Corporate and Economic Laws

Paper: 4

For CA- Final

CA Shivangi Agrawal
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About the Author

Shivangi Agrawal is a qualified Chartered Accountant with tremendous academic record having topped school & college. She qualified CA in her very first attempt at an early age of 21 and thereafter she is treasuring commerce education with unique presentation on subject matter. Her frequent use of simple examples from the daily life not only makes subject interesting but easy to remember and grasp.

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ABOUT THE BOOK

I am pleased to commend to readers the Revised Edition of Corporate & Economic Laws, which is commensurate with the New Syllabus of ICAI.

It is a comprehensive presentation of the subject matter in a lucid form understandable to the students. These will help students to maintain a meaningful focus on examination requirements.

The book is intended to serve as a standard text for students pursuing their CA- Final.

The following are the main features of the book:

- Simple Language
- Self-explanatory notes

I hope this edition will endear itself to students and peers. I welcome comments and suggestions for improving the utility of this book.

CA. Shivangi Agrawal
# Index

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Topics</th>
<th>Page No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Appointment and Qualifications of Directors</td>
<td>1.1 – 1.36</td>
</tr>
<tr>
<td>2</td>
<td>Appointment and Remuneration of Managerial Personnel</td>
<td>2.1 – 2.24</td>
</tr>
<tr>
<td>3</td>
<td>Meetings of Board and its Powers</td>
<td>3.1 – 3.47</td>
</tr>
<tr>
<td>4</td>
<td>Inspection, Inquiry and Investigation</td>
<td>4.1 – 4.23</td>
</tr>
<tr>
<td>5</td>
<td>Compromises, Arrangements and Amalgamations</td>
<td>5.1 – 5.23</td>
</tr>
<tr>
<td>6</td>
<td>Prevention of Oppression and Mismanagement</td>
<td>6.1 – 6.16</td>
</tr>
<tr>
<td>7</td>
<td>Registered Valuers</td>
<td>7.1 – 7.5</td>
</tr>
<tr>
<td>8</td>
<td>Removal of Names of Companies from the Register of Companies</td>
<td>8.1 – 8.8</td>
</tr>
<tr>
<td>9</td>
<td>Winding Up</td>
<td>9.1 – 9.37</td>
</tr>
<tr>
<td>10</td>
<td>Foreign Company</td>
<td>10.1 – 10.9</td>
</tr>
<tr>
<td>11</td>
<td>Government Company</td>
<td>11.1 – 11.2</td>
</tr>
<tr>
<td>12</td>
<td>Nidhis</td>
<td>12.1 – 12.7</td>
</tr>
<tr>
<td>13</td>
<td>NCLT &amp; NCLAT</td>
<td>13.1 – 13.7</td>
</tr>
<tr>
<td>14</td>
<td>Special Courts</td>
<td>14.1 – 14.6</td>
</tr>
<tr>
<td>15</td>
<td>Miscellaneous</td>
<td>15.1 – 15.5</td>
</tr>
<tr>
<td>16</td>
<td>Corporate Secretarial Practice</td>
<td>16.1 – 16.10</td>
</tr>
<tr>
<td>17</td>
<td>The Insolvency and Bankruptcy Code, 2016</td>
<td>17.1 – 17.40</td>
</tr>
<tr>
<td>18</td>
<td>Prevention of Money Laundering Act, 2002</td>
<td>18.1 – 18.21</td>
</tr>
<tr>
<td>20</td>
<td>SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015</td>
<td>20.1 – 20.9</td>
</tr>
<tr>
<td>22</td>
<td>The Arbitration and Conciliation Act, 1996</td>
<td>22.1 – 22.20</td>
</tr>
<tr>
<td>24</td>
<td>The Foreign Exchange Management Act, 1999</td>
<td>24.1 – 24.49</td>
</tr>
<tr>
<td>25</td>
<td>Foreign Contribution Regulation Act, 2010</td>
<td>25.1 – 25.23</td>
</tr>
</tbody>
</table>

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Appointment & Qualification of Directors

Section Summary

This chapter XI of Companies Act, 2013 is read with Companies (Appointment and Qualification of Directors) Rules, 2014

<table>
<thead>
<tr>
<th>Section No.</th>
<th>Topics Covered</th>
</tr>
</thead>
<tbody>
<tr>
<td>149</td>
<td>Company to have Board of Directors</td>
</tr>
<tr>
<td>150</td>
<td>Manner of Selection of Independent Directors and Maintenance of Databank of Independent Directors</td>
</tr>
<tr>
<td>151</td>
<td>Appointment of Director Elected by Small Shareholders</td>
</tr>
<tr>
<td>152</td>
<td>Appointment of Directors</td>
</tr>
<tr>
<td>153</td>
<td>Application for Allotment of Director Identification Number</td>
</tr>
<tr>
<td>154</td>
<td>Allotment of Director Identification Number</td>
</tr>
<tr>
<td>155</td>
<td>Prohibition to obtain more than One Director Identification Number</td>
</tr>
<tr>
<td>156</td>
<td>Company to intimate Director Identification Number</td>
</tr>
<tr>
<td>157</td>
<td>Company to inform Director Identification Number to Registrar</td>
</tr>
<tr>
<td>158</td>
<td>Obligation to Indicate Director Identification Number</td>
</tr>
<tr>
<td>159</td>
<td>Penalty for Default of Certain Provisions</td>
</tr>
<tr>
<td>160</td>
<td>Right of Persons other than Retiring Directors to stand for Directorship</td>
</tr>
<tr>
<td>161</td>
<td>Appointment of Additional Director, Alternate Director and Nominee Director</td>
</tr>
<tr>
<td>162</td>
<td>Appointment of Directors to be voted Individually</td>
</tr>
<tr>
<td>163</td>
<td>Option to Adopt Principle of Proportional Representation for Appointment of Directors</td>
</tr>
<tr>
<td>164</td>
<td>Disqualifications for Appointment of Director</td>
</tr>
<tr>
<td>165</td>
<td>Number of Directorships</td>
</tr>
<tr>
<td>166</td>
<td>Duties of Directors</td>
</tr>
<tr>
<td>167</td>
<td>Vacation of Office of Director</td>
</tr>
<tr>
<td>168</td>
<td>Resignation of Director</td>
</tr>
<tr>
<td>169</td>
<td>Removal of Directors</td>
</tr>
<tr>
<td>170</td>
<td>Register of Directors and Key Managerial Personnel and their Shareholding</td>
</tr>
<tr>
<td>171</td>
<td>Members’ Right to Inspect</td>
</tr>
<tr>
<td>172</td>
<td>Punishment</td>
</tr>
</tbody>
</table>

Directors

“director” means a director appointed to the Board of a company

Analysis-
✓ A person will be regarded as Director only if he is appointed by Board
If he performs all the functions but is not designated, he will not be a director as the definition is exhaustive.

Board of Directors

"Board of Directors" or "Board", in relation to a company, means the collective body of the directors of the company.

The terms 'Board of Directors', 'Board' and 'Directors' are synonymous & used interchangeably.

Why Directors?

The Company has a separate identity but only in contemplation of Law. It has no eyes to see, ears to hear or mind to think and take decisions. Hence the decision making powers are vested in the following-

- Members of the Company
- Board of Directors who are accountable to Members and can also delegate their functions.

Furthermore, the Act in section 149 prescribes the requirement of Directors.

Types of Directors

Executive Directors

- The directors who are in the employment of the company are called as Executive Directors.
- They possess in-depth knowledge of affairs of the Company.
- To become executive Director a person should be in whole time employment of the Company.
- They are connected with policy formulation and take active part in the day-to-day affairs of the company.
- Eg. MD, WTD

Non-Executive Directors

- Directors who are not in employment of the company are called as Non-executive Directors
- They generally have diverse experience and provide independent perspective and knowledge to the Company.
APPOINTMENT & QUALIFICATION OF DIRECTORS

✓ They are not appointed to work full time but under a contract of service.
✓ They attend meetings and contribute by giving unbiased opinions to the working of Company.
✓ Eg. Independent Directors

Who can be a Director?

Only Individuals who are not disqualified u/s 164 and have DIN can be appointed as Directors.

General Disqualifications u/s 164(1)

A person shall not be eligible for appointment as a director of a company, if —

a) he is of unsound mind and stands so declared by a competent court

b) he is an undischarged insolvent

c) he has applied to be adjudicated as an insolvent and his application is pending

d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence.

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company or otherwise” means any offence in respect of which he has been convicted by a Court under the Act or under the Companies Act, 1956.

e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force

f) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call

g) he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or

h) he has not complied with sub-section (3) of section 152.

i) he has not complied with the provisions of sub-section (1) of section 165

Provided that the disqualifications referred to in clauses (d), (e) and (g) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification

Disqualifications on Ground of Default by Company [Section 164(2)]

No person who is or has been a director of a company which—

a) has not filed financial statements or annual returns for any continuous period of three financial years; or

b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to

CA. SHIVANGI AGRAWAL
be re-appointed as a director of that company or appointed in other company for a period of **five years** from the date on which the said company fails to do so.

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall **not incur the disqualification for a period of six months from the date of his appointment.**

**In case of Government company - Sub-section (2) shall not apply.**

**Additional Grounds of Disqualification [Section 164(3)]**

A **private company may by its articles provide for any disqualifications** for appointment as a director in addition to those specified.

---

State with reference to the provisions of Companies Act, whether the following persons can be appointed as a Director of a Company.

- ✓ Mr L, who has not paid any calls in respect of any shares of the Company held by him and 5 months have passed from the last day fixed for payment of calls.
- ✓ Mr. G is a Director of LDT limited, who has not filed the Company's Annual Return pertaining to the AGM held in Calendar years 2016, 2017 and 2018.

State with reference to the relevant provisions, whether the following can be appointed as directors of a Public Company:

- ✓ Mr A, who has huge personal liabilities far in excess of his assets and properties, has applied to the court for adjudicating him as an insolvent and such application is pending.
- ✓ Mr B, who was caught red-handed in a shop lifting case two years ago, was convicted by a court and sentenced to imprisonment for a period of eight weeks.
- ✓ Mr C, a former bank executive was convicted by a court eight years ago for embezzlement of funds and sentenced to imprisonment for a period of one year.
- ✓ Mr. D is a director of DLT limited, which has not filed its annual returns for 3 continuous financial years.

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**Vacation of Office of Director**

The office of a director shall become vacant in case—

- a) he **incurs any of the disqualifications** specified in section 164

  Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.

- b) he **absents himself from all the meetings of the Board of Directors** held during a period of **twelve months with or without seeking leave** of absence of the Board
APPOINTMENT & QUALIFICATION OF DIRECTORS

1.5

c) he acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested

d) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184

e) he becomes disqualified by an order of a court or the Tribunal

f) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months

Provided that the office shall not be vacated by the director in case of orders referred to in clauses (e) and (f)-

✓ for thirty days from the date of conviction or order of disqualification;
✓ where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or
✓ where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of.

g) he is removed in pursuance of the provisions of this Act;

h) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

Penalty for Non Compliance

| If a person, functions as a director even when he knows that the office of director held by him has become vacant | Imprisonment= Max 1 year Or Fine Minimum- 1 lakh Maximum- 5 lakhs Or both |

Consequences in case all Directors vacate

✓ Where all the directors of a company vacate their offices under any of the disqualifications specified, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.

Additional Grounds of Vacation

✓ A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified.

M/S Iqbal & sons ltd issued shares of the nominal value of Rs. 10 per share, out of which Rs. 5 was payable on application and balance Rs. 5 was payable on call. The call money was invited by the Board of Directors but some shareholders including a non-executive Director failed to pay the same within the prescribed period. Explain the status of director who defaulted in paying call money.
Right of Persons Other than Retiring Directors to Stand for Directorship

A person who is not a retiring director in terms of section 152 shall, subject to the provisions of this Act,

✓ be eligible for appointment to the office of a director at any general meeting,
✓ if he, or some member intending to propose him as a director
✓ has, not less than fourteen days before the meeting, left at the registered office of the company,
✓ a notice in writing under his hand signifying his candidature as a director or, as the case may be,
✓ the intention of such member to propose him as a candidate for that office,
✓ along with the deposit of one lakh rupees or such higher amount as may be prescribed
✓ which shall be refunded to such person or, as the case may be, to the member,
✓ if the person proposed gets elected as a director or
✓ gets more than 25% of total valid votes cast either on show of hands or on poll on such resolution.

Provided that requirements of deposit of amount shall not apply in case of appointment of an independent director or a director recommended by the Nomination and Remuneration Committee, if any, constituted under sub-section (1) of section 178 or a director recommended by the Board of Directors of the Company, in the case of a company not required to constitute Nomination and Remuneration Committee.

Rule 13: Notice of Candidature of a Person for Directorship

The company shall, at least seven days before the general meeting, inform its members of the candidature of a person for the office of a director or the intention of a member to propose such person as a candidate for that office-

✓ by serving individual notices, on the members through electronic mode to such members who have provided their email addresses to the company for communication purposes, and in writing to all other members; and
✓ by placing notice of such candidature or intention on the website of the company, if any

Provided that it shall not be necessary for the company to serve individual notices if the company advertises such candidature not less than seven days before the meeting at least once in a vernacular newspaper and at least once in English language in an English newspaper.

Section 160 shall not apply in the following-

✓ In case of private company
✓ In case of Section 8 company - Section 160 shall not apply to companies whose articles provide for election of directors by ballot
✓ In case of nidhi company, in sub-section (1) of Section 160, for the words "one lakh rupees", the words "ten thousand rupees" shall be substituted.
✓ a Government Company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;
✓ a subsidiary of a Government company, referred to in (a) above, in which the entire paid up share capital is held by that Government company.
In case of Specified IFSC Public Company - Section 160 shall apply as per the articles framed by the company.

**Duties of Directors**

- Subject to the provisions of this Act, a director of a company shall act in accordance with the articles of the company.
- A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
- A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
- A director of a company shall not assign his office and any assignment so made shall be void.

If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

**Directors Identification Number**

**Meaning of DIN**

"Director Identification Number" (DIN) means an identification number allotted by the Central Government to any individual, intending to be appointed as director or to any existing director of a company, for the purpose of his identification as a director of a company.

**Application for DIN [Section 153 and Rule 9 of Companies (Appointment & Qualification of Directors) Rules, 2014]**

Every individual intending to be appointed as director of a company

- shall make an application for allotment of Director Identification Number
- to the Central Government in
- DIR-3 or SPiCe+ and along with such fees as may be prescribed.

Applicant shall download the form and after attaching following documents, scan, and sign and file the entire set.
electrónica using DSC and shall be verified digitally by CS in full time employment of Company, MD or CEO or CFO of the Company in which applicant is intended to be appointed as director in an existing company.

- photograph
- proof of identity
- proof of residence
- board resolution proposing his appointment as director in an existing company
- Specimen signature duly verified

In case the name of a person does not have a last name, then his or her father’s or grandfather’s surname shall be mentioned in the last name along with the declaration in Form No. DIR-3A

Provided that the Central Government may prescribe any identification number which shall be treated as Director Identification Number for the purposes of this Act and in case any individual holds or acquires such identification number, the requirement of this section shall not apply or apply in such manner as may be prescribed.

Allotment of DIN [Section 154 and Rule 10]

The Central Government shall, within one month from the receipt of the application under section 153, allot a Director Identification Number to an applicant in such manner as may be prescribed.

- On the submission of the Form DIR-3 an application number shall be generated by the system automatically
- If the CG, on examination, finds such application to be defective or incomplete, it shall give intimation by placing it on the website and by email to the applicant directing him to rectify such defects by resubmitting the application within a period of fifteen days of such placing on the website and email
- Central Government shall -
  - reject the application where the defect has been rectified partially or the information given is still defective
  - treat and label such application as invalid in case defects are not removed within given time
  - inform the applicant either by way of letter by post or electronically or in any other mode.
  - In case of rejection or invalidation the fee so paid will not be refunded or adjusted
  - DIN allotted by CG before the commencement of these rules shall be deemed to have been allotted under these rules.
  - DIN is valid for the life-time of the applicant.

Prohibition to Obtain More than One DIN [Section 155]

No individual, who has already been allotted a Director Identification Number under section 154, shall apply for, obtain or possess another Director Identification Number.

Intimation of DIN [Section 156]

Every existing director shall, within one month of the receipt of Director Identification Number from the Central Government, intimate his Director Identification Number to the company or all companies wherein he is a director.

Company to Inform DIN [Section 157 read with Rule 10A]
Every company shall, within fifteen days of the receipt of intimation under section 156, furnish the Director Identification Number of all its directors to the Registrar or any other officer or authority as may be specified by the Central Government with such fees as may be prescribed or with such additional fees as may be prescribed and every such intimation shall be furnished in such form and manner as may be prescribed.

✓ If any company fails to furnish the Director Identification Number, such company shall be liable to a penalty of twenty-five thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of one lakh rupees.

✓ If any officer of the company who is in default shall be liable to a penalty of not less than twenty-five thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of one lakh rupees.

Every director, functioning as a director in one or more companies on or before the 30th June, 2007 and who has not yet intimated his DIN to such company or companies shall, within one month of the receipt of Director Identification Number from the Central Government, intimate his Director Identification Number to the company or all companies wherein he is a director as per Form DIR-3B.

The intimation by the company of Director Identification Number of its directors under section 157 of the Act shall be furnished in Form DIR-3C within fifteen days of receipt of intimation under section 156.

Obligation to Indicate DIN [Section 158]

Every person or company, while furnishing any return, information or particulars as are required to be furnished under this Act, shall mention the Director Identification Number in such return, information or particulars in case such return, information or particulars relate to the director or contain any reference of any director.

Penalty [Section 159]

If any individual or director of a company makes any default in complying with any of the provisions of section 152, section 155 and section 156, such individual or director of the company shall be liable to a penalty which may extend to fifty thousand rupees and where the default is a continuing one, with a further penalty which may extend to five hundred rupees for each day after the first during which such default continues.

Intimation of Changes in Particulars Specified in DIN Application [Rule 12]
Every individual shall, in the event of any change in his particulars as stated in Form DIR-3, intimate such changes to the Central Government within a period of thirty days of such changes in Form DIR-6 in the following manner, namely:-

- The Central Government, upon being satisfied, after verification of such changed particulars from the enclosed proofs, shall incorporate the said changes and inform the applicant by way of a letter by post or electronically or in any other mode confirming the effect of such change in the electronic database maintained by the Ministry.

The DIN cell of the Ministry shall also intimate the changes in the particulars of the director submitted to it in Form DIR-6 to the concerned Registrars under whose jurisdiction the registered office of the company in which such individual is a director is situated.

The concerned individual shall also intimate the changes in his particulars to the company or companies in which he is a director within fifteen days of such change.

## Cancellation or Surrender or Deactivation of DIN [Rule 11]

### When can DIN be cancelled?

The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may cancel or deactivate the DIN in case -

- the DIN is found to be duplicated in respect of the same person provided the data related to both the DIN shall be merged with the validly retained number
- the DIN was obtained in a wrongful manner or by fraudulent means;
- of the death of the concerned individual
- the concerned individual has been declared as a person of unsound mind by a competent Court
- if the concerned individual has been adjudicated an insolvent

### Opportunity of Being Heard to be given

Before cancellation or deactivation of DIN, an opportunity of being heard shall be given to the concerned individual.

### Surrender of DIN

On an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN.

### Deactivation of DIN in case KYC not submitted

The Central Government or Regional Director (Northern Region), or any officer authorized deactivate the Director Identification Number (DIN), of an individual who does not intimate his particulars in e-form DIR-3-KYC 3 or the web service DIR-3-KYC-WEB as the case may be within stipulated time in accordance with rule 12A.

### Time Stipulated:

- Every individual who holds DIN as at 31st March of any financial year shall submit e-form DIR-3 KYC to the Central Government on or before 30th April of immediately next financial year.

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Every Individual who holds DIN as at 31st March 2018 shall submit e-form DIR-3-KYC on or before 5th October 2018.

Reactivation of DIN

The de-activated DIN shall be re-activated only after e-form DIR-3-KYC 3 or the web service DIR-3-KYC-WEB as the case may be is filed along with fee as prescribed under Companies (Registration Offices and Fees) Rules, 2014.

Directors KYC [Rule 12A]

Every individual who holds a Director Identification Number (DIN) as on 31st March of a financial year as per these rules shall, submit e-form DIR-3-KYC for the said financial year to the Central Government on or before 30th, September of immediate next financial year.

- Provided that every individual who has already been allotted a Director Identification Number (DIN) as at 31st March, 2018, shall submit e-form DIR-3 KYC on or before 5th October,2018
- Provided further that where an individual who has already submitted e-form DIR-3 KYC in relation to any previous financial year, submits web-form DIR-3 KYC-WEB through the web service in relation to any subsequent financial year it shall be deemed to be compliance of the provisions of this rule for the said financial year
- Provided also that in case an individual desires to update his personal mobile number or the e-mail address, as the case may be, he shall update the same by submitting e-form DIR-3 KYC only
- Provided also that fee for filing e-form DIR-3 KYC or web-form DIR-3 KYC-WEB through the web service, as the case may be, shall be payable as provided in Companies (Registration Offices and Fees) Rules, 2014.

For the financial year ending on 31st March 2019, the individual shall submit e-form DIR-3 KYC or web form DIR-3 KYC-WEB, as the case may be, on or before the 14th October, 2019.

Directors of Company Required to File e-Form Active [Rule 12B]

- Where a company governed by Rule 25A of the Companies (Incorporation) Rules, 2014, fails to file the e-form ACTIVE within the period specified therein, the Director Identification Number (DIN) allotted to its existing directors, shall be marked as “Director of ACTIVE non-compliant company”.
- Where the DIN of a director has been marked as “Director of ACTIVE non-compliant company”, such director shall take all necessary steps to ensure that all companies governed by rule 25A of the Companies (Incorporation) Rules, 2014, where such director has been so appointed, file e-form ACTIVE.
- After all the companies referred to in sub-rule (2) file the e-form ACTIVE, the DIN of such director shall be marked as “Director of ACTIVE compliant company”.

Appointment of Directors

- No person shall be appointed as a director of a company unless he has
been allotted the **Director Identification Number** under section 154 or any other number as may be prescribed under section 153. [Section 152(3)]

✓ Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall **furnish his Director Identification Number** or such other number as may be prescribed under section 153 and a **declaration that he is not disqualified** to become a director under this Act. [Section 152(4)]

✓ A person appointed as a director shall not act as a director unless he **gives his consent** in DIR-2 **to hold the office** as director and such consent has been **filed with the Registrar within thirty days of his appointment** in Form DIR-12. [Section 152(5) and Rule 8]

✓ Provided that in the **case of appointment of an independent director** in the general meeting, an **explanatory statement** for such appointment, **annexed to the notice for the general meeting**, **shall include a statement that in the opinion of the Board, he fulfils the conditions** specified in this Act for such an appointment.

**First Directors [Section 152(1)]**

✓ Where **no provision is made in the articles** of a company for the appointment of the first director,
  - the **subscribers to the memorandum** who are individuals
  - shall be **deemed to be the first directors** of the company
  - until the directors are duly appointed and
  - **in case of a One Person Company** an **individual being member** shall be **deemed to be its first director** until the director or directors are duly appointed by the member in accordance with the provisions of this section.

✓ Save as otherwise expressly provided in this Act, **every director shall be appointed** by the company in **general meeting** [Section 151(2)]

**Rotation of Directors [Section 152(6)]**

(a) **Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors** of a public company shall—

✓ be **persons whose period of office is liable to determination by retirement of directors by rotation**; and

✓ save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

(b) The **remaining directors** in the case of any such company **shall**, in default of, and subject to any regulations in the articles of the company, **also be appointed** by the company in **general meeting**.

(c) **At the first annual general meeting** of a public company held next after the date of the general meeting at which the first directors are appointed in accordance with clauses (a) and (b) and at **every subsequent annual general meeting, one-third of such of the directors** for the time being **as are liable to retire by rotation**, or if their number is neither three nor a multiple of three, **then, the number nearest to one-third, shall retire** from office.
(d) The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

(e) At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

"total number of directors" shall not include independent directors, whether appointed under this Act or any other law for the time being in force, on the Board of a company.

Filling Of Vacancy [Section 152(7)]

a) If the vacancy of the retiring director is not so filled-up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.

b) If at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless—
   • At that meeting or at the previous meeting a resolution for the re-appointment of such director has been put to the meeting and lost
   • the retiring director has, by a notice in writing addressed to the company or its Board of directors, expressed his unwillingness to be so re-appointed
   • he is not qualified or is disqualified for appointment
   • a resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act; or
   • section 162 is applicable to the case.

Appointment of Directors to Be Voted Individually

✓ At a general meeting of a company, a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be moved unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it.
✓ A resolution moved in contravention shall be void, whether or not any objection was taken when it was moved.
✓ A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

Section 162 shall not apply –
✓ In case of private company –
✓ In case of a Government Company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments
✓ a subsidiary of a Government company in which the entire paid up share capital is held by that Government company.
✓ In case of Specified IFSC Public Company
Proportional Representation for Appointment of Directors

✓ Notwithstanding anything contained in this Act, the **articles** of a company **may provide** for the appointment of
✓ **not less than two-thirds** of the total number of the **directors** of a company
✓ in accordance with the **principle of proportional representation**,
✓ **whether by** the single transferable vote or by a **system of cumulative voting** or otherwise
✓ and such appointments **may be made once in every three years** and casual vacancies of such directors shall be filled as provided in sub-section (4) of section 161.

In case of Government Company- Section 163 shall not apply to :-
(a) a Government Company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;
(b) a subsidiary of a Government company, referred to in (a) above, in which the entire paid up share capital is held by that Government company

Appointmen of Additional Director

✓ The **articles** of a company may confer
✓ on its **Board of Directors** the **power** to appoint any **person**,
✓ **other than** a person who **fails to get appointed** as a director in a **general meeting**
✓ as an additional director at any time
✓ who **shall hold office up to** the date of the **next annual general meeting** or
✓ the **last date** on which the annual general meeting **should have been held**,
✓ whichever is earlier

Prince Ltd desires to appoint an additional Director on its Board of Directors. The Articles of the Company confer upon his board to exercise power to appoint such a director. As such M is appointed as an additional director. In the light of provisions of Companies Act, Examine-

a) Whether M can continue as director if the Annual General Meeting of the company is not held within the stipulated period and is adjourned to a later date.

b) Can the power of appointing additional director be exercised by the Annual General Meeting?

c) As the secretary of the company what checks would you make after M is appointed as an additional Director?

Mr Abhi was appointed as an additional Director of Pioneer Ltd on 14th March, 2016. The Annual General Meeting was scheduled to be held on 29th September, 2016 but due to heavy rains and floods all records of company were destroyed. In order to rebuild the records, the company approached the Registrar of Companies for extension of time for holding the Annual General Meeting till 30th December, 2016. In the light of Companies Act, 2013, Advice Mr. Abhi who was appointed as additional Director during the year.
Appointment of Alternate Director

✓ The Board of Directors of a company may, if so authorized by its resolution passed by the company in general meeting, appoint a person, to act as an alternate director for a director during his absence for a period of not less than three months from India.

✓ The person so appointed shall not be a person holding any alternate directorship for any other director in the company or holding directorship in the same company.

✓ Provided that no person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act.

✓ Provided further that an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

✓ Provided also that if the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

Examine the Validity of the following:

The Board of directors of AJD limited appointed Mr. N as an alternate Director for a period of two months against a Director who has proceeded abroad on leave for a period of six months. Articles of Association of Company are silent.

Mr P who is not qualified to be appointed as an independent director is appointed by the Board of Directors of XYZ ltd for an independent director as an alternate director.

Appointment of Nominee Directors

Subject to the articles of a company,

✓ the Board may appoint any person as a director
✓ nominated by any institution
✓ in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

Illustration

The board of directors of Sakshi ltd decides to appoint on its Board, Mr. Ravi as a nominee director upon the request of a bank which has extended a long term financial assistance to the company. The Articles of Association of the company do not confer upon the Board any such power. Also, there is no formal agreement between the company and the bank for any such nomination.
Casual Vacancy of Directors

✓ If the office of any director appointed by the company in general before his term of office expires in the normal course,

✓ the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.

Provided that any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

The Board of Directors of XYZ Ltd filled up a Casual Vacancy caused by the death of Mr. P by appointing Mr. C as a Director on 3rd April, 2014. Unfortunately, Mr. C expired on 15th May, 2014 after working about 40 days as a director. The Board now wishes to fill up the casual vacancy by appointing Mrs. C in the forthcoming meeting of the Board. Advice the Board in this regard.

Number of Directorships

✓ A person shall not hold office as a director, including any alternate directorship, in more than twenty companies at the same time.

✓ Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included. For reckoning the limit of directorships of twenty companies, the directorship in a dormant company shall not be included.

✓ The members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors.

Any person holding office as director in companies more than the limits as specified immediately before the commencement of this Act shall, within a period of one year from such commencement-

a) choose companies in which he wishes to continue to hold the office of director;

b) resign his office as director in the other remaining companies; and

c) intimate the choice made by him to each of the companies in which he was holding the office of director before such commencement and to the Registrar having jurisdiction in respect of each such company.

✓ Any resignation shall become effective immediately on the despatch thereof to the company concerned.

✓ No such person shall act as director in more than the specified number of companies,—
• after despatching the resignation of his office as director or non-executive director; or
• after the expiry of one year from the commencement of this Act, whichever is earlier.

✓ If a person accepts an appointment as a director in contravention of sub-section (1), he shall be liable to a penalty of five thousand rupees for each day after the first during which such contravention continues.

In case of section 8 company - Section 165 (1) shall not apply

Mr Raj is Director in 10 Public Limited Companies. Following companies appoint Mr. Raj as a Director at their respective Annual General Meetings. State with reference to the relevant provisions, whether Mr Raj can accept or not the appointment of below companies
a) MLP Ltd
b) PAT Private Ltd
c) Retail Traders Association (Section 8 Company)
d) KMC Ltd

Resignation of Director

A director may resign from his office by
➢ giving a notice
➢ in writing
➢ to the company

Board shall on receipt of such notice take note of the same and the company shall intimate the Registrar within 30 days in DIR-12 and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company.
Provided that a director may also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days in DIR-11

Effective Time of Resignation

The resignation of a director shall take effect-
➢ from the date on which the notice is received by the company or
➢ the date, if any, specified by the director in the notice,
➢ whichever is later

Provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.

Where all the directors of a company resign from their offices, or vacate their offices under section 167, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.
Company to have Board of Directors

Proviso to Section 149(1)
✓ Provided that a company may appoint more than fifteen directors after passing a special resolution.
✓ Provided further that such class or classes of companies as may be prescribed, shall have at least one woman director.

Limit of Maximum directors and their increase is not applicable to-
✓ Government Companies
✓ Section 8 Companies
Provided they have not committed a default in filing of their financial statements u/s 137 or Annual return u/s 92 with the Registrar.

Provisions of Woman Director are not applicable to specified IFSC Public Companies

CA. SHIVANGI AGRAWAL
Sleeping Ltd is a listed company incorporated on 1st January, 2018. The Board of Directors of the Company decides to appoint in its Board 'Women Director' and the 'Resident Director'.

a) State whether it is mandatory for the company to appoint such directors in its board.
b) What would be your answer in case the company is a non-listed company and the Board of Directors decided not to have the women director in the company’s Board?
c) What would be your answer in case the company in question is not listed at any of the Exchanges. The Paid-up share capital of the company is Rs. 50 crore and the turnover of the company is 200 crores. Decide whether the company is mandatorily required to appoint the woman director.

Sky limited, a listed company has been incorporated under the Companies Act, 2013. An intermittent vacancy of a woman director has arisen on 15th June, 2018. Advise the company to fill the vacancy as per the provisions of the companies Act, 2013. The board meeting was held on 14th August, 2018.

Resident Director [Section 149(3)]

- Every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two days during the financial year
- Provided that in case of a newly incorporated company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated.

Independent Director Requirement

- Section 149(4)- Every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

Rule 4 of Companies (Appointment and Qualification of Directors) Rules, 2014

The following class or classes of companies shall have at least two directors as independent directors -
- the Public Companies having paid up share capital of ten crore rupees or more; or
- the Public Companies having turnover of one hundred crore rupees or more; or
- the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding fifty crore rupees

The following classes of unlisted public company shall not be covered above namely-
- a joint venture;
- a wholly owned subsidiary; and
- a dormant company

The paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.
Any fraction contained in such one-third number shall be rounded off as one.

Section 149(5)- Every company existing on or before the date of commencement of this Act shall, within one year from such commencement or from the date of notification of the rules in this regard as may be applicable, comply with the requirements.

Meaning Of Independent Director [Section 149(6)]

An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director,—

a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience

b) who is or was not a promoter of the company or its holding, subsidiary or associate company;
   • who is not related to promoters or directors in the company, its holding, subsidiary or associate company;

c) who has or had no pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent of his total income or such amount as may be prescribed with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year

d) none of whose relatives—
   • is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year
   Provided that the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or 2% of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed
   • is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year;
   • has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; or
   • has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to 2% or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii)

e) who, neither himself nor any of his relatives—
APPOINTMENT & QUALIFICATION OF DIRECTORS

- **holds** or has held the **position** of a **key managerial personnel** or is or has been **employee** of the company or its holding, subsidiary or associate company in any of the **three financial years immediately preceding the financial year** in which he is proposed to be appointed.
  
  Provided that in case of a relative who is an **employee**, the restriction under this clause shall **not apply** for his employment during preceding three financial years.

- is or has been an **employee** or **proprietor** or a **partner**, in any of the **three financial years immediately preceding** the financial year in which he is proposed to be appointed, of—
  
  A. a firm of **auditors** or **company secretaries** in practice or **cost auditors** of the **company** or its holding, subsidiary or associate company; or
  
  B. any **legal** or a consulting **firm** that **has** or had any **transaction** with the company, its holding, subsidiary or associate company **amounting to 10% or more** of the **gross turnover** of such firm

- **holds** together with his **relatives 2% or more** of the **total voting power** of the company; or

- is a **Chief Executive** or **director**, by whatever name called, of any **nonprofit organisation** that **receives 25% or more of its receipts from the company**, any of its promoters, directors or its holding, subsidiary or associate company or that **holds 2% or more** of the **total voting power** of the company; or

f) who possesses such other **qualifications** as may be prescribed.

For the purposes of section 149(6) : In case of Government Companies which has not committed default in filing Financial Statements or Annual return with registrar, The word ‘Board’ shall be substituted by the words ‘Ministry or Department of the Central Government which is administratively in charge of the Company.

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Narayana Murthy-

Founder of Infosys

also served as an Independent Director of HSBC Board for few years.

Appointment of Independent Directors shall be made considering Audit Committee u/s 177 and Nomination and Remuneration Committee u/s 178 and decide the number accordingly.

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XYZ ltd is an unlisted public company having a paid-up capital of twenty crore rupees as on 31st March, 2018 and a turnover of one hundred fifty crores during the year ended 31st March 2018. The total number of directors is thirteen. State the minimum number of directors appointed as Independent Director in XYZ limited. What if XYZ ltd. Is a dormant Company?

Considering the regulatory provisions of the Companies Act, 2013 and the rules thereof regarding the appointment of directors on a company’s Board, state whether
Z Ltd, a listed public company is required to appoint Independent Directors. State whether appointment of Independent Director is required in the following cases-

a) The Public Company has paid-up share capital of 10 crores
b) What shall be your answer in case the company's paid up share capital is only 2 crores?
c) Whether a person who holds the position of a key managerial personnel in the same company can be appointed as an Independent Director?
d) In relation to mandatory women directors as required under Companies Act, 2013 should such directors also be Independent Directors?

ABC Ltd is an unlisted Public Company having a paid-up equity share capital of Rs. 20 Crores and a turnover of Rs. 150 crores as on 31st March, 2018. The total number of directors on the Board is 13. Referring to the provisions of the Companies Act, 2013 answer the following:

a) The minimum number of Independent Directors that the company should appoint.
b) How many Independent Directors are to be appointed in case ABC Ltd is a listed company?

**Declaration of Independence [Section 149(7)]**

Every independent director shall-

- ✔ at the first meeting of the Board in which he participates as a director and thereafter
- ✔ at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an independent director,
- ✔ give a declaration that he meets the criteria of independence.

"Nominee director" means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

The company and independent directors shall abide by the provisions specified in Schedule IV. **Other Provisions of Independent Directors [Section 149(9)]**

An independent director shall not be entitled to-

- ✔ Any stock option and may
- ✔ Receive remuneration by way of fee provided under sub-section (5) of section 197,
- ✔ reimbursement of expenses for participation in the Board and other meetings and
- ✔ profit related commission as may be approved by the members.

**Term of Independent Director [Section 149(10) & 149(11)]**

- ✔ An independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.
**APPOINTMENT & QUALIFICATION OF DIRECTORS**

- No independent director shall **hold office for more than two consecutive terms**, but such independent director shall be **eligible for appointment after the expiration of three years** of ceasing to become an independent director.

- Provided that an independent director shall **not**, during the said period of three years, be **appointed** in or be associated with the company in any other **capacity**, either directly or indirectly.

**Liability [Section 149(12)]**

Notwithstanding anything contained in this Act,—

- an independent director &
- a non-executive director not being promoter or key managerial personnel,
- **shall be held liable, only** in respect of **such acts** of omission or commission by a company which had **occurred with his knowledge**, attributable through Board processes, and **with his consent** or connivance or where he had **not acted diligently**.

The provisions of retirement of directors by rotation shall **not** be applicable to appointment of independent directors.

**Manner of Appointment of Independent Directors & Maintenance of Data Bank**

An independent director may be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, maintained by any body, institute or association, as may be notified by the Central Government, having expertise in creation and maintenance of such data bank and put on their website for the use by the company making the appointment of such directors.

- The **appointment** of independent director **shall be approved** by the company in **general meeting** as provided in sub-section (2) of section 152 and the **explanatory statement annexed to the notice** of the general meeting called to consider the said appointment **shall indicate** the **justification for choosing** the **appointee** for appointment as independent director.

- The data bank referred to in sub-section (1), shall create and maintain data of persons willing to act as independent director in accordance with such rules as may be prescribed.

**Rule 6: Compliances Required by a Person Eligible and Willing To Be Appointed as an Independent Director.**

Every individual –
- who has been appointed as an independent director in a company, on the date of commencement of the Companies (Appointment and Qualification of Directors) Fifth
Amendment Rules, 2019, shall within a period of ten months from such commencement; or

- who intends to get appointed as an independent director in a company after such commencement, shall before such appointment, apply online to the institute for inclusion of his name in the data bank for a period of one year or five years or for his life-time, and from time to time take steps as specified till he continue to hold office as Independent Director.

Provided that any individual, including an individual not having DIN, may voluntarily apply to the institute for inclusion of his name in the data bank.

Every individual whose name has been so included in the data bank shall file an application for renewal within a period of thirty days from the date of expiry of the period upto which the name of the individual was applied for inclusion in the data bank, failing which, the name of such individual shall stand removed from the data bank of the institute.

Provided that no application for renewal shall be filed by an individual who has paid life-time fees for inclusion of his name in the data bank.

Every independent director shall submit a declaration of compliance of sub-rule (1) and sub-rule (2) to the Board, each time he submits the declaration required under sub-section (7) of section 149 of the Act.

Every individual whose name is so included shall pass an online proficiency self-assessment test conducted by the institute within a period of one year from the date of inclusion of his name failing which, his name shall stand removed.

Provided that an individual shall not be required to pass the online proficiency self-assessment test, when he has served as a director or key managerial personnel, for a total period of not less than ten years, as on the date of inclusion of his name in the databank, in one or more of the following, namely:-

- listed public company; or
- unlisted public company having a paid-up share capital of rupees ten crore or more; or
- body corporate listed on a recognized stock exchange.

Provided further that for the purpose of calculation of the period of ten years referred to in the first proviso, any period during which an individual was acting as a director or as a key managerial personnel in two or more companies or bodies corporate at the same time shall be counted only once.

- Indian Institute of Corporate Affairs at Manesar’ notified under sub-section (1) of section 150 of the Companies Act, 2013 as the institute for the creation and maintenance of data bank of Independent Directors;
- an individual who has obtained a score of not less than sixty percent in aggregate in the online proficiency self-assessment test shall be deemed to have passed such test;
- there shall be no limit on the number of attempts an individual may take for passing.

- The Central Government may prescribe the manner and procedure of selection of independent directors who fulfil the qualifications and requirements specified under section 149.

Appointment of Small Shareholders Director
A listed company may have one director elected by such small shareholders. “small shareholders” means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.

A listed company, may upon notice of –
- not less than
- one thousand small shareholders
- or one-tenth of the
- total number of such shareholders
- whichever is lower,
- have a small shareholders’ director elected by the small shareholders

A listed company may to opt to have a director representing small shareholders suo motu.

Notice to Company

The small shareholders intending to propose a person as a candidate for the post of small shareholders’ director shall-
- leave a notice of their intention with the company
- at least fourteen days before the meeting
- under their signatures
- specifying the name, address, shares held and folio number of the person
- whose name is being proposed for the post of director and of the
- small shareholders who are proposing such person for the office of director
- if the person being proposed does not hold any shares in the company, the details of shares held and folio number need not be specified in the notice:

The notice shall be accompanied by a statement signed by the person whose name is being proposed for the post of small shareholders’ director stating -
- his Director Identification Number;
- that he is not disqualified to become a director under the Act; and
- his consent to act as a director of the company

SSD to be considered as Independent Director

CA. SHIVANGI AGRAWAL
Such director shall be considered as an **independent** director subject to, his being **eligible** under **sub-section (6)** of **section 149** and his **giving** a **declaration** of his independence in accordance with **sub-section (7)** of **section 149** of the Act.

### Appointment of SSD

The appointment of small shareholders' director shall be subject to the provisions of **section 152** except that-

- **such director shall not be liable to retire by rotation;**
- **such director’s tenure as small shareholders’ director shall not exceed** a period of **three consecutive years**; and
- **on the expiry** of the tenure, such director shall **not be eligible for re-appointment**.

A person shall not be appointed as small shareholders’ director of a company, if the person is not eligible for appointment in terms of **section 164**.

### Vacation of Office by SSD

A **person appointed** as small shareholders’ director shall **vacate** the office if -

- the director incurs any of the **disqualifications** specified in **section 164**;
- the **office of the director becomes vacant** in pursuance of **section 167**;
- the director **ceases to meet** the **criteria of independence** as provided in **sub-section (6)** of **section 149**.

### Prohibition to Hold Position in More Companies

- **No person shall hold** the **position** of small shareholders’ director **in more than two companies at the same time**
- **Provided that the second company** in which he has been appointed shall **not be in a business which is competing** or is in conflict with the business of the first company.

**A small shareholders’ director shall not, for a period of three years from the date on which he ceases to hold office** as a small shareholders’ director in a company, **be appointed in or be associated with such company in any other capacity**, either directly or indirectly.

---

DD Ltd is a listed company and it has been served with notice for appointment of small shareholder's director. Referring to the provisions of Companies Act 2013, advise on the following:

- a) Define Small Shareholder and specify the number of small shareholders who may serve notice on the company for the Director representing them.
- b) Is it possible to appoint a person who does not hold any share in the Company?
- c) What is the tenure of small shareholders’ director and whether he can be re-appointed as such after expiry of his tenure? Whether he can be appointed as an officer of Company on expiry of his tenure as SSD?
A company may, by ordinary resolution, remove a director, not being a director appointed by the Tribunal before the expiry of the period of his office after giving him a reasonable opportunity of being heard.

Provided that an independent director re-appointed for second term shall be removed by the company only by passing a special resolution and after giving him a reasonable opportunity of being heard.

Not applicable where the company has availed itself of the option of proportional representation.

**Procedure**-

A special notice shall be required of any resolution, to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed.

On receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a
member of the company, shall be entitled to be heard on the resolution at the meeting.

Where notice has been given of a resolution to remove a director under this section and the director concerned makes with respect thereto representation in writing to the company and requests its notification to members of the company, the company shall, if the time permits it to do so,—

1. in any notice of the resolution given to members of the company, state the fact of the representation having been made; and
2. send a copy of the representation to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company), and if a copy of the representation is not sent, the director may require that the representation shall be read out at the meeting.

Representation Not Required To Be Sent/Read

- Provided that copy of the representation need not be sent out and the representation need not be read out at the meeting if,
- on the application either of the company or of any other person who claims to be aggrieved,
- the Tribunal is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter; and
- the Tribunal may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it.

Filling Of Vacancy

- A vacancy created by the removal of a director under this section may, if he had been appointed by the company in general meeting or by the Board, be filled by the appointment of another director in his place at the meeting at which he is removed, provided special notice of the intended appointment has been given.
- A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed.
- If the vacancy is not filled, it may be filled as a casual vacancy in accordance with the provisions of this Act but the director who was removed from office shall not be re-appointed as a director by the Board of Directors.

It is not necessary for a member to state the grounds of removal of a director at the time of calling the extraordinary general meeting. [LiC vs Escorts Ltd]

Mr. SDR, a shareholder in M/S JKP Ltd holding 50,000 equity shares of Rs. 10 each fully paid up wants to give a special notice to the company for removal of Mr. EDM, a director of M/S JKP Ltd without stating any reason in the notice. You are required to state whether Mr. SDR is entitled to do so.

Registers

Every company shall keep at its registered office a register containing such particulars of its directors and key managerial personnel as may be prescribed, which shall include the details of securities held by each
of them in the company or its holding, subsidiary, subsidiary of company’s holding company or associate companies.

A **return containing** such **particulars** and documents as may be prescribed, of the directors and the key managerial personnel shall be **filed** with the **Registrar** **within thirty days from** the **appointment** of every director and key managerial personnel, as the case may be, and **within thirty days of** any **change** taking place.

**In case of Government Company - Section 170 shall not apply to Government Company in which the entire share capital is held by the Central Government, or by any State Government or Governments or by the Central Government or by one or more State Governments.**

**In case of Specified IFSC Public and Private Company-** For the words “thirty days” at both places read as “sixty days”.

**Right of Inspection**

The register
- shall be **open for inspection** during **business hours** and
- the members shall have a **right to take extracts** on a request
- which be provided to them **free of cost within thirty days**; and
- shall also be kept **open for inspection** at every **AGM**
- and shall be made accessible to person attending meeting.

If any inspection is **refused**, or if any copy required under that clause is not sent within thirty days from the date of receipt of such request, the **Registrar shall** on an application made to him **order immediate inspection** and **supply** of copies required there under.

**In case of government company - section 171 shall not apply to government company in which the entire share capital is held by the central government, or by any state government or governments or by the central government or by one or more state governments**

**Punishment**

If a company-
- **contravenes** any of the provisions of this Chapter and
- **for which no specific punishment** is provided therein,
- the company and every officer of the company
- who is in default
- shall be punishable with fine
- **Minimum** Fine: Fifty thousand rupees
- **Maximum** Fine: Five lakh rupees.

**Multiple Choice Questions**

**CA. SHIVANGI AGRAWAL**
1. As per Section 149(1), minimum number of Directors in case of Private Company and OPC are:
   a. 2,1  
   b. 1,2  
   c. 3,1  
   d. 3,2

2. At least one Woman Director is required for:
   a. Every listed Company  
   b. Public Company with PUC 100 crores or more; or Turnover 300 crores or more  
   c. Private Company with PUC 100 crores or more; or Turnover 300 crores or more  
   d. Both (a) and (b)

3. The definition of ‘director’ is contained in ----
   a. Clause (10) of Sec. 2  
   b. Clause (34) of Sec. 2  
   c. Clause (33) of Sec. 2  
   d. Clause (32) of Sec. 2

4. Mrs Shivangi, the only Woman Director of BMV Ltd resigns on 10th May, 2019. The Board meeting was held on 15th September, 2019. Board wants to appoint Sudha as woman Director. The appointment should be made before
   e. 10th August, 2019  
   f. 15th September, 2019  
   g. 31st March, 2020  
   h. 10th November, 2019

5. A person who is below the age of ---- years is disqualified to be appointed as a director.
   a. 70 years  
   b. 25 years  
   c. 65 years  
   d. None of these

6. Mr. Hari resigns from directorship of ABC Ltd. by sending a notice of resignation on 5th December, 2019. The said notice is received by the company on 8th December, 2019. Mr Harry files Form No. DIR-11 with the Registrar on 12th December, 2019. ABC Ltd. files Form No. DIR-12 with the Registrar on 15th December, 2019. The resignation of Mr. Hari shall take effect from ----
   a. 5th December, 2019  
   b. 8th December, 2019  
   c. 12th December, 2019  
   d. 15th December, 2019

7. Karan is appointed as an independent Director of ABC Ltd. Karan is also a promoter of XYZ Ltd which is an associate of ABC Ltd. Appointment of Karan is:
   a. Valid  
   b. Void  
   c. Voidable  
   d. Any one of these

8. A company may have more than 15 directors ----
   a. By passing an ordinary resolution  
   b. By passing a special resolution  
   c. With the approval of the Central Government  
   d. With the approval of the Tribunal

9. A person who is convicted by a Court of any offence (whether involving moral turpitude or otherwise) and sentenced to imprisonment for ------- or more shall be disqualified for a period of ------- from the date of -------
   a. 3 months; 5 years; expiry of the sentence  
   b. 6 months; 5 years; expiry of the sentence

CA. SHIVANGI AGRAWAL
10. The articles of ABC Ltd. contain a provision that any person who is not a Chartered Accountant shall not be eligible to be appointed as a director. Whether Mr. Z, who is not a Chartered Accountant, is disqualified for appointment as a director?

<table>
<thead>
<tr>
<th>a. No</th>
<th>b. Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. No, if a special resolution is passed in general meeting for his appointment</td>
<td>d. No, if an ordinary resolution is passed in general meeting for his appointment</td>
</tr>
</tbody>
</table>

11. A person can’t be a director in 10 companies excluding:

<table>
<thead>
<tr>
<th>a. Dormant companies</th>
<th>b. Section 8 companies</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Both (a) and (b)</td>
<td>d. None of these</td>
</tr>
</tbody>
</table>

12. Mr. X holds shares of A Ltd. He failed to pay a call on such shares. The last day for the payment of call was 3rd December 2018. Mr. X shall be disqualified for appointment as a director if the default in payment of call continues till:

<table>
<thead>
<tr>
<th>a. 2nd June 2019</th>
<th>b. 3rd June 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. 3rd December 2018</td>
<td>d. 3rd March 2019</td>
</tr>
</tbody>
</table>

13. A person can be a director in 20 companies excluding:

<table>
<thead>
<tr>
<th>a. Dormant companies</th>
<th>b. Section 8 companies</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Both (a) and (b)</td>
<td>d. None of these</td>
</tr>
</tbody>
</table>

14. Mr. X, a director of XYZ Ltd fails to disclose his interest in a contract or arrangement in which he was interested. The consequences of such default shall be:

<table>
<thead>
<tr>
<th>a. His office of director in XYZ Ltd shall become vacant</th>
<th>b. His office of director in XYZ Ltd shall become vacant, if so decided by the Board</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. His office of director in all the companies in which he is a director shall become vacant</td>
<td>d. His office of director shall not be vacated</td>
</tr>
</tbody>
</table>

15. In a board meeting of a company, Mr. A and Mr. B are appointed as additional directors by passing a single resolution. The appointments of Mr. A and Mr. B shall be valid if:

<table>
<thead>
<tr>
<th>a. The company is a public company</th>
<th>b. The company is a private company</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. The company is a private company which has not made any default in filing with registrar</td>
<td>d. All of these</td>
</tr>
</tbody>
</table>

16. Mr. Singh applied for the first time for allotment of a directors Identification Number on 1st November, 2016 as he is planning to incorporate a private limited company in form no. DIN-3 under the Companies Act, 2013. The status of his DIN applications presently is showing as ‘Put under Resubmission’. Within ---- days Singh needs to resubmit the application

<table>
<thead>
<tr>
<th>a. 30 days</th>
<th>b. 15 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. 1 month</td>
<td>d. 90 days</td>
</tr>
</tbody>
</table>
17. The Nomination and Remuneration Committee of Hero Ltd recommended to appoint Mr. Amit as an Independent director. As per section 160 Mr. Amit needs to deposit:---

| a. 100000 | b. No deposit required |
| c. 50000 | d. 1000000 |

18. The board of directors of XYZ Ltd filled up a casual vacancy caused by death of Mr. P by appointing Mr. C as a director on 3rd April 2014. Unfortunately, Mr. C expired on 15th May 2014 after working for about 40 days as a director. Further appointment of director shall be made by:-----

| a. Board of Directors | b. Members at General Meeting |
| c. None of the above | d. Any of the above |

19. Where all the directors of company vacate their office under any of the disqualifications specified, the:----- shall be appointed till the required number of directors who shall hold office till the directors are appointed by the company in general meeting:

| a. Promoter | b. Members |
| c. CFO | d. Central Government |

20. If a person has been convicted of any offence and sentenced for more than or equal to 7 years:

| a. He will be ineligible to act as director for 5 years | b. He will be ineligible to act as director for lifetime |
| c. He will be ineligible to act as director for 10 years | d. None of the above |

21. A rotational director may be appointed:

| a. In AGM | b. In EGM |
| c. In AGM as well as in EGM | d. In AGM or in EGM or in Board meeting |

22. Every person proposed to be appointed as a director shall furnish to the company a declaration that he is not disqualified to become a director:

| a. Within 15 days of his appointment as a director | b. Within 30 days of his appointment as a director |
| c. Within 60 days of his appointment as a director | d. Anytime before his appointment as a director |

23. A person who is not a retiring director can stand for directorship:

| a. By giving a special notice | b. By giving a notice at least 14 days before general meeting |
| c. By giving notice at least 7 days before meeting | d. By giving a notice at least 14 days before board meeting |

24. A company which has adopted proportional representation shall appoint not less than:----- of the total number of directors by proportional representation and such appointment shall be made once in every:-----

| a. 1/3; 3 years | b. 2/3; 5 years |
| c. 2/3; 3 years | d. 1/3; 5 years |
25. Every company shall have atleast 1 director who stays in India for a total period of not less than ----- days during -----  
   a. 180; Calendar Year  
   b. 180; financial Year  
   c. 182; Calendar Year  
   d. 182; Financial Year

26. Mr. X had pecuniary relationship exceeding 10% but not exceeding 20% of his total income with XYZ ltd during the financial year 2016-17. Mr. X cannot be appointed as an independent director in XYZ ltd during financial year -----  
   a. 2017-18 and 2018-19  
   b. 2016-17, 2017-18 and 2018-19  
   c. 2016-17, 2017-18, 2018-19 and 2019-20  
   d. None of these

27. Mr. X has taken loan of Rs. 25 lakh from XYZ ltd. Consider the following statements:  
   1) The wife of Mr. X cannot be appointed as an Independent Director in XYZ ltd  
   2) The father-in-law of Mr. X cannot be appointed as an independent director in XYZ ltd  
   a. Only statement (1) is correct  
   b. Only statement (2) is correct  
   c. Both statement are correct  
   d. None of these

28. An independent director shall hold office for-  
   a. Maximum term of 5 consecutive years  
   b. Maximum term of 3 consecutive years  
   c. 2 term of 5 years  
   d. None of these

29. An independent director shall be eligible for re-appointment--  
   a. On passing an ordinary resolution  
   b. On passing special resolution  
   c. On approval of CG  
   d. On approval of tribunal

30. The provisions relating to appointment of Small Shareholders Director apply to -  
   a. All listed companies  
   b. All public companies having 1000 or more small shareholders  
   c. All public companies having 100 crore or more PUC  
   d. Any of these

31. The board may appoint Additional Director if-  
   a. Company in General meeting has authorized board by passing resolution  
   b. The articles of the company has authorized board  
   c. Both (a) and (b)  
   d. Either (a) or (b)

32. Mr. D, a director died in an accident. The board can fill such vacancy if----  
   a. Mr. D was appointed as an additional director by the Board  
   b. Mr. D was appointed as a director in general meeting  
   c. Mr. D was appointed to fill casual vacancy in the office of Mr. C  
   d. None of these

33. Who can appoint an Alternate Director?  
   a. Original Director  
   b. Members of the company  
   c. Board of directors  
   d. Central Government
34. A small shareholders director may be removed-

<table>
<thead>
<tr>
<th>a.</th>
<th>By passing an ordinary resolution in a meeting of small shareholders</th>
</tr>
</thead>
<tbody>
<tr>
<td>b.</td>
<td>By passing a special resolution in a meeting of small shareholders</td>
</tr>
<tr>
<td>c.</td>
<td>By passing a special resolution in a general meeting</td>
</tr>
<tr>
<td>d.</td>
<td>By passing an ordinary resolution in a general meeting</td>
</tr>
</tbody>
</table>

35. Which of the following directors cannot be appointed by passing a resolution by circulation?

<table>
<thead>
<tr>
<th>a.</th>
<th>An additional Director</th>
</tr>
</thead>
<tbody>
<tr>
<td>b.</td>
<td>An Alternate Director</td>
</tr>
<tr>
<td>c.</td>
<td>A director filling a casual vacancy</td>
</tr>
<tr>
<td>d.</td>
<td>None of these</td>
</tr>
</tbody>
</table>

36. After allotment of DIN to Ms. Nikita some changes took place in her particulars as stated in Form No. DIR-3. Ms. Nikita shall have to intimate such changes to the Central Government in form No. ----- within ------

<table>
<thead>
<tr>
<th>a.</th>
<th>DIR 3C; 30 Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>b.</td>
<td>DIR 6; 15 days</td>
</tr>
<tr>
<td>c.</td>
<td>DIR 6; 30 days</td>
</tr>
<tr>
<td>d.</td>
<td>DIR 3C; 60 days</td>
</tr>
</tbody>
</table>

37. A company is required to file with the Registrar a return in Form No. DIR-12 within ------ of appointment of every director and key managerial personnel and any change taking place in their particulars.

<table>
<thead>
<tr>
<th>a.</th>
<th>7 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>b.</td>
<td>14 days</td>
</tr>
<tr>
<td>c.</td>
<td>15 days</td>
</tr>
<tr>
<td>d.</td>
<td>30 days</td>
</tr>
</tbody>
</table>

38. Mohan, a member of M Ltd, requests the company to furnish to him a copy of the register of directors and KMP. M Ltd shall have to provide the copy to Mr. Mohan ----- within -----.

<table>
<thead>
<tr>
<th>a.</th>
<th>Free of cost: 30 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>b.</td>
<td>Free of cost: 7 days</td>
</tr>
<tr>
<td>c.</td>
<td>On payment of Rs. 100; 30 days</td>
</tr>
<tr>
<td>d.</td>
<td>On payment of Rs. 100; 7 days</td>
</tr>
</tbody>
</table>

39. If a company contravenes any of the provisions contained in section 149 to 172, for which no specific punishment is provided, the company and every officer in default shall be punishable with a fine which shall not be less than ----- but which may extend to -----

<table>
<thead>
<tr>
<th>a.</th>
<th>25000; 5 lakh</th>
</tr>
</thead>
<tbody>
<tr>
<td>b.</td>
<td>50000; 5 lakh</td>
</tr>
<tr>
<td>c.</td>
<td>50000; 10 lakh</td>
</tr>
<tr>
<td>d.</td>
<td>1 lakh; 5 lakh</td>
</tr>
</tbody>
</table>

40. On an application made by any person for allotment of DIN, the Central Government shall allot DIN to the applicant within 1 month of receipt of such application.

<table>
<thead>
<tr>
<th>a.</th>
<th>7 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>b.</td>
<td>14 days</td>
</tr>
<tr>
<td>c.</td>
<td>15 days</td>
</tr>
<tr>
<td>d.</td>
<td>1 month</td>
</tr>
</tbody>
</table>

41. Mr. Swann is convicted by a Court of an offence under IPC and is sentenced to imprisonment for 2 years. However, court does not specify that the offence involves moral turpitude. What will be the consequences?

<table>
<thead>
<tr>
<th>a.</th>
<th>Disqualified for 5 years from expiry of sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>b.</td>
<td>Disqualified for life</td>
</tr>
<tr>
<td>c.</td>
<td>Not disqualified</td>
</tr>
<tr>
<td>d.</td>
<td>None of these</td>
</tr>
</tbody>
</table>

42. A vacancy in the office of Independent Director arises on 13th August, 2018. After 13th August 2018, the next board meeting was held on 3rd December 2018. The vacancy in the office of independent director shall have to be filled on or before--
43. The Independent directors of the company shall hold at least ____ in a financial year
   a. Two meetings  
   b. Three meetings
   c. Four meetings
   d. None of these

44. An unlisted public company shall not be required to have any independent director if it is---
   a. A joint venture  
   b. A wholly owned subsidiary
   c. A dormant company
   d. Any of (a) or (b) or (c)

45. In order to remove a director before the expiry of his term of office, a special notice is given to the company not earlier than ____ before the date of the meeting but at least ____ before the general meeting
   a. 1 month: 14 days  
   b. 1 month: 30 days
   c. 3 months: 14 days
   d. 3 months: 30 days

46. The board is entitled to appoint an alternate director in place of a director during his absence from ____ for a period of ____ or more.
   a. India; 3 months  
   b. India; 6 months
   c. State; 3 months
   d. State; 6 months

47. Resignation submitted by a director to the company shall become effective---
   a. When it is accepted by the Board  
   b. When it is received by the Company
   c. From the date specified by the director in the notice of resignation
   d. Later of (b) and (c)

48. A company may have more than 15 directors without passing a special resolution if the company is---
   a. A government company  
   b. Section 8 company
   c. Both (a) and (b)
   d. A private company

49. Disqualification specified u/s 164(2) shall apply to---
   a. Directors of Government Companies  
   b. Nominee Directors appointed by Public Financial Institutions
   c. Directors of private companies
   d. Both (a) and (b)

50. S Ltd is an unlisted public company having a paid up share capital of Rs. 80 Crore. The audit committee of S Ltd has 7 directors. S Ltd is required to appoint ____ independent directors
   a. 2  
   b. 3
   c. 4
   d. 5

Answer to MCQs

CA. SHIVANGI AGRAWAL
<p>| | | | | | | |</p>
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>(a)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>(d)</td>
<td>12</td>
<td>(b)</td>
<td>22</td>
<td>(d)</td>
<td>32</td>
</tr>
<tr>
<td>3</td>
<td>(b)</td>
<td>13</td>
<td>(c)</td>
<td>23</td>
<td>(b)</td>
<td>33</td>
</tr>
<tr>
<td>4</td>
<td>(b)</td>
<td>14</td>
<td>(a)</td>
<td>24</td>
<td>(c)</td>
<td>34</td>
</tr>
<tr>
<td>5</td>
<td>(d)</td>
<td>15</td>
<td>(d)</td>
<td>25</td>
<td>(d)</td>
<td>35</td>
</tr>
<tr>
<td>6</td>
<td>(b)</td>
<td>16</td>
<td>(b)</td>
<td>26</td>
<td>(b)</td>
<td>36</td>
</tr>
<tr>
<td>7</td>
<td>(b)</td>
<td>17</td>
<td>(b)</td>
<td>27</td>
<td>(a)</td>
<td>37</td>
</tr>
<tr>
<td>8</td>
<td>(b)</td>
<td>18</td>
<td>(b)</td>
<td>28</td>
<td>(a)</td>
<td>38</td>
</tr>
<tr>
<td>9</td>
<td>(b)</td>
<td>19</td>
<td>(a)</td>
<td>29</td>
<td>(b)</td>
<td>39</td>
</tr>
<tr>
<td>10</td>
<td>(a)</td>
<td>20</td>
<td>(b)</td>
<td>30</td>
<td>(a)</td>
<td>40</td>
</tr>
</tbody>
</table>
Appointment & Remuneration of Managerial Personnel

Section Summary

This chapter XIII of Companies Act, 2013 is read with Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014

<table>
<thead>
<tr>
<th>Section No.</th>
<th>Topics Covered</th>
</tr>
</thead>
<tbody>
<tr>
<td>196</td>
<td>Appointment of Managing Director, Whole Time Director or Manager</td>
</tr>
<tr>
<td>197</td>
<td>Overall Managerial Remuneration and Managerial Remuneration in case of absence or inadequacy of Profits</td>
</tr>
<tr>
<td>198</td>
<td>Calculation of Profits</td>
</tr>
<tr>
<td>199</td>
<td>Recovery of Remuneration in certain cases</td>
</tr>
<tr>
<td>200</td>
<td>Central Government or company to fix limit with regard to Remuneration</td>
</tr>
<tr>
<td>201</td>
<td>Forms of, and Procedure in relation to certain applications</td>
</tr>
<tr>
<td>202</td>
<td>Compensation for loss of office of MD/WTD/Manager</td>
</tr>
<tr>
<td>203</td>
<td>Appointment of Key Managerial Personnel</td>
</tr>
<tr>
<td>204</td>
<td>Secretarial Audit for Bigger Companies</td>
</tr>
<tr>
<td>205</td>
<td>Functions of Company Secretary</td>
</tr>
</tbody>
</table>

Meaning of Managing Director

"Managing director" means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

For the purposes of this clause,

- the power to do administrative acts of a routine nature when so authorised by the Board
- such as the power to affix the common seal of the company to any document or
- to draw and endorse any cheque on the account of the company in any bank or
- to draw and endorse any negotiable instrument or
- to sign any certificate of share or to direct registration of transfer of any share,
- shall not be deemed to be included within the substantial powers of management.

CA. SHIVANGI AGRAWAL
Prince was appointed as additional director by the Board of directors of John ltd on 1st March 2015. He was simultaneously appointed as the company's managing director by majority voting at the same Board meeting. Referring to the provisions of the Companies Act, 2013, examine the validity of the appointment of prince as additional director and as the managing director at the same time. What shall be your answer in case Prince failed to get appointed at the company's annual general meeting?

There are four directors in Two squares ltd. Mr. Rao, being the director in station, has been authorized to draw and endorse cheque or other negotiable instrument on account of the company and also to direct registration of transfer of shares and signing share certificate etc. Whether as per provisions of Companies Act, 2013, he will be treated as managing director of the company?

Meaning of Manager

"Manager" means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not;

Meaning of Whole Time Director

"whole-time director" includes a director in the whole-time employment of the company

- A company can have 2 or more MDs
- A company can't have MD and a manager together
- A company can't have 2 managers
- A company may have manager and whole time directors
- A company may have MD and whole time directors
Appointment of Managing Director, Whole time Director or Manager

Prohibition on Appointment [Section 196(1)]

No company shall appoint or employ at the same time a managing director and a manager.

Term of Appointment [Section 196(2)]

✓ No company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time
✓ No re-appointment shall be made earlier than one year before the expiry of his term.

Disqualifications [Section 196(3)]

No company shall appoint or continue the employment of any person as managing director, whole-time director or manager who—

(a) is below the age of twenty-one years or has attained the age of seventy years
(b) is an undischarged insolvent or has at any time been adjudged as an insolvent
(c) has at any time suspended payment to his creditors or makes, or has at any time made, a composition with them; or
(d) has at any time been convicted by a court of an offence and sentenced for a period of more than six months.

More than 70 years [Proviso to clause (a) of 196(3)]

✓ Appointment of a person who has attained the age of seventy years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person
✓ Where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

Notice

A notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any

Approval

Subject to the provisions of section 197 and Schedule V,
✓ a managing director, whole-time director or manager
shall be appointed and the terms and conditions of such appointment and remuneration payable
be approved by the Board of Directors
at a meeting which shall be subject to approval by a resolution
at the next general meeting of the company and
by the Central Government in case such appointment is at variance to the conditions specified in Part I of that Schedule

Forms of and Procedure in relation to Certain Applications

Every application made to the Central Government under Section 196 shall be in Form No. MR.2 and shall be accompanied by fee as may be specified for the purpose.
Every such application seeking approval shall be made to the Central Government within a period of ninety days from the date of such appointment.

Before any application is made by a company to the Central Government under Section 196 there shall be issued by or on behalf of the company a general notice to the members thereof, indicating the nature of the application proposed to be made.
Such notice shall be published at least once in a newspaper in the principal language of the district in which the registered office of the company is situate and circulating in that district, and at least once in English in an English newspaper circulating in that district.
The copies of the notices, together with a certificate by the company as to the due publication thereof, shall be attached to the application.

Who Can Be Appointed? [Part I of Schedule V]

No person shall be eligible for appointment as a managing or whole-time director or a manager of a company unless he satisfies the following conditions, namely:—

(a) he had not been sentenced to imprisonment for any period, or to a fine exceeding one thousand rupees, for the conviction of an offence under any of the following Acts, namely:—

- the Indian Stamp Act, 1899
- the Central Excise Act, 1944
- the Industries (Development and Regulation) Act, 1951
- the Prevention of Food Adulteration Act, 1954
- the Essential Commodities Act, 1955
- the Companies Act, 2013 or any previous company law
- the Securities Contracts (Regulation) Act, 1956
- the Wealth-tax Act, 1957
- the Income-tax Act, 1961
- the Customs Act, 1962
- the Competition Act, 2002;
- the Foreign Exchange Management Act, 1999;
- the Sick Industrial Companies (Special Provisions) Act, 1985;
- the Securities and Exchange Board of India Act, 1992;
- the Foreign Trade (Development and Regulation) Act, 1922;
- the Prevention of Money-Laundering Act, 2002;
(b) he had not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974

Provided that where the Central Government has given its approval to the appointment of a person convicted or detained under sub-paragraph (a) or sub-paragraph (b), as the case may be, no further approval of the Central Government shall be necessary for the subsequent appointment of that person if he had not been so convicted or detained subsequent to such approval.

(c) he has completed the age of twenty-one years and has not attained the age of seventy years

Provided that where he has attained the age of seventy years; and where his appointment is approved by a special resolution passed by the company in general meeting, no further approval of the Central Government shall be necessary for such appointment.

(e) he is resident of India.

For the purpose of this Schedule, resident in India includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India,—

(i) for taking up employment in India; or

(ii) for carrying on a business or vacation in India.

This condition shall not apply to the companies in Special Economic Zones as notified by Department of Commerce from time to time.

Provided that a person, being a non-resident in India shall enter India only after obtaining a proper Employment Visa from the concerned Indian mission abroad. For this purpose, such person shall be required to furnish, along with the visa application form, profile of the company, the principal employer and terms and conditions of such person’s appointment.

Validity of Acts [Section 196(5)]

Where an appointment of a managing director, whole-time director or manager is not approved by the company at a general meeting, any act done by him before such approval shall not be deemed to be invalid.

Filing of Return [Section 196(4)]

A return in the prescribed form shall be filed within sixty days of such appointment with the Registrar in MR 2.
Overall Maximum Managerial Remuneration and Managerial Remuneration in Case Of Absence or Inadequacy of Profits

Managerial Remuneration

Non-Executive Directors

Executive Directors

Based on Profits

In case of adequate profit

In case company have ED

1% of NP to all NED

In case company do not have ED

3% of NP to all ED

In case of loss/Inadequate profit

No Remuneration

Sitting fees

Max 1 lakh per director per board meeting

Non-Executive Directors

Based on Profit

The total managerial remuneration payable by a public company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year shall not exceed 11% of the net profits of that company for that financial year computed in the manner laid down in section 198 except that the remuneration of the directors shall not be deducted from the gross profits.

Provided that the company in general meeting may authorise the payment of remuneration exceeding 11% of the net profits of the company, subject to the provisions of Schedule V.
Provided further that, except with the approval of the company in general meeting by a special resolution and where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting, Remuneration shall not exceed the following:

**Remuneration Exclusive Of Sitting Fees [Section 197(2)]**

The percentages aforesaid shall be exclusive of any fees payable to directors under sub-section (5).

**Remuneration In Case Of Loss [Section 197(3)]**

Notwithstanding anything contained in sub-sections (1) and (2), but subject to the provisions of Schedule V, if, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including any managing or whole time director or manager, by way of remuneration any sum exclusive of any fees payable to directors under sub-section (5) hereunder except in accordance with the provisions of Schedule V.

**Schedule V - Part II**

**Remuneration in case of Loss or Inadequate Profits**

Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may pay remuneration to the managerial person not exceeding limits under (A) and (B)

(A) Remuneration Limit

---

CA. SHIVANGI AGRAWAL
Where the effective capital is | Limit of yearly remuneration payable shall not exceed (Rupees)
---|---
(i) Negative or less than 5 crores | 60 Lakhs
(ii) 5 crores and above but less than 100 crores | 84 Lakhs
(iii) 100 crores and above but less than 250 crores | 120 Lakhs
(iv) 250 crores and above | 120 lakhs plus 0.01% of the effective capital in excess of Rs. 250 crores

Provided that the remuneration in excess of above limits may be paid if the resolution passed by the shareholders is a special resolution.

### Effective Capital

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid up share Capital</td>
<td>XX</td>
</tr>
<tr>
<td>Add: Share Premium Account</td>
<td>XX</td>
</tr>
<tr>
<td>Add: Reserves &amp; Surplus</td>
<td>XX</td>
</tr>
<tr>
<td>Add: Long-term loans &amp; deposits repayable after one year</td>
<td>XX</td>
</tr>
<tr>
<td>Less: Any investments (except in case of investments company)</td>
<td>XX</td>
</tr>
<tr>
<td>Less: Accumulated losses</td>
<td>XX</td>
</tr>
<tr>
<td>Less: Preliminary expenses w/off</td>
<td>XX</td>
</tr>
<tr>
<td><strong>Effective Capital</strong></td>
<td><strong>XX</strong></td>
</tr>
</tbody>
</table>

### (B) Remuneration to Professional Director

- ✓ In case of a **managerial person**
- ✓ who is **functioning in a professional capacity**, remuneration as per item (A) may be paid,
- ✓ if such managerial person is **not having any interest in the capital** of the company
- ✓ or its holding company or any of its subsidiaries directly or indirectly or
- ✓ through any other statutory structures and
- ✓ **not having any, direct or indirect interest or related to the directors or promoters** of the company or its holding company or any of its subsidiaries
- ✓ at any time during the last two years
- ✓ before or on or after the date of appointment and
- ✓ **possesses graduate level qualification** with expertise and specialised knowledge in the field in which the company operates

Provided that any employee of a company holding shares of the company not exceeding 0.5% of its paid up share capital under any scheme formulated for allotment of shares to such employees including Employees Stock Option Plan or by way of qualification shall be deemed to be a person not having any interest in the capital of the company;

### Conditions for Payment

Provided further that the limits specified under items (A) and (B) of this section shall apply, if-
(i) payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of section 178 also by the Nomination and Remuneration Committee;

(ii) the company has not committed any default in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, and in case of default, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting.

(iii) an ordinary resolution or a special resolution, as the case may be, has been passed for payment of remuneration as per item (A) or a special resolution has been passed for payment of remuneration as per item (B), at the general meeting of the company for a period not exceeding three years.

(iv) a statement along with a notice calling the general meeting referred to in clause (iii) is given to the shareholders containing the following information, namely:-

I. General information: like nature of industry, expected date of commencement of commercial production, Financial performance etc.

II. Information about the appointee like background details, past remuneration, awards, profile etc.

III. Other information: like Reasons of loss or inadequate profits, Steps taken or proposed to be taken for improvement

IV. Disclosures in Board’s report

Section III.—

Remuneration Payable by Companies Having No Profit or Inadequate Profit In Certain Special Circumstances

In the following circumstances a company may, pay remuneration to a managerial person in excess of the amounts provided in Section II above:—

(a) where the remuneration in excess of the limits specified in Section I or II is paid by any other company and that other company is either a foreign company or has got the approval of its shareholders in general meeting to make such payment, and treats this amount as managerial remuneration for the purpose of section 197 and the total managerial remuneration payable by such other company to its managerial persons including such amount or amounts is within permissible limits under section 197.

(b) where the company—

(i) is a newly incorporated company, for a period of seven years from the date of its incorporation, or

(ii) is a sick company, for whom a scheme of revival or rehabilitation has been ordered by the Board for Industrial and Financial Reconstruction for a period of five years from the date of sanction of scheme of revival, or

(iii) is a company in relation to which a resolution plan has been approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 for a period of five years from the date of such approval, it may pay "any remuneration to its managerial persons".
(c) where remuneration of a managerial person exceeds the limits in Section II but the remuneration has been fixed by the Board for Industrial and Financial Reconstruction or the National Company Law Tribunal.

**Additional Conditions to be followed in above Circumstances**

Provided that the limits under this Section shall be applicable subject to meeting all the conditions specified under Section II and the following additional conditions:—

- **✓** the *managerial person is not receiving remuneration from any other company*;
- **✓** the *auditor or Company Secretary* of the company or where the company has not appointed a Secretary, a Secretary in whole-time practice, *certifies that* all secured creditors and term lenders have stated in writing that they have no objection for the appointment of the managerial person as well as the quantum of remuneration and such certificate is filed along with the return as prescribed under sub-section (4) of section 196;
- **✓** the *auditor or Company Secretary* or where the company has not appointed a secretary, a secretary in whole-time practice certifies that there is no default on payments to any creditors, and all dues to deposit holders are being settled on time.

**Section IV - Perquisites Not Included In Managerial Remuneration**

- **✓** A managerial person shall be eligible for the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II and Section III:—
  1. **(a) contribution to provident fund**, superannuation fund or annuity fund
  2. **(b) gratuity**
  3. **(c) encashment of leave** at the end of the tenure.

- **✓** An expatriate managerial person (including a non-resident Indian) shall be eligible to the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II or Section III—
  1. **(a) Children’s education allowance**: In case of children studying in or outside India, an allowance limited to a maximum of Rs. 12,000 per month per child or actual expenses incurred, whichever is less. Such allowance is admissible up to a maximum of two children.
  2. **(b) Holiday passage** for children studying outside India or family staying abroad: Return holiday passage once in a year by economy class or once in two years by first class to children and to the members of the family from the place of their study or stay abroad to India if they are not residing in India, with the managerial person.
  3. **(c) Leave travel concession**: Return passage for self and family in accordance with the rules specified by the company where it is proposed that the leave be spent in home country instead of anywhere in India.

**PART III**

Provisions applicable to Parts I and II of this Schedule

- **✓** The appointment and remuneration referred to in Part I and Part II of this Schedule shall be subject to approval by a resolution of the shareholders in general meeting.

- **✓** The auditor or the Secretary of the company or where the company is not required to appointed a Secretary, a Secretary in whole-time practice shall certify that the
requirement of this Schedule have been complied with and such certificate shall be incorporated in the return filed with the Registrar under sub-section (4) of section 196.

PART IV

The Central Government may, by notification, exempt any class or classes of companies from any of the requirements contained in this Schedule.

Remuneration [Section 197(4)]

The remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either by the articles of the company, or by a resolution or, if the articles so require, by a special resolution, passed by the company in general meeting and the remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity:
Provided that any remuneration for services rendered by any such director in other capacity shall not be so included if—
(a) the services rendered are of a professional nature; and
(b) in the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Sitting Fees [Section 197(5)]

A director may receive remuneration by way of fee for attending meetings of the Board or Committee thereof or for any other purpose whatsoever as may be decided by the Board
✓ Provided that the amount of such fees shall not exceed the amount as may be prescribed.
✓ Provided further that different fees for different classes of companies and fees in respect of independent director may be such as may be prescribed.

Rule 4 of Companies(Appointment & Remuneration of Managerial Remuneration) Rules

✓ A company may pay a sitting fee to a director for attending meetings of the Board or committees thereof, such sum as may be decided by the Board of directors thereof which shall not exceed one lakh rupees per meeting of the Board or committee thereof
✓ Provided that for Independent Directors and Women Directors, the sitting fee shall not be less than the sitting fee payable to other directors.

Mode of Remuneration [Section 197(6)]

A director or manager may be paid remuneration either-
✓ by way of a monthly payment or
✓ at a specified percentage of the net profits of the company or
✓ partly by one way and partly by the other.

Net Profits [Section 197(8)]
The net profits for the purposes of this section shall be computed in the manner referred to in section 198.

Recovery of Excess Remuneration [Section 197(9)]

If any **director draws** or receives, directly or indirectly, by way of **remuneration** any such sums **in excess** of the limit prescribed by this section or without approval required under this section,

✓ **he shall refund** such sums to the company,
✓ **within two years or such lesser period** as may be **allowed** by the company,
✓ and until such sum is refunded, hold it in trust for the company.

Waiver of Recovery [Section 197(10)]

The **company shall not waive** the **recovery** of any sum refundable to it under sub-section (9) **unless approved** by the company **by special resolution within two years** from the date the sum becomes refundable.

Provided that where the **company has defaulted in payment of dues** to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the **prior approval** of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, **shall be obtained** by the company before obtaining approval of such waiver.

Increase In Accordance With Schedule V [Section 197(11)]

In cases where Schedule V is applicable on grounds of no profits or inadequate profits, any provision relating to the remuneration of any director which purports to increase or has the effect of increasing the amount thereof, whether the provision be contained in the company’s memorandum or articles, or in an agreement entered into by it, or in any resolution passed by the company in general meeting or its Board, shall not have any effect unless such increase is in accordance with the conditions specified in that Schedule.

Disclosure [Section 197(12)]

Every listed company shall disclose in the Board’s report, the ratio of the remuneration of each director to the median employee’s remuneration and such other details as may be prescribed.

**Rule 5:**
Every listed company shall disclose in the Board’s report-

✓ the ratio of the remuneration of each director to the median remuneration of the employees of the company for the financial year;
✓ the percentage increase in remuneration of each director, Chief Financial Officer, Chief Executive Officer, Company Secretary or Manager, if any, in the financial year;
✓ the percentage increase in the median remuneration of employees in the financial year;
✓ the number of permanent employees on the rolls of company;
✓ average percentile increase already made in the salaries of employees other than the managerial personnel in the last financial year and its comparison with the percentile increase in the managerial remuneration and justification thereof and point out if there are any exceptional circumstances for increase in the managerial remuneration;
✓ **affirmation** that the remuneration is as per the remuneration policy of the company.
(2) The board’s report shall include a statement showing the names of the top ten employees in terms of remuneration drawn and the name of every employee, who-

- if employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than one crore and two lakh rupees
- if employed for a part of the financial year, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than eight lakh and fifty thousand rupees per month
- if employed throughout the financial year or part thereof, was in receipt of remuneration in that year which, in the aggregate, or as the case may be, at a rate which, in the aggregate, is in excess of that drawn by the managing director or whole-time director or manager and holds by himself or along with his spouse and dependent children, not less than two percent of the equity shares of the company.

**Insurance Not A Part of Remuneration [Section 197(13)]**

Where any insurance is taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel. Provided that if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration.

**No Prohibition [Section 197(14)]**

Subject to the provisions of this section, any director who is in receipt of any commission from the company and who is a managing or whole-time director of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board’s report.

**Penalty [Section 197(15)]**

If any person makes any default in complying with the provisions of this section, he shall be liable to a penalty of one lakh rupees and where any default has been made by a company, the company shall be liable to a penalty of five lakh rupees.

**Report by Auditor [Section 197(16)]**

The auditor of the company shall, in his report under section 143, make a statement as to whether the remuneration paid by the company to its directors is in accordance with the provisions of this section, whether remuneration paid to any director is in excess of the limit laid down under this section and give such other details as may be prescribed.

**Approval before Amendment Act**
On and from the commencement of the Companies (Amendment) Act, 2017, any application made to the Central Government under the provisions of this section as it stood before such commencement, which is pending with that Government shall abate, and the company shall, within one year of such commencement, obtain the approval in accordance with the provisions of this section, as so amended.

**Calculation of Net Profits**

**Credits Allowed [Section 198(2)]**

- **Bounties and subsidies** received from any Government, or any public authority constituted or authorised in this behalf, by any Government, unless and except in so far as the Central Government otherwise directs.

**Credits Not Allowed [Section 198(3)]**

1. profits, by way of premium on shares or debentures of the company, which are issued or sold by the company, unless the company is an investment company as referred to in section 186
2. profits on sales by the company of forfeited shares;
3. profits of a capital nature including profits from the sale of the undertaking or any of the undertakings of the company or of any part thereof;
4. profits from the sale of any immovable property or fixed assets of a capital nature comprised in the undertaking or any of the undertakings of the company, unless the business of the company consists, whether wholly or partly, of buying and selling any such property or assets:
   - Provided that where the amount for which any fixed asset is sold exceeds the written-down value thereof, credit shall be given for so much of the excess as is not higher than the difference between the original cost of that fixed asset and its written-down value;
5. any change in carrying amount of an asset or of a liability recognised in equity reserves including surplus in profit and loss account on measurement of the asset or the liability at fair value.
6. any amount representing unrealised gains, notional gains or revaluation of assets

**Deductions Allowed [Section 198(4)]**

1. all the usual working charges
2. directors’ remuneration
3. bonus or commission paid or payable to any member of the company’s staff, or to any engineer, technician or person employed or engaged by the company, whether on a whole-time or on a part-time basis
4. any tax notified by the Central Government as being in the nature of a tax on excess or abnormal profits
5. any tax on business profits imposed for special reasons or in special circumstances and notified by the Central Government in this behalf
6. interest on debentures issued by the company
7. interest on mortgages executed by the company and on loans and advances secured by a charge on its fixed or floating assets
8. interest on unsecured loans and advances
i) expenses on repairs, whether to immovable or to movable property, provided the repairs are not of a capital nature
j) outgoings inclusive of contributions made under section 181
k) depreciation to the extent specified in section 123
l) the excess of expenditure over income, which had arisen in computing the net profits in accordance with this section in any year in so far as such excess has not been deducted in any subsequent year preceding the year in respect of which the net profits have to be ascertained
m) any compensation or damages to be paid in virtue of any legal liability including a liability arising from a breach of contract
n) any sum paid by way of insurance against the risk of meeting any liability such as is referred to in clause (m)
o) debts considered bad and written off or adjusted during the year of account.

Deductions Not Allowed [Section 198(5)]

a) income-tax and super-tax payable by the company under the Income-tax Act, 1961, or any other tax on the income of the company not falling under clauses (d) and (e) of sub-section (4)
b) any compensation, damages or payments made voluntarily, that is to say, otherwise than in virtue of a liability such as is referred to in clause (m) of sub-section (4)
c) loss of a capital nature including loss on sale of the undertaking or any of the undertakings of the company or of any part thereof not including any excess of the written-down value of any asset which is sold, discarded, demolished or destroyed over its sale proceeds or its scrap value
d) any change in carrying amount of an asset or of a liability recognised in equity reserves including surplus in profit and loss account on measurement of the asset or the liability at fair value

Questions

Mr. Smart, a technocrat aged 71 years and reputed to be a specialist in reviewing sick companies is being considered to be appointed as Managing Director of Downhill Industries limited. The company has been incurring losses for the past several years and its effective capital is Rs. 500 crores. Discuss:

a) Can Mr. Smart be appointed as Managing director of the company despite being over 70 years of age?. If so, what is the process to be followed to enable this?
b) What is effective capital as per schedule V of the Act?
c) What is the maximum permissible remuneration under Companies Act?

Advise M/S Super specialities ltd in respect of payment of remuneration of Rs. 40,000 p.m. to the whole time director of the company running in loss and having an effective capital of Rs. 95 lakhs.

Examine whether the payment of following remuneration to non-executive directors (directors who are neither in whole time employment nor managing director) is in...
accordance with the provisions of the Companies Act, 2013:

Sitting fee payable to directors is increased from 30,000 to 60,000 per meeting.

M/S Star health specialities limited owns a multi speciality hospital in Chennai. Dr. Hamilton, a practicing Heart surgeon has been appointed by the company as its non-executive ordinary director and it wants to pay him fee, on case to case basis for surgery performed on the patients at the hospital. A question has arisen whether payment of such fee to him would amount to payment of managerial remuneration to a director subject to any restriction under companies Act. Advise the company, which seeks to ensure that the same does not contravene any provisions of companies Act, 2013

Mr. X, a director of sunrise ltd, was appointed on 1st April, 2014. One of the terms of appointment was that in the absence of adequacy of profits or if the company had no profits in any particular year, he will be paid remuneration in accordance with schedule V. The company suffered heavy losses during the financial year ended 31st March 2018. The company was not in a position to pay any remuneration but he was paid Rs. 50 lakhs for the year as paid to other directors. The effective capital of the company is Rs. 150 crores. Referring to provisions of Companies Act, 2013 as contained in schedule V, examine the validity of above payment of remuneration to Mr. X

Venus ltd is a widely held, listed company having two executive directors who are technocrats. The company has suffered losses in the last four years. The company wants to enhance the remuneration of the executive directors to 6,00,000 per month from existing remuneration of Rs. 4,00,000. The audited balance sheet as on 31st March 2016 reveals that the paid up capital of the company is Rs. 15 crores, accumulated losses 11 crores and secured long term borrowings Rs. 5 crores. Besides the company has long term investments of 11 crores. The company's remuneration committee has recommended the proposal and the company is regular in repayment of its debts. Analyse the proposition with reference to the provisions of Companies Act, 2013.

Mr. Weldon was appointed as a director of Esquire Engineering ltd with effect from 1st April, 2017. Since the company namely, Esquire Engineering ltd wanted to take full advantage of the wisdom and expertise of Mr. Weldon, it offered him remuneration payable on monthly basis. Esquire Engineering ltd started paying such remuneration from the date of appointment continued to do so till 31st March 2018. On scrutiny of the accounts, it was established that the company, till 31st March, 2018 has paid to Mr. Weldon a total sum of 1.20 lakhs in excess of remuneration permissible u/s 197. You are required to state with reference to the provisions of Companies Act, 2013 in respect of recovery and waiver of recovery of the excess remuneration so paid, whether Mr. Weldon can keep excess remuneration received and under what conditions.

Arc ltd has two managing directors, three whole time directors and two part time directors. Referring to the provisions of Companies Act, 2013, state the extent to which the managing directors, whole time directors and part time directors can be paid remuneration, when the company has sufficient profits.
Further, what advice would you render when company's profits are inadequate? Can company continue to make payment of remuneration.

Appointment of Key Managerial Personnel

Every company belonging to such class or classes of companies as may be prescribed shall have the following whole-time key managerial personnel,—

(i) managing director, or Chief Executive Officer or manager and in their absence, a whole-time director;
(ii) company secretary; and
(iii) Chief Financial Officer

Rule 8: Prescribed Classes of Companies

Every listed company and every other public company having a paid-up share capital of ten crore rupees or more shall have whole-time key managerial personnel.

Rule 8A: Appointment of Company Secretaries in Companies Not Covered Under Rule 8

Every private company which has a paid up share capital of ten crore rupees or more shall have a whole-time company secretary.

Prohibition to be appointed as Chairperson and MD/CEO

An individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the articles of the company, as well as the managing director or Chief Executive Officer of the company at the same time after the date of commencement of this Act unless,—

✓ the articles of such a company provide otherwise; or
✓ the company does not carry multiple businesses:

Provided further that nothing contained in the first proviso shall apply to such class of companies engaged in multiple businesses and which has appointed one or more Chief Executive Officers for each such business as may be notified by the Central Government.

Appointment by Resolution

Every whole time managerial personnel shall be appointed by means of a resolution of Board containing terms and conditions of appointment including remuneration.

Office in One Company Only [Section 203(3)]

A whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time.

✓ Provided that nothing contained in this sub-section shall disentitle a key managerial personnel from being a director of any company with the permission of the Board:
✓ Provided further that whole-time key managerial personnel holding office in more than one company at the same time on the date of commencement of this Act, shall, within a period of six months from such commencement, choose one company, in which he wishes to continue to hold the office of key managerial personnel:
Provided also that a company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company and such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting and of which the resolution to be moved thereat, specific notice has been given to all the directors then in India.

Vacancy to be filled Up by Board [Section 203(4)]

If the office of any whole-time key managerial personnel is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of six months from the date of such vacancy.

Penalty [Section 203(5)]

If any company makes any default in complying with the provisions of this section,

✓ such company shall be liable to a penalty of
✓ five lakh rupees and
✓ every director and key managerial personnel of the company who is in default shall be liable to a penalty of
✓ fifty thousand rupees and
✓ where the default is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such default continues but not exceeding five lakh rupees.

ABC limited, an unlisted company having a paid up share capital of 10 crores during the preceding financial year has appointed Shri X, a fellow member of the Institute of Chartered Accountants of India as Chief financial officer of the company who is appointed as Key Managerial Personnel u/s 203 of Companies Act, 2013. Shri X is also a fellow member of the Institute of Company Secretaries of India. The Company secretary post has become vacant. In order to reduce the administrative expenses, the company proposes to appoint Shri X as Company secretary in addition to Chief financial Officer post. Whether the proposal is legally valid?

Mr. Amit is the managing director of ANJ ltd which is a non-government public company. The directors of CHH ltd decided to appoint Mr. Amit as the managing director of the company, even though Mr. Amit decided not to vacate his place of office of managing director of ANJ ltd. A notice for a board meeting specifying a resolution containing the proposal of appointment of Mr. Amit was served to all the eligible directors of CHH ltd. Out of 8 directors of the company, 6 directors attended the meeting and out of them 4 directors gave consent to the resolution, one director voted against the said appointment and another director abstained from voting. The Board of directors seek your opinion whether Mr. Amit can be appointed as the managing director of the company in this situation. Advise them.

Recovery of Remuneration in certain cases

Where a company is required to re-state its financial statements due to fraud or non-compliance with any requirement under this Act and the rules made there under, the company shall recover from any past or present managing director or whole-time director or
manager or Chief Executive Officer (by whatever name called) who, during the period for which the financial statements are required to be re-stated, received the remuneration (including stock option) in excess of what would have been payable to him as per restatement of financial statements.

Central Government/Company to Fix Limit

A company may, while according its approval under section 196, to any appointment or to any remuneration under section 197 in respect of cases where the company has inadequate or no profits, fix the remuneration within the limits specified in this Act, at such amount or percentage of profits of the company, as it may deem fit and while fixing the remuneration, the company shall have regard to—
(a) the financial position of the company;
(b) the remuneration or commission drawn by the individual concerned in any other capacity;
(c) the remuneration or commission drawn by him from any other company;
(d) professional qualifications and experience of the individual concerned;
(e) such other matters as may be prescribed.

Compensation for Loss of Office of Managing or Whole-Time Director or Manager

A company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

Cases of Non-Payment [Section 202(2)]

a) where the director resigns from his office as a result of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation;
b) where the director resigns from his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid;
c) where the office of the director is vacated under 167(1)
d) where the company is being wound up, whether by an order of the Tribunal or voluntarily, provided the winding up was due to the negligence or default of the director;
e) where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement of, the conduct of the affairs of the company or any subsidiary company or holding company thereof; and
f) where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

Limit on Compensation [Section 202(3)]
Compensation made to a managing or whole-time director or manager in pursuance of sub-section (1) shall not exceed the
✓ remuneration which he would have earned if he had been in office
✓ for the remainder of his term or for three years, whichever is shorter,
✓ calculated on the basis of the average remuneration actually earned by him
✓ during a period of three years immediately preceding the date on which he ceased to hold office
✓ or where he held the office for a lesser period than three years,
✓ during such period

No Remuneration in Special Case

Provided that no such payment shall be made to the director in the event of the commencement of the winding up of the company, whether before or at any time within twelve months after, the date on which he ceased to hold office, if the assets of the company on the winding up, after deducting the expenses thereof, are not sufficient to repay to the shareholders the share capital, including the premiums, if any, contributed by them

Nothing in this section shall be deemed to prohibit the payment to a managing or whole-time director, or manager, of any remuneration for services rendered by him to the company in any other capacity

Secretarial Audit for Bigger Companies

✓ Every listed Company
✓ Every public company having a paid-up share capital of fifty crore rupees or more; or
✓ Every public company having a turnover of two hundred fifty crore rupees or more.
shall annex with its Board’s report a secretarial audit report, given by a company secretary in practice in Form MR 3.

