Increase in financial scams in the recent past;
- Increase in non-performing assets (NPA) with Banks and other Financial institutions;
- To have a strong regulator to oversee the process of Financial Reporting; and frame required regulations and compliance mechanism, to see proper implementation of the Financial Reporting.

Objectives/Powers of NFRA:

- Recommending Accounting Standards and Auditing Standards;
- Monitoring and enforcing Compliance with accounting standards and auditing standards;
- Oversee the quality of Service and Suggesting measures for improvement;
- Financial Reporting Advocacy and Education;
- Power to Investigate and initiate Disciplinary proceedings.

Applicability of provisions of NFRA:

The NFRA shall have power to monitor and enforce compliance with accounting standards, auditing standards, oversee the quality of service and undertake investigation of the auditors of the following class of companies and bodies corporate, namely:-

➔ Companies whose securities are listed on any stock exchange in India or outside India;

➔ Unlisted Public Companies having:

- o Paid up Capital is Rs. 500 Crores or more; or
- o Turnover is Rs. 1000 Crores or more; or
- o Aggregate of Outstanding Loans, Debentures and Deposit is Rs. 500 Crores or more in immediately preceding Financial Year.

This article is an attempt to list out the provisions/compliances by the applicable entities, in respect of the provisions of National Financial Reporting Authority, constituted under provisions of Section 132 of the Companies Act, 2013.

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➔ Companies whose securities are listed on any stock exchange in India or outside India;

➔ Unlisted Public Companies having:

- o Paid up Capital is Rs. 500 Crores or more; or
- o Turnover is Rs. 1000 Crores or more; or
- o Aggregate of Outstanding Loans, Debentures and Deposit is Rs. 500 Crores or more in

The Companies Act, 2013, defines ***Body Corporate*** as below:

(11) "**Body corporate**" or "**Corporation**" includes a company incorporated outside India, but does not include:

(i) A Co-operative Society registered under any law relating to Co-operative Societies; and

(ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf;

(20) **"Company**" means a company incorporated under this Act or under any previous company law;

From the above, it can be seen that the definition is an inclusive definition, excluding the following i.e., A Co-operative Society; and any other body corporate (not being a Company as defined in this Act.

However, to the best of knowledge of the author, there is no notification from the Central Government, excluding any Body Corporate, falling under the purview of the definition of Body Corporate under the Companies Act, 2013.

In view of the above, the Author, on a plain reading of the NFRA rules, read with the definition of **Body Corporate** under the Companies, Act, is of the view/opinion that **LIMITED LIABILITY PARTNERSHIPS (LLPs),** will strictly fall under the scope of Bodies Corporate, and accordingly, the applicability of the provisions of NFRA rules to **LLPs.**

Since the relevant NFRA-1, forms are not yet made available, the Ministry has to come-up with clarifications as to the applicability of Rules with reference to **Body Corporates**, to clear the persisting ambiguity.

This article is contributed by CS D V K Phanindra, The author can be reached at phanindra@sbsandco.com

DIRECT TAXES

FAIR MARKET VALUE - NOT MORE AND NOT LESS

Contributed by CA Suresh Babu S & CA Ramaprasad T

One of the famous quotes from Warren Buffet *'Long ago, Ben Graham taught me that Price is what you pay; Value is what you get'.* This statement is true not only from investor viewpoint but also from taxman viewpoint!

Income Tax Act, 1961 ('Act') contains provisions which focus primarily on value rather than nature of receipt, whether revenue or capital. Sec 2(22B)of the Act has defined the term 'Fair Market Value' (FMV) in relation to Capital Asset. However, reference to FMV is made in the Act in various scenarios and not limited to capital asset only though it was defined for such.

Receipt more than FMV:

Finance Act 2012 has inserted clause (viib) to Section 56 (2) with effect from 01.04.2013, which provides for chargeability of share premium received from a person[1] who is resident in the hands of a company in which public are not substantially interested, under the head income from other sources. Though the receipt is not in the nature of income, it was made taxable from Assessment Year 2013-14. The amendment which brought insertion of new clause was as part of measures to prevent generation and circulation of unaccounted money[2] .

Income is chargeable to the extent the amount received as a consideration for shares exceeds FMV of shares. FMV for this purpose would be highest of value of share determined as per the rules[3] or as may be substantiated by the company to the satisfaction of AO.

To attract the provisions of Sec 56(2)(viib) the following conditions are to be satisfied:

1. A company in which public are not substantially interested has issued shares for consideration;
2. Shares are issued at a premium;
3. Consideration for shares is received from resident[4] ;
4. The consideration received is in excess of FMV of shares.
5. Company has not able to substantiate the excess receipt with reference to FMV i.e the grounds for issue price which is in excess of FMV.

The provisions of Sec 56(2)(viib) shall not apply[5] to a 'Start Up' which complies with the conditions mentioned below:

(1) The Eligible Start up is a Pvt Ltd Company;
(2) The aggregate paid up capital and share premium after the proposed issue does not exceed Rs. 10 Crores;

[1]As defined under Section 2(31)
[2]As referred to in Memorandum to FA 2012.
[3]Rule 11U and 11UA.
[4]Not necessarily from the same person
[5]Notification dated 11/04/2018

(3) The investor or proposed investor, who propose to subscribe to the issue of shares of the start-up has (i) Avg. returned income of Rs. 25 Lakhs or more in the preceding three financial years or (ii) Net worth of Rs. 2 Crores or more on the last date of preceding financial year;

(4) Start up has obtained a report from a Merchant Banker specifying the FMV of the shares as per the Rule 11UA of the Income-tax Rules, 1962.

