

	<p>section 77A, <b><u>be liable to pay compensation to every person who has sustained such loss or damage.</u></b></p> <ul style="list-style-type: none"> <li>➤ <b>Defence against Liability-</b> No person shall be liable if the list of claims or the preliminary information memorandum was submitted by the corporate debtor <b><u>without his knowledge or consent.</u></b></li> <li>➤ <b>Right of an aggrieved person effected from misinformation in LoC, PIM-</b> <b><u>entitled to move a court having jurisdiction for seeking compensation for such loss or damage.</u></b></li> </ul>
<p><b>54 H. Management of affairs of corporate debtor.</b></p>	<p><b>Management to be vested with existing BOD or partners, They shall <u>protect and preserve the property of the corporate debtor, and manage its operations as a going concern.</u></b></p> <p><b><u>The promoters, members, personnel and partners,</u></b> as the case may be, of the corporate debtor, shall <b><u>exercise and discharge their contractual or statutory rights and obligations in relation to the corporate debtor subject to provisions of PPIRP.</u></b></p>
<p><b>54 I. Committee of creditors.</b></p>	<ul style="list-style-type: none"> <li>➤ <b>RP to constitute CoC- <u>within 7 days of the PPIRP commencement date.</u></b></li> <li>➤ Provided that the composition of the committee of creditors <b><u>shall be altered on the basis of the updated list of claims and any such alteration shall not affect the validity of any past decision of the committee of creditors.</u></b></li> <li>➤ <b>First meeting of CoC- <u>within 7 days</u> of the constitution of the CoC.</b></li> <li>➤ <b>Application of Section 21 to this section-</b></li> </ul> <p><b>Note: Sec 21 states that CoC shall consist of all FCs except the related party.</b></p> <p><b>Regulation 25 Committee with only operational creditors of Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021</b></p> <p>Where the corporate debtor has <b><u>no financial debt or all financial creditors are related parties,</u></b> the committee shall consist of operational creditors, <b><u>being not related to the corporate debtor, as under:</u></b> -(a) <b>10 largest operational creditors by value,</b> and if the number of operational creditors is less than ten, the committee shall include all such operational creditors;</p> <p>(b) <b>one representative elected by all workmen</b> other than those workmen included under clause (a); and</p> <p>(c) <b>one representative elected by all employees</b> other than those employees included under clause(a).</p>
<p><b>54 J. <u>Vesting management of corporate debtor with resolution professional</u></b></p>	<p><b>Shift of Management from BOD to RP on approval by CoC (66%)-</b> the resolution professional shall make an application for this purpose to the Adjudicating Authority.</p> <p>On an application made, if the Adjudicating Authority is of the opinion that during the pre-packaged insolvency resolution process—</p> <p>(a) <b>the affairs of the corporate debtor have been conducted in a fraudulent</b></p>

	<p>manner; or</p> <p>(b) there has been <u>gross mismanagement of the affairs</u> of the corporate debtor,</p> <p><u>it shall pass an order vesting the management of the corporate debtor with the resolution professional.</u></p>	
<p><b>54 K. Consideration and approval of resolution plan.</b></p>	<p><b>Situation 1:</b>  <b>CoC may approve BASE RESOLUTION PLAN (BRP)</b></p> <p><b>Various Steps are:</b></p> <ol style="list-style-type: none"> <li>i. Present BRP to CoC- CD submit to RP within 2 days of PPIRP commencement date, then RP submit to CoC.</li> <li>ii. Revise the BRP- CoC may give an option for revision of BRP.</li> <li>iii. Compliance of Section 30 - Submission of Resolution Plan under Chapter II</li> <li>iv. CoC may approve BRP- <u>may approve the base resolution plan</u> for submission to the Adjudicating Authority if it does not impair (alter) any claims owed by the corporate debtor to the operational creditors.</li> </ol>	<p><b>Situation 2:</b>  <b>CoC does not approve BASE RESOLUTION PLAN (BRP)</b></p> <ul style="list-style-type: none"> <li>➤ <b>RP invites alternate Resolution Plan- within 21 days from PPIRP commencement date</b> to submit a resolution plan or plans, to <u>compete with the base resolution plan</u>, and provide time for submission of plan <u>which shall not be less than 15 days</u> from date of issue of invitation for resolution plan.</li> <li>➤ <b>RP submits all plans to CoC and CoC selects the Best Alternate Plan</b></li> <li>➤ <b>Alternate Plan better than BRP- Alternate plan selected.</b></li> <li>➤ <b>CoC approval of Resolution Plan for submission to AA</b>, Provided that where <u>the resolution plan selected for approval is not approved by the committee of creditors,</u> the resolution professional shall file an application <u>for termination of the PPIRP process.</u></li> <li>➤ <b>RP submits plan to AA-</b> The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.</li> </ul>
<p><b>54 L. Approval of resolution plan.</b></p>	<ul style="list-style-type: none"> <li>➤ <b>AA approves the resolution plan within 30 days-</b> Before passing an order, satisfy itself that the resolution plan has provisions for its effective</li> </ul>	