Explanation of Qualification

The Board of Directors, in their report shall explain in full any qualification or observation or other remarks made by the company secretary in practice in his report as above.

Penalty

If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section, the company, every officer of the company or the company secretary in practice, who is in default, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees

Functions of Company Secretary

✓ to report to the Board about compliance with the provisions of this Act, the rules made there under and other laws applicable to the company.
✓ to ensure that the company complies with the applicable secretarial standards
✓ to discharge such other duties as may be prescribed.

Functions Prescribed Under Rule 10

✓ to provide to the directors such guidance as they may require, with regard to their duties, responsibilities and powers
✓ to facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings
✓ to obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act
✓ to represent before various regulators, and other authorities under the Act in connection with discharge of various duties under the Act
✓ to assist the Board in the conduct of the affairs of the company
✓ to assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices and
✓ to discharge such other duties as have been specified under the Act or rules; and
✓ such other duties as may be assigned by the Board from time to time.

Multiple Choice Questions

1. A company cannot appoint or re-appoint any MD, WTD or manager for a term exceeding-

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<tbody>
<tr>
<td>a. 4 years</td>
<td>b. 5 years</td>
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<tr>
<td>c. 1 year</td>
<td>d. 6 months</td>
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2. Whole time director includes a director who is---

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<tbody>
<tr>
<td>a. In whole time employment of the Company</td>
<td>b. In part time employment of the company</td>
</tr>
<tr>
<td>c. Either (a) or (b)</td>
<td>d. None of these</td>
</tr>
</tbody>
</table>

3. Mr. X was appointed as a Managing director for life by AOA of a private company incorporated on 1st Feb 2019. Can he be appointed in such manner?

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<tbody>
<tr>
<td>a. Mr. X can be appointed as managing director for life in a private company</td>
<td>b. No, Mr. X can be appointed as Managing director for life in public company but not in private company</td>
</tr>
<tr>
<td>c. No, Mr. X can’t be appointed as MD for life since maximum term cannot exceed 5 years at a time</td>
<td>d. None of these</td>
</tr>
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</table>

4. Resident in India according to Schedule V includes a person who has been staying in India for ---- immediately preceding date of his appointment as a managerial personnel.

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<tbody>
<tr>
<td>a. More than 182 days</td>
<td>b. 182 days or more</td>
</tr>
<tr>
<td>c. Continuous period of not less than 12 months</td>
<td>d. Continuous period of not less than 6 months</td>
</tr>
</tbody>
</table>

5. Key managerial Personnel in relation to a company means-

CA. SHIVANGI AGRAWAL
### APPOINTMENT & REMUNERATION OF MANAGERIAL PERSONNEL

<p>| | |</p>
<table>
<thead>
<tr>
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<tbody>
<tr>
<td>a.</td>
<td>Managing director</td>
</tr>
<tr>
<td>b.</td>
<td>Chief Executive Officer</td>
</tr>
<tr>
<td>c.</td>
<td>Both (a) and(b)</td>
</tr>
<tr>
<td>d.</td>
<td>None of the above</td>
</tr>
</tbody>
</table>

6. No company shall appoint or continue the employment of any person as managing director, whole time director or manager who has attained age of----

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<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>a.</td>
<td>65 years</td>
</tr>
<tr>
<td>b.</td>
<td>55 years</td>
</tr>
<tr>
<td>c.</td>
<td>70 years</td>
</tr>
<tr>
<td>d.</td>
<td>60 years</td>
</tr>
</tbody>
</table>

7. Mr. X was appointed as a Manager of XYZ ltd for the period of 5 years in July 2018, considering his performance, management decided to re-appoint him before completion of his tenure as a manager. when can he be re-appointed at the earliest?

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>a.</td>
<td>July 2022</td>
</tr>
<tr>
<td>b.</td>
<td>July 2023</td>
</tr>
<tr>
<td>c.</td>
<td>March 2023</td>
</tr>
<tr>
<td>d.</td>
<td>None of these</td>
</tr>
</tbody>
</table>

8. Every public company having paid up share capital of ------ or more shall have whole time key managerial personnel

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>a.</td>
<td>1 crore</td>
</tr>
<tr>
<td>b.</td>
<td>5 crore</td>
</tr>
<tr>
<td>c.</td>
<td>10 crore</td>
</tr>
<tr>
<td>d.</td>
<td>50 crore</td>
</tr>
</tbody>
</table>

9. XYZ ltd had no profits in FY- 2018-19. It can pay remuneration upto ------ to its managerial person if its effective capital is 90 crores

<p>| | |</p>
<table>
<thead>
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<th></th>
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</thead>
<tbody>
<tr>
<td>a.</td>
<td>60 lakhs</td>
</tr>
<tr>
<td>b.</td>
<td>84 lakhs</td>
</tr>
<tr>
<td>c.</td>
<td>120 lakhs</td>
</tr>
<tr>
<td>d.</td>
<td>Any of these</td>
</tr>
</tbody>
</table>

10. Who shall not be entitled to any stock option

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>a.</td>
<td>Woman Director</td>
</tr>
<tr>
<td>b.</td>
<td>Managing Director</td>
</tr>
<tr>
<td>c.</td>
<td>Whole time director</td>
</tr>
<tr>
<td>d.</td>
<td>Independent director</td>
</tr>
</tbody>
</table>

11. Where appointment of Managerial personnel is not approved by company at a general meeting, any act done by him before such approval shall be deemed to be----

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>a.</td>
<td>Voidable</td>
</tr>
<tr>
<td>b.</td>
<td>Void</td>
</tr>
<tr>
<td>c.</td>
<td>Valid</td>
</tr>
<tr>
<td>d.</td>
<td>As decided by Board</td>
</tr>
</tbody>
</table>

12. Which form shall be filed with registrar and within how many days for appointment of managerial personnel

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>MR 1, 60 days</td>
</tr>
<tr>
<td>b.</td>
<td>MR 2, 60 days</td>
</tr>
<tr>
<td>c.</td>
<td>MR 2, 30 days</td>
</tr>
<tr>
<td>d.</td>
<td>MR 3, 60 days</td>
</tr>
</tbody>
</table>

13. If the office of any whole time KMP is vacated, the resulting vacancy shall be filled up by the Board at a meeting of the Board within a period of ------ from date of such vacancy

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<tbody>
<tr>
<td>a.</td>
<td>1 year</td>
</tr>
<tr>
<td>b.</td>
<td>6 months</td>
</tr>
<tr>
<td>c.</td>
<td>30 days</td>
</tr>
<tr>
<td>d.</td>
<td>Nine months</td>
</tr>
</tbody>
</table>
14. No company shall appoint in the employment of any person as managing director, whole time director or manager who is below age of---

<table>
<thead>
<tr>
<th>a. 22 years</th>
<th>b. 21 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. 18 years</td>
<td>d. 30 years</td>
</tr>
</tbody>
</table>

15. Every Public Company with -------shall appoint secretarial auditor.

<table>
<thead>
<tr>
<th>a. Paid up share capital of 50 Crore or more</th>
<th>b. Turnover of 250 crore or more</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Both (a) and (b)</td>
<td>d. None of the above</td>
</tr>
</tbody>
</table>

16. Every key managerial personnel shall be appointed by means of ------- resolution containing the terms and conditions of appointment including remuneration.

<table>
<thead>
<tr>
<th>a. Board</th>
<th>b. General</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Ordinary</td>
<td>d. Special</td>
</tr>
</tbody>
</table>

17. Any independent director can receive remuneration by way of-------

<table>
<thead>
<tr>
<th>a. Sitting fees</th>
<th>b. Reimbursement of expenses for participation in meetings</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Profit related commission</td>
<td>d. All of the above</td>
</tr>
</tbody>
</table>

18. The terms and conditions and remuneration approved by board of directors for appointment of MD, WTD & Manager shall be subject to the approval of-------

<table>
<thead>
<tr>
<th>a. Shareholders by a resolution at next GM</th>
<th>b. NCLT</th>
</tr>
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<tbody>
<tr>
<td>c. Central Government</td>
<td>d. None of the above</td>
</tr>
</tbody>
</table>

19. Directors including managing director, WTD and manager of public companies are eligible to maximum -------% of profits of company for that FY.

<table>
<thead>
<tr>
<th>a. 1</th>
<th>b. 3</th>
</tr>
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<tbody>
<tr>
<td>c. 10</td>
<td>d. 11</td>
</tr>
</tbody>
</table>

20. Sitting fees of directors shall not exceed ------- per meeting of board or committee thereof.

<table>
<thead>
<tr>
<th>a. 50,000</th>
<th>b. 1,00,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. 10,00,000</td>
<td>d. None of the above</td>
</tr>
</tbody>
</table>

21. In case of loss, a newly incorporated company may, without approval of the Central Government, pay remuneration to managerial remuneration in excess of amounts specified in Part II of schedule V for------

<table>
<thead>
<tr>
<th>a. 3 years</th>
<th>b. 5 years</th>
</tr>
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<tbody>
<tr>
<td>c. 7 years</td>
<td>d. 10 years</td>
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</tbody>
</table>

22. Where a person is a managerial person in 2 companies, he shall draw remuneration from one or both companies, provided that the total remuneration drawn from the

CA. SHIVANGI AGRAWAL
companies does not exceed ---- maximum limit admissible from any one of the companies of which he is a managerial person.

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</table>
| a. Lower | b. Higher | c. Average | d. None of these

23. The remuneration payable to the directors and manager of a company shall be determined-----

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| a. By the articles of the company | b. By an ordinary resolution | c. By a special resolution where articles require | d. Either (a) or (b) or (c)

24. The compensation for loss of office cannot be paid to-----

<p>| | | | | | |</p>
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</table>
| a. An ordinary director | b. Whole time director | c. Manager | d. Managing director

25. A company shall have a whole time company secretary, if-----

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</table>
| a. It is a private company | b. It is a public company | c. Paid up share capital is 2 crore or more | d. None of these

**Answer to MCQs**

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<tbody>
<tr>
<td>1</td>
<td>(b)</td>
<td>6</td>
<td>(c)</td>
<td>11</td>
<td>(c)</td>
<td>16</td>
<td>(a)</td>
</tr>
<tr>
<td>2</td>
<td>(a)</td>
<td>7</td>
<td>(a)</td>
<td>12</td>
<td>(a)</td>
<td>17</td>
<td>(d)</td>
</tr>
<tr>
<td>3</td>
<td>(c)</td>
<td>8</td>
<td>(c)</td>
<td>13</td>
<td>(b)</td>
<td>18</td>
<td>(a)</td>
</tr>
<tr>
<td>4</td>
<td>(c)</td>
<td>9</td>
<td>(a)</td>
<td>14</td>
<td>(b)</td>
<td>19</td>
<td>(d)</td>
</tr>
<tr>
<td>5</td>
<td>(c)</td>
<td>10</td>
<td>(d)</td>
<td>15</td>
<td>(c)</td>
<td>20</td>
<td>(b)</td>
</tr>
</tbody>
</table>

CA. SHIVANGI AGRAWAL
Meetings of Board & its Powers

Meaning of Board Meetings

✓ Board Meeting refers to the meeting of directors of the Company. A company is not a natural person thus, it is incapable of acting on its own.
✓ Board of directors has the responsibilities and powers to take major decision of the company. To facilitate the process of decision making it is essential that board of directors meet at regular intervals.

Some Relevant Points

✓ A resolution at Board meeting is passed by voting irrespective of number of shares if any held by director by show of hands only.
✓ A chairman may exercise casting votes in case of equality.
✓ The resolution passed shall be binding on all directors whether they voted or not or voted against the resolution.
✓ A director can vote only if he is present at the meeting and can't appoint proxy.
✓ All the provisions must be complied with for holding a valid Board Meeting.

ABC Ltd has 12 directors on its Board and has following clause in its Articles of Association:
The question arising at any meeting of the Board of Directors or any committee thereof shall be decided by a majority of votes, except in cases where the Companies Act expressly provide otherwise.

In one of the meeting of BOD of ABC Ltd, 8 directors were present. After completion of discussion of matter, voting was done. 3 Directors voted in favour of the motion, 2 directors voted against the motion while 3 directors abstained from voting. State whether the motion was carried or not?

Meetings of Board

Every company shall hold the first meeting of the Board of Directors within thirty days of the date of its incorporation and thereafter hold a minimum number of four meetings of its Board of Directors every year in such a manner that not more than one hundred and twenty days shall intervene between two consecutive meetings of the Board.

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Provided that the Central Government may, by notification, direct that the provisions of this sub-section shall not apply in relation to any class or description of companies or shall apply subject to such exceptions, modifications or conditions as may be specified.

A Specified IFSC public and Private company shall hold the first meeting of the Board of Directors within sixty days of its incorporation and thereafter hold at least one meeting of the Board of Directors in each half of a calendar year.

Seafood Ltd, a public limited company was incorporated on 1st April, 2015. The company has conducted four board meetings during the financial year 2015-16 i.e. on 6th April, 2015, 28th Aug 2015, 30th September 2015 and 30th March 2016.

i) Has the company contravened the provisions of the Companies Act, 2013 in respect of the conduct of the meetings?

ii) Will your answer differ if the company was incorporated u/s 8?
Participation in Meeting - Video Conferencing

The participation of directors in a meeting of the Board may be:
- either in person or
- through video conferencing or
- other audio visual means, as may be prescribed,
which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

Provided that the Central Government may, by notification, specify such matters which shall not be dealt with in a meeting through video conferencing or other audio visual means.

Rule 3 of Companies (Meetings of Board & Its Powers) Rules, 2014

"video conferencing or other audio visual means" means audio-visual electronic communication facility employed which enables all the persons participating in a meeting to communicate concurrently with each other without an intermediary and to participate effectively in the meeting.

Rules for Video Conferencing:

(1) Every Company shall make necessary arrangements to avoid failure of video or audio visual connection.

(2) The Chairperson of the meeting and the company secretary, if any, shall take due and reasonable care -
- to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;
- to ensure availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorised participants at the Board meeting;
- to record proceedings and prepare the minutes of the meeting;
- to store for safekeeping and marking the tape recordings or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year.
✓ to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means; and

✓ to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting:

✓ The persons, who are differently abled, may make request to the Board to allow a person to accompany him.

Notice:

✓ The notice of the meeting shall be sent to all the directors in accordance with the provisions of the Act.

✓ The notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio visual means.

✓ A director intending to participate through video conferencing or audio visual means shall communicate his intention to the Chairperson or the company secretary of the company.

✓ If the director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect sufficiently in advance so that company is able to make suitable arrangements in this behalf.

✓ Any director who intends to participate in the meeting through electronic mode may intimate about such participation at the beginning of the calendar year and such declaration shall be valid for one year. Such declaration shall not debar him from participation in the meeting in person in which case he shall intimate the company sufficiently in advance of his intention to participate in person.

✓ In the absence of any intimation, it shall be assumed that the director shall attend the meeting in person.

Roll Call:

At the commencement of the meeting, a roll call shall be taken by the Chairperson when every director participating through video conferencing or other audio visual means shall state, for the record, the following namely:-

✓ name
✓ the location from where he is participating
✓ that he has received the agenda and all the relevant material for the meeting; and
✓ that no one other than the concerned director is attending or having access to the proceedings of the meeting.

After the roll call, the Chairperson or the Company Secretary shall inform the Board about the names of persons other than the directors who are present for the said meeting at the request or with the permission of the Chairperson and confirm that the required quorum is complete.

CA. SHIVANGI AGRAWAL
MEETINGS OF BOARD & ITS POWERS

Other Relevant Points:
- The Chairperson shall ensure that the required quorum is present throughout the meeting.
- The scheduled venue of the meeting as set forth in the notice convening the meeting shall be deemed to be the place of the said meeting.
- The statutory registers which are required to be placed in the Board meeting as per the provisions of the Act shall be placed at the scheduled venue of the meeting.
- If a motion is objected to and there is a need to put it to vote, the Chairperson shall call the roll and note the vote of each director who shall identify himself while casting his vote.
- From the commencement of the meeting and until the conclusion of such meeting, no person other than the Chairperson, Directors, Company Secretary and any other person whose presence is required by the Board shall be allowed access to the place where any director is attending the meeting either physically or through video conferencing without the permission of the Board.

Draft Minutes:
- At the end of discussion on each agenda item, the Chairperson of the meeting shall announce the summary of the decision taken on such item along with names of the directors, if any, who dissented from the decision taken by majority and the draft minutes so recorded shall be preserved by the company till the confirmation of the draft minutes.
- The minutes shall disclose the particulars of the directors who attended the meeting through video conferencing or other audio visual means.
- The draft minutes of the meeting shall be circulated among all the directors within fifteen days of the meeting either in writing or in electronic mode as may be decided by the Board.
- Every director who attended the meeting, whether personally or through video conferencing or other audio visual means, shall confirm or give his comments in writing, about the accuracy of recording of the proceedings of that particular meeting in the draft minutes, within seven days or some reasonable time as decided by the Board, after receipt of the draft minutes failing which his approval shall be presumed.
- After completion of the meeting, the minutes shall be entered in the minute book as specified under section 118 of the Act and signed by the Chairperson.

Moonlight Ltd held its board meeting through video conferencing. Due to technical problems, the video recording which was done, could not be retrieved. The company seeks your advice for the preparation and recording of the minutes of the board meeting in the above situation, under the provisions of the Companies Act, 2013.

CA. SHIVANGI AGRAWAL
M/S OBC ltd at its forthcoming Board Meeting decided that it will not provide the directors with the facility of participation in the said meeting through electronic mode; can the directors insist on attending the meeting through such mode? Will your answer differ, if a director participates in a Board Meeting through electronic mode from his end even if company does not provide such facility?

Notice of Board Meeting

<table>
<thead>
<tr>
<th>When?</th>
<th>To whom?</th>
<th>Where?</th>
<th>How?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atleast 7 days before meeting</td>
<td>Every Director</td>
<td>Director's address registered with Company</td>
<td>Hand delivery or post or Electronic means</td>
</tr>
</tbody>
</table>

✓ Provided that a **meeting** of the Board **may be called at shorter notice** to transact urgent business subject to the condition that **at least one independent director**, if any, **shall be present** at the meeting.

✓ Provided further that in case of **absence of independent directors** from such a meeting of the Board, **decisions taken** at such a meeting **shall be circulated to all the directors** and shall be **final only on ratification** thereof by **at least one independent director**, if any.

**Penalty [Section 173(4)]**

Every **officer** of the company-

✓ whose duty is to **give notice** under this section and

✓ who fails to do so

shall be **liable to a penalty of twenty-five thousand rupees**.

**Other Relevant Points**

✓ Oral Notice is not adequate

✓ **Notice is required to be given to all directors** including alternate, interested as well as those who have waived the requirement of notice.

✓ **Meeting shall be void if notice not sent** to all directors. Even accidental omission to give notice to single director would render the resolutions passed at meeting void. **[Parmeshwari Prasad vs Union of India]**

✓ Ratification is possible and it shall relate back to the date of ratification.
The Board of directors of Infortech consultants ltd registered in kolkata proposes to hold the next board meeting in the month of May 2018. They seek your advice in respect of the following matters:

Can the board meeting be held in Chennai through video conferencing when all the directors of the company reside at Kolkata?

Is it necessary that the notice of the board meeting should specify the nature of business to be transacted?

XYZ Ltd is a foreign collaborator in ABC ltd incorporated in India under the Companies Act, 2013. The foreign collaborator holds 49% of the shareholding. The Board meetings of ABC ltd are usually held in India and sometimes meetings of the Board are called at a very short notice for which there is a provision in the Articles of Association that during such situations notices of the meetings of the Board can be sent by e-mail. State in this connection whether such a provision in AOA of a foreign collaborated company is valid.

Examine with reference to the provisions of the Companies Act, 2013 whether notice of a Board Meeting is required to be sent to the following persons:

a) Alternate director
b) An interested director
c) A director who has expressed his inability to attend a particular Board Meeting
d) A director who has gone abroad (for less than 3 months)

Quorum for Board Meeting

The quorum for a meeting of the Board of Directors of a company shall be:

- one third of its total strength or
- two directors,
- whichever is higher

The participation of the directors by video conferencing or by other audio visual means shall also be counted for the purposes of quorum under this sub-section.

In case of Section 8 Company-

- either eight members or twenty five per cent, of its total strength whichever is less shall be the quorum.
- Provided quorum shall not be less than two members

Other Relevant Points

- For the purposes of this section,—
  - any fraction of a number shall be rounded off as one
  - “total strength” shall not include directors whose places are vacant.
- The continuing directors may act notwithstanding any vacancy in the Board; but, if and so long as their number is reduced below the quorum fixed by the Act for a meeting of the Board, the continuing directors or director may act for the purpose of increasing the number of directors to that fixed for the quorum, or of summoning a general meeting of the company and for no other purpose.
- No fresh notice is required for adjourned meeting
- Quorum has to be present throughout the meeting.
MEETINGS OF BOARD & ITS POWERS

✓ Resolutions passed at adjourned meeting does not relate to the date of original meeting
✓ Articles of a company may provide for higher quorum but not lower than required u/s 174.

Interested Director [Section 174(3)]

Where at any time the number of interested directors exceeds or is equal to two thirds of the total strength of the Board of Directors, the number of directors who are not interested directors and present at the meeting, being not less than two, shall be the quorum during such time.

In case of Private Company, interested director may also be counted towards quorum in such meeting after disclosure of his interest pursuant to section 184.
In case of Specified IFSC Public and Private Company - Sub-section (3) of section 174 shall apply with the exception that interested director may participate in such meeting provided the disclosure of his interest is made by the concerned director either prior or at the meeting.

Quorum Not Present [Section 174(4)]

Where a meeting of the Board could not be held for want of quorum,
✓ then, unless the articles of the company otherwise provide,
✓ the meeting shall automatically stand adjourned
✓ to the same day at the same time and place in the next week or
✓ if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

Discuss the following situations with respect to the quorum.

a) There are 9 directors in a company and out of which 2 offices of the directors have fallen vacant.
b) There are 15 directors in a company and during discussion of a particular item, 13 of the directors are said to be interested within the meaning of section 184.

A meeting of the Board of 'No Holiday ltd' was held on a national holiday on account of Ganesh Chaturthi, the day being Sunday. However, due to lack of quorum, the proceedings of the meeting could not be held and therefore the Chairman of the meeting decided with the consent of the majority that the Board Meeting be adjourned to next week on the same day. Whether the meeting of the Board can be held on a Sunday.

The board meeting of MNO ltd was held on 10th May 2018 at Chennai at 11 am. At the time of starting the board meeting the number of directors present were 7. The total number of directors were 10. The board transacted ten items in the Board meeting. At 12 noon after the completion of four items in the agenda 4 directors left the meeting. Examine the validity of these transactions.

The articles of association of Amriz ltd provides for a maximum of 15 directors. But the company has only 10 directors and for two of them representing collaborators, alternate directors have been appointed. Board meeting held on 1st August 2018 was attended.
by four directors including two alternate directors. Examine whether quorum was present at the Board meeting held on 1st August 2018. Will your answer be different if the articles provide for a quorum of six directors?

### Resolution by Circulation

- **No resolution** shall be deemed to have been **duly passed** by the Board or by a committee thereof by circulation,
- **unless** the **resolution** has been **circulated in draft**, together with the necessary papers, if any,
- **to all the directors**, or **members of the committee**, as the case may be,
- **at their addresses registered** with the company in India
- **by hand delivery or by post or by courier, or through such electronic means** including e-mail and fax and
- **has been approved by a majority** of the directors or members, who are entitled to vote on the resolution

Provided that, where not less than one-third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board.

The provisions of chairperson and minutes of meetings already studied at previous level and hence not reproduced again.

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**Proximo Limited**

Proximo Limited has 9 directors out of whom 3 directors have gone abroad. The Chairman had an urgent matter to be approved by the Board of Directors which could not be postponed till the next board meeting. The Company therefore circulated the resolution for the approval of the directors. 4 out of 6 directors in India approved the resolution. The Company claimed that the resolution was passed. Examine with reference to the provisions of Section 175 of the Companies Act, 2013 the validity of the resolution.

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**M/S Hurybury Builders Limited**

M/S Hurybury Builders Limited is contemplating to enter into a joint venture agreement with another construction company for the development of landed properties located at Bangalore. Since it is not possible to convene the Board meeting immediately, as the directors are at different places in connection with various works, the managing director seeks your advice as to whether the resolution pertaining to the joint venture agreement is required to be passed at the Board meeting convened for the purpose or whether it can be passed by means of a circular resolution. What steps are required to be taken to pass a Board resolution by circulation?

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**Defects in Appointment of Directors not to invalidate Actions Taken**

- **No act** done by a person as a **director** shall be deemed to be **invalid if** it was **subsequently noticed that** his **appointment** was **invalid** by reason of any defect or
MEETINGS OF BOARD & ITS POWERS

3.10

disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company

✓ However, Any act done by the director after his defect in appointment has been noticed by the company shall be invalid

MTP was appointed as a director at the Annual General Meeting of a limited company held on 30th September 2013 and he carried on his duties and functions as a director. In the month of August, 2014, it was found out that there were certain irregularities in his appointment and on 31st August, 2014, his appointment was declared invalid. But Mr. MTP continued to act as director even after 31st August 2014. You are required to state, with reference to the provisions of the Companies Act, 2013 whether the acts done by MTP are valid and binding upon the Company.

Audit Committee

Following shall constitute an Audit Committee:-
✓ The Board of Directors of every listed public company and
✓ Prescribed Classes:
• Unlisted Public Company having PUC>= 10 Cr Turnover>= 100 Cr Loans> 50 Cr
According to Rule 6: A company covered under rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014

(2) The Audit Committee shall consist of a minimum of three directors with-
✓ majority being independent directors; and
✓ majority with ability to read and understand, the financial statement.

Every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board which shall, inter alia, include,—

i) the recommendation for appointment,
MEETINGS OF BOARD & ITS POWERS

remuneration and terms of appointment of auditors of the company

i) review and monitor the auditor’s independence and performance, and effectiveness of audit process

ii) examination of the financial statement and the auditors’ report thereon

iv) approval or any subsequent modification of transactions of the company with related parties

Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to conditions

Rule 6A - Omnibus Approval for Related Party Transactions on Annual Basis

All related party transactions shall require approval of the Audit Committee and the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to the following conditions, namely

(1) The Audit Committee shall, after obtaining approval of the Board of Directors, specify the criteria for making the omnibus approval which shall include the following, namely:

(a) maximum value of the transactions, in aggregate, which can be allowed under the omnibus route in a year

(b) the maximum value per transaction which can be allowed

(c) extent and manner of disclosures to be made to the Audit Committee at the time of seeking omnibus approval

(d) review, at such intervals as the Audit Committee may deem fit, related party transaction entered into by the company pursuant to each of the omnibus approval made

(e) transactions which cannot be subject to the omnibus approval by the Audit Committee.

(2) The Audit Committee shall consider the following factors while specifying the criteria for making omnibus approval, namely:

(a) repetitiveness of the transactions (in past or in future)

(b) justification for the need of omnibus approval.

(3) The Audit Committee shall satisfy itself on the need for omnibus approval for transactions of repetitive nature and that such approval is in the interest of the company.

(4) The omnibus approval shall contain or indicate the following:

(a) name of the related parties

(b) nature and duration of the transaction

(c) maximum amount of transaction that can be entered into

(d) the indicative base price or current contracted price and the formula for variation in the price, if any; and

(e) any other information relevant or important for the Audit Committee to take a decision on the proposed transaction:

Provided that where the need for related party transaction cannot be foreseen and aforesaid details are not available, audit committee may make omnibus approval for such transactions subject to their value not exceeding rupees one crore per transaction.

(5) Omnibus approval shall be valid for a period not exceeding one financial year and shall require fresh approval after the expiry of such financial year.

(6) Omnibus approval shall not be made for transactions in respect of selling or disposing of the undertaking of the company.

(7) Any other conditions as the Audit Committee may deem fit.
MEETINGS OF BOARD & ITS POWERS

Where Audit Committee does not approve the transaction, it shall make its recommendations to the Board.

In case any transaction
✓ involving any amount not exceeding one crore rupees
✓ is entered into by a director or officer of the company
✓ without obtaining the approval of the Audit Committee and
✓ it is not ratified by the Audit Committee
✓ within three months from the date of the transaction,
✓ such transaction shall be voidable at the option of the Audit Committee
✓ the director concerned shall indemnify the company against any loss incurred by it:
The provisions of this clause shall not apply to a transaction, other than a transaction referred to in section 188, between a holding company and its wholly owned subsidiary company.

v) scrutiny of inter-corporate loans and investments;
vi) valuation of undertakings or assets of the company, wherever it is necessary;
vii) evaluation of internal financial controls and risk management systems;
viii) Monitoring the end use of funds raised through public offers and related matters.

Other Powers

✓ The Audit Committee may call for the comments of the auditors about internal control systems, the scope of audit, including the observations of the auditors and review of financial statement before their submission to the Board and may also discuss any related issues with the internal and statutory auditors and the management of the company.
✓ The Audit Committee shall have authority to investigate into any matter in relation to the items specified or referred to it by the Board and for this purpose shall have power to obtain professional advice from external sources and have full access to information contained in the records of the company.
✓ The auditors of a company and the key managerial personnel shall have a right to be heard in the meetings of the Audit Committee when it considers the auditor’s report but shall not have the right to vote.

Disclosure in Board’s Report

✓ The Board’s report of section 134 shall disclose the composition of an Audit Committee and where the Board had not accepted any recommendation of the Audit Committee, the same shall be disclosed in such report along with the reasons thereof.

Vigil Mechanism [Section 177(9) & 177(10)]

✓ Every listed company or such class or classes of companies, as may be prescribed, shall establish a vigil mechanism for directors and employees to report genuine concerns in such manner as may be prescribed.

Rule 7: Prescribed Classes of Companies
(a) the Companies which accept deposits from the public;
(b) the Companies which have borrowed money from banks and public financial
MEETINGS OF BOARD & ITS POWERS

Other Points

- The companies which are required to constitute an audit committee shall oversee the vigil mechanism through the committee and if any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the others on the committee would deal with the matter on hand.
- In case of other companies, the Board of directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism to whom other directors and employees may report their concerns.
- The vigil mechanism shall provide for adequate safeguards against victimisation of employees and directors who avail of the vigil mechanism and also provide for direct access to the Chairperson of the Audit Committee or the director nominated to play the role of Audit Committee, as the case may be, in exceptional cases.
- In case of repeated frivolous complaints being filed by a director or an employee, the audit committee or the director nominated to play the role of audit committee may take suitable action against the concerned director or employee including reprimand.

- The vigil mechanism shall provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases.
- Details of establishment of such mechanism shall be disclosed by the company on its website, if any, and in the Board's report.

Referring to the provisions of the Companies Act, examine the following:

XYZ Ltd, a listed company has constituted an audit committee consisting of five members out of whom two are independent directors. Subsequently, the company increased the composition of audit committee to six members with three independent directors.

Nomination and Remuneration Committee and Stakeholders Relationship Committee

The Board of Directors of-
- every listed public company and
- a company covered under rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014

shall constitute the Nomination and Remuneration Committee

Constitution of NRC

- Committee shall consist of three or more non-executive directors out of which not less than one-half shall be independent directors:
- The chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.

Functions of NRC

CA. SHIVANGI AGRAWAL
It shall identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall specify the manner for effective evaluation of performance of Board, its committees and individual directors to be carried out either by the Board, by the Nomination and Remuneration Committee or by an independent external agency and review its implementation and compliance shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees.

Ensure while formulating policy that—
(a) the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully;
(b) relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and
(c) remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals.

Provided that such policy shall be placed on the website of the company, if any, and the salient features of the policy and changes therein, if any, along with the web address of the policy, if any, shall be disclosed in the Board’s report.

Stakeholders Relationship Committee

The Board of Directors of a company which consists of more than one thousand shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year shall constitute a Stakeholders Relationship Committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the Board.

The Stakeholders Relationship Committee shall consider and resolve the grievances of security holders of the company.

The chairperson of each of the committees constituted under this section or, in his absence, any other member of the committee authorised by him in this behalf shall attend the general meetings of the company.

Punishment for Contravention of Section 177 and 178 [Section 178(8)]

The company shall be punishable with fine

- which shall not be less than one lakh rupees but
- which may extend to five lakh rupees and
- every officer of the company who is in default shall be punishable with
- imprisonment for a term which may extend to one year or
- with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both

Inability to resolve or consider any grievance by the Stakeholders Relationship Committee in good faith shall not constitute a contravention of this section.

CA. SHIVANGI AGRAWAL
M/S Dreamworks ltd (an unlisted company) without any public deposits as per the audited financial statements of the company as at 31st March, 2018 gives you the following information:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid up share capital</td>
<td>20 Crores</td>
</tr>
<tr>
<td>Gross turnover</td>
<td>500 crores</td>
</tr>
<tr>
<td>Bank borrowings</td>
<td>40 crores from Nationalized Bank</td>
</tr>
<tr>
<td>Other Borrowings</td>
<td>40 crores from PFI</td>
</tr>
</tbody>
</table>

Mr. Gupta, a Chartered Accountant employed in the finance and Audit department of the company wants to form a Vigil Mechanism for directors and employees of the company. Advise whether it is mandatory for the company to form Vigil Mechanism?

Are there any penalties that could be imposed for not formulating Vigil Mechanism?

Powers of Board

The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do:

- The Board shall exercise powers subject to-
  - the provisions contained in that behalf in this Act, or
  - in the memorandum or articles, or
  - in any regulations including regulations made by the company in general meeting.

- Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.

- No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.

Powers Exercisable By Resolution at Board Meeting Only [Section 179(3)]

The Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:

- to make calls on shareholders in respect of money unpaid on their shares
- to authorise buy-back of securities under section 68
- to issue securities, including debentures, whether in or outside India
- to borrow monies
- to invest the funds of the company
- to grant loans or give guarantee or provide security in respect of loans
- to approve financial statement and the Board’s report
- to diversify the business of the company
- to approve amalgamation, merger or reconstruction;
- to take over a company or acquire a controlling or substantial stake in another company;
- any other matter which may be prescribed
Delegation

The Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditions as it may specify.

Special Provisions for Banking Companies

Provided further that the acceptance by a banking company in the ordinary course of its business of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, or the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be deemed to be a borrowing of monies or, as the case may be, a making of loans by a banking company within the meaning of this section.

A company may in general meeting impose restrictions and conditions on the exercise by the Board of any of the powers specified in this section.

Advisory:

- Advise the Board of Directors to Spectra Papers Ltd regarding validity and extent of their powers, under the provisions of Companies Act, 2013 in relation to following matters:
  - Buy back of the shares of the Company upto 10% of the paid up equity share capital without passing SR.

- A is the Director of M & Co. Ltd. A has borrowed Rs. 50 lakhs on reasonable terms from X for company's benefit and business. A has no power to borrow, What will be the legal position?

Restrictions on Powers of Board

Powers Requiring Approval [Section 180(1)]

The Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely:—

a) to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

"undertaking" shall mean an undertaking in which the investment of the company exceeds 20% of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates 20% of the total income of the company during the previous financial year

"substantially the whole" of the undertaking in any financial year shall mean 20% or more of the value of the undertaking as per the audited balance sheet of the preceding financial year.
b) to **invest** otherwise in trust securities the **amount of compensation received by** it as a result of **any merger** or amalgamation;

c) to **borrow money, where the money to be borrowed**, together with the **money already borrowed** by the company will **exceed** aggregate of its **paid-up share capital, free reserves** and **securities premium**, apart from temporary loans obtained from the company's bankers in the ordinary course of business

Provided that the acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company within the meaning of this clause.

"**temporary loans**" means **loans repayable on demand or within six months from the date of the loan** such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but **does not include loans raised for the purpose of financial expenditure of a capital nature**

d) to **remit**, or **give time for the repayment of**, any **debt due from a director**.

**Specifications in SR**

Every **special resolution** passed by the company in general meeting in relation to the exercise of the powers referred to in clause (c) of sub-section (1) shall **specify the total amount up to which monies may be borrowed** by the Board of Directors.

Any **special resolution** passed by the company consenting to the transaction as is referred to in clause (a) of sub-section (1) **may stipulate** such **conditions** as may be specified in such resolution, including conditions **regarding the use, disposal or investment of the sale proceeds** which may result from the transactions

**No Effect on Title in Good Faith**

Nothing shall effect:-

- the title of a buyer or other person who buys or takes on lease any property, investment or undertaking as is referred to in that clause, in good faith
- the sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing.

**Onus of Proof on Lender [Section 180(5)]**

**No debt** incurred by the company **in excess of the limit** imposed by clause (c) of sub-section (1) shall be **valid or effectual, unless the lender proves that he advanced the loan in good faith** and **without knowledge that the limit** imposed by that clause had been **exceeded**.

Big Ben Ltd, a reputed Public Company had advanced certain sum of money to one of its directors, namely Mr. Tanmay on certain terms and conditions and fixing the time limit for repayment thereof. Now, Mr. Tanmay has approached the Company with a request to extend the time limit for repayment of balance of loan amounting to Rs. 12 lakhs by another six months. Who is authorized to grant the extension as requested by Mr. Tanmay?
The paid up share capital and free reserves of XYZ Co. Ltd, a public company, is Rs. 100 crores as on 1st April, 2014. The shareholders of the company at their General Meeting held on 4th April 2014 by a special resolution authorized the Board of Directors of the Company to borrow money exceeding the paid up share capital and free reserves of the company, to the extent required by the Board of Directors. The Board as a result borrowed money to an extent of Rs. 130 crores, including 20 crores as short term loan and Rs. 25 crores as temporary loan for financing the construction of a building of the company. Examine the validity of the following:

i) The Board exercising powers for borrowing money to an extent of Rs. 130 crores?

ii) What if Company’s Paid-up share capital and free reserves increased to Rs. 150 crores and the Board borrow money to an extent of Rs. 140 crores which does not include short-term or temporary loan for financing construction of building of company.

The Board of directors of Stepping Stones Publications Ltd at a meeting held on 15.1.2001 resolved to borrow a sum of Rs. 15 crores from a nationalized bank, subsequently the said amount was received by the company. One of the directors, who opposed the said borrowing as not in the interest of the company has raised an issue that the said borrowing is outside the powers of the Board. The company seeks your advice and the following data is given for your information:

i) Share Capital: Rs. 5 Crores

ii) Reserves & Surplus: Rs. 5 Crores

iii) Secured Loans: Rs. 15 Crores

iv) Unsecured Loans: Rs. 5 Crores

Advise the management of the company.

The last 3 years balance sheet of RBS Ltd contains the following information and figures:

<table>
<thead>
<tr>
<th></th>
<th>As at 31.03.2002</th>
<th>As at 31.03.2003</th>
<th>As at 31.03.2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid up Capital</td>
<td>50,00,000</td>
<td>50,00,000</td>
<td>75,00,000</td>
</tr>
<tr>
<td>General Reserve</td>
<td>45,00,000</td>
<td>50,00,000</td>
<td>60,00,000</td>
</tr>
<tr>
<td>DRR</td>
<td>15,00,000</td>
<td>20,00,000</td>
<td>25,00,000</td>
</tr>
<tr>
<td>Secured Loans</td>
<td>10,00,000</td>
<td>15,00,000</td>
<td>30,00,000</td>
</tr>
<tr>
<td>Net profit for the year</td>
<td>12,50,000</td>
<td>19,00,000</td>
<td>34,50,000</td>
</tr>
</tbody>
</table>

In the ensuing Board meeting scheduled to be on 5th November, 2004 among other items of agenda, following item is also appearing:

'To decide about borrowing from financial institutions on long-term basis'

Based on above information, you are required to find out as per the provisions of the Companies Act, 2013 the amount upto which the Board can borrow from financial institutions without seeking approval in General Meeting.

Following is the data relating to Prince Company Limited:

<table>
<thead>
<tr>
<th></th>
<th>Authorised capital</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>100 crores</td>
</tr>
</tbody>
</table>
Board of directors of the company by a resolution passed at its meeting decide to borrow an additional sum of 90 crores from Company’s bankers. Advise the board the procedure to be followed as required under Companies Act, 2013.

One of the objects of the Memorandum of Association of Info Company Ltd conferred upon the company power to sell its undertaking to another company with identical objects. Company's Articles also conferred upon the directors whereby power was conferred upon them to sell or otherwise deal with the property of the company. At an extraordinary general meeting of the company members passed a special resolution for the sale of its assets on certain terms and authorized the directors to carry out the sale. Directors refused to comply with the wishes of the members where upon it was contended on behalf of the members that they were the principals and directors being their agents, were bound to give effect to their (members’) decisions. Examining the provisions of the Companies Act, 2013, answer the following:

i) Whether the contention of members against the non-compliance of members’ decision by the directors is tenable?

ii) Whether it is possible for the members to usurp the powers which by the Articles are vested in the directors by passing a resolution in the General Meeting

**Contribution to Bona Fide and Charitable Funds**

The Board of Directors of a company may contribute to bona fide charitable and other funds.

Provided that

- prior permission of the company in general meeting
- shall be required for such contribution
- in case any amount the aggregate of which, in any financial year,
- exceed 5% of its average net profits
- for the three immediately preceding financial years

The last three years' balance sheets of PTL Ltd contains the following information and figures:

<table>
<thead>
<tr>
<th></th>
<th>As at 31.03.2003</th>
<th>As at 31.03.2004</th>
<th>As at 31.03.2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid up Capital</td>
<td>50,00,000</td>
<td>50,00,000</td>
<td>75,00,000</td>
</tr>
<tr>
<td>General Reserve</td>
<td>45,00,000</td>
<td>50,00,000</td>
<td>60,00,000</td>
</tr>
<tr>
<td>Credit Balance of P/L</td>
<td>5,00,000</td>
<td>7,50,000</td>
<td>10,00,000</td>
</tr>
<tr>
<td>DRR</td>
<td>15,00,000</td>
<td>20,00,000</td>
<td>25,00,000</td>
</tr>
</tbody>
</table>
MEETINGS OF BOARD & ITS POWERS

Secured Loans

<table>
<thead>
<tr>
<th></th>
<th>10,00,000</th>
<th>15,00,000</th>
<th>30,00,000</th>
</tr>
</thead>
</table>

On going through other records, Net profit for the year:

- 12,50,000 - As at 31.03.2003
- 19,00,000 - As at 31.03.2004
- 34,50,000 - As at 31.03.2005

In the ensuing Board meeting scheduled to be held on 5th November 2005, among other items of agenda, following are also appearing:

i) To decide about borrowings from financial Institutions on long-term basis

ii) Decide about contributions to be made to Charitable funds

- Decide the validity of powers of Board in:
  - Donation of Rs. 5 lakhs to a Charitable trust registered u/s 12A and exempted u/s 80G of the Income Tax Act

M/S Jai Industries Ltd earned net profit for last three years as under:

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Net Profit</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013-14</td>
<td>30 Crores</td>
</tr>
<tr>
<td>2014-15</td>
<td>40 Crores</td>
</tr>
<tr>
<td>2015-16</td>
<td>50 Crores</td>
</tr>
</tbody>
</table>

During FY: 2016-17, the Board of the company contributed to a Charitable fund Rs. 1.25 crores in July, 2016. Again in January 2017, the Board passed resolution to contribute to another charitable fund Rs. 1 crore. Decide the validity.

Prohibitions and Restrictions Regarding Political Contributions

A company may contribute any amount directly or indirectly to any political party by passing a resolution authorizing the making of such contribution at a meeting of the Board of Directors.

**Exception:**

- A Government company and
- A company which has been in existence for less than three financial years.

The board of LM Ltd incorporated in 2015 proposes to donate 50000 to a political party during financial year ending 31st March 2017. Average Net profits during two immediately preceeding financial years is 20,00,000. Whether proposed donation is within Section 182

CA. SHIVANGI AGRAWAL
powers of Board?

 Decide in the light of the provisions of Companies Act, extent and validity of powers of board in Donation of Rs. 5 lakhs to a political party registered with the appropriate authority.

 State with reference to the provisions of the Companies Act, 2013 whether following companies can make donation to political parties and if so the conditions to be complied with in this regard

 i) ABCD Ltd, a Government Company registered in 1991 wants to donate a sum of 10 lakhs  
 ii) EFG Ltd public company registered in 2013 wishes to contribute a sum of 5 lakhs  
 iii) RST Ltd a company incorporated in 2014 wants to contribute a sum of 3 lakhs  
 iv) Rama Ltd wants to make political contribution of 2000 in cash

Power of Board and Other Persons to make contributions to National Defence Fund Etc.

 ✓ The Board of Directors of any company or any person or authority exercising the powers of the Board of Directors of a company, or of the company in general meeting, may, notwithstanding anything contained in sections 180, 181 and section 182 or any other provision of this Act or in the memorandum, articles or any other instrument relating to the company, contribute such amount as it thinks fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.

 ✓ Every company shall disclose in its profits and loss account the total amount or amounts contributed by it to the Fund during the financial year to which the amount relates

Disclosure of Interest by Director

General Disclosure [Section 184(1)]

 Every director shall-
 ✓ at the first meeting of the Board in which he participates as a director and
 ✓ thereafter at the first meeting of the Board in every financial year or
 ✓ whenever there is any change in the disclosures already made, then at the first Board meeting held after such change,
 ✓ disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in such manner as may be prescribed.

Rule 9 of Companies(Meetings of Board & Its Powers ) Rules, 2014

 ✓ Notice shall be in writing in Form MBP 1.
 ✓ It shall be the duty of the director giving notice of interest to cause it to be disclosed at the meeting held immediately after the date of the notice.
✓ All notices shall be kept at the registered office and such notices shall be preserved for a period of eight years from the end of the financial year to which it relates and shall be kept in the custody of the company secretary of the company or any other person authorized by the Board for the purpose.

Specific Disclosure [Section 184(2)]

Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into—

✓ with a body corporate in which such director or such director in association with any other director, holds more than 2% shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or

✓ with a firm or other entity in which, such director is a partner, owner or member, as the case may be,

✓ shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting.

Provided that where any director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into, disclose his concern or interest forthwith when he becomes concerned or interested or at the first meeting of the Board held after he becomes so concerned or interested.

A contract or arrangement entered into by the company without disclosure under subsection (2) or with participation by a director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company.

Penalty

If a director of the company contravenes these provisions, such director shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to one lakh rupees, or with both.

Non-Applicability

Nothing in this section—

(a) shall be taken to prejudice the operation of any rule of law restricting a director of a company from having any concern or interest in any contract or arrangement with the company;

(b) shall apply to any contract or arrangement entered into or to be entered into between two companies or between one or more companies and one or more bodies corporate where any of the directors of the one company or body corporate or two or more of them together holds or hold not more than 2% of the paid-up share capital in the other company or the body corporate.

✓ In case of Private Company which has not committed default in filing u/s 137 or 92, the interested director may participate in the Board meeting after his disclosure of his interest.
MEETINGS OF BOARD & ITS POWERS

✓ Section 184(2) shall apply to a section 8 company which has not committed default in filing u/s 137 or 92, only when transaction value exceeds 1 lakh.

Seth MohanLal v Grain Chambers Ltd: Where the same matter comes before a general meeting, the right of an interested director to vote on it is not affected by section 184.

X Ltd. entered into a contract with M and Co. Ltd. for purchase of raw materials of 2,50,000 at the prevailing market rate. The director of X Ltd., Mr. B, was holding shares of the value of 1% of the paid up capital of M and Co. Ltd. Another Director of X Ltd. Mr. C was holding shares of the value of 1.5% of the paid up capital of M and Co. Ltd. Mr. B at the beginning of the year, gave a general notice to X Ltd. that he was interested in M and Co. Ltd, Mr. B claims that he had given notice to X Ltd. as required under the Companies Act, 2013 and that his holding being only 1% is within the limit under the Companies Act, 2013.

Articles of Association of company states that a director shall not vote in respect of a contract in which he is interested. In a resolution put up for approval of the shareholders, can a director exercise his voting right in favour of a contract in which he is interested.

Company Y with a paid up capital of 50 lakhs entered into a Contract with Company Z in which a director of Company Y is holding equity shares of the nominal value of Rs. 50,000. The director did not disclose his interest at the Board meeting u/s 184. Is the director liable for his act?

Loan to Directors

Prohibition on Loan to Directors [Section 185(1)]

No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,—
(a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or
(b) any firm in which any such director or relative is a partner.

Permitted Transactions [Section 185(2)]

A company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in whom any of the director of the company is interested, subject to the condition that—
(a) a special resolution is passed by the company in general meeting:
Provided that the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and
(b) the loans are utilised by the borrowing company for its principal business activities.
"any person in whom any of the director of the company is interested" means—
(a) any private company of which any such director is a director or member;
(b) any body corporate at a general meeting of which not less than twenty-five per cent. of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or
(c) any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

Non-Applicability

Nothing contained in sub-sections (1) and (2) shall apply to—

(a) the giving of any loan to a managing or whole-time director—
   • as a part of the conditions of service extended by the company to all its employees; or
   • pursuant to any scheme approved by the members by a special resolution; or

(b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan; or

(c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or

(d) any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company:
Provided that the loans made under clauses (c) and (d) are utilised by the subsidiary company for its principal business activities.

MCA Circular:
Section 185 shall not apply to a private company—

- in whose share capital no other body corporate has invested any money;
- if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and
- such a company has no default in repayment of such borrowings subsisting at the time of making transactions under this section.

Section 185 shall not apply to Nidhi Company provided the loan is given to a director or his relative in their capacity as members and such transaction is disclosed in the annual accounts by a note.

Section 185 shall not apply to Government Company in case such company obtains approval of the Ministry or Department of the Central Government which is administratively in charge of
the company, or, as the case may be, the State Government before making any loan or giving any guarantee or providing any security under the section.

Does not apply to Specified IFSC Public and Private Companies to certain conditions

**Penalty [Section 185(4)]**

If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section,—

(i) the **company shall be punishable with fine** which shall **not be less than five lakh rupees but which may extend to twenty-five lakh rupees**;

(ii) every **officer** of the company who is in default shall be **punishable with imprisonment** for a term which may extend to **six months** or with **fine** which shall not be less than **five lakh rupees** but which may extend to **twenty-five lakh rupees**; and

(iii) the **director** or the **other person to whom** any loan is **advanced or guarantee or security is given** or provided in connection with any loan taken by him or the other person, shall be **punishable with imprisonment** which may extend to **six months** or with **fine** which shall not be less than **five lakh rupees** but which may extend to **twenty-five lakh rupees**, or with both.

Mr. DRT is a director of PCS Ltd. The said company is having sufficient liquid funds and Mr. DRT is in dire need of funds. In order to mitigate the hardship of Mr. DRT the board of directors of PCS Ltd. wants to lend 5 lakhs to him and 2 lakhs to his wife. State whether such loans can be given and if so under what conditions. What would be your answer if the company PCS Ltd. would have been PCS Private Ltd.?

Mr. X is a director of M/s ABC Ltd. He has approached M/s Housing Finance Co. Ltd. for the purpose of obtaining a loan of 50 lacs to be used for construction of building his residential house. The loan was sanctioned subject to the condition that M/s ABC Ltd. should provide the guarantee for repayment of loan installments by Mr. X. Advise Mr. X.

Queen Construction Company Ltd. acquired 60% of the equity paid up share capital of ABC Ltd. Queen Construction Ltd. has planned to expand its operation for which additional fund is required. The Board of Directors decided to avail additional exposure of 10 crore from the Bank. The following data is furnished as on 30th June, 2017.

<table>
<thead>
<tr>
<th>Authorised Equity Share Capital</th>
<th>25</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issued and Subscribed Equity Share Capital</td>
<td>22</td>
</tr>
<tr>
<td>Paid up Equity Share Capital</td>
<td>20</td>
</tr>
<tr>
<td>Capital Reserve</td>
<td>2</td>
</tr>
<tr>
<td>Revaluation Reserve</td>
<td>1</td>
</tr>
<tr>
<td>General Reserve</td>
<td>3</td>
</tr>
<tr>
<td>Open cash credit Limit (for working Capital requirement) with the Bank repayable in 3</td>
<td>5</td>
</tr>
</tbody>
</table>
ABC Ltd. approached Queen Construction Ltd. to grant a loan of 25 Lakhs and stand as guarantor for repayment of loan 10 Lakhs to be sanctioned by a Bank. The two loans (25 Lakhs plus 10 Lakhs) will be utilized by ABC Ltd. for its principal business activities. You being the Financial Advisor of the company, advise the Board of Directors about the procedure to be followed to avail additional exposure of 10 Crore from the Bank. Also evaluate whether the loan guarantee given by Queen construction Ltd. to ABC Ltd. is valid according to Section 185 of the Companies Act, 2013.

Loan and Investment by Company

A company shall unless otherwise prescribed, make investment through not more than two layers of investment companies:
Provided that the provisions of this sub-section shall not affect,—
(i) a company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country;
(ii) a subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

Limit for Investment [Section 186(2)]

No company shall directly or indirectly —
✓ give any loan to any person or other body corporate;
✓ give any guarantee or provide security in connection with a loan to any other body corporate or person; and
✓ acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more.

Explanation.—For the purposes of this sub-section, the word "person" does not include any individual who is in the employment of the company

(3) Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under sub-section (2), no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting

Provided that where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of,
the securities of its wholly owned subsidiary company, the requirement of this sub-section shall not apply

Provided further that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-section (4)

Where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of sub-section (3) of section 186 shall not apply

Disclosure [Section 186(4)]

The company shall disclose to the members in the financial statement the full particulars of-

✓ the loans given,
✓ investment made or guarantee given or security provided and
✓ the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security.

Approval of Board and PFI [Section 186(5)]

No investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained:

Provided that prior approval of a public financial institution shall not be required-

✓ where the aggregate of the loans and investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given
✓ does not exceed the limit as specified in sub-section (2), and
✓ there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

Restriction u/s 186(6)

No company, which is registered under section 12 of the Securities and Exchange Board of India Act, 1992 and covered under such class or classes of companies as may be prescribed, shall take inter-corporate loan or deposits exceeding the prescribed limit and such company shall furnish in its financial statement the details of the loan or deposits.

Rate of Interest [Section 186(7)]

No loan shall be given under this section at a rate of interest lower than the prevailing yield of one year, three year, five year or ten year Government Security closest to the tenor of the loan.

No Loan in Case of Default [Section 186(8)]
MEETINGS OF BOARD & ITS POWERS

No company which is in default in the repayment of any deposits accepted before or after the commencement of this Act or in payment of interest thereon, shall give any loan or give any guarantee or provide any security or make an acquisition till such default is subsisting.

Register [Section 186(9) & 186(10)]

Every company giving loan or giving a guarantee or providing security or making an acquisition under this section shall keep a register which shall contain such particulars and shall be maintained in such manner as may be prescribed.

The register referred to in sub-section (9) shall be kept at the registered office of the company and —
(a) shall be open to inspection at such office; and
(b) extracts may be taken therefrom by any member, and copies thereof may be furnished to any member of the company on payment of such fees as may be prescribed.

Non-Applicability [Section 186(11)]

Nothing contained in this section, except sub-section (1), shall apply—
(a) to any loan made, any guarantee given or any security provided or any investment made by a banking company, or an insurance company, or a housing finance company in the ordinary course of its business, or a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities;

(b) to any investment—
(i) made by an investment company;
(ii) made in shares allotted in pursuance of clause (a) of sub-section (1) of section 62 or in shares allotted in pursuance of rights issues made by a body corporate;
(iii) made, in respect of investment or lending activities, by a non-banking financial company registered under Chapter III-B of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities.

Nothing in this Section shall apply to
(✓) Government Company engaged in defence production

CA. SHIVANGI AGRAWAL
✓ Government Company other than a listed company in case such a company obtains approval of Ministry or Department or Central Government which is administratively in charge of Company

Penalty [Section 186(13)]

If a company contravenes the provisions of this section,

✓ the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and

✓ every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

“investment company” means a company whose principal business is the acquisition of shares, debentures or other securities and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than fifty per cent. of its total assets, or if its income derived from investment business constitutes not less than fifty per cent. as a proportion of its gross income.

Amar Textiles Ltd. is a company engaged in manufacture of fabrics. The Company has investments in shares of other bodies corporate including 70% shares in Amar Cotton Co. Ltd. and it has also advanced loans to other bodies corporate. The aggregate of all the investments made and loans granted by Amar Textiles Ltd. exceeds 60% of its paid up share capital and free reserves and also exceeds 100% of its free reserves. In course of its business requirements, Amar textiles Ltd. has obtained a term loan from IDBI and the same is still subsisting. Now the company wants to increase its holding from 70% to 80% of the equity share capital in Amar Cotton Co. Ltd. by purchase of additional 10% shares from other existing shareholders. State the legal requirements to be complied with by Amar Textiles Ltd. under the provisions of the Companies Act, 2013 to give effect to the above proposal.

Soft and Secure Lenders Limited, has convened a Board Meeting on 25th October, 2016. One of the items of the agenda is to approve the grant of loan of Rs.20 crore to Easy Going Industries Limited, for expansion of its business activities. At the Board Meeting, out of the total of six Directors of the lending company, five directors were present and expect one director, the remaining four directors approved the grant of loan of Rs.20 crores to Easy Going Industries Limited. The Borrowing company has taken loans from a public financial institution and also deposits from public. Examine the loan proposal with reference to the provisions of the Companies Act, 2013

Star Ltd proposes to acquire 15% equity shares of gain investments(P) ltd for 45 lakhs which has a face value of 35 lakhs. Star Ltd has an outstanding loan of 15 lakhs to a public financial Institution and had not defaulted in the repayment of loan instalments stipulated in the loan agreements. Based on the following data, Advise Star ltd about the legal position regarding the allowability of the proposed investment under the provisions of the Companies Act, 2013

CA. SHIVANGI AGRAWAL
MEETINGS OF BOARD & ITS POWERS

<table>
<thead>
<tr>
<th>In Crores</th>
<th>In Crores</th>
</tr>
</thead>
<tbody>
<tr>
<td>Star Ltd</td>
<td>Gain Investment (P) Ltd</td>
</tr>
<tr>
<td>Authorized Capital</td>
<td>1</td>
</tr>
<tr>
<td>Paid up Share Capital</td>
<td>0.5</td>
</tr>
<tr>
<td>Free Reserves</td>
<td>0.2</td>
</tr>
</tbody>
</table>

As on the date of proposition, star Ltd does not hold any shares of any company.

ASK Housing finance company limited is prepared to give housing loans to the employees of M/S News Pharmacy ltd subject to the condition that the loans are guaranteed by M/S News Pharmacy ltd. M/S News Pharmacy ltd is not a listed company and the company will be exceeding the limits prescribed under Companies Act, 2013 by providing guarantee. Advise the Company about this legal requirement? What would be your advice if the company was required to provide security instead of guarantee?

Investments of Company to be held in its own Name

All investments made or held by a company in any property, security or other asset shall be made and held by it in its own name.

Exceptions

A Company may hold any shares in its subsidiary company in the name of any nominee or nominees of the company, if it is necessary to do so, to ensure that the number of members of the subsidiary company is not reduced below the statutory limit.

Nothing in this section shall be deemed to prevent a company—

a) from depositing with a bank, being the bankers of the company, any shares or securities for the collection of any dividend or interest payable thereon; or

b) from depositing with, or transferring to, or holding in the name of, the State Bank of India or a scheduled bank, being the bankers of the company, shares or securities, in order to facilitate the transfer thereof.

Provided that if within a period of six months from the date on which the shares or securities are transferred by the company to, or are first held by the company in the name of, the State Bank of India or a scheduled bank as aforesaid, no transfer of such shares or securities takes place, the company shall, as soon as practicable after the expiry of that period, have the shares or securities re-transferred to it from the State Bank of India or the scheduled bank or, as the case may be, again hold the shares or securities in its own name; or

ca) from depositing with, or transferring to, any person any shares or securities, by way of security for the repayment of any loan advanced to the company or the performance of any
obligation undertaken by it;

d) from holding investments in the name of a depository when such investments are in the form of securities held by the company as a beneficial owner.

Rule 14:
Investments of Company to be Held in its Own Name
(1) Every company shall, from the date of its registration, maintain a register in Form MBP 3 and enter therein, chronologically, the particulars of investments in shares or other securities beneficially held by the company but which are not held in its own name and the company shall also record the reasons for not holding the investments in its own name and the relationship or contract under which the investment is held in the name of any other person.
(2) The company shall also record whether such investments are held in a third party's name for the time being or otherwise.
(3) The register shall be maintained at the registered office of the company. The register shall be preserved permanently and shall be kept in the custody of the company secretary of the company or if there is no company secretary, any director or any other officer authorised by the Board for the purpose.
(4) The entries in the register shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

Related Party Transactions

Meaning of Related Party [Section 2(76)]

"related party", with reference to a company, means—
  i) a director or his relative;
  ii) a key managerial personnel or his relative;
  iii) a firm, in which a director, manager or his relative is a partner;
  iv) a private company in which a director or manager or his relative is a member or director;
  v) a public company in which a director and manager is a director and holds along with his relatives, more than two per cent of its paid-up share capital;
  vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
  vii) any person on whose advice, directions or instructions a director or manager is accustomed to act:

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity

  viii) any body corporate which is—
   i. a holding, subsidiary or an associate company of such company;
   ii. a subsidiary of a holding company to which it is also a subsidiary; or
   iii. an investing company or the venturer of the company;"

"the investing company or the venturer of a company" means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.
ix) such other person as may be prescribed;

Contract with Related Party

Any contract or arrangement with a related party with respect to—

a) sale, purchase or supply of any goods or materials;
b) selling or otherwise disposing of, or buying, property of any kind;
c) leasing of property of any kind;
d) availing or rendering of any services;
e) appointment of any agent for purchase or sale of goods, materials, services or property;
f) such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and

Office or Place of Profit

(i) where such office or place is held by a director, if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;
(ii) where such office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

shall be entered only with consent of Board of Directors by a resolution at Board Meeting and complying with following conditions specified in Rule 15

✓ Provided that no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by a resolution
✓ Provided further that no member of the company shall vote on such resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party
✓ Provided also that nothing contained in the second proviso shall apply to a company in which ninety per cent. or more members, in number, are relatives of promoters or are related parties
✓ Provided also that nothing in this sub-section shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis.

"arm’s length transaction" means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.
✓ Provided also that the requirement of passing the resolution under first proviso shall not be applicable for transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval
Rule 15 of Companies (Meetings of Board & Its Powers) Rules, 2014

A company shall enter into any contract or arrangement with a related party subject to the following conditions, namely:

Disclosure in Agenda of Board Meeting

The agenda of the Board meeting at which the resolution is proposed to be moved shall disclose-
(a) the name of the related party and nature of relationship;
(b) the nature, duration of the contract and particulars of the contract or arrangement;
(c) the material terms of the contract or arrangement including the value, if any;
(d) any advance paid or received for the contract or arrangement, if any;
(e) the manner of determining the pricing and other commercial terms, both included as part of contract and not considered as part of the contract;
(f) whether all factors relevant to the contract have been considered, if not, the details of factors not considered with the rationale for not considering those factors; and
(g) any other information relevant or important for the Board to take a decision on the proposed transaction.

Interested Director not to Participate

Where any director is interested in any contract or arrangement with a related party, such director shall not be present at the meeting during discussions on the subject matter of the resolution relating to such contract or arrangement-

(3) For the purposes of first proviso to sub-section (1) of section 188, except with the prior approval of the company by a resolution, a company shall not enter into a transaction or transactions, where the transaction or transactions to be entered into-
(a) as contracts or arrangements with respect to clauses (a) to (e) of sub-section (1) of section 188, with criteria as mention below-
(i) sale, purchase or supply of any goods or material, directly or through appointment of agent, amounting to ten percent or more of the turnover of the company or rupees one hundred crore, whichever is lower, as mentioned in clause (a) and clause (e) respectively of sub-section (1) of section 188;
(ii) selling or otherwise disposing of or buying property of any kind, directly or through appointment of agent, amounting to ten percent or more of net worth of the company or rupees one hundred crore, whichever is lower, as mentioned in clause (b) and clause (e) respectively of sub-section (1) of section 188;
(iii) leasing of property any kind amounting to ten percent or more of the net worth of company or ten per cent or more of turnover of the company or rupees one hundred crore, whichever is lower, as mentioned in clause (c) of sub-section (1) of section 188;
(iv) availing or rendering of any services, directly or through appointment of agent, amounting to ten percent or more of the turnover of the company or rupees fifty crore, whichever is lower as mentioned in clause (d) and clause (e) respectively of sub-section (1) of section 188:

Explanation.- It is hereby clarified that the limits specified in sub-clause (i) to (iv) shall apply for transaction or transactions to be entered into either individually or taken together with the previous transactions during a financial year.
(b) is for appointment to any office or place of profit in the company, its subsidiary company or associate company at a monthly remuneration exceeding two and a half lakh rupees as
mentioned in clause (f) of sub-section (1) of section 188.

(c) is for remuneration for underwriting the subscription of any securities or derivatives thereof, of the company exceeding one percent of the net worth as as mentioned in clause (g) of sub-section (1) of section 188.

Explanation.-

(1) The turnover or net worth referred in the above sub-rules shall be computed on the basis of the audited financial statement of the preceding financial year.

(2) In case of wholly owned subsidiary, the resolution is passed by the holding company shall be sufficient for the purpose of entering into the transaction between the wholly owned subsidiary and the holding company.

Explanatory Statement

The explanatory statement to be annexed to the notice of a general meeting convened pursuant to section 101 shall contain the following particulars, namely:-

(a) name of the related party;
(b) name of the director or key managerial personnel who is related, if any;
(c) nature of relationship;
(d) nature, material terms, monetary value and particulars of the contract or arrangements;
(e) any other information relevant or important for the members to take a decision on the proposed resolution.

Contract without Consent

✓ Where any contract or arrangement is entered into by a director or any other employee,
✓ without obtaining the consent of the Board or approval by a resolution in the general meeting
✓ and if it is not ratified by the Board or, as the case may be,
✓ by the shareholders at a meeting
✓ within three months from the date on which such contract or arrangement was entered into
✓ such contract or arrangement
✓ shall be voidable at the option of the Board or, as the case may be,
✓ of the shareholders
✓ and if the contract or arrangement is with a related party to any director,
✓ or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

Penalty

Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall,—

✓ In case of listed company, be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both; and
✓ In case of any other company, be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees.
M/s. Kith and Kin Consultants Private Limited seeks your legal advice regarding the following appointments relating to directors and their relatives.

   a) Miss. Niece, a relative of a director, is to be appointed as Chief Public Relations Officer on a salary of Rs. 65,000 per month
   b) Mr. Wellconnected, a relative of a director is to be appointed as Chief Executive Officer on a consolidated salary of 2,55,000 per month.
   c) Mr. Nephew, who is a relative of one of the directors, is to be appointed as the Managing Director on a monthly salary of Rs. 2,80,000 plus other perquisites as applicable to other executives of the company.

Advise explaining the relevant provisions of the Companies Act, 2013

Reliable Castings Limited is a subsidiary of unique Machineries Limited. The Board of Directors of the respective companies have made the following appointments on a consolidated monthly salary of 2,52,000 with effect from 1.6.2014:

   a) A, a Director of Unique Machineries Limited, s Factory Manager of Reliable Castings Limited.
   b) B, a Director of Reliable Castings Limited, as Purchase Manager of Unique Machineries Limited.
   c) C, a relative of a Director of Unique Machineries Limited, as Sales Manager of Unique Machineries Limited.
   d) D not related to any Director of both the companies as Chief Accountant of Unique Machineries Limited. But his relative has been appointed as Additional Director of Unique Machineries Limited with effect from 1.11.2014.

Explain the legal requirements to be compiled with the Companies Act to give effect to or continuation of the above appointments of employees.

Sweet tea limited wants to sell its tea by entering into contract with the following parties:

   a) Tea bros, a partnership firm in which a director of Sweet Tea ltd is a partner.
   b) R & T pvt ltd in which one of the director of Sweet Tea ltd is a member
   c) Strong Tea ltd in which one of the directors of Sweet Tea ltd is a director holding 3% of the paid up capital of Strong Tea ltd.

Advise steps to be taken for entering into contracts in which directors are interested.

Register of Contracts or Arrangements in which Directors Are Interested

Section 189

CA. SHIVANGI AGRAWAL
Such register or registers shall be placed before the next meeting of the Board and signed by all the directors present at the meeting.

It shall be open for inspection at such office during business hours and extracts may be taken therefrom, and copies thereof as may be required by any member of the company shall be furnished by the company to such extent, in such manner, and on payment of such fees as may be prescribed.

The register to be kept under this section shall also be produced at the commencement of every annual general meeting of the company and shall remain open and accessible during the continuance of the meeting to any person having the right to attend the meeting.

Non-Applicability

Nothing shall apply to any contract or arrangement—

- for the sale, purchase or supply of any goods, materials or services if the value of such goods and materials or the cost of such services does not exceed five lakh rupees in the aggregate in any year; or
- by a banking company for the collection of bills in the ordinary course of its business.

Penalty

Every director who fails to comply with the provisions of this section and the rules made thereunder shall be liable to a penalty of twenty-five thousand rupees.
Payment to Director for Loss Of Office in Connection With Transfer Of Undertaking, Property Or Shares

No director of a company shall, in connection with—

a) the transfer of the whole or any part of any undertaking or property of the company;

b) the transfer to any person of all or any of the shares in a company being a transfer resulting from—

✓ an offer made to the general body of shareholders;
✓ an offer made by or on behalf of some other body corporate with a view to a company becoming a subsidiary company of such body corporate or a subsidiary company of its holding company;
✓ an offer made by or on behalf of an individual with a view to his obtaining the right to exercise, or control the exercise of, not less than one-third of the total voting power at any general meeting of the company; or
✓ any other offer which is conditional on acceptance to a given extent, receive any payment by way of compensation for loss of office or as consideration for retirement from office, or in connection with such loss or retirement from such company or from the transferee of such undertaking or property, or from the transferees of shares or from any other person, not being such company, unless particulars as may be prescribed with respect to the payment proposed to be made by such transferee or person, including the amount thereof, have been disclosed to the members of the company and the proposal has been approved by the company in general meeting.

(2) Nothing in sub-section (1) shall affect any payment made by a company to a managing director or whole-time director or manager of the company by way of compensation for loss of office or as consideration for retirement from office or in connection with such loss or retirement subject to limits or priorities, as may be prescribed.

Section 191

CA. SHIVANGI AGRAWAL
(3) If the payment under sub-section (1) or sub-section (2) is not approved for want of quorum either in a meeting or an adjourned meeting, the proposal shall not be deemed to have been approved.

(4) Where a director of a company receives payment of any amount in contravention of sub-section (1) or the proposed payment is made before it is approved in the meeting, the amount so received by the director shall be deemed to have been received by him in trust for the company.

Penalty

If a director of the company makes any default in complying with the provisions of this section, such director shall be liable to a penalty of one lakh rupees.

Nothing in this section shall be taken to prejudice the operation of any law requiring disclosure to be made with respect to any payment received under this section or such other like payments made to a director.

Restriction on Non-Cash Transaction Involving Directors

No company shall enter into an arrangement by which—
- a director of the company or its holding, subsidiary or associate company or a person connected with him acquires or is to acquire assets for consideration other than cash, from the company; or
- the company acquires or is to acquire assets for consideration other than cash, from such director or person so connected,
- unless prior approval for such arrangement is accorded by a resolution of the company in general meeting and if the director or connected person is a director of its holding company, approval under this sub-section shall also be required to be obtained by passing a resolution in general meeting of the holding company.

The notice for approval of the resolution by the company or holding company in general meeting shall include the particulars of the arrangement along with the value of the assets involved in such arrangement duly calculated by a registered valuer.

Any arrangement entered into by a company or its holding company in contravention of the provisions of this section shall be voidable at the instance of the company unless—
- the restitution of any money or other consideration which is the subject matter of the arrangement is no longer possible and the company has been indemnified by any other person for any loss or damage caused to it; or
- any rights are acquired bona fide for value and without notice of the contravention of the provisions of this section by any other person.
Multiple Choice Questions

1. PQR Company give its assent to give guarantee to ABZ Company on the taking of loan from financial Institution. According to Companies Act 2013, the said act should be approved by the Board of Directors. State the mode of approval adopted by the Board of Directors of PQR company-

   a. Board shall give approval for giving guarantee on the loan by simple majority.
   b. Board shall give approval by passing circular resolution.
   c. Board shall give approval by passing resolution through special majority
   d. Board shall give unanimous approval.

2. Mr. X, a director of the Company intimated of his participation in the meeting scheduled on August, 2018. He declared his participation through Electronic mode in April 2017. State whether Mr. X is entitled to participate in the meeting to be conducted in August 2018-

   a. Yes, intimation about such participation was made at the beginning of the calendar year
   b. No because intimation was made in previous calendar year
   c. Yes, because company was intimated of its participation in the meeting
   d. No, because valid period of declaration(1 year) of his participation expired.

3. A director of XYZ, a pvt ltd takes a loan from its company. Due to some reasons, he fails to repay the debt within the given time period. He requests board of directors to give him time for repayment of debt. State which of the below statements is correct with respect to the exercise of the power in the given situation as per Companies Act, 2013-

   a. Power to fix time limit for
   b. Power to fix time limit for
4. According to Companies Act, 2013, the draft minutes of a Board meeting held through Audio visual means shall be circulated among all the directors within ---- of the meeting.

   a. 10 days  
   b. 15 days  
   c. 30 days  
   d. One Month

5. There are 9 directors in a company and out of which 2 offices of the directors have fallen vacant. What will be the quorum for the Board Meeting?

   a. 2  
   b. 3  
   c. 4  
   d. 5

6. Mr. Rajesh Jathar and Mr. Veena Jathar are the shareholders of NY Private limited. Mr. Jathar is out of country for business purpose. They have to have a Board Meeting through video Conference to comply with the requirements. Which of the following items they cannot discuss in such meeting?

   a. Convening of General Meeting  
   b. Approval of Board’s Report  
   c. Appointment of Managing Director  
   d. Transfer of Shares

7. The gap between two consecutive board meetings of a company shall not exceed ---- days.

   a. 90  
   b. 120  
   c. 150  
   d. 180

8. A company shall not hold more than ---- board meetings in a calendar year.

   a. 4  
   b. 6  
   c. 10  
   d. None of these

9. Notice of every Board meeting shall be sent to every director of the company at ----

   a. Indian Address  
   b. Address registered with Company
### MEETINGS OF BOARD & ITS POWERS

10. No Board meeting is required to be held by -----

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<thead>
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<tbody>
<tr>
<td>a. Small companies, dormant companies and companies u/s 8</td>
<td>b. One person Company</td>
</tr>
<tr>
<td>c. An OPC in which there is only 1 director</td>
<td>d. All of these</td>
</tr>
</tbody>
</table>

11. Central government is empowered to grant exemption from the provisions relating to holding of Board meeting. Such exemption may be granted to-

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<tbody>
<tr>
<td>a. An class of Companies</td>
<td>b. Any company</td>
</tr>
<tr>
<td>c. Small companies</td>
<td>d. Dormant companies</td>
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12. The notice of a board meeting shall be sent by---

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<table>
<thead>
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<tbody>
<tr>
<td>a. Hand delivery</td>
<td>b. Post</td>
</tr>
<tr>
<td>c. Electronic means</td>
<td>d. Any of these</td>
</tr>
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13. Any director who intends to participate in the meeting through electronic mode may intimate about such participation at the beginning of the -----year and the said declaration shall be valid for -----

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<tbody>
<tr>
<td>a. Calendar year; 6 months</td>
<td>b. Calendar year; 1 year</td>
</tr>
<tr>
<td>c. Financial year; 1 year</td>
<td>d. Financial year; 6 months</td>
</tr>
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14. In case of a Board Meeting, the quorum is required to be present-

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<tbody>
<tr>
<td>a. Only at commencement of board meeting</td>
<td>b. At the time of passing each and every resolution</td>
</tr>
<tr>
<td>c. No quorum needed in Board meeting</td>
<td>d. None of these</td>
</tr>
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15. Every contract or arrangement to which section 188 applies, shall be disclosed in ----

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</thead>
<tbody>
<tr>
<td>a. AOC-2 in Board’s report</td>
<td>b. MBP-2 in Annual Return</td>
</tr>
<tr>
<td>c. MBP-2 in Board's report</td>
<td>d. AOC-2 in financial statements</td>
</tr>
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16. Every company is required to keep at its registered office, a copy of contract of service entered into by it with -----

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<tbody>
<tr>
<td>a. Managing director</td>
<td>b. Whole-time director</td>
</tr>
<tr>
<td>c. Both (a) and (b)</td>
<td>d. Every director</td>
</tr>
</tbody>
</table>
17. Every contract of service entered into by a company with its managing director and whole time director shall be open to inspection by -----

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<tbody>
<tr>
<td>a.</td>
<td>Any member of the company</td>
</tr>
<tr>
<td>b.</td>
<td>Any director of the company</td>
</tr>
<tr>
<td>c.</td>
<td>Both (a) and (b)</td>
</tr>
<tr>
<td>d.</td>
<td>Any creditor of the company</td>
</tr>
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18. A company intends to acquire laptops from one of its directors and in return the company shall deliver some old furniture to the director concerned. Such arrangement requires prior approval of the members by passing; -----

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<tbody>
<tr>
<td>a.</td>
<td>An ordinary resolution</td>
</tr>
<tr>
<td>b.</td>
<td>A special resolution</td>
</tr>
<tr>
<td>c.</td>
<td>A resolution with no vote against it</td>
</tr>
<tr>
<td>d.</td>
<td>A resolution with consent of all members present.</td>
</tr>
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19. Where an OPC enters into a contract which is required to be recorded in the minutes of Board meeting, the company shall inform the ---- about such contract within ---- of the date of approval by the Board of directors

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<tbody>
<tr>
<td>a.</td>
<td>Central Government; 7 days</td>
</tr>
<tr>
<td>b.</td>
<td>Registrar; 7 days</td>
</tr>
<tr>
<td>c.</td>
<td>Registrar; 15 days</td>
</tr>
<tr>
<td>d.</td>
<td>Central Government; 30 days</td>
</tr>
</tbody>
</table>

20. Where any investment in securities is beneficially held by the company but such investments are not held in its own name, the company shall include the particulars of such investment in the Registrar maintain by it in Form No. ---- and such register shall be preserved -----

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>MBP-2; for 8 years</td>
</tr>
<tr>
<td>b.</td>
<td>MBP-2; permanently</td>
</tr>
<tr>
<td>c.</td>
<td>MBP-3; for 8 years</td>
</tr>
<tr>
<td>d.</td>
<td>MBP-3; permanently</td>
</tr>
</tbody>
</table>

21. Where a company makes any loan, investment, guarantee or security, it shall within ---- enter the required particulars in the register maintained in Form -----

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>7 days; MBP-4</td>
</tr>
<tr>
<td>b.</td>
<td>7 days; MBP-2</td>
</tr>
<tr>
<td>c.</td>
<td>30 days; MBP-4</td>
</tr>
<tr>
<td>d.</td>
<td>30 days; MBP-2</td>
</tr>
</tbody>
</table>

22. Every director shall disclose his concern or interest in any company or companies or bodies corporate, firms or other association of individuals at ---

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>First Board Meeting in which director participates</td>
</tr>
<tr>
<td>b.</td>
<td>First Board meeting of every Financial year</td>
</tr>
<tr>
<td>c.</td>
<td>First board meeting after any change</td>
</tr>
<tr>
<td>d.</td>
<td>All of these</td>
</tr>
</tbody>
</table>

23. A notice of disclosure of interest by a director u/s 184(1) shall be given in Form ---- and it shall be preserved by the company-----
MEETINGS OF BOARD & ITS POWERS

3.43

<table>
<thead>
<tr>
<th></th>
<th>a. MBP-1; for a period of 8 years</th>
<th>b. MBP-2; for a period of 8 years</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>c. MBP-1; permanently</td>
<td>d. MBP-2; permanently</td>
</tr>
</tbody>
</table>

24. A director is required to make disclosure of his interest if he is, whether directly or indirectly concerned or interested in a contract or an arrangement or proposed contract or arrangement entered into or to be entered into with a body corporate in which he with any other director holds ---- of that body corporate.

<table>
<thead>
<tr>
<th></th>
<th>a. More than 10% shareholding</th>
<th>b. More than 2% shareholding</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>c. More than 1% shareholding</td>
<td>d. Share</td>
</tr>
</tbody>
</table>

25. If an interested director does not disclose his interest in a contract or arrangement, such contract or arrangement shall be---

<table>
<thead>
<tr>
<th></th>
<th>a. Voidable at the option of company</th>
<th>b. Voidable at option of other party</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>c. Void</td>
<td>d. Illegal</td>
</tr>
</tbody>
</table>

26. Where a director is interested in any contract or arrangement----

<table>
<thead>
<tr>
<th></th>
<th>a. He shall not participate in discussion on such contract or arrangement</th>
<th>b. He shall not vote on such contract or arrangement</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>c. His presence shall not be counted for determining quorum with respect to such contract</td>
<td>d. All of the above</td>
</tr>
</tbody>
</table>

27. A company may make political contribution if approval of the board is obtained----

<table>
<thead>
<tr>
<th></th>
<th>a. By passing a resolution by circulation</th>
<th>b. By passing a resolution in Board Meeting</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>c. Either (a) or (b)</td>
<td>d. By passing Unanimous Resolution of Board</td>
</tr>
</tbody>
</table>

28. The Board of directors of ABC Ltd intends to contribute Rs. 50 lakhs to a charitable fund. Such charitable contribution exceeds the limit prescribed u/s 181. Such contribution-----

<table>
<thead>
<tr>
<th></th>
<th>a. Cannot be made</th>
<th>b. Can be made if an ordinary resolution is passed in General meeting</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>c. Can be made if special resolution is passed in general meeting</td>
<td>d. Can be made on approval of CG</td>
</tr>
</tbody>
</table>

29. A company which makes any political contribution shall disclose in P/L----

|   | a. Amount contributed to Political Party | b. Name of Political Party to whom contribution is made |

CA. SHIVANGI AGRAWAL
### MEETINGS OF BOARD & ITS POWERS

#### 30. A company can contribute how much to National Defence fund?

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>Such amount as it thinks fit</td>
</tr>
<tr>
<td>b.</td>
<td>Maximum 5% of the average net profits during immediately preceding 3 financial years</td>
</tr>
<tr>
<td>c.</td>
<td>Maximum 7.5% of the average net profits during immediately preceding 3 financial years</td>
</tr>
<tr>
<td>d.</td>
<td>Maximum 50,000</td>
</tr>
</tbody>
</table>

#### 31. The consent of company by a ----- is required for borrowing of money if money already borrowed together with money proposed to be borrowed will exceed aggregate of -----.

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>Ordinary resolution; Paid up share capital, free reserves and securities premium account</td>
</tr>
<tr>
<td>b.</td>
<td>Special resolution; paid up share capital, free reserves and securities premium</td>
</tr>
<tr>
<td>c.</td>
<td>Ordinary resolution; paid up share capital and free reserves</td>
</tr>
<tr>
<td>d.</td>
<td>Special resolution; paid up share capital and free reserves</td>
</tr>
</tbody>
</table>

#### 32. A company may sell the whole of any of one or more of its undertakings if it is so authorized by-----.

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>A special resolution passed in general meeting</td>
</tr>
<tr>
<td>b.</td>
<td>An ordinary resolution passed in general meeting</td>
</tr>
<tr>
<td>c.</td>
<td>The Central Government</td>
</tr>
<tr>
<td>d.</td>
<td>A resolution passed in Board Meeting with consent of all directors present</td>
</tr>
</tbody>
</table>

#### 33. The board may delegate-----.

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>Power to borrow money</td>
</tr>
<tr>
<td>b.</td>
<td>Power to invest funds of company</td>
</tr>
<tr>
<td>c.</td>
<td>Power to grant loans or give guarantee or provide security in loan</td>
</tr>
<tr>
<td>d.</td>
<td>All of the above</td>
</tr>
</tbody>
</table>

#### 34. Any regulation made in a general meeting shall not ----- any prior act of Board which was otherwise valid.

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>Override</td>
</tr>
<tr>
<td>b.</td>
<td>Invalidate</td>
</tr>
<tr>
<td>c.</td>
<td>Validate</td>
</tr>
<tr>
<td>d.</td>
<td>None of these</td>
</tr>
</tbody>
</table>

#### 35. Ac act which is ultra Vires the companies Act, 2013 may be ratified by-----.

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>The Board</td>
</tr>
<tr>
<td>b.</td>
<td>The members in General meeting</td>
</tr>
<tr>
<td>c.</td>
<td>The Central government</td>
</tr>
<tr>
<td>d.</td>
<td>None of these</td>
</tr>
</tbody>
</table>
36. The quorum of Board meeting shall be---
   a. one-half its total strength or one director, whichever is higher
   b. one fourth of its total strength or two director, whichever is higher
   c. one-third of its total strength or two directors, whichever is higher
   d. one-third of its total strength or two directors, whichever is lower

37. when a resolution exercising any of powers specified in section 179(3) is passed in a Board meeting, the Company shall file with the registrar form ------ within 30 days
   a. MBP-1
   b. MBP-2
   c. MBP-3
   d. MGT-14

38. Board of directors of a company which consists of more than 1000 at any time during a financial year shall constitute a Relationship Committee.
   a. Debenture holders
   b. Deposit holders
   c. Shareholders
   d. All of the above

39. A member of the company is entitled to inspect----
   a. Minutes of General Meeting
   b. Minutes of Board Meeting
   c. Both (a) and (b)
   d. None of these

40. A company cannot hold an original Board meeting on---
   a. Sunday
   b. Public holiday
   c. National Holiday
   d. None of the above

41. Acts done by a person as a director shall be deemed to be valid even if it was subsequently noticed that-----
   a. His appointment was invalid by reason of any defect or disqualification
   b. His appointment was terminated by virtue of any provision contained in the Act or in the articles
   c. Either (a) or (b)
   d. None of the above

42. Omnibus approval granted by the Audit Committee shall be valid for a period not exceeding-----
   a. 1 months
   b. 6 months
   c. 3 months
   d. 1 year
43. Vigil mechanism shall be performed in _____ company

<table>
<thead>
<tr>
<th>a. Every listed company</th>
<th>b. Companies which accept deposits from public</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Both of the above</td>
<td>d. None of the above</td>
</tr>
</tbody>
</table>

44. The Nomination and Remuneration Committee shall consist of -------

<table>
<thead>
<tr>
<th>a. Minimum of 3 directors with independent directors forming a majority</th>
<th>b. 3 or more non-executive directors with at least 50% independent directors</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. 3 or more Independent directors</td>
<td>d. 3 or more directors with at least 50% independent directors</td>
</tr>
</tbody>
</table>

45. In the Board Meeting of Moon Ltd, 9 directors were present out of total 12 directors. Suppose, 3 directors vote against the resolution, and 1 director abstains from voting. The resolution shall be passed by majority if ---- or more directors vote in favour of the resolution.

<table>
<thead>
<tr>
<th>a. 7</th>
<th>b. 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. 4</td>
<td>d. 3</td>
</tr>
</tbody>
</table>

46. The function of Nomination and Remuneration committee shall ----- effective evaluation of -----.

<table>
<thead>
<tr>
<th>a. Specify manner for; performance of Board, its committees and Individual directors</th>
<th>b. Carry out; performance of Board, its committees and individual directors</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Specify manner for; every director’s performance</td>
<td>Carry out; every director’s performance</td>
</tr>
</tbody>
</table>

47. In case a company has appointed an alternate director to act for the original director, the notice of Board meeting shall be given-

<table>
<thead>
<tr>
<th>a. To the original director</th>
<th>b. To the alternate director</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Either to the original director or to the alternate director at the option of the company</td>
<td>d. To the original director as well as the alternate director</td>
</tr>
</tbody>
</table>

48. ABC Ltd, a public company carrying on publication business intends to advance a loan of Rs. 20 lakhs to one of its non-executive directors. Such loan is-

<table>
<thead>
<tr>
<th>a. Prohibited</th>
<th>b. Permitted, if it forms part of the conditions of service extended by company to all its employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Permitted, if it is given pursuant to</td>
<td>d. Permitted, if it is approved by</td>
</tr>
</tbody>
</table>
49. It is permitted for a company to hold the shares in its subsidiary company in the name of ---- of the company, if it is necessary to do so to ensure that the number of members of the subsidiary company is not reduced below the statutory limit.

- a. Any nominee
- b. Any member
- c. Any director
- d. Managing director

50. A contract or arrangement shall not be required to be included in the register of contracts or arrangements in which directors are interested, if it relates to the sale, purchase or supply of any goods, materials or services and the value of such goods and materials or the cost of such services does not exceed ----- in the aggregate in any year.

- a. Rs. 1 lakh
- b. Rs. 5 lakh
- c. Rs. 10 lakh
- d. Rs. 25 lakh

Answer to MCQs

<p>| | | | | | |</p>
<table>
<thead>
<tr>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>(d)</td>
<td>11</td>
<td>(a)</td>
<td>21</td>
<td>(b)</td>
</tr>
<tr>
<td>2</td>
<td>(d)</td>
<td>12</td>
<td>(d)</td>
<td>22</td>
<td>(d)</td>
</tr>
<tr>
<td>3</td>
<td>(b)</td>
<td>13</td>
<td>(b)</td>
<td>23</td>
<td>(a)</td>
</tr>
<tr>
<td>4</td>
<td>(b)</td>
<td>14</td>
<td>(b)</td>
<td>24</td>
<td>(b)</td>
</tr>
<tr>
<td>5</td>
<td>(b)</td>
<td>15</td>
<td>(a)</td>
<td>25</td>
<td>(a)</td>
</tr>
<tr>
<td>6</td>
<td>(b)</td>
<td>16</td>
<td>(c)</td>
<td>26</td>
<td>(d)</td>
</tr>
<tr>
<td>7</td>
<td>(b)</td>
<td>17</td>
<td>(a)</td>
<td>27</td>
<td>(b)</td>
</tr>
<tr>
<td>8</td>
<td>(d)</td>
<td>18</td>
<td>(a)</td>
<td>28</td>
<td>(b)</td>
</tr>
<tr>
<td>9</td>
<td>(b)</td>
<td>19</td>
<td>(c)</td>
<td>29</td>
<td>(a)</td>
</tr>
<tr>
<td>10</td>
<td>(c)</td>
<td>20</td>
<td>(d)</td>
<td>30</td>
<td>(a)</td>
</tr>
</tbody>
</table>
Inspection, Inquiry & Investigation

Power to Call for Information, Inspect Books and Conduct Inquiries

Power of Registrar to Call Information [Section 206(1)]

Where on a scrutiny of any document filed by a company or on any information received by him, the Registrar is of the opinion that any further information or explanation or any further documents relating to the company is necessary, he may by a written notice require the company—

✓ to furnish in writing such information or explanation; or
✓ to produce such documents, within such reasonable time, as may be specified in the notice.

Duty to furnish Information [Section 206(2)]

✓ On the receipt of a notice under sub-section (1), it shall be the duty of the company and of its officers concerned to furnish such information or explanation to the best of their knowledge and power and to produce the documents to the Registrar within the time specified or extended by the Registrar.

✓ Provided that where such information or explanation relates to any past period, the officers who had been in the employment of the company for such period, if so called upon by the Registrar through a notice served on them in writing, shall also furnish such information or explanation to the best of their knowledge.

Order of Inspection [Section 206(3)]

✓ If no information or explanation is furnished to the Registrar within the time specified under sub-section (1) or
✓ if the Registrar on an examination of the documents furnished is of the opinion that the information or explanation furnished is inadequate or
INSPECTION, INQUIRY AND INVESTIGATION

4.2

✓ if the Registrar is satisfied on a scrutiny of the documents furnished that an unsatisfactory state of affairs exists in the company and does not disclose a full and fair statement of the information required, he may, by another written notice, call on the company to produce for his inspection such further books of account, books, papers and explanations as he may require at such place and at such time as he may specify in the notice.

Provided that before any notice is served under this sub-section, the Registrar shall record his reasons in writing for issuing such notice.

Order of Inquiry [Section 206(4)]

If the Registrar is satisfied-
✓ on the basis of information available with or
✓ furnished to him or
✓ on a representation made to him by any person that the business of a company is being carried on for a fraudulent or unlawful purpose or not in compliance with the provisions of this Act or
✓ if the grievances of investors are not being addressed,
the Registrar may, after informing the company of the allegations made against it by a written order, call on the company to furnish in writing any information or explanation on matters specified in the order within such time as he may specify therein and carry out such inquiry as he deems fit after providing the company a reasonable opportunity of being heard.

Provided that the Central Government may, if it is satisfied that the circumstances so warrant, direct the Registrar or an inspector appointed by it for the purpose to carry out the inquiry under this sub-section:

Provided further that where business of a company has been or is being carried on for a fraudulent or unlawful purpose, every officer of the company who is in default shall be punishable for fraud in the manner as provided in section 447.

Inspection by Central Government [Section 206(5) and 206(6)]

✓ Without prejudice to the foregoing provisions of this section, the Central Government may, if it is satisfied that the circumstances so warrant, direct inspection of books and papers of a company by an inspector appointed by it for the purpose.

✓ The Central Government may, having regard to the circumstances by general or special order, authorise any statutory authority to carry out the inspection of books of account of a company or class of companies.

Penalty [Section 206(7)]

If a company fails to furnish any information or explanation or produce any document required under this section, the company and every officer of the company, who is in default shall be punishable with a fine which may extend to one lakh rupees and in the case of a continuing failure, with an additional fine which may extend to five hundred rupees for every day after the first during which the failure continues.

CA. SHIVANGI AGRAWAL
Conduct of Inspection and Inquiry

Duty to furnish information [Section 207(1)]

✓ Where a Registrar or inspector calls for the books of account and other books and papers under section 206,
✓ it shall be the duty of
  • every director,
  • officer or
  • other employee
✓ of the company to produce
✓ all such documents to the Registrar or inspector and
✓ furnish him with such statements, information or explanations
✓ in such form as the Registrar or inspector may require and
✓ shall render all assistance to the Registrar or inspector in connection with such inspection.

Powers of Inspector [Section 207(2)]

The Registrar or inspector, making an inspection or inquiry under section 206 may, during the course of such inspection or inquiry, as the case may be,—
(a) make or cause to be made copies of books of account and other books and papers; or
(b) place or cause to be placed any marks of identification in such books in token of the inspection having been made.

Powers Coextensive with those in Civil Court [Section 207(3)]

Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the Registrar or inspector making an inspection or inquiry shall have all the powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:—
(a) the discovery and production of books of account and other documents, at such place and time as may be specified by such Registrar or inspector making the inspection or inquiry;
(b) summoning and enforcing the attendance of persons and examining them on oath; and
(c) inspection of any books, registers and other documents of the company at any place.

Penalty [Section 207(4)]

(i) If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to one year and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.
(ii) If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.
Report on Inspection made

The Registrar or inspector shall, after the inspection of the books of account or an inquiry under section 206 and other books and papers of the company under section 207, submit a report in writing to the Central Government along with such documents, if any, and such report may, if necessary, include a recommendation that further investigation into the affairs of the company is necessary giving his reasons in support.