Application[6] has to be made to the Board for getting relief from applicability of provisions of Sec 56(2)(viib).

Receipt less than FMV:

Sec 56(2)(X) provides taxability of income in case any person receives from any other person any property (which includes shares and securities) either without consideration or for consideration less than FMV subject to base limit of Rs. 50,000/-. Exceptions are provided for receipts from specified persons i.e. relatives etc. However, unlike sec 56(2)(viib) non-resident is not excluded for this purpose.

This section does not require the receipt should be for issue of shares. If shares of private limited company are purchased for less than FMV the difference between FMV of the share and amount paid will be treated as income in the hands of recipient for the purpose of this section.

Difference between provisions of Sec 56(2)(viib) and (X) are tabulated as follows:

Particulars	Sec 56(2)(viib)	Sec 56(2)(X[7])
Applicability	A Company in which public are not substantially interested	Receipt by person from another person
Trigger Point	Amount received for issue of shares from a person, who is resident, is more than FMV	Shares are received without consideration or for a consideration paid which is less than FMV subject to limit of Rs. 50,000
Non-applicability	Amount ***received*** by Venture Capital Undertaking from Venture Capital Fund/Venture Capital Company/ Amount received ***from*** Non-resident/ Amount received from an Investor by an Eligible Start -up subject to conditions	Shares are received from relatives/ on occasion of marriage/under a will or inheritance/ on contemplation of death of payer or donor/ Local Authority/ Charitable trust etc
Taxable Component	Amount received in excess of FMV of shares	Amount of FMV, in case where no consideration paid or the difference between FMV of share and amount paid subject to amount of Rs. 50,000/-

[6] Form 2

[7] With reference to shares only

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INSOLVENCY & BANKRUPTCY

DIFFERENTIAL TREATMENT INTER SE CREDITORS

Contributed by CA Suresh Babu S & CA Sri Harsha , CS DVK Phanindra

The recent judgment of Hon'bleNational Company Law Appellate Tribunal (NCLAT), New Delhi in the case of **Binani Industries Limited v Bank of Baroda**, has made significant observations on certain aspects pertaining to Insolvency & Bankruptcy Code, 2016 (IBC). Though the judgement contains various aspects, decided by the Hon'ble NCLAT, in this article, we wish to deliberate on the aspect which is deliberated by Hon'ble NCLAT with respect to discriminatory or differential treatment among similarly placed creditors while submission of resolution plan by resolution applicant(s). The Hon'ble NCLAT has stated that differential or discriminatory treatment among similarly placed creditors is not what is envisaged under the IBC or its regulations. Before proceeding to further examine, let's get the facts in place to appreciate the judgment.

The matter pertains to the corporate insolvency resolution process (CIRP) of Binani Cement Limited (Corporate Debtor - CD). Corporate Debtor is a flagship subsidiary of Binani Industries Limited. After the commencement of CIRP of CD, the Resolution Professional (RP) has constituted Committee of Creditors (CoC) and started accepting resolution plans. The RP has received resolution plan from one resolution applicant 'Rajputana Properties Private Limited' (Rajputana). There was also another resolution plan which was submitted by 'Ultratech Cement Limited' (Ultratech) which was not considered by CoC for various reasons.

The CoC has met to consider such resolution application of Rajputana and approved with 99.43% and approved the plan. However, 10.53% of CoC were forced to vote in favour of resolution plan after recording protest notes. The allegation of such creditors is that they have not been treated with equitably when compared with other 'Financial Creditors' who were corporate guarantee beneficiaries of CD.

The resolution plan submitted by Rajputana is considered by the Hon'ble NCLAT, which is as under:

S No	Particulars	Voting Share	Verified Claim (In Rs Crores)	Proposed Payment (In Rs Crore)	Percentage
1	Insolvency Resolution Process Costs	NA	114.08	114.08	100%
2	Workmen Wages	NA	18	18	100%
FINANCIAL CREDITORS WITH DIRECT EXPOSURE TO CORPORATE DEBTOR					
3	Edelweiss Asset Reconstruction Company	42.9%	2775.82	2775.82	100%
4	IDBI Bank Limited	5.2%	335.85	335.85	100%
5	Bank of Baroda	6.6%	427.69	427.69	100%
6	Canara Bank	5.7%	370.34	370.34	100%
7	Bank of India	1.5%	94.66	94.66	100%
8	State Bank of India	0.6%	36.89	36.89	100%
FINANCIAL CREDITORS TO WHOM CORPORATE DEBTOR WAS A GURANTOR					
9	IDBI Bank Limited (Dubai Branch)	24.2%	1567	1567	100%
10	**Export-Import Bank of India**	**9.6%**	**620**	**450**	**72.59%**
11	**State Bank of India (Hong Kong)**	**0.6%**	**37**	**3.7**	**10%**
12	Bank of Baroda (London)	2.7%	172	172	100%
13	State Bank of India (Bahrain)	0.4%	25	25	100%
14	Syndicate Bank	0.1%	7	7	100%
OPERATIONAL CREDITORS (OTHER THAN WORKMEN)					
15	Unrelated Parties	NA	443.23	151	33%
16	Related Parties	NA	60.14	Nil	NA
17	Statutory Liabilities	NA	177.5	33.1	19.3%
18	Equity/Working Capital Infusion	NA	NA	350	NA
Total			**7289.05**	**6932.46**	--

The Hon'ble NCLAT has observed that Financial Creditors such as Edelweiss, IDBI, Bank of Baroda, Canara Bank, Bank of India and State Bank of India has been provided with 100% of verified claim. However, Rajputana has given lesser percentage to Export Import Bank [72.59%] and State Bank of India (Hong-Kong) [10%]. The discrimination has been justified by Rajputana by stating that some of the financial creditors have direct exposure to the CD and whereas the other financial creditors are just guarantors to the CD. The Hon'ble NCLAT even observed that among the guarantors, certain financial creditors were proposed to be paid in full and others at a haircut which leads to discrimination in creditors who are similarly placed.

The counsel appearing for Rajputana tried to justify the discrimination by stating that EXIM bank has been allotted 72.59% for the reason, that the principal borrower Binani Industries Limited is also facing CIRP and regarding State Bank of India (Hong Kong), the amounts cannot be paid in full because they were never granted opportunity to undertake diligence of underlying plants in China and no opportunity to appropriately analyze the commercial viability.

The counsel appearing for the EXIM bank has stated that they have voted in favour of the resolution plan because failing so, the resolution applicant stated that they will pay them only liquidation value amounting to almost Nil and nothing more.

The Hon'ble NCLAT has referred to the judgment passed by the same Tribunal in the case of Central Bank of India v Resolution Professional of the **Sirpur Paper Mills Limited & Others** – Company Appeal (AT) (Insolvency) No. 526 of 2018, wherein it was held that Regulation 38(1)(b) and (c) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are inconsistent with the provisions of IBC and accordingly found to be void. The Hon'ble NCLAT has further stated that any resolution plan which provides for liquidation value to operational creditors or dissenting financial creditors without any other reason to discriminate between two set of creditors similarly placed such as financial creditors or operational creditors cannot be approved being illegal.Keeping the above in mind, the Hon'ble NCLAT has framed the following question to be addressed – ***Whether the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' is discriminatory?***

To answer the above, Hon'ble NCLAT has also pursued another resolution plan(revised) submitted by Ultratech which was not considered by CoC for discriminatory reasons. The Hon'ble NCLAT after perusing the process document and various timelines in which Ultratech has submitted its resolution plan stated that CoC acted without application of mind and the discrimination in approving the resolution plan submitted by Rajputana is apparent. The Hon'ble NCLAT further observed that the revised resolution plan submitted by Ultratech is in excess to the tune of Rs. 203.1 Crores (approx.), in comparison with the revised resolution plan submitted by Rajputana, favouring the financial creditors. The Hon'ble NCLAT also perused the terms of resolution plan submitted by Ultratech:

S No	Particulars	Verified Claim (In Rs Crores)	Proposed Payment (In Rs Crore)	Interest
1	Insolvency Resolution Process Costs	115.91	115.91	NA
2	Workmen Wages	18.01	18.01	NA
FINANCIAL CREDITORS WITH DIRECT EXPOSURE TO CORPORATE DEBTOR				
3	Edelweiss Asset Reconstruction Company	2775.82	2775.82	217.63
4	IDBI Bank Limited	335.85	335.85	26.33
5	Bank of Baroda	427.69	427.69	33.53
6	Canara Bank	370.34	370.34	29.03
7	Bank of India	94.66	94.66	7.42
8	State Bank of India	36.89	36.89	2.89
9	Oriental Bank of Commerce	0.72	0.72	0.06
FINANCIAL CREDITORS TO WHOM CORPORATE DEBTOR WAS A GURANTOR				
9	IDBI Bank Limited (Dubai Branch)	1567	1567	Interest will be paid @ 10% pa quarterly rests if the same is not being paid to the creditor
10	**Export-Import Bank of India**	**619.95**	**619.95**	**48.6**
11	**State Bank of India (Hong Kong)**	**36.82**	**36.82**	Interest will be paid @ 10% pa quarterly rests if the same is not being paid to the creditor
12	Bank of Baroda (London)	171.57	171.57	13.45
13	State Bank of India (Bahrain)	24.56	24.56	1.93
14	Syndicate Bank	7.05	7.05	0.55
OPERATIONAL CREDITORS (OTHER THAN WORKMEN)				
15	Unrelated Parties	438.13	438.13	Nil
16	Related Parties	60.14	Nil	Nil
17	Statutory Liabilities	177.5	177.5	Nil
18	Equity/Working Capital Infusion	NA	350	NA
Total		**7289.05**	**7568.89**	**381.62**
Total amount with interest				**7950.34**

The Hon'ble NCLAT has observed that on a perusal of both the resolution plans, it is evident that the resolution plan submitted by Rajputana has discriminated some of the Financial Creditors who are equally situated and not balanced other stake holders, such as operational creditors and accordingly upheld the order of adjudicating authority (National Company Law Tribunal – NCLT) who found the resolution plan submitted by Rajputana was discriminatory.