Search and Seizure

Power of Inspector to Enter, Search And Seize [Section 209(1)]

(1) Where, upon information in his possession or otherwise, the Registrar or inspector has reasonable ground to believe that the books and papers of a company, or relating to the key managerial personnel or any director or auditor or company secretary in practice if the company has not appointed a company secretary, are likely to be destroyed, mutilated, altered, falsified or secreted, he may, after obtaining an order from the Special Court for the seizure of such books and papers,—

(a) enter, with such assistance as may be required, and search, the place or places where such books or papers are kept; and

(b) seize such books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books or papers at its cost.

Duty of Inspector to return Books [Section 209(2)]

(2) The Registrar or inspector shall return the books and papers seized under subsection (1), as soon as may be, and in any case not later than one hundred and eightieth day after such seizure, to the company from whose custody or power such books or papers were seized

✓ Provided that the books and papers may be called for by the Registrar or inspector for a further period of one hundred and eighty days by an order in writing if they are needed again

✓ Provided further that the Registrar or inspector may, before returning such books and papers as aforesaid, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such other manner as he considers necessary.

The provisions of the Code of Criminal Procedure, 1973 relating to searches or seizures shall apply, mutatis mutandis, to every search and seizure made under this section.

A group of creditors of Mac Trading Ltd makes a complaint to the Registrar of Companies, Hyderabad alleging that the management of the company is indulging in destruction and falsification of the accounting records of the company. The complainants request the Registrar to take immediate steps to seize the records of the company so that the management may not be allowed to tamper with the records. The complaint was received
Investigation into Affairs of Company

(1) **Where the Central Government is of the opinion**, that it is necessary to investigate into the affairs of a company,—
(a) on the receipt of a report of the Registrar or inspector under section 208;
(b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or
(c) in public interest, it may order an investigation into the affairs of the company.

(2) **Where an order is passed by a court or the Tribunal** in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation into the affairs of that company.

(3) For the purposes of this section, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct.

Shareholders of Hide and seek Ltd are not satisfied about performance of the company. It is suspected that some activities being run in the name of the company are not in the interest of the company or its members. 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation and find out the true picture. With reference to the provisions of Companies Act, 2013, mention whether shareholders’ application will be accepted?

Greater DINA Investors Association made a complaint by an informal letter to the Central Government that management of Secret Ltd has been indulging in fraudulent activities causing loss to the shareholders and that an investigation should be carried out to find out the whole truth. On receipt of the letter, the Central Government directed the Association to approach them formally after complying with the provisions of the Companies Act, Advise the Association.

The shareholders of Kumar Ltd passed a special resolution that the affairs of the company ought to be investigated. The company submitted the special resolution to the Central Government. Examine, explaining the relevant provision of the Companies Act 2013, whether the Power of Central Government to order an investigation is mandatory or discretionary?

Investigating into Company’s Affairs in Other Cases

The Tribunal may,—
(a) on an application made by—
(i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or
(ii) not less than one-fifth of the persons on the company’s register of members, in the case of a company having no share capital, and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or

CA. SHIVANGI AGRAWAL
(b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that—

(i) the business of the company

- is being conducted with intent to defraud its creditors, members or any other person
- or otherwise for a fraudulent or unlawful purpose,
- or in a manner oppressive to any of its members
- or that the company was formed for any fraudulent or unlawful purpose;

(ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

(iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company, order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct

Provided that if after investigation it is proved that—

(i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.

The business of Weak Fabrication Ltd is conducted fraudulently and the management activities are not in the interest of the company. The paid up capital of the company is one crore rupees. A group of shareholders numbering 110 representing 1/9th of total voting power decided to approach Tribunal to carry out investigation into the company's affairs under the provision of the Companies Act. They seek your advice in the following matters stating the relevant provisions of the Companies Act, 2013.

i) Whether the group can make valid application?

ii) Other than member, can any other person make application?

iii) Are the applicants required to furnish security for payment of cost and expenses of investigation?

A majority of the Board of directors of M/S Bulk Drugs Ltd have reasons to believe that some of the business activities carried on in the name of the company are prima facie against the interests of the company and its members. They want the matter to be referred to the Central Government in the form of an application for appointment of an Inspector to reach to the bottom of the matter and unveil the truth. In this connection you are required to state the steps required to be taken with reference to the provisions of Companies Act.
Some creditors of NTY ltd approached you to guide them to apply to the Tribunal for seeking an order for conducting an investigation into the affairs of the company due to the fact that the business of the company is being conducted with intention to defraud its creditors. Referring to the provisions of Companies Act, guide them regarding the circumstances under which and how a person not being a member of the company can apply to the Tribunal to seek an order for conducting an investigation into the affairs of the company.

Establishment of SFIO

The Central Government shall, by notification, establish an office to be called the Serious Fraud Investigation Office to investigate frauds relating to a company

Provided that until the Serious Fraud Investigation Office is established under subsection (1), the Serious Fraud Investigation Office set-up by the Central Government in terms of the Government of India Resolution dated 2nd July, 2003 shall be deemed to be the Serious Fraud Investigation Office for the purpose of this section.

Composition of SFIO [Section 211(2)]

The Serious Fraud Investigation Office shall be headed by a Director and consist of such number of experts from the following fields to be appointed by the Central Government from amongst persons of ability, integrity and experience in,—

(i) banking;
(ii) corporate affairs;
(iii) taxation;
(iv) forensic audit;
(v) capital market;
(vi) information technology;
(vii) law; or
(viii) such other fields as may be prescribed.

Qualification of Director [Section 211(3)]

The Central Government shall, by notification, appoint a Director in the Serious Fraud Investigation Office, who shall be an officer not below the rank of a Joint Secretary to the Government of India having knowledge and experience in dealing with matters relating to corporate affairs.

The Central Government may appoint such experts and other officers and employees in the Serious Fraud Investigation Office as it considers necessary for the efficient discharge of its functions under this Act.

Terms of Employment [Section 211(5)]

The terms and conditions of service of Director, experts, and other officers and employees of the Serious Fraud Investigation Office shall be such as may be prescribed.
Investigation into Affairs of Company by SFIO

Where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office—

(a) on receipt of a report of the Registrar or inspector under section 208;
(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;
(c) in the public interest; or
(d) on request from any Department of the Central Government or a State Government, the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

Not to Initiate or Continue Investigation [Section 212(2)]

Where any case has been assigned by the Central Government to the Serious Fraud Investigation Office for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to Serious Fraud Investigation Office.

Report to CG [Section 212(3)]

Where the investigation into the affairs of a company has been assigned by the Central Government to Serious Fraud Investigation Office, it shall

✓ conduct the investigation in the manner and follow the procedure provided in this Chapter and
✓ submit its report to the Central Government
✓ within such period as may be specified in the order.

The Director, Serious Fraud Investigation Office shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217.

Duty of Employees and Officers [Section 212(5)]

The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation.

Conditions of Bail [Section 212(6)]
Notwithstanding anything contained in the Code of Criminal Procedure, 1973, **offence covered under section 447 of this Act shall be cognizable** and no person accused of any offence under those sections shall be released on bail or on his own bond unless—
(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

✓ Provided that a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

✓ Provided further that the Special Court shall not take cognizance of any offence referred to this sub-section except upon a complaint in writing made by—
- the Director, Serious Fraud Investigation Office; or
- any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

The limitation on granting of bail specified in sub-section (6) is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.

**Power to Arrest [Section 212(8)]**

If the Director, Additional Director or Assistant Director of Serious Fraud Investigation Office authorised in this behalf by the Central Government by general or special order, **has on the basis of material in his possession reason to believe** (the reason for such belief to be recorded in writing) that any person has been **guilty of any offence punishable under sections referred to in sub-section (6), he may arrest such person** and shall, as soon as may be, inform him of the grounds for such arrest.

**Forwarding Copy Of Order [Section 212(9)]**

The Director, Additional Director or Assistant Director of Serious Fraud Investigation Office shall, **immediately after arrest** of such person under sub-section (8), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Serious Fraud Investigation Office in a sealed envelope, in such manner as may be prescribed and the Serious Fraud Investigation Office shall keep such order and material for such period as may be prescribed.

**Presentment after Arrest [Section 212(10)]**

**Every person arrested** under sub-section (8) **shall within twenty-four hours, be taken to a Judical Magistrate or a Metropolitan Magistrate**, as the case may be, having jurisdiction: Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate’s court.

**Report to Central Government [Section 212(11) & 212(12)]**

✓ **The Central Government if so directs**, the Serious Fraud Investigation Office **shall submit** an interim report to the **Central Government**.
On completion of the investigation, the Serious Fraud Investigation Office shall submit the investigation report to the Central Government.

**Obtaining Copy of Report [Section 212(13)]**

Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court.

**Action in Pursuance of Report [Section 212(14)]**

- On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud Investigation Office to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company.

- The investigation report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973.

**Investigation under Companies Act 1956 [Section 212(16)]**

Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by Serious Fraud Investigation Office under the provisions of the Companies Act, 1956 shall continue to be proceeded with under that Act as if this Act had not been passed.

**Authorities to Share Information [Section 212(17)]**

(a) In case Serious Fraud Investigation Office has been investigating any offence under this Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to the Serious Fraud Investigation Office.

(b) The Serious Fraud Investigation Office shall share any information or documents available with it, with any investigating agency, State Government, police authority or income tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law.

Mrs. Preeti, a lady aged about 32 years and Managing Director of M/S Growmore Plantations ltd has been arrested for an offence covered u/s 447 of the Companies Act, 2013 on a complaint made by the director, Serious Fraud Investigation Officer. Mrs. Preeti seeks your legal advice as to the conditions under which she can be released on bail and the role of special court in this regard.

**Investigation into Ownership of Company [Section 216]**

CA. SHIVANGI AGRAWAL
(1) Where it appears to the Central Government that there is a reason so to do, it may appoint one or more inspectors to investigate and report on matters relating to the company, and its membership for the purpose of determining the true persons—
(a) who are or have been financially interested in the success or failure, whether real or apparent, of the company; or
(b) who are or have been able to control or to materially influence the policy of the company; or
(c) who have or had beneficial interest in shares of a company or who are or have been beneficial owners or significant beneficial owner of a company.

(2) Without prejudice to its powers under sub-section (1), the Central Government shall appoint one or more inspectors under that sub-section, if the Tribunal, in the course of any proceeding before it, directs by an order that the affairs of the company ought to be investigated as regards the membership of the company and other matters relating to the company, for the purposes specified in sub-section (1).

(3) While appointing an inspector under sub-section (1), the Central Government may define the scope of the investigation, whether as respects the matters or the period to which it is to extend or otherwise, and in particular, may limit the investigation to matters connected with particular shares or debentures.

(4) Subject to the terms of appointment of an inspector, his powers shall extend to the investigation of any circumstances suggesting the existence of any arrangement or understanding which, though not legally binding, is or was observed or is likely to be observed in practice and which is relevant for the purposes of his investigation.

Power of Inspector to Conduct Investigation of Related Companies

If an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, to investigate also the affairs of—
(a) any other body corporate which is, or has at any relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding company;
(b) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant time, the managing director or the manager of the company;
(c) any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or
(d) any person who is or has at any relevant time been the company's managing director or manager or employee,

✓ he shall,
✓ subject to the prior approval of the Central Government,
✓ investigate into and report on the affairs of the other body corporate or
✓ of the managing director or manager,
✓ in so far as he considers that the results of his investigation
✓ are relevant to the investigation of the affairs of the company for which he is appointed.
During Investigations conducted on the affairs of a company in the public interest, the inspector observed that the directors of the company had been acting on the instructions of the holding company and he proceeded to investigate the holding company. Is inspector permitted to do under the provisions of the Companies Act, 2013?

Seizure of Documents by Inspector

(1) Where in the course of an investigation under this Chapter, the inspector has reasonable grounds to believe that the books and papers of, or relating to, any company or other body corporate or managing director or manager of such company are likely to be destroyed, mutilated, altered, falsified or secreted, the inspector may—

✓ enter, with such assistance as may be required, the place or places where such books and papers are kept in such manner as may be required; and

✓ seize books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books and papers at its cost for the purposes of his investigation.

(2) The inspector shall keep in his custody the books and papers seized under this section for such a period not later than the conclusion of the investigation as he considers necessary and thereafter shall return the same to the company or the other body corporate, or, as the case may be, to the managing director or the manager or any other person from whose custody or power they were seized:

Provided that the inspector may, before returning such books and papers as aforesaid, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such manner as he considers necessary.

(3) The provisions of the Code of Criminal Procedure, 1973, relating to searches or seizures shall apply mutatis mutandis to every search or seizure made under this section.

Freezing of Assets of Company on Inquiry and Investigation

Where it appears to the Tribunal

✓ on a reference made to it by the Central Government
✓ or in connection with any inquiry or investigation into the affairs of a company under this Chapter or
✓ on any complaint made by such number of members as specified under sub-section (1) of section 244 or
✓ a creditor having one lakh amount outstanding against the company or
✓ any other person having a reasonable ground to believe
✓ that the removal, transfer or disposal of funds, assets, properties of the company
✓ is likely to take place in a manner that is prejudicial
✓ to the interests of the company
✓ or its shareholders or creditors or in public interest,
✓ it may by order direct that such transfer, removal or disposal
shall not take place during such period not exceeding three years as may be specified

in the order or may take place subject to such conditions and restrictions as the Tribunal may deem fit.

**Penalty [Section 221(2)]**

In case of any removal, transfer or disposal of funds, assets, or properties of the company in contravention of the order of the Tribunal under sub-section (1),

- the company shall be punishable with fine
- which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and
- every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or
- with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

**Impositions of Restrictions upon Securities**

Where it appears to the Tribunal,

- in connection with any investigation under section 216 or
- on a complaint made by any person in this behalf, that there is good reason to find out the relevant facts about any securities issued or to be issued by a company and the Tribunal is of the opinion that such facts cannot be found out unless certain restrictions, as it may deem fit, are imposed,

the Tribunal may, by order, direct that the securities shall be subject to such restrictions as it may deem fit for such period not exceeding three years as may be specified in the order.

**Penalty [Section 222(2)]**

Where securities in any company are issued or transferred or acted upon in contravention of an order of the Tribunal under sub-section (1), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

Remedial Pharma Ltd, over the years enjoys a high reputation in the market and its general reserve are ten times more than the paid up capital of the company. There is a serious apprehension of cornering the share of the company by a group of unscrupulous persons likely to result in change in the Board of directors which may be prejudicial to the public interest. The company seeks your advice as to how it can block the transfer of shares of the company under the provisions of Companies Act.

An investigation was ordered by the Central Government u/s 216 of the Companies Act, 2016, against PKR Ltd for determining the true membership of the company. In connection with the investigation, it appears to the Tribunal that there is good reason to find out...
the relevant facts about 9% Redeemable Cumulative Preference Shares issued by the company on 15.10.2017 and the Tribunal is of the opinion that unless restriction is imposed on further issue of such shares, the purpose can’t be solved. Accordingly, the Tribunal by an order dated 15.08.2018, directed the company that the further issue of RCPS shall be subject to restrictions for a period of 4 years. Despite the order of the Tribunal as above, PKR ltd proceeded with further issue of RCPS on 20.08.2018 in order to fund working capital requirements for expansion. Referring to provisions of Companies Act, examine the following:

a) Can the Tribunal restrict further issue of RCPS? If yes, then to what period?

b) What are the penal provisions in case of contravention?

## Inspector’s Report

1) An inspector appointed under this Chapter may, and if so directed by the Central Government shall, submit interim reports to that Government, and on the conclusion of the investigation, shall submit a final report to the Central Government.

2) Every report made under sub-section (1) shall be in writing or printed as the Central Government may direct.

### Obtaining Copy of Report [Section 223(3)]

A copy of the report made under sub-section (1) may be obtained by members, creditors or any other person whose interest is likely to be affected by making an application in this regard to the Central Government.

### Authentication of Report [Section 223(4)]

The report of any inspector appointed under this Chapter shall be authenticated either—

(a) by the seal, if any, of the company whose affairs have been investigated; or

(b) by a certificate of a public officer having the custody of the report, as provided under section 76 of the Indian Evidence Act, 1872, and such report shall be admissible in any legal proceeding as evidence in relation to any matter contained in the report.

Nothing in this section shall apply to the report referred to in section 212.

### Actions to Be Taken In Pursuance of Report

1) If, from an inspector’s report, made under section 223, it appears to the Central Government that any person has, in relation to the company or in relation to any other body corporate or other person whose affairs have been investigated under this Chapter been guilty of any offence for which he is criminally liable, the Central Government may prosecute such person for the offence and it shall be the duty of all officers and other employees of the company or body corporate to give the Central Government the necessary assistance in connection with the prosecution.

2) If any company or other body corporate is liable to be wound up under this Act or under the Insolvency and Bankruptcy Code, 2016 and it appears to the Central Government from any such report made under section 223 that it is expedient so to do by reason of any such circumstances as are referred to in section 213, the Central Government may, unless the
company or body corporate is already being wound up by the Tribunal, **cause to be presented to the Tribunal** by any person authorised by the Central Government in this behalf—

(a) a petition for the winding up of the company or body corporate **on the ground that it is just and equitable that it should be wound up;**

(b) an **application under section 241**; or

(c) **both.**

(3) **If from any such report as aforesaid, it appears to the Central Government that proceedings ought, in the public interest, to be brought by the company or any body corporate whose affairs have been investigated under this Chapter—**

(a) for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation, or the management of the affairs, of such company or body corporate; or

(b) for the recovery of any property of such company or body corporate which has been misapplied or wrongfully retained,

the Central Government may itself bring proceedings for winding up in the name of such company or body corporate.

(4) **The Central Government, shall be indemnified by such company or body corporate against any costs or expenses incurred by it in, or in connection with, any proceedings brought by virtue of sub-section (3).**

(5) **Where the report made by an inspector states that fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement of such asset, property, or cash, as the case may be, and also for holding such director, key managerial personnel, officer or other person liable personally without any limitation of liability.**

**Security for Payment of Cost and Expenses**

- Where an investigation is ordered by the Central Government in pursuance of clause (b) of sub-section (1) of **section 210,**
- or in pursuance of an order made by the Tribunal under **section 213,**
- the Central Government may before appointing an inspector under subsection (3) of section 210 or clause (b) of section 213, require the applicant to give such security not exceeding twenty-five thousand rupees as may be prescribed, as it may think fit, for payment of the costs and expenses of the investigation and such security shall be refunded to the applicant if the investigation results in prosecution

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<td>2</td>
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Individual as Inspector

No firm, body corporate or other association shall be appointed as an inspector

Procedure, Powers of Inspector

(1) It shall be the duty of all officers and other employees and agents including the former officers, employees and agents of a company which is under investigation in accordance with the provisions contained in this Chapter, and where the affairs of any other body corporate or a person are investigated under section 219, of all officers and other employees and agents including former officers, employees and agents of such body corporate or a person—

(a) to preserve and to produce to an inspector or any person authorised by him in this behalf all books and papers of, or relating to, the company or, as the case may be, relating to the other body corporate or the person, which are in their custody or power; and

(b) otherwise to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.

(2) The inspector may require any body corporate, other than a body corporate referred to in sub-section (1), to furnish such information to, or produce such books and papers before him or any person authorised by him in this behalf as he may consider necessary, if the furnishing of such information or the production of such books and papers is relevant or necessary for the purposes of his investigation.

(3) The inspector shall not keep in his custody any books and papers produced under sub-section (1) or sub-section (2) for more than one hundred and eighty days and return the same to the company, body corporate, firm or individual by whom or on whose behalf the books and papers were produced. Provided that the books and papers may be called for by the inspector if they are needed again for a further period of one hundred and eighty days by an order in writing.

(4) An inspector may examine on oath—

(a) any of the persons referred to in sub-section (1); and

(b) with the prior approval of the Central Government, any other person, in relation to the affairs of the company, or other body corporate or person, as the case may be, and for that purpose may require any of those persons to appear before him personally:

Provided that in case of an investigation under section 212, the prior approval of Director, Serious Fraud Investigation Office shall be sufficient under clause (b).

(5) Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the inspector, being an officer of the Central Government, making an investigation under this Chapter shall have all the powers as are vested in a civil
court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:—
(a) the discovery and production of books of account and other documents, at such place and time as may be specified by such person;
(b) summoning and enforcing the attendance of persons and examining them on oath; and
(c) inspection of any books, registers and other documents of the company at any place.

(6) (i) If any director or officer of the company disobey the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to one year and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.
(ii) If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.

(7) The notes of any examination under sub-section (4) shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him.

(8) If any person fails without reasonable cause or refuses—
(a) to produce to an inspector or any person authorised by him in this behalf any book or paper which is his duty under sub-section (1) or sub-section (2) to produce;
(b) to furnish any information which is his duty under sub-section (2) to furnish;
(c) to appear before the inspector personally when required to do so under subsection (4) or to answer any question which is put to him by the inspector in pursuance of that sub-section; or
(d) to sign the notes of any examination referred to in sub-section (7), he shall be punishable with imprisonment for a term which may extend to six months and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, and also with a further fine which may extend to two thousand rupees for every day after the first during which the failure or refusal continues.

(9) The officers of the Central Government, State Government, police or statutory authority shall provide assistance to the inspector for the purpose of inspection, inquiry or investigation, which the inspector may, with the prior approval of the Central Government, require.

Reciprocal Agreements with Foreign State For Investigation

(10) The Central Government may enter into an agreement with the Government of a foreign State for reciprocal arrangements to assist in any inspection, inquiry or investigation under this Act or under the corresponding law in force in that State and may, by notification, render the application of this Chapter in relation to a foreign State with which reciprocal arrangements have been made subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the agreement with that State.

(11) Notwithstanding anything contained in this Act or in the Code of Criminal Procedure, 1973
• if, in the course of an investigation into the affairs of the company,
• an application is made to the competent court in India
• by the inspector
• stating that evidence is, or may be, available
• in a country or place outside India,
INSPECTION, INQUIRY AND INVESTIGATION

✓ such court may issue a letter of request to a court
✓ or an authority in such country or place, competent to deal with such request,
✓ to examine orally, or otherwise, any person, supposed to be acquainted with the facts and circumstances of the case,
✓ to record his statement made in the course of such examination and also
✓ to require such person or any other person to produce any document or thing, which may be in his possession pertaining to the case, and
✓ to forward all the evidence so taken or collected or the authenticated copies thereof or the things so collected to the court in India which had issued such letter of request

Provided that the letter of request shall be transmitted in such manner as the Central Government may specify in this behalf

Provided further that every statement recorded or document or thing received under this subsection shall be deemed to be the evidence collected during the course of investigation.

(12) Upon receipt of
✓ a letter of request from a court or an authority in a country or place outside India, competent to issue such letter in that country or place
✓ for the examination of any person or production of any document or thing in relation to affairs of a company under investigation in that country or place,
✓ the Central Government may, if it thinks fit,
✓ forward such letter of request to the court concerned,
✓ which shall thereupon summon the person before it and
✓ record his statement or cause any document or thing to be produced,
✓ or send the letter to any inspector for investigation,
✓ who shall thereupon investigate into the affairs of company in the same manner as the affairs of a company are investigated under this Act and
✓ the inspector shall submit the report to such court within thirty days or
✓ such extended time as the court may allow for further action

Provided that the evidence taken or collected under this sub-section or authenticated copies thereof or the things so collected shall be forwarded by the court, to the Central Government for transmission, in such manner as the Central Government may deem fit, to the court or the authority in country or place outside India which had issued the letter of request.

Protection of Employees

(1) Notwithstanding anything contained in any other law for the time being in force, if—

(a) during the course of any investigation of the affairs and other matters of or relating to a company, other body corporate or person under section 210, section 212, section 213 or section 219 or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person, under section 216; or
(b) during the pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company under Chapter XVI, such company, other body corporate or person proposes—
(i) to discharge or suspend any employee; or
(ii) to punish him, whether by dismissal, removal, reduction in rank or otherwise; or
(iii) to change the terms of employment to his disadvantage.
the company, other body corporate or person, as the case may be, shall obtain approval of
the Tribunal of the action proposed against the employee and if the Tribunal has any
objection to the action proposed, it shall send by post notice thereof in writing to the
company, other body corporate or person concerned.

(2) If the company, other body corporate or person concerned does not receive within thirty
days of making of application under sub-section (1), the approval of the Tribunal, then and
only then, the company, other body corporate or person concerned may proceed to take
against the employee, the action proposed.

(3) If the company, other body corporate or person concerned is dissatisfied with the
objection raised by the Tribunal, it may, within a period of thirty days of the receipt of the
notice of the objection, prefer an appeal to the Appellate Tribunal in such manner and on
payment of such fees as may be prescribed.

(4) The decision of the Appellate Tribunal on such appeal shall be final and binding on the
Tribunal and on the company, other body corporate or person concerned.

(5) For the removal of doubts, it is hereby declared that the provisions of this section shall have
effect without prejudice to the provisions of any other law for the time being in force.

Damage Ltd, the company wanted to suspend Mr. Z, the CFO of the Company during the
pendency of an investigation being conducted under the provisions of the
Companies Act, 2013 on the order of the Tribunal. The company approached the
Tribunal on 3rd January 2017 for the proposed action. The company on 15th February, 2017
passed an order of suspension without waiting for the orders from Tribunal. Comment upon the
action taken by Company with reference to latest provisions of the Act.

2

Pursuant to section 210 of the Act, an inspector was appointed to investigate the
affairs of Sterling Trading Limited. Mr. Ahmed, the General Manager (Operations)
who is aware of certain misdeeds of the management, desires to know whether he is entitled to
any protection against dismissal by the company if he discloses the misdeeds during the course
of examination by the Inspector. Advise him explaining relevant provisions of the Companies
Act, 2013.

Expenses of Investigation

(1) The expenses of, and incidental to, an investigation by an inspector appointed by the
Central Government under this Chapter other than expenses of inspection under section
214 shall be defrayed in the first instance by the Central Government, but shall be
reimbursed by the following persons to the extent mentioned below, namely:—
(a) any person who is convicted on a prosecution instituted, or who is ordered to pay
damages or restore any property in proceedings brought, under section 224, to the extent
that he may in the same proceedings be ordered to pay the said expenses as may be specified by
the court convicting such person, or ordering him to pay such damages or restore such
property, as the case may be;

CA. SHIVANGI AGRAWAL
(b) any company or body corporate in whose name proceedings are brought as aforesaid, to the extent of the amount or value of any sums or property recovered by it as a result of such proceedings;

(c) unless, as a result of the investigation, a prosecution is instituted under section 224,—

✓ any company, body corporate, managing director or manager dealt with by the report of the inspector; and

✓ the applicants for the investigation, where the inspector was appointed under section 213, to such extent as the Central Government may direct.

(2) Any amount for which a company or body corporate is liable under clause (b) of sub-section (1) shall be a first charge on the sums or property mentioned in that clause.

Voluntary Winding Up not to stop Proceedings

An investigation under this Chapter may be initiated notwithstanding, and no such investigation shall be stopped or suspended by reason only of, the fact that—

(a) an application has been made under section 241;

(b) the company has passed a special resolution for voluntary winding up; or

(c) any other proceeding for the winding up of the company is pending before the Tribunal:

Provided that where a winding up order is passed by the Tribunal in a proceeding referred to in clause (c), the inspector shall inform the Tribunal about the pendency of the investigation proceedings before him and the Tribunal shall pass such order as it may deem fit:

Provided further that nothing in the winding up order shall absolve any director or other employee of the company from participating in the proceedings before the inspector or any liability as a result of the finding by the inspector.

Legal Advisers and Bankers Not To Disclose Information

Nothing in this Chapter shall require the disclosure to the Tribunal or to the Central Government or to the Registrar or to an inspector appointed by the Central Government—
Investigation of Foreign Companies

The provisions of this Chapter shall apply mutatis mutandis to inspection, inquiry or investigation in relation to foreign companies.

Penalty Provisions

Where a person who is required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or an officer or other employee of a company or other body corporate which is also under investigation,—

(a) destroys, mutilates or falsifies, or conceals or tampers or unauthorisedly removes, or is a party to the destruction, mutilation or falsification or concealment or tampering or unauthorised removal of, documents relating to the property, assets or affairs of the company or the body corporate;
(b) makes, or is a party to the making of, a false entry in any document concerning the company or body corporate; or
(c) provides an explanation which is false or which he knows to be false,

he shall be punishable for fraud in the manner as provided in section 447.

Multiple Choice Questions

1. Where Inspector calls for the books of account and other books and papers u/s 206, it shall be the duty of every director, officer or other employees of the company to-----
   a. To produce all documents to Inspector
   b. To furnish him with statements, information or explanation in such form as Inspector may require.
   c. To render all assistance in connection with such inspection
   d. All of the above

2. SFIO is to be established as per sec---- of the Companies Act, 2013.
   a. Sec 210
   b. Sec 211
   c. Sec 209
   d. Sec. 212

3. SFIO shall submit Investigation report to whom on completion of Investigation?
   a. Central Government
   b. Director of SFIO
   c. Tribunal
   d. None of the above

4. SFIO shall be headed by ------
   a. Director
   b. Member
   c. CFO
   d. Expert

5. NCLT may by order direct that the Securities shall be subject to such restriction as it may deem fit for such period not exceeding------ period as may be specified in the order.
   a. 1 year
   b. 2 years
   c. 3 years
   d. 4 years
6. The tribunal may on an application made by not less than --- or members holding not less than one tenth of the total voting power, in case of a company having a share capital conduct an investigation into the affairs of the company.

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<tr>
<td>a. 100</td>
<td>b. 500</td>
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<tr>
<td>c. 50</td>
<td>d. 1000</td>
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7. Qualification of director of SFIO is not below rank of --- to Government of India & having knowledge in ---

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</thead>
<tbody>
<tr>
<td>a. Joint Secretary; corporate affairs</td>
<td>b. Joint Secretary; Taxation</td>
</tr>
<tr>
<td>c. Additional Director; Corporate affairs</td>
<td>d. Secretary; Forensic Audit</td>
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8. Legal advisor to any company shall be bound to disclose --- to the tribunal/CG

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<tbody>
<tr>
<td>a. Confidential Information</td>
<td>b. Name and address of client</td>
</tr>
<tr>
<td>c. Both of the above</td>
<td>d. None of the above</td>
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9. Under section 218, if Company does not receive approval within --- days of making the application, then company --- to take action against the employee

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<tr>
<td>a. 30 days; may proceed</td>
<td>b. 60 days; may proceed</td>
</tr>
<tr>
<td>c. 30 days; shall not</td>
<td>d. 30 days; shall not</td>
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10. Investigation may be ordered by CG u/s 210 on which basis?

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<tbody>
<tr>
<td>a. SR passed by Company</td>
<td>b. Report of Inspector u/s 208</td>
</tr>
<tr>
<td>c. In public Interest</td>
<td>d. All of the above</td>
</tr>
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11. The provisions of Chapter XIV of Companies Act, 2013 consisting of sections 206 to 209 shall---

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<tbody>
<tr>
<td>a. Not apply to foreign companies</td>
<td>b. Apply to foreign companies</td>
</tr>
<tr>
<td>c. Apply so far provisions are consistent</td>
<td>d. None of these</td>
</tr>
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12. A copy of the report of the Inspector may be obtained from the Central Government.

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<tbody>
<tr>
<td>a. Members</td>
<td>b. Creditors</td>
</tr>
<tr>
<td>c. Any person whose interest is likely to be affected</td>
<td>d. Any/All of these</td>
</tr>
</tbody>
</table>

13. The Tribunal is empowered to make an order that the removal, transfer or disposal of funds, assets, properties of the company shall not take place or may take place subject to such conditions and restrictions as the Tribunal may deem fit. The period during which assets shall be subject to freeze shall be specified in the order of the Tribunal which shall not exceed-----

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<tbody>
<tr>
<td>a. 3 Months</td>
<td>b. 6 Months</td>
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<tr>
<td>c. 1 year</td>
<td>d. 3 years</td>
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</table>

14. Any person who is arrested by the Director, Additional Director or Assistant Director of Serious Fraud Investigation Office shall within ---- be taken to a Judicial Magistrate or a Metropolitan Magistrate.

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<tr>
<td>a. 24 hours</td>
<td>b. 48 hours</td>
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<tr>
<td>c. 72 hours</td>
<td>d. 1 week</td>
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</table>
15. The appointment of Director of the Serious Fraud Investigation Office shall be made by -

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<table>
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<tr>
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<tbody>
<tr>
<td>a.</td>
<td>The Central Government</td>
</tr>
<tr>
<td>b.</td>
<td>Registrar</td>
</tr>
<tr>
<td>c.</td>
<td>Inspector</td>
</tr>
<tr>
<td>d.</td>
<td>The Tribunal</td>
</tr>
</tbody>
</table>

16. The registrar is entitled to enter, search and seize books and papers only after obtaining an order from -

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<tbody>
<tr>
<td>a.</td>
<td>The Central Government</td>
</tr>
<tr>
<td>b.</td>
<td>The Special Court</td>
</tr>
<tr>
<td>c.</td>
<td>The Tribunal</td>
</tr>
<tr>
<td>d.</td>
<td>Any of these</td>
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</table>

17. The turnover of a company was Rs. 120 crore. The amount of security deposit required to be made along with an application seeking an order of Investigation shall be -

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<tbody>
<tr>
<td>a.</td>
<td>Rs. 10,000</td>
</tr>
<tr>
<td>b.</td>
<td>Rs. 15,000</td>
</tr>
<tr>
<td>c.</td>
<td>Rs. 20,000</td>
</tr>
<tr>
<td>d.</td>
<td>Rs. 25,000</td>
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18. Where the purpose of the Investigation is to determine the true persons who are or have been financially interested in the success or failure of a company, such investigation is termed as -

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<tbody>
<tr>
<td>a.</td>
<td>Investigation into affairs of related companies</td>
</tr>
<tr>
<td>b.</td>
<td>Investigation into membership of a company</td>
</tr>
<tr>
<td>c.</td>
<td>Investigation into affairs of the Company</td>
</tr>
<tr>
<td>d.</td>
<td>None of these</td>
</tr>
</tbody>
</table>

19. An investigation into the affairs of a company may be initiated even if -

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<tbody>
<tr>
<td>a.</td>
<td>An application has been made u/s 241</td>
</tr>
<tr>
<td>b.</td>
<td>Any proceeding for winding up of the company is pending before the Tribunal</td>
</tr>
<tr>
<td>c.</td>
<td>Either (a) or (b) or both</td>
</tr>
<tr>
<td>d.</td>
<td>None of these</td>
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20. During the course of Investigation, the Inspector is entitled to take into his custody the books and papers produced before him for a maximum period of how many days?

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<tr>
<td>a.</td>
<td>30 days</td>
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<tr>
<td>b.</td>
<td>90 days</td>
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<tr>
<td>c.</td>
<td>60 days</td>
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<td>d.</td>
<td>180 days</td>
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**Answer to MCQs**

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<td>1</td>
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<td>(a)</td>
<td>11</td>
<td>(b)</td>
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<td>2</td>
<td>(b)</td>
<td>7</td>
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<td>12</td>
<td>(d)</td>
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<td>(a)</td>
<td>8</td>
<td>(b)</td>
<td>13</td>
<td>(d)</td>
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<td>4</td>
<td>(a)</td>
<td>9</td>
<td>(a)</td>
<td>14</td>
<td>(a)</td>
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<td>5</td>
<td>(c)</td>
<td>10</td>
<td>(d)</td>
<td>15</td>
<td>(a)</td>
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</table>
Compromises, Arrangements & Amalgamation

Arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

Power to Compromise and make Arrangements with Creditors & Members

Compromise between Whom?

A compromise or arrangement may be made between-

✓ between a company and its creditors or any class of them; or
✓ between a company and its members or any class of them

Application by Whom?

Where a compromise or arrangement is proposed, the Tribunal may, on the application of –

✓ the company or
✓ of any creditor or
✓ member of the company, or
✓ in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Rule 3 of Companies (Compromises, Arrangements and Amalgamation of Companies) Rules, 2016
An application may be submitted in form no. NCLT-1 along with:
- a notice of admission in Form No. NCLT-2
- an affidavit in Form No. NCLT-6
- a copy of scheme of compromise or arrangement
- fee as prescribed in the Schedule of Fees.

Steps u/s 230

| Application to NCLT | • Application can be made in NCLT 1 by-
|                    | • Company/ Creditor/ Member/ Liquidator in case of winding up. |
| Attachment to Application | • Scheme of Compromise
|                       | • Notice of Admission in NCLT-2
|                       | • Affidavit in NCLT-6 |
| Disclosure by Affidavit | • Material Facts: Latest financial position, Auditor's report, Investigation
|                       | • Reduction of Share Capital
|                       | • Scheme of Corporate Debt Restructuring |
| Calling & Sending Notice of Meeting on Tribunal's Order | • All creditors, members and debentureholders
|                           | • in Form CAA 2
|                           | • by Registered/speed post or courier or e-mail or hand delivery or any other manner directed |
| Voting on Scheme | • Voting can be done by
|                       | • In person or proxy; or
|                       | • by postal ballot within 1 month |
| Notice to other authorities | • Notice to certain statutory authorities in Form CAA 3
|                           | • Authorities shall have right to make representations |
| Tribunal's Order | • Chairperson submits report on result on meeting in CAA 4
|                           | • Petition is presented in CAA 5 for sanctioning
|                           | • Tribunal sanctions scheme in CAA 6 |

Disclosure by Affidavit [Section 230(2)]

The company or any other person, by whom an application is made under subsection (1), shall disclose to the Tribunal by affidavit—
a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor’s report on the accounts of the company and the pendency of any investigation or proceedings against the company;

b) reduction of share capital of the company, if any, included in the compromise or arrangement;

c) Any scheme of corporate debt restructuring consented to by not less than 75% of the secured creditors in value, including—
- a creditor’s responsibility statement in the prescribed form;
- safeguards for the protection of other secured and unsecured creditors;
- a report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;
- where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and
- a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

Sending Of Notice [Section 230(3)]

Where a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (1), a notice of such meeting shall be sent to
- all the creditors or class of creditors and
- to all the members or class of members and
- the debenture-holders of the company,
- individually at the address registered with the company.

It shall be accompanied by
- a statement disclosing the details of the compromise or arrangement,
- a copy of the valuation report, if any,
- and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and
- the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees,
- and such other matters as may be prescribed

Provided that such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed.

Provided further that where the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.

Rule 6
- Where a meeting of any class or classes of creditors or members has been directed or to be convened, the notice of the meeting pursuant to the order of the Tribunal to be given in the manner provided in sub-section (3) of section 230 of the Act shall be
in Form No. CAA.2 and shall be sent individually to each of the creditors or members.

✓ The notice shall be sent by the chairperson appointed for the meeting, or, if the Tribunal so directs, by the company (or its liquidator), or any other person as the Tribunal may direct, by registered post or speed post or by courier or by e-mail or by hand delivery or any other mode as directed by the Tribunal to their last known address at least one month before the date fixed for the meeting.

✓ Enclosures:
  - Details of Order of Tribunal,
  - Details of Company,
  - Summary of Valuation report,
  - Statement explaining effect of compromise or arrangement on the creditors, key managerial personnel, members, promoters, debenture-holders, directors, debenture trustees
  - Parties involved in Compromise in Explanatory statement
  - A statement to the effect that the persons to whom the notice is sent may vote in the meeting either in person or by proxies, or where applicable, by voting through electronics means.
  - details of approvals, sanctions or no-objection(s), if any, form regulatory or any other government authorities required, received or pending for the purpose scheme of compromise or arrangement.
  - details of the availability of the following documents for obtaining extract from or for making/obtaining copies of or for inspection by the members and creditors eg. Copy of scheme of compromise or arrangement
  - Other matters as prescribed

Rule 7

✓ The notice of the meeting shall be advertised in Form No. CAA.2 in at least one English newspaper and in at least one vernacular newspaper having wide circulation in the state in which the registered office of the company is situated, or such newspaper as may be directed by the Tribunal and shall also be placed, not less than thirty days before the date fixed for the meeting, on the website of the company of the SEBI and the recognized stock exchange where the securities of the company are listed.

Voting Mode Specified In Notice [Section 230(4)]

A notice under sub-section (3) shall provide that the persons to whom the notice is sent may vote in the meeting-

✓ either themselves or
✓ through proxies or
✓ by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice.

Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than 10% of the shareholding or having outstanding debt amounting to not less than 5% of the total outstanding debt as per the latest audited financial statement.

Notice to Statutory Authorities [Section 230(5)]
A notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to:

✓ the Central Government,
✓ the income-tax authorities,
✓ the Reserve Bank of India,
✓ the Securities and Exchange Board,
✓ the Registrar,
✓ the respective stock exchanges,
✓ the Official Liquidator,
✓ the Competition Commission of India if necessary,
✓ and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

**Rule 8:**

✓ the notice shall be in Form No. CAA.3, and shall be accompanied with a copy of the scheme of compromise or arrangement, the explanatory statement and the disclosures mentioned under rule 6

✓ It shall be sent forthwith, after the notice is sent to the members or creditors of the company, by registered post or by speed post or by courier or by hand delivery at the office of the authority.

✓ If they desire to make any representation, the same shall be sent to the Tribunal within a period of thirty days from the date of receipt of such notice and copy of such representation shall simultaneously be sent to the concerned companies and in case of representation is received within the stated period of thirty days by the Tribunal, it shall be presumed that the authorities have no representation to make on the proposed scheme of compromise or arrangement.

**Consent of Members or Creditors [Section 230(6)]**

✓ Where, at a meeting held in pursuance of sub-section (1),
✓ majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be,
✓ voting in person or by proxy or by postal ballot,
✓ agree to any compromise or arrangement and
✓ if such compromise or arrangement is sanctioned by the Tribunal by an order,
✓ the same shall be binding on the company, all the creditors, or class of creditors or members of class of members, as the case may be, or, in case of a company being wound up, on the liquidator, “appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be,” and the contributories of the company.

**Report of Meeting To Tribunal**

**Rule 14**

The chairperson of the meeting (or where there are separate meetings, the chairperson of each meeting) shall, within the time fixed by the tribunal, or where no time has been fixed, within three days after the conclusion of the meeting submit a report to the Tribunal on the result of the meeting in Form No. CAA.4
Rule 15
Where the proposed compromise or arrangement is agreed to by the members or creditors or both as the case maybe with or without modification, the company (or its liquidator), shall, within seven days of the filing of the report by the chairperson, present a petition to the tribunal in Form No.CAA.5 for sanction of the scheme of compromise or arrangement.

Rule 16
The tribunal shall fix a date for the hearing of petition, and notice of the hearing shall be advertised in the same newspaper in which the notice of the meeting was advertised, or in such other newspaper as the Tribunal may direct not less than ten days before the date fixed for the hearing.

The notice of the hearing of the petition shall also be served by the Tribunal to the objectors or to their representatives under sub-section (4) of section 230 of the Act and to the central government and other authorities who have made representation under rule 8 and have desired to be heard in their representation.

Rule 17
The order of Tribunal has the discretion to sanction scheme in Form No. CAA. 6, with such variations as may be necessary.

Contents of Order of Tribunal [Section 230(7)]

An order made by the Tribunal under sub-section (6) shall provide for all or any of the following matters, namely:

(a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;
(b) the protection of any class of creditors;
(c) if the compromise or arrangement results in the variation of the shareholders’ rights, it shall be given effect to under the provisions of section 48;
(d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;
(e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement.

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

Filing Of Order [Section 230(8)]

The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

Waiver of Creditor's Meeting [Section 230(9)]

CA. SHIVANGI AGRAWAL
The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least 90% value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

**Buy Back To Be In Accordance With Section 68 [Section 230(10)]**

No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

**Regulations of SEBI In Case Of Listed Companies [Section 230(11)]**

Any compromise or arrangement may include takeover offer made in such manner as may be prescribed:

Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

**Appeal to Tribunal [Section 230(12)]**

An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

Explanation.—For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.

A meeting of members of Jaora Agricultural Equipments Ltd was convened under the orders of the Tribunal for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 200 members holding 5,00,000 shares. 70 members holding 4,00,000 shares in the aggregate voted for the scheme. 120 members holding 90,000 shares in aggregate voted against the scheme. 10 members holding 10,000 shares abstained from voting.

The shareholders and creditors of Superfine Ltd, in a meeting convened for approval of a scheme of reconstruction of the company, passed resolutions. The scheme of reconstruction provided for the following:

i) Sale of plant and machineries and appropriation of proceeds for payment of outstanding wages, tax dues and repayment of loan.

ii) Unsecured creditors to forego 60% of their claims against the company and receive debentures for the balance amount. A few shareholders and creditors raised objections against the said arrangements.

Advise the directors about the steps to be taken to give effect to the proposed scheme under the Companies Act, 2013.
### Power of Tribunal to Enforce Compromise or Arrangement

**Power of Tribunal to Make Orders [Section 231(1)]**

*Where the Tribunal makes an order under section 230 sanctioning a compromise or an arrangement in respect of a company,* it—

(a) *shall have power to supervise* the implementation of the compromise or arrangement; and

(b) *may, at the time of making* such order or at any time thereafter, *give such directions in regard to any matter* or make such modifications in the compromise or arrangement *as it may consider necessary for the proper implementation* of the compromise or arrangement.

**Power to Make Winding up Order [Section 231(2)]**

*If the Tribunal is satisfied that the compromise or arrangement sanctioned under section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme,* it *may make an order* for winding up the company and such an order shall be deemed to be an order made under section 273.

**Provisions Applicable Before Commencement of Act [Section 231(3)]**

The provisions of this section shall, so far as may be, *also apply to* a company in respect of which an order has been *made before the commencement of this Act* sanctioning a compromise or an arrangement.

### Merger and Amalgamation of Companies

**Application to Tribunal For Merger Or Amalgamation [Section 232(1)]**

*Where an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section,* and *it is shown to the Tribunal—*

(a) *that the compromise or arrangement has been proposed for* the purposes of, *or in connection with,* a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and*

(b) *that under the scheme, the whole or any part of the undertaking, property or liabilities of* transferor company *is required to be transferred* to transferee company, or is proposed to be divided among and transferred to two or more companies,

*the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply mutatis mutandis.*

**Circulation of Documents [Section 232(2)]**

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CA. SHIVANGI AGRAWAL
(2) Where an order has been made by the Tribunal under sub-section (1), merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:—

(a) the draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;
(b) confirmation that a copy of the draft scheme has been filed with the Registrar;
(c) a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;
(d) the report of the expert with regard to valuation, if any;
(e) a supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

Order of Tribunal [Section 232(3)]

The Tribunal, after satisfying itself that the procedure specified in sub-sections (1) and (2) has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:—

(a) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise

(b) the allotment or appropriation by the transferee company of any shares, debentures, policies or other like instruments in the company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person: Provided that a transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer

(d) dissolution, without winding-up, of any transferor company

(e) the provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement

(f) where share capital is held by any non-resident shareholder under the foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law for the time being in force, the allotment of shares of the transferee company to such shareholder shall be in the manner specified in the order

(g) the transfer of the employees of the transferor company to the transferee company

(h) where the transferor company is a listed company and the transferee company is an unlisted company,—
the transferee company shall remain an unlisted company until it becomes a listed company

if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal

Provided that the amount of payment or valuation under this clause for any share shall not be less than what has been specified by the Securities and Exchange Board under any regulations framed by it

(i) where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation; and

(j) such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

Transfer Of Property and Liabilities [Section 232(4)]

Where order provides for the transfer of

- any property or liabilities, then,
- that property shall be transferred to the transferee company and
- the liabilities shall be transferred to and become the liabilities of the transferee company

- and any property may, if the order so directs,
- be freed from any charge which
- shall cease to have effect.

Filing Of Order with Registrar [Section 232(5)]

Every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within thirty days of the receipt of certified copy of the order.

Effective Date of Scheme [Section 232(6)]

The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

Certificate of Compliance [Section 232(7)]

- Every company in relation to which the order is made
- shall, until the completion of the scheme,
file a statement in CAA 8 within 210 days from end of each financial year
with the Registrar
every year
duly certified by a chartered accountant or a cost accountant or a company secretary in practice
indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

Penalty [Section 233(8)]

If a transferor company or a transferee company contravenes the provisions of this section, the transferor company or the transferee company, as the case may be,
shall be punishable with fine which shall not be less than one lakh rupees but
which may extend to twenty-five lakh rupees and
every officer of such transferor or transferee company who is in default,
shall be punishable with imprisonment for a term
which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

ABC Co. Ltd was amalgamated with and merged in XYZ Co. Ltd. Some workers of ABC Co. Ltd refuse to join as workers of XYZ Co. Ltd and claim compensation for premature termination of services. XYZ Co. Ltd resists the claim on the ground that their services are transferred to XYZ Co. Ltd by the order of amalgamation and merger and therefore, the workers must join service of XYZ Co. Ltd and cannot claim any compensation. Who will succeed the workers of ABC Co. Ltd or the XYZ Co. Ltd? Give reasons.

Hi tech Engineering Ltd engaged in the business of engineering construction and cement manufacturing, decided to concentrate on its core business of engineering construction and hive off (demerge) its cement business in favour of Premier Cement Ltd. State the steps to be taken by Hi-tech Engineering Ltd to give effect to the proposed demerger under the provisions of the Companies Act, 2013.

In the context of judicial rulings in the matter of merger, answer the following: Whether transferor company is justified in excluding assets held on lease and license arrangement, from those transferred to the transferee company?
Case Law: Hindustan Lever Employees’ Union v Hindustan Lever Ltd.

Merger and Amalgamation of Certain Companies

Notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered into
between two or more small companies or
between a holding company and its wholly-owned subsidiary company or
such other class or classes of companies as may be prescribed,
subject to the following, namely:—
(a) a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered office of the respective companies are
situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company

(b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent of the total number of shares

(c) each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar of the place where the registered office of the company is situated and

(d) the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.

Filing Of Copy of Scheme [Section 233(2)]

The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.

Communication of Objections [Section 233(4)]

If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of thirty days

Provided that if no such communication is made, it shall be presumed that he has no objection to the scheme.

Registration of Scheme by CG [Section 233(3)]

On the receipt of the scheme, if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.

Filing of Application by CG for Consideration Of Scheme u/s 232 [Section 233(5)]

✔ If the Central Government
✔ after receiving the objections or suggestions
✔ or for any reason is of the opinion that
✔ such a scheme is not in public interest or in the interest of the creditors,
✔ it may file an application before the Tribunal
✔ within a period of sixty days of the receipt of the scheme
✔ stating its objections and
✔ requesting that the Tribunal may consider the scheme under section 232.

Confirmation by Tribunal by Passing Order [Section 233(6)]
On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit.

Provided that if the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme.

Communication to Registrar for Registration [Section 233(7)]

A copy of the order under sub-section (6) confirming the scheme shall be communicated to the Registrar having jurisdiction over the transferee company and the persons concerned and the Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where transferor company or companies were situated.

Dissolution without Winding Up [Section 233(8)]

The registration of the scheme under sub-section (3) or sub-section (7) shall be deemed to have the effect of dissolution of the transferor company without process of winding-up.

Consequences of Registration [Section 233(9)]

The registration of the scheme shall have the following effects, namely:—
(a) transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company;

(b) the charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company;

(c) legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company; and

(d) where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company.

Not to Hold Shares in Own Name [Section 233(10)]

A transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation.

Fees on Authorized Capital [Section 233(11)]

The transferee company shall file an application with the Registrar along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on revised capital.
Provided that the fee, if any, paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company shall be set-off against the fees payable by the transferee company on its authorised capital enhanced by the merger or amalgamation.

Other Points

- The provisions of this section shall mutatis mutandis apply to a company or companies specified in sub-section (1) in respect of a scheme of compromise or arrangement referred to in section 230 or division or transfer of a company referred to clause (b) of subsection (1) of section 232.
- The Central Government may provide for the merger or amalgamation of companies in such manner as may be prescribed.
- A company covered under this section may use the provisions of section 232 for the approval of any scheme for merger or amalgamation.

Rule 25

1) The notice of the proposed scheme objections or suggestions from the Registrar and official liquidator or persons affected by the scheme shall be in Form No.CAA.9.
2) The act the declaration of solvency shall be filed by each of the companies involved in the scheme of merger or amalgamation in Form No.CAA.10 along with the fee as provided.
3) The notice of the meeting to the members and creditors shall be accompanied by-
   - a statement, as far as applicable, referred to in sub section (3) of section 230
   - The declaration of solvency made in pursuance of sub-section (1) of section 233 of the Act in Form No.CAA.10
   - A copy of the scheme.
4) The transferee company shall, within seven days after the conclusion of the meeting of members or class of members or creditors, file a copy of the scheme as agreed to by the members and creditors, along with a report of the result of each of the meetings in Form no. CAA.11 with the central government, along with the fees.
   - Copy of the scheme shall also be filed, along with Form No. CAA.11 with-
     - (i) the registrar of companies in form no. GNL-1 along with fees
     - (ii) the official liquidator through hand delivery or by registered post or speed post.
5) Where no objection or suggestion is received to the scheme from the Registrar of companies and official Liquidator or where the objection or suggestion of registrar and official liquidator is deemed to be not sustainable and the central government shall issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12.
6) Where objections or suggestions are received from the registrar of companies or official liquidator and the central government is of the opinion, whether on the basis of such objections or otherwise, that the scheme is not in the public interest of creditors, it may file an application before the tribunal in Form No.CAA.13 within sixty days of the receipt of the scheme stating its objections or opinion and requesting that tribunal may consider the scheme under section 232 of the act.
7) The confirmation order of the scheme issued by the central government or tribunal shall be filed, within thirty days of the receipt of the order of confirmation, in Form
Merger and Amalgamation of Company with Foreign Company

Applicability of Provisions of the Act [Section 234(1)]

✓ The provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government.

✓ Provided that the Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

Terms and Conditions of Merger [Section 234(2)]

Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company:

✓ in cash, or
✓ in Depository Receipts,
✓ or partly in cash and partly in Depository Receipts,
as the case may be, as per the scheme to be drawn up for the purpose.

“foreign company” means any company or body corporate incorporated outside India whether having a place of business in India or not.

Rule 25A

✓ A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Act and these rules.

✓ The transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation.

✓ A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval under clause (a) of this sub-rule.

✓ It is clarified that no amendment shall be made in this rule without consultation of the Reserve Bank of India.”
Power to Acquire Shares of Shareholders Dissenting From Scheme or Contract Approved By Majority

Notice to Dissenting Shareholders to Acquire Shares

- Where a scheme or contract involving the transfer of shares or any class of shares in transferor company to the transferee company has,
- within four months after making of an offer in that behalf by the transferee company,
- been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved,
- other than shares already held at the date of the offer by, or by a nominee of the transferee company or its subsidiary companies,
- the transferee company may, at any time within two months after the expiry of the said four months,
- give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

Acquisition of Such Shares

- Where a notice under sub-section (1) is given, the transferee company shall,
- unless on an application made by the dissenting shareholder to the Tribunal,
- within one month from the date on which the notice was given and
- the Tribunal thinks fit to order otherwise,
- be entitled to and bound to acquire those shares
- on the terms on which, under the scheme or contract,
- the shares of the approving shareholders are to be transferred to the transferee company.

Registration of Shares in the name of Transferee Company

- Where a notice has been given by the transferee company under sub-section (1)
- and the Tribunal has not, on an application made by the dissenting shareholder,
- made an order to the contrary,
- the transferee company shall, on the expiry of one month from the date on which the notice has been given, or,
- if an application to the Tribunal by the dissenting shareholder is then pending,
- after that application has been disposed of,
- send a copy of the notice to the transferor company together
- with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferor company and
- on its own behalf by the transferee company,
- and pay or transfer to the transferor company the amount or other consideration
- representing the price payable by the transferee company for the shares
- which, by virtue of this section, that company is entitled to acquire,
- and the transferor company shall—
  (a) thereupon register the transferee company as the holder of those shares; and
  (b) within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other consideration representing the price payable to them by the transferee company.
Amount in Separate Bank Account

Any sum received by the transferor company under this section shall be paid into a separate bank account, and any such sum and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which the said sum or other consideration were respectively received and shall be disbursed to the entitled shareholders within sixty days.

"dissenting shareholder" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

Purchase of Minority Shareholding

Who Can Buy Shares? [Section 236(1)]

- ✓ In the event of an acquirer, or a person acting in concert with such acquirer,-
- ✓ becoming registered holder of 90% or more of the issued equity share capital of a company, or
- ✓ in the event of any person or group of persons becoming 90% majority or
- ✓ holding 90% of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason,
- ✓ such acquirer, person or group of persons, as the case may be,
- ✓ shall notify the company of their intention to buy the remaining equity shares.

Offer by Majority shareholders to Acquire Shares [Section 236(2)]

The acquirer, person or group of persons under sub-section (1) shall offer-
- ✓ to the minority shareholders of the company
- ✓ for buying the equity shares held by such shareholders
- ✓ at a price determined
- ✓ on the basis of valuation by a registered valuer
- ✓ in accordance with such rules as may be prescribed.

Offer by Minority Shareholders to Sell Shares [Section 236(3)]

Without prejudice to the provisions of sub-sections (1) and (2), the minority shareholders of the company may offer to the majority shareholders to purchase the minority equity shareholding of the company at the price determined in accordance with such rules as may be prescribed under sub-section (2).

(4) The majority shareholders shall deposit an amount equal to the value of shares to be acquired by them under sub-section (2) or sub-section (3), as the case may be, in a separate bank account to be operated by company whose shares are being transferred for at least one year for payment to the minority shareholders and such amount shall be disbursed to the entitled shareholders within 60 days.

Provided that such disbursement shall continue to be made to the entitled shareholders for a period of one year, who for any reason had not been made disbursement within the said period.
of 60 days or if the disbursement have been made within the aforesaid period of 60 days, fail to receive or claim payment arising out of such disbursement.

(5) In the event of a purchase under this section, company whose shares are being transferred shall act as a transfer agent for receiving and paying the price to the minority shareholders and for taking delivery of the shares and delivering such shares to the majority, as the case may be.

(6) In the absence of a physical delivery of shares by the shareholders within the time specified by the company, the share certificates shall be deemed to be cancelled, and company whose shares are being transferred shall be authorised to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law and make payment of the price out of deposit made under sub-section (4) by the majority in advance to the minority by despatch of such payment.

(7) In the event of a majority shareholder or shareholders requiring a full purchase and making payment of price by deposit with the company for any shareholder or shareholders who have died or ceased to exist, or whose heirs, successors, administrators or assignees have not been brought on record by transmission, the right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be available for a period of three years from the date of majority acquisition or majority shareholding.

Acquisition at a Higher Price [Section 236(8)]

- Where the shares of minority shareholders have been acquired in pursuance of this section and as on or prior to the date of transfer following such acquisition,
- the shareholders holding seventy-five per cent. or more minority equity shareholding
- negotiate or reach an understanding
- on a higher price for any transfer, proposed or agreed upon, of the shares held by them
- without disclosing the fact or likelihood of transfer taking place on the basis of such negotiation, understanding or agreement, the majority shareholders shall share the additional compensation so received by them with such minority shareholders on a pro rata basis.

Power of Central Government to provide for Amalgamation of Companies in Public Interest

Power of Central Government to Order Amalgamation [Section 237(1)]

Where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may be specified in the order.

Order of Central Government [Section 237(2) & Section 237(3)]

- The order under sub-section (1) may also provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor
company and such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to the amalgamation.

Every member or creditor, including a debenture holder, of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor, and in case the interest or rights of such member or creditor in or against the transferee company are less than his interest in or rights against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the Official Gazette, and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company.

Appeal to Tribunal [Section 237(4)]

Any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may, within a period of thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

Pre-Conditions for Making Order [Section 237(5)]

No order shall be made under this section unless—
(a) a copy of the proposed order has been sent in draft to each of the companies concerned; 
(b) the time for preferring an appeal under sub-section (4) has expired, or where any such appeal has been preferred, the appeal has been finally disposed of; and 
(c) the Central Government has considered, and made such modifications, if any, in the draft order as it may deem fit in the light of suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any class of creditors thereof.

Copy of Order to be laid before Parliament [Section 237(6)]

The copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament.

Registration of Offer of Schemes Involving Transfer of Shares

Registration and Issuance of Circular [Section 238(1)]

In relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company under section 235,—

a) every circular containing such offer and recommendation to the members of the transferor company by its directors to accept such offer shall be accompanied by such information and in such manner as may be prescribed.
COMPROMISES, ARRANGEMENTS & AMALGAMATION

5.20

b) every such offer shall contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that necessary cash will be available; and

c) every such circular shall be presented to the Registrar for registration and no such circular shall be issued until it is so registered.

Provided that the Registrar may refuse, for reasons to be recorded in writing, to register any such circular which does not contain the information required to be given under clause (a) or which sets out such information in a manner likely to give a false impression, and communicate such refusal to the parties within thirty days of the application.

Appeal to Tribunal [Section 238(2)]

An appeal shall lie to the Tribunal against an order of the Registrar refusing to register any circular under sub-section (1).

Penalty [Section 238(3)]

The director who issues a circular which has not been presented for registration and registered under clause (c) of sub-section (1), shall be liable to a penalty of one lakh rupees.

Preservation of Books and Papers of Amalgamated Companies

The books and papers of

✓ a company which has been amalgamated with,

✓ or whose shares have been acquired by, another company

✓ under this Chapter

✓ shall not be disposed of

✓ without the prior permission of the Central Government

Before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

CPR ltd and TJC ltd are wholly owned by Government of Tamil Nadu. As a policy matter, the Government issued administrative orders for merging TJC ltd with CPR ltd in the public interest. State the authority with whom the application for merger is required to be filed under the provisions of the Companies Act, 2013. Also, state the provisions governing preservation of Books and Records of TJC ltd after merger under the said Act.

Liability of Officers in respect of Offences Committed Prior to Merger, Amalgamation etc.
Notwithstanding anything in any other law for the time being in force, the liability in respect of offences committed under this Act by the officers in default of the transferor company prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.

Multiple Choice Questions

1. A compromise or arrangement may be proposed between company and whom?
   a. All Creditors or any class  b. All members or any class  
   c. Either (a) or (b) or both  d. None of these

2. A member or creditor may vote on a scheme of compromise or arrangement----
   a. Himself  b. Proxy  
   c. Postal Ballot  d. All of the above

3. Where the Tribunal sanctions a compromise or an arrangement, it shall have power to---
   a. Supervise implementation of scheme  b. Give directions and make modifications in compromise or arrangement  
   c. Order winding up  d. All of the above

4. An application proposing compromise may be made to Tribunal by-----
   a. The Company  b. Any Creditor or member of Company  
   c. The liquidator in case company is being wound up  d. Any of the above

5. Any objection to compromise may be made by-----
   a. Persons holding not less than 5% of the shareholding  b. Person having outstanding debt amounting to not less than 10% of the total outstanding debt  
   c. Either (a) or (b)  d. None of these

6. A scheme of merger or amalgamation between two or more companies may be entered into in accordance with the provisions of section 233, only if-----
   a. They are small companies  b. One company is a holding company and other is a wholly owned subsidiary  
   c. Such companies belong to such class of companies as may be prescribed  d. Either (a) or (b) or (c)

7. Where a scheme of merger or amalgamation is proposed in accordance with the provisions of section 233, a notice shall be issued by the transferor company and the transferee company to-----
   a. Registrar  b. Official liquidator  
   c. Both (a) and (b)  d. Central Government

8. A scheme of merger proposed u/s 233 is required to be approved by majority representing ---- of creditors of transferor company and transferee company.
### Compromises, Arrangements & Amalgamation

#### 5.22

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<thead>
<tr>
<th></th>
<th>9/10th in value</th>
<th>2/3rd in Value</th>
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<th>3/4th in value</th>
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9. Prior approval of ---- shall be required for merger of a foreign company into a company registered under this Act or vice-versa.

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<thead>
<tr>
<th></th>
<th>Reserve Bank of India</th>
<th>Central Government</th>
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<tr>
<th></th>
<th>The Tribunal</th>
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<td>c</td>
<td>All of the above</td>
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10. The transferee company is entitled to give a notice to any dissenting shareholder of the transferor company to acquire his shares within ----- of expiry of the period during which the offer was open.

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<th></th>
<th>4 months</th>
<th>6 months</th>
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<th>2 months</th>
<th>1 month</th>
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<td>c</td>
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11. A notice is sent by the transferee company to some dissenting shareholders of the transferor company to acquire their shares. No dissenting shareholder makes any application to the Tribunal within till the time allowed for making such application. As a consequence, the transferee company shall be ----- to acquire shares of the dissenting shareholders.

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<th>Entitled</th>
<th>Bound</th>
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<th>Entitled as well as bound</th>
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12. The terms and conditions of the scheme of merger of a foreign company into a company registered under this Act or vice-versa may provide that consideration to the shareholders of the merging company shall be paid-----

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<thead>
<tr>
<th></th>
<th>In cash</th>
<th>In Depository receipts</th>
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<tr>
<th></th>
<th>Partly in cash and partly in depository receipts</th>
<th>All of the above</th>
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13. Where an acquirer becomes registered holder of ---- of the issued equity share capital of a company, he shall notify ---- of his intention to buy remaining equity shares.

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<tr>
<th></th>
<th>75% or more; Tribunal</th>
<th>90% or more; Company</th>
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<td>a</td>
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<table>
<thead>
<tr>
<th></th>
<th>90% or more; Central Government</th>
<th>75% or more; Central Government</th>
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<td>c</td>
<td>d</td>
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14. Where section 236 applies, the majority shareholders shall make an offer to minority shareholders of the company to buy equity shares held by minority shareholders at -----.

<table>
<thead>
<tr>
<th></th>
<th>Market price</th>
<th>Price determined on the basis of valuation by registered valuer in accordance with prescribed rules</th>
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<td>a</td>
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<table>
<thead>
<tr>
<th></th>
<th>Fair value to be determined by Tribunal</th>
<th>Fair value to be determined by Central Government</th>
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15. Who is empowered to order the amalgamation of 2 or more companies, if it is satisfied that such amalgamation is essential in public interest.

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<thead>
<tr>
<th></th>
<th>Central Government</th>
<th>Tribunal</th>
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<tr>
<th></th>
<th>Registrar</th>
<th>None of the above</th>
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16. Prior permission of whom shall be required for disposal of books and papers of a company which has been amalgamated with another company.

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<th>Central Government</th>
<th>Liquidator</th>
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CA. SHIVANGI AGRAWAL
17. In relation to every offer of a scheme or contract involving transfer of shares or any class of shares in the transferor company to the transferee company u/s 235, the directors of the ---- shall prepare a circular which shall be addressed to -----

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<tbody>
<tr>
<td>a.</td>
<td>Transferor company; members of transferor company</td>
</tr>
<tr>
<td>b.</td>
<td>Transferor company; members of transferee company</td>
</tr>
<tr>
<td>c.</td>
<td>Transferee company; members of Transferor company</td>
</tr>
<tr>
<td>d.</td>
<td>Transferee company; members of transferee company</td>
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18. In relation to every offer of a scheme or contract involving transfer of shares or any class of shares in the transferor company to the transferee company u/s 235, a circular shall be issued to members---------

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<tbody>
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<td>a.</td>
<td>After it is presented to Registrar for registration</td>
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<td>b.</td>
<td>Before it is presented to Registrar for registration</td>
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<td>c.</td>
<td>After it is registered by Registrar</td>
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<tr>
<td>d.</td>
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**Answer to MCQs**

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<td>13</td>
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<td>9</td>
<td>(a)</td>
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<td>5</td>
<td>(d)</td>
<td>10</td>
<td>(c)</td>
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<td>(a)</td>
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Prevention of Oppression & Mismanagement

Majority Rule

✓ It states that **ones who hold the majority of shares rule the company.**
✓ Corporate Law works on the principle of democracy.
✓ It was established in the landmark judgement of Foss v Harbottle.
✓ The judgement held that if the majority shareholders have made a decision to take certain action, it must be respected.

Foss v Harbottle

Two shareholders commenced legal action against the promoters and directors of the company alleging that they had misapplied the company assets. The court rejected their plea on following grounds:

✓ Plaintiff is the company and not the shareholders
✓ Mere loss is not sufficient.

Hence following was established-

✓ **Company is a separate legal entity**
✓ **Court will not interfere with internal management of the company.**

Majority Rule has exception in following cases-

✓ Ultra Vires and Illegal Acts
✓ Breach of duties
✓ Fraud on minority

The words "**oppression**" and "**mismanagement**" are **not defined** in the Act. The meaning of these words for the purpose of Company Law should be used in a broad generic sense and not in any strict literal sense.

Meaning of Oppression

✓ It should involve a **visible departure from** the standards of **fair dealing**.
✓ A member can complain of oppression **only in his capacity as a member** and not in his capacity as director or creditor.
Oppression must be a continuous process. Isolated acts of oppression or mismanagement will not give rise to an action under this Chapter.

It should be burdensome, harsh, wrongful.

Re. Hindustan Co-operative Insurance Society Ltd

In Re. Hindustan Co-operative Insurance Society Ltd, the life insurance business of a company was acquired in 1956 by the Life Insurance Corporation of India on payment of compensation. The directors, who had the majority voting power, refused to distribute this amount among shareholders, rather they passed a special resolution changing the objects of the company to utilise the compensation money for the new objects.

This was held to be an "Oppression".

The court observed: “The majority exercised their authority wrongfully, in a manner burdensome, harsh and wrongful. They attempted to force the minority shareholders to invest their money in different kind of business against their will. The minority had invested their money in a life insurance business with all its safeguards and statutory protections. But they were being forced to invest where there would be no such protections or safeguards”.

Lalita Rajya Lakshmi v. Indian Motor Co

Minor acts of mismanagement, however, are not to be regarded as oppression. As far as possible, shareholders should try to resolve their differences by mutual readjustment.

In Lalita Rajya Lakshmi v. Indian Motor Co, the petitioner alleged that the Board of directors were guilty of certain acts detrimental to the minority of the shareholders. The allegations were that the income of the company was deliberately shown less by excessive expenditure; that passengers travelling without ticket on the company’s buses were not checked; that petrol consumption was not properly checked; that second hand buses of the company had been disposed of at low price, that dividends were being declared at too low a figure.

It was held that even if each of these allegations were proved to the satisfaction of the court, there would have been no oppression.

Application to Tribunal for Relief in Cases of Oppression, Etc

Any member of a company who complains that—

a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or

b) the material change,

- not being a change brought about by, or in the interests of,
- any creditors,
PREVENTION OF OPPRESSION & MISMANAGEMENT

- including debenture holders or
- any class of shareholders of the company,
- has taken place in the management or control of the company,
- whether by an alteration in the Board of Directors,
- or manager,
- or in the ownership of the company's shares,
- or if it has no share capital, in its membership,
- or in any other manner whatsoever, and that by reason of such change,
- it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members,

may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

Power of Central Government to Apply to Tribunal [Section 241(2)]

The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

Power of Central Government to request inquiry into fit and Proper Person [Section 241(3)]

Where in the opinion of the Central Government there exist circumstances suggesting that—

a. any person concerned in the conduct and management of the affairs of a company is or has been in connection therewith guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law or of breach of trust;
b. the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices;
c. a company is or has been conducted and managed by such person in a manner which is likely to cause, or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains; or
d. the business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest,

the Central Government may initiate a case against such person and refer the same to the Tribunal with a request that the Tribunal may inquire into the case and record a decision as to whether or not such person is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.

The person against whom a case is referred to the Tribunal under sub-section (3), shall be joined as a respondent to the application.

Every application under sub-section (3)—
(a) shall contain a concise statement of such circumstances and materials as the Central Government may consider necessary for the purposes of the inquiry; and

CA. SHIVANGI AGRAWAL
(b) shall be signed and verified in the manner laid down in the Code of Civil Procedure, 1908, for the signature and verification of a plaint in a suit by the Central Government.

Right to Apply under Section 241

Eligibility of Members

(a) In the case of a company having a share capital-
   - not less than one hundred members of the company or
   - not less than one-tenth of the total number of its members,
   - whichever is less, or
   - any member or members holding not less than one tenth of the issued share capital of the company,
   - subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares

(b) In the case of a company not having a share capital-
   - not less than one-fifth of the total number of its members

Where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

Waiver by Tribunal

- Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

Prior Consent in Writing [Section 241(2)]

Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

- Consent must be prior to Application.
- Consent is reckoned at the beginning of proceedings.

There are eight shareholders in M/S Supra Private Ltd. Mr. Shyam who is holding less than one-tenth of the share capital of the company seeks your advice whether he can apply to the Tribunal for relief against oppression and mismanagement. Advise.
The issued, subscribed and paid up capital of OPM limited is Rs. 5 crores consisting of 50,00,000 equity shares of Rs. 10 each. The company has 700 members. A petition was made to the appropriate authority duly signed by 80 members holding 2,50,000 equity shares of the company seeking relief against oppression and mismanagement. Subsequently 20 of them withdrew consent. Explain with reference to the relevant provisions of Companies Act, 2013 and decided case law whether petition is maintainable.

M/s City Hospital pvt ltd has two groups of directors. A dispute arose between the two groups out of which one group controlled the majority of shares. A very serious situation arose in the administration of the company’s affairs when the minority group ousted the lawful board of directors from the possession and control of the management of the company’s factory and workshop. Books of accounts and statutory records were held by the minority group and consequently the annual accounts could not be prepared for two years. The majority group applied to the Tribunal u/s 241 of the Companies Act 2013. You are required to decide with reference to the provisions of the said Act, the following issues:
   a) can majority of shareholders apply to Tribunal for relief against oppression by the minority shareholders.
   b) Whether tribunal can grant relief in such circumstances.

MNC pvt ltd is a company in which there are 6 shareholders. Mr. Srinath who is a director and also the legal representative of a deceased shareholder holding less than one-tenth of the share capital of the company made a petition to the Tribunal for relief against oppression and mismanagement. Examine under the provisions of the Companies Act, 2013 whether the petition made by Mr. Srinath is valid and maintainable?

M/S DJ ltd, a listed company as per the audited financial statements as at 31st March 2018 is having issued and paid up equity share capital compromising of Rs. 10 lakh shares of Rs. 10 each and issued and paid up preference share capital of Rs. 5 lakh shares of Rs. 10 each respectively. The members of the company after complying with the provisions of section 169 of the Companies Act, 2013 removed Mr. Satish from directorship of the company on 1st August 2018 before completion of his term of office. Mr. Satish is also one of the members of the company holding 110000 fully paid-up equity shares. Mr. satish has alleged oppression on his removal and has moved the jurisdictional Honourable NCLT u/s 241. The board of directors is of the opinion that the application is not maintainable as per the provisions of section 244 of Companies Act. Decide. Also, state if any other recourse that is available with Mr. Satish.

Powers of Tribunal

Power of Tribunal to Pass Orders [Section 242(1)]
If, on any application made under section 241, the Tribunal is of the opinion—

(a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up,

the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

**Types of Orders [Section 242(2)]**

Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for—

- a) the regulation of conduct of affairs of the company in future;
- b) the purchase of shares or interests of any members of the company by other members thereof or by the company;
- c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;
- d) restrictions on the transfer or allotment of the shares of the company;
- e) the termination, setting aside or modification, of any agreement, however arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;
- f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e) Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned
- g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference
- h) recovery of undue gains made by any managing director, manager or any of the directors of the company during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;
- i) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h);
- k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;
- l) imposition of costs as may be deemed fit by the Tribunal;
- m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.
Order to Be Filed with Registrar [Section 242(3)]

A certified copy of the order of the Tribunal under sub-section (1) shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.

Interim Order [Section 242(4)]

The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company’s affairs upon such terms and conditions as appear to it to be just and equitable.

Order of Fit and Proper Person [Section 242(5)]

At the conclusion of the hearing of the case in respect of sub-section (3) of section 241, the Tribunal shall record its decision stating therein specifically as to whether or not the respondent is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.

Alteration of Memorandum or Articles

(5) Where an order of the Tribunal under sub-section (1) makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

(6) Subject to the provisions of sub-section (1), the alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered.

(7) A certified copy of every order altering, or giving leave to alter, a company’s memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.

Penalty [Section 242(8)]

- ✓ If a company contravenes the provisions of sub-section (5), the company shall be punishable with fine
- ✓ which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and
- ✓ every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or
- ✓ with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.
A group of shareholders holding 20% of the issued share capital of DEF Ltd have filed a petition before the Tribunal alleging the following:

i) Various acts of illegal, invalid and irregular transactions entered into in the name of the company.

ii) Losses incurred due to mismanagement by the Board of directors.

iii) Non-declaration of dividend despite having sufficient profits in the past years.

Examine the merits of the above petitions made u/s 241 of the Companies Act, 2013 in the light of the judicial pronouncements made in this regard.

In an application made to the Tribunal claiming relief against oppression and mismanagement, it is alleged that the directors of the company have misused their position in making certain inter-corporate deposits which are against the interests of the company. Will Tribunal entertain application containing such allegation in the case of a private company?

Whether continuation of directors in office after expiry of their tenure and where infighting continues among them amounts to mismanagement?

Mutual Distrust Pvt Ltd has two shareholders namely A and B holding 51% and 49% respectively. Both are working as directors. Due to differences between them, A decides to hold a Board meeting on 30th April, 2014 but the same could not be held due to non-cooperation from B and lack of quorum. Advice A about the steps that can be taken under Companies Act.

Referring to the provisions of Companies Act, as contained in section 241 of the Act, examine whether the following acts of the company amounts to oppression?

a) Allotment of shares by directors of the company by which the existing majority is reduced to minority.

b) Allotment of shares by the directors by which the existing minority shareholders are made to majority.

c) A share sale agreement was executed by VC, an NRI. The shares and transfer deed were handed over to an escrow agent. The sale was subject to RBI permission. The shares were not transferred for 6 years since RBI permission was not received. VC, after waiting for a long period of time raises the issue and complains of oppression in the capacity of a member. As per the agreement the sale was unconditional. During the above period VC did not exercise any right as shareholder nor did the company treat...
M/s Continuous conflicts ltd is a company controlled by two family groups. The first family group has four directors, namely Mr. A, Mr. B, Mr. C and Mr. D on the Board of directors. The second family group has two representatives Mr. X and Mr. Y on the Board. Because of internal family troubles, the first group by virtue of its majority shareholding removed both Mr. X and Mr. Y as the directors of the company. Aggrieved by this action the second group is planning to move an application before the Tribunal. You have been approached for advice. Advise as to the eligibility restrictions regarding filing the application and the chances of getting relief from Tribunal assuming that there is no other material on record in support of oppression on the minority group.

Consequence of Termination or Modification of Certain Agreements

Effect of Order u/s 242(2)[Section 243(1)]

Where an order made under section 242 terminates, sets aside or modifies an agreement such as is referred to in sub-section (2) of that section,—

(a) such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise;

(b) no managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as the managing director or other director or manager of the company:

Provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter.

Consequence of not Being Fit and Proper

(1A) The person who is not a fit and proper person pursuant to sub-section (4A) of section 242 shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision:

Provided that the Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years.

(1B) Notwithstanding anything contained in any other provision of this Act, or any other law for the time being in force, or any contract, memorandum or articles, on the removal of a person from the office of a director or any other office connected with the conduct and management of
the affairs of the company, that person shall not be entitled to, or be paid, any compensation for the loss or termination of office.

**Penalty for Contravention [Section 243(2)]**

- Any person who
- knowingly acts as a managing director or other director or manager of a company in contravention of clause (b) of sub-section (1),
- and every other director of the company who is knowingly a party to such contravention,
- shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five lakh rupees, or with both.

**Class Action**

- Such number of member or members,
- depositor or depositors or any class of them, as the case may be,
- as are indicated in sub-section (2) may,
- if they are of the opinion that
- the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors,
- file an application before the Tribunal
- on behalf of the members or depositors for seeking all or any of the following orders, namely:—

**List of Orders**

(a) to **restrain** the company from committing an act which is **ultra vires** the articles or memorandum of the company;

(b) to **restrain** the company from committing **breach** of any provision of the company's memorandum or articles;

(c) to **declare** a resolution altering the memorandum or articles of the company as **void** if the resolution was **passed by suppression** of material facts or obtained by **mis-statement** to the members or depositors;

(d) to **restrain** the company and its directors from **acting on** such resolution;

(e) to **restrain** the company from doing an act which is **contrary to the provisions of this Act**
or any other law for the time being in force;

(f) to restrain the company from taking action contrary to any resolution passed by the members;

(g) to claim damages or compensation or demand any other suitable action from or against—
   - the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part
   - the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or
   - any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) to seek any other remedy as the Tribunal may deem fit.

Liability of Firm [Section 245(2)]

Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.

Requisite Number of Members/Depositors [Section 245(3)]

(i) The requisite number of members provided in sub-section (1) shall be as under:—
   a) in the case of a company having a share capital—
      - not less than one hundred members of the company or
      - not less than such percentage of the total number of its members as may be prescribed, whichever is less,
      - or any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed,
      - subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares
   b) in the case of a company not having a share capital—
      - not less than one-fifth of the total number of its members.

(ii) The requisite number of depositors provided in sub-section (1) shall
   - not be less than one hundred depositors or
   - not less than such percentage of the total number of depositors as may be prescribed,
   - whichever is less,
   - or any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.
Points of Consideration by Tribunal [Section 245(4)]

In considering an application under sub-section (1), the Tribunal shall take into account, in particular—

(a) whether the member or depositor is acting in good faith in making the application for seeking an order;

(b) any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters provided in clauses (a) to (f) of subsection (1);

(c) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;

(d) any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;

(e) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—authorised by the company before it occurs; or ratified by the company after it occurs;

(f) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.

Other Relevant Points [Section 245(5)]

If an application filed under sub-section (1) is admitted, then the Tribunal shall have regard to the following, namely:

(a) public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;

(b) all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant’s side

(c) two class action applications for the same cause of action shall not be allowed;

(d) the cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.

Order of Tribunal Binding [Section 245(6)]
Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

**Penalty for Contravention [Section 245(7)]**

- Any company which fails to comply with an order passed by the Tribunal under this section
- shall be punishable with fine
- which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and
- every officer of the company who is in default
- shall be punishable with imprisonment for a term which may extend to three years and
- with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

**Power of Tribunal to Reject Application [Section 245(8)]**

Where any application filed before the Tribunal is found to be frivolous or vexatious,
- it shall, for reasons to be recorded in writing,
- reject the application and
- make an order that the applicant shall pay to the opposite party such cost,
- not exceeding one lakh rupees, as may be specified in the order.

**Non Applicability to Banking Company [Section 245(9)]**

Nothing contained in this section shall apply to a banking company.

---

**Case Laws:**

**Shanti Prasad Jain v Kalinga Tubes:** Conduct complained of should at least involve visible departure from the standards of their dealing and violations of conditions of fair play.
**Prevention of Oppression & Mismanagement**

**Rao v Rajeshwari Ramakrishnan:** Oppression complained off must affect a person in his capacity as a member of the company.

**Thomas Veddon V.J. v Kuttanad Robber Co. Ltd:** Non declaration of dividend is not an act of oppression. Failure to declare dividend does not amount to oppression.

**Ashok Betelnut Co. P Ltd v M.K. Chandrakanth:** Continuous losses by itself cannot be regarded as oppression while obtaining relief from Tribunal.

**Jagdish Chandra Mehra v New India Embroidery Mills:** The requirement of minimum shareholding is to be satisfied only at the time of filing application. Subsequently if some shareholders sell their shares and cease to be the member, it will not render the application invalid.

**Rajamundhry Electric Corporation v V Nageshwar Rao:** The consent to be given by a shareholder is reckoned at the beginning of the proceedings. The withdrawal of consent by any shareholder during course of proceedings shall not affect maintainability of the petition.

**Makhanlal Jain v Amrit Banaspati Company Ltd:** Consent obtained subsequent to the making of application is ineffective.

**Worldwide Agencies Pvt. Ltd. and Another v. Mrs. Margaret T. Desor and Others:** The legal representatives of a deceased member whose name is still on the register of members are entitled to file a petition under Sections 397 and 398 of the Companies Act, 1956, for relief against oppression or mismanagement.

**Re. Sindhri Iron Foundry (P) Ltd.:** If the court is satisfied about the act of oppression or mismanagement, relief can be granted even if the application is made by a majority, who have been rendered completely ineffective by the wrongful acts of a minority group.

**Sudha M. Singh v Eagle cones Pvt Ltd:** The decisions relating to operation of company's bank accounts are a part of the managerial power of the directors. The mere fact that a director is not being associated with the operation of the company's bank accounts does not constitute oppression or mismanagement.

**Lalita Rajya Lakshmi v Indian Motor Co. Ltd** Mere denial of inspection of books of accounts and documents of company to shareholders whether during pendency of petition or before it does not amount to oppression.

**Sheth Mohanlal Ganpatram v Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd:** The shareholders have alleged that the company has entered into various illegal, invalid and irregular transactions. This in itself would not constitute a ground for invoking provisions of section 241 unless it is proved that these acts are oppressive to the shareholders or prejudicial to the interest of the company or public interest.

**Yashovardhan Saboo v Groz Beckert Saboo Ltd:** Tribunal is empowered to make an order that either group shall buy the shareholding of the other at a fair price.
Kishan Lal Ahuja v Suresh Kumar Ahuja: In case, both parties fail to buy the shareholding of the other, the Tribunal may make an order of winding up of the company under just and equitable ground.

Multiple Choice Questions

1. A class application may be made by:
   - a. Members
   - b. Depositors
   - c. Directors
   - d. Both (a) and (b)

2. Who has the power to waive the requirements of eligibility while filing application u/s 241?
   - a. Tribunal
   - b. Central Government
   - c. Both (a) and (b)
   - d. Eligibility requirement can’t be waived

3. A certified copy of the order of Tribunal u/s 242 shall be filed within ----- days of
   - a. 7
   - b. 30
   - c. 15
   - d. 60

4. In case of a company not having share capital, application u/s 241 may be made by-
   - a. 100 members or 1/10th of total members
   - b. 1/5th of total number of members
   - c. Higher of (a) or (b)
   - d. Lower of (a) or (b)

5. In case of a company having share capital, an application u/s 241 may be made by-
   - a. 100 members
   - b. 1/10th of total number of members
   - c. Higher of (a) or (b)
   - d. Lower of (a) or (b)

6. On receiving application u/s 241, the tribunal may exercise powers vested in it u/s 242 only if it is of the opinion that-
   - a. The facts justify the making of winding up order
   - b. Order of winding up would unfairly prejudice members
   - c. Both (a) and (b)
   - d. Facts do not justify making of winding up order

7. A class application may be made to--
   - a. The Tribunal
   - b. The Central Government
   - c. The Registrar
   - d. Any of these

8. Where an application claiming relief from oppression or mismanagement is made to the Tribunal, the Tribunal may--
   - a. Impose such costs as it may deem
   - b. Make order altering MOA/AOA

CA. SHIVANGI AGRAWAL
### Prevention of Oppression & Mismanagement

6.16

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<th>fit</th>
<th>c. Make interim order</th>
<th>d. All of these</th>
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9. ------ class action applications for the same cause of action shall not be allowed

<table>
<thead>
<tr>
<th>a. Two</th>
<th>b. More than two</th>
<th>c. One</th>
<th>d. None of these</th>
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10. Where a class action application is found to be frivolous, the Tribunal shall direct the applicant to pay to the opposite party such cost, not exceeding ------ as the Tribunal may deem fit.

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<tr>
<th>a. Rs. 10,000</th>
<th>b. Rs. 50,000</th>
<th>c. Rs. 1,00,000</th>
<th>d. Rs. 2,00,000</th>
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11. The provisions relating to class action application shall not apply to------

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<tr>
<th>a. Banking companies</th>
<th>b. Insurance companies</th>
<th>c. Electricity companies</th>
<th>d. All of these</th>
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12. In case of a company having no share capital, a class action application shall be valid only if it is made by------

<table>
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<tr>
<th>a. 100 members or such percentage of total number of members of issued capital as may be prescribed</th>
<th>b. One or more members holding not less than such percentage of issued capital as may be prescribed</th>
<th>c. Lower of (a) or (b)</th>
<th>d. Atleast 1/5th of total number of members</th>
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### Answer to MCQs

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<td>(c)</td>
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Registered Valuers

Valuation by Registered Valuers

Scope of Valuation

Where a valuation is required to be made in respect of-
✓ any property,
✓ stocks,
✓ shares,
✓ debentures,
✓ securities or
✓ goodwill or
✓ any other assets or
✓ net worth of a company or
✓ its liabilities
✓ under this Act

it shall be valued by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be prescribed and

Appointment by Whom?

Registered Valuer shall be appointed by the
✓ audit committee or
✓ in its absence by the Board of Directors of that company.

Functions of Registered Valuers [Section 247(2)]

The valuer appointed under sub-section (1) shall,—
✓ make an impartial, true and fair valuation of any assets which may be required to be valued;
✓ exercise due diligence while performing the functions as valuer;
✓ make the valuation in accordance with such rules as may be prescribed; and
✓ not undertake valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during a period of three years prior to his appointment as valuer or three years after the valuation of assets was conducted by him.
Penalty for Contravention [Section 247(3)]

If a valuer contravenes the provisions of this section or the rules made thereunder, the valuer shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

Provided that if the valuer has contravened such provisions with the intention to defraud the company or its members, he shall be punishable with imprisonment for a term which may extend to one year and with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Consequences of Conviction [Section 247(3)]

Where a valuer has been convicted under sub-section (3), he shall be liable to—
(i) refund the remuneration received by him to the company; and
(ii) pay for damages to the company or to any other person for loss arising out of incorrect or misleading statements of particulars made in his report.

Companies (Registered Valuers and Valuation) Rules, 2017

Rule 3: Eligibility for Registered Valuers

A person shall be eligible to be a registered valuer if he-
✓ Is a valuer member of a registered valuers organisation;
✓ Is recommended by the registered valuers organisation of which he is a valuer member for registration as a valuer
✓ Has passed the valuation examination within three years preceding the date of making an application for registration
✓ Possesses the qualifications and experience as specified
✓ Is not a minor
✓ Has not been declared to be of unsound mind
✓ Is not an undischarged bankrupt, or has not applied to be adjudicated as a bankrupt
✓ Is a person resident in India
✓ Has not been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude, and a period of five years has not elapsed from the date of expiry of the sentence
✓ Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to

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be registered
✓ Has not been levied a penalty under section 271J of Income-tax Act, 1961 and five years have not elapsed after levy of such penalty; and
✓ Is a fit and proper person
For determining whether an individual is a fit and proper person under these rules, the authority may take account of any relevant consideration, including but not limited to the following criteria:
- Integrity, reputation and character,
- Absence of convictions and restraint orders, and
- Competence and financial solvency.

Eligibility for Partnership Firm
No partnership entity or company shall be eligible to be a registered valuer if:
✓ It has been set up for objects other than for rendering professional or financial services, including valuation services and that in the case of a company, it is 1[Omitted] a subsidiary, joint venture or associate of another company or body corporate;
✓ It is undergoing an insolvency resolution or is an undischarged bankrupt
✓ All the partners or directors, as the case may be, are not ineligible
✓ Three or all the partners or directors, whichever is lower, of the partnership entity or company, as the case may be, are not registered valuers
✓ None of its partners or directors, as the case may be, is a registered valuer for the asset class, for the valuation of which it seeks to be a registered valuer.

Rule 4: Qualifications and Experience
An individual shall have the following qualifications and experience to be eligible for registration under rule 3, namely:
✓ post-graduate degree or post-graduate diploma, in the specified discipline, from a University or Institute established, recognised or incorporated by law in India and at least three years of experience in the specified discipline thereafter; or
✓ a Bachelor's degree or equivalent, in the specified discipline, from a University or Institute established, recognised or incorporated by law in India and at least five years of experience in the specified discipline thereafter; or
✓ membership of a professional institute established by an Act of Parliament enacted for the purpose of regulation of a profession with at least three years' experience after such membership

Rule 5: Valuation Examination
✓ The authority shall, either on its own or through a designated agency, conduct valuation examination for one or more asset classes, for individuals, who possess the qualifications and experience as specified
✓ The authority shall determine the syllabus for various valuation specific subjects or assets classes for the valuation examination
✓ The syllabus, format and frequency of the valuation examination, including qualifying marks, shall be published on the website of the authority at least three months before the examination.
✓ An individual who passes the valuation examination, shall receive acknowledgement of
An individual may appear for the valuation examination any number of times.

Rule 6: Application for Certificate of Registration
- An individual eligible for registration as a registered valuer under rule 3 may make an application to the authority in Form-A and Firm in Form B with prescribed fees.
- The authority shall examine the application, and may grant twenty one days to the applicant to remove the deficiencies.
- The authority may require the applicant to submit additional documents or clarification or appear before authority within twenty-one days.
- If the authority is satisfied, after such scrutiny, inspection or inquiry as it deems necessary, that the applicant is eligible under these rules, it may grant a certificate of registration to the applicant to carry on the activities of a registered valuer for the relevant asset class or classes in Form-C of the Annexure-II within sixty days of receipt of the application.
- If the authority is of the prima facie opinion that the registration ought not be granted, it shall communicate the reasons for forming such an opinion within forty-five days of receipt of the application.
- The applicant shall submit an explanation as to why his/its application should be accepted within fifteen days of the receipt of the communication under sub-rule (7), to enable the authority to form a final opinion.
- After considering the explanation it may accept or reject application and communicate the same within 15 days of receiving application.

Rule 7: Conditions of Registration
- The registration granted under rule 6 shall be subject to the conditions that the valuer shall:
  - at all times possess the eligibility and qualification and experience
  - in his capacity as a registered valuer, not conduct valuation of the assets or class(es) of assets other than for which he/it has been registered by the authority
  - take prior permission of the authority for shifting his/its membership from one registered valuers organisation to another
  - maintain records of each assignment
  - comply with the Code of Conduct
  - in case a partnership entity or company is the registered valuer, allow only the partner or director who is a registered valuer for the asset class(es) that is being valued to sign and act on behalf of it;
  - take adequate steps for redressal of grievances;
  - comply with such other conditions as may be imposed by the authority

Rule 8: Conduct of Valuation
- A valuer shall make valuations as per internationally accepted valuation standards and valuation standards adopted by any registered valuers organization.
- The valuer shall, in his report, state the following:
  - background information of the asset being valued
  - purpose of valuation and appointing authority
  - identity of the valuer and any other experts involved in the valuation.
✓ disclosure of valuer interest or conflict, if any
✓ date of appointment, valuation date and date of report
✓ inspections and/or investigations undertaken
✓ nature and sources of the information used or relied upon
✓ procedures adopted in carrying out the valuation and valuation standards followed
✓ restrictions on use of the report, if any
✓ major factors that were taken into account during the valuation
conclusion and limitations

Multiple Choice Questions

1. The registered valuer shall be appointed by -----
   
   a. The audit committee  
   b. The Board  
   c. Either (a) or (b)  
   d. None of these

2. Valuation under section 247 shall be made by a person only if -----

   a. Such person possesses such qualifications and experience as may be prescribed  
   b. Such person is registered as a valuer  
   c. Such person is a member of an organisation recognised in the prescribed manner  
   d. All of these

3. Section 247 applies where a valuation is required to be made in respect of -----

   a. Goodwill  
   b. Shares  
   c. Net worth of a company  
   d. Any/ all of these

4. Where a registered valuer makes an incorrect or misleading statement in his report and is therefore convicted for contravention of section 247, he shall be liable to -----

   a. Refund to the company the remuneration received by him.  
   b. Pay damages to the company or to any other person concerned  
   c. Both (a) and (b)  
   d. None of these
Removal of Names of Companies from ROC

Power of Registrar to Remove Name of Company from Register of Companies.