The counsel for Rajputana also stated that the process of Insolvency Resolution is in the domain of CoC and jurisdiction of the NCLT is limited. He also stated that CoC, RP and Resolution Applicants are bound by 'process document' which was prepared under the mandate of Section 25(2)(h) of IBC. The Hon'ble NCLAT has stated adherence to process document and non-adherence to provision of Section 25(2)(h) will render the whole process illegal and stated various instances wherein the CoC has ignored the provisions of Section 25(2)(h).

The Hon'ble NCLAT then proceeded with an important observation that the ***maximization of value of assets of the corporate debtor cannot be ignored nor it can be ignored that the same should balance all the stakeholders. If the operational creditors are ignored and provided with 'liquidation value' on the basis of misplaced notion and misreading of Section 30(2)(b) of 'I&B Code', then in such case no creditor will supply the goods or render services on credit to any 'Corporate Debtor'. All those who will supply goods and provide services, will ask for advance payment for such supply of goods or to render services which will be against the basic principle of 'I&B Code' and will also affect the Indian economy. Therefore, it is necessary to balance the 'Financial Creditors' and the 'Operational Creditors' while emphasizing on maximization of assets of 'Corporate Debtor'. Any 'Resolution Plan' if shown to be discriminatory against one or other 'Financial Creditor' or the 'Operational Creditor', such plan can be held against the provisions of the 'I&B Code'.***

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INSOLVENCY & BANKRUPTCY

KEY RECOMMONDATIONS OF INSOLVENCY COMMITEE ON CROSS BORDER INSOLVENCY

Contributed by CA Suresh Babu S & CA Sri Harsha , CS DVK Phanindra

The Insolvency Committee (Committee) constituted by Ministry of Corporate Affairs submitted its first report in March 2018 which recommended amendments to Insolvency & Bankruptcy Code (IBC/Code) based on the experience gained from implementation of code. The Committee decided to submit its recommendations on cross border insolvency separately given the complexity of the subject matter and requirement of in-depth research on the matter.

The existing provisions of the code Section 234 and Section 235 (entering into bilateral agreements and issuance of letters of request to foreign courts by Adjudicating Authorities) do not provide a comprehensive framework for cross-border insolvency matters and in light of which the Committee recommended adoption of UNCITRAL Model Law on Cross Border Insolvency, 1997. UNCITRAL Model law was the most widely accepted legal framework to deal with cross border insolvency and legislation based on the Model law has been adopted in 44 countries in a total of 46 jurisdictions. **UNCITRAL Model Law ensures full recognition of a country's domestic insolvency law by giving precedence to domestic proceedings and allowing denial of relief under the Model Law if such relief is against the public policy of the enacting country.**

The Committee reported that it is necessary to make the existing cross border insolvency framework under the Code more elaborate and self-contained and needs immediate attention. Some of the key advantages of adopting Model Law with specific carve outs as recommended by the Committee are as under:

Increasing Foreign Investment	Even though the foreign creditors have a remedy under the current code, adoption of model law will provide added avenues for recognition of foreign insolvency proceedings, foster cooperation and communication between domestic and foreign courts and insolvency professionals and so on. Moreover, there will be significant positive signalling to global investors, creditors, governments, international organizations such as World Bank as well as multinational corporations with regard to the robustness of India's financial sector reforms.
Flexibility	The model law is designed to be flexible and to respect the differences amongst national insolvency laws. Therefore, necessary carve outs may be made in relation to model law to maintain consistency with domestic insolvency law while adopting a globally accepted framework. For example, the moratorium under the model law may be tweaked to make it harmonious with the moratorium under Section 14 of Code, a reciprocity requirement may be incorporated for stakeholders in other countries.
Protection of Domestic Interest	The model law enables refusal of recognition of foreign proceedings or provision of any other assistance if such action contradicts domestic public policy. Hence, it provides enough flexibility to protect public interest.
Priority to Domestic Proceedings	The model law gives precedence to domestic insolvency proceedings in relation to foreign proceedings. For example, a moratorium due to recognition of a foreign proceeding will not prevent commencement of domestic insolvency proceedings.
Mechanism for Cooperation	The model law incorporates a robust mechanism for cooperation and coordination between courts and insolvency professionals, in foreign jurisdictions and domestically. This would facilitate faster and effective conduct of current proceedings.

In light of the above, the Committee has recommended the Model Law be adopted with necessary modifications. Broadly, the four main principles on which the Model Law is based on are as follows:

In light of the above, the Committee has recommended the Model Law be adopted with necessary modifications. Broadly, the four main principles on which the Model Law is based on are as follows:

Access	The model law allows foreign insolvency professionals and foreign creditors direct access to domestic courts and confers on them the ability to participate in and commence domestic insolvency proceedings against a debtor. The committee recommends that Central Government to devise a mechanism for creating access to foreign insolvency professionals that is practicable in light of the Honourable Supreme Court judgment in the case of Bar Council of India v AK Balaji & Others.
Recognition	The model law allows recognition of foreign and provision of remedies by domestic courts based on such recognition. **Relief can be provided if the foreign proceeding is either a main or non-main proceeding.** **If domestic courts decide that the debtor has its centre of main interest (COMI) in the foreign country, such a foreign insolvency proceeding is recognized as main proceeding. If domestic courts determine that the debtor has an establishment (applying a test based on carrying on of non-transitory economic activity), such a foreign insolvency proceeding is recognized as non-main proceeding.** **Recognition as a main proceeding will result in automatic relief, such as moratorium on transfer of assets of debtor, and allow the foreign representative greater powers in handling the estate of debtor. For non-main proceedings, such relief is at discretion of courts.**
Cooperation	The model law lays down the basic framework for cooperation between domestic and foreign courts, and domestic and foreign insolvency professionals. The committee recommends that guidelines to be notified for cooperation between Adjudicating Authorities and Foreign Courts since the infrastructure of Adjudicating Authorities is still evolving. However, the cooperation between domestic and foreign insolvency professionals, domestic insolvency professionals and foreign courts and foreign insolvency professionals and domestic courts have been retained as stated in model law.
Coordination	The model law provides a framework for commencement of domestic insolvency proceedings, when a foreign insolvency proceeding has already commenced or vice versa. It also provides for coordination of two or more concurrent insolvency proceedings in different countries by encouraging cooperation between courts.

Recommendations:

The Committee has made recommendations under 19 heads. The key recommendations are discussed hereunder:

1. General Provisions:

a. The Committee recommends that the provisions dealing with cross border insolvency should be made applicable only to corporate debtors in the first phase. After gaining experience, such provisions may be made applicable to individuals and partnership firms. The Committee states that globally all the countries adopted the provisions of Model Law initially for corporate entities and then extended them to other individuals and other entities. Also, the Committee recommends that certain entities like banks, insurance companies may also be excluded from the operations of Model Law considering the public interest in such entities.

b. The Committee recommends that the definition of 'corporate debtor' for the purposes of cross border insolvency proceedings has to be amended to include 'foreign companies' to ensure that creditors and insolvency professionals of companies registered outside India can approach the Adjudicating Authority (AA) for cooperation or recognition of foreign proceedings to avail relief in India.

c. The Committee also opines that certain provisions of Companies Act, 2013 deal with insolvency of foreign companies like Section 375(3)(b) may not be relevant after commencement of cross border insolvency regulations. Hence, to avoid dual regime for insolvency of foreign companies, the Committee recommends that Ministry of Corporate Affairs may undertake a study and analyse the efficacy of retaining such provisions in Companies Act which deal with insolvency of foreign companies.

d. The Committee deliberated whether the Model Law must be adopted based on legislative reciprocity[1] or without any reciprocity requirement. The UNCITRAL has not contemplated a complete rejection of reciprocity and settled on a Model Law so that countries may have the freedom to incorporate reciprocity provisions. The Committee recommends that initially the Model Law may be adopted on reciprocity basis and based on experience in implementation the requirement of reciprocity may be diluted. The Committee also stressed that the reciprocity requirement would be confined only to the cross-border insolvency provisions and not to the entire code so as to allow foreign creditors to initiate, participate and file claims in proceedings under the Code regardless of reciprocity.

[1]Legislative Reciprocity in general would indicate that a domestic court will recognize and enforce a foreign courts judgment or orders only if the country in which the foreign court is located had adopted the same or similar legislation to that governing the domestic court.

2. Definitions:

a. **Establishment:** The definition of 'establishment' in the draft of cross-border insolvency provisions tracks the definition provided in Model Law. This definition assumes significance since the Model Law limits recognition as foreign non-main proceedings to proceedings in countries where the debtor has an 'establishment'. The Committee considered whether the requirement to carry out economic activity 'with human means' may be omitted from definition of 'establishment' to account for internet-based companies, like e-commerce companies. However, the committee observed that US have excluded such entities from the definition of 'establishment', whereas UK and Singapore retained. The Committee opines that at this juncture, it would be advisable to develop the jurisprudence internationally, recommending any change to definition of 'establishment' for Indian scenario.

b. The Committee also deliberated whether a precautionary look back period of 3 months must be built in the definition of 'establishment' in order to ensure that only those proceedings which were opened in a place where the corporate debtor had a stable business location would be recognised. The look back period would essentially mean that if the debtor has conducted economic activity in a country only within or after the specified look back period then such activity shall not be regarded for purpose of deciding that an establishment exists in such a country. Under the model law, commencement of foreign main proceedings is not mandatory before commencement of foreign non-main proceedings and recognition of foreign non-main proceedings may be made prior to recognition of foreign main proceeding. Hence, the 3 months look back period for determining the 'establishment' cannot be benchmarked from date of filing of application to initiate the foreign proceeding. Further, 3-month look back period for determining existence of an 'establishment' cannot also be benchmarked from date of filing of insolvency application in foreign non-main proceeding as by such time in many cases it may be possible that no economic activity exists. This may result in denial of recognition for several foreign non-main proceedings unintendedly. In light of qualifying the term economic activity with the adjective, 'non-transitory' already provided sufficient room for courts to prevent abuse and forum shopping and accordingly it was decided the look back period is not necessary.

3. Public Policy:

a. The Committee opines that the draft cross-border insolvency provisions have right to refuse to take any action, including denial of recognition or relief, if such action would be manifestly contrary to the public policy of the country that receives the application for recognition.

b. The Committee noted that the UNCITRAL Guide to Enactment recommends that the interpretation of 'public policy' should be narrow, so that the courts discretion should be minimal, and the aim should be to provide relief to a bigger pool of proceedings. The Committee opined that the phrase 'public policy' should be qualified with phrase 'manifestly', to narrow the ambit of 'public policy'.

c. **The Committee suggested that while determining, whether an issue is contrary to public policy or not, AA may consider existing international jurisprudence along with domestic interpretations of public policy[2] .** The Committee outlined the instances by US Courts where the public policy exception was applied to cases where relief sought in foreign proceedings amounted to:
   i. abuse of automatic stay order of US court by foreign insolvency proceedings
   ii. violation of US privacy and criminal laws
   iii. detrimental effect on technological innovations in US by disregard of US patent licensing agreements.

d. The Committee stated that differences in insolvency laws do not themselves justify a finding that enforcing one country's laws would violate the public policy of another country. The Committee recommended that when the matter pertains to determination whether an action is against the public policy of the country, the Central Government should also be given an opportunity to provide its submission ***(please recollect the situation which RBI has faced before the Delhi High Court in the case of NTT Docomo Inc v Tata Sons Limited 2017 SCC OnLine Del 8078 – these lines are added by paper writer and does not form part of the committee report)*** and accordingly suggested to incorporate such provisions in cross border insolvency scheme.

4. Other Provisions:

a. The Committee opined that the model law allows domestic insolvency professionals in the enacting country to access foreign courts or act in a foreign country in relation to insolvency proceedings against debtor and currently there is no bar on the Indian Insolvency Professionals to access courts in foreign or to act in foreign countries and suggested that the same shall be subjected to regulations framed by Insolvency & Bankruptcy Board of India (IBBI).

5. Access to Foreign Representatives:

a. The model law provides that the foreign representative shall have the right to access to a court in the enacting country, which allows the foreign representative to approach courts to seek remedies directly and aims to simplify the process. Formal requirements such as registration, license or consular action which may be applicable domestically are intended to be dispensed with for foreign representatives.

b. The Committee stated that countries like US and Singapore have implemented such provisions of mode law into their cross-border insolvency laws, with minor changes. The Committee noticed that the challenge in allowing the foreign representatives with direct access to India Courts is not permissible in India in light of the recent judgment of Honourable Supreme Court in Bar Council of India v AK Balaji & Others (supra).

[2]For jurisprudence on 'public policy', please refer the judgments of Arbitration and Conciliation Act, 1996.

c. The Committee has provided two options to resolve the subject issue. One, the foreign representatives may form a separate class of professionals akin to Indian Insolvency professionals and may therefore not have a legal bar to access courts in India. Second, the foreign representatives may be allowed to access courts and exercise their powers under the cross-border insolvency provisions through domestic representatives. Finally, the Committee was of the opinion that it may be desirable to adopt a conservative approach in providing access to foreign representatives till the development infrastructure regarding the cross-border insolvency in India.

6. Regulating the Foreign Representative:

a. The model law provides that merely based on application of foreign representative, a court in the enacting country shall not exercise jurisdiction over the foreign representative or foreign assets of the debtor. UNCITRAL Guide to Enactment discusses that this is a 'safe conduct' rule which controls excessive imposition of jurisdiction by Courts. However, this should not prevent the domestic courts for imposing penalties for any misconduct by foreign representative according to the law in the enacting country.

b. **The Committee discussed that above provisions of Model Law may be adopted in our cross-border insolvency law and may be subjected to a code of conduct by IBBI and to a penalty provision, similar to that applicable to domestic insolvency professionals under Code.**

7. Participation in a proceeding under the Code:

a. The model law allows the foreign representative to commence and participate in domestic insolvency proceedings against the debtor. The power to commence domestic insolvency proceedings is provided as a remedy, to the foreign representative, exercisable without availing recognition of the foreign proceeding in which she is appointed. The Committee opines that the foreign representative may be allowed to participate in domestic insolvency proceedings and the power to initiate the domestic insolvency proceedings need not be vested with the foreign representative (since creditors under the code includes foreign creditors who are already allowed to initiate the domestic insolvency proceedings).

8. Access of Foreign Creditors to a proceeding under the Code:

a. The model law embodies the principle that subject to the exclusions provided in mode law, foreign creditors who apply to commence insolvency proceedings in the enacting country or file claims in such a proceeding, should not be treated as worse than domestic creditors. The exclusions normally refer to tax claims and foreign social security. The Committee recommends that adoption of such provision under the Indian cross-border insolvency laws without any substantial modification.

9. Notice to Foreign Creditors:

a. The model law provides that know foreign creditors may be given notice individually whenever a notice is to be given to creditors of the debtor. This is to enable foreign creditors to have easy access to information regarding the insolvency of the debtor since many modes of services of notice may not be accessible to foreign creditors. The Committee suggested that IBBI has to come up with a procedure to notify such foreign creditors either through website of corporate debtor or IBBI, instead of sending individual notices to foreign creditors.

10. Recognition of Foreign Proceeding and Relief:

a. The model law empowers a foreign representative to seek recognition of a foreign proceeding from a court in the domestic country, in order to avail appropriate relief in relation to foreign proceeding. The provisions dealing with recognition of foreign proceedings have been identified as the core of model law.

b. The model law provides the documents required to be submitted by foreign representative when making an application for recognition. This includes proof of existence of the foreign proceeding and of the appointment of foreign representative in such proceedings along with details of any pending foreign proceedings against the debtor.

c. The Committee is of the view that both the above provisions can be incorporated in the cross-border insolvency laws in India along with foreign representative may also be mandated to specify pending foreign and domestic insolvency proceedings against the corporate debtor that are know to her to ensure that AA has complete information about the foreign proceedings along with any proceedings under the Code against the corporate debtor.