Removal of Name Suo Motu [Section 248(1)]

Where the Registrar has reasonable cause to believe that—

a) a company has failed to commence its business within one year of its incorporation or

b) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455

✓ he shall send a notice to
✓ the company and
✓ all the directors of the company,
✓ of his intention to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents, if any, within a period of thirty days from the date of the notice.

Removal of Name on Application [Section 248(2)]

Without prejudice to the provisions of sub-section (1), a company may,

✓ after extinguishing all its liabilities,
✓ by a special resolution or
✓ consent of seventy-five per cent. members in terms of paid-up share capital,
✓ file an application in the prescribed manner to the Registrar
✓ for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner

Provided that in the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

Non-Applicability [Section 248(3)]

Nothing in sub-section (2) shall apply to a company registered under section 8.

Publish Of Notice [Section 248(4)]
A notice issued under sub-section (1) or sub-section (2) shall be published in the prescribed manner and also in the Official Gazette for the information of the general public.

### Striking Off Name [Section 248(5)]

At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.

### Discharge of Liabilities before Striking Name [Section 248(6)]

The Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company.

Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.

### Liability of Officer etc. To Be Continued [Section 248(7)]

The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved.

### Winding Up Powers Not affected [Section 248(8)]

Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies.

### Rule 3

Removal of name of company from the Register on suo-motu basis.-
(1) The Registrar of Companies may remove the name of a company from the register of companies in terms of sub-section (1) of section 248 of the Act:

Provided that following categories of companies shall not be removed from the register of companies under this rule and rule 4, namely:-
(i) listed companies;
(ii) companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;
(iii) vanishing companies;
(iv) companies where inspection or investigation is ordered and being carried out or actions on such order are yet to be taken up or were completed but prosecutions arising out of
REMOVAL OF NAMES OF COMPANIES FROM REGISTER OF COMPANIES

such inspection or investigation are pending in the Court;

(v) companies where notices under section 234 of the Companies Act, 1956 (1 of 1956) or section 206 or section 207 of the Act have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 has not yet been submitted or follow up of instructions on report under section 208 is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the Court;

(vi) companies against which any prosecution for an offence is pending in any court;

(vii) companies whose application for compounding is pending before the competent authority for compounding the offences committed by the company or any of its officers in default;

(viii) companies, which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;

(ix) companies having charges which are pending for satisfaction; and

(x) companies registered under section 25 of the Companies Act, 1956 or section 8 of the Act.

Explanation.- For the purposes of clause (iii), the expression “vanishing company” means a company, registered under the Act or previous company law or any other law for the time being in force and listed with Stock Exchange which has failed to file its returns with the Registrar of Companies and Stock Exchange for a consecutive period of two years, and is not maintaining its registered office at the address notified with the Registrar of Companies or Stock Exchange and none of its directors are traceable.

(2) For the purpose of sub-rule (1), the Registrar shall give a notice in writing in Form STK 1 which shall be sent to all the directors of the company at the addresses available on record, by registered post with acknowledgement due or by speed post.

(3) The notice shall contain the reasons on which the name of the company is to be removed from the register of companies and shall seek representations, if any, against the proposed action from the company and its Directors along with the copies of relevant documents, if any, within a period of thirty days from the date of the notice.

Restrictions on Making Application u/s 248 in Certain Situations

(1) An application under sub-section (2) of section 248 on behalf of a company shall not be made if, at any time in the previous three months, the company—

(a) has changed its name or shifted its registered office from one State to another;

(b) has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business;

(c) has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement;
(d) has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded; or
(e) is being wound up under Chapter XX of this Act or under the Insolvency and Bankruptcy Code, 2016."

(2) If a company files an application under sub-section (2) of section 248 in violation of sub-section (1), it shall be punishable with fine which may extend to one lakh rupees.

(3) An application filed under sub-section (2) of section 248 shall be withdrawn by the company or rejected by the Registrar as soon as conditions under sub-section (1) are brought to his notice.

**Rule 4**

Application for removal of name of company.—

(1) An application for removal of name of the company under sub-section (2) of section 248 shall be made in Form STK-2 along with the fee of ten thousand rupees.

(2) Every application under sub-rule (1) shall accompany a no objection certificate from appropriate Regulatory Authority concerned in respect of following companies, namely:-

- (i) companies which have conducted or conducting non-banking financial and investment activities as referred to in the Reserve Bank of India Act, 1934 (2 of 1934) or rules and regulations thereunder;
- (ii) housing finance companies as referred to in the Housing Finance Companies (National Housing Bank) Directions, 2010 issued under the National Housing Bank Act, 1987 (53 of 1987);
- (iii) insurance companies as referred to in the Insurance Act, 1938 (4 of 1938) or rules and regulations thereunder;
- (iv) companies in the business of capital market intermediaries as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder;
- (v) companies engaged in collective investment schemes as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder;
- (vi) asset management companies as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder;
- (vii) any other company which is regulated under any other law for the time being in force.

(3) The application in Form STK 2 shall be accompanied by -

- (i) indemnity bond duly notarised by every director in Form STK 3;
- (ii) a statement of accounts in Form No. STK-8 containing assets and liabilities of the company made up to a day, not more than thirty days before the date of application and certified by a Chartered Accountant;
- (iii) An affidavit in Form STK 4 by every director of the company;
- (iv) a copy of the special resolution duly certified by each of the directors of the company or consent of seventy five per cent of the members of the company in terms of paid up share capital as on the date of application;
- (v) a statement regarding pending litigations, if any, involving the company.
Kojol Research Development Ltd. was registered to innovate unique business ideas emerging from research and development in a new area. It is a future project and the company has no significant accounting transactions and business activities. Therefore, the company made an application to ROC for obtaining the status of a Dormant Company. The application is under process. In the meantime, the company without extinguishing all its liabilities files an application to ROC for removing the name of the Company, after passing a special resolution giving effects to this.

In the light of the provisions of the Companies Act, 2013, analyse the following:
1. Whether the application is tenable under the Act?
2. What are the restrictions imposed under the Act for making an application by a company to remove the name of the Company from the register of ROC?
3. What are the penal consequences in case of violation of restrictions?

Effect of Company as Dissolved

Where a company stands dissolved under section 248, it shall on and from the date mentioned in the notice under sub-section (5) of that section cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.

Fraudulent Application for Removal of Name

(1) Where it is found that an application by a company under sub-section (2) of section 248 has been made with the object of evading the liabilities of the company or with the intention to deceive the creditors or to defraud any other persons, the persons in charge of the management of the company shall, notwithstanding that the company has been notified as dissolved—
(a) be jointly and severally liable to any person or persons who had incurred loss or damage as a result of the company being notified as dissolved; and
(b) be punishable for fraud in the manner as provided in section 447.

(2) Without prejudice to the provisions contained in sub-section (1), the Registrar may also recommend prosecution of the persons responsible for the filing of an application under sub-section (2) of section 248.

Appeal to Tribunal
Any person aggrieved by an order of the Registrar, notifying a company as dissolved under section 248, may file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar and if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the company in the register of companies.

✓ Provided that before passing any order under this section, the Tribunal shall give a reasonable opportunity of making representations and of being heard to the Registrar, the company and all the persons concerned:

✓ Provided further that if the Registrar is satisfied, that the name of the company has been struck off from the register of companies either inadvertently or on the basis of incorrect information furnished by the company or its directors, which requires restoration in the register of companies, he may within a period of three years from the date of passing of the order dissolving the company under section 248, file an application before the Tribunal seeking restoration of name of such company.

(2) A copy of the order passed by the Tribunal shall be filed by the company with the Registrar within thirty days from the date of the order and on receipt of the order, the Registrar shall cause the name of the company to be restored in the register of companies and shall issue a fresh certificate of incorporation.

(3) If a company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal on an
application made by the company, member, creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of section 248 may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.

Multiple Choice Questions

1. Notice u/s 248 is sent by Registrar to company & directors to send representation in ----
   a. Form STK-1                   b. Form STK-3
   c. Form STK-4                   d. None of these

2. A company may file an application to the Registrar for removing its name from the register of companies only if the company is authorised by -
   a. A special resolution          b. Consent of members holding 75% paid-up share capital
   c. Both (a) and (b)              d. None of these

3. A company may file an application to the Registrar for removing its name from the register of companies only if ----
   a. It has no assets              b. The company has extinguished all its liabilities
   c. The assets of the company exceed its liabilities d. The assets of the company are more than twice of its liabilities

4. The Registrar is empowered to send a notice to the company and all its directors, of his intention to remove the name of the company from the register of companies, if the Registrar has reasonable cause to believe that a company has failed to commence its business within ------ of its incorporation.
   a. 6 months                     b. 1 year
   c. 2 years                      d. 3 years

5. Where the name of a company is removed from the register of companies, --------
   a. The liability, if any, of every director and manager shall continue
   b. The liability, if any, of every director and manager shall come to an end
   c. Every director and manager shall become personally liable for whole of the debts of the company
   d. None of these
6. With effect from such date a company stands dissolved under section 248, the Certificate of incorporation issued to it shall be deemed to have been cancelled except for the purpose of

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<td>c.</td>
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<td>d.</td>
<td>None of these</td>
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7. If an order of dissolution of a company is passed under section 248 by the Registrar, any person aggrieved by such an order may file an appeal to the Tribunal within a period of

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8. The Tribunal may under restoration of the name of the company in the register of companies

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**Answer to MCQs**

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Circumstances in which Company may be wound up

A company may, on a petition under section 272, be wound up by the Tribunal,—

a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal

b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality

c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up

d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years or

e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up
Petition for Winding Up

(1) Subject to the provisions of this section, a **petition** to the **Tribunal** for the winding up of a company **shall be presented by**—

a) the **company**;

b) any **contributory** or contributories;

c) all or any of the **persons specified** in clauses (a) and (b);

d) the **Registrar**;

e) any **person authorised by** the **Central Government** in that behalf; or

f) in a case falling under clause (b) of section 271, by the **Central Government** or a **State Government**.

Petition by Contributory

A **contributory** shall be entitled to present a **petition** for the winding up of a company, **notwithstanding that**

✓ he may be the holder of fully paid-up shares, or that

✓ the company may have no assets at all

✓ or may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities,

✓ and shares in respect of which he is a contributory or some of them were either originally allotted to him or

✓ have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up or have devolved on him through the death of a former holder.

Petition by Registrar

✓ **The Registrar shall be entitled to present a petition** for winding up under section 271, except on the grounds specified in clause (a) or clause (e) of that sub-section

✓ Provided that the **Registrar shall obtain** the **previous sanction of the Central Government to the presentation of a petition**

✓ Provided further that the **Central Government shall not accord its sanction unless the company has been given a reasonable opportunity** of making representations.

Petition by Company

A **petition** presented by the **company** for winding up before the Tribunal **shall be admitted only if accompanied by a statement of affairs** in such form and in such manner as may be prescribed.
### Filing with Registrar

A copy of the petition made under this section shall also be filed with the Registrar and the Registrar shall, without prejudice to any other provisions, submit his views to the Tribunal within sixty days of receipt of such petition.”

### Powers of Tribunal

The Tribunal may, on receipt of a petition for winding up under section 272 pass any of the following orders, namely:

- a) dismiss it, with or without costs;
- b) make any interim order as it thinks fit;
- c) appoint a provisional liquidator of the company till the making of a winding up order;
- d) make an order for the winding up of the company with or without costs; or
- e) any other order as it thinks fit:

Provided that an order under this sub-section shall be made within ninety days from the date of presentation of the petition.

Provided further that before appointing a provisional liquidator under clause (c), the Tribunal shall give notice to the company and afford a reasonable opportunity to it to make its representations, if any, unless for special reasons to be recorded in writing, the Tribunal thinks fit to dispense with such notice.

Provided also that the Tribunal shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged for an amount equal to or in excess of those assets, or that the company has no assets.

### Refusal in Just and Equitable Case

- ✓ Where a petition is presented on the ground that it is just and equitable that the company should be wound up,
- ✓ the Tribunal may refuse to make an order of winding up,
- ✓ if it is of the opinion that some other remedy is available to the petitioners and
- ✓ that they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy.

### Directions for Filing Statement of Affairs

### Duty to File Statement of Affairs

- ✓ Where a petition for winding up is filed before the Tribunal by
- ✓ any person other than the company,
- ✓ the Tribunal shall, if satisfied that
- ✓ a prima facie case for winding up of the company is made out,
- ✓ by an order direct the company
- ✓ to file its objections along with a statement of its affairs
- ✓ within thirty days of the order
✓ in such form and in such manner as may be prescribed

Provided that the Tribunal may allow a further period of thirty days in a situation of contingency or special circumstances

Provided further that the Tribunal may direct the petitioner to deposit such security for costs as it may consider reasonable as a precondition to issue directions to the company.

**Failure to File Statement of Affairs**

✓ A company, which fails to file the statement of affairs
✓ shall forfeit the right to oppose the petition and
✓ such directors and officers of the company as found responsible for such non-compliance,
✓ shall be liable for punishment as stated in this section.

**Duty to Submit Books of Accounts**

The directors and other officers of the company, in respect of which an order for winding up is passed by the Tribunal under section 273, shall, within a period of thirty days of such order, submit, at the cost of the company, the books of account of the company completed and audited up to the date of the order, to such liquidator and in the manner specified by the Tribunal.

**Penalty**

If any director or officer of the company contravenes the provisions of this section,
✓ the director or the officer of the company who is in default
✓ shall be punishable with imprisonment for a term
✓ which may extend to six months or
✓ with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

The complaint may be filed in this behalf before the Special Court by Registrar, provisional liquidator, Company Liquidator or any person authorised by the Tribunal.

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LED bulb ltd has made default in filing financial statements and annual returns for a continuous period of 4 financial years ending on 31st March, 2017. The registrar of companies having jurisdiction approached the Central Government to accord sanction to present to Tribunal(NCLT) for the winding up of the company on the ground u/s 272 of the Companies Act, 2013. Examine the validity of ROC move, explaining relevant provisions of the Companies Act, 2013. State the time limit for passing an order by Tribunal u/s 273 of the Companies Act, 2013?

**Company Liquidators and their Appointments**

**Appointment of Liquidator**
For the purposes of winding up of a company by the Tribunal, the Tribunal at the time of the passing of the order of winding up, shall appoint an Official Liquidator or a liquidator from the panel maintained under sub-section (2) as the Company Liquidator.

The provisional liquidator or the Company Liquidator, as the case may, shall be appointed by the Tribunal from amongst the insolvency professionals registered under the Insolvency and Bankruptcy Code, 2016.

Restriction on Powers of Liquidator

Where a provisional liquidator is appointed by the Tribunal, the Tribunal may limit and restrict his powers by the order appointing him or it or by a subsequent order, but otherwise he shall have the same powers as a liquidator.

Terms of Appointment

The terms and conditions of appointment of a provisional liquidator or Company Liquidator and the fee payable to him or it shall be specified by the Tribunal on the basis of task required to be performed, experience, qualification of such liquidator and size of the company.

Declaration of Independence

On appointment as provisional liquidator or Company Liquidator, as the case may be, such liquidator shall file a declaration within seven days from the date of appointment in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the Tribunal and such obligation shall continue throughout the term of his appointment.

Appointment of Provisional Liquidator

While passing a winding up order, the Tribunal may appoint a provisional liquidator, if any, appointed under section 273, as the Company Liquidator for the conduct of the proceedings for the winding up of the company.

Removal and Replacement of Liquidator

The Tribunal may, on a reasonable cause being shown and for reasons to be recorded in writing, remove the provisional liquidator or the Company Liquidator, as the case may be, as liquidator of the company on any of the following grounds, namely:—

(a) misconduct;
(b) fraud or misfeasance;
(c) professional incompetence or failure to exercise due care and diligence in performance of the powers and functions;
(d) inability to act as provisional liquidator or as the case may be, Company Liquidator;
(e) conflict of interest or lack of independence during the term of his appointment that would justify removal.

Transfer of Work

CA. SHIVANGI AGRAWAL
In the event of death, resignation or removal of the provisional liquidator or as the case may be, Company Liquidator, the Tribunal may transfer the work assigned to him or it to another Company Liquidator for reasons to be recorded in writing.

**Recovery of Loss or Damage**

Where the Tribunal is of the opinion that any liquidator is responsible for causing any loss or damage to the company due to fraud or misfeasance or failure to exercise due care and diligence in the performance of his or its powers and functions, the Tribunal may recover or cause to be recovered such loss or damage from the liquidator and pass such other orders as it may think fit.

**Reasonable Opportunity**

The Tribunal shall, before passing any order under this section, provide a reasonable opportunity of being heard to the provisional liquidator or, as the case may be, Company Liquidator.

**Intimation to Company Liquidator, Provisional Liquidator and Registrar**

**Intimation of Order by Tribunal**

Where the Tribunal makes an order for appointment of provisional liquidator or for the winding up of a company, it shall, within a period not exceeding seven days from the date of passing of the order, cause intimation thereof to be sent to the Company Liquidator or provisional liquidator, as the case may be, and the Registrar.

**Intimation by Registrar**

- On receipt of the copy of order of appointment of provisional liquidator or winding up order,
- the Registrar shall make an endorsement to that effect in his records relating to the company and
- notify in the Official Gazette that such an order has been made and
- in the case of a listed company, the Registrar shall intimate about such appointment or order,
- as the case may be, to the stock exchange or exchanges where the securities of the company are listed.

**Winding up Order to be Deemed Notice**

The winding up order shall be deemed to be a notice of discharge to the officers, employees and workmen of the company, except when the business of the company is continued.

**Constituting Winding up Committee**

Within three weeks from the date of passing of winding up order, the Company Liquidator shall make an application to the Tribunal for constitution of a winding up committee to assist and monitor the progress of liquidation proceedings by the Company Liquidator in
carrying out the function as provided in sub-section (5) and such winding up committee shall comprise of the following persons, namely:—

(i) Official Liquidator attached to the Tribunal
(ii) nominee of secured creditors; and
(iii) a professional nominated by the Tribunal.

Functions of Winding Up Committee

The Company Liquidator shall be the convener of the meetings of the winding up committee which shall assist and monitor the liquidation proceedings in following areas of liquidation functions, namely:—

(i) taking over assets
(ii) examination of the statement of affairs
(iii) recovery of property, cash or any other assets of the company including benefits derived therefrom
(iv) review of audit reports and accounts of the company
(v) sale of assets
(vi) finalisation of list of creditors and contributories
(vii) compromise, abandonment and settlement of claims
(viii) payment of dividends, if any and
(ix) any other function, as the Tribunal may direct from time to time.

Reporting

✓ The Company Liquidator shall place before the Tribunal a report along with minutes of the meetings of the committee on monthly basis duly signed by the members present in the meeting for consideration till the final report for dissolution of the company is submitted before the Tribunal.
✓ The Company Liquidator shall prepare the draft final report for consideration and approval of the winding up committee.
✓ The final report so approved by the winding up committee shall be submitted by the Company Liquidator before the Tribunal for passing of a dissolution order in respect of the company.

Effect of Winding up Order

The order for the winding up of a company shall operate in favour of all the creditors and all contributories of the company as if it had been made out on the joint petition of creditors and contributories.

Stay of Suits, Etc., on Winding up Order

✓ When a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose:
✓ Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.
✓ Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

Jurisdiction of Tribunal

The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of,—

(a) any suit or proceeding by or against the company;
(b) any claim made by or against the company, including claims by or against any of its branches in India;
(c) any application made under section 233;
(d) any question of priorities or any other question whatsoever, whether of law or facts, including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter arising out of, or in relation to winding up of the company, whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted, before or after the order for the winding up of the company is made."

Submission of Report by Company Liquidator

Contents of Report

Where the Tribunal has made a winding up order or appointed a Company Liquidator, such liquidator shall, within sixty days from the order, submit to the Tribunal, a report containing the following particulars, namely:

a) the nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company:

Provided that the valuation of the assets shall be obtained from registered valuers for this purpose;
b) amount of capital issued, subscribed and paid-up;
c) the existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and in the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given;
d) the debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof;
e) guarantees, if any, extended by the company;
f) list of contributories and dues, if any, payable by them and details of any unpaid call;
g) details of trade marks and intellectual properties, if any, owned by the company;
h) details of subsisting contracts, joint ventures and collaborations, if any;
i) details of holding and subsidiary companies, if any;
j) details of legal cases filed by or against the company; and
k) any other information which the Tribunal may direct or the Company Liquidator may consider necessary to include.
Other Contents

✓ The Company Liquidator shall include in his report the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any officer of the company in relation to the company since the formation thereof and any other matters which, in his opinion, it is desirable to bring to the notice of the Tribunal.

✓ The Company Liquidator shall also make a report on the viability of the business of the company or the steps which, in his opinion, are necessary for maximising the value of the assets of the company.

✓ The Company Liquidator may also, if he thinks fit, make any further report or reports.

Right of Inspection

Any person describing himself in writing to be a creditor or a contributory of the company shall be entitled by himself or by his agent at all reasonable times to inspect the report submitted in accordance with this section and take copies thereof or extracts therefrom on payment of the prescribed fees.

Directions of Tribunal on Report of Company Liquidator

Fixing Time Limit for Completion of Proceedings

The Tribunal shall, on consideration of the report of the Company Liquidator, fix a time limit within which the entire proceedings shall be completed and the company be dissolved.

Revision of Time Limit

The Tribunal may,
✓ if it is of the opinion, at any stage of the proceedings, or
✓ on examination of the reports submitted to it by the Company Liquidator and
✓ after hearing the Company Liquidator, creditors or contributories or any other interested person, that
✓ it will not be advantageous or economical to continue the proceedings,
✓ revise the time limit within which the entire proceedings shall be completed and the company be dissolved.

Order of Sale

The Tribunal may, on examination of the reports submitted to it by the Company Liquidator and after hearing the Company Liquidator, creditors or contributories or any other interested person, order sale of the company as a going concern or its assets or part thereof.

Appointment of Sale Committee

The Tribunal may, where it considers fit, appoint a sale committee comprising such
creditors, promoters and officers of the company as the Tribunal may decide to assist the Company Liquidator in sale.

Order for Investigation

Where a report is received from the Company Liquidator or the Central Government or any person that
- a fraud has been committed in respect of the company,
- the Tribunal shall, without prejudice to the process of winding up,
- order for investigation under section 210, and
- on consideration of the report of such investigation it may pass order and give directions under sections 339 to 342 or direct the Company Liquidator to file a criminal complaint against persons who were involved in the commission of fraud.

Order for Protecting Assets

The Tribunal may order for taking such steps and measures, as may be necessary, to protect, preserve or enhance the value of the assets of the company.

Other Orders

The Tribunal may pass such other order or give such other directions as it considers fit.

Custody of Company’s Properties

Liquidator to take Custody of Company Properties

- Where a winding up order has been made or
- where a provisional liquidator has been appointed,
- the Company Liquidator or the provisional liquidator, as the case may be,
- shall, on the order of the Tribunal, forthwith
- take into his or its custody or control all the property, effects and actionable claims to which the company is or appears to be entitled to and
- take such steps and measures, as may be necessary, to protect and preserve the properties of the company.

All the property and effects of the company shall be deemed to be in the custody of the Tribunal from the date of the order for the winding up of the company.

Requiring Contributory etc. to pay, deliver etc

On an application by the Company Liquidator or otherwise,
- the Tribunal may, at any time after the making of a winding up order,
- require any contributory for the time being on the list of contributories, and any trustee, receiver, banker, agent, officer or other employee of the company,
- to pay, deliver, surrender or transfer forthwith, or within such time as the Tribunal directs,
- to the Company Liquidator,
- any money, property or books and papers in his custody or under his control
- to which the company is or appears to be entitled.
Promoters, Directors, Etc., To Cooperate With Company Liquidator

The promoters, directors, officers and employees, who are or have been in employment of the company or acting or associated with the company shall extend full cooperation to the Company Liquidator in discharge of his functions and duties.

Penalty

Where any person, without reasonable cause, fails to discharge his obligations, he shall be punishable

- with imprisonment which may extend to six months or
- with fine which may extend to fifty thousand rupees,
- or with both

Settlement of List of Contributories and Application of Assets

Meaning of Contributory [Section 2(26)]

- Contributory means a person liable to contribute towards assets of the Company in the event of winding up.
- A person holding fully paid up shares in a company shall be considered as a contributory but shall have no liabilities of a contributory under the Act whilst retaining rights of such a contributory

Settlement of List of Contributories

- As soon as may be after the passing of a winding up order by the Tribunal, the Tribunal shall settle a list of contributories, cause rectification of register of members in all cases where rectification is required in pursuance of this Act and shall cause the assets of the company to be applied for the discharge of its liability.
- Provided that where it appears to the Tribunal that it would not be necessary to make calls on or adjust the rights of contributories, the Tribunal may dispense with the settlement of a list of contributories.

In settling the list of contributories, the Tribunal shall distinguish between those who are contributories in their own right and those who are contributories as being representatives of, or liable for the debts of, others.

Conditions of Contribution

While settling the list of contributories, the Tribunal shall include every person, who is or has been a member, who shall be liable to contribute to the assets of the company an amount sufficient for payment of the debts and liabilities and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, subject to the following conditions, namely:—
a) a person who has been a member shall not be liable to contribute if he has ceased to be a member for the preceding one year or more before the commencement of the winding up

b) a person who has been a member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member

c) no person who has been a member shall be liable to contribute unless it appears to the Tribunal that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act

d) in the case of a company limited by shares, no contribution shall be required from any person, who is or has been a member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as such member

e) in the case of a company limited by guarantee, no contribution shall be required from any person, who is or has been a member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up but if the company has a share capital, such member shall be liable to contribute to the extent of any sum unpaid on any shares held by him as if the company were a company limited by shares.

M/S IJK ltd was wound up with effect from 1st March 2018 by an order of the court. Mr. A who ceased to be a member of the company from 1st June 2017, has received notice from liquidator that he should deposit a sum of Rs. 5000 as his contribution towards the liability on the shares previously held by him. In this context explain whether Mr. A can be called as contributory, whether he can be made liable and whether there is any limitation on his liability.

Obligations of Directors and Managers

In the case of a limited company, any person who is or has been a director or manager, whose liability is unlimited under the provisions of this Act, shall, in addition to his liability, if any, to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of winding up, a member of an unlimited company

Exceptions

(a) a person who has been a director or manager shall not be liable to make such further contribution, if he has ceased to hold office for a year or upwards before the commencement of the winding up

(b) a person who has been a director or manager shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office

(c) subject to the articles of the company, a director or manager shall not be liable to make such further contribution unless the Tribunal deems it necessary to require the contribution in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up.
Advisory Committee

The Tribunal may, while passing an order of winding up of a company, direct that there shall be, an advisory committee to advise the Company Liquidator and to report to the Tribunal on such matters as the Tribunal may direct.

Composition

The advisory committee appointed by the Tribunal shall consist of
- not more than twelve members,
- being creditors and contributories of the company or
- such other persons in such proportion
- as the Tribunal may, keeping in view the circumstances of the company under liquidation, direct.

Convening Meeting to Determine Members

The Company Liquidator shall convene a meeting of creditors and contributories, as ascertained from the books and documents, of the company within thirty days from the date of order of winding up for enabling the Tribunal to determine the persons who may be members of the advisory committee.

Inspection of Books

The advisory committee shall have the right to inspect the books of account and other documents, assets and properties of the company under liquidation at a reasonable time.

Other Points

- The provisions relating to the convening of the meetings, the procedure to be followed thereat and other matters relating to conduct of business by the advisory committee shall be such as may be prescribed.
- The meeting of advisory committee shall be chaired by the Company Liquidator.

Submission of Periodical Reports to Tribunal

- The Company Liquidator shall make periodical reports to the Tribunal and in any case make a report at the end of each quarter with respect to the progress of the winding up of the company in such form and manner as may be prescribed.
- The Tribunal may, on an application by the Company Liquidator, review the orders made by it and make such modifications as it thinks fit.

Powers and Duties of Company Liquidator

Subject to directions by the Tribunal, if any, in this regard, the Company Liquidator, in a winding up of a company by the Tribunal, shall have the power—
a) **to carry** on the **business** of the company so far as may be **necessary** for the beneficial winding up of the company

b) **to do all acts** and to **execute**, in the name and on behalf of the company, all **deeds, receipts** and other **documents**, and for that purpose, to use, when necessary, the company's seal

c) **to sell** the **immovable and movable property and actionable claims** of the company by public **auction** or private **contract**, with power to transfer such property to any person or body corporate, or to sell the same in parcels

d) **to sell** the whole of the **undertaking** of the company as a going concern

e) **to raise** any **money** required on the security of the assets of the company

f) **to institute** or **defend** any **suit**, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company

g) **to invite** and **settle claim** of creditors, employees or any other claimant and distribute sale proceeds in accordance with priorities established under this Act

h) **to inspect** the **records** and returns of the company on the files of the Registrar or any other authority

i) **to prove** rank and **claim** in the insolvency of any contributory for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors

j) **to draw, accept, make and endorse** any **negotiable instruments** including cheque, bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if such instruments had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business

k) **to take out**, in his **official name, letters of administration** to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the Company Liquidator to take out the letters of administration or recover the money, be deemed to be due to the Company Liquidator himself

l) **to obtain** any **professional assistance** from any person or appoint any professional, in discharge of his duties, obligations and responsibilities and for protection of the assets of the company, appoint an agent to do any business which the Company Liquidator is unable to do himself

m) **to take all such actions, steps, or to sign, execute and verify** any **paper, deed, document, application, petition, affidavit, bond or instrument** as may be necessary,—

- ✓ for **winding up** of the company
- ✓ for **distribution of assets**
- ✓ in **discharge of his duties** and obligations and functions as Company Liquidator; and

n) **to apply to the Tribunal for** such **orders or directions** as may be **necessary** for the winding up of the company.

✓ The exercise of powers by the Company Liquidator shall be subject to the overall control of the Tribunal.
✓ The Company Liquidator shall perform such other duties as the Tribunal may specify in this behalf.
Professional Assistance to Company Liquidator

- The Company Liquidator may, with the sanction of the Tribunal, appoint one or more
  - chartered accountants or
  - company secretaries or
  - cost accountants or
  - legal practitioners or
  - such other professionals
  on such terms and conditions, as may be necessary, to assist him in the performance of his duties and functions under this Act.

- Any person appointed under this section shall disclose forthwith to the Tribunal in the prescribed form any conflict of interest or lack of independence in respect of his appointment.

Exercise and Control of Company Liquidator's Powers

Overriding Effect of Direction by Creditors or Contributories

- Subject to the provisions of this Act, the Company Liquidator shall, in the administration of the assets of the company and the distribution thereof among its creditors, have regard to any directions which may be given by the resolution of the creditors or contributories at any general meeting or by the advisory committee.

- Any directions given by the creditors or contributories at any general meeting shall, in case of conflict, be deemed to override any directions given by the advisory committee.

Summon Of Meetings

The Company Liquidator—

- may summon meetings of the creditors or contributories, whenever he thinks fit, for the purpose of ascertaining their wishes; and
- shall summon such meetings at such times, as the creditors or contributories, as the case may be, may, by resolution, direct, or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories, as the case may be.

Appeal to Tribunal

Any person aggrieved by any act or decision of the Company Liquidator may apply to the Tribunal, and the Tribunal may confirm, reverse or modify the act or decision complained of and make such further order as it thinks just and proper in the circumstances.

Books to be kept by Company Liquidator

Section 291

Section 292

Section 293
The Company **Liquidator shall keep proper books** in such manner, as may be prescribed, in which he shall cause entries or minutes to be made of proceedings at meetings and of such other matters as may be prescribed.

**Power of Inspection**

Any creditor or contributory may, subject to the control of the Tribunal, inspect any such books, personally or through his agent.

**Audit of Company Liquidator’s Accounts**

**Maintenance of Books of Accounts**

The Company **Liquidator shall maintain proper and regular books of account including accounts of receipts and payments** made by him in such form and manner as may be prescribed.

**Presentment of Receipts and Payments to Tribunal**

The Company **Liquidator shall**, at such times as may be prescribed but **not less than twice in each year during his tenure of office**, present to the Tribunal an account of the receipts and payments as such liquidator in the prescribed form in duplicate, which shall be verified by a declaration in such form and manner as may be prescribed.

**Audit of Accounts**

The Tribunal shall cause the accounts to be audited in such manner as it thinks fit, and for the purpose of the audit, the Company **Liquidator shall furnish** to the Tribunal with such vouchers and information as the Tribunal may require, and the Tribunal may, at any time, require the production of, and inspect, any books of account kept by the Company Liquidator.

**Filing with Tribunal and Registrar**

When the accounts of the company have been audited, one copy thereof shall be filed by the Company Liquidator with the Tribunal, and the other copy shall be delivered to the Registrar which shall be open to inspection by any creditor, contributory or person interested.

**Forwarding In Case of Government Company**

Where an account referred above relates to a Government company, the Company Liquidator shall forward a copy thereof—

a) to the Central Government, if that Government is a member of the Government company; or

b) to any State Government, if that Government is a member of the Government company; or

c) to the Central Government and any State Government, if both the Governments are members of the Government company.
Sending Copy to Creditors and Contributory

✓ The Company **Liquidator shall cause** the accounts when audited, or a summary thereof, to be **printed, and shall send a printed copy** of the accounts or summary thereof **by post to every creditor and every contributory**

✓ Provided that the Tribunal may dispense with the compliance of the provisions of this sub-section in any case it deems fit.

Payment of Debts by Contributory and Extent of Set-Off

Order Requiring Contributories to Pay

The **Tribunal may**, at any time

✓ after passing of a winding up order,

✓ **pass an order requiring** any contributory for the time being on the list of contributories to pay,

✓ in the manner directed by the order,

✓ **any money due to the company, from him or from the estate** of the person whom he represents, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

Set-Off

The **Tribunal**, in making an order, under sub-section (1), **may,—**

a) **in the case of an unlimited company, allow to the contributory, by way of setoff, any money due to him** or to the estate which he represents, from the company, **on any independent dealing or contract with the company**, but not any money due to him as a member of the company in respect of any dividend or profit; and

b) **in the case of a limited company, allow to any director or manager whose liability is unlimited**, or to his estate, **such set-off**.

In the case of any company, whether limited or unlimited, when all the creditors have been paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

Power of Tribunal to Make Calls

The **Tribunal may**, at any time after the passing of a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company,—

a) **make calls on all or any of the contributories** for the time being on the list of the contributories, **to the extent of their liability**, for payment of any money which the Tribunal considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves; and

b) **make an order for payment of any calls so made**
Adjustment of Rights of Contributories

The Tribunal shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.

Power to Order Costs

The Tribunal may, in the event of the assets of a company being insufficient to satisfy its liabilities, make an order for the payment out of the assets, of the costs, charges and expenses incurred in the winding up, in such order of priority inter se as the Tribunal thinks just and proper.

Power To Summon Persons Suspected Of Having Property Of Company, Etc.

Issue of Summons

The Tribunal may, at any time after the appointment of a provisional liquidator or the passing of a winding up order, summon before it

- any officer of the company or person known or suspected to have in his possession any property or books or papers, of the company, or
- known or suspected to be indebted to the company,
- or any person whom the Tribunal thinks to be capable of giving information concerning the promotion, formation, trade, dealings, property, books or papers, or affairs of the company.

Power of Tribunal to Examine on Oath

The Tribunal may examine any officer or person so summoned on oath concerning the matters aforesaid, either by word of mouth or on written interrogatories or on affidavit and may, in the first case, reduce his answers to writing and require him to sign them.

Production of Books and Papers

The Tribunal may require any officer or person so summoned to produce any books and papers relating to the company in his custody or power, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to such lien, and the Tribunal shall have power to determine all questions relating to that lien.

Report of Debt or Property

The Tribunal may direct the liquidator to file before it a report in respect of debt or property of the company in possession of other persons.

Order of Tribunal for Making Payment/Delivery Of Property

If the Tribunal finds that—
(a) a person is indebted to the company, the Tribunal may order him to pay to the...
provisional liquidator or, as the case may be, the liquidator at such time and in such manner as the Tribunal may consider just, the amount in which he is indebted, or any part thereof, either in full discharge of the whole amount or not, as the Tribunal thinks fit, with or without costs of the examination;

(b) a person is in possession of any property belonging to the company, the Tribunal may order him to deliver to the provisional liquidator or, as the case may be, the liquidator, that property or any part thereof, at such time, in such manner and on such terms as the Tribunal may consider just.

Other Relevant Points

- If any officer or person so summoned fails to appear before the Tribunal at the time appointed without a reasonable cause, the Tribunal may impose an appropriate cost.

- Every order made shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Code of Civil Procedure, 1908.

- Any person making any payment or delivery in pursuance of an order made shall by such payment or delivery be, unless otherwise directed by such order, discharged from all liability whatsoever in respect of such debt or property.

Power to Order Examination of Promoters, Directors, Etc.

Power of Tribunal to Issue Directions

- Where an order has been made for the winding up of a company by the Tribunal,
- and the Company Liquidator has made a report to the Tribunal under this Act,
- stating that in his opinion a fraud has been committed
  - by any person
  - in the promotion,
  - formation,
  - business or
  - conduct of affairs of the company
  - since its formation,
- the Tribunal may, after considering the report,
- direct that such person or officer shall attend before the Tribunal
- on a day appointed by it for that purpose, and
- be examined as to the promotion or formation or the conduct of the business of the company or as to his conduct and dealings as an officer thereof.

Examination with Legal Assistance

The Company Liquidator shall take part in the examination, and for that purpose he or it may, if specially authorised by the Tribunal in that behalf, employ such legal assistance as may be sanctioned by the Tribunal.

Examination on Oath
The person shall be examined on oath and shall answer all such questions as the Tribunal may put, or allow to be put, to him.

Rights of Persons to be examined

A person ordered to be examined under this section—
   a) shall, before his examination, be furnished at his own cost with a copy of the report of the Company Liquidator; and
   b) may at his own cost employ chartered accountants or company secretaries or cost accountants or legal practitioners entitled to appear before the Tribunal under section 432, who shall be at liberty to put to him such questions as the Tribunal may consider just for the purpose of enabling him to explain or qualify any answers given by him.

Duty of Company Liquidator To Appear

If any such person applies to the Tribunal to be exculpated from any charges made or suggested against him, it shall be the duty of the Company Liquidator to appear on the hearing of such application and call the attention of the Tribunal to any matters which appear to the Company Liquidator to be relevant.

Order for Payment of Cost

If the Tribunal, after considering any evidence given or hearing witnesses called by the Company Liquidator, allows the above application, the Tribunal may order payment to the applicant of such costs as it may think fit.

Notes of Examination

Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, a copy be supplied to him and may thereafter be used in evidence against him, and shall be open to inspection by any creditor or contributory at all reasonable times.

Adjournment

The Tribunal may, if it thinks fit, adjourn the examination from time to time.

Examination before any Authorized Person

An examination under this section may, if the Tribunal so directs, be held before any person or authority authorised by the Tribunal.

Exercise of Powers Of Tribunal

The powers of the Tribunal under this section as to the conduct of the examination, but not as to costs, may be exercised by the person or authority before whom the examination is held.
Arrest of Person Trying to Leave India or Abscond

At any time either before or after passing a winding up order, if the Tribunal is satisfied that a contributory or a person having property, accounts or papers of the company in his possession is about to leave India or otherwise to abscond, or is about to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, the Tribunal may cause—
(a) the contributory to be detained until such time as the Tribunal may order; and
(b) his books and papers and movable property to be seized and safely kept until such time as the Tribunal may order.

Dissolution of Company by Tribunal

Application for Dissolution

When the affairs of a company have been completely wound up, the Company Liquidator shall make an application to the Tribunal for dissolution of such company.

Order of Dissolution

The Tribunal shall on an application filed by the Company Liquidator or when the Tribunal is of the opinion that it is just and reasonable in the circumstances of the case that an order for the dissolution of the company should be made, make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

Filing of Dissolution

A copy of the order shall, within thirty days from the date thereof, be forwarded by the Company Liquidator to the Registrar who shall record in the register relating to the company a minute of the dissolution of the company.

Penalty

If the Company Liquidator makes a default in forwarding a copy of the order within the period specified in sub-section (3), the Company Liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the default continues.

Appeals from Orders made before Commencement of Act

Nothing in this Chapter shall affect the operation or enforcement of any order made by any Court in any proceedings for the winding up of a company immediately before the commencement of this Act and an appeal against such order shall be filed before such authority competent to hear such appeals before such commencement.
Overriding Preferential Payments

✓ In the winding up of a company under this Act, the following debts shall be paid in priority to all other debts:
  • workmen's dues; and
  • where a secured creditor has realised a secured asset, so much of the debts due to such secured creditor as could not be realised by him or the amount of the workmen's portion in his security whichever is less, pari passu with the workmen's dues

Provided that in case of the winding up of a company, the sums of wages or salary and accrued holiday remuneration referred in explanation of workmen's due which are payable for a period of two years preceding the winding up order or such other period as may be prescribed, shall be paid in priority to all other debts within a period of thirty days of sale of assets and shall be subject to such charge over the security of secured creditors as may be prescribed.

✓ The debts payable under the proviso above shall be paid in full before any payment is made to secured creditors and thereafter debts payable under that subsection shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Meaning
(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947

(b) "workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely: —
  ✓ all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to the company and any compensation payable to any workman under Industrial Disputes Act
  ✓ all accrued holiday remuneration becoming payable to any workman
  ✓ unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for
  ✓ compensation under the said Act in respect of the death or disablement of any workman of the company
  ✓ all sums due to any workman from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of the amount of workmen's dues and the amount of the debts due to the secured creditors.
Illustration
The value of the security of a secured creditor of a company is Rs. 1,00,000. The total amount of the workmen's dues is Rs. 1,00,000. The amount of the debts due from the company to its secured creditors is Rs. 3,00,000. The aggregate of the amount of workmen's dues and the amount of debts due to secured creditors is Rs. 4,00,000. The workmen's portion of the security is, therefore, one-fourth of the value of the security, that is Rs. 25,000.*

Preferential Payments

In a winding up, subject to the provisions of section 326, there shall be paid in priority to all other debts,—

a) all revenues, taxes, cesses and rates due from the company to the Central Government or a State Government or to a local authority at the relevant date, and having become due and payable within the twelve months immediately before that date

b) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any employee in respect of services rendered to the company and due for a period not exceeding four months within the twelve months immediately before the relevant date, subject to the condition that the amount payable under this clause to any workman shall not exceed such amount as may be notified

c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death, to any other person claiming under him, on the termination of his employment before, or by the winding up order, or, as the case may be, the dissolution of the company

d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company, all amount due in respect of contributions payable during the period of twelve months immediately before the relevant date by the company as the employer of persons under the Employees’ State Insurance Act, 1948 or any other law for the time being in force

e) unless the company has, at the commencement of winding up, under such a contract with any insurer as is mentioned in section 14 of the Workmen’s Compensation Act, 1923, rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company Provided that where any compensation under the said Act is a weekly payment, the amount payable under this clause shall be taken to be the amount of the lump sum for which such weekly payment could, if redeemable, be redeemed, if the employer has made an application under that Act

f) all sums due to any employee from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the employees, maintained by the company; and

g) the expenses of any investigation held in pursuance of sections 213 and 216, in so far as they are payable by the company.

Other Relevant Points

✓ Where any payment has been made to any employee of a company on account of wages or salary or accrued holiday remuneration, himself or, in the case of his death, to any other person claiming through him, out of money advanced by some person for that
purpose, the person by whom the money was advanced shall, in a winding up, have a
right of priority in respect of the money so advanced and paid-up to the amount by
which the sum in respect of which the employee or other person in his right would have
been entitled to priority in the winding up has been reduced by reason of the payment
having been made.

✓ The debts enumerated in this section shall—
(a) rank equally among themselves and be paid in full, unless the assets are
insufficient to meet them, in which case they shall abate in equal proportions; and
(b) so far as the assets of the company available for payment to general creditors are
insufficient to meet them, have priority over the claims of holders of debentures
under any floating charge created by the company, and be paid accordingly out of
any property comprised in or subject to that charge.

✓ Subject to the retention of such sums as may be necessary for the costs and expenses of
the winding up, the debts under this section shall be discharged forthwith so far as the
assets are sufficient to meet them, and in the case of the debts to which priority is given
under clause (d) of sub-section (1), formal proof thereof shall not be required except in
so far as may be otherwise prescribed.

✓ In the event of a landlord or other person distraining or having distrained on any goods
or effects of the company within three months immediately before the date of a winding
up order, the debts to which priority is given under this section shall be a first charge on
the goods or effects so distrained on or the proceeds of the sale thereof:
✓ Provided that, in respect of any money paid under any such charge, the landlord or other
person shall have the same rights of priority as the person to whom the payment is
made.

✓ Any remuneration in respect of a period of holiday or of absence from work on medical
grounds through sickness or other good cause shall be deemed to be wages in respect of
services rendered to the company during that period.

Non-Applicability

Sections 326 and 327 shall not be applicable in the event of liquidation under the Insolvency
and Bankruptcy Code, 2016.

Consider the following cases:

Case (a).
M/s Raman Ltd. was wound up by the Tribunal. The Liquidator invited claims from its creditors
which stood as under:

<table>
<thead>
<tr>
<th>Type of Claim</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income tax dues</td>
<td>Rs. 11 Lakhs</td>
</tr>
<tr>
<td>Sales tax dues</td>
<td>Rs. 5 lakhs</td>
</tr>
<tr>
<td>Dues of Workers</td>
<td>Rs. 25 lakhs</td>
</tr>
<tr>
<td>Unsecured loans payable to directors</td>
<td>Rs. 25 lakhs</td>
</tr>
<tr>
<td>Trade creditors who supplied raw material</td>
<td>Rs. 25 lakhs</td>
</tr>
<tr>
<td>Secured creditor being the bankers of the company</td>
<td>Rs. 75 lakhs</td>
</tr>
</tbody>
</table>

CA. SHIVANGI AGRAWAL
Liquidator could realise only Rs. 80 lakhs by sale of assets and realisations made from the company’s debtors, which is not sufficient to pay to all the creditors. Please decide the order of priority for payment to creditors explaining the relevant provisions of the Companies Act, 2013.

Case (b).
Mars India Limited, a company incorporated under the Companies Act, 2013 is being wound up by the Tribunal. After realization of the assets of the company, the liquidator has an amount of Rs. 70,00,000 at his disposal towards payment of creditors of the said company. The details of creditors are as follows:

i) Unsecured creditors Rs. 50,00,000
ii) Taxes and duties payable to Government Rs. 5,00,000
iii) Dues to workers Rs. 30,00,000
iv) Dues to secured creditors Rs. 40,00,000

The available amount with the liquidator, obviously is not sufficient to meet the claims of all the creditors. Moreover, the company had already created a charge on all assets of the company in favour of the secured creditors. Explain the procedure to be followed by the liquidator for payment of dues as provided in the Companies Act, 2013.

Fraudulent Preference

Restoration of Position in Fraudulent Preference

✓ Where a company has given preference to
✓ a person who is one of the creditors of the company or
✓ a surety or guarantor for any of the debts or other liabilities of the company, and
✓ the company does anything or suffers anything done
✓ which has the effect of putting that person into a position
✓ which, in the event of the company going into liquidation,
✓ will be better than the position he would have been in
✓ if that thing had not been done prior to six months of making winding up application,
✓ the Tribunal, if satisfied that, such transaction is a fraudulent preference
✓ may order as it may think fit for restoring the position to what it would have been if the company had not given that preference.

Order of Tribunal

If the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, execution made, taken or done by or against a company within six months before making winding up application, the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position.

A company was in financial distress. They pledged certain immovable properties with a nationalized bank in the belief that their loan limits would be increased. However...
within 3 months, some creditors filed petition for winding up. The management was accused of fraudulent preference.
  a) In the above context discuss fraudulent preference
  b) Would your answer be different if the charge was created in favour of an NBFC?

Transfers not in Good Faith to Be Void

Any transfer of property, movable or immovable, or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by the Tribunal under this Act shall be void against the Company Liquidator

Certain Transfers to be Void

Any transfer or assignment by a company of all its properties or assets to trustees for the benefit of all its creditors shall be void

Liabilities and Rights of Certain Persons Fraudulently Preferred

✓ Where a company is being wound up and
✓ anything made, taken or done after the commencement of this Act
✓ is invalid under section 328 as a fraudulent preference of
✓ a person interested in property mortgaged or charged to secure the company’s debt,
✓ then, without prejudice to any rights or liabilities arising,
✓ apart from this provision,
✓ the person preferred shall be subject to the same liabilities, and
✓ shall have the same rights, as if he had undertaken to be personally liable as a surety
✓ for the debt,
✓ to the extent of the mortgage or charge on the property or the value of his interest, whichever is less.

The value of the interest of the person preferred under sub-section (1) shall be determined as at the date of the transaction constituting the fraudulent preference, as if the interest were free of all encumbrances other than those to which the mortgage or charge for the debt of the company was then subject.

On an application made to the Tribunal with respect to any payment on the ground that the payment was a fraudulent preference of a surety or guarantor, the Tribunal shall have jurisdiction to determine any questions with respect to the payment arising between the person to whom the payment was made and the surety or guarantor and to grant relief in respect thereof, notwithstanding that it is not necessary so to do for the purposes of the winding up, and for that purpose, may give leave to bring in the surety or guarantor as a third party as in the case of a suit for the recovery of the sum paid.
The provisions of sub-section (3) shall apply mutatis mutandis in relation to transactions other than payment of money.

Effect of Floating Charge

Where a company is being wound up,

✓ a floating charge on the undertaking or property of the company
✓ created within the twelve months immediately preceding the commencement of the winding up,
✓ shall, unless it is proved that
✓ the company immediately after the creation of the charge was solvent, be invalid,
✓ except for the amount of any cash paid to the company at the time of,
✓ or subsequent to the creation of, and in consideration for, the charge,
✓ together with interest on that amount at the rate of 5% or
✓ such other rate as may be notified by the Central Government in this behalf.

Disclaimer of Onerous Property

Where any part of the property of a company which is being wound up consists of—

a) land of any tenure, burdened with onerous covenants
b) shares or stocks in companies
c) any other property which is not saleable or is not readily saleable by reason of the possessor thereof being bound either to the performance of any onerous act or to the payment of any sum of money; or
d) unprofitable contracts,

the Company Liquidator may, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto or done anything in pursuance of the contract, with the leave of the Tribunal and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Tribunal, disclaim the property

Provided that where the Company Liquidator had not become aware of the existence of any such property within one month from the commencement of the winding up, the power of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the Tribunal.

The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interest and liabilities of the company in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights, interest or liabilities of any other person.

Notice to Interested Person before Disclaimer

The Tribunal, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order in the matter as the Tribunal considers just and proper.
The Company Liquidator shall not be entitled to disclaim any property in any case where an application in writing has been made to him by any person interested in the property requiring him to decide whether he will or will not disclaim and the Company Liquidator has not, within a period of twenty-eight days after the receipt of the application or such extended period as may be allowed by the Tribunal, give notice to the applicant that he intends to apply to the Tribunal for leave to disclaim, and in case the property is under a contract, if the Company Liquidator after such an application as aforesaid does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it.

Order for Rescinding Contract

The Tribunal may, on the application of any person who is, as against the Company Liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the Tribunal considers just and proper, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

Order for Vesting of Property

The Tribunal may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged under this Act in respect of any disclaimed property, and after hearing any such persons as it thinks fit, make an order for the vesting of the property in, or the delivery of the property to, any person entitled thereto or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Tribunal considers just and proper, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person named therein in that behalf without any conveyance or assignment for the purpose.

Person Affected to Be Creditor

Any person affected by the operation of a disclaimer under this section shall be deemed to be a creditor of the company to the amount of the compensation or damages payable in respect of such effect, and may accordingly prove the amount as a debt in the winding up.

Transfers, Etc., after Commencement of Winding Up To Be Void

In the case of a winding up by the Tribunal, any disposition of the property including actionable claims, of the company and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up shall, unless the Tribunal otherwise orders, be void.

Certain Attachments, Executions, Etc., in Winding Up by Tribunal to be Void

Where any company is being wound up by the Tribunal,
✓ any **attachment, distress** or execution put in force, **without leave of the Tribunal** against the estate or effects of the company, after the commencement of the winding up; or
✓ **any sale** held, **without leave of the Tribunal** of any of the properties or effects of the company, after such commencement, shall be **void**.

(2) Nothing in this section shall apply to any proceedings for the recovery of any tax or impost or any dues payable to the Government.

### Offences by Officers of Companies in Liquidation

If **any person**, who **is** or has been an **officer** of a **company** which, **at the time** of the **commission** of the **alleged offence**, is **being wound up**, "by the Tribunal under this Act or which is subsequently ordered to be wound up by the Tribunal under this Act",—

(a) **does not**, to the best of his knowledge and belief, **fully and truly disclose to the Company Liquidator all the property**, movable and immovable, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary course of the business of the company;
(b) **does not deliver up** to the **Company Liquidator**, or as he directs, **all** such part of the **movable and immovable property** of the company as is in **his custody** or under his control and which he is required by law to deliver up;
(c) **does not deliver up** to the **Company Liquidator**, or as he directs, all such **books** and **papers** of the company as are in **his custody** or under his control and which he is required by law to deliver up;
(d) **within the twelve months immediately before the commencement of the winding up or at any time thereafter**,—
   ✓ **conceals** any part of the **property** of the company to the **value of one thousand rupees or more**, or conceals any debt due to or from the company
   ✓ **fraudulently removes** any part of the **property** of the company to the **value of one thousand rupees or more**
   ✓ **conceals, destroys, mutilates** or falsifies, or is **privy to** the concealment, destruction, mutilation or falsification of, **any book or paper** affecting or relating to, the **property or affairs** of the company
   ✓ **makes**, or is privy to the making of, any **false entry in** any **book** or paper affecting or relating to, the property or affairs of the company
   ✓ **fraudulently parts with, alters** or makes any omission in, or is privy to the fraudulent parting with, altering or making of any omission in, any **book or paper** affecting or relating to the property or affairs of the company
   ✓ **by any false representation or other fraud, obtains on credit**, for or on behalf of the company, **any property** which the company does not subsequently pay for
   ✓ **under the false pretence that the company is carrying on its business, obtains on credit**, for or on behalf of the company, **any property** which the company does not subsequently pay for; or
   ✓ **pawns, pledges or disposes** of any **property** of the company which has been **obtained on credit** and has not been paid for, unless such pawning, pledging or disposing of the property is in the ordinary course of business of the company

#### Penalty for above contravention

Where any person pawns, pledges or disposes of any property in circumstances which

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CA. SHIVANGI AGRAWAL
WINDING UP

amount to an offence in above mentioned sub clause of clause (d) of sub-section (1),
✓ every person who takes in pawn or pledge or otherwise receives the property,
✓ knowing it to be pawned, pledged, or disposed of in such circumstances as aforesaid,
✓ shall be punishable with imprisonment for a term
✓ which shall not be less than three years but which may extend to five years and
✓ with fine which shall not be less than three lakh rupees but which may extend to five lakh rupees.

(e) makes any material omission in any statement relating to the affairs of the company;
(f) knowing or believing that a false debt has been proved by any person under the winding up, fails for a period of one month to inform the Company Liquidator thereof;
(g) after the commencement of the winding up, prevents the production of any book or paper affecting or relating to the property or affairs of the company;
(h) after the commencement of the winding up or at any meeting of the creditors of the company within the twelve months next before the commencement of the winding up, attempts to account for any part of the property of the company by fictitious losses or expenses; or
(i) is guilty of any false representation or fraud for the purpose of obtaining the consent of the creditors of the company or any of them, to an agreement with reference to the affairs of the company or to the winding up,

Penalty for Contravention of Section

✓ he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees
✓ Provided that it shall be a good defence if the accused proves that he had no intent to defraud or to conceal the true state of affairs of the company or to defeat the law.

"officer" includes any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

Statement That Company is in Liquidation

Where a company is being wound up, whether by the Tribunal or voluntarily, every invoice, order for goods or business letter issued by or on behalf of the company or a Company Liquidator of the company, or a receiver or manager of the property of the company, being a document on or in which the name of the company appears, shall contain a statement that the company is being wound up.

Penalty

If a company contravenes the provisions of sub-section (1), the company, and every officer of the company, the Company Liquidator and any receiver or manager, who wilfully authorises or permits the non-compliance, shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees.
Disposal of Books and Papers of Company

✓ When the affairs of a company have been completely wound up and it is about to be dissolved, the books and papers of such company and those of the Company Liquidator may be disposed of in such manner as the Tribunal directs.

✓ After the expiry of five years from the dissolution of the company, no responsibility shall devolve on the company, the Company Liquidator, or any person to whom the custody of the books and papers has been entrusted, by reason of any book or paper not being forthcoming to any person claiming to be interested therein.

✓ The Central Government may, by rules,—
  • prevent for such period as it thinks proper the destruction of the books and papers of a company which has been wound up and of its Company Liquidator; and
  • enable any creditor or contributory of the company to make representations to the Central Government in respect of the matters specified in clause (a) and to appeal to the Tribunal from any order which may be made by the Central Government in the matter.

Penalty

If any person acts in contravention of any rule framed or an order made above, he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees, or with both

Books and Papers Of Company to be Evidence

Where a company is being wound up, all books and papers of the company and of the Company Liquidator shall, as between the contributories of the company, be prima facie evidence of the truth of all matters purporting to be recorded therein

Inspection of Books and Papers by Creditors and Contributories

At any time after the making of an order for the winding up of a company by the Tribunal, any creditor or contributory of the company may inspect the books and papers of the company only in accordance with, and subject to such rules as may be prescribed.

Nothing shall exclude or restrict any rights conferred by any law for the time being in force—
(a) on the Central Government or a State Government;
(b) on any authority or officer thereof; or
(c) on any person acting under the authority of any such Government or of any such authority or officer.

Company Liquidation Dividend and Undistributed Assets Account
Where any company is being wound up and the liquidator has in his hands or under his control any money representing—

✓ dividends payable to any creditor but which had remained unpaid for six months after the date on which they were declared; or

✓ assets refundable to any contributory which have remained undistributed for six months after the date on which they become refundable,

the liquidator shall forthwith deposit the said money into a separate special account to be known as the Company Liquidation Dividend and Undistributed Assets Account maintained in a scheduled bank.

The liquidator shall, on the dissolution of the company, pay into the Company Liquidation Dividend and Undistributed Assets Account any money representing unpaid dividends or undistributed assets in his hands at the date of dissolution.

Furnishing of Statement to Registrar

The liquidator shall, when making any payment referred to in sub-sections (1) and (2), furnish to the Registrar, a statement in the prescribed form, setting forth, in respect of

✓ all sums included in such payment,

✓ the nature of the sums,

✓ the names and last known addresses of the persons entitled to participate therein,

✓ the amount to which each is entitled and

✓ the nature of his claim thereto,

✓ and such other particulars as may be prescribed.

Receipt from Bank to Be Effectual Discharge

The liquidator shall be entitled to a receipt from the scheduled bank for any money paid to it under sub-sections (1) and (2), and such receipt shall be an effectual discharge of the Company Liquidator in respect thereof.

Right To Claim Any Money Entitled

Any person claiming to be entitled to any money paid into the Company Liquidation Dividend and Undistributed Assets Account, whether paid in pursuance of this section or under the provisions of any previous company law may

✓ apply to the Registrar for payment thereof, and

✓ the Registrar, if satisfied that the person claiming is entitled,

✓ may make the payment to that person of the sum due

✓ and shall settle the claim of such person within a period of sixty days from the date of receipt of such claim,

✓ failing which the Registrar shall make a report to the Regional Director giving reasons of such failure.

Unclaimed Amount to be transferred

✓ Any money paid into the Company Liquidation Dividend and Undistributed Assets Account in pursuance of this section,

✓ which remains unclaimed thereafter for a period of fifteen years,

✓ shall be transferred to the general revenue account of the Central Government,

✓ but a claim to any money so transferred may be preferred under sub-section (6) and
shall be dealt with as if such transfer had not been made

Consequences of not Depositing Any Money

Any liquidator retaining any money which should have been paid by him into the Company Liquidation Dividend and Undistributed Assets Account under this section shall—

- pay interest on the amount so retained at the rate of 12% and also pay such penalty as may be determined by the Registrar
  Provided that the Central Government may in any proper case remit either in part or in whole the amount of interest which the liquidator is required to pay under this clause
- be liable to pay any expenses occasioned by reason of his default; and
- where the winding up is by the Tribunal, also be liable to have all or such part of his remuneration, as the Tribunal may consider just and proper, to be disallowed,
- and to be removed from his office by the Tribunal.

Liquidator to Make Returns, Etc

If any Company Liquidator who has made any default in filing, delivering or making any return, account or other document, or in giving any notice which he is by law required to file, deliver, make or give,
- fails to make good the default
- within fourteen days after the service on him of a notice requiring him to do so,
- the Tribunal may,
  on an application made to it
  by any contributory or creditor of the company or by the Registrar,
  make an order directing the Company Liquidator
  to make good the default
  within such time as may be specified in the order.

It may also provide that all costs of, and incidental to, the application shall be borne by the Company Liquidator.

Nothing shall prevent enforcing any enactment imposing penalties on a Company Liquidator in respect of any such default as aforesaid

Meetings to Ascertain Wishes of Creditors or Contributories

In all matters relating to the winding up of a company, the Tribunal may—
  a) have regard to the wishes of creditors or contributories of the company, as proved to it by any sufficient evidence
  b) if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Tribunal may direct; and
  c) appoint a person to act as chairman of any such meeting and to report the result thereof to the Tribunal.
Due regard while Ascertaining Wishes

✓ While ascertaining the wishes of creditors under sub-section (1), regard shall be had to the value of each debt of the creditor.
✓ While ascertaining the wishes of contributories under sub-section (1), regard shall be had to the number of votes which may be cast by each contributory.

Court, Tribunal or Person, Etc., before whom Affidavit May Be Sworn

Any affidavit required to be sworn under the provisions, or for the purposes, of this Chapter may be sworn—
✓ in India before any court, tribunal, judge or person lawfully authorised to take and receive affidavits; and
✓ in any other country before any court, judge or person lawfully authorised to take and receive affidavits in that country or before an Indian diplomatic or consular officer.

Powers of Tribunal to Declare Dissolution of Company Void

Where a company has been dissolved, whether in pursuance of this Chapter or of section 232 or otherwise, the Tribunal may at any time-
✓ within two years of the date of the dissolution,
✓ on application by the Company Liquidator of the company or
✓ by any other person who appears to the Tribunal to be interested,
✓ make an order, upon such terms as the Tribunal thinks fit,
✓ declaring the dissolution to be void, and thereupon
✓ such proceedings may be taken as if the company had not been dissolved.

Duty to File Order with Registrar [Section 356(2)]

It shall be the duty of the Company Liquidator or the person on whose application the order was made,
✓ within thirty days after the making of the order or
✓ such further time as the Tribunal may allow,
✓ to file a certified copy of the order with the Registrar who shall register the same, and

Penalty

If the Company Liquidator or the person fails so to do, the Company Liquidator or the person shall be punishable with fine which may extend to ten thousand rupees for every day during which the default continues

Commencement of Winding Up by Tribunal

The winding up of a company by the Tribunal under this Act shall be deemed to commence at the time of the presentation of the petition for the winding up.

CA. SHIVANGI AGRAWAL
Exclusion of Certain Time in Computing Period of Limitation

✓ Notwithstanding anything in the Limitation Act, 1963, or in any other law for the time being in force, in computing the period of limitation specified for any suit or application in the name and on behalf of a company which is being wound up by the Tribunal,
✓ the period from the date of commencement of the winding up of the company to a period of one year immediately following the date of the winding up order shall be excluded.

Multiple Choice Questions

1. The preferential payments shall have priority over ------
   a. Overriding preferential payments  
   b. The workmen’s dues
   c. The claims of holders of debentures under any floating charge
   d. None of these

2. On the ground of fraud or misfeasance, the Tribunal may, for reasons to be recorded in writing, remove ------
   a. The provisional liquidator
   b. The Company Liquidator
   c. Either (a) or (b) or both
   d. None of these

3. A person who has been a member shall not be liable to contribute if he has ceased to be a member for the preceding ------ or more before the commencement of the winding up.
   a. 6 months
   b. 1 year
   c. 18 months
   d. 3 years

4. A person who has been a member shall not be liable to contribute in respect of any debt or liability of the company contracted --------
   a. After he ceased to be a member
   b. Before he ceased to be a member
   c. After he ceased to be a director
   d. After he ceased to be an employee

5. The previous approval of the Central Government is required before a petition for winding up is made by the ------
   a. The company
   b. The Registrar
   c. Any contributory of the company
   d. Any of these

6. On receipt of a petition for winding up under section 272, the Tribunal shall pass its order within from the date of presentation of the petition.
   a. 30 days
   b. 60 days
   c. 90 days
   d. 120 days
7. Any application to the Tribunal seeking leave for commencement or continuation of any suit or other legal proceedings shall be disposed of by the Tribunal within ------
   a. 7 days          b. 45 days
   c. 30 days         d. 60 days

8. Where a petition for winding up is presented before the Tribunal by ------, such petition shall be admitted only if it is accompanied by a statement of affairs
   a. Any contributory of the company  b. The company
   c. The Registrar                 d. The Central Government

9. Winding up under the Companies Act, 2013 can be --------
   a. Winding up by the Tribunal
   b. Voluntary winding up
   c. Winding up subject to supervision of the Tribunal
   d. Both (a) and (c)

10. Where a petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal has the discretion to dismiss it, if ----------
    a. An alternate remedy is available
    b. The applicant is acting unreasonably in asking for a winding up order
    c. Both (a) and (b)
    d. None of these

11. In case of any conflict, the directions given by the -------- shall override the directions given by the -------
    a. Creditors; advisory committee
    b. Contributories; advisory committee
    c. Creditors or contributories; advisory committee
    d. Advisory committee; creditors or contributories;

12. The Company Liquidator shall make periodical reports to the Tribunal and in any case make a report ---------- with respect to the progress of the winding up of the company.
    a. At the end of every
    b. At the end of every quarter
    c. At the end of every year
    d. None of these

13. Before appointing a provisional liquidator, the Tribunal shall grant to -------- a reasonable opportunity to make representations, if any.
    a. The Registrar
    b. The company
    c. The Central Government
    d. All of these

14. All revenues, taxes, ceases and rates due, within -------- immediately before the relevant date, to the Central Government or any State Government or to a local authority shall amount to preferential payments.
    a. 3 months
    b. 6 months
    c. 12 months
    d. 2 years

15. The Company Liquidator shall summon meetings of creditors or contributories if --------
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<th>a. The creditors or contributories, as the case may be, so direct by passing a resolution in a meeting</th>
<th>b. Not less than 1/10th in value of the creditors or contributories, as the case may be, make such a request in writing</th>
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<td>c. Either (a) or (b) or both</td>
<td>d. Any creditor or contributory, as the case may be, makes such a request in writing</td>
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### Answer to MCQs

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Meaning of Foreign Companies

"Foreign company" means any company or body corporate incorporated outside India which,—

✓ has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
✓ conducts any business activity in India in any other manner.

Place of Business:
It includes a share transfer or registration office.

Electronic Mode: Rule 2 of Companies (Registration of foreign companies) Rules, 2014

"Electronic mode" means carrying out electronically based, whether main server is installed in India or not, including, but not limited to -

(i) business to business and business to consumer transactions, data interchange and other digital supply transactions;
(ii) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;
(iii) financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;
(iv) online services such as telemarketing, telecommuting, telemedicine, education and information research; and
(v) all related data communication services,
whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise;

As per provisions of Companies Act, 2013, what is the status of XYZ Ltd, a company incorporated in London, U.K., which has a share transfer office at Mumbai?
Examine whether the following companies can be considered as Foreign Companies?

a) A company incorporated outside India having share registration office at New Delhi.
b) A company incorporated outside India having shareholders who are all Indian Citizens.
c) A company incorporated in India but all shares are held by foreigners.

Robertson Ltd is a company registered in Thailand. Although, it has no place of business established in India, yet it is doing online business through telemarketing in India. Whether it will be treated as a foreign company under Companies Act, 2013? Explain.

Examine whether the following companies can be considered as Foreign Companies?

a) A company which has no place of business established in India, yet is doing online business through telemarketing in India
b) A company which is incorporated outside India employs agents in India, but has no place of business in India.
c) A company incorporated outside India having shareholders who are all Indian citizens.

Application of Act to Foreign Companies

Sections Applicable To all Foreign Companies

✓ Sections 380 to 386 (both inclusive) and
✓ sections 392 and 393
✓ shall apply to all foreign companies

Power of Central Government to Exempt

✓ The Central Government may, by order published in the Official Gazette,
✓ exempt any class of foreign companies, specified in the Order,
✓ from any of the provisions of sections 380 to 386 and sections 392 and 393 and
✓ a copy of every such Order shall, as soon as may be after it is made,
✓ be laid before both Houses of Parliament.

Applicability of Other Provisions Prescribed

✓ Where not less than 50% of the paid-up share capital,
✓ whether equity or preference or partly equity and partly preference,
✓ of a foreign company is held by
✓ one or more citizens of India or
✓ by one or more companies or bodies corporate incorporated in India, or
✓ by one or more citizens of India and one or more companies or bodies corporate incorporated in India,
✓ whether singly or in the aggregate,
✓ such company shall comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed
Mr. Ziyan, an Indian Citizen holds 25% of the paid up capital of Laurel Steven limited, a company which was incorporated in Singapore with a paid up capital of 10 million Singapore dollars. Swaraj ltd a company registered in India holds 30% of the paid up capital of Laurel Steven ltd. It has recently established a share transfer office at New Delhi. The company seeks your advice as to what formalities it should observe as a foreign company under Companies Act, 2013.

Documents, Etc., to be delivered to Registrar by Foreign Companies

Every foreign company shall, within thirty days of the establishment of its place of business in India file with the registrar Form FC-1 with such fee as provided in Companies (Registration Offices and Fees) Rules, 2014 and with following documents required to be delivered for registration:

a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in the English language, a certified translation thereof in the English language
b) the full address of the registered or principal office of the company
c) a list of the directors and secretary of the company containing such particulars as may be prescribed

d) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company

Rule 3: Particulars Relating to Directors and Secretary to be Furnished to the Registrar by Foreign Companies

✓ personal name and surname in full
✓ any former name or names and surname or surnames in full
✓ father's name or mother's name and spouse's name
✓ date of birth
✓ residential address
✓ nationality
✓ if the present nationality is not the nationality of origin, his nationality of origin
✓ passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)
✓ income-tax permanent account number (PAN) , if applicable
✓ occupation, if any
✓ whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship)
✓ other directorship or directorships held by him
✓ Membership Number (for Secretary only); and
✓ e-mail ID.

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e) the full address of the office of the company in India which is deemed to be its principal place of business in India
f) particulars of opening and closing of a place of business in India on earlier occasion or occasions
g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad
h) any other information as may be prescribed.

Approval from RBI and Other Regulators

The application shall also be supported with an attested copy of approval from the Reserve Bank of India under Foreign Exchange Management Act or Regulations, and also from other regulators, if any, approval is required by such foreign company to establish a place of business in India or a declaration from the authorised representative of such foreign company that no such approval is required.

Provision With Respect To Existing Companies

Every foreign company existing at the commencement of this Act shall, if it has not delivered to the Registrar before such commencement, the documents and particulars specified in sub-section (1) of section 592 of the Companies Act, 1956, continue to be subject to the obligation to deliver those documents and particulars in accordance with that Act.

Where any alteration is made or occurs in the documents delivered to the Registrar under this section, the foreign company shall, within thirty days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in Form FC-2.

Accounts of Foreign Company

Preparation of Balance Sheet and Profit & Loss Account

Every foreign company shall, in every calendar year,—

a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having annexed or attached thereto such documents as may be prescribed; and
b) deliver a copy of those documents to the Registrar

Power of CG to Provide Exemption

Provided that the Central Government may, by notification, direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in that notification.

Certified Translation

If any such document as is mentioned in sub-section (1) is not in the English language, there shall be annexed to it a certified translation thereof in the English language.
List of all Places of Business in India

Every foreign company shall send to the Registrar along with the documents required to be delivered to him under sub-section (1), a copy of a list in the Form FC-3 with such fee as provided of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in sub-section (1) is made out.

Rule 4:
Every foreign company shall, along with the financial statement required to be filed with the Registrar, attach thereto the following documents; namely:-
- Statement of related party transaction
- Statement of repatriation of profits
- Statement of transfer of funds which shall, in relation of any fund transfer between place of business of foreign company in India and any other related party of the foreign company outside India including its holding, subsidiary and associate company

Time Limit

The documents referred to in this rule shall be delivered to the Registrar within a period of six months of the close of the financial year of the foreign company to which the documents relate: Provided that the Registrar may, for any special reason, and on application made in writing by the foreign company concerned, extend the said period by a period not exceeding three months.

Display of Name etc. of Foreign Company

Every foreign company shall—
(a) conspicuously exhibit on the outside of every office or place where it carries on business in India, the name of the company and the country in which it is incorporated, in legible English characters, and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situate;

(b) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, billheads and letter paper, and in all notices, and other official publications of the company; and

(c) if the liability of the members of the company is limited, cause notice of that fact—
- to be stated in every such prospectus issued and in all business letters, bill-heads, letter paper, notices, advertisements and other official publications of the company, in legible English characters; and
- to be conspicuously exhibited on the outside of every office or place where it carries on business in India, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situate

Service on Foreign Company

Any process, notice, or other document required to be served on a foreign company shall be deemed to be sufficiently served, if addressed to any person whose name and address have been
X Inc. is a company registered in UK and carrying on Trading Activity, with Principal Place of Business in Chennai. Since the Company did not obtain registration or make arrangement to file return, the State VAT officer having jurisdiction, intends to serve show cause notice on foreign company. As standing counsel for the department, advise VAT officer on valid service of Notice.

Debentures, Annual Return, Registration of Charges, Books of Account and their Inspection

- The provisions of section 71 shall apply mutatis mutandis to a foreign company.
- The provisions of section 92 and section 135 shall, subject to such exceptions, modifications and adaptations as may be made therein by rules made under this Act, apply to a foreign company as they apply to a company incorporated in India.
- The provisions of section 128 shall apply to a foreign company to the extent of requiring it to keep at its principal place of business in India, the books of account referred to in that section, with respect to monies received and spent, sales and purchases made, and assets and liabilities, in the course of or in relation to its business in India.
- The provisions of Chapter VI shall apply mutatis mutandis to charges on properties which are created or acquired by any foreign company.
- The provisions of Chapter XIV shall apply mutatis mutandis to the Indian business of a foreign company as they apply to a company incorporated in India.

Fee for Registration of Documents

There shall be paid to the Registrar for registering any document required by the provisions of this Chapter to be registered by him, such fee, as provided in the Companies (Registration Offices and Fees) Rules, 2014.

Dating of Prospectus and Particulars to be Contained Therein

(1) No person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless the prospectus is dated and signed, and—

(a) contains particulars with respect to the following matters, namely:—

- the instrument constituting or defining the constitution of the company
- the enactments or provisions by or under which the incorporation of the company was effected
- address in India where the said instrument, enactments or provisions, or copies thereof, and if the same are not in the English language, a certified translation thereof in the English language can be inspected
the date on which and the country in which the company would be or was incorporated; and
whether the company has established a place of business in India and, if so, the address of its principal office in India; and

(b) states the matters specified under section 26:

Provided that sub-clauses (i), (ii) and (iii) of clause (a) of this sub-section shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business.

No Waiver of Compliances

Any condition requiring or binding an applicant for securities to waive compliance with any requirement imposed shall be void.

Prospectus with Application

No person shall issue to any person in India a form of application for securities of such a company or intended company as is mentioned in sub-section (1), unless the form is issued with a prospectus which complies with the provisions of this Chapter and such issue does not contravene the provisions of section 388.

Non-Applicability

✓ Form is not required to be issued with Prospectus if it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to securities.
✓ This section shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to securities of the company.
✓ Nothing in this section shall limit or diminish any liability which any person may incur under any law for the time being in force in India or under this Act apart from this section.

Provisions as to Expert’s Consent and Allotment

No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not been established, or when formed will or will not establish, a place of business in India,—
if, where the prospectus includes a statement purporting to be made by an expert, he has not given, or has before delivery of the prospectus for registration withdrawn, his written consent to the issue of the prospectus with the statement included in the form and context in which it is included, or there does not appear in the prospectus a statement that he has given and has not withdrawn his consent as aforesaid; or

For the purposes of this section, a statement shall be deemed to be included in a prospectus, if it is contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.
Registration of Prospectus

No person shall issue, circulate or distribute in India any prospectus of in securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India,

✓ unless before the issue, circulation or distribution of the prospectus in India,
✓ a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body
✓ has been delivered for registration to the Registrar and
✓ the prospectus states on the face of it that a copy has been so delivered,
✓ and there is endorsed on or attached to the copy,
✓ any consent to the issue of the prospectus required by section 388 and such documents as may be prescribed.

Rule 11:
Documents to be Annexed to Prospectus

The following documents shall be annexed to the prospectus, namely:-

✓ any consent to the issue of the prospectus required from any person as an expert
✓ a copy of contracts for appointment of managing director or manager
✓ a copy of any other material contracts but entered within preceding two years
✓ a copy of underwriting agreement and
✓ a copy of power of attorney

Offer of Indian Depository Receipts

Notwithstanding anything contained in any other law for the time being in force, the Central Government may make rules applicable for—

✓ the offer of Indian Depository Receipts
✓ the requirement of disclosures in prospectus or letter of offer issued in connection with Indian Depository Receipts
✓ the manner in which the Indian Depository Receipts shall be dealt with in a depository mode and by custodian and underwriters; and
✓ the manner of sale, transfer or transmission of Indian Depository Receipts, by a company incorporated or to be incorporated outside India, whether the company has or has not established, or will or will not establish, any place of business in India

Application of Sections 34 To 36 and Chapter XX

✓ The provisions of sections 34 to 36 shall apply to—
• the issue of a prospectus by a company incorporated outside India under section 389 as they apply to prospectus issued by an Indian company
• the issue of Indian Depository Receipts by a foreign company.

✓ The provisions of Chapter XX shall apply mutatis mutandis for closure of the place of business of a foreign company in India as if it were a company incorporated in India

Punishment for Contravention

Without prejudice to the provisions of section 391, if a foreign company contravenes the provisions of this Chapter,
✓ the foreign company shall be punishable with fine
✓ which shall not be less than one lakh rupees but which may extend to three lakh rupees and
✓ in the case of a continuing offence, with an additional fine
✓ which may extend to fifty thousand rupees for every day after the first during which the contravention continues and
✓ every officer of the foreign company who is in default
✓ shall be punishable with imprisonment for a term
✓ which may extend to six months or
✓ with fine
✓ which shall not be less than twenty five thousand rupees but which may extend to five lakh rupees,
✓ or with both

Company’s Failure to Comply with Provisions of this Chapter not to affect Validity of Contracts, Etc

Any failure by a company to comply with the provisions of this Chapter
✓ shall not affect the validity of any contract, dealing or transaction entered into by the company
✓ or its liability to be sued in respect thereof,
✓ but the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction,
✓ until the company has complied with the provisions of this Act applicable to it.
Government Companies

Meaning of Government Company

"Government company" means any company in which
✓ not less than 51% of the paid-up share capital
✓ is held by the Central Government,
✓ or by any State Government or Governments,
✓ or partly by the Central Government and partly by one or more State Governments,
✓ and includes a company which is a subsidiary company of such a Government company

Annual Reports on Government Companies

Only CG is a Member

Where the Central Government is a member of a Government company, the Central Government shall cause an annual report on the working and affairs of that company to be—
 a) prepared within three months of its annual general meeting before which the comments given by the Comptroller and Auditor-General of India and the audit report is placed under the proviso to sub-section (6) of section 143; and
 b) as soon as may be after such preparation, laid before both Houses of Parliament together with a copy of the audit report and comments upon or supplement to the audit report, made by the Comptroller and Auditor-General of India.

Where CG and SG is a Member

Where in addition to the Central Government, any State Government is also a member of a Government company, that State Government shall cause a copy of the annual report prepared under sub-section (1) to be laid before the House or both Houses of the State Legislature together with a copy of the audit report and the comments upon or supplement to the audit report referred to in sub-section (1).
Annual Reports Where One or More Government Companies Are Members

(1) Where the Central Government is not a member of a Government company, every State Government which is a member of that company, or where only one State Government is a member of the company, that State Government shall cause an annual report on the working and affairs of the company to be—
- prepared within the time specified in sub-section (1) of section 394; and
- as soon as may be after such preparation, laid before the House or both Houses of the State Legislature together with a copy of the audit report and comments upon or supplement to the audit report referred to in sub-section (1) of that section.

(2) The provisions of this section and section 394 shall, so far as may be, apply to a Government company in liquidation as they apply to any other Government company.

Multiple Choice Questions

1. A company shall be a Government company if -------- of its -------- is held by the Central Government or any State Government(s) or jointly by the Central Government and any State Government(s).
   
   a. Not less than 50%; Paid up share capital
   b. Not less than 51%; Paid up share capital
   c. More than 50%; Paid up equity share capital
   d. More than 51%; Paid up equity share capital

2. A government co. shall prepare its Annual report within ---------- of AGM
   
   a. 3 months
   b. 6 months
   c. 1 month
   d. None of these

3. What is to be laid before Houses of parliament by Central Government in Government company?
   
   a. Annual report
   b. Audit report
   c. Comments made by CAG
   d. All of the above

4. XYZ ltd. is a subsidiary of Government Company. What will be its status?
   
   a. Public Company
   b. Government Company
   c. Private Company
   d. Either (a) or (b)

Answer to MCQs

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Nidhis

Nidhi is a Hindi word which means “finance or fund”. They are mutual benefit societies, because their dealings are restricted only to the members. The principal source of funds is the contribution from the members. The loans are given to the members at relatively reasonable rates. Nidhi company is governed by the Companies Act, 2013 under section 406 and Nidhi Rules, 2014.

Power to Modify Act in its Application to Nidhis

In this section, "Nidhi" or "Mutual Benefit Society" means a company which the Central Government may, by notification in the Official Gazette, declare to be a Nidhi or Mutual Benefit Society, as the case may be.

Applicability of Act

The Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Act specified in the notification—
(a) shall not apply to any Nidhi or Mutual Benefit Society; or
(b) shall apply to any Nidhi or Mutual Benefit Society with such exceptions, modifications and adaptations as may be specified in the notification.

Approval of Houses of Parliament

A copy of every notification proposed to be issued under sub-section (2), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days, and if, both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

The copies of every notification issued under this section shall, as soon as may be after it has been issued, be laid before each House of Parliament.
Nidhis Rules 2014

Rule 4: Incorporation & Incidental Matters

✓ A Nidhi shall be a public company and shall have a minimum paid up equity share capital of five lakh rupees.
✓ On and after the commencement of the Act, no Nidhi shall issue preference shares.
✓ If preference shares had been issued by a Nidhi before the commencement of this Act, such preference shares shall be redeemed in accordance with the terms of issue.
✓ No Nidhi shall have any object in its Memorandum of Association other than the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit.
✓ Every "Nidhi" shall have the last words ‘Nidhi Limited’ as part of its name.

Rule 3A: Declaration of Nidhis

✓ The Central Government, on receipt of application (in Form NDH-4 along with fee thereon) of a public company for declaring it as Nidhi and on being satisfied that the company meets the requirements under these rules, shall notify the company as a Nidhi in the official Gazette.

✓ Provided that a Nidhi incorporated under the Act on or after the commencement of the Nidhi (Amendment) Rules, 2019 shall file Form NDH-4 within sixty days from the date of expiry of:
   (a) one year from the date of its incorporation or
   (b) the period up to which extension of time has been granted by the Regional Director.

✓ In case a company does not comply with the requirements of this rule, it shall not be allowed to file Form No. SH-7 (Notice to Registrar of any alteration of share capital) and Form PAS-3 (Return of Allotment).

Rule 5: Requirements for Minimum Members, funds etc.

✓ Every Nidhi shall, within a period of one year from the date of its incorporation, ensure that it has-
   (a) not less than two hundred members;
   (b) Net Owned Funds of ten lakh rupees or more;
   (c) unencumbered term deposits of not less than ten per cent. of the outstanding deposits as specified in rule 14; and
   (d) ratio of Net Owned Funds to deposits of not more than 1:20

✓ Net Owned Funds" means the aggregate of paid up equity share capital and free reserves as reduced by accumulated losses and intangible assets appearing in the last audited balance sheet.
Within ninety days from the close of the first financial year after its incorporation and where applicable, the second financial year, Nidhi shall file a return of statutory compliances in Form NDH-1.

If a Nidhi is not complying with clauses (a) or (d) of sub-rule (1) above, it shall within thirty days from the close of the first financial year, apply to the Regional Director in Form NDH-2 along with fee specified for extension of time and the Regional Director may consider the application and pass orders within thirty days of receipt of the application.

If the failure to comply with sub-rule (1) of this rule extends beyond the second financial year, Nidhi shall not accept any further deposits from the commencement of the second financial year till it complies with the provisions and gets itself declared under subsection (1) of section 406.

No Nidhi shall-

- carry on the business of chit fund, hire purchase finance, leasing finance, insurance or acquisition of securities issued by any body corporate
- issue preference shares, debentures or any other debt instrument by any name or in any form whatsoever
- open any current account with its members
- acquire another company by purchase of securities or control the composition of the Board of Directors of any other company in any manner whatsoever or enter into any arrangement for the change of its management, unless it has passed a special resolution in its general meeting and also obtained the previous approval of the Regional Director having jurisdiction over such Nidhi
- carry on any business other than the business of borrowing or lending in its own name

Provided that Nidhis which have adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding 20% of the gross income of the Nidhi at any point of time during a financial year.

- accept deposits from or lend to any person, other than its members
- pledge any of the assets lodged by its members as security
- take deposits from or lend money to any body corporate
- enter into any partnership arrangement in its borrowing or lending activities
- issue or cause to be issued any advertisement in any form for soliciting deposit

Provided that private circulation of the details of fixed deposit schemes among the members of the Nidhi carrying the words “for private circulation to members only” shall not be considered to be an advertisement for soliciting deposits.

- pay any brokerage or incentive for mobilising deposits from members or for deployment of funds or for granting loans
**Rule 8: Membership**

- A Nidhi shall **not admit a body corporate or trust as a member**.
- Except as otherwise permitted under these rules, every Nidhi shall ensure that its membership is not reduced to less than two hundred members at any time.
- A **minor** shall **not** be admitted as a **member** of Nidhi.
- Provided that deposits may be accepted in the name of a minor, if they are made by the natural or legal guardian who is a member of Nidhi.

**Rule 17: Rules Relating To Directors**

- The **Director** shall be a **member** of Nidhi.
- The **Director** of a Nidhi **shall hold office for a term up to ten consecutive years on the Board** of Nidhi.
- The Director shall be **eligible for re-appointment only after the expiration of two years** of ceasing to be a Director.
- Where the tenure of any Director in any case had already been extended by the Central Government, it shall terminate on expiry of such extended tenure.
- The person to be appointed as a Director shall comply with the requirements of sub-section (4) of section 152 of the Act and shall not have been disqualified from appointment as provided in section 164 of the Act.

**Rule 18: Dividend**

A Nidhi shall **not declare dividend exceeding twenty five per cent**. or such higher amount as may be specifically **approved by the Regional Director** for reasons to be recorded in writing and further **subject to the following** conditions, namely:-

- (a) an **equal amount** is **transferred to General Reserve**;
- (b) there has been **no default in repayment** of matured deposits and interest; and
- (c) it has **complied with all the rules** as applicable to Nidhis.

**Rule 19: Auditor**

- No Nidhi shall appoint or re-appoint an **individual** as auditor for **more than one term of five consecutive years**.
- No Nidhi shall appoint or re-appoint an **audit firm** as auditor for **more than two terms of five consecutive years**.
- Provided that an auditor (whether an individual or an audit firm) shall be eligible for subsequent appointment after the expiration of two years from the completion of his or its term.
- In case of an auditor (whether an individual or audit firm), the period for which he or it has been holding office as auditor prior to the commencement of these rules shall be taken into account in calculating the period of five consecutive years or ten consecutive years, as the case may be.
Rule 22: Auditor’s Certificate

The Auditor of the company shall furnish a certificate every year to the effect that the company has complied with all the provisions contained in the rules and such certificate shall be annexed to the audit report and in case of non-compliance, he shall specifically state the rules which have not been complied with.

Acceptance of Deposits By Nidhis

✓ A Nidhis shall not accept deposits exceeding twenty times of its Net Owned Funds (NOF) as per its last audited financial statements.
✓ The ratio specified in sub-rule (2) shall also apply to incremental deposits.
✓ The application form shall also contain the following statements, namely:
  • in case of Non-payment of the deposit or part thereof as per the terms and conditions of such deposit, the depositor may approach the Registrar of companies having jurisdiction over Nidhi.
  • in case of any deficiency of Nidhi in servicing its depositors, the depositor may approach the National Consumers Disputes Redressal Forum, the State Consumers Disputes Redressal Forum or District Consumers Disputes Redressal Forum, as the case may be, for redressal of his relief.
  • a declaration by the Board of Directors to the effect that the financial position of Nidhi as disclosed and the representations made in the application form are true and correct and that Nidhi has complied with all the applicable rules.
  • a statement to the effect that the Central Government does not undertake any responsibility for the financial soundness of Nidhi or for the correctness of any of the statement or the representations made or opinions expressed by Nidhi.
  • the deposits accepted by Nidhi are not insured and the repayment of deposits is not guaranteed by either the Central Government or the Reserve Bank of India, and
  • a verification clause by the depositor stating that he had read and understood the financial and other particulars furnished and representations made by Nidhi in his application form and after careful consideration he is making the deposit with Nidhi at his own risk and volition.

Every Nidhi shall obtain proper introduction of new depositors before opening their accounts or accepting their deposits and keep on its record the evidence on which it has relied upon for the purpose of such introduction.

✓ The fixed deposits shall be accepted for a minimum period of six months and a maximum period of sixty months.
✓ Recurring deposits shall be accepted for a minimum period of twelve months and a maximum period of sixty months.

Un-Encumbered Term Deposits

Every Nidhi shall invest and continue to keep invested, in unencumbered term deposits with a Scheduled commercial bank (other than a co-operative bank or a regional rural bank), or post

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office deposits in its own name an amount which shall not be less than ten per cent of the deposits outstanding at the close of business on the last working day of the second preceding month.

Other Relevant Rules

✓ Every Nidhi shall issue fully paid up equity shares of the nominal value of not less than ten rupees each

✓ A Nidhi may open branches, only if it has earned net profits after tax continuously during the preceding three financial years

✓ A Nidhi shall provide loans only to its members.

✓ The loans given by a Nidhi to a member shall be subject to the following limits, namely:
  • two lakh rupees, where the total amount of deposits of such Nidhi from its members is less than two crore rupees;
  • seven lakh fifty thousand rupees, where the total amount of deposits of such Nidhi from its members is more than two crore rupees but less than twenty crore rupees;
  • twelve lakh rupees, where the total amount of deposits of such Nidhi from its members is more than twenty crore rupees but less than fifty crore rupees; and
  • fifteen lakh rupees, where the total amount of deposits of such Nidhi from its members is more than fifty crore rupees

✓ The rate of interest to be charged on any loan given by a Nidhi shall not exceed seven and half per cent. above the highest rate of interest offered on deposits by Nidhi

✓ Every company covered under rule 2 shall file half yearly return with the Registrar in Form NDH-3 along with such fee as provided within thirty days from the conclusion of each half year duly certified by a company secretary in practice or chartered accountant in practice or cost accountant in practice.

✓ If a company falling under rule 2 contravenes any of the provisions of the rules prescribed herein, the company and every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees, and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first during which the contravention continues.

M/s Kashi Mutual Benefits Nidhi Ltd. is incorporated as a Nidhi Company under the Companies Act, 2013. The Board of directors of the company seeks your advice on the following issues as per the provisions of the Companies Act, 2013 read with rules. Advice (i) The Board of Directors is planning to issue preference shares.

(ii) The Board of Directors have decided to provide Locker facilities on rent to its member and have estimated that rental income from such letting will be around 30% of the gross income of...
(iii) The Board of Directors of the company is planning to declare dividend for the current year at 45%.
(iv) The Board of Directors of the company have decided to appoint Mr. Prince (a minor) as a member of the company.
Basics of Tribunal and Appellate Tribunal

✓ The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, a Tribunal consisting of a President and such number of Judicial and Technical members, and Appellate Tribunal consisting of Chairman and such number of Judicial and Technical members as the Central Government may deem necessary.
✓ Qualification of President and Members of Tribunal are given u/s 409 and qualification of Chairman and Members of Appellate Tribunal are given u/s 411.
✓ The President of the Tribunal and the chairperson and Judicial Members of the Appellate Tribunal, shall be appointed after consultation with the Chief Justice of India.
✓ The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee.
✓ President Chairman and members shall be eligible for re-appointment for another term after their term has expired. Their term of Office is as under:

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</tr>
<tr>
<td>Other Members</td>
<td>5</td>
<td>5</td>
</tr>
</tbody>
</table>

✓ Tenure (In years)

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<thead>
<tr>
<th></th>
<th>NCLT</th>
<th>NCLAT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tenure (In years)</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Maximum Age</td>
<td>67</td>
<td>65</td>
</tr>
<tr>
<td>Minimum Age</td>
<td>50</td>
<td>50</td>
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</tbody>
</table>

✓ The salary, allowances and other terms and conditions of service of the Members of the Tribunal and the Appellate Tribunal shall be such as may be prescribed.

✓ Section 417 provides for Grounds of removal of members.
✓ The President, the Chairperson or any Member may, by notice in writing under his hand addressed to the Central Government, resign from his office.
✓ The Central Government shall, in consultation with the Tribunal and the Appellate Tribunal, provide the Tribunal and the Appellate Tribunal, as the case may be, with such officers and other employees as may be necessary for the exercise of the powers and discharge of the functions.
✓ There shall be constituted such number of Benches of the Tribunal, as may, by notification, be specified by the Central Government. The Principal Bench of the Tribunal shall be at New Delhi.

Orders of Tribunal

✓ The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.
The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties.

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

Appeal from Orders of Tribunal

Right to Appeal Against Order of Tribunal

Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal. No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

Time Limit for Appeal

Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed.

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

Order of Appellate Tribunal

On the receipt of an appeal, the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal.

Aggrieved by an order of NCLT dated 05.05.2018, passed without the consent of the parties, Madhruk Ltd decided to file an appeal before NCLAT. Meanwhile, the employees and officers of the company went on a strike from 10.05.2018 demanding higher pay and allowances and as a result of which, the operational and management activities were badly affected. The strike was called-off on 15.06.2018. thereafter, the appeal was filed on
25.06.2018 before NCLAT with a prayer for condoning the delay in filing the appeal. A single judicial member of NCLT started the hearing. With reference to the provisions of the Companies Act, 2013, examine the following:

i) Whether the appeal is admissible?

ii) Maximum period allowed for condonation.