11. COMI:

a. The model law provides recognition as foreign main proceeding is based on the finding of COMI. Thus, determination of COMI is central to operation of model law as it accords proceedings in COMI greater deference and more immediate, automatic relief.

b. The foreign main proceeding is expected to have the principal responsibility for managing the insolvency of the corporate debtor regardless of number of countries in which the debtor has assets and creditors. Therefore, essential attributes of corporate debtor's COMI correspond to those attributes that will enable those who deal with debtor (especially creditors) to ascertain the place where an insolvency proceeding concerning corporate debtor is likely to commence.

c. The model law does not define COMI but provides a rebuttable presumption that a corporate debtor's registered office is its COMI in the absence of proof to the contrary. This presumption ensures speed and convenience of proof in vanilla cases where no controversy om COMI is involved. However, the Committee opined that this presumption may in certain cases lead to abuse and forum shopping and UNCITRAL Guide to Enactment has left the onus on court to detect such an abuse.

d. **The EU Insolvency Regulation (Recast) seeks to prevent such forum shopping by making the presumption inapplicable in cases where the debtor has relocated its registered office to another country within a 3-month period prior to request for opening insolvency proceeding. The Committee recommends in addition to proactive enquiry by AA, adoption of look back period of 3 months while enforcing COMI presumption would be suitable to Indian context.**

e. The UNCITRAL Guide to Enactment provides the following two principal factors which may indicate COMI in most cases:
   i. **Where the central administration of debtor takes place and**
   ii. **Which is readily ascertainable by Creditors**

   The Committee recommends that the code and its enforcement in India is still evolving, it may be prudent to include these principal factors in code with an intent to provide objective factors to assist the AA in cases where the COMI does not coincide with the registered office.

12. Decision of Recognition:

a. The model law provides that as long as the requirements set out are met, the court shall recognise the foreign proceeding at the earliest times possible. This reduces discretion given to the court in selecting the proceeding which are to be recognized and lays down the objective criterion for recognition if the application for recognition is made to the appropriate court.

b. Based on certain criterion, a foreign proceeding may be recognized as a foreign main proceeding or a foreign non-main proceeding. This is based on the finding of COMI in the case of recognition as a foreign main proceeding and existence of an establishment in case of recognition as foreign non-main proceeding. The approach of model law is to provide distinct treatment of foreign main and non-main proceedings with respect to the nature of relief available and the coordination of concurrent proceedings. The Committee is of the view that same provisions may be adopted in the cross-border insolvency provisions without substantial modifications. However, a period of 30 days may be provided to AA to decide on the application for recognition with an additional limit of 30 days.

13. Interim Relief:

a. The model law provides for two kinds of relief – interim relief and relief on recognition. While the former may be provided by the Court until an application for recognition of foreign proceeding is decided upon, the latter is to be granted if a foreign proceeding is recognised.

b. The model law provides urgent relief which may be granted, at the discretion of the court, after an application for recognition is filed. The relief mentioned is narrower than the relief which may be granted after recognition of foreign proceedings. Unless extended by Court, the relief shall terminate when the decision with respect to recognition of the foreign proceedings is taken by the Court.

c. This relief is not exhaustively provided and may include – (a) staying of the execution of debtor's assets (b) staying transfer and disposal of debtor's assets and other related. **The Code does not empower the AA to provide any interim relief in CIRP. In view of the above, the Committee recommends that power to grant interim relief may not be provided under cross-border insolvency laws.**

14. Relief on Recognition:

a. The relief available on recognition of foreign proceeding may be of two kinds – (a) mandatory relief on recognition as a foreign main proceeding and (b) discretionary relief on recognition as either foreign main proceeding or foreign non-main proceeding. The former applies when a foreign main proceeding is recognized while the later may be provided by court on recognition of either foreign main or foreign non-main proceeding.

b. The model law provides that **an automatic moratorium shall apply on recognition of foreign main proceedings. This moratorium is to be similar in scope as the moratorium available under the domestic insolvency law of the enacting country. This moratorium in the model law does not interfere with the right to commence any domestic insolvency proceedings or with the right to file claims in such a domestic proceeding.** This is in line with the general approach of model law which gives prominence to the domestic insolvency proceedings of the enacting country over foreign proceedings.

c. The Committee is of the view that a moratorium similar in scope as Section 14 of Code may be inserted in draft cross-border insolvency provisions and such moratorium shall be applicable immediately on recognition of foreign main proceeding. The Committee also recommends that the automatic moratorium does not affect the right to commence individual proceedings against the corporate debtor to the extent necessary to preserve claims against the corporate debtor.

d. The model law provides relief that may be granted in respect of foreign main or non-main proceedings and provision of such relief is left to discretion of court. The relief provided in model law is not limited in scope as it is assumed that the courts will utilise their discretion to define the scope of relief while providing it. Therefore, the Committee is of the view that the AA shall consider the scope of moratorium under Section 14 of Code, including limitations and exceptions to it, while providing discretionary relief.

e. **The model law provides a broad power to the Court to enable the foreign representative or any other designated person to distribute all or part of the debtor's assets located in the enacting country. This provision also envisages a safeguard for domestic creditors by subjecting entrustment of distribution of assets of corporate debtor to the foreign representative on satisfaction of the court that interests of domestic creditors are adequately protected. Further, the relief provided as interim relief or as discretionary relief on recognition in the model law is subject to satisfaction of the court that the interests of parts, such as creditors and the debtor, are protected. This may help in achieving a balance between the relief provided by Court and the interests of various stakeholders.**

f. In view of the above, the Committee advised that the power to provide discretionary relief to distribute all or part of assets of debtor may be sparingly exercised in cases where the need for such relief is clearly established and interests of domestic creditors are protected.

15. Avoidance Actions:

a. Insolvency laws across various jurisdictions provide insolvency professionals with power to commence an avoidance action to collect assets that the debtor fraudulently transferred out of its estate, often to place them beyond the reach of debtor's creditors. The model law provides that a foreign representative may apply to the court, upon recognition of foreign proceeding, to set aside such antecedent transactions of the debtor which are detrimental to creditors. **The Committee concluded that the above provisions of model law shall be admitted in the cross-border insolvency provisions and like all other powers given to the foreign representative, exercise of power under this provision of model law will be subject to manner of access of foreign representative.**

16. Cooperation with Foreign Courts and Foreign Representatives:

a. The model law contains provisions regarding cooperation and communication with foreign courts and foreign representatives. This part is the key element of mode law. **The UNCITRAL Guide to Enactment states that cooperation is often the only realistic way to prevent dissipation of assets, to maximize the value of assets, to find the best solutions for reorganization of enterprise and so on.**

b. The Committee opined that given the nascent stage of insolvency infrastructure under the Code and lack of experience of AA in communicating with foreign courts, the Committee discussed the obligatory cooperation and direct communication of domestic AA with foreign courts may be premature and accordingly recommended that in the initial stages of introduction of model law, cooperation and communication between AA and foreign courts must be based on framework as notified by Central Government.

c. **The Committee recommended that in light of burden of the overworked AA and in the interest of speed and efficiency, the Central Government may notify an appropriate authority to assist the AA in facilitating transmission of notices and other communications between AA and foreign courts.**

17. Concurrent Proceedings:

a. The model law permits multiple proceedings in various jurisdictions to take place simultaneously by enabling coordination and cooperation of such proceedings. It also provides the conditions for commencement of domestic proceedings after recognition of foreign main proceeding and enables modification of relief to maintain consistency in multiple proceedings.

b. **As stated above, the model law permits initiation of domestic insolvency proceedings after recognition of a foreign main proceeding, as long as the debtor has assets in enacting country. For example, if a foreign main proceeding taking place in another country in respect of a corporate debtor is recognized in India, an insolvency resolution process may also be commenced against such a corporate debtor in India, if it has assets in India.**

c. The effect of domestic insolvency proceeding in such a scenario will be limited to the assets in the enacting country. The model law also provides a manner in which relief may be modified when a foreign proceeding and domestic insolvency proceeding are taking place concurrently. The Committee therefore concluded that the above provisions of model law may be adopted with an option to review the relief.

18. Payment in Concurrent Proceedings:

a. As discussed above, the Model Law contemplates that multiple insolvency proceedings in separate jurisdictions may run concurrently. However, there may be instances where a creditor may have a common claim in more than one jurisdiction. In this scenario, such a creditor may receive payment from multiple insolvency proceedings in relation to the same claim. To counter the possibility of unjust enrichment of creditors due to concurrent insolvency proceedings, Article 32 of the Model Law provides the hotch pot rule, by virtue of which if the creditor has received part payment for a claim in an insolvency proceeding, she may not receive a payment for the same claim in another insolvency proceeding relating to the same debtor.

b. **The Committee recommends the adoption of the same in draft provisions of cross-border insolvency with two modifications:**
   i. In case of insolvency resolution process under the Code, the payment to creditors will be in accordance with resolution plan. Therefore, the threshold for comparison of payment to the creditor may be the payment according to the resolution plan to creditors of the same standing.
   ii. In case of liquidation under the Code, the threshold for comparison may be creditors of the same class and ranking.

19. Presumption of Insolvency:

a. The model law provides that on recognition of a foreign main proceeding, the debtor shall be presumed to be insolvent for the purposes of commencement of domestic insolvency proceeding. The intent of this provision is to enable a simple trigger for commencing insolvency proceedings in jurisdictions which have to establish a state of insolvency of the debtor to initiate insolvency proceedings. Since the test of insolvency is subjective and a criterion which may be time-consuming to satisfy, this provision is of special significance in jurisdictions which have such a test of insolvency. In India, the test for commencing CIRP does not involve satisfying the Adjudicating Authority that the corporate debtor is insolvent. Rather, the Code provides an objective criterion which allows initiation of a CIRP on default of INR 1 lakh.

b. The Committee agreed that a presumption relating to a test of insolvency may not be of practical significance since the Code does not contemplate the satisfaction of a test of insolvency for the purposes of commencement of a proceeding. However, the Committee discussed that it may be beneficial for creditors if initiating insolvency resolution proceedings in India is made simpler when an insolvency proceeding in corporate debtor's COMI has been recognized in India. Therefore, the draft provisions may provide that instead of test of insolvency, recognition of a foreign man proceeding may be presumed to be proof of default by the corporate debtor for the purposes of commencement of CIRP.

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