Expeditious Disposal by Tribunal and Appellate Tribunal

Every application or petition presented before the Tribunal and every appeal filed before the Appellate Tribunal shall be dealt with and disposed of by it as expeditiously as possible and every endeavour shall be made by the Tribunal or the Appellate Tribunal, as the case may be, for the disposal of such application or petition or appeal within three months from the date of its presentation before the Tribunal or the filing of the appeal before the Appellate Tribunal.

Where any application or petition or appeal is not disposed of within the period specified the Tribunal or, as the case may be, the Appellate Tribunal, shall record the reasons for not disposing of the application or petition or the appeal, as the case may be, within the period so specified and the President or the Chairperson, as the case may be, may, after taking into account the reasons so recorded, extend the period referred by such period not exceeding ninety days as he may consider necessary.

Appeal to Supreme Court

Any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order.

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Procedure before Tribunal and Appellate Tribunal

Power to Regulate Own Procedure

The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act or of the Insolvency and Bankruptcy Code, 2016.
and of any rules made there under, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

Powers of NCLT and NCLAT

The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act "or under the Insolvency and Bankruptcy Code, 2016", the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:—

a) summoning and enforcing the attendance of any person and examining him on oath
b) requiring the discovery and production of documents
c) receiving evidence on affidavits
d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office
e) issuing commissions for the examination of witnesses or documents
f) dismissing a representation for default or deciding it ex parte
g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
h) any other matter which may be prescribed.

Enforcement of Order

Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,—

a) in the case of an order against a company, the registered office of the company is situated; or
b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings.

Power to Punish for Contempt

The Tribunal and the Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of themselves as the High Court has and may exercise, for this purpose, the powers under the provisions of the Contempt of Courts Act, 1971.

Delegation of Powers

The Tribunal or the Appellate Tribunal may, by general or special order, direct, subject to such conditions, if any, as may be specified in the order, any of its officers or employees or any
other person authorised by it to inquire into any matter connected with any proceeding or, as the case may be, appeal before it and to report to it in such manner as may be specified in the order.

President, Members, Officers, Etc., to be Public Servants

The President, Members, officers and other employees of the Tribunal and the Chairperson, Members, officers and other employees of the Appellate Tribunal shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Protection of Action Taken in Good Faith

No suit, prosecution or other legal proceeding shall lie against the Tribunal, the President, Member, officer or other employee, or against the Appellate Tribunal, the Chairperson, Member, officer or other employees thereof or liquidator or any other person authorised by the Tribunal or the Appellate Tribunal for the discharge of any function under this Act in respect of any loss or damage caused or likely to be caused by any act which is in good faith done or intended to be done in pursuance of this Act.

Power to Seek Assistance of Chief Metropolitan Magistrate Etc

(1) The Tribunal may, in any proceedings for winding up of a company under this Act or in any proceedings under the Insolvency and Bankruptcy Code, 2016, in order to take into custody or under its control all property, books of account or other documents, request, in writing, the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector within whose jurisdiction any such property, books of account or other documents of such company under this Act or of corporate persons under the said Code, are situated or found, to take possession thereof, and the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector, as the case may be, shall, on such request being made to him,—
(a) take possession of such property, books of account or other documents; and
(b) cause the same to be entrusted to the Tribunal or other persons authorised by it.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector may take or cause to be taken such steps and use or cause to be used such force as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector done in pursuance of this section shall be called in question in any court or before any authority on any ground whatsoever.
Civil Court not to have Jurisdiction

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.

Vacancy in Tribunal or Appellate Tribunal not to Invalidate Acts or Proceedings

No act or proceeding of the Tribunal or the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Tribunal or the Appellate Tribunal, as the case may be.

Right to Legal Representation

A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or authorize:
- one or more chartered accountants or
- company secretaries or
- cost accountants or
- legal practitioners or
- any other person
to present his case before the Tribunal or the Appellate Tribunal, as the case may be.

Limitation

The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.

Transfer of Certain Pending Proceedings

On such date as may be notified by the Central Government in this behalf,—
(a) all matters, proceedings or cases pending before Company Law Board immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act
(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of
the decision or order of the Company Law Board to him on any question of law arising out of such order

Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days; and

(c) all proceedings under the Companies Act, 1956 (1 of 1956), including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer

Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government.

Provided also that only such proceedings relating to cases other than winding-up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal

Provided further that –

(i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or

(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts shall be dealt with in accordance with provisions of the Companies Act, 1956

The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section."
Establishment of Special Courts

The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

Constitution of Special Court

A Special Court shall consist of—

✓ a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and
✓ a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences,

who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

Offences Triable by Special Courts

Notwithstanding anything contained in the Code of Criminal Procedure, 1973,—

a) all offences specified under sub-section (1) of section 435 shall be triable only by the Special Court established for the area in which the registered office of the company in relation to which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned

b) where a person accused of, or suspected of the commission of, an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding...
fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate

Provided that where such Magistrate considers that the detention of such person upon or before the expiry of the period of detention is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 in relation to an accused person who has been forwarded to him under that section; and

d) a Special Court may, upon perusal of the police report of the facts constituting an offence under this Act or upon a complaint in that behalf, take cognizance of that offence without the accused being committed to it for trial.

When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial.

Summary Trial

✓ Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Special Court may, if it thinks fit, try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years

✓ Provided that in the case of any conviction in a summary trial, no sentence of imprisonment for a term exceeding one year shall be passed:

✓ Provided further that when at the commencement of, or in the course of, a summary trial, it appears to the Special Court that the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Special Court shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial.

Appeal and Revision

The High Court may exercise, so far as may be applicable, all the powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure, 1973 on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.
Application of Code to Proceedings before Special Court

Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session or the court of Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

Offences to Be Non-Cognizable

- Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act except the offences referred to in sub-section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code.

- No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder or a member of the company, or of a person authorised by the Central Government in that behalf.

- Provided that the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India:

- Provided further that nothing in this sub-section shall apply to a prosecution by a company of any of its officers.

No Personal Attendance Required

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, where the complainant under sub-section (2) is the Registrar or a person authorised by the Central Government, the presence of such officer before the Court trying the offences shall not be necessary unless the court requires his personal attendance at the trial.

Non-Applicability

The provisions of sub-section (2) shall not apply to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters in Chapter XX or in any other provision of this Act relating to winding up of companies.

Mediation and Conciliation Panel

The Central Government shall maintain a panel of experts to be called as the Mediation and Conciliation Panel consisting of such number of experts having such qualifications as
may be prescribed for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

- The Regional Director may invite applications from persons interested in getting empanelled as mediator or conciliator and possessing the requisite qualifications specified in Rule 4.
- A person who intends to get empanelled as mediator or conciliator and possesses the requisite qualifications shall apply to the Regional Director in Form MDC-1.
- Application received, if rejected by the Regional Director, the Regional Director shall record the reasons in writing for the same.
- The Regional Director shall invite applications from persons interested in getting empanelled as mediator or conciliator every year and update the Panel which shall be effective from 1st of April of every year.

Application by Parties

Any of the parties to the proceedings may, at any time during the proceedings before the Central Government or the Tribunal or the Appellate Tribunal, apply to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, in MDC-2 along with such fees as may be prescribed, for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or Tribunal or the Appellate Tribunal, as the case may be, shall appoint one or more experts from the panel referred to in sub-section (1).

Reference to Panel Suo Motu

The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, suo motu, refer any matter pertaining to such proceeding to such number of experts from the Mediation and Conciliation Panel as the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, deems fit.

Fees and Other Terms

The fee and other terms and conditions of experts of the Mediation and Conciliation Panel shall be such as may be prescribed.

- The Regional Director may by recording reasons in writing and after giving him an opportunity of being heard, remove any person from the Panel.
- Any person who intends to withdraw his name may make an application to the Regional Director indicating the reasons and the Regional Director shall take a decision on such application within fifteen days and update the Panel accordingly.
- It shall be the duty of a mediator or conciliator to disclose at appointment and during continuance to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, about any circumstances which may give rise to a reasonable doubt as to his independence or impartiality in carrying out his functions.
Procedure

The Mediation and Conciliation Panel shall follow such procedure as may be prescribed and dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

Rule 11

✓ Mediator or conciliator shall in consultation with the parties fix the dates and the time of each mediation or conciliation session, where all parties have to be present
✓ he shall hold the mediation or conciliation at the place decided by the authority or jointly agreed by parties.
✓ he may conduct joint or separate meetings with the parties
✓ each party shall furnish to the mediator or conciliator such other information as may be required by him in connection with the issues to be resolved.

Right to File Objections

Any party aggrieved by the recommendation of the Mediation and Conciliation Panel may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be

Power of Central Government to Appoint Many Prosecutors

✓ Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Central Government may appoint generally, or for any case, or in any case, or for any specified class of cases in any local area, one or more persons, as company prosecutors for the conduct of prosecutions arising out of this Act and
✓ the persons so appointed as company prosecutors shall have all the powers and privileges conferred by the Code on Public Prosecutors appointed under section 24 of the Code.

Appeal against Acquittal

✓ Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Central Government may, in any case arising under this Act, direct any company prosecutor or authorise any other person either by name or by virtue of his office, to present an appeal from an order of acquittal passed by any court, other than a High Court,
✓ an appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the appellate court.
Compensation for Accusation without Reasonable Cause

The provisions of section 250 of the Code of Criminal Procedure, 1973 shall apply mutatis mutandis to compensation for accusation without reasonable cause before the Special Court or the Court of Session.

Application of Fines

The court imposing any fine under this Act may direct that the whole or any part thereof shall be applied
- in or towards payment of the costs of the proceedings, or
- in or towards the payment of a reward to the person on whose information the proceedings were instituted

Factors Determining Fines

The court or the Special Court, while deciding the amount of fine or imprisonment under this Act, shall have due regard to the following factors, namely:—
(a) size of the company;
(b) nature of business carried on by the company;
(c) injury to public interest;
(d) nature of the default; and
(e) repetition of the default

Lesser Penalty for OPC and Small Companies

Notwithstanding anything contained in this Act, if a One Person Company or a small company fails to comply with any of the provisions of this Act, such company and officer in default of such company shall be liable to a penalty which shall not be more than one half of the penalty specified in such sections subject to a maximum of two lakh rupees in case of a company and one lakh rupees in case of an officer who is in default or any other person, as the case may be.
**Punishment for Fraud**

**Meaning of Fraud**

"fraud" in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

- "wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled.
- "wrongful loss" means the loss by unlawful means of property to which the person losing is legally entitled.

**Punishment**

- Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower] shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

- Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

- Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.
Punishment for Fraud involving an Amount of at least 10 lakhs/1% of Turnover of the Company, whichever is Lower

- **Imprisonment**
  - Minimum: Involvement of Public Interest: 3 years
  - Maximum: No Involvement of Public Interest: 6 Months
  - 10 years

- **Fine**
  - Minimum: Amount of fraud
  - Maximum: 3 times of fraud

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Punishment for Fraud involving an Amount less than 10 lakhs/1% of Turnover of the Company, whichever is Lower & No Public Interest

- **Imprisonment**
  - Maximum: 5 years

- **Fine**
  - Maximum: 50 lakhs
Punishment where no Specific Penalty or Punishment is provided

If a company or any officer of a company or any other person contravenes any of the provisions of this Act or the rules made there under, or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is provided elsewhere in this Act,

✓ the company and every officer of the company who is in default or such other person
✓ shall be punishable with fine
✓ which may extend to ten thousand rupees, and
✓ where the contravention is continuing one,
✓ with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues.

Adjudication of Penalties

Appointment of Adjudicating Officers

✓ The Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government, not below the rank of Registrar, as adjudicating officers for adjudging penalty under the provisions of this Act in the manner as may be prescribed.

✓ The Central Government shall while appointing adjudicating officers, specify their jurisdiction in the order.

Powers of Adjudicating Officer

The adjudicating officer may, by an order-

✓ impose the penalty on the company, the officer who is in default, or any other person, as the case may be, stating therein any non-compliance or default under the relevant provisions of this Act; and

✓ direct such company, or officer who is in default, or any other person, as the case may be, to rectify the default, wherever he considers fit.

The adjudicating officer shall, before imposing any penalty, give a reasonable opportunity of being heard to such company, the officer who is in default or any other person.

Appeal against Adjudicating Officer

✓ Any person aggrieved by an order made by the adjudicating officer may prefer an appeal to the Regional Director having jurisdiction in the matter.
Every appeal shall be filed within sixty days from the date on which the copy of the order made by the adjudicating officer is received by the aggrieved person and shall be in ADJ in manner and be accompanied by such fees as may be prescribed.

The Regional Director may, after giving the parties to the appeal an opportunity of being heard, pass such order as he thinks fit, confirming, modifying or setting aside the order appealed against.

Penal Consequences

Where company fails to comply with the order by Adjudicating Officer or Regional director, as the case may be, within a period of ninety days from the date of the receipt of the copy of the order, the company shall be punishable with fine which shall not be less than twenty five thousand rupees but which may extend to five lakh rupees.

Where an officer of a company or any other person who is in default fails to comply with the order within a period of ninety days from the date of the receipt of the copy of the order, such officer shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

Dormant Company

Where
- a company is formed and registered under this Act for a future project or
- to hold an asset or intellectual property and has no significant accounting transaction,
- such a company or
- an inactive company
- may make an application to the Registrar in Form MSC-1 along with such fee as provided and in such manner as may be prescribed for obtaining the status of a dormant company.

Significant Accounting Transaction
It means any transaction other than—
(a) payment of fees by a company to the Registrar;
(b) payments made by it to fulfil the requirements of this Act or any other law;
(c) allotment of shares to fulfil the requirements of this Act; and
(d) payments for maintenance of its office and records.

Inactive Company
It means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed...
MISCELLANEOUS

financial statements and annual returns during the last two financial years

Issuance of Certificate

The Registrar on consideration of the application shall allow the status of a dormant company to the applicant and issue a certificate in Form MSC-2

Maintenance of Register

The Registrar shall maintain a register of dormant companies. Register maintained under the portal maintained by the Ministry of Corporate Affairs on its web-site shall be the Register.

Issuance of Notice by Registrar

In case of a company which has not filed financial statements or annual returns for two financial years consecutively, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies.

Requirements for Dormant Companies

A dormant company shall-

✓ Have minimum number of three directors in case of a public company, two directors in case of a private company and one director in case of a One Person Company.
✓ The provisions of the Act in relation to the rotation of auditors shall not apply on dormant companies.
✓ file a “Return of Dormant Company” within a period of thirty days from the end of each financial year.
✓ pay such annual fee as may be prescribed to the Registrar to retain its dormant status.

The Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements of this section.

Retaining Status of Active Company

✓ An application for obtaining the status of an active company shall be made in Form MSC-4 along with fees provided.
✓ The Registrar shall, after considering the application issue a certificate in Form MSC-5 allowing the status of an active company to the applicant.
✓ Registrar shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of consecutive five years.
Components of Meetings

A meeting consists of 4 components-
✓ Notice
✓ Agenda
✓ Resolutions
✓ Minutes

Drafting of Notice

Notice of Board Meetings

✓ Under Companies Act, a Meeting of the Board should be called by giving a Notice of Board Meeting in writing to every Director of the Company. The notice of board meeting must be in writing and should be given to every Director by hand or by speed post or by registered post or by facsimile or by e-mail or by any other electronic means.
✓ Notice convening a Meeting should be given at least seven days before the date of the Meeting, unless the Articles of Association prescribe a longer period.
✓ It is a best practice to send the agenda of the meeting along with the notice of board meeting.

NOTICE OF BOARD MEETING

Notice of -----Board Meeting of ABC ltd
Regd Office: xxxxxxxxxxxxx

To
Mr. ............
Director
Company Name
Address

Dear Sir,
Notice is hereby given that the ........................ (serial number of Meeting) Meeting of the Board of Directors of the company will be held on ........................ (day of the week), the ........................ (date) ........................ (month) ........................ (year) at ........................
The Agenda of the business to be transacted at the Meeting is enclosed/will follow.

You may attend the Meeting through Electronic Mode, the details of which are enclosed. In case you desire to participate through such mode, please send a confirmation in this regard to ……………………… (Name of Company Secretary/ Chairman/other Authorised Person), email …………………., Tel No. …………………. within …………………. days (time frame) to enable making necessary arrangements. In case no reply is received from you, it shall be presumed that you will attend Board meeting in person.

Kindly make it convenient to attend the Meeting.

Place:
Date:

For, ABC ltd
xxxxxxxxxxx
(Company Secretary)

Notice of General Meeting

ABC ltd
Notice to the shareholders

Notice is hereby given that the ...........th ANNUAL GENERAL MEETING of the shareholders of ABC Ltd. Will be held on ...........(day)...............(date) at ........(time) at..........(venue) to transact the following:

Ordinary Business:

Special Business:

Place:
Date:

By Order of the Board
For, ABC ltd
Notes:

- A member entitled to attend and vote at the Annual General Meeting may appoint a proxy to attend and vote. The Proxy Form must be affixed with requisite revenue stamp and must be deposited at the Registered Office of the Company not less than 48 hours before the time fixed for the meeting.
- Explanatory statement pursuant to section 102 of Companies Act, 2013 in respect of special business is annexed herewith.

Drafting of Agenda

✓ Items to be transacted or things to be done at a meeting is called as Agenda.
✓ The current practice is to lay down the agenda preferably in the form of proposed resolutions.
✓ Preparation requires considerable care.
✓ Order in which items appear are generally the order in which business is required to be transacted at the meeting.
✓ An ideal agenda is one where altering only few words would convert it into past tense.
✓ Various items listed on agenda are numbered serially for convenience of recording minute and for future reference.

Drafting of Resolutions

✓ Resolution is a formal agreement as to adoption of proposal put before persons in meetings.
✓ Passing of resolution expresses the intent or will of the company in case of Board and general meetings respectively.
Sample Resolutions

Ordinary Resolution: Appointment of Independent Director

“RESOLVED that pursuant to the provisions of Sections 149, 150, 152 and any other applicable provisions of the Companies Act, 2013 and the rules made thereunder read with Schedule IV to the Companies Act, 2013, Mr. ---- (holding DIN -------), Director of the Company who retires by rotation at the Annual General Meeting and in respect of whom the Company has received a notice in writing from a member proposing his candidature for the office of Director, be and is hereby appointed as an Independent Director of the Company to hold office for five consecutive years fora term up to ---, 20---.”

Special Resolution: Waiver of Excess Remuneration Paid to Director

“RESOLVED THAT pursuant to the provisions of section 197 and other applicable provisions, if any, consent of the company be and is hereby given for waiving the recovery of an amount of Rs.---------- paid to Mr.----------, the director of the company, during the period 1st April, 2019 to 31st March, 2020, being in excess of the remuneration permissible under section 197.

FURTHER RESOLVED THAT the Company Secretary be and is hereby authorized to take the necessary steps in this regard.”

Board Resolution by Simple Majority: Appointment of Additional Director

“RESOLVED THAT pursuant to the provisions of section 16(1) and all other applicable...
provisions, if any, of the Companies Act, 2013 and pursuant to Regulation No. .......... of the articles of association of the Company, .......... who holds Director Identification No. .........., and who has filed his consent with the company as per the provisions of section 152(5) of the Companies Act, 2013, and who is not disqualified as per the provisions of section 164 of the Companies Act, 2013, be and is hereby appointed as an additional director of the company.

FURTHER RESOLVED THAT .......... shall hold office of additional director till the next annual general meeting or the last date on which the AGM should have been held, whichever is earlier.

FURTHER RESOLVED THAT Mr. .........., the Company Secretary of the company, be and is hereby authorised to file all the necessary returns in this regard with the Registrar, make necessary entries in the Register of Directors and to do all acts and things as may be necessary in this connection.”

Board Resolution by Circulation:

Section 175 of Companies Act, 2013 talks about Resolution by Circulation

To

Mr. ................., Director

..........................

(Address).

Dear Sir,
The following resolution, which is intended to be passed as a resolution by circulation as provided in Section 175 of the Companies Act, 2013, is circulated herewith as per the provisions of the said section.

If only you are Not Interested in the resolution, you may please indicate by appending your signature in the space provided beneath the resolution appearing herein below as a separate perforated slip if you are in favour or against the said resolution. The perforated slip may please be returned if and when signed within.................... days of this letter.

However, it need not be returned if you are interested in the resolution.

Yours faithfully,

(Secretary)

......................Ltd.

Resolution by circulation passed by the directors as per circulation effected............. 20.....

Resolved
Drafting of Minutes of Meetings

**Minutes Meaning**

- A note to preserve memory of anything.
- Minutes of a meeting are a written record of the business transacted, decisions and resolutions arrived at the meeting.
- Section 118 of Companies Act, 2013 imposes a statutory obligation on every company to cause minutes of all proceedings of general meetings and other meetings and resolution passed by postal ballot.
- Section 119 of Companies Act, 2013 provides for inspection of minutes books of General meeting.

**Statutory Requirement Relating to Keeping of The Minutes**

**Preparation of the Minutes of the Proceedings of Meetings**

- Every company shall cause minutes of proceedings of every general meeting of any class of shareholders or creditors and every resolution passed by postal ballot.
- Every meeting of its Board of Directors or of every committee of the board, to be prepared and signed in such manner as may be prescribed.
- It shall be kept within thirty days of the conclusion of every such meeting concerned or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered.

**Contain Fair & Correct Summary**

The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat.
Appointments to be Included in the Minutes

All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting.

Other Details

In case of meeting of BOD or of committee of Board, the minutes shall also contain:
- The names of directors present
- The names of directors dissenting from the resolution

Exemptions to Matters from Inclusion in the Minutes

Any matter which in the opinion of the Chairman of the meeting:
- is or could reasonably be regarded as defamatory of any person.
- is irrelevant or immaterial to the proceedings
- is detrimental to the interests of the company

Absolute Discretion of Chairman

The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds specified in the previous slide.

Considered as Evidence of the Proceedings

The minutes kept in accordance with the provisions of this section shall be evidence of the proceedings recorded therein.

Minutes Signifies the Validity of the Proceedings

- The meeting shall be deemed to have been duly called and held
- All the proceedings thereat to have duly taken place
- The resolutions passed by postal ballot to have been passed
- The resolutions passed by postal ballot to have been passed
- All appointments of directors, key managerial personnel, auditors or company secretary in practice shall be deemed to be valid
Matters Contained in the Minutes shall be Circulated

No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required to be contained in the minutes.

Adherence to Secretarial Standards by Company

Every company shall observe secretarial standards with respect to general and board meetings specified by ICSI constituted u/s 3 of Company Secretaries Act, 1980 and approved by CG

Default in Compliance

The company shall be liable to a penalty of twenty five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees.

Tampering with the Minutes

Imprisonment for a term which may extend to two years and with fine which shall not be less than twenty five thousand rupees but which may extend to one lakh rupees

Drafting of Minutes

The Minutes may be Drafted

- The minutes may be drafted in a tabular form; OR
- It may be drafted in a series of paragraphs numbered consecutively and with relevant headings.

Particulars of Meeting

- Name of the Meeting
- Place, Date and Time of Meeting
- Constitution of Meeting
How the Meeting was Constituted

✓ Names of the person in the Chair
✓ Names of Directors and Secretary
✓ Names of Person in attendance
✓ Number of Members

Draft Minutes of Meeting

Minutes of ................. meeting of the Board of Directors of ABC Limited held on ................. the ................. 2019, at New Delhi

Present:
............... Chairman
............... Director
............... Director
In attendance (Secretary)

Item No. 1: Leave of absence:
Leave of absence was granted to Saravashri............... directors.

Item No. 2: Confirmation of minutes of the ................. Board meeting:
The minutes of the ................. meeting of the Board of Directors held on ................. were considered and confirmed.

Item No. 3: Appointment of Managing Director:
The Board noted the appointment of Shri ................. director of the company as the Managing Director of the company. In this connection, the following resolutions were passed:

Resolved that Shri ................. who fulfils the conditions specified in Parts I and II of Schedule V to the Companies Act, 2013, be and is here by appointed as the Managing Director of the company for a period of five years effective from ................. and that he may be paid remuneration by way of salary, commission and perquisites in accordance with Part II of Schedule V to the Act.

Item No. 4: Vote of thanks

Contents of Meeting

✓ Serial Number of the Minutes
✓ Subject Heading
✓ Full terms of Resolution
✓ All statistical Figures
✓ Specific business upon which decisions were taken
✓ All appointments of officers, salaries
✓ Financial and Contractual Transaction
✓ In case of Special Resolution, No. of votes for and against
✓ Objections and Protests raised by members together with Chairman's rulings
✓ Names of Directors dissenting with any resolution
✓ Reference about interested Directors abstaining from Voting
✓ Chairman's Signature and Date of verification of Minutes
Concept of Insolvency and Bankruptcy

- **Insolvency** in this Code is regarded as a "state" where assets are insufficient to meet the liabilities.
- If untreated insolvency will lead to bankruptcy for non-corporates and liquidation of corporate.
- **Insolvency** is a state and **bankruptcy** is a conclusion
- Insolvency is a situation which arises due to inability to pay off the debts due to insufficient assets, bankruptcy is a situation wherein application is made to an authority declaring insolvency and seeking to be declared as bankrupt
- Liquidation is the winding up of a corporation or incorporated entity.

**Earlier Laws**

- Presidency Towns Insolvency Act, 1909
- Provincial Insolvency Act, 1920
- Indian Partnership Act, 1932
- Recovery of Debts due to banks & financial Institutions Act, 1993
- Sick Industries Companies Act, 1985
- Companies Act, 1956
- Companies Act, 2013
- SARFAESI Act, 2002
- Insolvency and Bankruptcy Code, 2016
Need of New Law

✓ In past Bankruptcy regime of India as mentioned in chart above, company's revival has been sluggish and cumbersome which often leads to productive assets lying dormant and getting wasted.

✓ It takes an average of four to five years in insolvency resolution in India. The main reason behind such delay in the legal process is the existence of overlapping legislations and adjudicating authorities dealing with insolvency of companies and individuals in India.

✓ The Government of India then formulated a plan to refurbish the prevailing bankruptcy laws and replace them with one that will facilitate hassle-free and time-bound for revival and closure of businesses.

✓ For this, Insolvency and Bankruptcy Code, 2016 has come up with the expeditious insolvency resolution/revival process for corporate persons, firms and Individuals

Evolution of the Code

- In Union Budget 2014-15, Finance Minister Announced Bankruptcy Code
- On 21st December, 2015.. it was introduced in Lok sabha
- On 5th May, 2016 Lok Sabha passed IBC, 2016
- It was notified the same day. It appeals and amends many laws
- On 28th May, 2016 Code received assent of President
- On 11th May, 2016 Rajya Sabha passed IBC, 2016

Objective of Insolvency & Bankruptcy Code, 2016

a) **Comprehensive Law:** Insolvency Code is a comprehensive law which envisages and regulates the process of insolvency and bankruptcy of all persons including corporates, partnerships, LLP’s and individuals.

b) **No Multiplicity of Laws:** The Code has withered away the multiple laws covering the recovery of debts and insolvency and liquidation process and presents singular platform for all the reliefs relating to recovery of debts and insolvency.

c) **Low Time Resolution:** The Code provides a low time resolution and defines fixed time frames for insolvency resolution of companies and individuals. The process is mandated to be completed within 180 days, extendable to maximum of 90 days. Further, for a speedier process there is provision for fast-track resolution of corporate insolvency within 90 days. If insolvency cannot be resolved, the assets of the borrowers may be sold to repay creditors.
d) **One Window Clearance:** It has been drafted to provide one window clearance to the applicant whereby he gets the appropriate relief at the same authority unlike the earlier position of law where in case the company is not able to revive the procedure for winding up and liquidation has to be initiated under separate laws governed by separate authorities.

e) **One Chain of Authority:** There is one chain of authority under the Code. It does not even allow the civil courts to interfere with the application pending before the adjudicating authority, thereby reducing the multiplicity of litigations. The National Company Law Tribunal (NCLT) will adjudicate insolvency resolution for companies. The Debt Recovery Tribunal (DRT) will adjudicate insolvency resolution for individuals.

f) **Priority to the interests of workman and employees:** The Code also protects the interests of workman and employees. It excludes dues payable to workmen under provident fund, pension fund and gratuity fund from the debtor’s assets during liquidation.

g) **New Regulatory Authority:** It provides for constitution of a new regulatory authority ‘Insolvency and Bankruptcy Board of India’ to regulate professionals, agencies and information utilities engaged in resolution of insolvencies of companies, partnership firms and individuals. The Board has already been established and started functioning.

**Objective of IBC, 2016**

a) To consolidate and amend the laws relating to re-organization and insolvency resolution of corporate persons, partnership firms and individuals.

b) To fix time periods for execution of the law in a time bound manner.

c) To maximize the value of assets of interested persons.

d) To promote entrepreneurship

e) To increase availability of credit.

f) To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues.

g) To establish an Insolvency and Bankruptcy Board of India as a regulatory body for insolvency and bankruptcy law.

**Pillars of the Code**
Insolvency and Bankruptcy Board of India

Establishment
- On 1st October, 2016
- Head Office- New Delhi

Features
- Body Corporate
- perpetual Succession
- Common seal
- Capacity to sue and be sued
- Hold & dispose property

Functions
- Legislative
- Executive
- Quasi Judicial with respect to Insolvency Professionals, their agencies & Information Utilities
Insolvency Professional Agencies

The Code provides for establishment of insolvency professionals agencies to enroll and regulate insolvency professionals as its members in accordance with the Insolvency and Bankruptcy Code 2016 and read with regulations.

Functions of IPA

✓ Regulatory Functions- Drafting detailed standards and codes of conduct through bye-laws, that are made public and are binding on all members
✓ Executive Functions- Gathering information for preventing frivolous behaviour, and malfeasance in the conduct of IP duties
✓ Quasi-Judicial Functions- Addressing grievances of aggrieved parties, hearing complaints against members and taking suitable actions

Insolvency Professionals

The Code provides for insolvency professionals as intermediaries who would play a key role in the efficient working of the bankruptcy process.

Every insolvency professional shall abide by the following code of conduct:

✓ to take reasonable care and diligence
✓ to allow the insolvency professional agency to inspect his records
✓ to submit a copy of the records

Information Utilities

✓ The Code envisages creation of information utility to collect, collate, authenticate and disseminate financial information of debtors in centralized electronic databases, at all times
The Code requires creditors to provide financial information of debtors to multiple utilities on an ongoing basis. Such information would be available to creditors, resolution professionals, liquidators and other stakeholders in insolvency and bankruptcy proceedings.

Adjudicating Authorities

The Code has created one chain of authority for adjudication under the Code. Civil Courts have been prohibited to interfere in the matters related with application pending before the Adjudicating Authority.

Structure of the Code

Important Definitions

Claim [Section 3(6)]

Claim means a right to payment or right to remedy for breach of contract if such breach gives rise to a right to payment whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.
### Corporate Person [Section 3(7)]

Corporate Person means
- (a) a company as defined under section 2(20) of the Companies Act, 2013
- (b) a Limited Liability Partnership as defined in 2(1)(n) of Limited Liability Act, 2008 or,
- (c) any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.

### Corporate Debtor [Section 3(8)]

Corporate Debtor means a corporate person who owes a debt to any person.

### Creditor [Section 3(10)]

Creditor means 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.

### Debt [Section 3(11)]

Debt means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

### Default [Section 3(12)]

Default means non-payment of debt when whole or any part or instalment 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.

### Financial Information [Section 3(13)]

Financial information, in relation to a person, means one or more of the following categories of information, namely:—
- (a) records of the debt of the person
- (b) records of liabilities when the person is solvent
- (c) records of assets of person over which security interest has been created
- (d) records, if any, of instances of default by the person against any debt
- (e) records of the balance sheet and cash-flow statements of the person; and
- (f) such other information as may be specified.

### Person [Section 3(23)]

A person includes:
- ✓ an individual
- ✓ a Hindu Undivided Family
- ✓ a company
- ✓ a trust
- ✓ a partnership
- ✓ A limited liability partnership, and
- ✓ any other entity established under a Statute.
- ✓ And includes a person resident outside India
<table>
<thead>
<tr>
<th><strong>Secured Creditor [Section 3(30)]</strong></th>
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</thead>
<tbody>
<tr>
<td>Secured creditor means a creditor in favour of whom security interest is created</td>
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<table>
<thead>
<tr>
<th><strong>Adjudicating Authority [Section 5(1)]</strong></th>
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<tbody>
<tr>
<td>Adjudicating Authority, for the purposes of this Part II (Insolvency Resolution and Liquidation for corporate persons), means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013. [Section 5(1)]</td>
</tr>
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<table>
<thead>
<tr>
<th><strong>Corporate Applicant [Section 5(5)]</strong></th>
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<tbody>
<tr>
<td>Corporate applicant means—</td>
</tr>
<tr>
<td>a) <strong>corporate debtor</strong>; or</td>
</tr>
<tr>
<td>b) a <strong>member</strong> or <strong>partner</strong> of the <strong>corporate debtor</strong> who is <strong>authorised to make</strong> an application for the <strong>corporate insolvency resolution process</strong> under the constitutional document of the corporate debtor; or</td>
</tr>
<tr>
<td>c) an <strong>individual</strong> who is <strong>in charge of managing the operations and resources of the corporate debtor</strong>; or</td>
</tr>
<tr>
<td>d) a <strong>person</strong> who has the <strong>control and supervision</strong> over the <strong>financial affairs of the corporate debtor</strong></td>
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</table>

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<thead>
<tr>
<th><strong>Dispute [Section 5(6)]</strong></th>
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<tbody>
<tr>
<td>Dispute includes a suit or arbitration proceedings relating to—</td>
</tr>
<tr>
<td>(a) the existence of the amount of debt</td>
</tr>
<tr>
<td>(b) the quality of goods or service; or</td>
</tr>
<tr>
<td>(c) the breach of a representation or warranty</td>
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</table>

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<tr>
<th><strong>Financial Creditor [Section 5(7)]</strong></th>
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<tbody>
<tr>
<td>Financial creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.</td>
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<thead>
<tr>
<th><strong>Insolvency Commencement Date [Section 5(12)]</strong></th>
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</thead>
<tbody>
<tr>
<td>Insolvency commencement date means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be.</td>
</tr>
</tbody>
</table>

<table>
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<tr>
<th><strong>Operational Creditor [Section 5(20)]</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred; [Section 5(20)]</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Related Party [Section 5(24)]</strong></th>
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<tbody>
<tr>
<td>Related party, in relation to a corporate debtor, means—</td>
</tr>
<tr>
<td>(a) a director or partner or a relative of a director or partner of the corporate debtor</td>
</tr>
<tr>
<td>(b) a key managerial personnel or a relative of a key managerial personnel of the corporate debtor</td>
</tr>
</tbody>
</table>
debtor;
(c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;
(d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;
(e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;
(f) any body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;
(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;
(k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;
(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;
(m) any person who is associated with the corporate debtor on account of—
   • participation in policy making processes of the corporate debtor; or
   • having more than two directors in common between the corporate debtor and such person; or
   • interchange of managerial personnel between the corporate debtor and such person

Resolution Plan [Section 5(26)]

Resolution plan means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II.
A resolution plan may include provisions for the restructuring of the corporate debtor including by way of merger, amalgamation and demerger.

Resolution Professional [Section 5(27)]

Resolution professional, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional.

Voting Share [Section 5(28)]

Voting share means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor.

Process of Corporate Insolvency Resolution Process
Part II of Code

- Part II of Code contains the provisions with respect to Insolvency Resolution and liquidation of Corporate Persons. It consists of sections 4 to 77.
- Part II shall apply to matters of insolvency and liquidation only when minimum amount of default is 1 crore.
- Central Government may by notification specify minimum amount of default of higher value which shall not be more than 1 crore.

Application to National Company Law Tribunal

The process of insolvency is triggered by occurrence of default.

The corporate insolvency process may be initiated against any defaulting corporate debtor by making an application for corporate insolvency resolution. The application may be made by:

a) Financial creditor
b) Operational creditor
c) Corporate debtor

Filing Of Application by Financial Creditor

CA. SHIVANGI AGRAWAL
A financial creditor either itself or along with other financial creditors may lodge an application before the Adjudicating Authority (National Company Law Tribunal) for initiating corporate insolvency resolution process against a corporate debtor who commits a default in payment of its dues in specified form and manner.

Enclosure to Application

The Financial Creditor shall along with the application give-

- Record of default with Information Utility or other evidence in support of the default committed by the corporate debtor.
- Name of the Interim Resolution Professional.
- Any other information as may be prescribed.

Admission/Rejection

The Adjudicating Authority may either accept or reject the application within fourteen days of receipt of application.

<table>
<thead>
<tr>
<th>Grounds of Acceptance</th>
<th>Grounds of Rejection</th>
</tr>
</thead>
<tbody>
<tr>
<td>If satisfied that-</td>
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</tr>
<tr>
<td>✓ Default has occurred</td>
<td>✓ Default has not occurred</td>
</tr>
<tr>
<td>✓ Application for Corporate Insolvency resolution process is complete</td>
<td>✓ Application for Corporate Insolvency resolution process is not complete</td>
</tr>
<tr>
<td>✓ No disciplinary proceedings are against proposed Resolution professional</td>
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However, applicant should be allowed to rectify the defect within seven days of receipt of notice of such rejection.

If Adjudicating Authority has not ascertained the existence of default and passed an order within such time, it shall record the reasons in writing for the same.

For financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less.

Pre-Condition for Filing by Operational Creditor

Sending Of Demand Notice

- An operational creditor shall on the occurrence of default, shall first send a demand notice in such form and manner as may be prescribed and a copy of invoice to the corporate debtor.
- Demand Notice shall contain demand requiring payment of amount involved in default.

CA. SHIVANGI AGRAWAL
Response to Notice

The corporate debtor shall-
- within a period of ten days of receipt of demand notice
- notify the operational creditor about the existence of a dispute, any or record of pendency of any suit or arbitration proceedings.
- Bring to notice of operational creditor about payment of unpaid operational debt by sending attested copy of record of payment

Dispute [Section 5(6)]

It includes suit or arbitration proceedings relating to-

a) Existence of amount of debt
b) Quality of goods or service
c) Breach of representation or warranty

Filing of Application by Operational Creditor

After the expiry of ten days, if the operational creditor does not receive his payment or the confirmation of a dispute that existed even before the demand notice was sent, he may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

Enclosure to Application

The Operational Creditor shall along with the application give-
- Copy of Invoice or demand notice delivered by operational creditor to debtor.
- An affidavit to effect that no notice given by corporate debtor relating to dispute
- Copy of certificate from Financial Institutions maintaining accounts confirming that no payment of unpaid operational debt is available.
- Any other proof confirming non-payment.
- An operational creditor may propose Name of Resolution professional

Admission/Rejection

The Adjudicating Authority may either accept or reject the application within fourteen days of receipt of application.

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<tr>
<td>✓ Invoice and demand notice is not</td>
<td></td>
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</table>
Invoice and demand notice is delivered to Corporate Debtor
No notice of dispute received.

However, applicant should be allowed to rectify the defect within seven days of receipt of notice of such rejection.

Filing of Application by Corporate Applicant

Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

Enclosure to Application

The Corporate Applicant shall along with the application give-

- Information relating to books of account and other documents
- Name of Resolution professional
- Special Resolution passed by shareholders of Corporate Debtor or the resolution passed by atleast 3/4th of total number of partners of corporate debtor approving filing of application.

Admission/Rejection

The Adjudicating Authority may either accept or reject the application within fourteen days of receipt of application.

Grounds of Acceptance
- Application for Corporate Insolvency resolution process is complete
- No disciplinary proceedings are against proposed Resolution professional

Grounds of Rejection
- Application for Corporate Insolvency resolution process is not complete
- discplinary proceedings are against proposed Resolution professional

Commencement of Insolvency Resolution Proceedings

The insolvency resolution process shall commence from the date of admission of application by the Adjudicating Authority. It is referred to as the Corporate Insolvency Resolution Date.

Persons not entitled to Initiate Insolvency Process
(a) A corporate debtor already undergoing an insolvency resolution process or

(b) A corporate debtor having completed corporate insolvency resolution process 12 months preceding the date of making of the application or

(c) A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved 12 months before the date of making of an application

(d) A corporate debtor in respect of whom a liquidation order has been made

In this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor

Time Limit for Completion of Insolvency Resolution Process

Corporate Insolvency Resolution process shall be completed within a period of 180 days from the date of admission of application to initiate such process.

Extension

- Resolution professional shall file an application to Adjudicating Authority to extend the period beyond 180 days, if a resolution in this regard is passed at a meeting of the committee of creditors by a vote of 66% of the voting shares.
- On receipt of application, if Authority is satisfied that subject matter of case is such that Corporate Insolvency resolution process can't be completed within 180 days, it may by order extend duration beyond 180 days by such further period as it thinks fit but not exceeding 90 days
- Extension shall not be granted more than once

Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor

Withdrawal of Application

Adjudicating Authority may allow withdrawal of application on application made with approval of 90% voting share of committee of creditors.

Order of Adjudicating Authority

The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order—

(a) declare a moratorium for the purposes referred to in section 14;

(b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and
(c) appoint an **interim resolution professional** in the manner as laid down in section 16.

**Appointment of IRP**

Section 16

**Adjudicating authority shall appoint an Interim Resolution Professional on the insolvency commencement date.**

**In Case of Application by Financial Creditor**

**Where** the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, the **resolution professional as proposed** in the application shall be appointed as the **interim resolution professional**, if no disciplinary proceedings are pending against him.

**In Case of Application by Operational Creditor**

**Where** the application for corporate insolvency resolution process is made by an **operational creditor** and

**Case I: No proposal for an interim resolution professional is made.**

✓ The **Adjudicating Authority** shall **make a reference to the Board** for the recommendation of an insolvency professional who may act as an interim resolution professional.

✓ The **Board shall recommend the name** of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending, within **ten days of the receipt of a reference from the Adjudicating Authority.**

✓ Name proposed by Board shall be appointed.

**Case II: A proposal for an interim resolution professional is made.**

The **proposed resolution professional** shall be appointed as the **interim resolution professional**, if no disciplinary proceedings are pending against him.

**Period of Appointment of IRP**

The term of Interim Resolution Professional shall not exceed 30 days from the date of appointment.

**Public Announcement**

Section 15

**Interim Resolution Professional shall make the Public Announcement immediately** after his appointment.

"Immediately" here means not more than three days from the date of appointment of the Interim Resolution Professional.

Public announcement shall include the following:-

CA. SHIVANGI AGRAWAL
(a) **Name & Address of Corporate Debtor** under the Corporate Insolvency Resolution Process.
(b) **Name of the authority with which** the corporate **debtor** is incorporated or **registered**.
(c) **Details of interim resolution Professional** who shall be vested with the management of the Corporate Debtor and be responsible for receiving claims.
(d) **Penalties** for false or misleading Claims.
(e) The **last date for the submission of the claims**.
(f) The **date on which** the Corporate Insolvency Resolution **Process ends**.

The expenses of public announcement shall be borne by the applicant which may be reimbursed by the Committee of Creditors, to the extent it ratifies them.

**Moratorium**

Following acts shall be **prohibited during the moratorium period**-

(a) The **institution of suits or continuation of any pending suits** or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority

(b) **Transferring, encumbering, alienating or disposing of by** the corporate **debtor** any of its **assets** or any legal right or beneficial interest therein

(c) Any **action to** foreclose, recover or **enforce** any **security interest** created by the corporate debtor in respect of its property including any action under the SARFAESI Act, 2002

(d) The **recovery of any property by an owner or lessor** where such property is occupied by or in the possession of the corporate debtor.

**Schweitzer Systemtek India (P) ltd v Phoenix ARC(P) Ltd**

**Alpha & Omega Diagnostics (India) ltd vs Asset Reconstruction Co. of India Ltd**

When moratorium is declared, it results in prohibition on any action to recover or enforce any security interest created by debtor in respect of its property. Property not owned by Corporate debtor is outside the ambit of this section

**Powers of IRP**

a) **Management of Affairs**: The management of the affairs of the corporate debtor shall vest in the interim resolution professional from the date of his appointment.

(b) **Exercise of Power of BoD/ partners**: 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.

(c) **Reporting of officers/managers**: 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.
(d) **Instructions to financial institutions:** The financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them.

**Committee of Creditors**

The **interim resolution professional shall after collation of all claims** received against the corporate debtor **and determination of the financial position** of the corporate debtor, **constitute a committee of creditors.**

**Composition of Committee**

**Where Financial Creditors exist:**

The **Committee of creditors shall comprise of all financial creditors of a corporate debtor.** The Resolution Professional shall identify the financial creditors and constitutes a creditors committee.

**Where No Financial Creditors exist:**

where a corporate debtor does not have any financial creditors, **the committee of creditors shall be constituted and comprise of such persons** to exercise such functions in such manner as may be specified by the Board.

Provided that a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

**Meetings and Report**

- The **resolution professional shall conduct all the meetings** of the Committee of Creditors.
- After the constitution of committee of creditors, the **interim resolution professional is required to file a report certifying the constitution** of the committee to the Adjudicating Authority.
- The report shall be filed **on or before the expiry of thirty days from the date of appointment** of the interim resolution professional.

**Consortium Finance**

Where the **corporate debtor owes financial debts to two or more financial creditors** as part of a consortium or agreement, **each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.**

**Where Any Person is a Financial Creditor as well as an Operational Creditor**
Such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor.

Such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

In Case of Legal Transfer

Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

One Trustee for More Than 1 Financial Creditor

Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility or issued as securities provide for a single trustee or agent to act for all financial creditors,

each financial creditor may—

(a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;
(b) represent himself in the committee of creditors to the extent of his voting share;
(c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or
(d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

Voting Share

The Board may specify the manner of determining the voting share in respect of financial debts issued as securities.

All decisions of the committee of creditors except otherwise stated shall be taken by a vote of not less than 51% of voting share of the financial creditors.

Right to Demand Information

The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

The resolution professional shall make available any financial information so required by the committee of creditors within a period of seven days of such requisition.

Appointment of Resolution Professional

First Meeting of Committee

The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.
Resolution for Appointment or Replacement

The committee of creditors, may, in the first meeting, by a majority vote of not less than 66% of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

Appointment

Where the committee of creditors resolves Appointment of resolution professional to continue the interim resolution professional as resolution professional, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority.

Replacement

✓ To replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional.
✓ The Adjudicating Authority shall forward the name of the resolution professional proposed to the Board for its confirmation and shall make such appointment after confirmation by the Board.
✓ Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.

Resolution Professional to Conduct Corporate Insolvency Resolution Process

✓ The resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period.
✓ The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.
✓ In case of any appointment of a resolution professional other than Interim RP, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional.

Meeting of Committee of Creditors

✓ The members of the committee of creditors may meet in person or by such electronic means as may be specified.
✓ All meetings of the committee of creditors shall be conducted by the resolution professional.
✓ The resolution professional shall give notice of each meeting of the committee of creditors to—

CA. SHIVANGI AGRAWAL
• members of Committee of creditors  
• members of the suspended Board of Directors or the partners of the corporate persons, as the case may be  
• operational creditors or their representatives if the amount of their aggregate dues is not less than 10% of the debt.

✓ The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings.

✓ Any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors.

✓ Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

✓ Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

✓ The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

✓ The meetings of the committee of creditors shall be conducted in such manner as may be specified.

Duties of Resolution Professional

It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

For above, the resolution professional shall undertake the following actions, namely:—

a. take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor
b. represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings
c. raise interim finances subject to the approval of the committee of creditors under section 28
d. appoint accountants, legal or other professionals in the manner as specified by Board
e. maintain an updated list of claims
f. convene and attend all meetings of the committee of creditors
g. prepare the information memorandum in accordance with section 29
h. invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans
i. present all resolution plans at the meetings of the committee of creditors
j. file application for avoidance of transactions in accordance with Chapter III, if any; and
k. such other actions as may be specified by the Board.

Rights and Duties of Authorised Representative

Section 25A
✓ The **Authorised representative** shall have the **right to participate** and vote in meetings of committee of creditors **on behalf of financial creditor** he represents with prior voting instructions obtained through physical or electronic means.

✓ Authorised representative shall **not act against** the **interest of financial creditor** and always acts in accordance with prior instructions.

✓ **In case no prior instructions,** he shall **abstain from voting** on behalf of such creditor.

✓ Authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means from the financial creditor he represents for voting in accordance therewith to ensure that appropriate voting instructions of the financial creditors is correctly recorded.

### Replacement of Resolution Professional to Committee of Creditors

✓ Where, at **any time during** the corporate insolvency resolution **process,** the **committee** of creditors is of the **opinion that** a resolution **professional** appointed under section 22 is required to **be replaced,** it may replace him with another resolution professional in the manner provided under this section.

✓ The **committee** of creditors may, at a meeting, **by a vote of sixty six per cent. of voting shares,** propose to replace the resolution **professional** appointed under section 22 with another resolution professional.

✓ The **committee** of creditors **shall forward** the **name** of the insolvency professional proposed by them to the **Adjudicating Authority.**

✓ The Adjudicating **Authority shall forward** the name of the proposed resolution professional to the **Board for its confirmation** and a resolution professional shall be appointed **in the same manner** as laid down in **section 16.**

✓ Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section.

### Approval of Committee of Creditors for Certain Actions

**Resolution professional,** during the corporate insolvency resolution process, **shall not take** any of the following **actions without** the **prior approval** of the committee of creditors namely:

(a) raise any **interim finance in excess of** the **amount** as may be **decided** by the committee of creditors in their meeting;

(b) create any **security interest** over the assets of the corporate debtor;

(c) change the **capital structure** of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(d) record any **change in the ownership** interest of the corporate debtor;

(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts **in excess of** the **amount** as may be **decided** by the committee of creditors in their meeting;

(f) undertake any **related party transaction**;

CA. SHIVANGI AGRAWAL
(g) amend any constitutional documents of the corporate debtor;
(h) delegate its authority to any other person;
(i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;
(j) make any change in the management of the corporate debtor or its subsidiary;
(k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;
(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or
(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

Methods of Approval

✓ The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the above actions
✓ No action stated above shall be approved by the committee of creditors unless approved by a vote of 66% of the voting shares.

Consequences of Non-Approval

✓ Where any action is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.
✓ The committee of creditors may report the actions of the resolution professional to the Board for taking necessary actions against him under this Code.

Information Memorandum

A resolution plan is a proposal agreed to by the Debtors and Creditors of an entity in a collective mechanism to propose a time bound solution to resolve the situation of insolvency.

The Resolution Professional shall prepare an Information Memorandum which shall contain information for preparing resolution plan.

Resolution Professional shall provide access of the following to a Resolution applicant in order to prepare the Resolution Plan:

✓ Financial position of corporate debtor
✓ Information required by applicant for resolution plan
✓ Other matters pertaining to corporate debtor

Resolution Professional shall examine the Resolution Plan and submit the same to Committee of Creditors for its approval.

Persons Not Eligible To Be Resolution Applicant

Section 29A
A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

✓ is an undischarged insolvent
✓ is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949
✓ has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor
Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan
✓ has been convicted for any offence punishable with imprisonment for two years or more under Act specified in Twelfth Schedule.
✓ has been convicted for any offence punishable with imprisonment for seven years or more under any other law for the time being in force
✓ is disqualified to act as a director under the Companies Act, 2013
✓ is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets
✓ has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code

Submission of Resolution Plan

A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.

Requirements to be examined by Resolution Professional [Section 30(2)]

The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor
(b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;
(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan
(d) the implementation and supervision of the resolution plan
(e) does not contravene any of the provisions of the law for the time being in force
(f) conforms to such other requirements as may be specified by the Board.

Approval by Creditors and Submission Of Plan
✓ The **resolution professional shall present to the committee** of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

✓ The **committee of creditors may approve a resolution plan by a vote of not less than 66% of voting share** of the financial creditors, after considering its feasibility and viability.

✓ The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered.

✓ Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

✓ The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

### Approval of Resolution Plan

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

Provided that the **Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.**

### Rejection of Resolution Plan

Where the **Adjudicating Authority is satisfied** that the resolution plan does **not confirm to the requirements** referred to in sub-section (1), it may, by an **order, reject the resolution plan.**

### Consequences of Approval

*After the order of approval under sub-section (1), -

(a) the **moratorium order** passed by the Adjudicating Authority under section 14 shall **cease to have effect;** and

(b) the **resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.**

The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority.*
Order of Liquidation

Adjudicating Authority may order for liquidation of the Corporate Debtor in the following cases:-

a) Where before the expiry of the Insolvency Resolution Process or within 180 days of the initiation of Insolvency Resolution, the Adjudicating Authority does not receive the Resolution Plan.

b) If the Committee of Creditors before the expiry of the resolution process intimate the Adjudicating Authority of their decision that they have passed an order for liquidation of the Corporate Debtor.

c) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order. Once the Adjudicating Authority passes an order of liquidation, a moratorium is imposed on the pending legal proceedings against the corporate debtor, and the assets of the debtor (including the proceeds of liquidation) vest in the liquidation estate.

Appointment of Liquidator

- Where the Adjudicating Authority passes an order for liquidation of the corporate debtor under section 33, the resolution professional appointed for the corporate insolvency resolution process under Chapter II shall, subject to submission of a written consent by the resolution professional to the Adjudicatory Authority in specified form, shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority.

- All powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.

- The personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor.

Replacement of Resolution Professional

The Adjudicating Authority shall by order replace the resolution professional, if—

(a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or

(b) the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing; or

(c) the resolution professional fails to submit written consent under sub-section (1).

- The Adjudicating Authority may direct the Board to propose name of another insolvency professional to be appointed as a liquidator.

- The Board shall propose the name of another insolvency professional along with written consent from the insolvency professional in the specified form within ten days of the direction issued by the Adjudicating Authority.
The Adjudicating Authority shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator.

Fees of Liquidator

An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.

The fees for the conduct of the liquidation proceedings shall be paid to the liquidator from the proceeds of the liquidation estate under section 53.

Powers and Duties of Liquidator

to verify claims of all the creditors;

to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;

to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report;

to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;

to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary;

subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified

to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;

to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;

to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;

to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;

to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the corporate debtor;

to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;

to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;
✓ to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and
✓ to perform such other functions as may be specified by the Board.

✓ The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53. Provided that any such consultation shall not be binding on the liquidator.

Liquidation Estate

Inclusions

Liquidation estate shall comprise all liquidation estate assets which shall include the following:
(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;
(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;
(c) tangible assets, whether movable or immovable;
(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;
(e) assets subject to the determination of ownership by the court or authority;
(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;
(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;
(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and
(i) all proceeds of liquidation as and when they are realised.

Exclusions

The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:
(a) assets owned by a third party which are in possession of the corporate debtor, including -
- bailment contracts;
- all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund
- other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
- such other assets as may be notified by the Central Government in consultation with any financial sector regulator;
(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;
(c) **personal assets of any shareholder** or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) **assets of any Indian or foreign subsidiary** of the corporate debtor; or

(e) any **other assets** as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

### Powers of Liquidator to Access Information

The **liquidator shall have the power to access any information systems** for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor from the following sources, namely-

(a) an information utility

(b) credit information systems regulated under any law for the time being in force;

(c) any agency of the Central, State or Local Government including any registration authorities;

(d) information systems for financial and non-financial liabilities regulated under any law for the time being in force;

(e) information systems for securities and assets posted as security interest regulated under any law for the time being in force;

(f) any database maintained by the Board; and

(g) any other source as may be specified by the Board.

### Power of Creditors to Call for Information

- The creditors may require the liquidator to provide them any financial information relating to the corporate debtor in such manner as may be specified.

- The liquidator shall provide information referred to in sub-section (2) to such creditors who have requested for such information within a period of seven days from the date of such request or provide reasons for not providing such information.

### Consolidation of Claims

- The **liquidator shall receive or collect the claims** of creditors within a period of thirty days from the date of the commencement of the liquidation process.

- A financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility

  Provided that where the information relating to the claim is not recorded in the information utility, the financial creditor may submit the claim in the same manner provided for the submission of claims for the operational creditor

- An operational creditor may submit a claim to the liquidator in such form and in such manner and along with such supporting documents required to prove the claim as may be specified by the Board.

- A creditor who is partly a financial creditor and partly an operational creditor shall submit claims to the liquidator to the extent of his financial debt and to the extent of his operational debt in specified manner.

- **A creditor may withdraw or vary his claim under this section within fourteen days of its submission.**
Verification of Claims

✓ The liquidator shall verify the claims submitted under section 38 within such time as specified by the Board.
✓ The liquidator may require any creditor or the corporate debtor or any other person to produce any other document or evidence which he thinks necessary for the purpose of verifying the whole or any part of the claim.

Admission or Rejection of Claims

✓ The liquidator may, after verification of claims under section 39, either admit or reject the claim, in whole or in part, as the case may be.
✓ Provided that where the liquidator rejects a claim, he shall record in writing the reasons for such rejection.
✓ The liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within seven days of such admission or rejection of claims.

Determination of Valuation of Claims

The liquidator shall determine the value of claims admitted under section 40 in such manner as may be specified by the Board.

Appeal against the Decision of Liquidator

A creditor may appeal to the Adjudicating Authority against the decision of the liquidator accepting or rejecting the claims within fourteen days of the receipt of such decision.

Secured Creditor in liquidation proceedings

✓ A secured creditor in the liquidation proceedings may-
  • relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or
  • realise its security interest in the manner specified in this section.

✓ Where the secured creditor realises security interest under clause (b) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

✓ Before any security interest is realised by the secured creditor under this section, 52

✓ the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either –
  • by the records of such security interest maintained by an information utility; or
by such other means as may be specified by the Board.

✓ A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

✓ If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

✓ The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

✓ Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—
  • account to the liquidator for such surplus; and
  • tender to the liquidator any surplus funds received from the enforcement of such secured assets.

✓ The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

✓ Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53.

Distribution of Assets

The proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:-
(a) the insolvency resolution process costs and the liquidation costs paid in full
(b) the following debts which shall rank equally between and among the following:—
  ✓ workmen’s dues for the period of twenty-four months preceding the liquidation commencement date; and
  ✓ debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52
(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date
(d) financial debts owed to unsecured creditors
(e) the following dues shall rank equally between and among the following:—
✓ any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
✓ debts owed to a secured creditor for any amount unpaid following the enforcement of security interest
(f) any remaining debts and dues; Other debts and dues Unsecured Financial creditors Dues of Central Government & State Government Wages and any unpaid dues owed to employees, other than workmen, for the period of 12 months Workmen’s dues for the period of 24 months & dues of secured creditors Costs and Expenses of Insolvency 
(g) preference shareholders, if any; and
(h) equity shareholders or partners, as the case may be.
Dissolution of Corporate Debtor

- Where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor.
- The Adjudicating Authority shall on application filed by the liquidator under sub-section (1) order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.
- A copy of an order under sub-section (2) shall within seven days from the date of such order, be forwarded to the authority with which the corporate debtor is registered.

Fast Track Insolvency Resolution for Corporate Persons

A fast track insolvency resolution, as the name suggests, is a process wherein the insolvency resolution process shall be completed in an expeditious manner.

The provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall, mutatis mutandis, apply to the conduct of a fast track corporate insolvency resolution process.

Who May Apply?

An application under this category can be made by any corporate debtor falling under any of the below mentioned category:-

(a) a corporate debtor with assets and income below a level as may be notified by the Central Government; or

(b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or

(c) such other category of corporate persons as may be notified by the Central Government.

Notified Persons:

- A small company as defined u/s 2(85) of Companies Act, 2013
- A startup as defined in Notification by Government of India
- An unlisted company with total assets as reported in financial statement of immediately preceding financial year not exceeding 1 crore.

Time Period for Completion

The fast track corporate insolvency resolution process shall be completed within a period of ninety days from the insolvency commencement date.
Extension of Time

✓ The **Adjudicating Authority may extend time period** for fast track corporate insolvency resolution process.

✓ The aggrieved may make an application to the Adjudicating Authority and it is satisfied that the fast track corporate insolvency resolution process cannot be completed within a period of ninety days, it may, by order; extend the duration of such process to a further period **which shall not be exceeding forty-five days**.

✓ The extension of the fast track corporate insolvency resolution process under this section shall **not** be granted **more than once**.

Voluntary Liquidation of Corporate Persons

Who may Initiate Voluntary Liquidation Proceeding?

✓ A **corporate person who intends to liquidate itself voluntarily and has not committed any default** may **initiate** voluntary liquidation proceedings under the provisions of this Chapter V of Part II of the code.

Conditions of Proceedings

The **voluntary liquidation** of a corporate person **shall meet** such **conditions** and procedural requirements as may be **specified** by the Board.

Voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions, namely:—

(a) a **declaration from majority of the directors of the company verified by an affidavit stating** that—

 ✓ they **have made** a **full inquiry into the affairs of the company** and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and

 ✓ the company **is not being liquidated to defraud any person**;

(b) the **declaration** given above shall be **accompanied with** the following documents, namely:—

 ✓ **audited financial statements and record of business operations** of the company for the **previous two years** or for the period since its incorporation, whichever is later;

 ✓ a report of the valuation of the assets of the company, if any prepared by a registered valuer;

(c) **within four weeks of a declaration**, there shall be—

 ✓ a **special resolution of the members** of the company in a general meeting **requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator**; or

 ✓ a **resolution** of the members of the company in a general meeting **requiring the company to be liquidated** voluntarily **as a result of expiry of the period** of its duration, if any, **fixed** by its articles, or
✓ on the occurrence of any event in respect of which the articles provide that the
corporation shall be dissolved, as the case may be and appointing an insolvency
professional to act as the liquidator
Provided that the company owes any debt to any person, creditors representing two thirds
in value of the debt of the company shall approve the resolution passed under sub-clause
(c) within seven days of such resolution.

Notification to Registrar and Board

The Company shall notify the Registrar of Companies and the Board about the resolution to
liquidate the company within seven days of such resolution or the subsequent approval by
the creditors, as the case may be.

Date of Commencement

The voluntary liquidation proceedings in respect of a company shall be deemed to have
commenced from the date of passing of the resolution.

Application for Dissolution

Where the affairs of the corporate person have been completely wound up, and its assets
completely liquidated, the liquidator shall make an application to the Adjudicating
Authority for the dissolution of such corporate person.

Order of Dissolution

The Adjudicating Authority shall on an application filed by the liquidator, pass an order
that the corporate debtor shall be dissolved from the date of that order and the corporate
debtor shall be dissolved accordingly.

Forwarding Copy of Order

A copy of an order shall within fourteen days from the date of such order, be forwarded to
the authority with which the corporate person is registered.

Rose Garden Ltd. was incurring continuous losses and its financial position went bad
to worse. Black Stone (Private) Ltd., a trade creditor, issued notice under Section
271 of the Companies Act, 2013 for winding up of Rose Garden Ltd. on the ground that Rose
Garden Ltd. was unable to pay its debts. After some time, Black Stone (Private) Ltd. being an
operational creditor filed a petition before the Adjudicating Authority to initiate insolvency
process under the Insolvency and Bankruptcy Code, 2016. Demand Notice and copy of invoice
were not served to Rose Garden Ltd. since a notice was earlier issued for winding up. All other
formalities were compiled with. The Adjudicating Authority initiated Insolvency Resolution
Process by admitting the application and appointed Resolution Professional. After complying
required formalities, the Adjudicating Authority issued orders for moratorium and other relief
within the stipulated time. Being aggrieved by the order of Adjudicating Authority, Rose Garden
Ltd. (Corporate debtor) filed an appeal before NCLAT under the Insolvency and Bankruptcy
Code, 2016. Determine will the Company succeed in its appeal?

Answer:
According to section 9, an operational creditor is entitled to file an application before the Adjudicating Authority for initiating Corporate Insolvency Resolution Process on non-receipt of payment from corporate Debtor or notice of dispute under section 8 within 10 days from the date of delivery of notice or invoice demanding payment and according to section 8, in case of default, an operational creditor may deliver a demand notice containing demand requiring payment of amount involved in default to corporate debtor along with copy of invoice. It is clear that an operational creditor shall not be entitled to make an application to the Adjudicating Authority u/s 9 unless he has served upon the corporate debtor a demand notice in accordance with the provisions of section 8.

There is a case of ‘Prideco Commercial Projects Pvt. Ltd v Era Infra Engineering’, wherein it was held that serving of notice u/s 271 of Companies Act 2013 can’t be considered as sufficient notice as required to be served u/s 8 of IBC, 2016.

In the given case, Black Stone Pvt Ltd is the operational Creditor and Rose Garden Ltd is the corporate debtor but Demand Notice and copy of invoice were not served to Rose Garden Ltd. Hence, applying the provisions and the judgement of the above stated case law, it is clear that Black Stone Pvt Ltd is not entitled to make an application under section 9 of IBC and Rose Garden Ltd shall succeed in appeal.

M/s TAS Construction Private Limited, an operational creditor, on 2nd April, 2018 being the default date issued a demand notice through speed post to M/s Dheeraj Construction Private Limited, an unpaid operational/corporate Debtor demanding payment of its invoice dated 19th March, 2018 for Rs. 5,60,000 (15 days payment terms) towards supply of certain works contract services as per the provisions of section 8(1) of the Insolvency and Bankruptcy Code, 2016 and rules framed thereunder.

Dheeraj Constructions Private Limited on receipt of the demand notice informed the operational creditor, that vide their e-mail dated 30th March, 2018, addressed to the company and all its directors, they have disputed the invoice on the quality of the services rendered and were withholding payment till the dispute is settled but without initiating any legal proceedings under any law for the time being in force. The operational creditor on expiry of the period of 10 days from the date of delivery of the demand notice and non-payment of its dues approached the Adjudicating Authority for the initiation of the corporate insolvency resolution process under section 9(1) of the Insolvency and Bankruptcy Code, 2016. Will the application of the operational creditor filed under section 9(1) read with section 8(2)(a) of the Insolvency and Bankruptcy Code, 2016 be permitted?

Answer: According to section 8, in case of default, an operational creditor may deliver a demand notice containing demand requiring payment of amount involved in default to corporate Debtor along with copy of invoice.

On receipt of demand notice, Corporate Debtor shall within 10 days of receipt of demand notice bring to notice of operational creditor about existence of dispute if any which includes suit relating to existence of debt, quality of goods or breach or the payment of unpaid operational debt by sending attested copy of record of payment.

Within 14 days of receipt of application, Adjudicating Authority may by an order reject application and communicate such decision to operational creditor and corporate Debtor if-

- application for initiating insolvency process is not complete
In the given case, TAS construction private ltd, the operational creditor delivered a demand notice to Dheeraj Constructions Private limited, the Corporate debtor on 2\textsuperscript{nd} April, 2018 and The corporate debtor replied on 30\textsuperscript{th} March 2018 stating about disputed payment.

It is clear that corporate debtor is required to satisfy any two requirements being existence of dispute or record of pendency. In the given case, Corporate debtor brought into notice of operational creditor the fact of existence of dispute but Corporate debtor did not initiate any suit and there was no record of pendency of proceeding with information utility.

In Mobilox Innovations (P) Ltd vs Kirusa Software (P) Ltd
If Corporate Debtor brings to notice of Operational Creditor existence of dispute, it is sufficient to reject application even though there is no record of pendency of suit or arbitration proceedings.

In the light of above provisions and case law, it is evident that the application made by the operational creditor is liable to be rejected.

XY Ltd. filed a petition under Insolvency and Bankruptcy Code, 2016 with NCLT against DF Ltd (Corporate Debtor) and the petition was admitted. There were only three financial creditors including XY Ltd.

During the Corporate Insolvency Resolution Process, the Corporate Debtor settled the claims of all 3 financial creditors. Whether such settlement agreement could be termed as a valid resolution plan? Also discuss whether a financial creditor in respect of whom there is no default can file an application can file an application before Adjudicating Authority (NCLT) for initiating Corporate Insolvency Resolution Process. Discuss.

\textbf{Answer:} According to Section 30, Resolution applicant may submit a resolution plan to the Resolution Professional. The Resolution professional shall examine each resolution plan received by him to confirm that it fulfills the conditions in section 30 and then present to the committee of creditors for its approval.

The creditors may approve a resolution plan by a vote of not less than 66\% of voting share of financial creditors. The resolution professional shall after approval submit resolution plan as approved by the committee of creditors to Adjudicating Authority.

In the given situation, XY ltd, the financial creditor made a petition to Adjudicating Authority for initiating corporate Insolvency Resolution Process of the Corporate Debtor. During the process, the corporate debtor settled the claims of all 3 financial creditors.

Though the claims of all three financial creditors were settled, the requirements of section 30 with respect to the submission of resolution plan by a resolution applicant to the resolution professional, examination of resolution plan by the resolution professional, presentation of resolution plan to the committee of creditors by the resolution professional, approval of resolution plan by the committee of creditors and submission of resolution plan to the Adjudicating Authority have not been satisfied.
Since the process stated above with respect to the submission of resolution plan has not been followed, settlement agreement can’t be termed as a valid Settlement Agreement. According to section 7, where corporate debtor has not made any default in respect of a particular financial creditor in respect of whom there is no default is entitled to file an application before Adjudicating Authority for initiating Corporate Insolvency Resolution Process.

Multiple Choice Questions

1. IBC, 2016 was passed by Lok Sabha on ----------.
   a. 5th May, 2016   b. 11th May, 2016
   c. 28th May, 2016 d. 21st December, 2016

2. IBC, 2016 was notified in the Official Gazette on ----------.
   a. 5th May, 2016   b. 11th May, 2016
   c. 28th May, 2016 d. 21st December, 2016

3. The Head Office of Insolvency and Bankruptcy Board of India is situated at --------.
   a. Mumbai   b. Kolkata
   c. Hyderabad d. New Delhi

4. The provisions relating to Insolvency Resolution and Liquidation for Corporate Persons are contained in ----------.
   a. Part I of the Code   b. Part II of the Code
   c. Part III of the Code d. Part IV of the Code

5. IBC, 2016 does not apply to --------.
   a. Individuals, other than personal guarantors to corporate debtors
   b. Personal guarantors to corporate debtors
   c. A company governed by any Special Act
   d. None of these

6. The provisions relating to insolvency and liquidation of corporate debtors shall apply only where the minimum amount of the default is ----------.
   a. Rs. 1 lakh   b. Rs. 20 lakh
   c. Rs. 50 lakh d. Rs. 1 crore

7. The definition contained in section 5 of the Code are applicable to ----------.
   c. Part II of the Code d. Part III of the Code

8. The purpose of the Code is ----------
   a. To provide time-bound settlement of insolvency
   b. To resolve India’s bad debt problem by creating a database of defaulters

CA. SHIVANGI AGRAWAL
c. Facilitate easy exit of bankrupt corporates and individuals  
d. All of these

9. The extension of the period of corporate insolvency resolution process shall not be granted more than --------.

| a. Once | b. Twice |
| c. Thrice | d. None of these |

10. The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of -------- voting share of the committee of creditors, in such manner as may be specified.

| a. 66% | b. 75% |
| c. 90% | d. 100% |

11. The corporate insolvency resolution process shall be completed within a period of -------- from the date of admission of the application to initiate such process.

| a. 90 days | b. 120 days |
| c. 180 days | d. 240 days |

12. A corporate debtor shall not be entitled to make an application to initiate corporate insolvency resolution process if it has completed corporate insolvency resolution process ----------- preceding the date of making such application.

| a. 6 months | b. 12 months |
| c. 18 months | d. 24 months |

13. The first meeting of the committee of creditors shall be held within ----------- of the constitution of the committee of creditors.

| a. 3 days | b. 7 days |
| c. 14 days | d. 30 days |

14. If any financial creditor does not give prior instructions, the authorised representative shall ----------- on behalf of such creditor.

| a. Vote against | b. Vote in favour |
| c. Abstain from voting | d. None of these |

15. -------- shall prepare an information memorandum.

| a. The Adjudicating Authority | b. The Committee of creditors |
| c. The resolution professional | d. The corporate debtor |

16. The committee of creditors may replace a resolution professional with another resolution professional, by a majority vote of not less than -------- of the voting share.

| a. 51% | b. 66% |
| c. 75% | d. 90% |
17. -------- may submit to the resolution professional, a resolution plan.
   a. Any person  
   b. A resolution applicant
   c. The Committee of creditors  
   d. None of these

18. A creditor may withdraw or vary his claim under this section within -------- of submission of such claim.
   a. 7 days  
   b. 14 days
   c. 15 days  
   d. 30 days

19. An application for fast track corporate insolvency resolution process may be made in respect of --------.
   a. A small company as defined under clause (85) of section 2 of Companies Act, 2013
   b. A listed company
   c. A partnership firm  
   d. All of these

20. A creditor may appeal to the Adjudicating Authority against the decision of the liquidator accepting or rejecting his claim within -------- of the receipt of the decision of the liquidator.
   a. 3 days  
   b. 7 days
   c. 14 days  
   d. 30 days

21. A person shall not be eligible to submit a resolution plan, if he has been convicted for any offence punishable with imprisonment of -------- or more under any other law for the time being in force.
   a. 1 year  
   b. 2 years
   c. 5 years  
   d. 7 years

22. -------- is the Adjudicating Authority in case of individuals and partnership firms.
   a. National Company Law Tribunal
   b. National Company Law Appellate Tribunal
   c. Debt Recovery Tribunal  
   d. Supreme Court

23. A financial creditor or the authorised representative of the financial creditor, if it is a related party of the corporate debtor, shall not have any right of -------- in a meeting of the committee of creditors.
   a. Representation  
   b. Participation
   c. Voting  
   d. All of these

24. The Adjudicating Authority shall appoint an interim resolution professional within -------- from the insolvency commencement date.
   a. 3 days  
   b. 7 days
   c. 14 days  
   d. 30 days
25. Where a financial creditor files an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority, the Adjudicating Authority may, by order, reject such application, if it is satisfied that

a. Default has not occurred
b. Such application is incomplete
c. Any disciplinary proceeding is pending against the proposed resolution professional
d. Either (a) or (b) or (c)

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Answer to MCQs
Prevention of Money Laundering Act, 2002

Meaning and Process of Money Laundering

It is the process by which illegal funds and assets are converted into legitimate funds and assets. It is the process used by criminals' to wash their “tainted” money to make it “clean.

Process of Money Laundering

Money laundering is a single process. However, its cycle can be broken down into three distinct stages:

- **Placement**: First and the initial stage when the crime money is injected into the formal financial system.
- **Layering**: Money injected into the system is layered and moved or spread over various transactions in different accounts and different countries.
- **Integration**: Money enters financial system in such a way that original association with the crime is sought to be obliterated so that the money can then be used as clean Money.
Methods of Money Laundering

Money Laundering can erode a nation’s economy by changing the demand for cash, making interest and exchange rates more volatile and by causing inflation in countries where criminal elements are operating.

It is done by following methods-
✓ Cash Smuggling
✓ Structuring
✓ Laundering via Real Estate
✓ Stock Markets scams
✓ By creating bogus companies

Hawala

✓ Hawala system works with a network of operators called Hawaladars or Hawala agents. For a Hawala transaction a customer contacts a Hawala agent at the source location.
✓ The Hawala agent at that end collects money from the person who wishes to make a transfer.
✓ The agent then calls up his counterpart in the country where the transfer has to be made.
✓ This counterpart then hands over the cash to the recipient after deducting a commission.
✓ The source agent promises to settle the debt to the destination agent through an informal settlement.

Basics of Act

✓ The Bill received the assent of the President and became the Prevention of Money Laundering Act, 2002 on 17th January 2003.
✓ The Act has come into force with effect from 1st July 2005.
✓ The objective of the Act is to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected.
✓ It extends to whole of India

Definition of Money Laundering

"Money-laundering" has the meaning assigned to it in section 3

Offence of Money Laundering

Whosoever (directly or indirectly)
✓ attempts to indulge or
✓ knowingly assists or
✓ knowingly is a party or
✓ is actually involved
  • in any process or activity or connected with the proceeds of crime
  • including its concealment,
  • possession,
  • acquisition or use

and projecting or claiming it as untainted property shall be guilty of offence of money laundering

Other Definitions

Proceeds of Crime [Section 2(1)(u)]

Any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken/held outside the country, then the property equivalent in value held within the country.

Property [Section 2(1)(v)]

It means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.

Scheduled Offence [Section 2(1)(y)]

It means –
(a) the offences specified under Part A of the Schedule; or
(b) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or
(c) The offences specified under Part C of the Schedule.

Transfer

It includes sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

Reporting Entity

It means a banking company, financial institution, intermediary or a person carrying on a designated business or profession.

Banking Company

It means a banking company or a co-operative bank to which the Banking Regulation Act, 1949 applies and includes any bank or banking institution referred to in section 51 of that Act.
Financial Institution

It means a financial institution as defined in clause (c) of section 45 l of the Reserve Bank of India Act, 1934 and includes a chit fund company, a housing finance institution, an authorised person, a payment system operator, a non-banking financial company and the Department of Posts in the Government of India.

Intermediary

(i) a stock-broker, sub-broker, share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser or any other intermediary associated with securities market and registered under section 12 of the Securities and Exchange Board of India Act, 1992

(ii) an association recognised or registered under the Forward Contracts (Regulation) Act, 1952 or any member of such association; or

(iii) intermediary registered by the Pension Fund Regulatory and Development Authority; or

(iv) a recognised stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956.

Punishment for Money Laundering

Whether Proceeds of crime involved in money laundering relate to any offence specified under Para 2 of Part A of Schedule

Yes

Rigorous Imprisonment (Fine also imposed)

Minimum- 3 years

Maximum- 10 years

No

Rigorous Imprisonment (Fine also imposed)

Minimum- 3 years

Maximum- 7 years

Examine the following cases:

Case I. Z, a known smuggler, was caught in transfer of funds illegally exporting narcotic drugs from India to some counties in Africa. State the maximum punishment that can be awarded to him under Prevention of Money Laundering Act, 2002.

Case II. Sohan Lal, a farmer, was found involved in embezzlement of opium cultivated by him.
State the punishment that can be awarded to him under the Prevention of Money Laundering Act, 2002.

Case III. Mr. Honest, a notorious, was caught in possession of Counterfeit Currency Notes, an offence specified under Part A - Paragraph 1 of Schedule of the Prevention of Money Laundering Act, 2002. State the punishment that can be awarded to him under the above act. Also identify the punishment for the offence specified under Part A- Paragraph 2 of the Schedule of the prevention of Money Laundering Act, 2002

Case IV. Mr. Raja was arrested for counterfeiting Two Thousand Rupees Notes. State the maximum punishment that can be awarded to him under Prevention of Money Laundering Act, 2002.

Obligation of Banking Companies, Financial Institutions and Intermediaries

Maintenance of Records

a) maintain a record of all transactions, including information relating to transactions covered under clause (b), in such manner as to enable it to reconstruct individual transactions
b) furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed
c) verify the identity of its clients in such manner and subject to such conditions, as may be prescribed
d) identify the beneficial owner, if any, of such of its clients, as may be prescribed
e) maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients

Other Relevant Points

✓ Every information maintained, furnished or verified, save as otherwise provided under any law for the time being in force shall be kept confidential.
✓ The records referred above shall be maintained for a period of five years from the date of transaction between a client and the reporting entity or after the business relationship has ended as the case may be.
✓ The Central Government may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this chapter

Procedure for Maintaining and Furnishing Information [Section 15]

Section 15 provides for prescribing the procedure and manner of furnishing information by reporting entities. The Central Government may, in consultation with the Reserve Bank of India, prescribe the procedure and the manner of maintaining and furnishing information under subsection (1) of section 12 for the purpose of implementing the provisions of this Act.
'Manav Kalyan', a charitable organisation, opened a current account with M/s ABZ Bank on 1st July, 2012. This account was closed on 30th June, 2016. Referring to the obligations of banking companies under the Prevention of Money Laundering Act, 2002, specify the period upto which the said bank has to maintain records relating to the account of 'Manav Kalyan'.

Access to Information

- The Director may call for from any reporting entity any of the records referred to in subsection (1) of section 12 and any additional information as he considers necessary for the purposes of this Act.
- Every reporting entity shall furnish to the Director such information as may be required by him under sub-section (1) within such time and in such manner as he may specify.
- Save as otherwise provided under any law for the time being in force, every information sought by the Director under sub-section (1), shall be kept confidential.

Power of Director to Impose Fine

Inquiry by Director

The Director may, either of his own motion or on an application made by any authority, officer or person, may make such inquiry or cause such inquiry to be made, as he thinks fit to be necessary, with regard to the obligations of the reporting entity, under this chapter.

Audit of Accounts

If at any stage of inquiry or any other proceedings before him, the Director having regard to the nature and complexity of the case, is of the opinion that it is necessary to do so, he may direct the concerned reporting entity to get its records, as may be specified, audited by an accountant from amongst a panel of accountants, maintained by the Central Government for this purpose.

Expenses by Central Government

The expenses of, and incidental to, any audit specified above shall be borne by the Central Government.

Consequences of Failure/Non Compliance

If the Director, in the course of any inquiry, finds that a reporting entity or its designated director on the Board or any of its employees has failed to comply with the obligations under this Chapter, then, without prejudice to any other action that may be taken under any other provisions of this Act, he may

- issue a warning in writing; or
- direct such reporting entity or its designated director on the Board or any of its employees, to comply with specific instructions; or

CA. SHIVANGI AGRAWAL
✓ **direct** such reporting **entity** or its designated director on the Board or any of its employees, **to send reports** at such interval as may be prescribed on the measures it is taking; or

✓ **by an order, impose a monetary penalty** on such reporting entity or its designated director on the Board or any of its employees, **which shall not be less than ten thousand rupees but may extend to one lakh rupees for each failure.**

**Forwarding Copy of Order**

The Director shall *forward a copy of the order passed* under sub-section (2) *to every banking company, financial institution* or *intermediary* or person who is a party to the proceedings.

**Immunity**

This section gives **immunity to reporting entity**, its directors and employees etc., against **civil or criminal proceedings for furnishing information** under clause (b) of sub-section (1) of section 12.

**Attachment of Property**

"Attachment" means prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III of the Act

Where the **Director or any other officer not below the rank of Deputy Director** authorised by the Director for the purposes of this section, **has reason to believe** (the reason for such belief to be recorded in writing), on the basis of material in his possession, **that**—

(a) **any person** is **in possession of any proceeds of crime**; and

(b) **such proceeds** of crime are **likely to be concealed, transferred** or dealt with in any manner **which may result in frustrating** any **proceedings** under this Chapter,

he **may**, by order in writing, **provisionally attach** such **property for a period not exceeding one hundred and eighty days from the date of the order**, in such manner as may be prescribed.

**No Order before Complaint**

Provided that **no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate** under section 173 of the Code of Criminal Procedure, 1973, or a **complaint has been filed** by a person authorised to **investigate the offence** mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country.

**Forwarding Copy of Order**
The **Director**, or any other officer not below the rank of Deputy Director, **shall, immediately** after attachment **forward a copy of the order**, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

### Cessation of Order

**Every order of attachment** made under sub-section (1) shall **cease to have effect after** the **expiry of the period specified** in that sub-section or on the date of an order made under subsection (2) of section 8, whichever is earlier.

Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

### Filing of Complaint

The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

### Adjudicating Authorities

- The Central Government shall, by notification, appoint an Adjudicating Authority to exercise jurisdiction, powers and authority conferred by or under this Act.
- An **Adjudicating Authority shall consist of a Chairperson and two other Members.**
- One Member each shall be a person having experience in the field of law, administration, finance or accountancy.

### Adjudication

#### Issue of Show Cause Notice

On receipt of a complaint under sub-section (5) of section 5, or applications made under subsection (4) of section 17 or under sub-section (10) of section 18,

- if the **Adjudicating Authority has reason to believe that**
- any **person has committed an offence** under section 3 or
- is **in possession of proceeds** of crime,
- it **may serve a notice of not less than 30 days** on such person
- calling upon him to indicate the **sources of his income**, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized or frozen under section 17 or section 18,
- the evidence on which he relies and other relevant information and particulars, and
- **to show cause why** all or any of such **properties should not be** declared to be the properties involved in money-laundering and **confiscated** by the Central Government.

### Other Points Relating to Notice
Where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person.

Where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

**Record Of Finding By Adjudicating Authority**

The **Adjudicating Authority** shall, after—

- considering the reply, if any, to the notice issued
- hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and
- taking into account all relevant materials placed on record before him, by an order, record a finding whether all or any of the properties are involved in money-laundering.

If the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

**Confirmation of Attachment**

Where the Adjudicating Authority decides that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made u/s 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall—

- continue during the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and
- become final after an order of confiscation is passed by the Special Court

**Possession of Property**

- Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed, the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the property or frozen in such manner as may be prescribed
- Provided that if it is not practicable to take possession of a property frozen, the order of confiscation shall have the same effect as if the property had been taken possession of.

**Confiscation of Property**

Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money laundering or which has been used for commission of the offence of money laundering shall stand confiscated to the Central Government.

**Release of Property**
Where on conclusion of a trial under this Act, the Special Court finds that the offence of money laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.

Orders in Case Of Death of Accused

Where the trial under this Act cannot be conducted

✓ by reason of the death of the accused or the accused being declared a proclaimed offender or

✓ for any other reason or having commenced but could not be concluded,

the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property involved, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money-laundering after having regard to the material before it.

Power of Special Court to Direct Restoration

✓ Where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in such manner as may be prescribed, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money laundering.

✓ Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering.

Vesting Of Property in Central Government

✓ Where an order of confiscation has been made under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 in respect of any property of a person, all the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances.

✓ However, where the Special Court or the Adjudicating Authority, as the case may be, after giving an opportunity of being heard to any other person interested in the property attached under this Chapter, or seized or frozen under Chapter V, is of the opinion that any encumbrance on the property or lease-hold interest has been created with a view to defeat the provisions of this Chapter, it may, by order, declare such encumbrance or lease-hold interest to be void and thereupon the aforesaid property shall vest in the Central Government free from such encumbrances or lease-hold interest.

✓ Further, nothing in this section shall operate to discharge any person from any liability in respect of such encumbrances which may be enforced against such person by a suit for damages.

Appellate Tribunal

The Appellate Tribunal constituted under sub-section (1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the Appellate...
Tribunal for hearing appeals against the orders of the Adjudicating Authority and the other authorities under this Act.

**Appeals to Appellate Tribunal**

**Appeal by Director or any Other Person**

- The Director or any person aggrieved by an order made by the Adjudicating Authority under this Act may prefer an appeal to the Appellate Tribunal.
- The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Adjudicating Authority is received and it shall be in such form and be accompanied by prescribed fees.

**Appeal by Reporting Entity**

- Any reporting entity aggrieved by any order of the Director made under sub-section (2) of section 13 may prefer an appeal to the Appellate Tribunal.
- The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Director is received and it shall be in such form and be accompanied by prescribed fees.

**Condonation of Delay**

The Appellate Tribunal may, after giving an opportunity of being heard, entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

**Passing of Order**

On receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

**Sending of Order**

The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Director, as the case may be.

**Time Limit**

The appeal filed before the Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within 6 months from the date of filing of the appeal.

**Powers of Appellate Tribunal**

The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:-

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CA. SHIVANGI AGRAWAL
 ✓ summoning and enforcing the attendance of any person and examining him on oath;
 ✓ requiring the discovery and production of documents
 ✓ receiving evidence on affidavits
 ✓ subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872,
   requisitioning any public record or document or copy of such record or document from
   any office
 ✓ issuing commissions for the examination of witnesses or documents
 ✓ reviewing its decisions
 ✓ dismissing a representation for default or deciding it ex parte
 ✓ setting aside any order of dismissal of any representation for default or any order passed
   by it ex parte; and
 ✓ any other matter, which may be, prescribed by the Central Government.

Decision by Majority

If the Members of a Bench consisting of two Members differ in opinion on any point, they
shall state the point or points on which they differ, and make a reference to the Chairman
who shall either hear the point or points himself or refer the case for hearing on such point or
points by third member of the Appellate Tribunal and such point or points shall be decided
according to the opinion of the majority of the Members of the Appellate Tribunal who have
heard the case, including those who first heard it.

An Appellate Tribunal consisting of two members was formed to hear the appeal
preferred by Mr. Hari, being aggrieved by an order made by the Adjudicating
Authority under the Prevention of Money Laundering Act, 2002. Two members of the Bench
differ in their opinion on a particular point referred in the appeal.
Explain the next course of action to be followed by the Bench members under the said Act.

Right of Appellant to take assistance of Authorised Representative

 ✓ A person preferring an appeal to the Appellate Tribunal under this Act may either
   appear in person or take the assistance of any authorised representative of his
   choice to present his case before the Appellate Tribunal.
 ✓ The Central Government or the Director may authorise one or more authorised
   representatives or any of its officers to act as presenting officers and every person so
   authorised may present the case with respect to any appeal before the Appellate
   Tribunal.

Civil Court Not to Have Jurisdiction

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any
matter which the Director, an Adjudicating Authority or the Appellate Tribunal is empowered
by or under this Act to determine and no injunction shall be granted by any court or other
authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

**Appeal to High Court**

- Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order.
- Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.
- The High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business.

**Special Court**

- “Special Court” means a Court of Session designated as Special Court under sub-section (1) of section 43.
- This section empowers the Central Government in consultation with the Chief Justice of the High Court for trial of offence of money laundering (offence punishable under section 4), to designate one or more Courts of Sessions as Special Court or Special Courts for such area or areas or for such cases as may be prescribed in the notification to this effect.

**Offences Triable By Special Courts**

It overrides the provisions of the Code of Criminal Procedure, 1973 and provides that –
- a) an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed. The Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or
- b) a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under section 3, without the accused being committed to it for trial; or
- c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed; or
- d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973, as it applies to a trial before a Court of Session.
Power of Bail

The provisions of Section 44 shall not be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under section 43.

Offences to be Cognizable and Non-Bailable

It provides that the offences under the Act shall be cognizable and non-bailable.

Conditions Of Bail

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless:

✓ The Public Prosecutor has been given an opportunity to oppose the application for such release and
✓ Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

In case of any person who is under the age of 16 years or in case of a woman or in case of a sick or infirm person, the Special Court can direct the release of such person on bail.

Cognizance of Offence

The Special Court cannot take cognizance of any offence under the Act, unless a complaint in writing is made by:

(a) The Director or
(b) Any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

Other Relevant Points

✓ No police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.
✓ The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.

Mr. Gambler has been arrested for a cognizable and non-bailable offence punishable for a term of imprisonment for more than three years under the Prevention of Money Laundering Act, 2002. He seeks your advise as to how can he be released on bail. Advise him.
Applicability of Code of Criminal Procedure

Section 46 provides that the provisions of the Code of Criminal Procedure, 1973 (including the provisions as to bails or bonds) shall apply to the proceedings before a Special Court and the Special Court shall be deemed to be a Court of Session and the persons conducting the prosecution before the Special Court, shall be deemed to be a Public Prosecutor.

Appeals

Section 47 empowers the High Court to exercise (so far as applicable) all the powers granted by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure 1973 on Special Court within its jurisdiction, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.

Reciprocal Arrangement for Assistance in Certain Matters

Meaning of Corresponding Law

"Corresponding law" means any law of any foreign country corresponding to any of the provisions of this Act or dealing with offences in that country corresponding to any of the scheduled offences.

Meaning of Contracting State [Section 55]

"Contracting State" means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise.

Agreements with Foreign Countries

The Central Government may enter into an agreement with the Government of any country outside India for—
(a) enforcing the provisions of this Act;
(b) exchange of information for the prevention of any offence under this Act or under the corresponding law in force in that country or investigation of cases relating to any offence under this Act, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

The Central Government may, by notification in the Official Gazette, direct that the application of this Chapter in relation to a contracting State with which reciprocal arrangements have been made, shall be subject to such conditions, exceptions or qualifications as are specified in the said notification.
Letter of Request to a Contracting State in Certain Cases

Notwithstanding anything contained in this Act or the Code of Criminal Procedure, 1973, if, in the course of an investigation into an offence or other proceedings under this Act, an application is made to a Special Court by the Investigating Officer or any officer superior in rank to the Investigating Officer that any evidence is required in connection with investigation into an offence or proceedings under this Act and he is of the opinion that such evidence may be available in any place in a contracting State, and the Special Court, on being satisfied that such evidence is required in connection with the investigation into an offence or proceedings under this Act, may issue a letter of request to a court or an authority in the contracting State competent to deal with such request to-

(i) examine facts and circumstances of the case,
(ii) take such steps as the Special Court may specify in such letter of request, and
(iii) forward all the evidence so taken or collected to the Special Court issuing such letter of request.

The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.

Every statement recorded or document or thing received shall be deemed to be the evidence collected during the course of investigation.

Assistance to a Contracting State in Certain Cases

Where a letter of request is received by the Central Government from a court or authority in a contracting State requesting for investigation into an offence or proceedings under this Act and forwarding to such court or authority any evidence connected therewith, the Central Government may forward such letter of request to the Special Court or to any authority under the Act as it thinks fit for execution of such request in accordance with the provisions of this Act or, as the case may be, any other law for the time being in force.

Disclosure of Information

The Director or any other authority specified by him by a general or special order in this behalf may furnish or cause to be furnished to-

a) any officer, authority or body performing any functions under any law relating to imposition of any tax, duty or cess or to dealings in foreign exchange, or prevention of illicit traffic in the narcotic drugs and psychotropic substances under the Narcotic Drugs and Psychotropic Substances Act, 1985 or
b) such other officer, authority or body performing functions under any other law as the Central Government may, if in its opinion it is necessary so to do in the public interest, specify by notification in the Official Gazette in this behalf, any information received or obtained by such Director or any other authority, specified by him in the performance of their functions under this Act, as may, in the opinion of the Director or the other authority so specified by him, be necessary for the purpose of the officer, authority or body specified to perform his or its functions under that law.
Punishment for Vexatious Search

Any authority or officer exercising powers under this Act or any rules made thereunder, who, without reasons recorded in writing,-
(a) searches or causes to be searched any building or place; or
(b) detains or searches or arrests any person, shall for every such offence be liable on conviction for imprisonment for a term which may extend to two years or fine which may extend to fifty thousand rupees or both.

Punishment for False Information or Failure to Give Information, Etc.

Punishment for False Information

Any person wilfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall on conviction be liable for imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees or both.

Other Punishment

If any person,-
a) being legally bound to state the truth of any matter relating to an offence under section 3, refuses to answer any question put to him by an authority in the exercise of its powers under this Act; or
b) refuses to sign any statement made by him in the course of any proceedings under this Act, which an authority may legally require to sign; or
c) to whom a summon is issued under section 50 either to attend to give evidence or produce books of account or other documents at a certain place and time, omits to attend or produce books of account or documents at the place or time,

he shall pay, by way of penalty, a sum which shall not be less than 500 rupees but which may extend to 10,000 rupees for each such default or failure.

Opportunity of Being Heard

No order under this section shall be passed by an authority unless the person on whom the penalty is proposed to be imposed is given an opportunity of being heard in the matter by such authority.

Punishment for Intentional Disobey

Notwithstanding anything contained in clause (c) of sub-section (2), a person who intentionally disobeys any direction issued under section 50 shall also be liable to be proceeded against under section 174 of the Indian Penal Code.

Cognizance of Offences
✓ No court shall take cognizance of any offence under section 62 or sub-section (1) of section 63 except with the previous sanction of the Central Government.
✓ The Central Government shall, by an order, either give sanction or refuse to give sanction within ninety days of the receipt of the request in this behalf.

**Code of Criminal Procedure, 1973 to Apply**

The provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under this Act.

**Recovery of Fine or Penalty**

*Where* any fine or penalty imposed on any person under section 13 or section 63 is not paid within six months from the day of imposition of fine or penalty, the Director or any other officer authorized by him in this behalf may proceed to recover the amount from the said person in the same manner as prescribed in Schedule II of the Income-tax Act, 1961 for the recovery of arrears and he or any officer authorised by him in this behalf shall have all the powers of the Tax Recovery Officer mentioned in the said Schedule for the said purpose.

**Offences by Companies**

**Person in Charge to be Guilty**

*Where* a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder *is* a company, every person who, at the time the contravention was committed, was in charge of and was responsible to the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

**Not Liable in Case of Due Diligence**

Nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

**Officer Whose Consent Obtained Is Liable**

*Where* a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of any company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

✓ Company” means any body corporate and includes a firm or other association of Individuals
✓ Director”, in relation to a firm, means a partner in the firm.
PREVENTION OF MONEY LAUNDERING ACT, 2002

Act to Have Overriding Effect

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Continuation of Proceedings in the event of Death or Insolvency

Where-

a) any property of a person has been attached under section 8 and no appeal against the order attaching such property has been preferred; or

b) any appeal has been preferred to the Appellate Tribunal, and-

✓ in a case referred to in clause (a), such person dies or is adjudicated an insolvent before preferring an appeal to the Appellate Tribunal; or

✓ in a case referred to in clause (b), such person dies or is adjudicated an insolvent during the pendency of the appeal, then, it shall be lawful for the legal representatives of such person or the official assignee or the official receiver, as the case may be, to prefer an appeal to the Appellate Tribunal or as the case may be, to continue the appeal before the Appellate Tribunal, in place of such person and the provisions of section 26 shall, so far as may be, apply, or continue to apply, to such appeal.

Proceedings with High Court

Where-

a) after passing of a decision or order by the Appellate Tribunal, no appeal has been preferred to the High court under section 42; or

b) any such appeal has been preferred to the High Court, then-

✓ in a case referred to in clause (a), the person entitled to file the appeal dies or is adjudicated an insolvent before preferring an appeal to the High Court, or

✓ in a case referred to in clause (b), the person who had filed the appeal dies or is adjudicated an insolvent during the pendency of the appeal before the High Court, then, it shall be lawful for the legal representatives of such person, or the official assignee or the official receiver, as the case may be, to prefer an appeal to the High Court or to continue the appeal before the High Court in place of such person and the provisions of section 42 shall, so far as may be, apply, or continue to apply, to such appeal.

Multiple Choice Questions

1. Every reporting entity shall maintain a record of all transactions for a period of ------- from the date of transaction between a client and the reporting entity.

| a. 8 years | b. 6 years |
| c. 5 years | d. 3 years |

2. Every reporting entity shall maintain record of documents evidencing identity of its ----- -- and -----.  

| a. Clients; beneficial owners | b. Employees; officers |
| c. Employees; directors | d. Directors; members |

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3. An appeal to the Appellate Tribunal against an order of the Adjudicating Authority may be preferred by -

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<td>a. The Director</td>
<td>b. Any person aggrieved</td>
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<tr>
<td>c. Both (a) and (b)</td>
<td>d. The Central Government</td>
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4. Where an appeal is preferred to the Appellate Tribunal, the Appellate Tribunal shall ---- to dispose of the appeal within -----.  

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<td>a. 3 months</td>
<td>b. 6 months</td>
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<td>c. 1 year</td>
<td>d. 2 years</td>
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5. The reporting entity, its directors and employees shall not be liable to any -------- proceedings against them for furnishing information under section 12.  

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<tr>
<td>a. Civil</td>
<td>b. Criminal</td>
</tr>
<tr>
<td>c. Civil or/ and criminal</td>
<td>d. None of these</td>
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6. A Special Court while trying the scheduled offence or the offence of money laundering shall conduct the trial in accordance with the provisions of ------.  

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<tr>
<td>c. Both (a) and (b)</td>
<td>d. Either (a) or (b)</td>
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7. An appeal to the Appellate Tribunal shall be filed within a period of -------- from the date on which a copy of the order made by the Adjudicating Authority or Director is received.  

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<tr>
<td>a. 60 days</td>
<td>b. 45 days</td>
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<tr>
<td>c. 30 days</td>
<td>d. 15 days</td>
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8. Every reporting entity shall furnish to the director -

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<tbody>
<tr>
<td>a. A record of all transactions</td>
<td>b. A record of all transactions executed within preceding 10 years</td>
</tr>
<tr>
<td>c. A record of all transactions executed within preceding 2 years</td>
<td>d. Information relating to such transactions, the nature and value of which may be prescribed</td>
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9. Any person who commits an offence of money laundering not relating to paragraph 2 of Part A shall be punishable with:-

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<tr>
<td>a. Rigorous imprisonment for 3 to 7 years</td>
<td>b. (a) with fine</td>
</tr>
<tr>
<td>c. Rigorous imprisonment for 3 to 10 years</td>
<td>d. None of these</td>
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10. Provisional attachment can be made for a maximum of -

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<tr>
<td>a. 180 days</td>
<td>b. 90 days</td>
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<tr>
<td>c. 60 days</td>
<td>d. 6 months</td>
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Answer to MCQs

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<tr>
<td>1</td>
<td>(c)</td>
<td>6</td>
<td>(b)</td>
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<tr>
<td>2</td>
<td>(a)</td>
<td>7</td>
<td>(b)</td>
</tr>
<tr>
<td>3</td>
<td>(c)</td>
<td>8</td>
<td>(d)</td>
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<tr>
<td>4</td>
<td>(d)</td>
<td>9</td>
<td>(c)</td>
</tr>
<tr>
<td>5</td>
<td>(c)</td>
<td>10</td>
<td>(a)</td>
</tr>
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</table>

Basics of the Act

- To regulate securitisation and reconstruction of financial assets and
- Enforcement of security interest and to provide for a central database of security interests created on property rights, and for matters connected therewith or incidental thereto.

It is an Act further to amend four laws:
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI),
- Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI),
- Indian Stamp Act, 1899 and
- Depositories Act, 1996, and for matters connected therewith or incidental thereto.

Applicability of the Act

It extends to whole of India.
## Important Definitions

### Asset Reconstruction [Section 2(b)]

"Asset reconstruction" means acquisition by any securitisation company (SC) or reconstruction company (RC) of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance.

### Financial Assistance [Section 2(k)]

The term "financial assistance" means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution.

### Asset Reconstruction Company [Section 2(ba)]

- Asset reconstruction company (ARC) means a company registered with Reserve Bank under section 3 for the purposes of carrying on the business of asset reconstruction or securitisation, or both.
- An ARC is not a banking company although it is regulated by RBI. Such company cannot carry out any other business other than securitisation or reconstruction.

### Borrower [Section 2(f)]

Borrower means any person

- who has been granted financial assistance by any bank or financial institution or
- who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and
- includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through issue of debt securities.

### Default [Section 2(j)]

It means-

a) non-payment of any debt or any other amount payable by the borrower to any secured creditor consequent upon which the account of such borrower is classified as nonperforming asset in the books of account of the secured creditor or

b) non-payment of any debt or any other amount payable by the borrower with respect to debt securities after notice of ninety days demanding payment of dues served upon such borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of such debt securities.

### Debt [Section 2(ha)]

"Debt" shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and includes—

(a) unpaid portion of the purchase price of any tangible asset given on hire or financial
(b) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable any borrower to acquire the intangible asset or obtain licence of such asset

### Financial Asset [Section 2(l)]

"Financial asset" means debt or receivables and includes-
(i) a claim to any debt or receivables or part thereof, whether secured or unsecured or
(ii) any debt or receivables secured by, mortgage of, or charge on, immovable property or
(iii) a mortgage, charge, hypothecation or pledge of movable property or
(iv) any right or interest in the security, whether full or part underlying such debt or receivables or
(v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent or
(va) any beneficial right, title or interest in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset or
(vb) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset
(vi) any financial assistance

An asset which is not a financial asset cannot be securitised, acquired or transferred under this Act.

Example: Value of an unsecured land in the balance sheet of the borrower cannot be acquired by an ARC by way of issuing security receipts.

### Non Performing Asset [Section 2(o)]

"Non-performing asset (NPA)" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,

a) in case such bank or financial institution is administered or regulated by an authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body

b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank.

### Qualified Buyer [Section 2(u)]

"Qualified buyer" means a financial institution, insurance company, bank, state financial corporation, state industrial development corporation, trustee or asset reconstruction company which has been granted a certificate of registration under sub-section (4) of section 3 or any asset management company making investment on behalf of mutual fund or pension fund or a foreign institutional investor registered under the Securities and Exchange Board of
India Act, 1992 (15 of 1992) or regulations made thereunder, any category of non-institutional investors as may be specified by the Reserve Bank under sub-section (1) of section 7 or any other body corporate as may be specified by the Board.

An ARC cannot raise funds from investors which is not a qualified buyer (QB) as defined above.

For example, a manufacturing company looking to invest surplus cash by investing in the ARC, or a Public sector unit, or a strategic investor who wish to acquire the assets of the borrower company etc.

**Securitisation [Section 2(z)]**

- "Securitisation" means acquisition of financial assets by any asset reconstruction company from any originator, whether by raising of funds by such asset reconstruction company from qualified buyers by issue of security receipts representing undivided interest in such financial assets or otherwise.
- The process of securitisation helps the ARC to acquire financial assets like Loans from banks due to which the ARC shall be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

**Secured Creditor [Section 2(zd)]**

"Secured creditor” means-

(a) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (l);
(b) debenture trustee appointed by any bank or financial institution; or
(c) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or
(d) debenture trustee registered with the Board appointed by any company for secured debt securities; or
(e) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created by any borrower for due repayment of any financial assistance

**Security Interest [Section 2(zf)]**

"Security interest" means right, title and interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes—

(a) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or
(b) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset
A creditor shall not be called as secured creditor unless its interest over the assets of the debtor or borrower is covered under the above definition. Refer section 31 (Provisions of this Act not to apply in certain cases) for specific exclusions of rights that shall not be treated as security interest.

Registration of Asset Reconstruction Company

A company can commence or carry on the business of securitisation or asset reconstruction only after:

- obtaining a certificate of registration granted under this section and
- having the net owned fund of not less than one hundred crore rupees or such other higher amount as the Reserve Bank, may, by notification, specify.

Amount specified by RBI: 100 Crores

Process of Obtaining Certificate of Registration

Application to Reserve Bank in prescribed form and manner

Compliance of Pre-Conditions u/s 3(3) before registration

Grant of Certificate of Registration

Conditions for Grant of Certificate [Section 3(3)]

The Reserve Bank may, for the purpose of considering to grant its approval for the application for registration of an ARC to commence or carry on the business of securitisation or asset reconstruction, as the case may be, require to be satisfied, by an inspection of records or books of such ARC, or otherwise, that the following conditions are fulfilled, namely:-

- that the ARC has not incurred losses in any of the three preceding financial years;
- that such ARC has made adequate arrangements for realisation of the financial assets acquired for the purpose of securitisation or asset reconstruction and shall be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the qualified buyers or other persons
- that the directors of ARC have adequate professional experience in matters related to finance, securitisation and reconstruction
- that any of its directors has not been convicted of any offence involving moral turpitude
- that a sponsor of an ARC is a fit and proper person in accordance with the criteria as may be specified in the guidelines issued by the Reserve Bank for such persons
- that ARC has complied with or is in a position to comply with prudential norms specified by the Reserve Bank.
- that ARC has complied with one or more conditions specified in the guidelines issued by the Reserve Bank for the said purpose.

'Sponsor' means any person holding not less than 10% of the paid-up equity capital of an asset reconstruction company.

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Grant of Certificate [Section 3(4)]

✓ Certificate of registration is granted to the ARC to commence or carry on business of securitisation or asset reconstruction.
✓ The Reserve Bank may also prescribe any other conditions, which it may consider, fit to impose.

Rejection of Application [Section 3(5)]

The Reserve Bank is of the opinion that the above conditions are not satisfied then it may reject the application, after the applicant is given a reasonable opportunity of being heard.

Prior Approval of RBI in Case of Changes [Section 3(6)]

ARC must obtain prior approval of the Reserve Bank for the following purposes:-
✓ any substantial change in its management, including appointment of any director, managing director or chief executive officer
✓ change of location of its registered office
✓ change in its name

Substantial Change in Management: means the change in the management by way of transfer of shares or change affecting the sponsorship in the company by way of transfer of shares or amalgamation or transfer of the business of the company.
Decision of Reserve Bank in ascertaining the same shall be final and binding.

Cancellation of Certificate of Registration

Cases Where Certificate may be cancelled [Section 4(1)]

The Reserve Bank may cancel a certificate of registration granted to an ARC, if such company-

a) ceases to carry on the business of securitisation or asset reconstruction; or
b) ceases to receive or hold any investment from a qualified buyer; or
c) has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or
d) at any time fails to fulfil any of the conditions referred to in Section 3(3) or
e) fails to-
  ✓ comply with any direction issued by the Reserve Bank under the provisions of this Act or
  ✓ maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act or
  ✓ submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank or
  ✓ obtain prior approval of the Reserve Bank required u/s 3(6)

Opportunity to comply provisions: In case delay not prejudicial to public interest

Before cancelling a certificate of registration on the ground that-
✓ the ARC has failed to comply with the provisions subject to which certificate was granted or
✓ has failed to fulfil any of the conditions referred to in sec 3(3) or
✓ has failed to obtain prior approval of Reserve Bank in required cases

**Reserve Bank shall give an opportunity** to such company on such terms as the Reserve Bank may specify for taking necessary steps to comply with such provisions or fulfillment of such conditions.

**No Opportunity in Case Delay is Prejudicial to Public Interest**

If **Reserve Bank** is of the opinion that the delay in cancelling the certificate of registration shall be prejudicial to the public interest or the interests of the investors or the ARC, it shall **cancel** certificate of registration without giving an opportunity to Company to fulfill conditions.

**Appeal against Cancellation Order [Section 4(2)]**

✓ In case the **ARC** is aggrieved by the order of cancellation of certificate of registration by the Reserve Bank, then it may prefer an appeal,
  • within a period of thirty days from the date on which such order of cancellation is communicated to it,
  • to the **Central Government**.
✓ The **Central Government** must also give such company a reasonable opportunity of being heard before rejecting the appeal.

**Consequences of Cancellation/Rejection [Section 4(3)]**

✓ **ARC**, which is holding investments of qualified buyers and
✓ whose application for grant of certificate of registration has been rejected or certificate of registration has been cancelled
✓ shall, notwithstanding such rejection or cancellation be deemed to be an **ARC**
✓ until it repays the entire investments held by it (together with interest, if any)
✓ within such period as specified by the Reserve Bank.

**Acquisition of Rights or Interest in Financial Assets**

**Acquiring of Financial Assets of Any Bank or Financial Institution** [Section 5(1)]

An **ARC** may acquire financial assets of any bank or financial institution-
✓ by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them or
✓ by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

**Exemption from Stamp Duty [Section 5(1a)]**

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Any document executed by any bank or financial institution as mentioned above, in favour of the ARC acquiring financial assets for the purposes of asset reconstruction or securitization shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899.

Provided that the provisions of this sub-section shall not apply where the acquisition of the financial assets by the asset reconstruction company is for the purposes other than asset reconstruction or securitisation.

Arc Deemed to be the Lender

In case where bank or financial institution is a lender in relation to any financial assets acquired by the ARC.

Then such ARC shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to the subject financial assets.

If the bank or financial institution is holding any right, title or interest upon any tangible asset or intangible asset to secure payment of any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire the tangible asset or assignment or licence of intangible asset, such right, title or interest shall vest in the asset reconstruction company on acquisition of such assets.

Enforcement by Asset Reconstruction Company [Section 5(3)]

All contracts, deeds, bonds, agreements, powers-of-attorney, permissions, approvals, consents or no-objections and other instruments of whatever nature which relate to the said financial asset shall have same effect against or in favour of such Company.

Continuation of Proceedings [Section 5(4)]

If, on the date of acquisition of financial asset, any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, the same shall not abate, or be discontinued but may be continued, prosecuted and enforced by or against the ARC.

Substitution of ARC in Legal Proceedings [Section 5(5)]

On acquisition of financial assets, the ARC, may with the consent of the originator, file an application before the Debts Recovery Tribunal or the Appellate Tribunal or any court or other Authority for the purpose of substitution of its name in any pending suit, appeal or other Proceedings.

On receipt of such application, such Debts Recovery Tribunal or the Appellate Tribunal or court or Authority shall pass orders for the substitution of the ARC in such pending suit, appeal or other proceedings.

Transfer of Pending Applications to anyone of Debts Recovery Tribunals in Certain Cases [Section 5A]
Application before More than One DRT by Banks

If any financial asset, of a borrower acquired by an ARC, comprise of secured debts or more than one bank or financial institution for recovery of which such banks or financial institutions has filed applications before two or more Debts Recovery Tribunals, the ARC may file an application to the Appellate Tribunal having jurisdiction over any of such Tribunals in which such applications are pending for transfer of all pending applications to any one of the Debts Recovery Tribunals as it deems fit.

Transfer of Applications Pending

✓ On receipt of such application for transfer of all pending applications under sub-section (1), the Appellate Tribunal may, after giving the parties to the application an opportunity of being heard, pass an order for transfer of the pending applications to any one of the Debts Recovery Tribunals.
✓ Any order passed by the Appellate Tribunal shall be binding on all the Debts Recovery Tribunals as if such order had been passed by the Appellate Tribunal having jurisdiction on each such Debts Recovery Tribunal.

Order Execution

Any recovery certificate, issued by the Debts Recovery Tribunal to which all the pending applications are transferred under sub-section (2), shall be executed in accordance with the provisions contained in sub-section (23) of section 19 and other provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 shall, accordingly, apply to such execution.

Notice to Obligor and Discharge of Obligation of such Obligor

The bank or financial institution may give a notice of acquisition of financial assets by any ARC to
✓ the concerned obligor and
✓ any other concerned person and
✓ to the concerned registering authority.

Payment to ARC

On receipt of notice, the obligor shall make payment to the concerned ARC in discharge of any of the obligations in relation to the financial asset specified in the notice which will mean full discharge to borrower.

Issue of Security by Raising of Receipts or funds by ARC

Offer to Qualified Buyers

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Any 

**ARC**, may, **after acquisition** of any financial asset under section 5(1), **offer security receipts to qualified buyers** (or such other category of investors including non-institutional investors as may be specified by the Reserve Bank in consultation with the Board, from time to time) **for subscription** in accordance with the provisions of those Acts.

### Raising of Funds

- An **ARC** may raise funds from the **qualified buyers** by
- **formulating schemes** for acquiring financial assets and
- shall keep and **maintain** separate and **distinct accounts**
- in respect of each such scheme for every financial asset acquired out of investments made by a qualified buyer and
- **ensure** that **realisations** of such financial asset
- **is held** and applied towards redemption of investments and payment of returns assured on such investments under the relevant scheme

### Consequences of Non-Realisation

In the **event of non-realisation** of financial assets, **qualified buyers holding not less than 75% of total value of security receipts** issued under a scheme, shall **be entitled to call** a **meeting** of all qualified buyers. Resolution passed in such meeting shall be binding.

### Exemption from Registration of Security Receipt

Any **security receipt** issued by the **ARC** and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder of the security receipt to an undivided interest afforded by a registered instrument, or any transfer of security receipts, shall not require compulsory registration under section 17 of the **Registration Act, 1908**.

### Measures for Asset Reconstruction

An **ARC** may, provide for any one or more of the following measures, for the purposes of asset reconstruction—

(a) the **proper management** of the business of the borrower, by change in, or **takeover of the management of the business** of the borrower

(b) the **sale or lease** of a part or whole of the **business** of the borrower

(c) **rescheduling** of **payment of debts** payable by the borrower

(d) **enforcement of security interest** in accordance with the provisions of this Act

(e) **settlement of dues** payable by the borrower

(f) **taking possession of secured assets** in accordance with the provisions of this Act

(g) **conversion of any portion of debt into shares** of a borrower company

Provided that conversion of any part of debt into shares of a borrower company shall be deemed always to have been valid, as if the provisions of this clause were in force at all material times.

### Power of RBI to Determine Policy
The Reserve Bank shall, for the purposes as given above, determine the policy and issue necessary directions including the direction for regulation of management of the business of the borrower and fees to be charged.

**Compliance with Directions by RBI**

The asset reconstruction company shall take measures in accordance with policies and directions of the Reserve Bank.

**Other Functions of ARC**

Any ARC may-

(a) act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fees or charges as may be mutually agreed upon between the parties

(b) act as a manager on such fee as may be mutually agreed upon between the parties

(c) act as receiver if appointed by any court or tribunal

**No Pecuniary Liability and Other Business**

- No ARC shall act as a manager if acting as such gives rise to any pecuniary liability.
- No ARC which has been granted a certificate of registration shall commence or carry on, without prior approval of the Reserve Bank, any business other than that of securitisation or asset reconstruction.

**Resolution of Disputes**

Where any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely,

- the bank, or
- financial institution, or
- ARC or
- qualified buyer,

Such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996, as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly.

**Power of Reserve Bank to Determine Policy and Issue Directions**

In the public interest, Reserve bank may determine the policy and give directions to any ARC in matters relating to income recognition, accounting standards, making provisions for bad and doubtful debts, capital adequacy based on risk weights for assets and also relating to deployment of funds by the ARC to regulate financial system of the country and to prevent affairs in manner detrimental to interest of investors.
Directions by Reserve Bank

✓ the type of financial asset of a bank or Financial institution which can be acquired and procedure for acquisition of such assets and valuation thereof
✓ the aggregate value of financial assets which may be acquired by any securitization company or reconstruction company.
✓ the fee and other charges which may be charged or incurred for management of financial assets acquired by any asset reconstruction company
✓ transfer of security receipts issued to qualified buyers

Power of Reserve Bank to Call for Statements and Information

The Reserve Bank may direct ARC to furnish it within such time as may be specified by the Reserve Bank, with such statements and information relating to the business or affairs of such securitisation company or reconstruction company (including any business or affairs with which such company is concerned) as the Reserve Bank may consider necessary or expedient to obtain for the purpose of this Act.

Power of Reserve Bank to Carry out Audit and Inspection

The Reserve Bank may, for the purposes of this Act, carry out or caused to be carried out audit and inspection of an asset reconstruction company from time to time.

Duty to Provide Assistance

It shall be the duty of an asset reconstruction company and its officers to provide assistance and cooperation to the Reserve Bank to carry out audit or inspection.

Order by Reserve Bank

Where on audit or inspection or otherwise, the Reserve Bank is satisfied that business of an asset reconstruction company is being conducted in a manner detrimental to public interest or to the interests of investors in security receipts issued by such asset reconstruction company, the Reserve Bank may, for securing proper management of an asset reconstruction company, by an order—

a) remove the Chairman or any director or appoint additional directors on the board of directors of the asset reconstruction company or

b) appoint any of its officers as an observer to observe the working of the board of directors of such asset reconstruction company

Provided that no order for removal of Chairman or director under clause (a) shall be made except after giving him an opportunity of being heard.

Duty to Produce Books of Accounts etc.
It shall be the duty of every director or other officer or employee of the asset reconstruction company to produce before the person, conducting an audit or inspection all such books, accounts and other documents in his custody or control and to provide him such statements and information relating to the affairs of the asset reconstruction company as may be required by such person within the stipulated time specified by him.

**Enforcement of Security Interest**

**No Intervention of Court [Section 13(1)]**

Any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

**Default in Payment of Debt: Notice to Pay [Section 13(2)]**

- Where any borrower makes any default in repayment of secured debt or any instalment thereof, and
- his account in respect of such debt is classified by the secured creditor as non-performing asset,
- then, the secured creditor may require the borrower
- by notice in writing to discharge in full his liabilities to the secured creditor
- within sixty days from the date of notice
- failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4) of Section 13.

**Notice Prescribing the Details of the Debt**

This notice shall give details-
- of the amount payable by the borrower and
- the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower
- that payment be made within 60 days failing which secured creditor shall be entitled to exercise all or any of the rights under sub-section (4) of Section 13.

**Objection or Rejection by the Borrower**

- If, on receipt of the notice, the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and
- If the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within 15 days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.

**No Right to Borrower to Prefer an Application**

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts recovery Tribunal or the Court.
Consequences of Failure to Discharge Liability [Section 13(4)]

If the borrower fails to discharge his liability in full within the above specified period, the secured creditor may take recourse to one or more of the following measures to recover his secured debt:

a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset
b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset
c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor
d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

Discharge from Payment

Any payment made by any person to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

Right With Respect to the Immovable Property [Section 13(5A)]

Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

Adjustment of Purchase Price [Section 13(5B)]

Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken.

Applicability of Banking Regulation Act [Section 13(5C)]

The provisions of section 9 of the Banking Regulation Act, 1949 shall, as far as may be, apply to the immovable property acquired by secured creditor.

Right Related to Transfer of Secured Assets [Section 13(6)]

Any transfer of secured asset after taking possession shall vest in the transferee all rights in relation to secured asset.

Recovery of Expenses [Section 13(7)]

(a) The secured creditor shall be entitled to determine the costs which have been properly incurred by him.
(b) Such costs shall be recoverable by the secured creditor from the borrower.
(c) Any money which is received by the secured creditor shall be applied, firstly, in payment of such costs and secondly, in discharge of the dues of the secured creditor, and if any amount remains after such payments, such amount shall be paid to the borrower.

No Sale of Secured Asset if all Dues Paid to Secured Creditor before the Date Fixed for Sale [Section 13(8)]

If the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets.

(i) the secured assets shall not be transferred by way of lease, assignment or sale of the secured creditor; and

(ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this subsection, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.

Right of Action in Case of Joint Financing of a Financial Asset [Section 13(9)]

In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any right conferred on him under section 13(4), unless such right is agreed upon by the secured creditors representing not less than 60% in value of the amount outstanding, and such action shall be binding on all the secured creditors.

Distribution Of Amount Realised In Case Of A Company In Liquidation [Proviso To Section 13(9)]

In the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956.

Recovery of Unsatisfied Dues Of Secured Creditor [Section 13(10)]

Where dues of the secured creditors are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application to the Debts Recovery Tribunal or a competent court, for recovery of the balance amount from the borrower.

Right of Action against the Guarantors or Pledged Assets [Section 13(11)]

The secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in section 13(4).

Exercise of Rights of Secured Creditor by Authorised officers [Section 13(12)]

The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf.
Popular Limited defaulted in the repayment of term loan taken from a Bank against security created as a first charge on some of its assets. The bank issued notice pursuant to Section 13 of the SARFAESI Act, 2002 to the company to discharge its liabilities within a period of 60 days from the date of the notice. The company filed to discharge its liabilities within the time limit specified. Explain the measures to be taken by the Bank to enforce its security interest under the said Act.

Chief Metropolitan Magistrate or District Magistrate to Assist Secured Creditor in Taking Possession of Secured Asset

The secured creditor may, for the purpose of taking possession or control of secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him—

✓ take possession of such asset and documents relating thereto; and
✓ forward such asset and documents to the secured creditor within a period of thirty days from the date of application.

Provided further that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.

Manner and Effect of Takeover of Management

Appointment of Persons by Secured Creditors

When the management of business of a borrower is taken over by an ARC, the secured creditor may, by publishing a notice in a newspaper published in English language and in a newspaper published in an Indian language in circulation in the place where the principal office of the borrower is situated, appoint as many persons as it thinks fit.

In Case Borrower is a Company

In any other Case

to be directors of that Borrower

To be administrator of the business of the borrower

Consequences of Publication of Notice

✓ All persons holding office as directors of the company (if the borrower is a company) and in any other case, all persons holding any office having power of superintendence,
direction and control of the business of the borrower immediately before the publication of the above notice, shall be deemed to have vacated their offices.

✓ Any contract of management between the borrower and any director or manager thereof holding office as such immediately before publication of the above notice, shall be deemed to be terminated.

✓ The directors or the administrators appointed under this section shall take such steps as may be necessary to take into their custody or under their control all the property, effects and actionable claims to which the business of the borrower is, or appears to be, entitled.

✓ All the property and effects of the business of the borrower shall be deemed to be in the custody of the directors or administrators, as the case may be, as from the date of the publication of the above notice.

✓ All directors appointed in accordance with the above notice shall, for all purposes, be the directors of the company of the borrower and such directors or the administrators appointed under section 15, shall only be entitled to exercise all the powers

Suspension of Rights during Takeover

Where the management of the business of a borrower, being a company as defined in the Companies Act is taken over by the secured creditor, then, notwithstanding anything contained, such borrower- in the said Act or in the memorandum or articles of association of such company-

- a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company
- b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the secured creditor
- c) no proceeding for the winding up of such company or for the appointment of a receiver in respect thereof shall lie in any court, except with the consent of the secured creditor.

Obligation of Secured Creditor

The secured creditor is under an obligation to restore the management of the business of the borrower, on realisation of his debt in full, in case of takeover of the management of the business of a borrower by such secured creditor.

The management of Gangotri Ltd was taken over by LBV Bank Ltd. (secured creditor) by complying with the provisions of SARFAESI Act, 2002 and appointed two directors. The Board of directors of Gangotri Ltd. duly authorised by its articles, appointed two alternate directors and the majority of the directors made a declaration required for voluntary liquidation proceedings. A special resolution requiring the company to be liquidated voluntarily by appointing an insolvency professional to act as the liquidator was passed at the general meeting of the company. The Board of directors and the shareholders passed the resolutions without the approval/consent of directors appointed by LBV Bank Ltd. Discuss the validity of the above resolutions under SARFAESI Act, 2002. Does an unsecured creditor have recourse to this Act?

No Compensation to Directors for Loss of Office

CA. SHIVANGI AGRAWAL
Irrespective of anything contained in any contract or in any other law for the time being in force, **no managing director or any other director or a manager or any person in charge of management of the business of the borrower shall be entitled to any compensation for the loss of office** or for the premature termination under this Act.

However any such managing director or any other director or manager or any such person in charge of management has the right to recover from the business of the borrower, moneys recoverable otherwise than by way of such compensation.

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**Right to Appeal**

**Filing of an Application**

Any **person** (including borrower), **aggrieved by any of the measures** given in section 13(4) **taken** by the secured creditor or his authorised officer under this Chapter, may make an **application** along with such fee, as may be prescribed to the **Debts Recovery Tribunal** having jurisdiction in the matter **within 45 days from the date of which such measure had been taken**.

**Jurisdiction of Filing Application**

An **application** under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local **limits of whose jurisdiction**—

(a) the **cause of action**, wholly or in part, **arises**;
(b) where the **secured asset** is **located**; or
(c) the **branch** or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

Different fees may be prescribed for making the application by the borrower and the person other than the borrower.

The communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

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**Orders Where Recourse not in Accordance with Act**

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CA. SHIVANGI AGRAWAL
The Debts Recovery Tribunal shall consider whether any of the measures referred to in section 13(4) taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in section 13(4), taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

a) declare the recourse to any one or more measures referred to in section 13(4) taken by the secured creditor as invalid; and

b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under subsection (1), as the case may be; and

c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

Disposal of Application

✓ Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application.

✓ Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing.

✓ However, Total period of pendency of the application shall not exceed four months from the date of making of such application.

✓ If the application is not disposed of by the Debts Recovery Tribunal within the period of four months, any party to the application may make an application to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

✓ The Debts Recovery Tribunal shall dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.

Appeal to Appellate Tribunal

Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

Deposit of Amount

✓ No appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less.

✓ Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than 25% of debt referred above.
Right of Borrower to Receive Compensation and Costs in Certain Cases

If the Debts Recovery Tribunal or the Court of District Judge, on an application or the Appellate Tribunal or the High Court on an appeal preferred holds that

✓ the possession of secured assets by the secured creditor is **not in accordance with** the provisions of this Act and rules made thereunder, and

✓ directs the secured creditors to return such secured assets to concerned borrowers or any other aggrieved person, who has filed the application or appeal as the case may be

✓ the **borrower or such other person** shall be entitled to the payment of such **compensation and costs** as may be determined by such **Tribunal** or Court of District Judge or Appellate Tribunal or the High Court referred to in section 18B.

Multiple Choice Questions

1. ‘Sponsor’ means any person holding not less than _______ of the paid-up equity capital of an asset reconstruction company.
   a. 10%
   b. 20%
   c. 25%
   d. 50% or more

2. The net owned funds of an asset reconstruction company shall not be less than _______ to _______ as the Reserve Bank may, by notification, specify.
   a. Rs. 1 crore; such other lower amount
   b. Rs. 2 crore; such other lower amount
   c. Rs. 1 crore; such other higher amount
   d. Rs. 2 crore; such other higher amount

3. ‘Securitisation’ means acquisition of financial assets by any asset reconstruction company from any _______, whether by raising of funds by such asset reconstruction company from qualified buyers by issue of security receipts representing _______ in such financial assets or otherwise.
   a. Originator; undivided interest
   b. Obligor; undivided interest
   c. Originator; interest
   d. Obligor; interest

4. _______ may give a notice of acquisition of financial assets by any asset reconstruction company, to the concerned borrower, the concerned registering authority in whose jurisdiction the charge is registered and any other concerned person.
   a. The asset reconstruction company
   b. The bank or financial institution
   c. The Debts Recovery Tribunal
   d. The Appellate Tribunal

5. A company which has incurred losses in _______ shall not be granted a certificate of registration as an asset reconstruction company.
   a. Any of 2 preceding financial years
   b. Any of 3 preceding financial years
   c. Any of 5 preceding financial years
   d. Any of 7 preceding financial years
6. Which of the following measures can be taken by an asset reconstruction company for the purposes of asset reconstruction?

<table>
<thead>
<tr>
<th>a. Conversion of any portion of debt into shares of a borrower company</th>
<th>b. Rescheduling of payment of debts payable by the borrower</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Settlement of dues payable by the borrower</td>
<td>d. All of these</td>
</tr>
</tbody>
</table>

7. When the management of business of a borrower, being a company is taken over by a secured creditor, the secured creditor may appoint to be the directors.

<table>
<thead>
<tr>
<th>a. As many persons as it thinks fit</th>
<th>b. Not more than 5 persons</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Not more than 7 persons</td>
<td>d. Not more than 12 persons</td>
</tr>
</tbody>
</table>

8. Where the management of the business of a borrower, being a company, is taken over by the secured creditors, then, no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by .

<table>
<thead>
<tr>
<th>a. The obligor</th>
<th>b. The Reserve Bank</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. The Central Government</td>
<td>d. The secured creditor</td>
</tr>
</tbody>
</table>

9. A borrower who is aggrieved by any of the measures referred to in section 13(4) taken by a secured creditor, may make an application to the Debts Recovery Tribunal within from the date on which such measures had been taken.

<table>
<thead>
<tr>
<th>a. 15 days</th>
<th>b. 30 days</th>
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<tbody>
<tr>
<td>c. 45 days</td>
<td>d. 60 days</td>
</tr>
</tbody>
</table>

10. If the certificate of Registration of an asset reconstruction company is cancelled by the Reserve Bank of India, such asset reconstruction company may, within from the date on which such order of cancellation is communicated to it, prefer an appeal to the Central Government.

<table>
<thead>
<tr>
<th>a. 15 days</th>
<th>b. 30 days</th>
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<tbody>
<tr>
<td>c. 45 days</td>
<td>d. 60 days</td>
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</table>

**Answer to MCQs**

<table>
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<tr>
<th>1</th>
<th>(a)</th>
<th>6</th>
<th>(d)</th>
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<tr>
<td>2</td>
<td>(d)</td>
<td>7</td>
<td>(a)</td>
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<tr>
<td>3</td>
<td>(a)</td>
<td>8</td>
<td>(d)</td>
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<td>4</td>
<td>(b)</td>
<td>9</td>
<td>(c)</td>
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<tr>
<td>5</td>
<td>(b)</td>
<td>10</td>
<td>(b)</td>
</tr>
</tbody>
</table>
SEBI(Listing Obligations & Disclosure Requirements), 2015

Basics of SEBI (LODR) Regulations

On September 2, 2015, SEBI notified the Listing Obligations and Disclosure Requirements Regulations, 2015 to be called as the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 with objectives:

✓ To align clauses of the listing agreement with Companies Act and secondly,
✓ To consolidate the conditions under different securities' listing agreements in one single regulation.

Applicability

These regulations shall apply to the listed entity who has listed any of the following designated securities on recognized stock exchange(s)

✓ Specified securities listed on main board or SME Exchange or Institutional trading platform
✓ Non-convertible debt securities, non-convertible redeemable preference Shares, perpetual debt instrument, perpetual non-cumulative preference Shares
✓ Indian depository receipts
✓ Securitized debt instruments
✓ Units issued by mutual funds
✓ Any other securities as may be specified by the Board.

General Compliance

The listed entity shall ensure that
✓ key managerial personnel,
✓ directors,
✓ promoters or
✓ any other person dealing with the listed entity,
complies with responsibilities or obligations, if any, assigned to them under these regulations.

Compliance Officer

Appointment

A listed entity shall appoint a qualified company secretary as the compliance officer.
Duties

The compliance officer of the listed entity shall be responsible for-

a) **ensuring conformity with** the regulatory **provisions** applicable to the listed entity in letter and spirit.

b) **co-ordination with and reporting to the Board**, recognised stock exchange(s) and depositories with respect to compliance with rules, regulations and other directives of these authorities in manner as specified from time to time.

c) **Ensuring** that the **correct procedures** have been **followed** that would result in the correctness, authenticity and comprehensiveness of the information, statements and reports filed by the listed entity under these regulations.

d) **monitoring email address of grievance redressal division** as designated by the listed entity for the purpose of registering complaints by investors.

Share Transfer Agent

The **listed entity shall**

✓ **appoint a share transfer agent or**

✓ **manage the share transfer facility in-house**

Provided that, in the case of in-house share transfer facility, as and when the total **number of holders of securities** of the listed entity **exceeds one lakh**, the **listed entity shall** either **register with the Board as a Category II share transfer agent or appoint Registrar to an issue** and share transfer agent registered with the Board.

Board of Directors

The composition of board of directors of the listed entity shall be as follows-

✓ **board of directors** shall have an **optimum combination of executive and non executive directors with at least one woman director and not less than 50% of the board of directors shall comprise of non-executive directors**.

✓ where the chairperson of the board of directors is a non-executive director, at least one-third of the board of directors shall comprise of independent directors and

✓ where the listed entity does not have a regular non-executive chairperson, at least half of the board of directors shall comprise of independent directors

✓ Provided that where the regular non-executive chairperson is a promoter of the listed entity or is related to any promoter or person occupying management positions at the level of board of director or at one level below the board of directors, at least half of the board of directors of the listed entity shall consist of independent directors.

✓ **The board of directors shall meet at least four times a year, with a maximum time gap of one hundred and twenty days between any two meetings.**

Corporate Governance Requirements With Respect to Subsidiary of Listed Entity

Meaning of Material Subsidiary
It means subsidiary whose income or net worth exceeds 20% of the consolidated income or net worth respectively, of the listed entity and its subsidiaries in the immediately preceding accounting year.

**Requirement with Respect to Director**

**Atleast one Independent Director on Board shall be a Director on Board of Unlisted Material Subsidiary.**

**Requirements with Respect to Significant Transactions**

The management of the unlisted subsidiary **shall periodically bring to the notice of the board** of directors of the listed entity, a **statement of all significant transactions and arrangements entered into by the unlisted subsidiary.**

**Requirements with Respect to reduction of shareholding**

✓ **A listed entity shall not dispose of shares** in its material subsidiary
✓ **resulting in reduction of its shareholding** (either on its own or together with other subsidiaries) **to less than 50 % or**
✓ **cease the exercise of control** over the subsidiary
✓ **without passing a special resolution** in its General Meeting
✓ except in cases where such divestment is made under a scheme of arrangement duly approved by a Court/Tribunal.

**Requirements with Respect to sale of assets**

✓ **Selling, disposing and leasing** of assets amounting to more than 20% of the assets of the material subsidiary on an aggregate basis during a financial year shall require
✓ **prior approval of shareholders by way of special resolution,**
✓ unless the sale/disposal/lease is made under scheme of arrangement duly approved by a Court/Tribunal.

**Quarterly Compliances**

<table>
<thead>
<tr>
<th>Regulation No.</th>
<th>Particulars</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>Filing of statement of investor complaints</td>
</tr>
<tr>
<td>27</td>
<td>Report on Corporate Governance</td>
</tr>
<tr>
<td>31</td>
<td>Shareholding pattern</td>
</tr>
<tr>
<td>32</td>
<td>Statement of Deviation/Variation</td>
</tr>
<tr>
<td>33</td>
<td>Financial Results</td>
</tr>
</tbody>
</table>

**Grievance Redressal Mechanism**

The listed entity shall ensure that it is registered on SCORES platform in order to handle investor complaints and also ensure expeditious redressal of the same.
Quarterly Report

The listed entity shall file with the recognized stock exchange(s) on a quarterly basis, within 21 days from the end of each quarter-
- ✓ a statement giving the number of investor complaints pending at the beginning of the quarter,
- ✓ those received during the quarter,
- ✓ disposed of during the quarter and
- ✓ those remaining unresolved at the end of the quarter.

Other Corporate Governance Requirements

A listed entity shall submit quarterly compliance report on corporate governance in the format as specified by the Board from time to time to the recognized stock exchange(s), Within 15 days from close of quarter.

Holding of Specified Securities and Shareholding Pattern

A listed entity shall submit a statement showing holding of securities and shareholding pattern separately for each class of securities-
(a) One day prior to listing of its securities on the stock exchange(s)
(b) On a quarterly basis, within 21 days from the end of each quarter; and
(c) Within 10 days of any capital restructuring of the listed entity resulting in a change exceeding 2% per cent of the total paid-up share capital

Financial Results

The listed entity shall submit quarterly and year-to-date standalone financial results to the stock exchange within 45 days of end of each quarter, other than the last quarter.

Approval and Authentication of the Financial Results

- ✓ The quarterly financial results submitted shall be approved by the board of directors.
- ✓ Provided that while placing the financial results before the board of directors, the chief executive officer and chief financial officer of the listed entity shall certify that the financial results do not contain any false or misleading statement or figures and do not omit any material fact which may make the statements or figures contained therein misleading.

Signing of Financial Results

The financial results submitted to the stock exchange shall be signed by the chairperson or managing director, or a whole time director or in the absence of all of them it shall be signed by any other director of the listed entity who is duly authorized by the board of directors to sign the financial results.
Submission of Financial Results

✓ The listed entity **shall submit quarterly and year-to-date standalone financial results** to the stock exchange **within forty-five days of end of each quarter**, other than the last quarter.
✓ In case the listed entity has subsidiaries, in addition to the requirement above, the listed entity may also submit quarterly/year-to-date consolidated financial results.
✓ The quarterly and year-to-date financial results may be either audited or unaudited.
✓ The **listed entity shall submit annual audited standalone financial results for the financial year, within sixty days from the end of the financial year along with the audit report and Statement on Impact of Audit Qualifications applicable only for audit report with modified opinion**.
✓ Provided further that, in case of audit reports with unmodified opinion(s), the listed entity shall furnish a declaration to that effect to the Stock Exchange(s) while publishing the annual audited financial results.

Statement of Deviations or Variations

A listed entity shall submit to the stock exchange the following statement(s) on a quarterly basis for public issue, rights issue, preferential issue etc-
(a) indicating deviations, if any, in the use of proceeds from the objects stated in the offer document or explanatory statement to the notice for the general meeting, as applicable
(b) indicating **category wise variation** (capital expenditure, sales and marketing, working capital etc.) between projected utilization of funds made by it in its offer document or explanatory statement to the notice for the general meeting, as applicable and the actual utilization of funds.

Prior Intimation of Board Meeting

Intimation to Stock Exchange for Certain Proposals

The listed entity **shall give prior intimation** to stock exchange about the **meeting of the board of directors in which any of the following proposals is due to be considered**:
✓ Proposal for **buyback** of securities
✓ Proposal for **voluntary delisting** by the listed entity from the stock exchange(s)
✓ **Fund raising** by way of further public offer, rights issue, American Depository Receipts/Global Depository Receipts/Foreign Currency Convertible Bonds, qualified institutions placement, debt issue, preferential issue or any other method and for determination of issue price
✓ **Declaration/recommendation of dividend, issue of convertible securities**
✓ The proposal for **declaration of bonus securities**

The intimation shall be given **atleast two working days in advance**, excluding the date of the intimation and date of the meeting.

Intimation to Stock Exchange for Financial Results
Intimation regarding financial results viz. quarterly, half yearly, or annual, as the case may be to be discussed at the meeting of board of directors shall be given at least five days in advance excluding the date of the intimation and date of the meeting.

Intimation of alteration to Stock Exchange

The listed entity shall give intimation to the stock exchange(s) at least eleven working days before any of the following proposal is placed before the board of directors –

✓ any alteration in the form or nature of any of its securities that are listed on the stock exchange or in the rights or privileges of the holders thereof.

✓ any alteration in the date on which, the interest on debentures or bonds, or the redemption amount of redeemable shares or of debentures or bonds, shall be payable.

Record Date or Date of Closure of Transfer Books

A listed entity shall give notice in to stock exchange of record date specifying the purpose of the record date, at least 7 working days excluding the date of intimation and the record date.

Dividend

A listed entity shall recommend or declare all dividend and/or cash bonuses at least 5 working days (excluding the date of intimation and the record date) before the record date.

Website

A listed entity shall update any change in the content of its website within 2 working days from the date of such change in content.

Purpose of Record Date

✓ Declaration of dividend
✓ Issue of right shares or bonus shares
✓ Issue of shares for conversion of debentures
✓ Corporate actions
✓ Other specified purposes

Annual Compliances

<table>
<thead>
<tr>
<th>Regulation No.</th>
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<tbody>
<tr>
<td>33</td>
<td>Financial Results</td>
</tr>
<tr>
<td>34</td>
<td>Annual Report to Stock Exchange</td>
</tr>
<tr>
<td>36</td>
<td>Annual Report to Shareholders</td>
</tr>
</tbody>
</table>

Annual Report
A listed entity shall submit the annual report to the stock exchange within 21 working days of it being approved and adopted in the Annual General Meeting as per the provisions of the Companies Act, 2013.

Contents

✓ Audited financial statements i.e. balance sheets, profit and loss accounts etc
✓ Statement on Impact of Audit Qualifications if applicable
✓ consolidated financial statements audited by its statutory auditors
✓ cash flow statement
✓ directors report
✓ Management discussion and analysis report
✓ Business responsibility report
✓ The annual report shall contain any other disclosures specified in Companies Act, 2013 along with other requirements as specified in Schedule V of these regulations.

Documents & Information to Shareholders

A listed entity shall send annual report to the holders of securities not less than 21 days before the Annual General Meeting.

Related Party Transactions

✓ The listed entity shall formulate a policy on materiality of related party transactions and on dealing with related party transactions
✓ A transaction with a related party shall be considered material if the transaction(s) to be entered into individually or taken together with previous transactions during a financial year, exceeds 10% of the annual consolidated turnover of the listed entity as per the last audited financial statements of the listed entity.
✓ All related party transactions shall require prior approval of the audit committee.
✓ Audit committee may grant omnibus approval for related party transactions proposed to be entered into by the listed entity

Audit Committee

Every listed entity shall constitute a qualified and independent audit committee in accordance with the terms of reference.

Composition

✓ The audit committee shall have minimum three directors as members
✓ Two-thirds of the members of audit committee shall be independent directors
✓ All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise.
✓ The chairperson of the audit committee shall be an independent director and he shall be present at Annual general meeting to answer shareholder queries.
✓ The Company Secretary shall act as the secretary to the audit committee.
The audit committee at its discretion shall invite the finance director or head of the finance function, head of internal audit and a representative of the statutory auditor and any other such executives to be present at the meetings of the committee.

### Meetings

The listed entity shall conduct the meetings of the audit committee in the following manner:

- The audit committee shall meet at least four times in a year and not more than one hundred and twenty days shall elapse between two meetings.
- The quorum for audit committee meeting shall either be two members or one third of the members of the audit committee, whichever is greater, with at least two independent directors.

### Nomination and Remuneration Committee

The board of directors shall constitute the nomination and remuneration committee as follows:

**Composition**

- The committee shall comprise of at least three directors
- All directors of the committee shall be non-executive directors; and
- At least fifty percent of the directors shall be independent directors.
- The Chairperson of the nomination and remuneration committee shall be an independent director
- Provided that the chairperson of the listed entity, whether executive or non-executive, may be appointed as a member of the Nomination and Remuneration Committee and shall not chair such Committee.

**Other Points**

- The Chairperson of the nomination and remuneration committee may be present at the annual general meeting, to answer the shareholders' queries
- However, it shall be up to the chairperson to decide who shall answer the queries.
- The role of the nomination and remuneration committee shall be as specified as in Part D of the Schedule II.

### Stakeholders Relationship Committee

- The listed entity shall constitute a Stakeholders Relationship Committee to specifically look into the mechanism of redressal of grievances of shareholders, debenture holders and other security holders.
- The chairperson of this committee shall be a non-executive director.
- The board of directors shall decide other members of this committee.
- The role of the Stakeholders Relationship Committee shall be as specified as in Part D of the Schedule II.

### Risk Management Committee

- The listed entity shall constitute a Risk Management Committee.
- The chairperson of the Risk Management Committee shall be a non-executive director.
- The board of directors shall decide other members of this committee.
- The role of the Risk Management Committee shall be as specified as in Part D of the Schedule II.
Constitution by Whom?

The board of directors of top 100 listed entities, determined on the basis of market capitalisation, as at the end of the immediate previous financial year shall constitute a Risk Management Committee.

Composition

- The majority of members of Risk Management Committee shall consist of members of the board of directors.
- The Chairperson of the Risk management committee shall be a member of the board of directors and senior executives of the listed entity may be members of the committee.

Role of Committee

The board of directors shall define the role and responsibility of the Risk Management Committee and may delegate monitoring and reviewing of the risk management plan to the committee and such other functions as it may deem fit.
Securities & Exchange Board of India Act, 1992

Applicability and Commencement

✓ This SEBI Act deemed to have **come into force on the 30th day of January, 1992**
✓ and extended to whole of India as per section 1 of the SEBI Act, 1992.

Objectives of the Act

✓ Protecting the **interests of the investors** in securities
✓ Promoting **fair dealings** and the development of, and
✓ **Regulating**, the **securities market** and for matters connected therewith or incidental thereto.

Establishment of the Securities and Exchange Board of India

SEBI (hereinafter called 'the Board') has been established as-
✓ a **body corporate**
✓ having **perpetual succession** and a common seal,
✓ with **powers to acquire**, hold and dispose of **property**, both movable and immovable, and
✓ to contract as also to **sue or be sued** by the name of SEBI.

Office of Board

✓ The **head office** of the Board shall be at **Mumbai**.
✓ Board may establish offices at other places in India.

Management of Board

Composition

✓ **Chairman** (nominated by Union Government of India)
✓ 2 **Members** (Officers from Union Ministry)
✓ 1 member (From RBI)
✓ 5 other members (nominated by Union Government of India), out of them at least 3 shall be whole-time members

Powers in Board
The general superintendence, direction and management of the affairs of the Board shall vest in a Board of Members, which may exercise all powers and do all acts and things, which may be exercised or done by the Board.

**Terms of Service**

- The term of office and other conditions of service of Chairman and other Members of the Board shall be such as may be prescribed by rules made under the Act.
- **Chairman and Whole time Members may hold office for a period of three years** subject to the **maximum age limit of 65 years** and can be re-appointed by the Central Government.
- A part-time member may also hold office for a maximum of three years but there is no age limit.

**Termination of Service by Central Government**

The Central Government will have the right to terminate the services of the Chairman or other members appointed to the Board at any time before the expiry of their tenure—

- by giving not less than three months' notice in writing, or
- three months' salary and allowance in lieu thereof.

**Relinquishment of Office**

The Chairman and other members shall have the right to relinquish office at any time before the expiry of their tenure by giving a notice of three months in writing to the Central Government.

**Removal of Members of the Board**

The Central Government shall have the power to remove a member or the Chairman appointed to the Board, if he:

- at any time has been adjudicated as insolvent
- has been declared by a competent court to be of unsound mind
- has been convicted of an offence which in the opinion of the Central Government, involves a moral turpitude.
- has in the opinion of the Central Government so abused his position as to render his continuance in office detrimental to the public interest.

Before removing a member or the Chairman, he will be given a reasonable opportunity of being heard in the matter.

**Meetings of the Board**

- The Board shall meet at such times and places and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be provided by regulations made under Section 30 of the Act.
✓ If for any reason, Chairman is unable to attend a meeting, any member chosen by the members present from amongst themselves shall preside over the meeting.
✓ All questions which come up before any meeting shall be decided by majority vote of the members present and the Chairman or the presiding member will have a second or casting vote, in the event of equality of votes.

Member Not to Participate in Meetings in Certain Cases

Any member-
✓ who is a director of a company, and
✓ who as such director has any indirect pecuniary interest in any matter coming up for consideration at a meeting of the Board,
shall, as soon as possible after relevant circumstances have come to his knowledge, disclose the nature of his interest at such meeting and such disclosure shall be recorded in the proceedings of the Board, and the member shall not take any part in any deliberation or decision of the Board with respect to that matter.

Vacancies etc. not to Invalidate Proceedings

No act or proceeding of SEBI shall be invalid merely by reason of-
✓ Any vacancy in or any defect in constitution of SEBI
✓ Any defect in the appointment of a person acting as a member of SEBI
✓ Any irregularity in procedure of SEBI

Powers and Functions of SEBI

It shall be the duty of the Board to protect the interest of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.

Measures for Performance of Duties

a) regulating the business in stock exchanges and any other securities markets
b) registering and regulating the working of stock brokers, sub - brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets in any manner
ba) registering and regulating the working of the depositories, participants, custodians of securities, foreign institutional investors, credit rating agencies and such other intermediaries as the Board may, by notification, specify in this behalf.
c) registering and regulating the working of venture capital funds and collective investment schemes, including mutual funds
d) promoting and regulating self-regulatory organizations
e) prohibiting fraudulent and unfair trade practices relating to securities markets
f) promoting investors’ education and training of intermediaries’ of securities markets
g) prohibiting insider trading in securities
h) regulating substantial acquisition of shares and take-over of companies
i) calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with securities market, intermediaries and self-regulatory organizations in the securities market.

ia) calling for information and records from any person including any bank or any other authority or board or corporation established or constituted by or under any Central or State Act which, in the opinion of the Board, shall be relevant to any investigation or inquiry by the Board in respect of any transaction in securities.

ib) calling for information from, or furnishing information to, other authorities, whether in India or outside India, having functions similar to those of the Board, in the matters relating to the prevention or detection of violations in respect of securities laws, subject to the provisions of other laws for the time being in force in this regard.

Provided that the Board, for the purpose of furnishing any information to any authority outside India, may enter into an arrangement or agreement or understanding with such authority with the prior approval of the Central Government.

j) performing such functions and exercising such powers under the provisions of the Securities Contracts (Regulation) Act, 1956, as may be delegated to it by the Central Government.

k) levying fees or other charges for carrying out the purposes of this section.

l) conducting research for the above purposes.

la) calling from or furnishing to any such agencies, as may be specified by the Board, such information as may be considered necessary by it for the efficient discharge of its functions.

m) performing such other functions as may be prescribed.

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**Power of Inspection**

**Board may take measures to undertake inspection** of any book, or register, or other document or record of **any listed public company** or a public company which intends to get its securities listed on any recognised stock exchange where the **Board has reasonable grounds to believe that** such company has been **indulging in insider trading** or fraudulent and unfair trade practices relating to securities market.

**Same Powers of Civil Court**

The **Board** shall **have the same powers** as are **vested in a civil court** under the Code of Civil Procedure, 1908 **while trying a suit**, in respect of the following matters, namely:

- discovery and production of books of account and other documents
- summoning and enforcing the attendance of persons
- Examination on oath
- inspection of any books, registers and other documents of any persons
- inspection of any book, or register, or other document or record
- issuing commissions for the examination of witnesses or documents

**Orders by Board in Case of Inquiry/Investigation**

The **Board may** by an **order**, for reasons to be recorded in writing, in the interests of investors or securities market, **take any of the following measures, either pending investigation or inquiry** or on completion of such investigation or inquiry, **namely**:—

(a) **suspend** the **trading** of any security in a recognised stock exchange

(b) **restrain persons from accessing** the **securities market** and prohibit any person associated with securities market to buy, sell or deal in securities.
(c) suspend any office-bearer of any stock exchange or self-regulatory organization from holding such position

(d) impound and retain the proceeds or securities in respect of any transaction which is under Investigation

(e) attach, after passing of an order on an application made for approval by the Judicial Magistrate of the first class having jurisdiction, for a period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made there under.

(f) direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation.

Amount To Be Credited To IEPF

The amount disgorged, pursuant to a direction issued, under the SEBI Act or the Securities Contracts (Regulation) Act, 1956 or the Depositories Act, 1996, as the case may be shall be credited to the Investor Protection and Education Fund (IEPF) established by the Board, and such amount shall be utilised by the Board in accordance with the regulations made under this Act.”.

Regulation of Issue of Prospectus

SEBI has powers to take following measures:
- the matters relating to issue of capital, transfer of securities and other matters incidental thereto and
- the manner in which such matters shall be disclosed by the companies
- prohibit any company from issuing prospectus, any offer document, or advertisement soliciting money from the public for the issue of securities
- specify the conditions subject to which the prospectus, such offer document or advertisement, if not prohibited, may be issued.
- may specify requirements for listing and transfer of securities and other matters.

Collective Investment Scheme

Any scheme or arrangement which satisfies the conditions referred to in sub-section (2) or subsection (2A) shall be a collective investment scheme.

Provided that any pooling of funds under any scheme or arrangement, which is not registered with the Board or is not covered under sub-section (3), involving a corpus amount of one hundred crore rupees or more shall be deemed to be a collective investment scheme.

Requisite Conditions [Section 11AA(2)]

Any scheme or arrangement made or offered by any person under which,-
- the contributions, or payments made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement
SEBI ACT, 1992

✓ the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement
✓ the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors
✓ the investors do not have day-to-day control over the management and operation of the scheme or arrangement

Any scheme or arrangement made or offered by any person satisfying the conditions as may be specified in accordance with the regulations made under this Act.

Exceptions [Section 11AA(3)]

Any scheme or arrangement-

(i) made or offered by a co-operative society registered under the Co-operative Societies Act, 1912 or a society being a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State
(ii) under which deposits are accepted by non-banking financial companies as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934
(iii) being a contract of insurance to which the Insurance Act, 1938 applies
(iv) providing for any Scheme, Pension Scheme or the Insurance Scheme framed under the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952
(v) under which deposits are accepted under the Companies Act, 2013
(vi) under which deposits are accepted by a company declared as a Nidhi or a mutual benefit society under the Companies Act, 2013
(vii) falling within the meaning of Chit business as defined in clause (d) of section 2 of the Chit Fund Act, 1982
(viii) under which contributions made are in the nature of subscription to a mutual fund
(ix) such other scheme or arrangement which the Central Government may, in consultation with the Board, notify shall not be a collective investment scheme.

Power to Issue Directions

SEBI may issue directions considering interests of investors issue directions to-
✓ Any person or class of persons referred in section 12
✓ Any person or class of persons associated with securities market
✓ Any company in respect of matters specified in section 11A

After making or causing to be made an enquiry, the Board has power to issue directions if it is satisfied that it is necessary:
✓ in the interest of investors, or orderly development of securities market or
✓ to prevent the affairs of any intermediary or other persons referred to in Section 12 being conducted in a manner detrimental to interest of investors or securities market or
✓ to secure the proper management of any such intermediary or persons.

The Board may by order for reasons to be recorded in writing levy penalty under sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15H, 15HA, 15HB after holding an inquiry in the prescribed manner.
Investigation

Grounds for Issue of an Order of Investigation

Where the Board has reasonable ground to believe that—
(a) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market; or
(b) any intermediary or any person associated with the securities market has violated any of the provisions of this Act or the rules or the regulations made or directions issued by the Board there under.

It may, at any time by order in writing, direct any person specified in the order to investigate the affairs of such intermediary or persons associated with the securities market and to report thereon to the Board.

Documents to the Investigating Authority

It shall be the duty of—
✓ every manager, managing director, officer and other employee of the company and
✓ every intermediary referred to in section 12, or
✓ every person associated with the securities market to preserve, and to produce to the Investigating Authority or any person authorised by it in this behalf, all the books, registers, other documents and record of, or relating to, the company or, as the case may be, of or relating to, the intermediary or such person, which are in their custody or power.

Period of Custody

✓ The Investigating Authority may keep in its custody any books, registers, other documents and record produced for six months and thereafter shall return the same to any intermediary or any person associated with securities market by whom or on whose behalf the books, registers, other documents and record are produced.
✓ The Investigating Authority may call for any book, register, other document and record if they are needed again. If the person on whose behalf the books, registers, other documents and record are produced requires certified copies of the books, registers, other documents and record produced before the Investigating Authority, it shall give certified copies of such books, registers, other documents and record to such person or on whose behalf the books, registers, other documents and record were produced.

Examination on Oath

Any person, directed to make an investigation, may examine on oath, any manager, managing director, officer and other employee of any intermediary or any person associated with securities market in any manner, in relation to the affairs of his business and may administer an oath accordingly and for that purpose may require any of those persons to appear before it personally.

Penalty
If any person fails without reasonable cause or refuses—
   a) to produce to the Investigating Authority or any person authorised by it in this behalf any book, register, other document and record which is his duty to produce; or
   b) to furnish any information which is his duty to furnish; or
   c) to appear before the Investigating Authority personally or to answer any question which is put to him by the Investigating Authority in pursuance of that sub-section; or
   d) to sign the notes of any examination,

Quantum of Penalty

Person shall be punishable with—
   ✓ imprisonment for a term which may extend to one year, or
   ✓ with fine, which may extend to one crore rupees, or
   ✓ with both, and
   ✓ also with a further fine which may extend to five lakh rupees for every day after the first during which the failure or refusal continues.

Cease and Desist Proceedings

✓ If the Board finds, after causing an inquiry to be made, that any person has violated, or is likely to violate, any provisions of this Act, or any rules or regulations made there under, it may pass an order requiring such person to cease and desist from committing or causing such violation
✓ Provided that the Board shall not pass such order in respect of any listed public company or a public company which intends to get its securities listed on any recognised stock exchange unless the Board has reasonable grounds to believe that such company has indulged in insider trading or market manipulation.

Registration Certificate

Application for Registration

Every application for registration shall be in such manner and on payment of such fees as may be determined by regulations

Prohibition of Manipulative and Deceptive Devices, Insider Trading and Substantial Acquisition of Securities or Control

✓ No person shall directly or indirectly use or employ in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognized stock exchange,
   • any manipulative or deceptive device or
   • contrivance in contravention of the provisions of this Act or the rules or the regulations made there under
✓ employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange.
✓ engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognized stock exchange, in contravention of the provisions of this Act or the rules or the regulations made there under

✓ engage in insider trading

✓ deal in securities while in possession of material or non public information or communicate such material or non-public information to any other person, in a manner which is in contravention of the provisions of this Act or the rules or the regulations made there under.

✓ acquire control of any company or securities more than the percentage of equity share capital of a company whose securities are listed or proposed to be listed on a recognised stock exchange in contravention of the regulations made under this Act.

Penalties

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<tr>
<th>Section No.</th>
<th>Particulars</th>
<th>Penalty</th>
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<tr>
<td>15A</td>
<td>If any person, who is required under this Act or any rules or regulations made there under fails to furnish any document, return or report to the Board, fails to furnish the same to file any return or furnish any information, books or other documents within the time specified thereof in the regulations, fails to file return or furnish the same within the time specified thereof in the regulations to maintain books of account or records, fails to maintain the same or files false or incorrect information</td>
<td>He shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees</td>
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Penalty for Failure by Any Person to enter into Agreement with Clients

| 15B | If any person, who is registered as an intermediary and is required under this Act or any rules or regulations made there under to enter into an agreement with his client, fails to enter into such agreement | He shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees. |

Penalty for Failure to Redress Investors’ Grievances

| 15C | If any listed company or any person who is registered as an intermediary, after having been called upon by the Board in writing | such company or intermediary shall be liable to a penalty which shall not be less than |
including electronic communication, to redress the grievances of investors, fails to redress such grievances within the time specified by the Board

one lakh rupees but
✓ which may extend to one lakh rupees for each day during which such failure continues
✓ subject to a maximum of one crore rupees

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<th>Penalty for Certain Defaults in Case of Mutual Funds</th>
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| **15D** | If any person, who is required under this Act or any rules or regulations made thereunder to obtain a certificate of registration from the Board for sponsoring or carrying on any collective investment scheme, including mutual funds, sponsors or carries on any collective investment scheme, including mutual funds, without obtaining such certificate of registration, he shall be liable to a penalty—
✓ which shall not be less than one lakh rupees but
✓ which may extend to one lakh rupees for each day during which such default/failure continues
✓ subject to a maximum of one crore rupees |

If any person, who is registered with the Board as a collective investment scheme, including mutual funds, for sponsoring or carrying on any investment scheme, fails to comply with the terms and conditions of certificate of registration, he shall be liable to a penalty—
✓ which shall not be less than one lakh rupees but
✓ which may extend to one lakh rupees for each day during which such default/failure continues
✓ subject to a maximum of one crore rupees

If any person, who is registered with the Board as a collective investment scheme, including mutual funds, fails to make an application for listing of its schemes as provided for in the regulations governing such listing, he shall be liable to a penalty—
✓ which shall not be less than one lakh rupees but
✓ which may extend to one lakh rupees for each day during which such default/failure continues
✓ subject to a maximum of one crore rupees

If any person, who is registered with the Board as a collective investment scheme, including mutual funds, fails to dispatch unit certificates of any scheme in the manner provided in the regulation governing such dispatch, he shall be liable to a penalty—
✓ which shall not be less than one lakh rupees but
✓ which may extend to one lakh rupees for each day during which such default/failure continues
✓ subject to a maximum of one crore rupees

If any person, who is registered as a collective investment scheme, including mutual funds, fails to refund the application monies paid by the investors within the period specified in the regulations, he shall be liable to a penalty—
✓ which shall not be less than one lakh rupees but
✓ which may extend to one lakh rupees for each day during which such default/failure continues
✓ subject to a maximum of one crore rupees

If any person, who is registered as a collective investment scheme, including mutual funds, fails to invest money collected by such collective investment schemes in the manner or within the period specified in the regulations, he shall be liable to a penalty—
✓ which shall not be less than one lakh rupees but
✓ which may extend to one lakh rupees for each day during which such default/failure continues
✓ subject to a maximum of one crore rupees

Penalty for Failure to Observe Rules and Regulations by an Asset Management Company

**15E** Where Any Asset Management Company Of A Mutual Fund Registered Under This Act, Fails such asset management company shall be liable to a
### To Comply With Any Of The Regulations Providing For Restrictions On The Activities Of The Asset Management Companies

Penalty
- ✓ which shall not be less than one lakh rupees but
- ✓ which may extend to one lakh rupees for each day during which such failure continues
- ✓ subject to a maximum of one crore rupees

### Penalty for Non Compliance with Regulations of AIF etc.

| 15EA | Any person Fails to comply with regulations by SEBI in respect of Alternate Investment Funds, Infrastructure Investment Trusts and Real Estate Investment Trusts or fails to comply with directions of SEBI | Min: 1 lakh  
Max: 1 lakh for each day subject to Higher of 1 crore/ 3 times of gain |

### Penalty for Non Compliance with Regulations: Investment Advisor

| 15EB | An investment advisor or research Analyst fails to comply with regulations made by SEBI or directions issued by SEBI | Min: 1 lakh  
Max: 1 lakh for each day of failure subject to 1 Crore. |

### Penalty for Default in Case of Stock Brokers

| 15F | Person registered as a stock broker fails to issue contract notes in the form and manner specified by the stock exchange of which such broker is a member  
Person registered as a stock broker fails to deliver any security or fails to make payment of the amount due to the investor in the manner within the period specified in the regulations  
Person registered as a stock broker charges an amount of brokerage which is in excess of the brokerage specified in the regulations | he shall be liable to a penalty of more than 1 lakh but  
✓ which may extend to 5 times contract note was required to be issued.  
✓ Max 1 crore  
he shall be liable to a penalty of more than 1lakh but  
✓ which may extend to one lakh rupees for each day during which he sponsors or carries on any such collective investment scheme including mutual funds  
✓ subject to a maximum of one crore rupees  
he shall be liable  
✓ for more than 1 lakh but  
✓ which may extend to five times the amount of brokerage charged in excess of the specified brokerage, |
### Penalty for Insider Trading

**Insider:** Person connected with company who is reasonable expected to have price sensitive information in respect of securities of a company.

**Price Sensitive Information:** Any information which relates directly or indirectly to a company and which if published is likely to affect price of securities of company.

Eg: Periodical financial results, Intention to declare dividend, Issue of securities, Buy back, Amalgamation, mergers, significant changes in policies etc.

<table>
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<tr>
<th>15G</th>
<th>If any insider who,—</th>
<th>shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher</th>
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<td>(i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price-sensitive information or</td>
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<td>(ii) communicates any unpublished price-sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law or</td>
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<td></td>
<td>(iii) counsels, or procures for any other person to deal in any securities of any body corporate on the basis of unpublished price-sensitive information</td>
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### Penalty for Non-Disclosure of Acquisition of Shares and Takeovers

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<tr>
<th>15H</th>
<th>If any person, who is required under this Act or any rules or regulations made thereunder, fails to,—</th>
<th>he shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher</th>
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<td></td>
<td>(i) disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or</td>
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<td>(ii) make a public announcement to acquire shares at a minimum price; or</td>
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<td>(iii) make a public offer by sending letter of offer to the shareholders of the concerned company; or</td>
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<td></td>
<td>(iv) make payment of consideration to the shareholders who sold their shares pursuant to letter of offer</td>
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### Penalty for Fraudulent and Unfair Trade Practices

| 15HA | If any person indulges in fraudulent and unfair trade practices relating to securities | he shall be liable to a penalty which shall not be less than five |

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CA. SHIVANGI AGRAWAL
SEBI ACT, 1992

Penalty for Alteration, destruction of Records and failure to protect etc.

15HAA
Any person who:
- knowingly Destroys, mutilates, conceals, falsifies and information or record to obstruct or influence investigation, inspection, inquiry audit under the Act
- Without authorization, access or tries to access regulatory data in the database
- Without authorization downloads or reproduces regulatory data
- Introduces virus and brings out trading halt
- Disrupts functioning of system
- Damages, deletes, alters or by any means affect regulatory data
- Providing assistance to anyone in any of the above.

Min: 1 lakh
Max: Higher of: 10 crores or 3 times of profit

Penalty for Contravention where no Separate Penalty has been provided

15HB
Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board there under for which no separate penalty has been provided shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees

SEBI received complaints from some investors alleging that ABC Limited and some brokers are indulging in price manipulation in the shares of ABC Limited. Explain the powers that can be exercised by SEBI under the Securities and Exchange Board of India, 1992 in case the allegations are found to be correct.

Adjudication

Appointment of Adjudicating Officer

For the purpose of adjudging Penalties, the **Board shall appoint any officer not below the rank of a Division Chief to be an adjudicating officer** for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.

Power of Officer

Adjudicating officer shall have power-

CA. SHIVANGI AGRAWAL
✓ to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document
✓ which in the opinion of the adjudicating officer, may be useful for or relevant to the subject-matter of the inquiry and
✓ if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified,
✓ he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections.

Order to Enhance Penalty

✓ The Board may call for and examine the record of any proceedings under this section and if it considers that the order passed by the adjudicating officer is erroneous to the extent it is not in the interests of the securities market, it may, after making or causing to be made such inquiry as it deems necessary, pass an order enhancing the quantum of penalty, if the circumstances of the case so justify
✓ Provided that no such order shall be passed unless the person concerned has been given an opportunity of being heard in the matter
✓ Provided further that nothing contained in this sub-section shall be applicable after an expiry of a period of three months from the date of the order passed by the adjudicating officer or disposal of the appeal under section 15T, whichever is earlier

Factors to be taken into Account by the Adjudicating Officer

While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:
✓ the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default
✓ the amount of loss caused to an investor or group of investors as a result of the default
✓ the repetitive nature of the default.

An investor has complained to SEBI that he has not received the payment due to him from the stock broker registered with Calcutta Stock Exchange Association Ltd. The complainant has requested SEBI to take appropriate action against the stock broker. You are required to state with reference to the provisions of Securities and Exchange Board of India Act, 1992 the answer to the following:
(i) What action SEBI can take against the stock broker on the complaint as stated above?
(ii) What is the procedure to be adopted and what are the factors that will be taken into account while taking such action?

Establishment of Securities Appellate Tribunal
The Central Government shall, by notification, establish a Tribunal to be known as the Securities Appellate Tribunal to exercise the jurisdiction, powers and authority conferred on it by or under this Act or any other law for the time being in force.

The Central Government shall also specify in the notification referred to in sub-section (1), the matters and places in relation to which the Securities Appellate Tribunal may exercise jurisdiction.

Composition of Securities Appellate Tribunal

- To be appointed
- By Notification
- By Central Government

Jurisdiction may be exercised

- By benches
- Each bench shall include
- Atleast 1 judicial
- & 1 technical member

Qualification for Appointment as Presiding Officer or Member of Securities Appellate Tribunal

Qualifications of Presiding Officer

A person shall not be qualified for appointment as the Presiding Officer of the Securities Appellate Tribunal unless he –

(a) is a sitting or retired Judge of the Supreme Court or a sitting or retired Chief Justice of a High Court; or
(b) is a sitting or retired Judge of a High Court who has completed not less than seven years of service as a Judge in a High Court.

Appointment of Presiding Officer

The Presiding Officer of the Securities Appellate Tribunal shall be appointed by the Central Government in consultation with the Chief Justice of India or his nominee.

Qualification of Judicial Member

A person shall not be qualified for appointment as the Judicial Member of the Securities Appellate Tribunal unless he is or has been a Judge of high court for 5 years.

Qualifications of Technical Member

- is, or has been, a Secretary or an Additional Secretary in the Ministry or Department of the Central Government or any equivalent post in the Central Government or a State Government; or
✓ is a person of proven ability, integrity and standing having special knowledge and professional experience, of not less than fifteen years, in financial sector including securities market or pension funds or commodity derivatives or insurance.

Appointment of Judicial Member

The Presiding Officer and Judicial Members of the Securities Appellate Tribunal shall be appointed by the Central Government in consultation with the Chief Justice of India or his nominee.

Appointment of Technical Member

The Technical Members of the Securities Appellate Tribunal shall be appointed by the Central Government on the recommendation of a Search-cum-Selection Committee consisting of the following, namely:—
(a) Presiding Officer, Securities Appellate Tribunal—Chairperson
(b) Secretary, Department of Economic Affairs—Member
(c) Secretary, Department of Financial Services—Member and
(d) Secretary, Legislative Department or Secretary, Department of Legal Affairs—Member.

Other Points

✓ The Secretary, Department of Economic Affairs shall be the Convener of the Search-cum-Selection Committee.
✓ The Search-cum-Selection Committee shall determine its procedure for recommending the names of persons to be appointed.

Appeal to the Securities Appellate Tribunal

(1) any person aggrieved,—
✓ by an order of the Board
✓ by an order made by an adjudicating officer under this Act; or
✓ by an order of the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority,
may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

Period of Appeal

✓ Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order made by the Board or the Adjudicating Officer or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, as the case may be, is received by him and it shall be in such form and be accompanied by such fee as may be prescribed
✓ Provided that the Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.
Order by SAT

On receipt of an appeal under sub-section (1), the Securities Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

Sending of Copy of Order

The Securities Appellate Tribunal shall send a copy of every order made by it to the Board, or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, as the case may be the parties to the appeal and to the concerned Adjudicating Officer.

Disposal of Appeal

The appeal filed before the Securities Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

Procedure and Powers of the Securities Appellate Tribunal

Guided By Principle of Natural Justice

The Securities Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, and of any rules, the Securities Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

Powers of Civil Court

The Securities Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:—
(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavits;
(d) issuing commissions for the examination of witnesses or documents;
(e) reviewing its decisions;
(f) dismissing an application for default or deciding it ex parte;
(g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;
(h) any other matter which may be prescribed.

Other Points

✓ Every proceeding shall be a Judicial Proceeding within the meaning of IPC.
Where Benches are constituted, the Presiding Officer of the Securities Appellate Tribunal may, from time to time make provisions as to the distribution of the business of the Securities Appellate Tribunal amongst the Benches and also provide for the matters which may be dealt with, by each Bench.

On the application of any of the parties and after notice to the parties, and after hearing such of them as he may desire to be heard, or on his own motion without such notice, the Presiding Officer of the Securities Appellate Tribunal may transfer any case pending before one Bench, for disposal, to any other Bench.

If a Bench of the Securities Appellate Tribunal consisting of two members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Presiding Officer of the Securities Appellate Tribunal who shall either hear the point or points himself or refer the case for hearing only on such point or points by one or more of the other members of the Securities Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of the members of the Securities Appellate Tribunal who have heard the case, including those who first heard it.

Appeal to Supreme Court

Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out of such order

Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

By virtue of the powers conferred under Section 29 & 30 of the Act, the SEBI is empowered to make rules and regulations. In this context, the SEBI has framed rules under the Act and also issued a number of regulations, guidance notes, circulars, notifications and clarifications etc., from time to time.

Eg:

- SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015
- SEBI (Prohibition of Insider Trading) Regulations, 2015
- SEBI (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2015
- Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2015
- The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Third Amendment) Regulations, 2015
- The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Fourth Amendment) Regulations, 2015
- The SEBI (Issue of Capital and Disclosure Requirements) (Sixth Amendment) Regulations, 2015
- SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009
- SEBI (Central Listing Authority) Regulations, 2003
- SEBI (Delisting of Securities) Guidelines, 2003
- SEBI (Employees Stock Option Scheme and Employees Stock Purchase Scheme) Guidelines, 1999
- SEBI (Issue of Sweat Equity) Regulations, 2002
- SEBI (Buy-Back of Securities) Regulations, 1998
Power of Central Government to Issue Directions

- Without prejudice to the foregoing provisions of this Act or the Depositories Act, 1996, the Board shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time.
- Provided that the Board shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.
- The decision of the Central Government whether a question is one of policy or not shall be final.

Power of Central Government to Supersede Board

If at any time the Central Government is of opinion that Board unable to perform its functions, it may by notification, supersede the Board for such period, not exceeding six months.

Reasons to Supersede

- on account of grave emergency, the Board is unable to discharge the functions and duties under the provisions of this Act; or
- that the Board has persistently made default in complying with any direction issued by the Central Government under this Act or
- default in the discharge of the functions and duties imposed under the provisions of this Act and as a result of such default the financial position of the Board or the administration of the Board has deteriorated; or
- that circumstances exist which render it necessary in the public interest so to do
Consequences after Superseding

Upon the publication of a notification of superseding the Board,—

a) all the members shall, as from the date of supersession, vacate their offices as such

b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Board, shall until the Board is reconstituted, be exercised and discharged by such person or persons as the Central Government may direct and

c) all property owned or controlled by the Board shall, until the Board is reconstituted vest in the Central Government.

Consequences of Contravention or Failure to pay Penalty

✓ If any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules or regulations made thereunder, he shall be punishable with imprisonment for a term which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both

✓ If any person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any of his directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both

Composition of Certain Offences

Notwithstanding anything contained in the Code of Criminal Procedure, any offence punishable under this Act, not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may either before or after the institution of any proceeding, be compounded by a Securities Appellate Tribunal or a court before which such proceedings are pending.

Power to Grant Immunity

The Central Government may, on recommendation by the Board, if the Central Government is satisfied, that

✓ any person, who is alleged to have violated any of the provisions of this Act or the rules or the regulations made thereunder,

✓ has made a full and true disclosure in respect of the alleged violation, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act, or the rules or the regulations made thereunder or also from the imposition of any penalty under this Act with respect to the alleged violation.

Exception

✓ No such immunity shall be granted by the Central Government in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of application for grant of such immunity.
Recommendation of the Board under this sub-section shall not be binding upon the Central Government.

Withdrawal of Immunity

An immunity granted to a person above may, at any time, be withdrawn by the Central Government, if it is satisfied that such person had, in the course of the proceedings, not complied with the condition on which the immunity was granted or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the contravention and shall also become liable to the imposition of any penalty under this Act to which such person would have been liable, had not such immunity been granted.

Cognizance of Offences by Courts

No court shall take cognizance of any offence punishable under this Act or any rules or regulations made there under, save on a complaint made by the Board.

Establishment of Special Courts

The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding the office of a Sessions Judge or an Additional Sessions Judge, as the case may be.

Recovery of Amounts

If a person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any direction of the Board for refund of monies or fails to comply with a direction of disgorgement order or fails to pay any fees due to the Board, the Recovery Officer may draw up under his signature a statement in the specified form specifying the amount due from the person and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes, namely:

(a) attachment and sale of the person's movable property;
(b) attachment of the person's bank accounts;
(c) attachment and sale of the person's immovable property;
(d) arrest of the person and his detention in prison;
(e) appointing a receiver for the management of the person's movable and immovable Properties

The Recovery Officer shall be empowered to seek the assistance of the local district administration while exercising the powers.
Mr. Ravi failed to pay the penalty imposed by the Adjudicating Officer for an offence committed under Securities and Exchange Board of India Act, 1992. After the penalty has become due, Mr. Ravi, otherwise than for adequate consideration, transferred his residential property to his sister and the fixed deposits with banks in favour of his minor son. The minor son has become major and deposits continue to be held by his son.

With reference to the provisions of SEBI Act, 1992 discuss,
(i) Whether the residential property and fixed deposits with banks can be attached by the Recovery Officer for the purpose of recovering the penalty?
(ii) Whether the Recovery Officer can seek assistance of local district administration for attaching the property?

Multiple Choice Questions

1. SEBI Act, 1992 came into force on -------.

2. If Chairman of SEBI is unable to attend a meeting of SEBI, then, who shall preside at the meeting.
   a. Vice-Chairman  b. The senior most member of SEBI  c. Any person appointment for this purpose, by the Chairman  d. Any other member chosen by the members present

3. The Chairman of SEBI may resign from his office by giving a notice of not less than ------- months in writing to Central Government.
   a. 3  b. 6  c. 2  d. 1

4. The Chairman or a whole-time Member of SEBI shall not hold office after he has attained the age of -----. years.
   a. 60  b. 65  c. 70  d. None of these

5. The SEBI shall consist of a Chairman and ------ members.
   a. 5  b. 8  c. 10  d. 12

6. SEBI is empowered to suspend the trading in any security in a recognised stock exchange -------.
   a. Pending investigation or inquiry  b. On completion of investigation or inquiry  c. Either (a) or (b)  d. After obtaining approval of the Judicial Magistrate of first class
7. SEBI may make inspection of books of a listed company if it has reasonable ground to believe that such company has been indulging in -----------.

<table>
<thead>
<tr>
<th>a. Insider trading</th>
<th>b. Fraudulent practices relating to securities market</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Unfair trade practices</td>
<td>d. All of these</td>
</tr>
</tbody>
</table>

8. If a registered stock broker fails to issue contract notes in the form and in manner specified by the stock exchange, he shall be liable to a penalty which shall not be less than -------- but which may extend to -------- the amount for which the contract note was required to be issued by that broker.

<table>
<thead>
<tr>
<th>a. Rs. 5 lakh; 3 times</th>
<th>b. Rs. 5 lakh; 5 times</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Rs. 1 lakh; 5 times</td>
<td>d. Rs. 1 lakh; 3 times</td>
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</table>

9. The Presiding Officer or the Judicial or Technical Member of the Securities Appellate Tribunal shall not hold office after he has attained the age of ------- years.

<table>
<thead>
<tr>
<th>a. 60</th>
<th>b. 65</th>
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<tbody>
<tr>
<td>c. 67</td>
<td>d. 70</td>
</tr>
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</table>

10. The Technical Members of the Securities Appellate Tribunal shall be appointed by the Central Government on the recommendation of -----------.

<table>
<thead>
<tr>
<th>a. The Chief Justice of India</th>
<th>b. The Chief Justice of a High Court</th>
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<tbody>
<tr>
<td>c. A Judge of the Supreme Court</td>
<td>d. A Search-cum-Selection Committee</td>
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</table>

11. If a person fails to pay any fees due to SEBI, ------- shall proceed to recover such amount from such person.

<table>
<thead>
<tr>
<th>a. The Chairman of SEBI</th>
<th>b. The Collector</th>
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<tr>
<td>c. The adjudicating officers</td>
<td>d. The Recovery Officer</td>
</tr>
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</table>

12. A member of the SEBI shall not be appointed as Presiding Officer or Member of the Securities Appellate Tribunal for a period of ------- from the date on which he ceases to hold office as such in SEBI.

<table>
<thead>
<tr>
<th>a. 1 year</th>
<th>b. 2 years</th>
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<tr>
<td>c. 3 years</td>
<td>d. 5 years</td>
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13. If an appeal to the Supreme Court is not filed within the stipulated period, the Supreme Court -------- entertain the appeal within next -------- if it is satisfied that there was sufficient cause for not filing the appeal within that period.

<table>
<thead>
<tr>
<th>a. May; 60 days</th>
<th>b. Shall; 60 days</th>
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<tbody>
<tr>
<td>c. May; 45 days</td>
<td>d. Shall; 45 days</td>
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14. A person shall not be qualified for appointment as the Presiding Officer of the Securities Appellate Tribunal, unless he is or has been a Judge of the Supreme Court or Chief Justice of a High Court or a Judge of High Court for at least ------- years.
15. An appeal to the Securities Appellate Tribunal may be filed within ------ from the date on which a copy of the order is received by the aggrieved person.

<p>| | | | | |</p>
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<tr>
<td>a.</td>
<td>1 month</td>
<td>b.</td>
<td>45 days</td>
<td></td>
</tr>
<tr>
<td>c.</td>
<td>2 months</td>
<td>d.</td>
<td>90 days</td>
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**Answer to MCQs**

<p>| | | | | |</p>
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<tr>
<td>1</td>
<td>(b)</td>
<td>6</td>
<td>(c)</td>
<td>11</td>
</tr>
<tr>
<td>2</td>
<td>(d)</td>
<td>7</td>
<td>(d)</td>
<td>12</td>
</tr>
<tr>
<td>3</td>
<td>(a)</td>
<td>8</td>
<td>(c)</td>
<td>13</td>
</tr>
<tr>
<td>4</td>
<td>(b)</td>
<td>9</td>
<td>(d)</td>
<td>14</td>
</tr>
<tr>
<td>5</td>
<td>(b)</td>
<td>10</td>
<td>(d)</td>
<td>15</td>
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</table>
**Arbitration and Conciliation Act, 1996**

The Arbitration and Conciliation Act, 1996 is an Act enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

The Act **came into enforcement on 22nd of August, 1996**

**Structure of Act**

The Arbitration and Conciliation Act is divided into 4 Parts, Containing 86 sections along with seven schedules.
- Part I contains ten chapters which deals with the Arbitration
- Part II contains two chapters which deals with the enforcement of certain foreign awards
- Part III deals with the conciliation
- Part IV deals with the Supplementary provisions

**Objective of the Act**

- To provide for fair and neutral settlement
- To minimize supervisory role of courts
- To cover international commercial arbitration and conciliation as also domestic arbitration and conciliation
- To provide that every final arbitral award is enforced in the same manner as if it were the decree of the court.
- To provide well defined area of work for arbitral tribunal and conciliator

**Alternate Methods of Dispute Resolution**

Alternate methods of dispute resolution are used to resolve disputes outside the ordinary court system.

**Advantages of ADR**

- lower costs
- greater flexibility of process
- higher confidentiality
- greater likelihood of settlement
- choice of forum
Disadvantages of ADR

- requirement of cooperative behaviour of both parties
- power imbalance between parties
- lacks the possibility of interim measures
- difficulty in enforcement of final outcome

Relevant Definitions

<table>
<thead>
<tr>
<th>Definition</th>
<th>Description</th>
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<tbody>
<tr>
<td>Arbitration</td>
<td>“Arbitration” defined by the Arbitration and Conciliation Act, 1996 in section 2. According to which “arbitration” means any arbitration whether or not administered by permanent arbitral institution.</td>
</tr>
<tr>
<td>Arbitral Tribunal</td>
<td>“Arbitral tribunal” means a sole arbitrator or a panel of arbitrators</td>
</tr>
<tr>
<td>Arbitral Award</td>
<td>“Arbitral award” includes an interim award</td>
</tr>
</tbody>
</table>
| International Commercial Arbitration | “International commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—
- an individual who is a national of, or habitually resident in, any country other than India;
- a body corporate which is incorporated in any country other than India;
- an association or a body of individuals whose central management and control is exercised in any country other than India;
- the Government of a foreign country |
| Party | Party means a party to an arbitration agreement.
Meaning of Arbitration

Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a court of law. The settlement of dispute is arrived by the judgement of the third person (or more persons) who are called Arbitrators.

Arbitrator

The term “arbitrator” is not defined in the Arbitration and Conciliation Act. But “arbitrator” is a person who is appointed to determine differences and disputes between two or more parties by their mutual consent.

Features of Arbitration

a) Arbitration agreement - No arbitration can happen without the consent of the parties. The consent is contained within an arbitration agreement. This agreement clearly specifies the desire of the parties to arbitrate their dispute. In other words they clearly note that in the event of a dispute between them they would not go to the court, instead they will proceed to arbitrate their dispute. This agreement takes the form of a binding contract.

b) Arbitrator - also known as the arbitral tribunal is similar to a judge of the court. The arbitrator decides the disputes between the parties. Just like the judge an arbitrator is also required to be completely neutral, impartial and not favour any party. Because the parties can choose the arbitrators, it inspires confidence in the arbitrators, the process and the decisions taken by the arbitrators. If however the arbitrators who are not independent then they could be removed by the court.

c) Seat of arbitration - means the legal system which would supervise the arbitration to ensure that mandatory legal requirements are complied with. The courts of the seat would provide assistance through supportive measures. For example if India is the seat then Indian laws would apply and Indian courts would have the authority to provide supportive assistance such as issuance of interim measures, etc. It would also be the court which would hear challenges against the arbitral award.

d) Party autonomy and procedure - Arbitration also gives the parties the choice of applicable law especially if the arbitration is an international commercial arbitration. Additionally there is enormous flexibility to choose the type and kind of procedure that the parties want to adopt for the arbitration. These rules will deal with many things including what kind of hearing should be there for instance only written statements or oral arguments, etc.
e) **Finality of outcome** - Usually there is no appeal against an arbitral award. An arbitral award can only be set aside on very few grounds such as invalid arbitration agreement, parties’ incapacity, independence and impartiality of an arbitrator, unfair procedure, etc.

f) **Confidentiality** – An important feature of arbitration is that whatever that happens in arbitration remains private. It is only known to the parties and the arbitrators. All of them are prohibited with sharing with third parties who are not involved in arbitration, any document or information that is received during the course of arbitration. This is done to ensure that parties feel free to share all information during arbitration so that a proper solution can be arrived at.

g) **Arbitral Awards** – An award is a decision by the arbitrator on the dispute that was submitted to it for adjudication.

h) **Enforcement of arbitral awards** - It is much simpler to enforce an arbitral award in foreign nations than a judgment rendered by a court. Such enforcement happens under an international treaty.

**Difference between Litigation and Arbitration**

<table>
<thead>
<tr>
<th>Litigation</th>
<th>Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Takes place in court</td>
<td>The place of arbitration is chosen by the Parties</td>
</tr>
<tr>
<td>The litigants have no say on who will judge their disputes</td>
<td>One or more arbitrators are appointed with consent of Parties</td>
</tr>
<tr>
<td>The procedure followed by the court is fixed and determined by provisions in Code of Civil Procedure, 1908</td>
<td>The parties have adequate flexibility to choose the procedures that would apply to their arbitration.</td>
</tr>
<tr>
<td>there is very little privacy and confidentiality.</td>
<td>Confidentiality is one of the most important characteristic of arbitration.</td>
</tr>
<tr>
<td>Court decisions are subject to numerous appeals.</td>
<td>Arbitral awards are binding and can be challenged on very limited grounds.</td>
</tr>
<tr>
<td>It is often difficult to enforce judgments of court of one country in a foreign country.</td>
<td>Enforcing an arbitral award in foreign nations is much easier and is governed by international treaties</td>
</tr>
</tbody>
</table>

**Arbitration Agreement**

According to section 2, unless the context otherwise requires “arbitration agreement” means an agreement referred to in section 7.

✓ In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. An arbitration agreement shall be in writing. An arbitration agreement is in writing if it is contained in –
- a document signed by the parties;
- An exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or
- An exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Disputes Which Can’t Be Submitted To Arbitration

All matters in dispute between parties relating to private rights or obligation which civil courts may take cognizance of may be referred to arbitration. However a matter, the reference of which is forbidden by a statute or is opposed to public policy, cannot be referred to arbitration. Also the following matters have been held by judicial decisions to be not referable to arbitration:

- Testamentary matters like the validity of a will
- Matrimonial matters such as a suit for divorce or restitution of conjugal rights.
- Matters if criminal nature based on illegal transaction.
- Insolvency matters
- Matters relating to the guardianship of a minor
- Lunacy proceedings
- Matters relating to title to immovable property in a foreign country.
- Disputes with respect to charity
- Disputes relating to revenue matters

Examine the validity of the following statement with reference to the Arbitration and Conciliation Act, 1996: The disputes submitted to arbitration must be arbitrable.

Types of Arbitration Agreements

Arbitration Clause

A clause contained within a principal contract. The parties undertake to submit disputes in relation to or in connection with the principal contract that may arise in future to arbitration.
Submission Agreement

An agreement to refer disputes that already exist. Such an agreement is entered into after the disputes have arisen and parties agree that the dispute shall be referred to arbitration.

Requirements for Valid Arbitration Agreement

Writing

Unlike the possibility of an oral contract, arbitration agreements are required to be mandatorily in writing. There is however no requirement for the same to be in writing in one document. There is also no particular form or template for an arbitration agreement.

Eg: C owns a shop in Chandni Chowk dealing in readymade clothes. D is a supplier of clothes to C. They have been doing business for many years. No separate written contract exists between them. However for each consignment D issues an individual invoice to C on the basis of which payment is made. Each invoice contains the following note “All disputes pertaining to this transaction if any will be subject to the Arbitration Rules & Regulations of Bharat Merchant Chamber”. This is an arbitration agreement in writing.

Eg: Vikram wants to start a Sweet and Confectionary Shop and contacts Ahuja Confectioners & Bakers for supply of cakes. The entire communication between the parties took place over email. One of the emails received by Vikram from Ahuja Bakers had, among other terms of service, the following condition “any disputes regarding quality or delivery shall be submitted to arbitration conducted under the aegis of Indian Confectionary Manufacturers Association. Please place your order if the above terms and conditions are agreeable to you.” Vikram placed an order. The contract stood affirmed by reason of their conduct. This would be an arbitration agreement in writing contained in correspondence between the parties.

Arbitration With Reference to Other Documents

In Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corp, Ltd, the respondent had placed an order of purchase of various quantities of phosphoric acid from the petitioner. The purchase order noted that the terms and conditions were to be as per the Fertilizer Association of India (FAI) Terms and Conditions for Sale and Purchase of Phosphoric Acid. Clause 15 of the terms provided for settlement of disputes by arbitration.

It was held by the Supreme Court of India that for a reference to constitute an arbitration agreement the contract should be writing and reference should be such as to make that arbitration clause a part of the contract. Both the conditions were held to be fulfilled in the present instance.

Clarity of Consent

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The intention to go to arbitration must be clear in other words there must be consensus ad idem. Utilization of vague words cannot be considered to be adequate. Words used by parties should make it clear that the parties intend to enter into arbitration agreement.

**Substance over Form**

*Mere absence of the word Arbitration or Arbitrator does not make any difference.* It is the substance and not the form which is material.  
Eg. The following clause in an agreement is a Valid Arbitration Agreement:  
The contractor agrees that in case of any difference/dispute, the decision of the managing director, south, Shimla, HPSFC ltd shall be final and binding.  
*Mohan Singh v Himachal Pradesh State Forest Corporation*

**Defined Legal Relationship**

The important idea here is that *any dispute that arises from a legal relationship can be submitted to arbitration* unless it is expressly or impliedly barred by a Statute. Thus disputes concerning illegal activities cannot be submitted to arbitration.

**Final and Binding Award**

*Parties must agree that resolution* of disputes and their rights as would be determined by the arbitral award shall be final and binding upon them.

**Existence of Dispute**

*There must be a present or a future dispute/difference* in connection with some contemplated affairs that is proposed to be submitted to arbitration.

**Arbitrability**

*Disputes submitted/proposed to be submitted to arbitration must be arbitrable.*  
For example criminal offences, matrimonial disputes, guardianship matters, testamentary matters, mortgage suit for sale of a mortgaged property, etc. cannot be arbitrated.

**Signature**

- It is only *required when the arbitration agreement is contained in a contract* i.e. in one set of documents.  
- However no signature is required if the arbitration agreement is contained in correspondence or exchange of pleadings.

**Termination of Arbitration Agreement**

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Mutual Consent

The parties involved can jointly agree to put an end to a particular arbitration agreement.

Termination of Principal Contract

✓ An arbitration agreement always operates in relation to a principal contract.
✓ If the principal contract is terminated through discharge or novation, the arbitration agreement terminates with the contract.
✓ However if the principal contract is breached, then the arbitration agreement survives because of the operation of the doctrine of separability.

Death of Parties

An arbitration agreement is not discharged by the death of any party. It shall be enforceable by or against the legal representatives of the deceased.

Operation of Law

If there is a dispute with respect to a particular right of a party and such dispute is submitted to arbitration but such right is extinguished by operation of law, then the arbitration agreement shall come to an end.

Arbitral Tribunal

The terms arbitrator(s) or arbitral tribunal are interchangeable and refers to the same person or group of persons. Thus there could be one (sole) arbitrator or more than one arbitrator. Both would be referred to as arbitral tribunal who judges the dispute.

Who Can Be an Arbitrator?

✓ Any person capable of contracting, in theory can be an arbitrator.
✓ Since arbitration is a private arrangement, whereby when dispute arise it would be submitted to a private party instead of courts, the arbitrator can be anyone who is capable of contracting with the parties.
✓ Arbitrator has to independent and impartial.
✓ Only a person who has attained the age of majority and is of sound mind can be appointed as an arbitrator.

Grounds for Determining Independence and Impartiality [Fifth Schedule]

✓ Relationship of arbitrator with parties or counsel eg. Arbitrator is present or past employee etc.
✓ Relationship of arbitrator with dispute eg. He has given some legal advice or opinion on the same matter previously to one of the parties
### Appointment of Arbitral Tribunal

**The parties have the right to choose the persons** who would act as arbitrators in their dispute. A person of any nationality may be appointed as Arbitrator.

### Challenging an Appointment

Appointment of person may be challenged if circumstances exist that give doubt as to his independence or he does not possess qualifications agreed by parties.

### Disqualifications for Appointment as Arbitrator [Seventh Schedule]

- If arbitrator has relationship with parties or counsel eg. Arbitrator is present or past employee etc.
- If arbitrator has relationship with dispute eg. He has given some legal advice or opinion on the same matter previously to one of the parties
- If arbitrator has direct or indirect interest in dispute eg. If he holds shares in one of the parties or close family member has financial interest in outcome.

### Number of Arbitrators

- The **parties** are **free to determine** the **number** of arbitrators, **provided** that such number shall **not be an even number**.
- Failing the determination, the arbitral tribunal shall consist of a sole arbitrator.
Narayan Prasad Lohia v. Nikunj Kumar Lohia
The Supreme Court held that even number of arbitrators is an acceptable possibility. Among the many reasons put forward, the court observed that it was possible that the two arbitrators may not disagree, in which case there would be consensus and no disagreement. It seems that parties can choose 'even' number of arbitrators.

Procedure for Appointment

Appointment may be done in following manner where there is no procedure for appointment-

✓ The **parties will jointly appoint in case of one arbitrator**.
✓ Each party will appoint one and the two **arbitrators would appoint the rest in case of two or more arbitrators**.
✓ **Appointment may be made by** an unrelated person or **institution**, e.g. President of ICAI, President FICCI, etc if parties can't decide.

Situation Where No Procedure Is Agreed and There Is Failure to Appoint Arbitrator Within 30 Days

In such situations the **parties would have to approach the authorities designated under the Arbitration and Conciliation Act 1996 for appointment** of arbitrators. The designated authority is either the Supreme Court of India (for international commercial arbitration) or the High Court (for domestic arbitration).

Requirements of an Arbitral Tribunal

✓ **The arbitrator could be of any nationality** – the arbitrator could be of any nationality. There is no requirement that the arbitrator should be of the nationality of one of the parties. This is relevant in international commercial arbitration, when the parties are from different countries. In such a situation an arbitrator who belongs to the nationality of one of the parties may be considered as biased.

✓ **Capable of contracting** – **The arbitrator should be capable of contracting**. This is because arbitration is a private arrangement and requires consent of all involved i.e. parties and arbitrators. All requirements of a contract as noted in the Indian Contract Act 1872 required to be fulfilled.

✓ **Lack of Bias** - arbitral tribunal **should not be biased** instead should remain at all times remain independent and impartial.

✓ **Independence and Impartiality**
Grounds of Challenge of Award

When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances

✓ such as existence either direct or indirect of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

✓ which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Duties of Arbitrator

Impartiality

Impartiality maintains the sanctity and integrity of the process and the outcome. A biased outcome is no outcome, and would not be acceptable under law.

Timely Disposal of Proceedings

It is necessary that the arbitrator conducts the proceeding as expeditiously as possible. This does not mean that arbitrator should conduct the proceedings arbitrarily just to finish faster. He has to ensure that all legal requirements are met, and unnecessary delay is avoided.

Confidentiality

Confidentiality allows the parties to fully explore all aspects of the dispute so as to arrive at a more acceptable solution. This requirement of confidentiality extends to all including the arbitral tribunal, who is under a duty to not divulge any information that comes to their knowledge.

Deliberation

Arbitral tribunal should properly discuss all issues before issuing a decision or award.

Avoid Unilateral Communication with One Party

This is necessary to ensure that no allegation of bias can be made against the arbitrator.

Compliances

✓ Ensure that the award and all other decisions comply with legal requirements
✓ Ensure all documents and communication received from one party is communicated to the other party

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Ensure that he/she himself at all times comply with legal requirements associated with arbitrator
He should not disregard principles of natural justice.

Termination, Removal and Substitution of Arbitral Tribunal

Arbitrator Leaves Voluntarily

An arbitrator may withdraw from his office. It is possible that the arbitrator for reasons which he may or may not disclose to the parties, decides to no longer act as the arbitrator. He can’t be forced to disclose reason or continue as arbitrator against his will.

Mutual Consent of Parties

At times all the parties involved may decide to no longer continue with a particular arbitrator. This could be for many reasons including that the parties realise that the arbitrator does not have the particular expertise they had desired.

Operation of Law

- In situations when arbitration falls ill and is unable to conduct proceedings or lost interest in matter or law no longer permits etc., the law steps in and automatically terminates the arbitrators. If confusion remains as to whether arbitrator has indeed been terminated, then any party could proceed to the court which finally decides on the question of termination.
- The mandate of the arbitrator ends when the arbitration process ends. The process can end in multiple ways, for instance when final award has been made (Section 32), failure to make the award within 12 months (Section 29A) or when the parties decide to no longer continue with arbitration (Section 25).

Removal by Court

- There may be a possibility, where none of the above is present for example the arbitrator is working without delay, parties are satisfied with their performance, etc., but still a party feels that the arbitrator should not continue, then it could, for reasons of bias approach the court to remove the arbitrator challenge must be raised before the arbitral tribunal itself. Only after that could the challenge be raised in front of the District Court (for domestic arbitration) and High Court (for international commercial arbitration).

- A party who intends to challenge arbitrator shall within 15 days after becoming aware of any circumstances in section 12 send a written statement for reasons to challenge to Arbitral Tribunal.
The appointment of the arbitrator whose appointment is challenged shall be terminated if he withdraws from his office or the other party agrees to the challenge.

If the arbitrator whose appointment is challenged does not withdraw from his office and the other party does not agree to the challenge, the challenge is unsuccessful and so the arbitral Tribunal shall continue the arbitral proceedings and make an arbitral award. However, party who has challenged appointment shall have right to make an application to the court for setting aside arbitral award in accordance with section 34.

Time Limit for Arbitral Award

The award shall be made within a period of 12 months from the date the arbitrator or all arbitrators received written notice of their appointment.

Parties may by mutual consent extend the time period of 12 months by a further period not exceeding 6 months.

Arbitral Award

An arbitral award is given by the arbitral tribunal as a decision on various issues in a matter which the parties had placed before the arbitral tribunal.

Types of Arbitral Award

Final Award [Section 31]

An award that is made in accordance with the requirements of the law (including signature, reason and delivery), and finally adjudicates on the issues submitted to arbitration, would be a final award.

Interim Award [Section 31]

If an award made by the arbitral Tribunal resolves one or more, but not all issues submitted to arbitration and as a result certain rights and obligations of the parties remain unsettled then the award is termed as interim award.

Settlement Award [Section 30]

During the arbitration process, the parties may choose to settle the matter instead of having it adjudicated by the arbitrator. In such a situation the arbitrator could assist the parties in arriving at the settlement. If a settlement is arrived at, and the arbitrator has no objection with it, then terms of the settlement could be made part of an award. This is referred to as a settlement award.
Additional Award [Section 33]

When a final award has been rendered, but it is later found out that certain claims that had been submitted to the arbitral tribunal were not resolved/adjudicated, the parties can request the arbitral tribunal to make an additional award covering the issues that had been left out. Such a request must be made within 30 days from the date of receipt of the final award.

Correction of Award [Section 33]

After award has been made, it Arbitrator satisfied that there is any computation error, any clerical or typographical error, it is empowered to correct the same

Requirements of an Arbitral Award

✓ **A decision by the majority** – all decisions, including an award, must be made through majority. An award must also be complete concerning all issues that are submitted to the arbitral tribunal for adjudication.

✓ **In writing, signed and dated** - an award has to be in writing and having the signature of majority of the members of the arbitral tribunal. It is not an award unless these two conditions are fulfilled. It is quite possible that a particular arbitrator may not agree with the contents of the award. Therefore the law only requires majority of the arbitrators to sign.

✓ **Must be reasoned**- Presence of reason would show that the arbitrator had applied their minds to the matter, taken into consideration all materials put before them and only then arrived at a decision. In other words, the decision would not be an arbitrary decision. The only exception is when the parties have agreed that no reasons need be given for the award.

✓ **Must not be vague**- arbitral award should be both certain and clearly note which party has to do what. In other words it must be clear about decision on each issue, what liabilities each party has and finally what relief has been awarded to parties. it should not seem like a recommendation

✓ **Should be capable of being performed**- the award should be capable of being performed. The award must be realistic in what it suggests, and should not ask parties to do something that is not possible or illegal. An unenforceable award would be set aside

✓ **Must not be illegal**- Public policy represents some of the most cherished and important principles and policies of the State. An award would be in violation of public policy if it is contrary to substantive provisions of law.
Delivery - an award is ready to be delivered as soon as it is signed. An award that is signed should be delivered to the parties.

Application for Setting Aside Award

- Application can be made by any Party within 3 months from the date such party received arbitral Award.
- If court finds that applicant was prevented by sufficient cause from making application within said period of 3 months, it may entertain application within a further period of 30 days.
- Application will be made after issuing prior notice to other party.

Grounds of Challenge

Section 13: The parties can challenge an arbitral tribunal on the ground that the arbitral tribunal is favouring or is biased in favour of one of the parties. Such a challenge should be first raised before the arbitral tribunal under Section 13. If the challenge is not accepted by the arbitral tribunal then the award rendered by that arbitral tribunal can be challenged.

Section 16: If during the arbitral tribunal one of the parties challenges the arbitral tribunal stating that the arbitral tribunal does not jurisdiction. The arbitral tribunal will decide on this challenge. If however the arbitral tribunal does not agree with the parties, the arbitral tribunal will render the award. That award can later be challenged by the parties for review.

Section 34: Specific Grounds

The first set of grounds includes:
- Party is under some incapacity which can be both contractual and personal incapacity, example that one of the party was a minor.
- If the arbitration agreement is invalid then there can be no arbitration. This is because arbitration agreement forms the basis for any arbitration as it contain the consent of the parties that in the event there is dispute between them, the parties would not go to the court instead would submit it to arbitration.
- Party is not given proper notice about appointment of arbitrator or arbitral proceedings- notice is crucial because it informs the parties as to the nature of the proceedings, and what is expected of each party.
- The award deals with disputes not submitted to arbitration – it is possible that the parties do not submit all questions that is in dispute between them to arbitration. The arbitral tribunal derives its authority from the agreement between the parties. So if the parties have not agreed, an arbitral tribunal does not have any authority to adjudicate a particular dispute between the parties.
Arbitral tribunal or procedure was not in accordance with necessary requirements under the law – the law prescribes certain basic minimum requirements that all dispute resolution procedures must adhere to.

Second set of grounds which the court can look at its own motion, includes:
- the subject matter of the dispute is not capable of settlement by arbitration.
- the award is in contravention of the public policy of India.

Consequence of Challenge
- Set aside – the court reviewing the award could set aside an award on grounds noted above. Once an award has been set aside that award has no legal consequence. It is no longer an award and has no legal sanctity. It is nothing more than a document and has no legal value.
- Confirm – the reviewing court also confirm the complete award. Confirming an award means that the court is of the opinion that there is nothing legally wrong with the award i.e. it fulfils all the requirements noted in law.
- Modify – the court the power to modify the award so that it may not be set aside.
- Remit back to the arbitral tribunal - the court may instead of setting aside the award, send the matter back to the arbitral tribunal to rectify some defect, which if not corrected would lead to setting aside of the award.

Enforcement
Where the time for making an application to set aside an award has expired, or when such application was made but it was rejected then the award can be enforced. Enforcement of an arbitral award shall happen under the Code of Civil Procedure 1908 in the same manner as if it were a decree of the court.

Conciliation

Conciliation in India
In India conciliation is governed by the Arbitration and Conciliation Act, 1996 and by Section 89 of the Code of Civil Procedure 1908. Any dispute arising out of a legal relationship, whether contractual or not, can be conciliated. Thus only those disputes which are not prohibited by law from being conciliated can be submitted to conciliation. The law provides for number of conciliators, and provides for a process using which conciliation would be conducted.

Features of Conciliation
- Voluntary – the process of conciliation is voluntary which implies that all parties have to agree to have their disputes conciliated. If a party is forced, then the outcome of such conciliation would not be binding on that party. Thus party autonomy and consent are an important aspect of conciliation.
✓ Non Adversarial – unlike arbitration or court based adjudication the parties don’t compete against each other to prove themselves as correct and others as wrong. Parties don’t behave as adversaries, who can only win by defeating the other party.

✓ Assisted procedure – the conciliation proceedings can be crafted in a manner which most suits the parties’ convenience. At all times to assist the parties in arriving at a solution the conciliator(s) are present. They, along with the parties, craft a procedure for sharing of information among the parties so as to reach an amicable settlement.

✓ Finality of settlement – the outcome i.e. settlement as an end result of the conciliation process is final and binding between the parties.

✓ Confidentiality – all aspects of the conciliation process are confidential. It prevents leak of information. However within the process information received by the conciliator from one party must be disclosed to the other party, unless the party giving the information has specifically requested that it be kept confidential.

**Difference between Mediation and Conciliation**

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<thead>
<tr>
<th>Mediation</th>
<th>Conciliation</th>
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<tr>
<td>The outcome is a binding contract between the parties. The agreement reached by the parties is a contract enforceable by law.</td>
<td>The outcome is a settlement agreement between parties. It is executable as a decree of the civil court.</td>
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<td>If the agreement is breached, the parties would have to proceed in the usual process adopted for breach of contract.</td>
<td>The settlement agreement is enforced as an arbitral award. Breach of the settlement agreement, would be the same as breach of an arbitral award.</td>
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<tr>
<td>Mediator plays a facilitative role</td>
<td>Conciliator plays a more proactive role</td>
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**Number of Conciliator [Section 63]**

The number of conciliators depends upon the parties, but with a maximum of three conciliators. In other words, number of conciliators can range from one to three.

**Appointment of Conciliators [Section 64]**

Conciliator appointments are subject to party consent, in other words, the conciliators are appointed by the parties. The law also permits parties to request an institution or some other person to recommend a conciliator. This allows parties to approach institutions that provide professional conciliation services, such as the ICADR. While appointment it must be ensured that independent and impartial conciliators are selected.

**Procedure [Section 65]**
Once the conciliators have been appointed both parties are required to submit their statements in writing, supply documents and other evidence to the conciliator. The conciliator then provides a copy of the statements, documents and other evidence of one party to the other party. The conciliator is then required to encourage and assist parties to engage in discussions based on the information to arrive at a settlement.

Bar on Judicial or Arbitral Proceedings [Section 77]

When the conciliation proceedings are ongoing parties cannot start arbitration proceedings or approach a court regarding the same dispute which is part of conciliation proceedings. The exception to this rule is that when it concerns preserving its right, the party can approach a court or initiate arbitration.

Settlement Agreement

- Initial steps - attempt of conciliation is to resolve the dispute and arrive at a settlement. This settlement could be based on suggestions made by the Conciliator or the parties. When it appears to the conciliator that a settlement is possible, he should identify possible terms of settlement and submit them to the parties for their observations and suggestions. The parties may also make suggestions as to contents of the agreement.

- Agreement – if the parties reach a settlement, then it has to be written down as an agreement. This agreement is known as settlement agreement (at times it is also referred to as Memorandum of Conciliation). It can be made by the parties or by the Conciliator on behalf of the parties. However the conciliator is required to authenticate the agreement without which the agreement would have no legal sanctity.

- Enforcement - the settlement agreement has the same status as that of an arbitral award. An arbitral award is final and binding on the parties and persons claiming under them. The award can be challenged before a court, and once the time for challenge has lapsed, or if the challenge had been made but was unsuccessful, then it could be enforced under the Code of Civil Procedure 1908.

Role of Conciliator [Section 67]

- It shall assist parties in independent and impartial manner.
- It shall be guided by principles of objectivity, fairness and justice
- It may conduct proceedings in manner as he considers appropriate.
- It may make proposals for settlement
Multiple Choice Questions

1. What is defined as a voluntary, confidential and flexible process by which the parties to a dispute seek to mutually settle their dispute with the assistance of a neutral third party.
   a. Arbitration  
   b. Conciliation  
   c. Litigation  
   d. None of these

2. The provisions relating to mediation are contained in --------.
   a. The Code of Civil Procedure, 1908  
   b. The Arbitration and Conciliation Act, 1996  
   c. Combination of Both  
   d. None of these

3. Where the parties enter into a written agreement which contains a clause that any dispute that may arise between the parties in future, shall be submitted to arbitration, it is termed as --------.
   a. Submission agreement  
   b. Arbitration clause  
   c. Conciliation  
   d. Mediation

4. An agreement by the parties to submit the dispute to arbitration shall be valid and enforceable only if it is --------.
   a. In writing  
   b. It is registered  
   c. In writing as well as registered  
   d. In writing, stamped and registered

5. Just like a Court delivers a decree or an order, the arbitral tribunal delivers --------.
   a. Arbitral proceedings  
   b. An arbitral award  
   c. Arbitral procedure  
   d. Arbitral process

6. An award given by the arbitral tribunal which disposes of all the issues submitted to arbitration is termed as --------.
   a. Settlement award  
   b. Correction award  
   c. Additional award  
   d. Final award

7. The Arbitration and Conciliation Act, 1996 came into force with effect from --------.
   a. 16th August, 1996  
   b. 22nd August, 1996  
   c. 15th August, 1996  
   d. 1st April, 1996

8. If an award made by the arbitral tribunal resolves one or more, but not all the issues submitted to arbitration, then the award is termed as --------.
   a. Final award  
   b. Interim award  
   c. Settlement award  
   d. Additional award
9. According to Sec. 10, how many arbitrators can be appointed?

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<td>Odd</td>
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<td>c.</td>
<td>Any Number</td>
<td>d.</td>
<td>Atleast more than 1</td>
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10. Which of the following is not ADR?

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<td>b.</td>
<td>Conciliation</td>
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<tr>
<td>c.</td>
<td>Arbitration</td>
<td>d.</td>
<td>Litigation</td>
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### Answer to MCQs

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SECURITIES CONTRACTS (REGULATION) ACT, 1956

Basic Provisions

- The Act is read with Securities Contracts (Regulation) Rules, 1957
- It extends to the whole of India.
- The objective of the Act is to prevent undesirable transactions in securities by regulating the business of dealing therein, by providing certain other matters connected therewith.

Non Applicability of the Act

The provisions of this Act shall not apply to –

- The Government,
- the Reserve Bank of India (RBI),
- any local authority, or
- any corporation set-up by a special law or any person who has effected any transaction with or through the agency of any such authority as is referred to in this clause;
- Any convertible bond or share warrant or any option or right in relation thereto, in so far as it entitles the person in whose favour any of the former has been issued to obtain at his option from the company or other body corporate, issuing the same or from any of its shareholders’ or duly appointed agents, shares of the company or other body corporate, whether by conversion of the bond or warrant or otherwise on the basis of the price agreed upon when the same was issued.
- Any class of contracts in respect of which an exemption notification has been issued by the Central Government.

Definitions

Contract [Section 2(a)]

“Means a contract for or relating to the purchase or sale of securities.”

Derivative [Section 2(ac)]

“Includes –

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<table>
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<th>Government Security [Section 2(b)]</th>
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<tr>
<td>&quot;Means a security created and issued, whether before or after the commencement of this Act, by the Central Government or a State Government for the purpose of raising a public loan and having one of the forms specified in Section 2(2) of the Public Debt Act, 1944.&quot;</td>
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<thead>
<tr>
<th>Member [Section 2(c)]</th>
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<tbody>
<tr>
<td>&quot;Means a member of a recognised stock exchange.&quot;</td>
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<tr>
<th>Option in Securities [Section 2(d)]</th>
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<tbody>
<tr>
<td>&quot;Means a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell, securities in future, and includes a teji, a mandi, a teji mandi, a galli, a put, a call or a put and a call in securities.&quot;</td>
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<tr>
<th>Recognised Stock Exchange [Section 2(f)]</th>
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<tbody>
<tr>
<td>&quot;Means a stock exchange which is for the time being recognised by the Central Government under section 4.&quot;</td>
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<tr>
<th>Securities Appellate Tribunal [Section 2(gb)]</th>
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<tbody>
<tr>
<td>&quot;Means a Securities Appellate Tribunal established under sub-section (1) of section 15K of the Securities and Exchange Board of India Act, 1992.&quot;</td>
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<tr>
<th>Securities [Section 2(h)]</th>
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| "Include –  
i. Shares, scrips, stocks, bonds, debenture, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate; 
ii. Derivative 
iii. Units or any other instrument issued by any collective investment scheme to the investors in such schemes; 
iv. Security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; 
v. Units or any other such instrument issued to the investor under any mutual fund scheme; 
Explanation – for the removal of doubts, it is hereby declared that "securities" shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a combined benefit risk on the life of the persons and investment by such persons and issued by an insurer referred to in clause (9) of section 2 of the Insurance Act, 1938; 
vi. Any certificate or instrument (by whatever name called), issued to an investor by any issuer |

CA. SHIVANGI AGRAWAL
being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debtor receivable, including mortgage debt, as the case may be; vii. Government securities; viii. Such other instruments as may be declared by the Central Government to be securities; and ix. Rights or interest in securities.

**Spot Delivery Contract [Section 2(i)]**

"Means a contract which provides for –
(a) Actual delivery of securities and the payment of a price therefor either on the same day as the date of the contract or on the next day, the actual period taken for the despatch of the securities or the remittance of money therefor through the post being excluded from the computation of the period aforesaid if the parties to the contract do not reside in the same town or locality;
(b) Transfer of securities by the depository from the account of a beneficial owner to the account of another beneficial owner when such securities are dealt with by a depository."

**Stock Exchange [Section 2(j)]**

"Means –
(a) Any body of individuals, whether incorporated or not, constituted before corporatization and demutualisation under section 4A and 4B, or
(b) A body corporate incorporated under the Companies Act, 1956 whether under a scheme of corporatisation and demutualisation or otherwise, for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities.

**Stock Exchanges Prohibited**

**Formation of stock exchange is prohibited unless it is recognized by Central Government.** Following activities are prohibited unless permission of Central Government is obtained:

- Organising or assisting in organizing stock exchange
- Becoming member of stock exchange

**Scheme [Section 2(ga)]**

"Means a scheme for corporatisation or demutualisation of recognised stock exchange which may provide for –
- The issue of shares for a lawful consideration and provision of trading rights in lieu of membership cards of members of a recognised stock exchange;
- The restrictions on voting rights;
- The transfer of property, business, assets, rights, liabilities, recognitions, contracts of the recognised stock exchange, whether in the name of the recognised stock exchange or any trustee or otherwise and any permission given to, or by, the recognised stock exchange.
- the transfer of employees of a recognised stock exchange to another recognised stock exchange;"
Concept of Corporatisation and Demutualisation

**Definition of Corporatisation [Section 2(aa)]**

"Means the succession of a recognised stock exchange, being a body of individuals, or a society registered under the Societies Registration Act, 1860, by another stock exchange, being a company incorporated for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities carried on by such individuals or society."

**Definition of Demutualisation [Section 2(ab)]**

"Means the segregation of ownership and management from the trading rights of the members of a recognised stock exchange in accordance with a scheme approved by the Securities and Exchange Board of India."

Compulsory Corporatisation and Demutualisation

✓ On and from the appointed date, all recognised stock exchanges (if not corporatised and demutualised before the appointed date) shall be corporatised and demutualised in accordance with the provisions contained in section 4B

✓ Provided that the Securities and Exchange Board of India may, if it is satisfied that any recognised stock exchange was prevented by sufficient cause from being corporatised and demutualised on or after the appointed date, specify another appointed date in respect of that recognised stock exchange and such recognised stock exchange may continue as such before such appointed date.

✓ Explanation.— For the purposes of this section, “appointed date” means the date which the Securities and Exchange Board of India may, by notification in the Official Gazette, appoint and different appointed dates may be appointed for different recognised stock exchanges.

Procedure for Corporatisation and Demutualization

**Submission of Scheme**

✓ All recognised stock exchanges referred to in section 4A shall, within such time as may be specified by the Securities and Exchange Board of India, submit a scheme for corporatisation and demutualisation for its approval

✓ The Securities and Exchange Board of India, may, by notification in the Official Gazette, specify name of the recognised stock exchange, which had already been corporatised and demutualised, and such stock exchange shall not be required to submit the scheme under this section.
Approval of Scheme

On receipt of the scheme, the Securities and Exchange Board of India may,

- after making such enquiry as may be necessary in this behalf and
- obtaining such further information, if any, as it may require and
- if it is satisfied that it would be in the interest of the trade and also in the public interest,
- approve the scheme with or without modification.

Publishing of Scheme

Where the scheme is approved, the scheme so approved shall be published immediately by—

- the Securities and Exchange Board of India in the Official Gazette
- the recognised stock exchange in such two daily newspapers circulating in India, as may be specified by the Securities and Exchange Board of India, and upon such publication, the scheme shall have effect and be binding on all persons and authorities including all members, creditors, depositors and employees of the recognised stock exchange and on all persons having any contract, right, power, obligation or liability with, against, over, to, or in connection with, the recognised stock exchange or its members.

Rejection of Scheme

Where the Securities and Exchange Board of India is satisfied that it would not be in the interest of the trade and also in the public interest to approve the scheme it may, by an order, reject the scheme and such order of rejection shall be published by it in the Official Gazette

Provided that the Securities and Exchange Board of India shall give a reasonable opportunity of being heard to all the persons concerned

Imposition of Restrictions

The Securities and Exchange Board of India may, while approving the scheme by an order in writing, restrict—

- the voting rights of the shareholders who are also stock brokers of the recognised stock exchange;
- the right of shareholders or a stock broker of the recognised stock exchange to appoint the representatives on the governing board of the stock exchange;
- the maximum number of representatives of the stock brokers of the recognised stock exchange to be appointed on the governing board of the recognised stock exchange, which shall not exceed one-fourth of the total strength of the governing board.

Post Approval Condition

Every recognised stock exchange, in respect of which the scheme for corporatisation or demutualisation has been approved under sub-section (2), shall, either by fresh
issue of equity shares to the public or in any other manner as may be specified, ensure that at least fifty-one per cent of its equity share capital is held, within twelve months from the date of publication of the order under sub-section (7), by the public other than shareholders having trading rights.

✓ Provided that the Securities and Exchange Board of India may, on sufficient cause being shown to it and in the public interest, extend the said period by another twelve months.

Consequences of Failure to Corporate or Demutualise

✓ Where the recognised stock exchange has not been corporatised or demutualised within the specified time
✓ it fails to submit the scheme referred to in sub-section (1) of section 4B
✓ the scheme has been rejected by the Securities and Exchange Board of India

the recognition granted to such stock exchange under section 4, shall notwithstanding anything to the contrary contained in this Act, stand withdrawn and the Central Government shall publish, by notification in the Official Gazette, such withdrawal of recognition no such withdrawal shall affect the validity of any contract entered into or made before the date of the notification

Recognition of Stock Exchange

Application to Central Government

Any stock exchange, which is desirous of being recognised for the purposes of this Act, may make an application in the prescribed manner to the Central Government.

Rule 3: Application will be made in Form A
Rule 4: Fees shall be Rs. 500 deposited in nearest branch of SBI

Enclosures to Application

✓ Receipt of fees paid
✓ Bye Laws containing matters relating to regulation and control of contracts
✓ Rules- 4 copies including memorandum and articles of association where applicant stock exchange is an incorporated body

Matters to be Stated in Relation to Rules

A copy of the rules relating in general to the constitution of the stock exchange and in particular, to—

a) the governing body of such stock exchange, its constitution and powers of management and the manner in which its business is to be transacted
b) the powers and duties of the office bearers of the stock exchange
c) the admission into the stock exchange of various classes of members, the qualifications for membership, and the exclusion, suspension, expulsion and readmission of members therefrom or there into

d) the procedure for the registration of partnerships as members of the stock exchange in cases where the rules provide for such membership and the nomination and appointment of authorised representatives and clerks.

Grant of Recognition to Stock Exchange

Section 4

if the Central Government (or SEBI) is satisfied, after making such inquiry as may be necessary in this behalf and after obtaining such further information, if any, as it may require. It may grant recognition.

Rule 6:
Recognition granted to a stock exchange shall be in Form B and be subject to the following conditions, namely –

(a) That the recognition, unless granted on a permanent basis, shall be for such period not less than one year as may be specified in the recognition;

(b) That the stock exchange shall comply with such conditions as are or may be prescribed or imposed under the provisions of the Act and these rules from time-to-time.

Satisfaction of Conditions for grant of recognition

a) that the rules and bye-laws of a stock exchange applying for registration are in conformity with such conditions as may be prescribed with a view to ensure fair dealing and to protect investors

b) that the stock exchange is willing to comply with any other conditions (including conditions as to the number of members) which the Central Government, after consultation with the governing body of the stock exchange and having regard to the area served by the stock exchange and its standing and the nature of the securities dealt with by it, may impose for the purpose of carrying out the objects of this Act; and

c) that it would be in the interest of the trade and also in the public interest to grant recognition to the stock exchange

Imposition of Conditions in Respect of Certain Matters

The conditions which the Central Government may prescribe under clause (a) of subsection (1) for the grant of recognition to the stock exchanges may include, among other matters, conditions relating to-

(i) the qualifications for membership of stock exchanges

(ii) the manner in which contracts shall be entered into and enforced as between members

(iii) the representation of the Central Government on each of the stock exchange by such number of persons not exceeding three as the Central Government may nominate in this behalf

(iv) the maintenance of accounts of members and their audit by chartered accountants whenever such audit is required.
Publication in Official Gazette

Every grant of recognition to a stock exchange under this section shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office as of the stock exchange is situate, and such recognition shall have effect as from the date of its publication in the Gazette of India.

Rejection of Application

No application for the grant of recognition shall be refused except after giving an opportunity to the stock exchange concerned to be heard in the matter and the reasons for such refusal shall be communicated to the stock exchange in writing.

Amendment with Approval of Central Government

No rules of a recognised stock exchange relating to any of the matters specified shall be amended except with the approval of the Central Government.

Renewal of Recognition

Three months before the expiry of the period of recognition, a recognised stock exchange desirous of renewal of such recognition may make an application to the Securities and Exchange Board of India in Form A.

The fee payable upon the application of renewal of recognition of stock exchange shall be two hundred rupees.

Eligibility of Membership of a Recognised Stock Exchange

No person shall be eligible to be elected as a member if –

- he is less than 21 years of age
- he is not a citizen of India; (provided that the governing body may in suitable cases relax this condition upon prior approval of SEBI)
- he has been adjudged bankrupt or receiving order in bankruptcy has been made against him or he has proved to be insolvent even though he has obtained his final discharge;
- he has been compounded with his creditors unless he has paid sixteen annas in the rupee;
- he has been convicted of an offence involving fraud and dishonesty;
- he is engaged as principal or employee in any business other than that of securities or commodity derivatives except as a broker or agent not involving any personal financial liability unless he undertakes on admission to sever his connection with such business
- he has been at anytime expelled or declared a defaulter by any other stock exchange;
- he has been previously refused admission to membership unless a period of one year has elapsed since the date of such rejection.
No person eligible for admission as a member shall be admitted as a member unless-

✓ he has worked for not less than two years as a partner with, or an authorised assistant or authorised clerk or remisier or apprentice to, a member; or
✓ he agrees to work for a minimum period of two years as a partner or representative member with another member and to enter into bargains on the floor of the stock exchange and not in his own name but in the name of such other member; or
✓ he succeeds to the established business of a deceased or retiring member who is his father, uncle, brother or any other person who is, in the opinion of the governing body, a close relative

Provided that the rules of the stock exchange may authorise the governing body to waive compliance with any of the foregoing conditions if the person seeking admission is in respect of means, position, integrity, knowledge and experience of business in securities, considered by the governing body to be otherwise qualified for membership.

Grounds for Vacation

No person who is a member at the time of application for recognition or subsequently admitted as a member shall continue as such if-

a) he ceases to be a citizen of India—Provided that nothing herein shall affect those, who are not citizens of India but who were members at the time of such application or were admitted subsequently under the provisions of Rule 8(1)(b), subject to their complying with all other requirements of this rule
b) he is adjudged bankrupt or a receiving order in bankruptcy is made against him or he is proved to be insolvent

No person who is a member at the time of application for recognition or subsequently admitted as a member shall continue as such if—

a) he ceases to be a citizen of India—Provided that nothing herein shall affect those, who are not citizens of India but who were members at the time of such application or were admitted subsequently under the provisions of Rule 8(1)(b), subject to their complying with all other requirements of this rule
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b) he is adjudged bankrupt or a receiving order in bankruptcy is made against him or he is proved to be insolvent

Eligibility for Companies to be Elected as Members

A company defined in Companies Act, 1956 shall be eligible to be elected as member of a stock exchange if

(i) such company is formed in compliance with the provisions of section 322 of the said Act

(ii) a majority of the directors of such company are shareholders of such company and also members of that stock exchange and

CA. SHIVANGI AGRAWAL
(iii) the directors of such company, who are members of that stock exchange, have ultimate liability in such company.

(iv) According to proviso to sub-rule (4), where SEBI makes a recommendation in this regard, the governing body of a stock exchange shall, in relaxation of the requirements of this clause, admit as member the following corporations, bodies corporate, companies or institutions namely –

(a) the **Industrial Finance Corporation**, established under the Industrial Finance Corporation Act, 1948

(b) the **Industrial Development Bank of India**, established under the Industrial Development Bank Act, 1964

(c) any insurance company registered by the Insurance Regulatory Development Authority under the Insurance Act, 1938

(e) the **Unit Trust of India**

(f) the **Industrial Credit and Investment Corporation of India**, a company registered under the Companies Act, 1956

(g) the subsidiaries of any of the corporations or companies specified in above and any subsidiary of the **State Bank** or any nationalised bank set up for providing merchant banking services, buying and selling securities and other similar activities

(h) any bank included in the Second Schedule to the Reserve Bank of India Act, 1934

(i) the **Export Import Bank of India**

(j) the **National Bank for Agriculture and Rural Development**

(k) the **National Housing Bank**

(l) Central Board of Trustees, Employees’ Provident Fund

(m) any pension fund registered or appointed or regulated by the Pension Fund Regulatory and Development Authority

(n) any Standalone Primary Dealers authorised by the Reserve Bank of India.

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**Eligibility of Company as a Member**

A company defined in the Companies Act, 1956 shall also be eligible to be elected as a member of a stock exchange, if –

- such company is formed in compliance with the provisions of section 12 of the said Act

- such company undertakes to comply with such financial requirements and norms as may be specified by SEBI for registration of such company under sub-section (1) of section 12 of SEBI Act, 1992

- the directors of the Company are not disqualified from being members of a stock exchange under clause and the Directors in any Company which had been a member of the stock exchange and had been declared defaulter or expelled by the stock exchange; and

- not less than two directors of the company are persons who possess a minimum two years’ experience:
  - dealing in securities; or
  - as portfolio managers; or
  - as investment consultants.

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**Withdrawal of Recognition**

Section 5
If the Central Government/SEBI is of the opinion that the recognition granted to a stock exchange under the provisions of this Act, should, in the interest of the trade or in the public interest, be withdrawn, the Central Government or SEBI may serve on the governing body of the stock exchange, a written notice that the Central Government is considering the withdrawal of the recognition for the reasons stated in the notice and after giving an opportunity to the governing body to be heard in the matter, the Central Government may withdraw by notification in the Official Gazette, the recognition granted to the stock exchange.

Provided that no such withdrawal shall affect the validity of any contract entered into or made before the date of the notification, and the Central Government may, after consultation with the stock exchange, make such provision as it deems fit in the notification of withdrawal or in any subsequent notification similarly published for the due performance of any contracts outstanding on that date.

Rule 13: The written notice for the withdrawal of recognition shall be in Form C.

Periodical Returns and Inquiries

Section 6 (1) read with Rule 17A states that it is the responsibility of every recognised stock exchange to furnish periodical return to Central Government or SEBI relating to –

- The official rates for the securities enlisted thereon;
- The number of shares delivered through the clearing house;
- The making-up prices;
- The clearing house programmes;
- The number of securities listed and de-listed during the previous 3 months;
- The number of securities brought on or removed from the forward list during the previous 3 months; and
- Any other matter as may be specified by the Securities and Exchange Board of India.

Furnishing of Annual Reports

Every recognised stock exchange shall before the 31st day of January in each year or within such extended time as the SEBI may from time-to-time allow, furnish an annual report to SEBI about its activities during the preceding calendar year, which shall inter alia contain detailed information about the following matters –

- Changes in the rules and bye-laws, if any;
- Changes in the composition of the governing body;
- Any new sub-committees set up and changes in the composition of existing ones;
- Admissions, re-admissions, deaths or resignations of members;
Disciplinary action against members;
Arbitration of disputes (nature and number) between members and non-members
Defaults
Action taken to combat any emergency in trade;
Securities listed and de-listed; and
Securities brought on or removed from the forward list.

Further, every recognised stock exchange shall within 1 month of the date of the holding of its annual general meeting, furnish the SEBI with a copy of its audited balance-sheet and profit and loss account for its preceding financial year.

### Maintenance of Books of Accounts

**Section 6 read with Rule 14**

**Books of Account and other documents to be maintained** and preserved by every stock exchange –

The above mentioned rule states that every recognised stock exchange shall maintain and preserve the following books of account and documents for a period of 5 years –

- Minute books of the meetings of –
- Members
- Governing body
- Any standing committee or committees of the governing body or of the general body of members.
- Register of members showing their full names and addresses. Where any member of the stock exchange is a firm, full names and addresses of all partners shall be shown.
- Register of authorised clerks
- Register of remisiers of authorised assistants
- Record of security deposits
- Margin deposits book
- Ledgers
- Journals
- Cash book
- Bank pass-book.

**Rule 15 – Books of Account and other documents to be maintained and preserved by every member of the recognised stock exchange** – Books of account to be maintained and preserved by the members for 5 years –

- Register of transactions (Sauda Book)
- Clients' ledger
- General ledger
- Journals
- Cash Book
- Bank pass-book
- Documents register showing full particulars of shares and securities received and delivered.

Books of account to be maintained and preserved for a period of two years –

- Members’ contract books showing details of all contracts entered into by him with other members of the same exchange or counterfoils or duplicates of memos of confirmation issued to such other members.
Counterfoils or duplicates of contract notes issued to clients.

Written consent of clients in respect of contracts entered into as principals.

**Inquiry into Affairs of Stock Exchange**

SEBI may, in the interest of trade or public interest, issue an order to –

- Call upon a recognised stock exchange or any member thereof to furnish in writing such information or explanation relating to the affairs of the stock exchange or of the members in relation to the stock exchanges as SEBI may require; or

- Appoint one or more persons to make an inquiry in the prescribed manner in Rule 16, in relation to the affair of the governing body of a stock exchange or the affairs of any of the members of the stock exchange in relation to the stock exchange and submit a report of the result of such inquiry to SEBI within such time as prescribed in Rule 16 or, in the case of an inquiry in relation to the affairs of any of the members of a stock exchange, direct the governing body to make the inquiry and submit its report to SEBI.

SEBI is empowered to take appropriate action as a result of inquiry.

**Duty to Furnish Books**

Where an inquiry in relation to the affairs of the stock exchange or the affairs of any of its members in relation to the stock exchange has been undertaken -

- Every director, manager, secretary, or other officer of such stock exchange

- Every member of such stock exchange

- If the members of the stock exchange is a firm, every partner, manager, secretary or other officer of the firm and

- Every other person or body of persons who has had dealings in the course of business with any of the persons mentioned in clause (a), (b) and (c), whether directly or indirectly

Shall be bound to produce before the authority making the inquiry all such books of account, and other documents in his custody or power relating to or having a bearing on the subject-matter of such inquiry and also to furnish the authorities within such time as may be specified with any such statement or information relating thereto as may be required of him.

In public interest, HEM Stock Exchange Limited was issued an order by the Securities and Exchange Board of India to produce certain information and explanation relating to its operations in writing. The management of the stock exchange was reluctant to part with such information with SEBI and approached you to seek your advice in the following matters:

i) Duty of HEM Stock Exchange Limited to furnish periodic returns to SEBI;

ii) Power of SEBI to ask for the information asked as stated above, over and above the periodic returns;

iii) Period for which the stock exchange is required to maintain the books of accounts which may be inspected by SEBI;

iv) Duty of the stock exchange and the persons dealing with the stock exchange with regard to the information sought for by SEBI.
Power of RSE to restrict voting rights

**Recognised stock exchange has the power to make rules** or amend its rules to provide for –

- The **restriction of voting rights** to members only in respect of any matter placed before the stock exchange at any meeting
- The **regulation of voting rights** in respect of any matter placed before the stock exchange at any meeting so that each member may be entitled to have one vote only, irrespective of his share of the paid-up equity capital of the stock exchange
- The **restriction** on the right of a member to appoint another person as his proxy to attend and vote at a meeting of the stock exchange;
- Such incidental, consequential and supplementary matters as may be necessary to give effect to any of the matters specified.

Powers of SEBI to Issue Directions

If, after making or causing to be made an inquiry, SEBI is satisfied that it is necessary in the interest of the investors or orderly development of securities market or to prevent the affairs of any recognised stock exchange or clearing corporation, or such other agency or person, providing trading or clearing or settlement facility in respect of securities, being conducted in a manner detrimental to the interests of investors or securities market or to secure the proper management of any such stock exchange or clearing corporation or agency or person, it **may issue** such **directions**-

- To any stock exchange or clearing corporation or agency or persons referred to in above or
- To any company whose securities are listed or proposed to be listed in a recognised stock exchange as may be appropriate in the interests of investors in securities and the securities market.

Power to Supersede the Governing Body of a Recognised Stock Exchange

If the Central Government is of the opinion that the governing body of any recognised stock exchange should be superseded, then CG may serve a notice to the governing body of such stock exchange and may appoint any person or persons to exercise and perform all the powers and duties of the governing body, to act as the Chairman and vice-chairman thereof.

Power to Suspend Business of Recognised Stock Exchange

If the Central Government opines that an emergency has arisen and for the purpose of meeting the emergency, the Central Government considers it expedient so to do, it may, by notification in the Official Gazette **direct** a recognised stock exchange to suspend such of its business for a period not exceeding 7 days and subject to the conditions as may be specified in the notification. Central Government may also extend the period of notification, if it is so considered in the interest of trade or public interest.

SCRA, 1956 23.14

CA. SHIVANGI AGRAWAL
Power of Recognised Stock Exchange to make Bye-Laws

The bye-laws may provide for—

✓ The opening and closing of markets and the regulation of the hours of the trade

✓ A clearing house for the periodical settlement of contracts and differences thereunder, the delivery of and payment for securities, the passing on of delivery orders and the regulation and maintenance of such clearing house

✓ The submission to SEBI by the clearing house as soon as may be after each periodical settlement of all or any of the following particulars as SEBI may from time-to-time, namely—
  • The total number of each category of security carried over from one settlement period to another
  • The total number of each category of security, contracts in respect of which have been squared up during the course of each settlement period
  • The total number of each category of security actually delivered at each clearing

✓ The publication by the clearing house of all or any of the particulars submitted to SEBI under the above mentioned clause subject to the directions, if any, issued by SEBI in this behalf

✓ The regulation or prohibition of blank transfers

✓ The number and classes of contracts in respect of which settlements shall be made or differences paid through the clearing house

✓ The regulation, or prohibition of budlas or carry-over facilities

✓ The fixing, altering or postponing of days for settlements

✓ The determination and declaration of market rates, including the prescription of margin requirements, if any, and conditions relating thereto, and the forms of contracts in writing

✓ The regulation of the entering into, making, performance, rescission and termination, of contracts, including contracts between members or between a member and his constituent or between a member and a person who is not a person, and the consequences of default or insolvency on the part of a seller or buyer or intermediary, the consequences of a breach or omission by a seller or buyer, and the responsibility of members who are not parties to such contracts

✓ The regulation of taravani business including the placing of limitations thereon

✓ The listing of securities on the stock exchange, the inclusion of any security for the purpose of dealings and suspension or withdrawal of any such securities, and the suspension or prohibition of trading in any specified securities

✓ The method and procedure for the settlement of claims or disputes, including settlement by arbitration

✓ The levy and recovery of fees, fines and penalties

✓ The regulation of the course of business between parties to contracts in any capacity

✓ The fixing of scale of brokerage and other charges

✓ The making, comparing, settling and closing of bargains

✓ The emergencies in trade which may arise, whether as a result of pool or syndicated operations or cornering or otherwise, and the exercise of powers in such emergencies, including the power to fix maximum and minimum prices for securities

✓ The regulation of dealings by members for their own accounts

✓ The separation of the functions of jobbers and brokers

✓ The limitations on the volume of trade done by any individual member in exceptional circumstances
✓ The obligation of members to supply such information or explanation and to produce such documents relating to the business as the governing body may require.

Power to Make or Amend Bye-Laws of Recognised Stock Exchange

✓ The Central Government or SEBI are entrusted with the power to make or amend the bye laws of the recognised stock exchange, either on its own or on behalf of a request received by it in writing.

✓ Such an amendment in the bye-laws of the stock exchange shall be published in Official Gazette of India and Official Gazette of State in which the principal office of the recognized stock exchange is situated.

✓ In case the governing body of the stock exchange, objects to the amendment of bye-laws, directed by SEBI on its own, then it may apply to SEBI within 2 months of the publication in Gazette of India and SEBI may make a revision to such an amendment after giving an opportunity to be heard to the governing body of such stock exchange.

Power of Central Government/SEBI to Direct Rules to be made or to make Rules of the Stock Exchange

✓ The Central Government may, after consultation with the governing bodies of stock exchanges, form an opinion that it is necessary or expedient so to do, direct any recognized stock exchange by order in writing, to make or amend any rules already made in respect of all or any of the matters specified in Section 3(2) within a period of 2 months from the date of the order.

✓ If the recognised stock exchange does not comply with the order of the CG/SEBI, the latter may make the rules for, or amend the rules made by the recognised stock exchange, either in the form proposed in the order or with such modifications thereof as may be agreed to between the stock exchange and Central Government.

Clearing Corporation

Clearing corporation is an organisation associated with a stock exchange to handle the confirmation, settlement and delivery of transactions, fulfilling the main obligation of ensuring transactions are made in a prompt and efficient manner.

Section 8A of the Act states that a recognised stock exchange may, with the prior approval of SEBI, transfer the duties and functions of a clearing house to a clearing corporation, being a company incorporated under the Companies Act for the purpose of –

✓ The periodical settlement of contracts and differences thereunder;
✓ The delivery of, and payment for, securities;
✓ Any other matter incidental to, or connected with, such transfer.
Also, the clearing corporation shall transfer the duties of the clearing house to a clearing corporation, make bye-laws and submit the same to SEBI for its approval. SEBI may grant the approval to the bye-laws submitted to it, upon being satisfied that the same is in public interest.

Additional Trading Floor

✓ A trading floor is an area on exchange where trading occurs. Trading floors can be found in the various buildings of Bombay Stock Exchange, National Stock Exchange, etc. However with the advent of electronic trading platforms, many of the trading floors that once dominated the market exchanges, have started to disappear since trading has become more electronically based.

✓ Additional trading floor means a trading ring or a trading facility offered by a recognised stock exchange outside its area of operating to enable the investors to buy and sell securities through such trading floor under the regulatory framework of that stock exchange.

Members may not act as Principals in Certain Circumstances

✓ No member of a recognised stock exchange shall enter into any contract as a principal with any person, other than a member of a recognised stock exchange, unless he has secured the consent or authority of such person and discloses the same in the note, memorandum or agreement of sale or purchase that he is acting as a principal.

✓ However, where the member has secured the consent or authority of such person, otherwise than in writing, he shall secure written confirmation by such person or such consent or authority within 3 days from the date of contract.

✓ Also, no such written consent or authority of such person shall be necessary for closing out any outstanding contract entered into by such persons in accordance with the bye-laws, if the member discloses in the note, memorandum or agreement of sale or purchase in respect of such closing out that he is acting as a principal.

Contracts in Derivatives

The provisions of the Act state that contracts in derivative shall be legal and valid if such contracts are:

✓ Traded on a recognised stock exchange

✓ Settled on the clearing house of the recognised stock exchange in accordance with the rules and bye-laws of such stock exchange

✓ Between such parties and on such terms as the CG may specify.

Power to Prohibit Contracts in Certain Cases

In case the Central Government or SEBI opines that

✓ it is necessary to prevent undesirable speculation in specified securities in any State or area,
it may, by notification in the Official Gazette, declare that

no person in the State or area, may enter into a contract for the sale or purchase of any security specified in the notification, except with the permission of Central Government or SEBI.

All the contracts entered into, in contravention of the provisions of this section shall be illegal after the date of notification.

Licensing of Dealers in Securities in Certain Areas

The provisions of this section state that no person shall carry on or purport to carry on, whether on his own or on behalf of any other person, the business of dealing in securities, except under the authority of a licence granted by SEBI.

Listing of Securities

Listing of securities with stock exchange is a matter of great importance for companies and investors, because this provides the liquidity to the securities in the market.

The prices at which the securities are traded in the stock exchange are published in the News papers. Investors are able to know these price trends from such publications. Compared to listed securities the trading of unlisted securities is difficult. The price trends in respect of unlisted securities are seldom known to the investors and the contract between the seller and buyer takes places mostly on one to one basis. Only public companies are allowed to list their securities in the stock exchange. Private Limited Companies cannot get listing facility. However, debt securities of Private companies could be listed in stock exchanges.

Section 17A provides for public issue and listing of securities referred to in clause (h) of Section 2. Without prejudice to the provisions contained in this Act or any other law for the time being in force, no securities of the nature referred to in clause (h) of Section 2 shall be offered to the public or listed on any recognised stock exchange unless the issuer fulfills such eligibility criteria and complies with such other requirements as may be specified by regulations made by the Securities and Exchange Board of India.

Every issuer referred to in clause (h) of Section 2 intending to offer the certificates or instruments referred therein to the public shall make an application, before issuing the offer document to the public, to one or more recognised stock exchanges for permission for such certificates or instruments to be listed on the stock exchange or each such stock exchange.

Where the permission applied for has not been granted or refused by the recognised stock exchanges or any of them, the issuer shall forthwith repay all moneys, if any, received from applicants in pursuance of the offer document, and if any such money is not repaid within eight days after the issuer becomes liable to repay it, the issuer and every director or trustee thereof, as the case may be, who is in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at the rate of fifteen percent per annum.

In reckoning the eighth day after another day, any intervening day which is a public holiday under the Negotiable Instruments Act, 1881, shall be disregarded, and if the eighth day (as so
reckoned) is itself such a public holiday, there shall for the said purposes be substituted the first day thereafter which is not a holiday.

All the provisions of this Act relating to listing of securities of a public company on a recognised stock exchange shall, mutatis mutandis, apply to the listing of the securities of the nature referred to in clause (h) of Section 2 by the issuer, being a special purpose distinct entity (Section 17A)

Listing means taking into admission the securities of any company to dealings on a recognized stock exchange.

Conditions for Listing

Where the securities are listed on the application of any person in any recognised stock exchange, such person shall comply with the conditions of the listing agreement with that stock exchange.

A public limited company which is proposing to get its securities listed on a stock exchange, shall do so, by applying to the recognised stock exchange in the prescribed form of the concerned stock exchange and the listing application form shall be duly filled and signed with enclosures. The same should be sent to the stock exchange along with the following –

- Listing agreement duly executed and stamped on a non-judicial stamp paper of requisite value;
- Initial listing fees as prescribed.

Rule 19(1) of the Securities Contracts (Regulations) Rules, 1957 prescribes the documents and particulars to be furnished by a public company while applying for listing its securities.

Types of Listing

Listing of securities falls under 5 groups:

- Initial listing: If the shares or securities are to be listed for the first time by a company on a stock exchange is called initial listing.
- Listing for Public Issue: When a company whose shares are listed on a stock exchange comes out with a public issue of securities, it has to list such issue with the stock exchange.
- Listing for Rights Issue: When companies whose securities are listed on the stock exchange issue further securities to existing shareholders on rights basis, it has to list such rights issues on the concerned stock exchange.
- Listing of Bonus Shares: Companies issuing shares as a result of capitalization of profits through bonus issue shall list such issues also on the concerned stock exchange.
- Listing for merger or amalgamation: When new shares are issued by an amalgamated company to the share holders of the amalgamating company, such shares are also required to be listed on the concerned stock exchange.

Benefits of Listing

The following benefits are available when securities are listed by a company in the stock exchange:

- public image of the company is enhanced.
- the liquidity of the security is ensured making it easy to buy and sell the securities in the stock exchange.
✓ tax concessions are made available both to the investors and the companies.
✓ listing procedure compels company management to disclose important information to
  the investors enabling them to make crucial decisions with regard to holding or
  disposing of such securities.
✓ Shares of listed companies command better credibility as they could be offered as
  security for loans from Banks and FIs.

**Multiple Listing**

A company with a paid up capital of over Rs.5 crores should list its securities or have its
securities permitted for trading, on at least one stock exchange having nationwide Trading
Terminals. Multiple listing provides arbitrage opportunities to the investors, whereby they can
make profit based on the difference in the prices prevailing in the said exchanges.

**Legal Provisions on Listing**

As per Section 40 of the Companies Act, 2013, every company intending to offer shares or
debentures to the public for subscription by the issue of a prospectus is required to make an
application to one or more recognised stock exchanges before such issue for permission for the
securities intending to be so offered to be dealt with in the stock exchange(s).
As per Section 40 of the Companies Act, 2013, prospectus should state the names of the stock
exchanges where application for listing has been made and any allotment of securities made on
the basis of such prospectus should be void if permission of listing is not granted by the stock
exchange(s) before the expiry of 10 weeks from the closure of the issue.

**Listing Agreement**

As per Section 4 of the Securities Contracts (Regulation) Act, 1956, every recognised stock
exchange has the powers to make bye-laws for the listing of securities on the stock exchange,
inclusion of any security for the purpose of dealings and suspension or withdrawal of securities
and the prohibition of trading in any specified security, subject to SEBI approval.
Every company while submitting its application for listing with the stock exchange(s) should
produce a number of documents as enclosures to satisfy the requirements of the concerned
stock exchange.
It should also give a number of undertakings as a condition precedent before listing as a sought
by the concerned stock exchange. Finally when the stock exchange(s) agree(s) to list the
securities, the company shall execute a listing agreement with the stock exchange(s). The listing
agreements of different stock exchanges have clauses ranging from 50 to 60.
When a company signs a listing agreement with a stock exchange, it means it has entered a
legally binding contract with that exchange and it has to ensure compliance of each and every
term and condition in the listing agreement. For failure to ensure such compliance the stock
exchange can take an action against the company after giving an opportunity of being heard.
Listing of securities on Indian Stock Exchanges, thus, is essentially governed by the provisions in
the Companies Act, 2013, the Securities Contracts (Regulation) Act, 1956, the Securities
Contracts (Regulations) Rules, 1957, Rules, Bye-laws, regulations of concerned stock exchange,
the listing agreement entered into by the issuer and stock exchange and circulars / guidelines
issued by the Central Government and SEBI.

**Delisting of Securities**

As per Section 21A of the Companies Act, 2013, if a company ceases to carry on its business
or if the board of directors of the company is of the opinion that it is expedient for the
purpose of the public interest or to avoid the risk of imminent failure of the company, a
notice shall be given to the stock exchange(s) where the securities are listed.

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CA. SHIVANGI AGRAWAL
A recognised stock exchange may delist the securities, after recording the reasons therefore, from any recognised stock exchange on any of the ground or grounds as may be prescribed under this Act.

The securities of a company shall not be delisted unless the company concerned has been given a reasonable opportunity of being heard.

A listed company or an aggrieved investor may file an appeal before the Securities Appellate Tribunal against the decision of the recognised stock exchange within fifteen days from the date of the decision.

### Grounds for Delisting

- The company has incurred losses during the preceding 3 consecutive years and it has negative net-worth
- Trading in securities of the company has remained suspended for a period of more than 6 months
- The securities of the company have remained infrequently traded during the preceding 3 years
- The company or any of its promoters or any of its director has been convicted for failure to comply with any of the provisions of the Act or SEBI Act, 1992, or Depositories Act, 1996 or rules, regulations, agreements made thereunder, as the case may be and awarded a penalty of not less than one crore rupees or imprisonment of not less than 3 years
- The addresses of the company or any of its promoter or any of its directors, are not known or false addresses have been furnished or the company has changed its registered office in contravention of the provisions of Companies Act; or
- Shareholding of the company held by the public has come below the minimum level applicable to the company as per the listing agreement under the Act and the company has failed to raise public holding to the required level within the time specified by the recognised stock exchange.

### Right of Appeal against Refusal of Stock Exchange to List Securities of Public Companies

Where a recognised stock exchange acting in pursuance of any power given to it by its bye-laws, refuses to list the securities of any public company or collective investment scheme, the company or scheme shall be entitled to be furnished with reasons for refusal, and may –

(i) within 15 days from the date on which the reasons for such refusal are furnished to it, or

(ii) where the stock exchange has omitted or failed to dispose of, within the time specified in corresponding provisions of Companies Act,

The application for permission for the shares or debentures to be dealt with on the stock exchange, within 15 days from the date of expiry of the specified time or within such further period, not exceeding one month, as the Central Government may on sufficient cause being shown, allow, appeal to Central Government against such refusal, omission or failure, as the case may be, and thereupon Central Government may, after giving the stock exchange an opportunity of being heard -

(i) vary or set aside the decision of the stock exchange, or
(ii) where the stock exchange has omitted or failed to dispose of the application within the specified time, grant or refuse the permission and where the Central Government sets aside the decision of the recognised stock exchange or grants the permission, the stock exchange shall act in conformity with the orders of Central Government.

**Title to Dividends**

It shall be **lawful for the holder of any security whose name appears on the books of the company issuing the said security to receive and retain any dividend** declared by the company in respect thereof for any year, notwithstanding that the said security has already been transferred by him for consideration, unless the transferee who claims the dividend from the transferor has lodged the security and all other documents relating to the transfer which may be required by the company with the company for being registered in his name **within fifteen days of the date on which the dividend became due**.

**Extension of Period**

The said **period** shall be **extended** –

- In case of **death** of the transferee, by the actual period taken by his legal representative to establish his claim to dividend
- In case of **loss of the transfer deed** by theft or any other cause beyond the control of the transferee, by the actual period taken for the replacement thereof; and
- In case of **delay** in the lodging of any security and other documents relating to the transfer **due to causes connected with the post**, by the actual period of the delay.

Nothing shall affect –

- The right of the company to pay any dividend which has become due to any person whose name is for the time being registered in the books of the Company as the holder of security in respect of which the dividend has become due; or
- The right of the transferee of any security to enforce against the transferor or any other person his rights, if any, in relation to the transfer in any case where the company has refused to register the transfer of the security in the name of the transferee.

**Right to Receive Income from Collective Investment Scheme**

It shall be **lawful for the holder of any securities, being units or other instruments issued by the collective investment scheme, whose name appears on the books of the collective investment scheme issuing the said security to receive and retain any income in respect of units or other instruments issued by the collective investment scheme declared by the collective investment scheme in respect thereof for any year, notwithstanding that the said security, being units or other instruments issued by the collective investment scheme, has already been transferred by him for consideration, unless the transferee who claims the income in respect of units or other instruments issued by the collective investment scheme from the transfer or has lodged the security and all other documents relating to the transfer which may be required by the collective investment scheme with the collective investment scheme for being registered in his name within fifteen days of the date on which the income in respect of units or other instruments issued by the collective investment scheme became due.**
**Extension of Period**

The said period shall be extended –

- ✓ In case of death of the transferee, by the actual period taken by his legal representative to establish his claim to dividend
- ✓ In case of loss of the transfer deed by theft or any other cause beyond the control of the transferee, by the actual period taken for the replacement thereof; and
- ✓ in case of delay in the lodging of any security, being units or other instruments issued by the collective investment scheme and other documents relating to the transfer due to causes connected with the post, by the actual period of the delay.

Nothing contained in sub-section (1) shall affect—

- ✓ the right of a collective investment scheme to pay any income from units or other instruments issued by collective investment scheme which has become due to any person whose name is for the time being registered in the books of the collective investment scheme as the holder of the security being units or other instruments issued by collective investment scheme in respect of which the income in respect of units or other instruments issued by collective scheme has become due; or
- ✓ the right of transferee of any security, being units or other instruments issued by collective investment scheme, to enforce against the transferor or any other person his rights, if any, in relation to the transfer in any case where the company has refused to register the transfer of the security being units or other instruments issued by the collective investment scheme in the name of the transferee.

Mr. Bansal holds certain securities on 31st March, 2008, issued in his favour under the 'Collective Investment Scheme'. For a consideration, Mr. Bansal transferred the said securities in favour of another person. One month after the date on which the income on these securities became due, the transferee lodged the instrument of transfer. Decide in the light of the provisions of the Securities Contracts (Regulations) Act, 1956:

(i) Whether in the given case Mr. Bansal is entitled to receive and retain the income on these securities for the financial year ended 31st March, 2008?

(ii) What would be your answer in case the transferee lodged the instrument of transfer 10 days after the date on which the income on these securities became due?

**Civil Court not to Have Jurisdiction**

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Securities Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

**Penalties**

<table>
<thead>
<tr>
<th>Section</th>
<th>Contravention</th>
<th>Quantum of Penalty</th>
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<tbody>
<tr>
<td>23A</td>
<td>✓ Failure to furnish any information, document,</td>
<td>Fine of at least INR 1,00,000</td>
</tr>
</tbody>
</table>

CA. SHIVANGI AGRAWAL
### Section 23

| 23A | books, returns or report to a recognised stock exchange within the time specified in the listing agreement or conditions or bye-laws of the stock exchange | but may extend to INR 1,00,000 per day during which such failure continues, subject to a maximum of INR 1 crore |
| 23B | Failure by any person to enter into an agreement with clients |
| 23C | Failure by a stock broker or sub-broker or a listed company or proposed listed company to redress investors' grievances |
| 23D | Failure to segregate securities or money of client or clients or using the securities or money of client for self-use or for any other client | At least INR 1,00,000 but may extend to INR 1 crore |
| 23E | Failure to comply with the provisions of listing conditions or delisting conditions or grounds, by a company or a person managing collective investment scheme | At least INR 5,00,000 which may extend to INR 25 crores |
| 23F | Excess dematerialisation or delivery of unlisted Securities |
| 23G | Failure to furnish periodical returns to SEBI or fails or neglects to make or amend its rules or bye-laws as directed by SEBI or fails to comply with the directions of SEBI |
| 23H | Failure to comply with any provision of this Act, the rules or articles or bye-laws or the regulations of recognised stock exchange or directions issued by SEBI for which no separate penalty has been provided | At least INR 1,00,000 which may extend to INR 1 crore |

### Adjudication

- **SEBI shall appoint any officer not below the rank of a Division Chief of the Securities and Exchange Board of India to be an adjudicating officer** for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.

- While holding an inquiry, the adjudicating officer shall have power to summon and **enforce the attendance of any person acquainted with the facts** and circumstances of the case to give evidence or to produce any document, which in the opinion of the adjudicating officer, may be useful for or relevant to the subject-matter of the inquiry and if, on such inquiry, he is **satisfied that the person has failed to comply** with the provisions of any of the sections specified in sub-section (1), he **may impose such penalty as he thinks fit** in accordance with the provisions of any of those sections.

### Power of SEBI to Enhance Penalty

- **The Board may call for and examine the record of any proceedings under this section and if it considers that the order passed** by the adjudicating officer is
erroneous to the extent it is not in the interests of the securities market, it may, after making or causing to be made such inquiry as it deems necessary, pass an order enhancing the quantum of penalty, if the circumstances of the case so justify. However, no such order shall be passed unless an opportunity of being heard has been given to the concerned person.

✓ nothing contained in this sub-section shall be applicable after an expiry of a period of 3 months from the date of the order passed by the adjudicating officer or disposal of the appeal under section 23L, whichever is earlier.

Factors to be taken into Account by Adjudicating Officer

- amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default
- the amount of loss caused to an investor or group of investors as a result of the default;
- The repetitive nature of the default.

Appeal to Securities Appellate Tribunal

- Person aggrieved by the order of stock exchange/adjudicating officer/ order of SEBI
- May file Appeal to be filed within 45 days (unless further extension granted by SAT)
- SAT shall give an opportunity of being heard and pass an order - confirming/modifying/ setting aside the appealed order
- SAT will send a copy of every order to the parties to appeal and to concerned adjudicating officer
- Every appeal filed before SAT to be disposed of within 6 months from the date of receipt of appeal.

Appeal to Supreme Court

- Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out of such order.
- However, the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Offences

- If any person contravenes, or attempts to contravene, or abets the contravention of the provisions of this Act or of any rules or regulations or bye-laws, for which no punishment is provided elsewhere in this Act, he shall be punishable with imprisonment
for a term which may extend to 10 years or with fine, which may extend to INR 25 crores, or with both.

✓ If any person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any of his directions or order, he shall be punishable with imprisonment for a term which shall not be less than 1 month but which may extend to 10 years, or with fine which may extend to INR 25 crores, or with both.

Composition of Certain Offences

Any offence punishable under this Act, not being an offence punishable 'with imprisonment' only, or 'with imprisonment and also with fine' may either before or after the institution of any proceeding, be compounded by SAT or a court before which such proceedings are pending.

Primex Securities (P) Ltd. is a company involved in stock broking and is registered with SEBI. The said broking company failed to:
- Redress the grievances of the investors within the stipulated time.
- Eregate securities or money of clients and used the same for self use or for any other clients.

The Securities and Exchange Board of India issued an order against the said company for committing the above offences. The managing director of the company seeks your advice on the following under the provisions of the Securities Contract (Regulations) Act, 1956.

i) What is the penalty for the above offences?
ii) Whether the offence committed by the stock broking company is compoundable? If so, by whom?

Whether this offence can be compounded after institution of proceedings against the stock broking company?

Power to Grant Immunity

Grant of Immunity

The Central Government may, on recommendation by the Securities and Exchange Board of India, if the Central Government is satisfied, that

✓ any person, who is alleged to have violated any of the provisions of this Act or the rules or the regulations made thereunder,

✓ has made a full and true disclosure in respect of alleged violation,

grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act, or the rules or the regulations made thereunder or also from the imposition of any penalty under this Act with respect to the alleged violation.

No Immunity in Case of Prosecution

Provided that no such immunity shall be granted by the Central Government in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of application for grant of such immunity.

Withdrawal of Immunity
Immunity granted to a person may, at any time, be withdrawn by the Central Government, if it is satisfied that such person had, in the course of the proceedings, not complied with the condition on which the immunity was granted or had given false evidence, and

Consequences

Thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the contravention and shall also become liable to the imposition of any penalty under this Act to which such person would have been liable, had not such immunity been granted.

Establishment of Special Courts

- Central Government may by notification establish or designate as many Special Courts as may be necessary.
- A Special Court shall consist of a single judge who shall be appointed by Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.
- A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding the office of a Sessions Judge or an Additional Sessions Judge, as the case may be.
- The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and the person conducting prosecution before the Special Court shall be deemed to be a Public Prosecutor within the meaning of Section 2(u) of the Code of Criminal Procedure, 1973.

Multiple Choice Questions

1. A member of a recognised stock exchange shall not continue, if ----------.
   - a. He ceases to be a citizen of India
   - b. He ceases to be resident in India
   - c. Either (a) or (b) or both
   - d. None of these

2. Any stock exchange, which is desirous of being recognised, shall make an application in - ------
   - a. Form C
   - b. Form A
   - c. Form B
   - d. Form D

3. The provisions of the Act shall not be apply to --------.
   - a. The Government
   - b. The Reserve Bank of India
   - c. Any Local authority
   - d. All of these

4. If the scheme of corporatisation or demutualisation submitted by the recognised stock exchange is rejected by SEBI, then ------
   - a. The members of the governing body shall cease to hold their offices
   - b. The recognition granted to such stock exchange under section 4 shall stand withdrawn
   - c. The business of the stock exchange
   - d. All of these
5. Every recognised stock exchange shall maintain the ledgers, journals, cash book and bank pass-book for a period of ______.

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<tbody>
<tr>
<td>a. 3 years</td>
<td>b. 5 years</td>
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<tr>
<td>c. 7 years</td>
<td>d. 8 years</td>
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6. A member may act as a principal with any person other than a member, if he secures the consent of such other person otherwise than in writing, and he secures written confirmation by such person of such consent within ______ from the date of the contract.

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<tbody>
<tr>
<td>a. 3 days</td>
<td>b. 7 days</td>
</tr>
<tr>
<td>c. 15 days</td>
<td>d. None of these</td>
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</table>

7. ______ means a company incorporated under the Companies Act, 1956, for the purpose of the periodical settlement of contracts and differences thereunder, the delivery of, and payment for, securities, and any other matter incidental to, or connected with, such transfer.

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<tbody>
<tr>
<td>a. Clearing company</td>
<td>b. Clearing corporation</td>
</tr>
<tr>
<td>c. Clearing unit</td>
<td>d. Clearing house</td>
</tr>
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8. A recognised stock exchange may delist the securities of a company if the securities of the company have remained infrequently traded during the preceding ______.

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<tr>
<td>a. 6 months</td>
<td>b. 1 year</td>
</tr>
<tr>
<td>c. 2 years</td>
<td>d. 3 years</td>
</tr>
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</table>

9. A recognised stock exchange may delist the securities of a company if trading in the securities of such company has remained suspended for a period of more than ______.

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<tbody>
<tr>
<td>a. 3 months</td>
<td>b. 6 months</td>
</tr>
<tr>
<td>c. 1 year</td>
<td>d. 3 years</td>
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10. Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal with ______.

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<tbody>
<tr>
<td>a. The Central Government</td>
<td>b. The Securities and Exchange Board of India</td>
</tr>
<tr>
<td>c. The High Court</td>
<td>d. The Supreme Court</td>
</tr>
</tbody>
</table>

11. Where SEBI makes or amends the bye-laws of a stock exchange on its own motion, the governing body may object to it within ______ of its publication in the Gazette of India.

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<tbody>
<tr>
<td>a. 7 days</td>
<td>b. 15 days</td>
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<tr>
<td>c. 30 days</td>
<td>d. None of these</td>
</tr>
</tbody>
</table>

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12. If the transferee has lodged the security and all other documents required for making the transfer of security within -------- of the date on which the dividend became due, the holder shall have --------.

<table>
<thead>
<tr>
<th></th>
<th>Option 1</th>
<th>Option 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>7 days; no right to retain the dividend</td>
<td>15 days; no right to retain the dividend</td>
</tr>
<tr>
<td>b</td>
<td>30 days; no right to retain the dividend</td>
<td>7 days; the right to retain the dividend</td>
</tr>
</tbody>
</table>

13. Person shall not be eligible to be elected as a member of a recognised stock exchange if he is less than -------- of age.

<table>
<thead>
<tr>
<th></th>
<th>Option 1</th>
<th>Option 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>18 years</td>
<td>21 years</td>
</tr>
<tr>
<td>b</td>
<td>25 years</td>
<td>None of these</td>
</tr>
</tbody>
</table>

14. Every recognised stock exchange shall furnish to SEBI periodical returns relating to the number of securities listed and de-listed during the previous --------.

<table>
<thead>
<tr>
<th></th>
<th>Option 1</th>
<th>Option 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>1 month</td>
<td>2 months</td>
</tr>
<tr>
<td>b</td>
<td>3 months</td>
<td>6 months</td>
</tr>
</tbody>
</table>

15. If the securities of a company are delisted by a recognised stock exchange, such company may, within ------ of date of the decision of the recognised stock exchange delisting the securities, file an appeal with Securities Appellate Tribunal.

<table>
<thead>
<tr>
<th></th>
<th>Option 1</th>
<th>Option 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>7 days</td>
<td>15 days</td>
</tr>
<tr>
<td>b</td>
<td>21 days</td>
<td>30 days</td>
</tr>
</tbody>
</table>

Answer to MCQs

<table>
<thead>
<tr>
<th></th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(a)</td>
<td>(b)</td>
<td>(d)</td>
<td>(b)</td>
<td>(b)</td>
</tr>
<tr>
<td></td>
<td>6</td>
<td>7</td>
<td>8</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>(a)</td>
<td>(b)</td>
<td>(d)</td>
<td>(b)</td>
<td>(d)</td>
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<tr>
<td></td>
<td>11</td>
<td>12</td>
<td>13</td>
<td>14</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>(d)</td>
<td>(b)</td>
<td>(b)</td>
<td>(c)</td>
<td>(b)</td>
</tr>
</tbody>
</table>
Foreign Exchange Management Act, 1999

Basic Provisions

FEMA has been brought into force from 1st June, 2000.

✓ FEMA, 1999 extends to the whole of India.
✓ It also applies to:
  ✓ All branches, offices and agencies outside India owned or controlled by a person resident in India; and
  ✓ Any contravention committed outside India by any person to whom this Act applies.

Objectives of the Act

This Act aims to consolidate and amend the law relating to foreign exchange with the objective of —

✓ facilitating external trade and payments and
✓ for promoting the orderly development and maintenance of foreign exchange market in India.

Difference between FERA and FEMA

<table>
<thead>
<tr>
<th>FERA</th>
<th>FEMA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Object of FERA was to conserve and control foreign exchange resources preventing its misuse</td>
<td>Object of FEMA is to promote and develop foreign exchange management of the country.</td>
</tr>
<tr>
<td>Citizenship was criterion to determine residential status</td>
<td>Citizenship is irrelevant in determining residential status</td>
</tr>
<tr>
<td>It prohibited almost all foreign exchange transactions unless permission was issued.</td>
<td>All current account transactions are permissible except some controlled through Rules</td>
</tr>
<tr>
<td>Presumption of guilty mind exists</td>
<td>Prosecution has to prove that person has committed an offence</td>
</tr>
<tr>
<td>FERA was harsh compared to FEMA as it involved criminal punishments also</td>
<td>Offences under FEMA are civil wrongs</td>
</tr>
<tr>
<td>Compounding was not permissible</td>
<td>Compounding is permissible</td>
</tr>
<tr>
<td>One appellate authority</td>
<td>Two appellate authorities</td>
</tr>
<tr>
<td>Legal assistance was wide</td>
<td>Legal assistance narrowed to legal practitioner and chartered accountant</td>
</tr>
</tbody>
</table>

Definitions

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### Adjudicating Authority

It means an officer authorised under sub-section (1) of section 16

### Appellate Tribunal

It means the Appellate Tribunal for Foreign Exchange established under section 18;

### Chairperson

“Chairperson” means the Chairperson of the Appellate Tribunal

### Currency

“Currency” includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank

### Currency Notes

“Currency Notes” means and includes cash in the form of coins and bank notes

### Director of Enforcement

“Director of Enforcement” means the Director of Enforcement appointed under section 36

### Export

“Export”, with its grammatical variations and cognate expressions means;
(i) the taking out of India to a place outside India any goods.
(ii) provision of services from India to any person outside India;

### Foreign Currency

“Foreign Currency” means any currency other than Indian currency;

### Foreign Exchange

“Foreign Exchange” means foreign currency and includes:
- deposits, credits and balances payable in any foreign currency,
- drafts, travellers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
- drafts, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;

### Foreign Security

“Foreign Security” means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or
dividends is payable in Indian currency;

Indian Currency

“Indian Currency” means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under section 28A of the Reserve Bank of India Act, 1934

Person

“Person” includes:
✓ an individual,
✓ a Hindu undivided family,
✓ a company,
✓ a firm,
✓ an association of persons or a body of individuals, whether incorporated or not,
✓ every artificial juridical person, not falling within any of the preceding sub-clauses, and;
✓ any agency, office or branch owned or controlled by such person

1.5 Repatriate to India

“Repatriate to India” means bringing into India the realised foreign exchange and
✓ the selling of such foreign exchange to an authorised person in India in exchange for rupees, or
✓ the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank. It includes use of the realised amount for discharge of a debt or liability denominated in foreign exchange and the expression “repatriation” shall be construed accordingly

Security

“Security” means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944, savings certificates to which the Government Saving Certificates Act, 1959 applies, deposit receipts in respect of deposit of securities and units of the Unit Trust of India established under sub-section (1) of section 3 of the Unit Trust of India Act, 1963 or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act;

Service

“Service” means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

Person Resident in India

Section 2(v)
"Person resident in India" means:
(i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include—
(A) a person who has gone out of India or who stays outside India, in either case—
    ✓ for or on taking up employment outside India, or
    ✓ for carrying on outside India a business or vocation outside India, or
    ✓ for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
(B) a person who has come to or stays in India, in either case, otherwise than:
    ✓ for or on taking up employment in India, or
    ✓ for carrying on in India a business or vocation in India, or
    ✓ for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;
(ii) any person or body corporate registered or incorporated in India,
(iii) an office, branch or agency in India owned or controlled by a person resident outside India,
(iv) an office, branch or agency outside India owned or controlled by a person resident in India

**Person Resident outside India**

Person resident outside India means a person who is not resident in India.

Printex Computer is a Singapore based company having several business units all over the world. It has a unit for manufacturing computer printers with its headquarters in Pune. It has a branch in Dubai which is controlled by the headquarters in Pune. What would be the residential status under FEMA, 1999 of printer units in Pune and that of Dubai branch?

Mr. Kishore resided in India during the Financial Year 2009-2010 for less than 182 days. He came to India on 1st April, 2010 for business. He closed down his business on 30th April, 2011 and left India on 30th June, 2011 for the purpose of employment outside India. Decide the residential status of Mr. Kishore during the Financial Years 2010-2011 and 2011-2012 under the provisions of the Foreign Exchange Management Act, 1999.

**Restrictions on Foreign Exchange**

All restrictions mentioned may be relaxed by making provisions in Act, Rules, Regulations and by permission of the Reserve Bank.

No person shall—
(a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;
(b) make any payment to or for the credit of any person resident outside India in any manner;

CA. SHIVANGI AGRAWAL
(c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.
(d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

**General Permissions**

**Prohibitions** shall not apply to any transaction entered into in Indian Rupees by or with-

- a) a person who is a citizen of India, Nepal or Bhutan resident in Nepal or Bhutan.
- b) A branch situated in Nepal or Bhutan of any business carried on by a company or a corporation incorporated in India, Nepal or Bhutan; and
- c) A branch situated in Nepal or Bhutan of any business carried on as a partnership firm or otherwise by a citizen of India, Nepal or Bhutan

**Restriction on Holding of Foreign Exchange**

No person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

**Authorised Person**

**Definition [Section 2(c)]**

“Authorised person” means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities.

**Appointment of Authorised Person**

- The Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.
- An authorisation under this section shall be in writing and shall be subject to the conditions laid down therein

**Revocation of Authorisation**

An authorisation granted may be revoked by the Reserve Bank after giving reasonable opportunity of being heard at any time if the Reserve Bank is satisfied that:

- it is in public interest so to do; or
- the authorised person has failed to comply with the condition subject to which the authorisation was granted or has contravened any of the provisions of the Act or any rule, regulation, notification, direction order made thereunder

**Duties of Authorised Persons**

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Authorised Person shall comply with such general or special directions or orders as the Reserve Bank may, from time to time.

Except with the previous permission of the Reserve Bank, an authorized person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.

Power of RBI to Issue Directions

The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security.

The Reserve Bank may, for the purpose of ensuring the compliance with the provisions of this Act or of any rule, regulation, notification direction or order made thereunder, direct any authorised person to furnish such information, in such manner, as it deems fit.

Penalty

Where any authorised person contravenes any direction given by the Reserve Bank under this Act or fails to file any return as directed by the Reserve Bank, the Reserve Bank may, after giving reasonable opportunity of being heard, impose on the authorised person a penalty which may extend to ten thousand rupees and in the case of continuing contravention with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

Power of Reserve Bank to Inspect Authorised Person

The Reserve Bank may, at any time, cause an inspection to be made by any officer of the Reserve Bank specially authorised in writing by the Reserve Bank in this behalf, of the business of any authorised person as may appear to it to be necessary or expedient for the purpose of:

verifying the correctness of any statement, information or particulars furnished to the Reserve Bank;

obtaining any information or particulars which such authorised person has failed to furnish on being called upon to do so;

securing compliance with the provisions of this Act or of any rules, regulations, directions or orders made thereunder.

Duty to Produce Documents

It shall be the duty of every authorised person, and where such person is a company or a firm, every director, partner or other officer of such company or firm, as the case may be, to produce to any officer making an inspection under sub-section (1), such books, accounts and
other documents in his custody or power and to furnish any statement or information relating to the affairs of such person, company or firm as the said officer may require within such time and in such manner as the said officer may direct.

Current Account Transactions

Definition [Section 2(j)]

"Current Account Transaction" means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes:

(i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business.
(ii) payments due as interest on loans and as net income from investments.
(iii) remittances for living expenses of parents, spouse and children residing abroad, and
(iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children.

No Restriction on Current Account Transactions

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction. Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions. Hence, such transactions are freely available if it is not prohibited and it is within limit or permission obtained.

Foreign Exchange Management (Current Account Transactions) Rules, 2000

As per rules, drawal of foreign exchange for certain current account transactions is prohibited, a few need permission of appropriate Govt. of India authority and some other transactions would require RBI permission if they exceed a certain ceiling. The three categories are:

✓ Transactions which are prohibited
✓ Transactions for which foreign exchange can be drawn subject to prior approval of CG
✓ Transactions for which foreign exchange can be drawn subject to prior approval of Reserve Bank of India

No approval of the Reserve Bank is required where payment is made out of funds held in Resident Foreign Currency Account of the remitter.

Rule 3 read with Schedule I

Transactions for which drawal of foreign exchange is prohibited:

✓ Payment for travel to Nepal/Bhutan
✓ Transaction with resident of Nepal/Bhutan
✓ Remittance out of lottery winnings.
✓ Remittance of income from racing/riding, etc., or any other hobby.
✓ Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
✓ Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
✓ Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
✓ Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
✓ Payment related to “Call Back Services” of telephones.
✓ Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.

Rule 4 Read with Schedule II

Prior approval of the Government of India for drawal of foreign exchange is required for following transactions:
✓ Cultural Tours
✓ Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding US$ 10,000) by a State Government and its Public Sector Undertakings.
✓ Remittance of freight of vessel charted by a PSU
✓ Payment of import through ocean transport by a Govt. Department or a PSU on c.i.f. basis
✓ Multi-modal transport operators making remittance to their agents abroad
✓ Remittance of hiring charges of transponders by TV Channels & Internet service providers
✓ Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping
✓ Remittance of prize money/sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies, if the amount involved exceeds US $ 100,000
✓ Remittance for membership of P & I Club

Rule 5 Read with Schedule III

Facilities for individuals
Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India.

✓ Private visits to any country (except Nepal and Bhutan)
✓ Gift or donation.
✓ Going abroad for employment
✓ Emigration
✓ Maintenance of close relatives abroad
✓ Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
✓ Expenses in connection with medical treatment abroad
✓ Studies abroad
✓ Any other current account transaction
For the following purposes from above:
- Emigration
- Medical treatment
- Studies abroad

the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme, if it is so required by a country of emigration, medical institute offering treatment or the university, respectively.

Further, if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted.

**Allowed Remittance in certain cases**

A person who is resident but not permanently resident in India and-
(a) is a citizen of a foreign State other than Pakistan; or
(b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company, may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

**Meaning Of Person Resident but not Permanently Resident**

A person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident.

Further, a person other than an individual may also avail of foreign exchange facility, mutatis mutandis, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above.

**Facilities for Persons Other than Individual**

The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India.
- Donations exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less,
  - creation of Chairs in reputed educational institutes,
  - contribution to funds (not being an investment fund) promoted by educational institutes; and
  - contribution to a technical institution or body or association in the field of activity of the donor Company.
- Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.
- Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.
✓ Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

Mr. G, an Indian national desires to obtain foreign exchange on current account transaction for following: Advise Payment of commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian Company. Remittance of hire charges of transponder.

Mr. Sane, an Indian National desire to obtain foreign exchange for the following purposes:

(i) Remittance of US Dollar 50,000 out of winnings on a lottery ticket.
(ii) US Dollar 1,00,000 for sending a cultural troupe on a tour of U.S.A.
(iii) US Dollar 50,000 for meeting the expenses of its business tour to Europe. Advise him whether he can get foreign exchange and if so, under what conditions?

Mr. Atul, an Indian national desires to obtain US Dollar 10,000 for payment for goods purchased from a party situated in Nepal. Advise him, if he can get the Foreign Exchange and under what conditions.

Mr. F, an Indian National desires to obtain foreign exchange for the following purposes:

(i) Payment of US $ 10,000 as commission on exports under Rupee State Credit Route.
(ii) US $ 30,000 for a business trip to U.K.
(iii) Remittance of US $ 2,00,000 for payment as prize money to the winning team in a Hockey Tournament to be held in Australia. Advise him, if he can get the Foreign Exchange and under what conditions.

Mr. Loma, an Indian National desires to obtain foreign exchange for the following purpose: Advise.

1) Payment of commission on exports under Rupee state credit route
2) Gift remittance exceeding 10000 US dollar.

State which kind of approval is required for following:

X, a film star wants to perform alongwith associates in New York on the occasion of Diwali for Indians residing at New York foreign Exchange drawal to the extent of US dollars 20000 is required for this purpose.

Y wants to get his heart surgery done at UK, upto what limit foreign exchange can be drawn by him and what are the approvals required.

L wants to pursue a course in fashion design in Paris. The foreign exchange drawal is US dollars 20000 towards tuition fees and US dollars 30000 for incidental and expenses for studying abroad.

Mr. Basu desires to draw foreign exchange for the following purposes:
(i) Payment related to ‘Call back services’ of telephones
(ii) USD 1,20,000 for studies abroad on the basis of estimates given by the foreign university.
(iii) USD 25,000 for sending a cultural troupe on a tour of Europe.

. Lifesys Limited, a billion dollar, Indian company wishes to create a chair in a reputed university in the U.S. This chair is for the department of computer science. The company wishes to obtain your advice in regard to the following with reference to the FEMA.
(i) Is such “chair” creation permissible?
(ii) What is the maximum amount that can be donated for such chair?
(iii) Any formalities to be complied with?

Capital Account Transactions

Definition [Section 2(e)]

“Capital Account Transaction” means a **transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liability in India of persons resident outside India**

Powers of RBI For Capital Account Transactions

Any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.

The Reserve Bank may, by regulations, prohibit, restrict or regulate Capital Account transactions as specified in section 6(3).
The Reserve Bank may, in consultation with the Central Government, specify
✓ any class or classes of capital account transactions, which are permissible
✓ the limit up to which foreign exchange shall be admissible for such transactions

Capital account transaction is basically split into the following categories:
✓ transaction, which are permissible in respect of persons resident in India and outside India.
✓ transaction on which restrictions cannot be imposed; and
✓ transactions, which are prohibited.

Permissible Transactions

**Reserve Bank shall not impose any restriction on the drawal of foreign exchange for payments** due on account of-
✓ **amortisation of loans** or
✓ for **depreciation of direct investments**
in the ordinary course of business.


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The Regulations specify the list of transactions, which are permissible in respect of persons resident in India in Schedule-I and the classes of capital account transactions of persons resident outside India in Schedule-II.

Schedule I

The list of permissible classes of transactions made by persons resident in India is:

a) Investment by a person resident in India in foreign securities.
b) Foreign currency loans raised in India and abroad by a person resident in India.
c) Transfer of immovable property outside India by a person resident in India.
d) Guarantees issued by a person resident in India in favour of a person resident outside India.
e) Export, import and holding of currency/currency notes.
f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India.
g) Maintenance of foreign currency accounts in India and outside India by a person resident in India.
h) Taking out of insurance policy by a person resident in India from an insurance company outside India.
i) Loans and overdrafts by a person resident in India to a person resident outside India.
j) Remittance outside India of capital assets of a person resident in India.
k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India.

Section 6(4)
A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

(i) Foreign currency accounts opened and maintained by such a person when he was resident outside India;
(ii) Income earned through employment or business or vocation outside India taken up or commenced which such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India
(iii) Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India.
(iv) A person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transactions is not in contravention to extant FEMA provisions.

Regulation 3 read with Schedule II

The list of permissible classes of transactions made by persons resident outside India is:

a) Investment in India by a person resident outside India, that is to say,
✓ issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
✓ investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of a person in India.

b) Acquisition and transfer of immovable property in India by a person resident outside India.

c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.

d) Import and export of currency/currency notes into/from India by a person resident outside India.

e) Deposits between a person resident in India and a person resident outside India.

f) Foreign currency accounts in India of a person resident outside India.

g) Remittance outside India of capital assets in India of a person resident outside India.

Section 6(5)
A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by a such person when he was resident in India or inherited from a person who was resident in India.

Prohibited Transactions [Regulation 4]

On certain transactions, the Reserve Bank of India imposes prohibition.

(a) no person shall undertake or sell or draw foreign exchange to or from an authorised person for any capital account transaction,

Provided that-
✓ subject to the provisions of the Act or the rules or regulations or directions or orders made or issued thereunder, a resident individual may, draw from an authorized person foreign exchange not exceeding USD 250,000 per financial year or such amount as decided by Reserve Bank from time to time for a capital account transaction specified in Schedule I.
✓ Where the drawing of foreign exchange by a resident individual for any capital account transaction specified in Schedule I exceeds USD 250,000 per financial year, or as decided by Reserve Bank from time to time as the case may be, the limit specified in the regulations relevant to the transaction shall apply with respect to such drawal.

(b) The person resident outside India is prohibited from making investments in India in any form, in any company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage:
✓ In the business of chit fund
✓ As Nidhi company;
✓ In agricultural or plantation activities;
✓ In real estate business, or construction of farm houses or
✓ In trading in Transferable Development Rights (TDRs).

“real estate business” the term shall not include shall not include development of townships, construction of residential/commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs)
Examine whether the following transactions are permissible or not under the above Act as Capital Account transactions:

(i) Investment by person resident in India in Foreign Securities.
(ii) Foreign currency loans raised in India and abroad by a person resident in India.
(iii) Export, import and holding of currency/currency notes.
(iv) Trading in transferrable development rights.
(v) Investment in a Nidhi Company.

State whether there are any restrictions in respect of the following transactions:

(i) Drawal of foreign exchange for payments due on account of amortization of loans in ordinary course of business.
(ii) Purchase by a person resident outside India of shares of a company in India engaged in plantation activities.

Examine with reference to the provisions of the Foreign Exchange Management Act, 1999 whether there are any restrictions in respect of the following:
A person who was resident of U.S.A. for several years, is planning to return to India permanently. Can he continue to hold the investment made by him in the securities issued by companies in U.S.A.?

Export of Goods and Services

Every exporter of goods shall-
(a) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertained at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India;
(b) furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realization of the export proceeds by such exporter.

(2) The Reserve Bank may, for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it deems fit.

(3) Every exporter of services shall furnish to the Reserve Bank or to such other authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services.
Foreign Exchange Management (Export of Goods and Services) Regulations, 2015

Declaration of Exports

In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, a declaration in one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing

- the full export value of the goods or software; or
- if the full export value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not or the software has been or will within the specified period be, paid in the specified manner.

(2) Declarations shall be executed in sets of such number as specified.

In respect of export of services to which none of the Forms specified in these Regulations apply, the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.

(4) Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

Exemptions

Notwithstanding anything contained in Regulation 3, export of goods / software may be made without furnishing the declaration in the following cases, namely-

(a) trade samples of goods and publicity material supplied free of payment
(b) personal effects of travellers, whether accompanied or unaccompanied
(c) ship’s stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements
(d) by way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value
(e) aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their reimport into India after overhauling /repairs, within a period of six months from the date of their export
(f) goods imported free of cost on re-export basis
(g) the following goods which are permitted by the Development Commissioner of the Special Economic Zones, Electronic Hardware Technology Parks, Software Technology Parks or Free Trade Zones to be re-exported, namely:

- imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators;
- goods imported from foreign suppliers/collaborators on loan basis;
 ✓ goods imported from foreign suppliers/collaborators free of cost, found surplus after production operations.

(ga) goods listed at items (1), (2) and (3) of clause (i) to be re-exported by units in Special Economic Zones, under intimation to the Development Commissioner of Special Economic Zones / concerned Assistant Commissioner or Deputy Commissioner of Customs

(h) replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being.

(i) goods sent outside India for testing subject to re-import into India;

(j) defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.

(k) exports permitted by the Reserve Bank, on application made to it, subject to the terms and conditions, if any, as stipulated in the permission.

### Indication of Importer-Exporter Code Number

The importer-exporter code number allotted by the Director General of Foreign Trade under Section 7 of the Foreign Trade (Development & Regulation) Act, 1992 shall be indicated on all documents.

### Details of Declaration

#### Declaration in Form EDF

- The declaration in form EDF shall be submitted in duplicate to the Commissioner of Customs.
- After duly verifying and authenticating the declaration form, the Commissioner of Customs shall forward the original declaration form/data to the nearest office of the Reserve Bank and hand over the duplicate form to the exporter for being submitted to the authorised dealer.

#### Declaration in Form SOFTEX

- The declaration in Form SOFTEX in respect of export of computer software and audio/video/television software shall be submitted in triplicate to the designated official of Ministry of Information Technology, Government of India at the Software Technology Parks of India (STPIs) or at the Free Trade Zones (FTZs) or Special Economic Zones (SEZs) in India.
- After certifying all three copies of the SOFTEX form, the said designated official shall forward the original directly to the nearest office of the Reserve Bank and return the duplicate to the exporter. The triplicate shall be retained by the designated official for record.

#### Duplicate Declaration Forms to be retained with Authorised Dealers

On the realisation of the export proceeds, the duplicate copies of export declaration forms viz. EDF and SOFTEX and Exchange Control copies of the shipping bills shall be retained by the Authorised Dealers.

#### Power of Authority to Ask for Evidence in Support Of Declaration

The Commissioner of Customs or the postal authority or the official of Department of Electronics, to whom the declaration form is submitted, may, in order to satisfy themselves
of due compliance with Section 7 of the Act and these regulations, require such evidence in support of the declaration as may establish that –
   a) the exporter is a person resident in India and has a place of business in India;
   b) the destination stated on the declaration is the final place of the destination of the goods exported;
   c) the value stated in the declaration represents –
      ✓ the full export value of the goods or software; or
      ✓ where the full export value of the goods or software is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods in the overseas market.

Payment of Export Value of Goods

✓ Amount representing the full export value of the goods exported shall be paid through an authorised dealer in the manner specified in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 as amended from time to time.
✓ Re-import into India, within the period specified for realisation of the export value, of the exported goods in respect of which a declaration was made under Regulation 3, shall be deemed to be realisation of full export value of such goods.

Period within which Export Value of Goods/Software/Services to be Realised

The amount representing the full export value of goods / software / services exported shall be realised and repatriated to India within nine months from the date of export, provided
   a) that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods
   b) further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be.

(2) (a) Where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in subregulation (1), the amount representing the full export value of goods or software shall be realised and repatriated to India within nine months from the date of export.

Provided further that the Reserve Bank, or subject to the directions issued by the Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months.

(b) The Reserve Bank may for reasonable and sufficient cause direct that the said exporter/s shall cease to be governed by sub-regulation (2);
Provided that no such direction shall be given unless the unit has been given a reasonable opportunity to make a representation in the matter.

(c) On such direction, the said exporter/s shall be governed by the provisions of subregulation (1), until directed otherwise by the Reserve Bank.

“date of export” in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export.

Submission of Export Documents

- The documents pertaining to export shall be submitted to the authorised dealer mentioned in the relevant export declaration form, within 21 days from the date of export, or from the date of certification of the SOFTEX form.
- Provided that, subject to the directions issued by the Reserve Bank from time to time, the authorized dealer may accept the documents pertaining to export submitted after the expiry of the specified period of 21 days, for reasons beyond the control of the exporter.

Payment for the Export

In respect of export of any goods or software for which a declaration is required to be furnished under Regulation 3, no person shall except with the permission of the Reserve Bank or, subject to the directions of the Reserve Bank, permission of an authorised dealer, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing:

(i) that the payment for the goods or software is made otherwise than in the specified manner; or
(ii) that the payment is delayed beyond the period specified under these Regulations; or
(iii) that the proceeds of sale of the goods or software exported do not represent the full export value of the goods or software subject to such deductions, if any, as may be allowed by the Reserve Bank or, subject to the directions of the Reserve Bank, by an authorised dealer.

Provided that no proceedings in respect of contravention of these provisions shall be instituted unless the specified period has expired and payment for the goods or software representing the full export value, or the value after deductions allowed under clause (iii), has not been made in the specified manner within the specified period.

(iv) Export of services to which no Form specified in these Regulations apply, the exporter may export such services without furnishing any declaration, (i), (ii) & (iii) above shall apply.

Certain Exports Requiring Prior Approval

Exports under trade agreement/rupee credit etc.

(i) Export of goods under special arrangement between the Central Government and Government of a foreign state, or under rupee credits extended by the Central Government to Govt. of a foreign state shall be governed by the terms and conditions set out in the relative public notices issued by the Trade Control Authority in India and the instructions issued from time to time by the Reserve Bank.

(ii) An export under the line of credit extended to a bank or a financial institution operating in a foreign state by the Exim Bank for financing exports from India, shall be
Delay in Receipt of Payment

Where in relation to goods or software export of which is required to be declared on the specified form and export of services, in respect of which no declaration forms has been made applicable, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,

(a) the payment therefor if the goods or software has been sold and
(b) the sale of goods and payment thereof, if goods or software has not been sold or reimport thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf

Provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

Advance Payment against Exports

Where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that –

✓ the shipment of goods is made within one year from the date of receipt of advance payment
✓ the rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
✓ the documents covering the shipment are routed through the authorised dealer through whom the advance payment is received

Provision for Refund

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

Exception

An exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

Issue of Directions by Reserve Bank in Certain Cases

Without prejudice to the provisions of Regulation 3 in relation to the export of goods or software which is required to be declared, the Reserve Bank may, for the purpose of ensuring that the full export value of the goods or, as the case may be, the value which the exporter having regard to the prevailing market conditions expects to receive on the sale of goods or software in the overseas market, is received in proper time and without delay, by general or
special order, direct from time to time that in respect of export of goods or software to any
destination or any class of export transactions or any class of goods or software or class of
exporters, the exporter shall, prior to the export, comply with the conditions as may be specified
in the order, namely.

(a) that the payment of the goods or software is covered by an irrevocable letter of credit or by
such other arrangement or document as may be indicated in the order

(b) that any declaration to be furnished to the specified authority shall be submitted to the
authorised dealer for its prior approval, which may, having regard to the circumstances, be
given or withheld or may be given subject to such conditions as may be specified by the Reserve
Bank by directions issued from time to time.

Project Exports

Where an export of goods or services is proposed to be made on deferred payment terms or in
execution of a turnkey project or a civil construction contract, the exporter shall, before entering
into any such export arrangement, submit the proposal for prior approval of the approving
authority, which shall consider the proposal in accordance with the guidelines issued by the
Reserve Bank of India from time to time.

Bharat Computer Hardware Ltd. received an advance payment for export of high-tech
hardware to a business concern in Singapore by entering into an export agreement
to supply the hardware within six months from the date of receipt of advance payment. The
shipment of hardware was made after 9 months and the documents covering the shipment were
routed through an authorized dealer through whom the advance payment was received.

(i) Examine whether Bharat Computer Hardware Ltd. has discharged its obligation in
accordance with the provisions of the Foreign Exchange Management Act, 1999?

(ii) Is it possible to receive advance payment where the export agreement provides for
shipment of goods within 15 months from the date of receipt of advance payment?

(iii) Also identify the maximum rate of interest payable on the advance payment under
the said Act.

Realisation and Repatriation of Foreign Exchange

Where any amount of foreign exchange is due or has accrued to any person resident in India,
such person shall take all reasonable steps to realize and repatriate to India such foreign
exchange within such period and in such manner as may be specified by the Reserve Bank.

Exemption from Repatriation

The provisions of sections 4 and 8 shall not apply to the following, namely:
a) possession of foreign currency or foreign coins by any person up to such limit as the
Reserve Bank may specify;
b) foreign currency account held or operated by such person or class of persons and the limit
up to which the Reserve Bank may specify;
c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing there on which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank;

d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising there from;

e) foreign exchange acquired from employment, business, trade, vocation, service, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify; and

f) such other receipts in foreign exchange as the Reserve Bank may specify.

Adjudication

✓ The Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) a reasonable opportunity of being heard for the purpose of imposing any penalty.

✓ Every Adjudicating Authority shall deal with the complaint under sub-section (2) as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint.

✓ Provided that where the complaint cannot be disposed of within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing of the complaint within the said period.

Penalties

If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication,

✓ be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable,

✓ or up to two lakh rupees where the amount is not quantifiable,

✓ and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

Where Person Acquired Foreign Exchange Assets Exceeding Limit

✓ If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India,

✓ of the aggregate value exceeding the threshold prescribed,

✓ he shall be liable to a penalty up to three times the sum involved in such contravention and
✓ **confiscation** of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property.

**Additional Penalty**

he shall be, in addition to the penalty imposed above, punishable with imprisonment for a term which may extend to five years and with fine.

If the Adjudicating Authority, in a proceeding above deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.

**Other Direction by Adjudicating Authority**

Any Adjudicating Authority adjudging any contravention may, if he thinks fit in addition to any penalty direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

"property" in respect of which contravention has taken place, shall include—

✓ deposits in a bank, where the said property is converted into such deposits;
✓ Indian currency, where the said property is converted into that currency; and
✓ any other property which has resulted out of the conversion of that property.

**Inquiry and Adjudication**

✓ **No Adjudicating Authority shall hold an enquiry** under sub-section (1) **except upon a complaint in writing made by any officer** authorised by a general or special order by the Central Government.

✓ Authority shall issue show cause Notice giving 10 days time to accused to reply.

✓ The said person may appear either in person or take the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the Adjudicating Authority.

✓ Authority shall give opportunity to person to produce such documents or evidence as he may consider relevant and necessary. In holding inquiry, if any person neglects or refuses to appear for hearing, Adjudication may be proceeded ex-parte also.

✓ Every Adjudicating Authority shall deal with the complaint under sub-section (2) as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint

✓ Where the complaint cannot be disposed of within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing of the complaint within the said period.

**Imposition Of Penalty**
FEMA ACT, 1999

Adjudicating Authority may impose penalty as it thinks fit if satisfied of contravention and the order shall also specify brief reasons for such decisions which will be signed and dated. A copy of order shall be supplied free of charge to person against whom order is made. Upon the conclusion of the inquiry, the Adjudicating Authority may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest.

No order for the arrest and detention in civil prison of a defaulter shall be made unless the Adjudicating Authority has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Adjudicating Authority, for reasons in writing, is satisfied

- that the defaulter, with the object or effect of obstructing the recovery of penalty, has after the issue of notice by the Adjudicating Authority, dishonestly transferred, concealed, or removed any part
- that the defaulter has, or has had since the issuing of notice by the Adjudicating Authority, the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.

if any person fails to make full payment of the penalty imposed on him under section 13 within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he shall be liable to civil imprisonment under this section.

**Imprisonment**

- If penalty amount exceeds 1 crore, imprisonment may extend to 3 years.
- In other cases, it may extend to 6 months.

**Recovery of Penalty**

- The Adjudicating Authority may, by order in writing, authorise an officer of Enforcement not below the rank of Assistant Director to recover any arrears of penalty from any person who fails to make full payment of penalty imposed on him under section 13 within the period of ninety days from the date on which the notice for payment of such penalty is served on him.

- The officer shall exercise all the like powers which are conferred on the income-tax authority in relation to recovery of tax under the Income-tax Act, 1961 and the procedure laid down under the Second Schedule to the said Act shall mutatis mutandis apply in relation to recovery of arrears of penalty under this Act.

**Compounding of Offences**

- Persons authorized by Central Government under section 15 i.e. classes of officers of the Enforcement Directorate and classes of officers of the RBI can act as Compounding Authority.

- Any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and Officers of the Reserve Bank as may be
authorised in this behalf by the Central Government in such manner as may be prescribed.

✓ Where a contravention has been compounded under sub-section (1), no proceeding or further proceeding as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.

Foreign Exchange (Compounding Proceedings) Rules 2000

Compounding Not Permissible

✓ No contravention shall be compounded if an appeal has been filed by the applicant.
✓ Nothing shall apply to a contravention committed by any person within a period of three years from the date on which a similar contravention committed by him was compounded under these rules.
✓ Any second or subsequent contravention committed after the expiry of a period of three years from the date on which the contravention was previously compounded shall be deemed to be a first contravention.

Time limit

Sum for which contravention is compounded shall be paid within 15 days and if applicant fails to pay the fee, it will be deemed that no application for compounding had ever been made by applicant and adjudication will restart.

Appeal to Special Director (Appeals)

The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction

Who Can Prefer Appeal?

✓ Any person aggrieved by an order made by-
✓ the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement,
✓ may prefer an appeal of the Special Director (Appeals).

Time Limit

Appeal shall be filed within 45 days from date of order of Adjudicating Authority. Delay may be condoned if sufficient cause is shown.

Order
On receipt of an appeal, the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit, confirming, modifying or setting aside the order appealed against.

Appellate Tribunal

The Appellate Tribunal constituted under sub-section(1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act.

Appeal to Appellate Tribunal

Who Can Prefer Appeal?

- Any person aggrieved by an order made by-
  - the Adjudicating Authority, other than Assistant Director of Enforcement or a Deputy Director of Enforcement,
  - Special Director (Appeals)
  - may prefer an appeal of the Special Director (Appeals).

Time Limit

Appeal shall be filed within 45 days from date of order of Adjudicating Authority or special director (appeals). Delay may be condoned if sufficient cause is shown.

Deposit of Penalty

- Any person appealing against the order of the Adjudicating Authority or the Special Director (Appeals) levying any penalty, shall while filing the appeal, deposit the amount of such penalty with such authority as may be notified by the Central Government.
- Appellate Tribunal may dispense with such deposit subject to such conditions.

Order

- On receipt of an appeal, the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit, confirming, modifying or setting aside the order appealed against.
- Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Special Director (Appeals), as the case may be.
- The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal.
Appeal to High Court

✓ Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such order.

✓ Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain

Mr. Bandha, a software Engineer of Indian Origin took employment in USA. He is a resident of USA for a long time. He desires

(i) To acquire a farm house in Munar (Kerala)
(ii) To make investment in KLJ (Nidhi) Ltd., registered as Nidhi Company.
(iii) To make investment in Rose Real Estate Ltd. an Indian Company formed for the development of township.

Mr. Unsatisfactory, brother of Mr. Bandha residing at Chennai is aggrieved by an order made by Appellate Tribunal established under Foreign Exchange Management Act, 1999 desires to file further appeal. With references to the provisions of Foreign Exchange Management Act, 1999 analyse whether there are any restrictions in respect of the transactions desired by Mr. Bandha. Also determine the appeal procedure to Mr. Unsatisfactory on the order of Appellate Tribunal under the said Act.

Powers of Authority

The Appellate Tribunal and the Special Director (Appeals) shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:--
(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavits;
(d) requisitioning any public record or document or copy of such record or document from any office;
(e) issuing commissions for the examination of witnesses or documents;
(f) reviewing its decisions;
(g) dismissing a representation of default or deciding it ex parte;
(h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
(i) any other matter which may be prescribed by the Central Government.

Power to Have Own Procedure

CA. SHIVANGI AGRAWAL
The Appellate Tribunal and the Special Director (Appeals) shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and shall have powers to regulate its own procedure.

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating Authority or the Appellate Tribunal or the Special Director (Appeals) is empowered by or under this Act to determine. [Section 34]

Directorate of Enforcement

The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, for the purposes of this Act.

Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act.

Power of Search

The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13.

Presumption of Documents

Where any document—

is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law; or

has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed) in the course of investigation of any contravention under this Act alleged to have been committed by any person,

and such document is tendered in any proceeding under this Act in evidence against him, or against him and any other person who is proceeded against jointly with him, the court or the Adjudicating Authority, as the case may be, shall—

presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person’s handwriting, and in the case or a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

also presume, the truth of the contents of such document.
If the Central Government is satisfied that circumstances have arisen rendering it necessary that any permission granted or restriction imposed by this Act should cease to be granted or imposed, or if it considers necessary or expedient so to do in public interest, the Central Government may, by notification, suspend or relax to such extent either indefinitely or for such period as may be notified, the operation of all or any of the provisions of this Act.

Such suspension or relaxation may, at any time while this Act remains in force, be removed by the Central Government by notification.

Every notification issued under this section shall be laid, as soon as may be after it is issued, before each House of Parliament.

Contravention by Companies

Where contravention is by a company, every person who, at the time when the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, and shall be liable to be proceeded against and punished accordingly.

Nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention.

Contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Miscellaneous

Central Government may, from time to time, give to the Reserve Bank such general or special directions as it thinks fit, and the Reserve Bank shall, in the discharge of its functions under this Act, comply with any such directions. [Section 41]

Any right, obligation, liability, proceeding or appeal arising in relation to the provisions of section 13 shall not abate by reason of death or insolvency of the person liable under that section and upon such death or insolvency such rights and obligations shall devolve on the legal representative of such person [Section 43]

External Commercial Borrowings

External Commercial Borrowings are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc.
Eligible Borrowers

For FCY Denominated ECB

✓ All entities eligible to receive FDI.
  Further, the following entities are also eligible to raise ECB:
  ✓ Port Trusts;
  ✓ Units in SEZ;
  ✓ SIDBI; and
  ✓ EXIM Bank of India.

For INR Denominated ECB

✓ All entities eligible to raise FCY ECB; and
✓ Registered entities engaged in microfinance activities, viz.,
✓ registered Not for Profit companies,
✓ registered societies/trusts/cooperatives and
✓ Non-Government Organisations.

Recognised Lenders

The lender should be resident of FATF or IOSCO compliant country, including on transfer of ECB.

However,
- ✓ Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders;
- ✓ Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad; and
- ✓ Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for FCY ECB (except FCCBs and FCEBs).

Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.

Minimum Average Maturity Period

MAMP for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:

<table>
<thead>
<tr>
<th>Category</th>
<th>MAMP</th>
</tr>
</thead>
<tbody>
<tr>
<td>ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.</td>
<td>1 year</td>
</tr>
<tr>
<td>ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans</td>
<td>5 years</td>
</tr>
<tr>
<td>ECB raised for (i) working capital purposes or general corporate purposes</td>
<td>10 Years</td>
</tr>
<tr>
<td>(ii) on-lending by NBFCs for working capital purposes or general corporate purposes</td>
<td></td>
</tr>
<tr>
<td>ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose</td>
<td>7 years</td>
</tr>
<tr>
<td>ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose</td>
<td>10 Years</td>
</tr>
</tbody>
</table>

All-in-cost ceiling per annum: Benchmark rate plus 450 bps spread.
Other Costs: Prepayment charge / Penal interest, if any, for default or breach of covenants, should not be more than 2 per cent over and above the contracted rate of interest on the outstanding principal amount and will be outside the all-in-cost ceiling.

End-Uses (Negative List)

The negative list, for which the ECB proceeds cannot be utilised, would include the following:

a) Real estate activities.
b) Investment in capital market.
c) Equity investment.
d) Working capital purposes, except in case of ECB mentioned above.
e) General corporate purposes, except in case of ECB mentioned above.
f) Repayment of Rupee loans, except in case of ECB mentioned above.
g) On-lending to entities for the above activities, except in case of ECB raised by NBFCs as given at above.

Exchange Rate

- Change of currency of FCY ECB into INR ECB can be at the exchange rate prevailing on the date of the agreement for such change between the parties concerned or at an exchange rate, which is less than the rate prevailing on the date of the agreement, if consented to by the ECB lender.
- For conversion to Rupee, the exchange rate shall be the rate prevailing on the date of settlement.

Hedging Provision

The entities raising ECB are required to follow the guidelines for hedging issued, if any, by the concerned sectoral or prudential regulator in respect of foreign currency exposure. Infrastructure space companies shall have a Board approved risk management policy. Further, such companies are required to mandatorily hedge 70 per cent of their ECB exposure in case the average maturity of the ECB is less than 5 years. The designated AD Category-I bank shall verify that 70 per cent hedging requirement is complied with during the currency of the ECB and report the position to RBI through Form ECB.

Operational Aspects to be ensured

- Coverage
  The ECB borrower will be required to cover the principal as well as the coupon through financial hedges.

- Tenor and rollover
  A minimum tenor of one year for the financial hedge would be required with periodic rollover, duly ensuring that the exposure on account of ECB is not unhedged at any point during the currency of the ECB.

Change of Currency of Borrowing
✓ Change of currency of ECB from one freely convertible foreign currency to any other freely convertible foreign currency as well as to INR is freely permitted.
✓ Change of currency from INR to any freely convertible foreign currency is not permitted.

Limit and Leverage

✓ All eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year under the automatic route.
✓ In case of FCY denominated ECB raised from direct foreign equity holder, ECB liability-equity ratio for ECB raised under the automatic route cannot exceed 7:1.
✓ However, this ratio will not be applicable if the outstanding amount of all ECB, including the proposed one, is up to USD 5 million or its equivalent.
✓ Further, the borrowing entities will also be governed by the guidelines on debt equity ratio, issued, if any, by the sectoral or prudential regulator concerned.

Guarantee

Issuance of Guarantee, etc. by Indian banks and Financial Institutions:
Issuance of any type of guarantee by Indian banks, All India Financial Institutions and NBFCs relating to ECB is not permitted. Further, financial intermediaries (viz., Indian banks, All India Financial Institutions, or NBFCs) shall not invest in FCCBs/ FCEBs in any manner whatsoever.

Parking of ECB Proceeds

ECB proceeds are permitted to be parked abroad as well as domestically in the manner given below:

Parking of ECB Proceeds Abroad

ECB proceeds meant only for foreign currency expenditure can be parked abroad pending utilisation. Till utilisation, these funds can be invested in the following liquid assets
✓ deposits or Certificate of Deposit or other products offered by banks rated not less than AA (-) by Standard and Poor/Fitch IBCA or Aa3 by Moody’s;
✓ Treasury bills and other monetary instruments of one-year maturity having minimum rating as indicated above and
✓ deposits with foreign branches/subsidiaries of Indian banks abroad.

Parking of ECB Proceeds Domestically

ECB proceeds meant for Rupee expenditure should be repatriated immediately for credit to their Rupee accounts with AD Category I banks in India. ECB borrowers are also allowed to park ECB proceeds in term deposits with AD Category I banks in India for a maximum period of 12 months cumulatively. These term deposits should be kept in unencumbered position.

Procedure of Raising ECB
Reporting Requirements

Borrowings under ECB Framework are subject to following reporting requirements apart from any other specific reporting required under the framework:

**Loan Registration Number (LRN)**

- Any draw-down in respect of an ECB should happen only after obtaining the LRN from the Reserve Bank.
- To obtain the LRN, borrowers are required to submit duly certified Form ECB, which also contains terms and conditions of the ECB, in duplicate to the designated AD Category I bank.
- In turn, the AD Category I bank will forward one copy to the Director, Reserve Bank of India, Department of Statistics and Information Management, External Commercial Borrowings Division.
- Copies of loan agreement for raising ECB are not required to be submitted to the Reserve Bank.

**Changes in Terms and Conditions of ECB**

Changes in ECB parameters in consonance with the ECB norms, including reduced repayment by mutual agreement between the lender and borrower, should be reported to the DSIM through revised Form ECB at the earliest, in any case not later than 7 days from the changes effected. While submitting revised Form ECB the changes should be specifically mentioned in the communication.

**Monthly Reporting Of Actual Transactions**
The borrowers are required to report actual ECB transactions through Form ECB 2 Return through the AD Category I bank on monthly basis so as to reach DSIM within seven working days from the close of month to which it relates. Changes, if any, in ECB parameters should also be incorporated in Form ECB 2 Return.

**Late Submission Fee (LSF) for Delay in Reporting**

Any borrower, who is otherwise in compliance of ECB guidelines, can regularise the delay in reporting of drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB 2 returns, by payment of late submission fees as detailed in the following matrix.

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Type of Return /Form</th>
<th>Period of delay</th>
<th>Applicable LSF</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Form ECB 2</td>
<td>Up to 30 calendar days from due date of submission</td>
<td>INR 5,000</td>
</tr>
<tr>
<td>2</td>
<td>Form ECB 2/Form ECB</td>
<td>Up to three years from due date of submission/date of drawdown</td>
<td>INR 50,000 per year</td>
</tr>
<tr>
<td>3</td>
<td>Form ECB 2/Form ECB</td>
<td>Beyond three years from due date of submission/date of drawdown</td>
<td>INR 100,000 per year</td>
</tr>
</tbody>
</table>

The borrower, through its AD bank, may pay the LSF by way of demand draft in favour of “Reserve Bank of India” or any other mode specified by the Reserve Bank. Such payment should be accompanied with the requisite return(s). Form ECB and Form ECB 2 returns reporting contraventions will be treated separately. Non-payment of LSF will be treated as contravention of reporting provision and shall be subject to compounding or adjudication as provided in FEMA 1999 or regulations/rules framed thereunder.

**Standard Operating Procedure (SOP) for Untraceable Entities**

The following SOP has to be followed by designated AD Category-I banks in case of untraceable entities who are found to be in contravention of reporting provisions for ECB by failing to submit prescribed return(s) under the ECB framework, either physically or electronically, for past eight quarters or more.

**Definition**

Any borrower who has raised ECB will be treated as ‘untraceable entity’, if entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/responsive/reply in negative over email/letters/phone for a period of not less than two quarters with documented communication/ reminders numbering 6 or more and it fulfills both of the following conditions:

✓ Entity not found to be operative at the registered office address as per records available with the AD Bank or not found to be operative during the visit by the officials of the AD Bank or any other agencies authorized by the AD bank for the purpose;

✓ Entities have not submitted Statutory Auditor’s Certificate for last two years or more;
Action

The followings actions are to be undertaken in respect of ‘untraceable entities’:

✓ File Revised Form ECB, if required, and last Form ECB 2 Return without certification from company with ‘UNTRACEABLE ENTITY’ written in bold on top. The outstanding amount will be treated as written-off from external debt liability of the country but may be retained by the lender in its books for recovery through judicial/ non-judicial means;
✓ No fresh ECB application by the entity should be examined/processed by the AD bank;
✓ Directorate of Enforcement should be informed whenever any entity is designated ‘UNTRACEABLE ENTITY’; and
✓ No inward remittance or debt servicing will be permitted under auto route.

Powers Delegated to AD Category I Banks to Deal with ECB cases

The designated AD Category I banks can approve any requests from the borrowers for changes in respect of ECB, except for FCCBs/FCEBs, duly ensuring that the changed conditions, including change in name of borrower/lender, transfer of ECB and any other parameters, comply with extant ECB norms and are with the consent of lender(s). Further, the following can also be undertaken under the automatic route.

Change of the AD Category I bank:

AD Category I bank can be changed subject to obtaining no objection certificate from the existing AD Category I bank.

Cancellation of LRN

The designated AD Category I banks may directly approach DSIM for cancellation of LRN for ECB contracted, subject to ensuring that no draw down against the said LRN has taken place and the monthly ECB-2 returns till date in respect of the allotted LRN have been submitted to DSIM.

Refinancing of Existing ECB

Refinancing of existing ECB by fresh ECB provided the outstanding maturity of the original borrowing (weighted outstanding maturity in case of multiple borrowings) is not reduced and all –in cost of fresh ECB is lower than the all-in-cost (weighted average cost in case of multiple borrowings) of existing ECB. Further, refinancing of ECB raised under the previous ECB frameworks may also be permitted, subject to additionally ensuring that the borrower is eligible to raise ECB under the extant framework.

Raising of fresh ECB to part refinance the existing ECB is also permitted subject to same conditions.

Indian banks are permitted to participate in refinancing of existing ECB, only for highly rated corporates (AAA) and for Maharatna/Navratna public sector undertakings.

Conversion of ECB into Equity
Conversion of ECB, including those which are matured but unpaid, into equity is permitted subject to the following conditions:

(i) The activity of the borrowing company is covered under the automatic route for FDI or Government approval is received, wherever applicable, for foreign equity participation as per extant FDI policy.

(ii) The conversion, which should be with the lender's consent and without any additional cost, should not result in contravention of eligibility and breach of applicable sector cap on the foreign equity holding under FDI policy.

(iii) Applicable pricing guidelines for shares are complied with.

(iv) In case of partial or full conversion of ECB into equity, the reporting to the Reserve Bank will be as under:

- For partial conversion, the converted portion is to be reported in Form FC-GPR prescribed for reporting of FDI flows, while monthly reporting to DSIM in Form ECB 2 Return will be with suitable remarks, viz., "ECB partially converted to equity".
- For full conversion, the entire portion is to be reported in Form FCGPR, while reporting to DSIM in Form ECB 2 Return should be done with remarks "ECB fully converted to equity". Subsequent filing of Form ECB 2 Return is not required.
- For conversion of ECB into equity in phases, reporting through Form FC-GPR and Form ECB 2 Return will also be in phases.

(v) If the borrower concerned has availed of other credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, the applicable prudential guidelines issued by the Department of Banking Regulation of Reserve Bank, including guidelines on restructuring are complied with.

(vi) Consent of other lenders, if any, to the same borrower is available or at least information regarding conversions is exchanged with other lenders of the borrower.

(vii) For conversion of ECB dues into equity, the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion or any lesser rate can be applied with a mutual agreement with the ECB lender. It may be noted that the fair value of the equity shares to be issued shall be worked out with reference to the date of conversion only.

Security for Raising ECB

AD Category I banks are permitted to allow creation/cancellation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees in favour of overseas lender/security trustee, to secure the ECB to be raised/raised by the borrower, subject to satisfying themselves that:

(i) the underlying ECB is in compliance with the extant ECB guidelines,

(ii) there exists a security clause in the Loan Agreement requiring the ECB borrower to create/cancel charge, in favour of overseas lender/security trustee, on immovable assets/movable assets/financial securities/issuance of corporate and/or personal guarantee, and

(iii) No objection certificate, as applicable, from the existing lenders in India has been obtained in case of creation of charge.

Once the aforesaid stipulations are met, the AD Category I bank may permit creation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees, during the currency of the ECB with security co-terminating with underlying ECB, subject to the following:
Creation of Charge on Immovable Assets

The arrangement shall be subject to the following:
(a) Such security shall be subject to provisions contained in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2017, as amended from time to time.
(b) The permission should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender/security trustee.
(c) In the event of enforcement / invocation of the charge, the immovable asset/property will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB.

Creation of Charge on Movable Assets

In the event of enforcement / invocation of the charge, the claim of the lender, whether the lender takes over the movable asset or otherwise, will be restricted to the outstanding claim country subject to getting 'No Objection Certificate' from domestic lender/s, if any.

Creation of Charge over Financial Securities

The arrangements may be permitted subject to the following:
(a) Pledge of shares of the borrowing company held by the promoters as well as in domestic associate companies of the borrower is permitted. Pledge on other financial securities, viz. bonds and debentures, Government Securities, Government Savings Certificates, deposit receipts of securities and units of the Unit Trust of India or of any mutual funds, standing in the name of ECB borrower/promoter, is also permitted.
(b) In addition, security interest over all current and future loan assets and all current assets including cash and cash equivalents, including Rupee accounts of the borrower with ADs in India, standing in the name of the borrower/promoter, can be used as security for ECB. The Rupee accounts of the borrower/promoter can also be in the form of escrow arrangement or debt service reserve account.
(c) In case of invocation of pledge, transfer of financial securities shall be in accordance with the extant FDI/FII policy including provisions relating to sectoral cap and pricing as applicable read with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, as amended from time to time.

Additional Requirements

While exercising the delegated powers, the AD Category I banks should ensure that:
✓ The changes permitted are in conformity with the applicable ceilings / guidelines and the ECB continues to be in compliance with applicable guidelines. It should also be ensured that if the ECB borrower has availed of credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, any extension of tenure of ECB (whether matured or not) shall be subject to applicable prudential guidelines issued by Department of Banking Regulation of Reserve Bank including guidelines on restructuring.
✓ The changes in the terms and conditions of ECB allowed by the ADs under the powers delegated and / or changes approved by the Reserve Bank should be reported to the DSIM. Further, these changes should also get reflected in the Form ECB 2 returns appropriately.
Special Dispensations Under The ECB Framework

**ECB Facility for Oil Marketing Companies**

Notwithstanding the provisions contained in paragraph 2.1 (viii), 2.1 (x) and 2.2 above, Public Sector Oil Marketing Companies (OMCs) can raise ECB for working capital purposes with minimum average maturity period of 3 years from all recognised lenders under the automatic route without mandatory hedging and individual limit requirements. The overall ceiling for such ECB shall be USD 10 billion or equivalent. However, OMCs should have a Board approved forex mark to market procedure and prudent risk management policy, for such ECB. All other provisions under the ECB framework will be applicable to such ECB.

**ECB Facility for Startups**

AD Category-I banks are permitted to allow Startups to raise ECB under the automatic route as per the following framework:

- **Eligibility**: An entity recognised as a Startup by the Central Government as on date of raising ECB.
- **Maturity**: Minimum average maturity period will be 3 years.
- **Recognised lender**: Lender / investor shall be a resident of a FATF compliant country. However, foreign branches/subsidiaries of Indian banks and overseas entity in which Indian entity has made overseas direct investment as per the extant Overseas Direct Investment Policy will not be considered as recognized lenders under this framework.
- **Forms**: The borrowing can be in form of loans or non-convertible, optionally convertible or partially convertible preference shares.
- **Currency**: The borrowing should be denominated in any freely convertible currency or in Indian Rupees (INR) or a combination thereof. In case of borrowing in INR, the nonresident lender, should mobilise INR through swaps/outright sale undertaken through an AD Category-I bank in India.
- **Amount**: The borrowing per Startup will be limited to USD 3 million or equivalent per financial year either in INR or any convertible foreign currency or a combination of both.
- **All-in-cost**: Shall be mutually agreed between the borrower and the lender.
- **End uses**: For any expenditure in connection with the business of the borrower.
- **Conversion into equity**: Conversion into equity is freely permitted subject to Regulations applicable for foreign investment in Startups.
- **Security**: The choice of security to be provided to the lender is left to the borrowing entity. Security can be in the nature of movable, immovable, intangible assets (including patents, intellectual property rights), financial securities, etc. and shall comply with foreign direct investment / foreign portfolio investment / or any other norms applicable for foreign lenders / entities holding such securities. Further, issuance of corporate or personal guarantee is allowed. Guarantee issued by a nonresident(s) is allowed only if such parties qualify as lender under ECB for Startups. However, issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by Indian banks, all India Financial Institutions and NBFCs is not permitted.
Hedging: The overseas lender, in case of INR denominated ECB, will be eligible to hedge its INR exposure through permitted derivative products with AD Category – I banks in India. The lender can also access the domestic market through branches/subsidiaries of Indian banks abroad or branches of foreign bank with Indian presence on a back to back basis.

Note: Startups raising ECB in foreign currency, whether having natural hedge or not, are exposed to currency risk due to exchange rate movements and hence are advised to ensure that they have an appropriate risk management policy to manage potential risk arising out of ECB.

Conversion rate: In case of borrowing in INR, the foreign currency – INR conversion will be at the market rate as on the date of agreement.

Other Provisions: Other provisions like parking of ECB proceeds, reporting arrangements, powers delegated to AD banks, borrowing by entities under investigation, conversion of ECB into equity will be as included in the ECB framework. However, provisions on leverage ratio and ECB liability: Equity ratio will not be applicable. Further, the Start-ups as defined above as well as other start-ups which do not comply with the aforesaid definition but are eligible to receive FDI, can also raise ECB under the general ECB route/framework.

IMPORT OF GOODS AND SERVICES

Import of Goods and Services into India is being allowed in terms of Section 5 of the Foreign Exchange Management Act 1999, read with Foreign Exchange Management (Current Account Transaction) Rules, 2000.

As per the section I of the Master Direction 17, Import trade is regulated by the Directorate General of Foreign Trade (DGFT) under the Ministry of Commerce & Industry, Department of Commerce, Government of India. Authorised Dealer Category – I banks should ensure that the imports into India are in conformity with the Foreign Trade Policy in force and Foreign Exchange Management (Current Account Transactions) Rules, 2000 and the Directions issued by Reserve Bank under Foreign Exchange Management Act, 1999 from time to time.

General Guidelines for Imports

Rules and regulations to be followed by the Authorised Dealer (AD) from the foreign exchange angle while undertaking import payment transactions on behalf of their clients are given in this para of the Section II of the Master direction. Where specific regulations do not exist, AD may be governed by normal trade practices and it may particularly adhere to "Know Your Customer" (KYC) guidelines in all their dealings.

Remittances for Import Payments

AD may allow remittance for making payments for imports into India, after ensuring that all the requisite details are made available by the importer and the remittance is for bona fide trade transactions as per applicable laws in force.

Obligation of Purchaser of Foreign Exchange
Following are the obligation of the purchaser to be complied with:

**Utilization Of Acquired Foreign Exchange For The Said Purpose**

In terms of Section 10(6) of the Foreign Exchange Management Act, 1999 (FEMA), any person acquiring foreign exchange is permitted to use it either for the purpose mentioned in the declaration made by him to an Authorised or for any other purpose for which acquisition of foreign exchange is permissible under the said Act or Rules or Regulations framed there under.

**Evidence of Import**

Where foreign exchange acquired has been utilised for import of goods into India, the AD should ensure that the importer furnishes evidence of import viz., as in IDPMS, Postal Appraisal Form or Customs Assessment Certificate, etc., and satisfy himself that goods equivalent to the value of remittance have been imported. AD should ensure that all import remittances outstanding on the notified date of IDPMS are uploaded in IDPMS (Import Data Processing and Monitoring System).

**Mode of Payment**

A person resident in India may make payment for import of goods in foreign exchange through:

- An international card held by him/in rupees from international credit card/ debit card through the credit/debit card servicing bank in India against the charge slip signed by the importer, or
- As prescribed by Reserve Bank from time to time, provided that the transaction is in conformity with the extant provisions and the import is in conformity with the Foreign Trade Policy in force.

**Other Mode**

Any person resident in India may also make payment as under:

- In rupees towards meeting expenses on account of boarding, lodging and services related thereto or travel to and from and within India of a person resident outside India who is on a visit to India;
- By means of a crossed cheque or a draft as consideration for purchase of gold or silver in any form imported by such person in accordance with the terms and conditions imposed under any order issued by the Central Government under the Foreign Trade (Development and Regulations) Act, 1992 or under any other law, rules or regulations for the time being in force;
- A company or resident in India may make payment in rupees to its non-whole time director who is resident outside India and is on a visit to India for the company’s work and is entitled to payment of sitting fees or commission or remuneration, and travel expenses to and from and within India, in accordance with the provisions contained in the company’s Memorandum of Association or Articles of Association or in any agreement entered into it or in any resolution passed by the company in general meeting or by its Board of Directors, provided the requirement of any law, rules, regulations, directions applicable for making such payments are duly complied with.

**Time Limit for Settlement of Import Payments**

CA. SHIVANGI AGRAWAL
**Time Limit for Normal Imports**

✓ In terms of the extant regulations, remittances against imports should be completed not later than six months from the date of shipment, except in cases where amounts are withheld towards guarantee of performance, etc.

✓ AD may permit settlement of import dues delayed due to disputes, financial difficulties, etc. However, interest if any, on such delayed payments, usance bills (a bill of exchange which allows the drawee to have period of credit or term) or overdue interest is payable only for a period of up to three years from the date of shipment at the rate prescribed for trade credit from time to time.

**Time Limit for Deferred Payment Arrangements**

Deferred payment arrangements (including suppliers’ and buyers’ credit) upto five years, are treated as trade credits for which the procedural guidelines as laid down in the Master Circular for External Commercial Borrowings and Trade Credits may be followed.

**Extension of Time**

**Limit of Extension**

AD can consider granting extension of time for settlement of import dues up to a period of six months at a time (maximum up to the period of three years) irrespective of the invoice value for delays on account of disputes about quantity or quality or non-fulfilment of terms of contract; financial difficulties and cases where importer has filed suit against the seller. In cases where sector specific guidelines have been issued by Reserve Bank of India for extension of time (i.e. rough, cut and polished diamonds), the same will be applicable.

**Circumstances**

While granting extension of time, AD must ensure that:

✓ The import transactions covered by the invoices are not under investigation by Directorate of Enforcement / Central Bureau of Investigation or other investigating agencies;

✓ While considering extension beyond one year from the date of remittance, the total outstanding of the importer does not exceed USD one million or 10 per cent of the average import remittances during the preceding two financial years, whichever is lower; and

✓ Where extension of time has been granted by the AD, the date up to which extension has been granted may be indicated in the ‘Remarks’ column.

**In Exceptional Cases**

Cases not covered by the above instructions / beyond the above limits, may be referred to the concerned Regional Office of Reserve Bank of India.
Note of the Extension

The above extension period shall be reported in IDPMS as per message "Bill of Entry Extension" and the date up to which extension is granted will be indicated in “Extension Date” column.

Import of Foreign Exchange / Indian Rupees

- Except as otherwise provided in the Regulations, no person shall, without the general or special permission of the Reserve Bank, import or bring into India, any foreign currency. Import of foreign currency, including cheques, is governed by Section 6(3)(g) of the Foreign Exchange Management Act, 1999, and the Foreign Exchange Management (Export and Import of Currency) Regulations 2000.
- Reserve Bank may allow a person to bring into India currency notes of Government of India and/or of Reserve Bank subject to such terms and conditions as the Reserve Bank may stipulate.

Import of Foreign Exchange into India

A person may-

- Send into India, without limit, foreign exchange in any form (other than currency notes, bank notes and travellers cheques);
- Bring into India from any place outside India, without limit, foreign exchange (other than unissued notes), subject to the condition that such person makes, on arrival in India, a declaration to the Customs Authorities at the Airport in the Currency Declaration Form (CDF) annexed to these Regulations; Provided further that it shall not be necessary to make such declaration where the aggregate value of the foreign exchange in the form of currency notes, bank notes or travellers cheques brought in by such person at any one time does not exceed USD 10,000 (US Dollars ten thousand) or its equivalent and/or the aggregate value of foreign currency notes (cash portion) alone brought in by such person at any one time does not exceed USD 5,000 (US Dollars five thousand) or its equivalent.

Import of Indian Currency and Currency Notes

- Any person resident in India who had gone out of India on a temporary visit, may bring into India at the time of his return from any place outside India (other than from Nepal and Bhutan), currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs. 25,000 (Rupees twenty five thousand only).
- A person may bring into India from Nepal or Bhutan, currency notes of Government of India and Reserve Bank of India for any amount in denominations up to Rs.100/-.

Issue of Guarantees by an Authorised Dealer

- An authorised dealer may give a guarantee in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India, as an importer, in respect of import on deferred payment terms in accordance with the approval by the Reserve Bank of India for import on such terms.
An authorised dealer may give guarantee, Letter of Undertaking or Letter of Comfort in respect of any debt, obligation or other liability incurred by a person resident in India and owned to a person resident outside India (being an overseas supplier of goods, bank or a financial institution), for import of goods, as permitted under the Foreign Trade Policy announced by Government of India from time to time and subject to such terms and conditions as may be specified by Reserve Bank of India from time to time.

An authorised dealer may, in the ordinary course of his business, give a guarantee in favour of a non-resident service provider, on behalf of a resident customer who is a service importer, subject to such terms and conditions as stipulated by Reserve Bank of India from time to time.

Limit of Providing Guarantee

<table>
<thead>
<tr>
<th>Service importer</th>
<th>Amount of guarantee</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Where a service importer is other than a Public Sector Company or a Department/Undertaking of the Government of India/State Government</td>
<td>• no guarantee for an amount exceeding USD 500,000 or its equivalent shall be issued</td>
</tr>
<tr>
<td>• Where the service importer is a Public Sector Company or a Department/Undertaking of the Government of India/State Government</td>
<td>• no guarantee for an amount exceeding USD 100,000 or its equivalent shall be issued without the prior approval of the Ministry of Finance, Government of India.</td>
</tr>
</tbody>
</table>

An authorised dealer may, subject to the directions issued by the Reserve Bank of India in this behalf, permit a person resident in India to issue corporate guarantee in favour of an overseas lessor for financing import through operating lease effected in conformity with the Foreign Trade Policy in force and under the provisions of the Foreign exchange Management (Current Account Transactions) Rules, 2000, and the Directions issued by Reserve Bank of India under Foreign Exchange Management Act, 1999 from time to time.

Overseas Direct Investment

Overseas Direct Investments by Resident Individuals

Overseas investments (or financial commitment) in

- Joint Ventures (JV) and
- Wholly Owned Subsidiaries (WOS)

have been recognised as important avenues for promoting global business by Indian entrepreneurs.

Relevant Statutory Provision
Section 6 of the Foreign Exchange Management Act, 1999 provides powers to the Reserve Bank to specify, in consultation with the Government of India the classes of permissible capital account transactions and limits up to which foreign exchange is admissible for such transactions. Section 6(3) of the aforesaid Act provides powers to the Reserve Bank to prohibit, restrict or regulate various transactions referred to in the sub-clauses of that sub-section, by making Regulations.

In exercise of the above powers conferred under the Act, the Reserve issued Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 which seeks to regulate acquisition and transfer of a foreign security by a person resident in India i.e. investment (or financial commitment) by Indian entities in overseas joint ventures and wholly owned subsidiaries as also investment by a person resident in India in shares and securities issued outside India.

### Relevant Definitions

<table>
<thead>
<tr>
<th>“Direct Investment Outside India”</th>
</tr>
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<tbody>
<tr>
<td>means investments, either under the Automatic Route or the Approval Route, by way of: (i) contribution to the capital or subscription to the Memorandum of a foreign entity, or (ii) purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, signifying a long-term interest in the foreign entity (JV or WOS). However, it does not include Portfolio investment. A resident individual may make overseas direct investment in the equity shares and compulsorily convertible preference shares of a Joint Venture (JV) or Wholly Owned Subsidiary (WOS) outside India. However, the limit of overseas direct investment by the resident individual is prescribed by RBI.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Portfolio Investments</th>
</tr>
</thead>
<tbody>
<tr>
<td>are investments in the form of a group (portfolio) of assets, including transactions in equity, securities, such as common stock, and debt securities, such as banknotes, bonds, and debentures</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>&quot;Financial Commitment&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>means the amount of direct investment by way of contribution to equity, loan and 100 per cent of the amount of guarantees and 50 per cent of the performance guarantees issued by an Indian Party to or on behalf of its overseas Joint Venture Company or Wholly Owned Subsidiary.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>'Joint Venture'</th>
</tr>
</thead>
<tbody>
<tr>
<td>means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country in which the Indian Party makes a direct investment.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>&quot;Wholly Owned Subsidiary (Wos)&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country, whose entire capital is held by the Indian Party.</td>
</tr>
</tbody>
</table>
"Indian Party"

means a company incorporated in India or a body created under an Act of Parliament or a partnership firm registered under the Indian Partnership Act, 1932, or a Limited Liability Partnership (LLP), registered under the Limited Liability Partnership Act, 2008, making investment in a Joint Venture or Wholly Owned Subsidiary abroad, and includes any other entity in India as may be notified by the Reserve Bank. When more than one such company, body or entity make an investment in the foreign entity, all such companies or bodies or entities shall together constitute the "Indian Party".

"Host Country"

 means the country in which the foreign entity receiving the direct investment from an Indian Party is registered or incorporated.

Mode of Direct Investment Outside India

Automatic Route for Direct Investment or Financial Commitment Outside India

As per the Regulation 6 of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004, an Indian Party has been permitted to make investment/undertake financial commitment in overseas Joint Ventures (JV)/Wholly Owned Subsidiaries (WOS), as per the ceiling prescribed by the Reserve Bank. With effect from July 03, 2014, It has been decided that

✓ any financial commitment (FC)
✓ exceeding USD 1 (one) billion (or its equivalent) in a financial year
✓ would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route [i.e., within 400% of the net worth (Paid up capital + Free Reserves) as per the last audited balance sheet].

Limit Permissible

The total financial commitment of the Indian Party in all the Joint Ventures/Wholly Owned Subsidiaries shall comprise of the following:

a) 100% of the amount of equity shares and/or Compulsorily Convertible Preference Shares (CCPS);

b) 100% of the amount of other preference shares;

c) 100% of the amount of loan;1.37

d) 100% of the amount of guarantee (other than performance guarantee) issued by the Indian Party;

e) 100% of the amount of bank guarantee issued by a resident bank on behalf of JV or WOS of the Indian Party provided the bank guarantee is backed by a counter guarantee/collateral by the Indian Party.
f) 50% of the amount of performance guarantee issued by the Indian Party provided that if the outflow on account of invocation of performance guarantee results in the breach of the limit of the financial commitment in force, prior permission of the Reserve Bank is to be obtained before executing remittance beyond the limit prescribed for the financial commitment.

Requirements for Investments / Financial Commitments

The criteria for overseas direct investment under the Automatic Route is as under:

✓ The Indian Party can invest up to the prescribed limit of its net worth (as per the last audited Balance Sheet) in JV / WOS for any bonafide activity permitted as per the law of the host country. The prescribed limit vis-a-vis the net worth will not be applicable where the investment is made out of balances held in the EEFC account of the Indian party or out of funds raised through ADRs/GDRs;

✓ The Indian Party is not on the Reserve Bank's exporters' caution list / list of defaulters to the banking system published / circulated by the Credit Information Bureau of India Ltd. (CIBIL) / RBI or any other credit information company as approved by the Reserve Bank or under investigation by the Directorate of Enforcement or any investigative agency or regulatory authority; and

✓ The Indian Party routes all the transactions relating to the investment in a JV/WOS through only one branch of an authorised dealer to be designated by the Indian Party.

Process

The Indian Party should approach an Authorized Dealer with an application in Form ODI and the prescribed enclosures / documents for effecting the remittances towards such investments. Investments (or financial commitment) in JV/WOS abroad by Indian Parties through the medium of a Special Purpose Vehicle (SPV) are also permitted under the Automatic Route if the Indian Party is not appearing in the Reserve Bank’s caution list or is under investigation by the Directorate of Enforcement or included in the list of defaulters to the banking system circulated by the Reserve Bank/any other Credit Information company as approved by the Reserve Bank.

Approval Route for Direct Investment or Financial Commitment Outside India

✓ Prior approval of the Reserve Bank would be required in all other cases of direct investment (or financial commitment) abroad.

✓ Reserve Bank would, inter alia, take into account the following factors while considering such applications:

- Prima facie viability of the JV / WOS outside India;
- Contribution to external trade and other benefits which will accrue to India through such investment (or financial commitment)
- Financial position and business track record of the Indian Party and the foreign entity and
- Expertise and experience of the Indian Party in the same or related line of activity as of the JV / WOS outside India.
Therefore, under the approval route (proposals not covered by the conditions under the automatic route) prior approval of the Reserve Bank would be required. For which a specific application in Form ODI with the documents prescribed therein is required to be made through the Authorized Dealer Category – I banks.

**Overseas Direct Investments by Resident Individuals**

With effect from August 05, 2013, a resident individual (single or in association with another resident individual or with an ‘Indian Party’ as defined in the Notification) satisfying the criteria as per Schedule V of the Notification, may make overseas direct investment in the equity shares and compulsorily convertible preference shares of a Joint Venture (JV) or Wholly Owned Subsidiary (WOS) outside India. The limit of overseas direct investment by the resident individual shall be within the overall limit prescribed by the Reserve Bank of India under the provisions of Liberalised Remittance Scheme, as prescribed by the Reserve Bank from time to time.

**Prohibitions on Direct Investment in Abroad by an Indian Party**

(a) Indian Parties are prohibited from making investment (or financial commitment) in foreign entity engaged in real estate (meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges) or banking business, without the prior approval of the Reserve Bank.

(b) An overseas entity, having direct or indirect equity participation by an Indian Party, shall not offer financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the Reserve Bank.

**General Permission**

General permission has been granted to persons residents in India for purchase / acquisition of securities in the following manner:

- out of the funds held in RFC account;
- as bonus shares on existing holding of foreign currency shares; and
- when not permanently resident in India, out of their foreign currency resources outside India.

General permission is also available to sell the shares so purchased or acquired.

**Multiple Choice Questions**

1. The Foreign Exchange Management Act came into force on --------.
   
   a. 1st May, 1999           b. 1st June, 1999
   c. 1st October, 1999       d. 1st June, 2000

2. The objective of the Act is to -------- and for promoting the orderly development and maintenance of foreign exchange market in India.
   
   a. Facilitating external trade and b. Promote the orderly development of

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<table>
<thead>
<tr>
<th>Payments</th>
<th>Foreign exchange market in India</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Promote the maintenance of foreign exchange market in India</td>
<td>d. All of these</td>
</tr>
</tbody>
</table>

3. Authorised person means ---------.

<table>
<thead>
<tr>
<th>a. An authorised dealer</th>
<th>b. Money changer</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Off-shore banking unit</td>
<td>d. All of these</td>
</tr>
</tbody>
</table>

4. A transaction shall be a capital account transaction if ---------.

<table>
<thead>
<tr>
<th>a. It alters the assets or liabilities in India of persons resident outside India</th>
<th>b. It alters the assets or liabilities outside India of persons resident in India</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Either (a) or (b)</td>
<td>d. None of these</td>
</tr>
</tbody>
</table>

5. ‘Current account transaction’ means a transaction 1. 

<table>
<thead>
<tr>
<th>a. Other than a capital account transaction</th>
<th>b. Which is permitted only after obtaining specific permission of RBI</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Both (a) and (b)</td>
<td>d. Which is not permitted under FEMA</td>
</tr>
</tbody>
</table>

6. ‘Currency’ includes 2.

<table>
<thead>
<tr>
<th>a. Currency notes, cheques, drafts, bills of exchange and promissory notes</th>
<th>b. Postal notes, postal orders, money orders, travellers’ cheques, letters of credit</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Such other instruments, as may be notified by the Reserve Bank</td>
<td>d. All of these</td>
</tr>
</tbody>
</table>

7. Remittances for living expenses of parents, spouse and children residing abroad is -----.

<table>
<thead>
<tr>
<th>a. A capital account transaction</th>
<th>b. A current account transaction</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Either (a) or (b)</td>
<td>d. None of these</td>
</tr>
</tbody>
</table>

8. ‘Repatriate to India’ means bringing into India the realised foreign statement and the holding of realised amount in an account with an authorised person in India 1.

<table>
<thead>
<tr>
<th>a. Without any limit</th>
<th>b. Upto the limit contained in the Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Upto the limit prescribed in the Rules</td>
<td>d. To the extent notified by the Reserve Bank</td>
</tr>
</tbody>
</table>

9. While determining as to whether a person is a resident in India or not, the period for which he has resided in India in the is to be considered.

<table>
<thead>
<tr>
<th>a. Current financial year</th>
<th>b. Current calendar year</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Preceding financial year</td>
<td>d. Preceding calendar year</td>
</tr>
</tbody>
</table>

10. No person shall deal in or transfer any foreign exchange or foreign security to any person not being 1.

<table>
<thead>
<tr>
<th>a. An authorised person</th>
<th>b. A person resident in India</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. A person resident outside India</td>
<td>d. All of these</td>
</tr>
</tbody>
</table>

CA. SHIVANGI AGRAWAL
## Answer to MCQs

<p>| | | | |</p>
<table>
<thead>
<tr>
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<tbody>
<tr>
<td>1</td>
<td>(d)</td>
<td>6</td>
<td>(d)</td>
</tr>
<tr>
<td>2</td>
<td>(d)</td>
<td>7</td>
<td>(b)</td>
</tr>
<tr>
<td>3</td>
<td>(d)</td>
<td>8</td>
<td>(d)</td>
</tr>
<tr>
<td>4</td>
<td>(c)</td>
<td>9</td>
<td>(c)</td>
</tr>
<tr>
<td>5</td>
<td>(a)</td>
<td>10</td>
<td>(a)</td>
</tr>
</tbody>
</table>
Basic Provisions

✓ The Foreign Contribution (Regulation) Act, 2010, is an Act to consolidate the law to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.
✓ Central Government hereby appointed the 1st day of May, 2011 as the date on which the provisions of the said Act came into force.
✓ Act is divided into 9 chapters with 54 sections.

Applicability of Act

As per Section 1(2) of FCRA, 2010, the provisions of the act shall apply to:
✓ Whole of India
✓ Citizens of India outside India; and
✓ Associate Branches or subsidiaries, outside India, of companies or bodies corporate, registered or incorporated in India.

Definitions
### Foreign Company [Section 2(1)(g)]

It means any company or association or body of individuals incorporated outside India and includes:

- (i) a foreign company within the meaning of section 591 of the Companies Act, 1956
- (ii) Company which is a subsidiary of a foreign company
- (iii) the registered office or principal place of business of a foreign company referred to in sub-clause (i) or company referred to in sub-clause (ii)
- (iv) a multi-national corporation.

### Foreign Contribution [Section 2(1)(h)]

It means the donation, delivery or transfer made by any foreign source,—

- (i) of any article, not being an article given to a person as a gift for his personal use, if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf; (This sum has been specified as Rs. 1,00,000/- currently)
- (ii) any currency, whether Indian or foreign
- (iii) of any security as defined in the Securities Contracts (Regulation) Act, 1956 and includes any foreign security as defined in the Foreign Exchange Management Act, 1999

A donation, delivery or transfer of any article, currency or foreign security referred to in this clause by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be foreign contribution within the meaning of this clause.

The interest accrued on the foreign contribution deposited in any bank referred to in section 17(1) or any other income derived from the foreign contribution or interest thereon shall also be deemed to be foreign contribution within the meaning of this clause.

### Exclusions from definition of Foreign Contribution

Any amount received, by any person from any foreign source in India,

- ✓ by way of fee (including fees charged by an educational institution in India from foreign student) or
- ✓ towards cost in lieu of goods or services rendered by such person in the ordinary course of his business, trade or commerce whether within India or outside India or
- ✓ any contribution received from an agent of a foreign source towards such fee or cost shall be excluded from the definition of foreign contribution within the meaning of this clause.

### Person [Section 2(1)(m)]

It includes:

- (i) an individual;
- (ii) a Hindu undivided family
- (iii) an association
- (iv) a company registered under section 25 of the Companies Act, 1956 (now Section 8 of Companies Act, 2013).

### Foreign Hospitality [Section 2(1)(i)]

It means any offer, not being a purely casual one, made in cash or kind by a foreign source for
providing a person with the costs of travel to any foreign country or territory or with free
boarding, lodging, transport or medical treatment

**Foreign Source [Section 2(1)(j)]**

It includes,—

i) the Government of any foreign country or territory and any agency of such Government

ii) any international agency, not being the United Nations or any of its specialized agencies,
the World Bank, International Monetary Fund or such other agency as the Central
Government may, by notification, specify in this behalf

iii) a foreign company

iv) a corporation, not being a foreign company, incorporated in a foreign country or
territory

v) a multi-national corporation referred to in Section 2(g) sub-clause (iv) of FCRA, 2010

vi) a company within the meaning of the Companies Act, 1956, and more than one-half of
the nominal value of its share capital is held, either singly or in the aggregate, by one or
more of the following, namely:-

✓ the Government of a foreign country or territory;
✓ the citizens of a foreign country or territory;
✓ corporations incorporated in a foreign country or territory;
✓ trusts, societies or other associations of individuals
✓ formed or registered in a foreign country or territory;
✓ Foreign company

Provided that where the nominal value of share capital is within the limits specified for
foreign investment under the Foreign Exchange Management Act, 1999, or the rules or
regulations made thereunder, then, notwithstanding the nominal value of share capital
of a company being more than one-half of such value at the time of making the
contribution, such company shall not be a foreign source

vii) a trade union in any foreign country or territory, whether or not registered in such
foreign country or territory

viii) foreign trust or a foreign foundation, by whatever name called, or such trust or
foundation mainly financed by a foreign country or territory

ix) a society, club or other association or individuals formed or registered outside India

x) a citizen of a foreign country

A few bodies/ organisations of the United Nations, World Bank and some other International
agencies or multilateral organisations are exempted from this definition, and are not treated as
foreign source. Hence, the funds received from them are not considered as foreign contribution.

**Prohibition to Accept Foreign Contribution**

**Prohibitions for Specified Person**

Following persons are prohibited to accept foreign contribution

a) **candidate for election**
b) **correspondent**, columnist, cartoonist, editor, owner, printer or publisher of a
registered newspaper
c) **Judge, Government servant** or employee of any corporation or any other body
controlled or owned by the Government
d) **member of any Legislature**
e) political party or office-bearer thereof
f) organisation of a political nature as may be specified under section 5(1) by the Central Government
g) association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in the Information Technology Act, 2000 or any other mode of mass communication
h) correspondent or columnist, cartoonist, editor, owner of the association or company referred to in clause (g).

Other Prohibitions

Following other persons are also prohibited from accepting foreign contribution

a) Person, resident in India, and citizen of India resident outside India - shall not accept any foreign contribution, or acquire or agree to acquire any currency from a foreign source, on behalf of any political party, or any person referred to in sub-section (1), or both.

b) Person, resident in India - shall not deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to any person if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to any political party or any person referred to in sub-section (1), or both.

c) Citizen of India resident outside India - shall not deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to —
   ✓ any political party or any person referred to in sub-section (1), or both; or
   ✓ any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a political party or to any person referred to in sub-section (1), or both.

Prohibition on Delivering Currency

Person receiving any currency, whether Indian or foreign, from a foreign source on behalf of any person or class of persons (referred to in section 9) shall not deliver such currency —
   ✓ to any person other than a person for which it was received, or
   ✓ to any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a person other than the person for which such currency was received.

Non-Applicability of Prohibition

Nothing contained in section 3 shall apply to the acceptance, by any person specified in that section, of any foreign contribution where such contribution is accepted by him, subject to the provisions of section 10,—
   ✓ by way of salary, wages or other remuneration due to him or to any group of persons working under him, from any foreign source or by way of payment in the ordinary course of business transacted in India by such foreign source; or
   ✓ by way of payment, in the course of international trade or commerce, or in the ordinary course of business transacted by him outside India; or
FCRA, 2010

✓ as an agent of a foreign source in relation to any transaction made by such foreign source with the Central Government or State Government; or
✓ by way of a gift or presentation made to him as a member of any Indian delegation, provided that such gift or present was accepted in accordance with the rules made by the Central Government with regard to the acceptance or retention of such gift or presentation; or
✓ from his relative; or

**Rule 6 of Foreign Contribution (Regulation) Rules, 2011**
Any person who receives foreign contribution in excess of Rs. 1 lakh or equivalent in a financial year from any of the relatives shall inform Central Government in Form FC-1 within 30 days from receipt.

**Arvind Khanna v Central Bureau of Investigation**: Receipt of foreign contribution through entity who holds money on behalf of a relative shall amount to receiving gift from a relative only.

✓ by way of remittance received, in the ordinary course of business through any official channel, post office, or any authorised person in foreign exchange under the Foreign Exchange Management Act, 1999; or
✓ by way of any scholarship, stipend or any payment of like nature: Provided that in case any foreign contribution received by any person specified under section 3 for any of the purposes other than those specified under this section, such contribution shall be deemed to have been accepted in contravention of the provisions of section 3.

Do the following transactions amount to contravention of the Foreign Contribution (Regulation) Act, 2010? Give reasons in support of your answer and refer to relevant provisions:
(i) Abhay, general secretary, Loktantrik Sangathan, Moradabad (UP) receives a sum of US $ 1,000 by way of payment in the ordinary course of business transacted by him in India.
(ii) Avtar, a government servant, is in receipt of contribution by way of gift as a member of Indian delegation.
(iii) Vidur, a District and Sessions Judge, accept a diamond studded watch from his relative residing in UK.
(iv) Sanjay, a private school teacher, is given a gift by his student living in USA for his personal use and the market value of the article is Rs. 2,200 only.

**Restriction on Acceptance of Foreign Hospitality**

Following categories of persons require prior approval from Ministry of Home Affairs before accepting Foreign Hospitality:-
(a) Members of a Legislature
(b) Office bearers of political parties
(c) Judges
(d) Government servants
(e) Employees of any corporation or any other body owned or controlled by the Government.
No Permission in Medical Emergency

It shall **not be necessary to obtain any such permission for an emergent medical aid needed on account of sudden illness** contracted during a visit outside India. **But**, where such foreign hospitality has been received, the person receiving such hospitality **shall give an intimation to the Central Government** as to the receipt of such hospitality within one month from the date of receipt of such hospitality, and the source from which, and the manner in which, such hospitality was received.

**Rule 7: Application for Permission**

- Any **person** belonging to any of the categories specified in section 6 who **wishes to avail** of foreign **hospitality** shall **apply to the Central Government in FC-2 for prior permission to accept such foreign hospitality**.
- Every application for acceptance of foreign hospitality shall be accompanied by an invitation letter from the host or the host country, as the case may be, and administrative clearance of the Ministry or department concerned in case of visits sponsored by a Ministry or department of the Government.
- The **application** for grant of permission to accept foreign hospitality **must reach** the appropriate authority **ordinarily two weeks before the proposed date of onward journey**.

**Rule 7: Intimation after Medical Emergency.**

- **No intimation** is required if the value of such hospitality in **emergent medical aid is upto one lakh rupees or equivalent thereto**.
- Details to be intimated include: Source, approximate value, purpose and manner of utilization.

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**Registration of Certain Persons with Central Government**

**Mandatory Registration**

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Person having a definite cultural, economic, educational, religious or social programme shall not accept foreign contribution unless such person obtains a certificate of registration from the Central Government.

Prior Permission

Every person may, if it is not registered with the Central Government, accept any foreign contribution only after obtaining the prior permission of the Central Government and such prior permission shall be valid for the specific purpose for which it is obtained and from the specific source.

Deemed Registration

- any association registered with the Central Government under section 6, or
- granted prior permission under that section of the Foreign Contribution (Regulation) Act, 1976, as it stood immediately before the commencement of this Act, shall be deemed to have been registered or granted prior permission, as the case may be, under this Act and such registration shall be valid for a period of five years from the date on which this section comes into force.

No Utilisation in Case of Contravention

- If the person has been found guilty of violation of any of the provisions of this Act or the Foreign Contribution (Regulation) Act, 1976,
- the unutilised or unreceived amount of foreign contribution shall not be utilised or received, as the case may be, without the prior approval of the Central Government.

Prior Permission in Certain Cases

The Central Government may, by notification in the Official Gazette, specify—
- the person or class of persons who shall obtain its prior permission before accepting the foreign contribution; or
- the area or areas in which the foreign contribution shall be accepted and utilised with the prior permission of the Central Government; or
- the purpose or purposes for which the foreign contribution shall be utilised with the prior permission of the Central Government; or
- the source or sources from which the foreign contribution shall be accepted with the prior permission of the Central Government.

Grant of Certificate of Registration

Procedure for Grant Of Certificate Of Registration

- An application by a person, referred to in section 11 for grant of certificate or giving prior permission, shall be made to the Central Government in such form and manner and along with such fee, as may be prescribed.
- On receipt of an application the Central Government shall, by an order, if the application is not in the prescribed form or does not contain any of the particulars specified in that form, reject the application.

Rule 9:

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Application shall be made in FC-3 on which sign will be uploaded or digitally signed with scanned documents.

Grant of Certificate or prior permission will not be made if-
Person had been granted certificate and afterwards, it was suspended and suspension continues on the date of application

Conditions to be met for the Grant of Registration and Prior Permission.

In terms of Sec.12 (4) of FCRA, 2010, the following shall be the conditions for the grant of registration and prior permission:

✓ The 'person' making an application for registration or grant of prior permission is not fictitious or benami;
✓ has not been prosecuted or convicted for indulging in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another
✓ has not been prosecuted or convicted for creating communal tension or disharmony in any specified district or any other part of the country
✓ has not been found guilty of diversion or mis-utilisation of its funds
✓ is not engaged or likely to engage in propagation of sedition or advocate violent methods to achieve its ends
✓ is not likely to use the foreign contribution for personal gains or divert it for undesirable purposes
✓ has not contravened any of the provisions of this Act
✓ has not been prohibited from accepting foreign contribution
✓ person making application has undertaken reasonable activity in chose field for benefit of society and prepared reasonable project for the benefit of the society for which contribution is proposed to be utilized.
✓ the person being an individual, such individual has neither been convicted under any law for the time being in force nor any prosecution for any offence is pending against him.
✓ the person being other than an individual, any of its directors or office bearers has neither been convicted under any law for the time being in force nor any prosecution for any offence is pending against him.
✓ the acceptance of foreign contribution by the association/ person is not likely to affect prejudicially -
  • the sovereignty and integrity of India
  • the security, strategic, scientific or economic interest of the State
  • the public interest
  • freedom or fairness of election to any Legislature
  • friendly relation with any foreign State;
  • harmony between religious, racial, social, linguistic, regional groups, castes or communities.
✓ the acceptance of foreign contribution shall not lead to incitement of an offence; shall not endanger the life or physical safety of any person.

Prohibition to Transfer Foreign Contribution to Other Person

Section 7
General Provision

According to the section, person who—

a) is registered and granted a certificate, or has obtained prior permission under this Act; and

b) receives any foreign contribution

shall not transfer such foreign contribution to any other person unless such other person is also registered and had been granted the certificate or obtained the prior permission under this Act.

This section is read with Rule 24

Transfer to Registered Person

No approval or prior permission is required to transfer foreign contribution to person who has been granted certificate or has permission u/s 12 if following conditions are satisfied:

✓ the recipient has not been proceeded against under any of the provisions of the Act

✓ transferor and the recipient shall be responsible for ensuring proper utilisation of the foreign contribution so transferred

✓ transfer of foreign contribution shall be reflected in the returns in Form FC-4 to be submitted by both the transferor and the recipient.

Transfer to Unregistered Person

A person who has been granted a certificate of registration or prior permission under section 11 and intends to transfer part of the foreign contribution received by him to a person who has not been granted a certificate of registration or prior permission under the Act, may transfer such foreign contribution to an extent not exceeding ten per cent of the total value thereof and for this purpose, make an application to the Central Government in FC-5.

Every application made under sub-rule (1) shall be accompanied by a declaration to the effect that prior approval is obtained and-

✓ the amount proposed to be transferred during the financial year is less than ten per cent of the total value of the foreign contribution received by him during the financial year;

✓ the transferor shall not transfer any amount of foreign contribution until the Central Government approves such transfer.

An association registered under the Foreign Contribution (Regulation) Act, 2010 (the Act) received donation from a club registered in Singapore. The Association proposes to transfer 10% of the donation to "Home for Aged Society", an unregistered person and 15% to "Welfare Club" a registered person under the Act.

In the light of provisions of the Foreign Contribution (Regulation) Act, 2010 decide whether the association can carry out the above proposal and if so state the procedures to be followed under the said Act?

Restriction to Utilize Foreign Contribution for Administrative Purpose

Section 8
Every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution, shall—
   a) utilise such contribution for the purposes for which the contribution has been received
      Provided that any foreign contribution or any income arising out of it shall not be used for speculative business

Rule 4: Speculative Activities
   ✓ any activity or investment that has an element of risk of appreciation or depreciation of the original investment, linked to marked forces, including investment in mutual funds or in shares
   ✓ participation in any scheme that promises high returns like investment in chits or land or similar assets not directly linked to the declared aims and objectives of the organization or association.

   b) not defray as far as possible such sum, not exceeding fifty per cent of such contribution, received in a financial year, to meet administrative expenses.
      Provided that administrative expenses exceeding fifty per cent of such contribution may be defrayed with prior approval of the Central Government.

Elements of Administrative Expenses

The Central Government may prescribe the elements which shall be included in the administrative expenses and the manner in which the administrative expenses referred to in subsection (1) shall be calculated.

An association registered under the Foreign Contribution (Regulation) Act, 2010 (the Act) received donation from a club registered in Singapore. The association proposes to invest portion of the donation in chits promising high returns.
In the light of provisions of the Foreign Contribution (Regulation) Act, 2010 decide whether the association can carry out the above proposal and if so state the procedures to be followed under the said Act?

Power of Central Government to Prohibit Receipt of Foreign Contribution, Etc., in Certain Cases

The Central Government may—
   a) prohibit any person or organisation (not specified in section 3), from accepting any foreign contribution;
   b) require any person or class of persons (not specified in section 6), to obtain prior permission of the Central Government before accepting any foreign hospitality;
   c) require any person or class of persons (not specified in section 11), to furnish intimation as to the amount of any foreign contribution received by such person or class of persons as the case may be, and the source from which and the manner in which such contribution was received and the purpose for which and the manner in which such foreign contribution was utilised
   d) require any person or class of persons specified in that Section 11(1) to obtain prior permission of the Central Government before accepting any foreign contribution;
e) require any person or class of persons, (not specified in section 6), to furnish intimation, as to the receipt of any foreign hospitality, the source from which and the manner in which such hospitality was received.

Criteria for Imposing Prohibition

Above prohibition or requirement shall not be made unless the Central Government is satisfied that the acceptance of foreign contribution by such person or class of persons, as the case may be, or the acceptance of foreign hospitality by such person, is likely to affect prejudicially—

✓ the sovereignty and integrity of India; or
✓ public interest; or
✓ freedom or fairness of election to any Legislature; or
✓ friendly relations with any foreign State; or
✓ harmony between religious, racial, social, linguistic or regional groups, castes or communities.

Power to Prohibit Payment of Currency Received in Contravention of the Act

Where the Central Government is satisfied, after making such inquiry, that any person has in his custody or control any—

✓ article or
✓ currency or
✓ security,
whether Indian or foreign, which has been accepted by such person in contravention of any of the provisions of this Act,

Order of Prohibition

✓ it may, by order in writing prohibit such person from paying, delivering, transferring or otherwise dealing with, such article or currency or security.
✓ A copy of such order shall be served upon the person so prohibited in the prescribed manner

Prescribed Manner of Serving Notice: Rule 8

✓ Order to person/Authorised Agent by Registered Post with acknowledgement due or speed post.
✓ If it can't be served, then it may be affixed on the door of premises in which person resides or ordinarily carries on business

Provisions of Unlawful Activities Act

The provisions of section 7 of the Unlawful Activities (Prevention) Act, 1967 shall, apply to, or in relation to, such article or currency or security and references in the said sub-sections to moneys, securities or credits shall be taken as references to such article or currency or security.

✓ CG may send prohibitory order to Gazetted Officer which shall be deemed to be a warrant authorizing officer to enter into premises for search.
✓ Person aggrieved from prohibitory order may within 15 days of service of such order make an application to Court.
No information obtained in course of investigation shall be divulged by Gazetted Officer without consent of Central Government.

Consequences of Contravention are given u/s 34. It may be referred here as well.

Suspension of Certificate of Registration

Where the Central Government is satisfied that pending consideration of the question of cancelling the certificate on any of the grounds mentioned in sub-section 14(1), it is necessary so to do, it may, by order in writing, suspend the certificate for such period not exceeding one hundred and eighty days as may be specified in the order.

Consequences of Suspension

Every person whose certificate has been suspended shall—

- not receive any foreign contribution during the period of suspension of certificate.
  However, the Central Government, on an application made by such person, if it considers appropriate, allow receipt of any foreign contribution by such person on such terms and conditions as it may specify.
- utilise, in the prescribed manner, the foreign contribution in his custody with the prior approval of the Central Government.

Rule 14:
The unspent amount that can be utilised in case of suspension of a certificate of registration may be as under:—

- In case the certificate of registration is suspended under section 13 of the Act, up to twenty-five per cent of the unutilised amount may be spent, with the prior approval of the Central Government, for the declared aims and objects for which the foreign contribution was received.
- The remaining seventy-five per cent of the unutilised foreign contribution shall be utilised only after revocation of suspension of the certificate of registration.

Cancellation of Certificate of Registration

Conditions of Cancellation

The Central Government may, by an order, cancel the certificate after inquiry if satisfied that one or more following grounds are attracted —

- the holder of the certificate has made a statement in, or in relation to, the application for the grant of registration or renewal thereof, which is incorrect or false; or
- the holder of the certificate has violated any of the terms and conditions of the certificate or renewal thereof; or
- in the opinion of the Central Government, it is necessary in the public interest to cancel the certificate; or
- the holder of certificate has violated any of the provisions of this Act or rules or order made there under; or
- if the holder of the certificate has not been engaged in any reasonable activity in its chosen field for the benefit of the society for two consecutive years or has become defunct.
Opportunity of Being Heard

No order of cancellation of certificate under this section shall be made unless the person concerned has been given a reasonable opportunity of being heard.

Cooling Period

Any person whose certificate has been cancelled under this section shall not be eligible for registration or grant of prior permission for a period of three years from the date of cancellation of such certificate.

Management of Foreign Contribution of Person Whose Certificate has Been Cancelled

✓ The foreign contribution and assets created out of the foreign contribution in the custody of every person whose certificate has been cancelled shall vest in such authority as may be prescribed.
✓ Such an authority may, if it considers necessary and in public interest manage the activities of the person, as the Central Government may direct and such authority may utilise the foreign contribution or dispose of the assets created out of it in case adequate funds are not available for running such activity.
✓ The authority shall return the foreign contribution and the assets vested upon it to the person, if such person is subsequently registered under this Act.

Renewal of Certificate

Application for Renewal

✓ Every person who has been granted a certificate, shall have such certificate renewed within six months before the expiry of the period of the certificate.
✓ The application for renewal of the certificate shall be made to the Central Government in such form and manner with such fee as may be prescribed.

Renewal by Central Government

✓ The Central Government shall renew the certificate, ordinarily within ninety days from the date of receipt of application for renewal of certificate subject to such terms and conditions as it may deem fit and grant a certificate of renewal for a period of five years.
✓ However, in case the Central Government does not renew the certificate within the said period of ninety days, it shall communicate the reasons therefor to the applicant.

Refusal to Grant Renewal

Central Government may refuse to renew the certificate in case where a person has violated any of the provisions of this Act or rules made thereunder.

Rule 12: Procedure

✓ Every certificate of registration issued to a person shall be liable to be renewed after the expiry of five years from the date of its issue on proper application.
FCRA, 2010

Every person shall apply to the Central Government in prescribed Form six months before the date of expiry of the certificate of registration, for its renewal.

An application made for renewal of the certificate of registration shall be accompanied by fee required.

In case no application for renewal of registration is received or such application is not accompanied by the requisite fee, the validity of the certificate of registration of such person shall be deemed to have ceased from the date of completion of the period of five years from the date of the grant of registration. If the validity of the certificate of registration of a person has ceased in accordance with the provisions of these rules, a fresh request for the grant of a certificate of registration may be made by the person to the Central Government as per the provisions of rule 9.

In case a person provides sufficient grounds, in writing, explaining the reasons for not submitting the certificate of registration for renewal within the stipulated time, his application may be accepted for consideration along with the requisite fee, but not later than one year after the expiry of the original certificate of registration.

Foreign Contribution through Scheduled Bank

Every person who has been granted a certificate or given prior permission shall receive foreign contribution in a single account only through such one of the branches of a bank as he may specify in his application for grant of certificate.

However, person may open one or more accounts in one or more banks for utilising the foreign contribution received by him.

No funds other than foreign contribution shall be received or deposited in such account or accounts.

Reporting by Bank

Every bank or authorised person in foreign exchange shall report to such authority as may be specified —

(a) prescribed amount of foreign remittance;
(b) the source and manner in which the foreign remittance was received; and
(c) other particulars, in such form and manner as may be prescribed.

Rule 16:
The bank shall report to the Central Government within 48 hours any transaction in respect of receipt or utilisation of any foreign contribution by any person whether or not such person is registered or granted prior permission under the Act.

Intimation

Every person who has been granted a certificate or given prior approval shall give an intimation to the Central Government, and such other authority as may be specified by the Central Government—

as to the amount of each foreign contribution received by it,
the source from which and
the manner in which such foreign contribution was received, and
✓ the purposes for which, and
✓ the manner in which such foreign contribution was utilised by him.

Submission of Certified Statement

Every person receiving foreign contribution shall submit a copy of a statement with the particulars of foreign contribution received duly certified by officer of the bank or authorised person in foreign exchange and furnish the same to the Central Government along with the intimation.

Maintenance of Accounts

Every person who has been granted a certificate or given prior approval under this Act shall maintain, in such form and manner as may be prescribed,—
✓ an account of any foreign contribution received by him; and
✓ a record as to the manner in which such contribution has been utilised by him.

Rule 11

Every person who has been granted registration or prior permission under section 12 shall maintain a separate set of accounts and records, exclusively, for the foreign contribution received and utilised.

Audit of Accounts

Inspection by Central Government

Where any person who has been granted a certificate or given prior approval, fails to furnish any intimation under this Act, or the intimation so furnished is not in accordance with law or if, after inspection of such intimation, the Central Government has any reasonable cause to believe that any provision of this Act has been, or is being, contravened, the Central Government may-

✓ by general or special order, authorise such Gazetted Officer, holding a Group A post under the Central Government or any other officer or authority or organisation, as it may think fit
✓ to audit any books of account kept or maintained by such person.

Right to enter Premises

Every such officer shall have the right to enter in or upon any premises at any reasonable hour, before sunset and after sunrise, for the purpose of auditing the said books of account.

Confidentiality

Any information obtained from such audit shall be kept confidential and shall not be disclosed except for the purposes of this Act.
Disposal of Assets Created out of Foreign Contribution

Where any person who was permitted to accept foreign contribution under this Act-
✓ ceases to exist or has become defunct – in this case all the assets of such person shall be disposed of in accordance with the provisions contained in any law for the time being in force under which the person was registered or incorporated, and
✓ in the absence of any such law- the Central Government may, having regard to the nature of assets created out of foreign contribution received under this Act, by notification, specify that all such assets shall be disposed of by such authority, in such manner and procedure as may be prescribed.

Confiscation of Article or Currency or Security Obtained in Contravention of the Act

Any article or currency or security which is seized under the Act shall be liable to confiscation if such article or currency or security has been adjudged under section 29 to have been received or obtained in contravention of this Act.

Adjudication

Any confiscation referred to in section 28 may be adjudged—
✓ without limit, by the Court of Session within the local limits of whose jurisdiction the seizure was made; and
✓ subject to such limits as may be prescribed, by such officer, not below the rank of an Assistant Sessions Judge, as the Central Government may, by notification in the Official Gazette, specify in this behalf.

Rule 19:
An officer above may adjudge confiscation in relation to any article or currency seized under section 25, if the value of such article or the amount of such currency seized does not exceed Rs. 10,00,000 (Ten lakh only).

Before making any order of confiscation, a reasonable opportunity of making representation against such confiscation shall be given

Appeal

✓ Where any person is aggrieved by any order of Court of Session may prefer an appeal to the High Court to which such Court is subordinate
✓ Any person aggrieved by order of confiscation made by an officer specified by the Central Government may prefer an appeal to the court of session.
✓ Appeal may be preferred within one month from the date of communication to such person of the order.
✓ However, the appellate court may, allow such appeal to be preferred within a further period of one month, but not thereafter.
Revision of Orders

Power of Central Government

The Central Government may either-
✓ of its own motion or
✓ on an application for revision by the person registered under this Act,
call for and examine the record of any proceeding under this Act in which any such order has
been passed by it and may make such inquiry or cause such inquiry to be made and, subject to
the provisions of this Act, may pass such order thereon as it thinks fit.

Restriction on Entertainment of Revision

The Central Government shall not of its own motion revise any order under this section if the
order has been made more than one year previously.

In The Case of an Application for Revision Under This Section

✓ The application must be made within one year from the date on which the order in
question was communicated to him or the date on which he otherwise came to know of
it, whichever is earlier.
✓ Where if, the Central Government is satisfied that such person was prevented by
sufficient cause from making the application within that period may admit an
application made after the expiry of that period.

Penalties

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<tr>
<th>Section</th>
<th>Type of Offence</th>
<th>Punishment</th>
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<tbody>
<tr>
<td>33</td>
<td>Any person who knowingly,— (a) gives false intimation under section 9(c) or section 18; or (b) seeks prior permission or registration by means of fraud, false representation or concealment of material fact</td>
<td>imprisonment for a term which may extend to six months or with fine or with both.</td>
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<td>34</td>
<td>Any person, on whom any prohibitory order has been served under section 10, pays, delivers, transfers or otherwise deals with, any article or currency or security, whether Indian or foreign, in contravention of such prohibitory order.</td>
<td>✓ imprisonment for a term which may extend to three years, or with fine, or with both. ✓ additional fine equivalent to the market value of the article or the amount of the currency or security in respect of which the prohibitory order has been contravened by him or such part thereof as the court may deem fit.</td>
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<td>35</td>
<td>Whoever accepts, or assists any person, political party or organisation in accepting, any foreign contribution or any currency or security from a foreign source, in</td>
<td>imprisonment for a term which may extend to five years, or with fine, or with both.</td>
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<tr>
<td>Section</td>
<td>Description</td>
<td>Penalty</td>
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<tr>
<td>36</td>
<td>person, who, in relation to any article or currency or security, whether Indian or foreign, does or omits to do any act which act or omission would render such article or currency or security liable to confiscation under this Act, may, in the event of the conviction of such person for the act or omission aforesaid</td>
<td>a fine not exceeding five times the value of the article or currency or security or one thousand rupees, whichever is more, if such article or currency or security is not available for confiscation, and the fine so imposed shall be in addition to any other fine which may be imposed on such person under this Act.</td>
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<tr>
<td>37</td>
<td>Whoever fails to comply with any provision of this Act for which no separate penalty has been provided in this Act</td>
<td>imprisonment for a term which may extend to one year, or with fine or with both.</td>
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<td>38</td>
<td>having been convicted of any offence under section 35 or section 37, insofar as such offence relates to the acceptance or utilization of foreign contribution, is again convicted of such offence</td>
<td>shall not accept any foreign contribution for a period of five years from the date of the subsequent conviction.</td>
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**Contravention by Companies**

- Where contravention is by a company, every person who, at the time when the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, and shall be liable to be proceeded against and punished accordingly.
- nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention.
- contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

**Compounding of Offences**

**Offences that may be Compounded**

- Any offence punishable under this Act whether committed by Individual or association or officer/employee, not being an offence punishable 'with imprisonment' only may be compounded in accordance with the provisions of this section.
- Applicant shall pay such sum as Central Government may by notification in the Official Gazette specify in this behalf.

**Authority**

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✓ Persons authorized by Central Government through notification in official gazette can act as Compounding Authority.
✓ Authority shall exercise powers subject to direction, control and supervision of Central Government.

Compounding not Permissible

✓ No contravention shall be compounded if an appeal has been filed by the applicant.
✓ Nothing shall apply to a contravention committed by any person within a period of three years from the date on which a similar contravention committed by him was compounded under these rules.
✓ Any second or subsequent contravention committed after the expiry of a period of three years from the date on which the contravention was previously compounded shall be deemed to be a first contravention.

Time Limit

Offence may be compounded before institution of any prosecution in application in such form and manner with fee as may be prescribed.

Power to Call for Information or Document

Any inspecting officer, authorised by the Central Government may, during the course of any inspection of any account or record maintained by any political party, person, organisation or association in connection with the contravention of any provision of this Act,—
✓ call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or rule or order made thereunder;
✓ require any person to produce or deliver any document or thing useful or relevant to such inspection
✓ examine any person acquainted with the facts and circumstances of the case related to the inspection.

Power to make rules

The Central Government may, by notification, make rules for carrying out the provisions of this Act. In particular, and without prejudice to the generality of the existing power, such rules may provide for all or any of the following matters, namely:—
✓ the value of the article which may be specified under section 2(1)(i)
✓ guidelines specifying the ground or grounds on which an organisation may be specified as an organisation of political nature under section 5(1);
✓ the activities or business which shall be construed as speculative business under the proviso to section 8(1)(a);
✓ Manner of calculating administrative expenses, furnishing intimation of foreign hospitality, serving of copy of order etc.

Power to exempt

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If the Central Government is of opinion that it is necessary or expedient in the interests of the general public so to do, it may—by order and subject to such conditions as may be specified in the order, exempt any person or association or organisation (not being a political party), or any individual (not being a candidate for election) from the operation of all or any of the provisions of this Act and may, revoke or modify such order.

**Miscellaneous**

- ✓ No court shall take cognizance of any offence under this Act, except with the previous sanction of the Central Government or any officer authorised by that Government in this behalf [Section 40]
- ✓ Any offence punishable under this Act may also be investigated into by such authority as the Central Government may specify in this behalf and it shall have all the powers which an officer-in-charge of a police station has while making an investigation [Section 43]
- ✓ The Central Government may give such directions as it may deem necessary to any other authority or any person or class of persons regarding the carrying into execution of the provisions of this Act. [Section 46]
- ✓ The Central Government may direct that any of its powers or functions under this Act, except power to make rule under section 48, shall, in relation to such matters and subject to such conditions, if any, may be specified in the notification, be exercised or discharged also by such authority as may be specified. [Section 47]
- ✓ Nothing contained in this Act shall apply to any transaction between the Government of India and the Government of any foreign country or territory. [Section 51]
- ✓ If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to be necessary for removing the difficulty [Section 53]

**Multiple Choice Questions**

1. A Member of any Legislature can accept foreign contribution from a relative
   - a. Upto Rs. 25,000
   - b. Upto Rs. 1 lakh
   - c. Without any limit
   - d. Upto such amount as is permitted by the Central Government

2. Foreign source does not include
   - a. The Central Government
   - b. The Government of any foreign country
   - c. A foreign company
   - d. A citizen of a foreign country

3. If an employee of a corporation owned or controlled by the Government wishes to avail of foreign hospitality, he is required to make an application in Form for obtaining prior permission of the Central Government.
   - a. FC-1
   - b. FC-2
   - c. FC-3
   - d. FC-4

4. A Government servant is authorised to receive foreign contribution by way of a gift or presentation made to him as a member by any Indian delegation.

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5. A person having a definite cultural, economic, educational, religious or social programme may accept foreign contribution only after -------- from the Central Government.

| a. Obtaining a certificate of resignation | b. Obtaining the prior permission of the Central Government |
| c. Both (a) and (b) | d. Either (a) or (b) |

6. An application for obtaining certificate of resignation or prior permission under section 11 shall be made to the Central Government by filling Form --------.

| a. FC-1 | b. FC-2 |
| c. FC-3 | d. FC-4 |

7. The Central Government is empowered to suspend the certificate of registration granted under section 12 for ----------.

| a. Maximum 90 days | b. Maximum 150 days |
| c. Maximum 180 days | d. Maximum 210 days |

8. A certificate of registration granted under section 12 shall be valid for a period of -------- from the date of its issue.

| a. 1 year | b. 2 years |
| c. 3 years | d. 5 years |

9. Any person whose certificate of registration is cancelled, shall not be eligible for registration or grant of prior permission for a period of -------- from the date of cancellation of such certificate.

| a. 1 year | b. 2 years |
| c. 3 years | d. 5 years |

10. A person whose certificate of registration has been suspended shall not utilise more than -------- of the unutilised foreign contribution in his custody, except with the prior approval of the Central Government.

| a. 10% | b. 25% |
| c. 50% | d. 75% |

11. An application for renewal of certificate of registration shall be made in Form --------.

| a. FC-1 | b. FC-2 |
| c. FC-3 | d. FC-4 |

12. The renewal of certificate of registration shall be for a period of --------.

| a. 1 year | b. 2 years |
| c. 3 years | d. 5 years |

13. Every person who receives any foreign contribution, shall submit an annual report in Form --------.

| a. FC-1 | b. FC-2 |
14. Every person who receives any foreign contribution, shall submit an annual report within ----- months of the closure of the financial year.

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<td>a. 2</td>
<td>b. 3</td>
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<td>c. 6</td>
<td>d. 9</td>
</tr>
</tbody>
</table>

15. Every bank shall report to the Central Government, within --------, any transaction in respect of receipt or utilisation of any foreign contribution by any person.

<p>| | |</p>
<table>
<thead>
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</thead>
<tbody>
<tr>
<td>a. 24 hours</td>
<td>b. 48 hours</td>
</tr>
<tr>
<td>c. 15 days</td>
<td>d. 30 days</td>
</tr>
</tbody>
</table>

16. Any person aggrieved by an order of confiscation made by the Court of Session, may, within --------, prefer an appeal to the High Court.

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<table>
<thead>
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</thead>
<tbody>
<tr>
<td>a. 1 month</td>
<td>b. 3 months</td>
</tr>
<tr>
<td>c. 60 days</td>
<td>d. 120 days</td>
</tr>
</tbody>
</table>

17. A person who has been granted a certificate of registration or prior permission under section 12 can open ------- for utilising the foreign contribution received by him.

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<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>a. A single bank account</td>
<td>b. One or more bank accounts</td>
</tr>
<tr>
<td>c. Maximum 3 bank accounts</td>
<td>d. Maximum 5 bank accounts</td>
</tr>
</tbody>
</table>

18. If the Central Government is satisfied that the holder of the certificate has not been engaged in any reasonable activity in its chosen field for the benefit of the society for ---- ---- consecutive years, it may cancel the certificate of registration.

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<thead>
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<tbody>
<tr>
<td>a. 2</td>
<td>b. 3</td>
</tr>
<tr>
<td>c. 5</td>
<td>d. 7</td>
</tr>
</tbody>
</table>

19. Every person who has been granted a certificate of registration under section 12 shall get such certificate renewed by making an application to the Central Government at least ------- before the date of expiry of the certificate of registration.

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<thead>
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<tbody>
<tr>
<td>a. 2 months</td>
<td>b. 3 months</td>
</tr>
<tr>
<td>c. 4 months</td>
<td>d. 6 months</td>
</tr>
</tbody>
</table>

20. Where a person having a definite cultural, economic, educational, religious or social programme has obtained --------- the Central Government, it can accept foreign contribution only for the specific purpose for which it is obtained and from the specific source.

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<table>
<thead>
<tr>
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<tbody>
<tr>
<td>a. A certificate of registration from</td>
<td>b. The prior permission of</td>
</tr>
<tr>
<td>c. Either (a) or (b)</td>
<td>d. None of these</td>
</tr>
</tbody>
</table>
Answer to MCQs

<p>| | | | | | | |</p>
<table>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>(c)</td>
<td>6</td>
<td>(c)</td>
<td>11</td>
<td>(c)</td>
<td>16</td>
</tr>
<tr>
<td>2</td>
<td>(a)</td>
<td>7</td>
<td>(c)</td>
<td>12</td>
<td>(d)</td>
<td>17</td>
</tr>
<tr>
<td>3</td>
<td>(b)</td>
<td>8</td>
<td>(d)</td>
<td>13</td>
<td>(d)</td>
<td>18</td>
</tr>
<tr>
<td>4</td>
<td>(d)</td>
<td>9</td>
<td>(c)</td>
<td>14</td>
<td>(d)</td>
<td>19</td>
</tr>
<tr>
<td>5</td>
<td>(d)</td>
<td>10</td>
<td>(b)</td>
<td>15</td>
<td>(b)</td>
<td>20</td>
</tr>
</tbody>
</table>