	<p><b><u>implementation.</u></b></p> <ul style="list-style-type: none"> <li>➤ <b>Rejection of plan by AA and orders termination-</b> if the resolution plan does not fulfill requirements , then AA <b><u>reject the resolution plan and pass an order under section 54N i.e. Termination of PPIRP</u></b></li> <li>➤ <b>Plan to be rejected if it doesn't provide for new Management-</b> Notwithstanding anything to the contrary contained in this section, where the Adjudicating Authority has passed an order under sub-section (2) of section 54J (<b><u>Vesting Management with RP</u></b>) and the resolution plan approved by the committee of creditors <b><u>does not result in the change in the management</u></b> or control of the corporate debtor to a person who was not a promoter or in the management or control of the corporate debtor, the Adjudicating Authority shall pass an order — <b>rejecting</b> such resolution plan; <b>terminating</b> the PPIRP and passing <b>a liquidation order</b> in respect of the corporate debtor section 33; and declaring that the PPIRP <b>costs</b>, if any, shall be included as part of the <b><u>liquidation costs</u></b> for the purposes of liquidation of the corporate debtor.</li> </ul>
<p><b>54 M. Appeal against order under section 54L.</b></p>	<p>Any appeal from an order approving the resolution plan under sub-section (1) of section 54L, shall be on the grounds laid down in <b><u>sub-section (3) of section 61.</u></b></p> <p><b><u>Who can file an appeal?</u></b></p> <p><b>Any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.</b></p> <p><b><u>Section 61(3) -Grounds of appeal-</u></b>An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely: approved resolution plan is in <b>contravention ,material irregularity</b> in exercise of the powers by the RP during resolution period, <b>the debts owed to operational creditors</b> of the corporate debtor <b>have not been provided</b> for in the resolution plan in the manner specified by the Board; the <b>insolvency resolution process costs</b> have not been provided for repayment in priority to all other debts and the resolution plan does not comply with any other criteria specified by the Board.</p>
<p><b>54 N. Termination of PPIRP</b></p>	<ul style="list-style-type: none"> <li>➤ <b>Application filed by RP for termination of PPIRP-</b> when Resolution plan not approved by CoC) or (time limit for completing PPIRP expired without any plan approved), then AA <b>shall within 30 days</b> of date of such application ,by an order terminate the PPIRP and provide for the <b><u>manner of continuation of proceedings</u></b> initiated for avoidance of transactions under Chapter III (<b>Preferential, undervalued or extortionate credit transaction</b>) or proceedings initiated under section 66 and section 67A, (<b>liability of Directors &amp; Promoters for fraudulent trading</b>) if any.</li> <li>➤ <b>CoC decides to terminate the PPIRP (66% approval)-</b> When RP at any time <b><u>after the PPIRP commencement date, but before the approval of resolution plan</u></b> intimates the AA of the decision of the <b>committee of creditors</b>, (66% approval), to <b><u>terminate the PPIRP, the Adjudicating Authority shall pass an order.</u></b></li> </ul>

	<ul style="list-style-type: none"> <li>➤ <b>PPIRP Costs-</b> Where the Adjudicating Authority passes an order for termination, <b><u>the corporate debtor shall bear the pre-packaged insolvency resolution process costs, if any.</u></b></li> <li>➤ <b>Liquidation order by AA (NCLT)-</b> Notwithstanding anything to the contrary contained in this section, where the <b>Adjudicating Authority has passed an order under sub-section (2) of section 54J</b> and the PPIRP is required to be terminated under sub-section (1), the Adjudicating Authority shall pass an order —       <ul style="list-style-type: none"> <li>(a) of liquidation in respect of the corporate debtor as referred to section 33;</li> <li>(b) <b><u>declare that the PPIRP process costs, if any, shall be included as part of the liquidation costs</u></b> for the purposes of liquidation of the corporate debtor</li> </ul> </li> </ul>
<p><b>54 O. <u>Initiation of corporate insolvency resolution process</u></b></p>	<ul style="list-style-type: none"> <li>➤ <b>CoC initiates CIRP (66% approval)-</b> The committee of creditors, <b><u>at any time after the pre-packaged insolvency commencement date but before the approval of resolution plan</u></b> by a vote of sixty-six per cent. of the voting shares, may resolve to <b><u>initiate a corporate insolvency resolution process</u></b> in respect of the corporate debtor, <b><u>if such corporate debtor is eligible for corporate insolvency resolution process under Chapter II.</u></b></li> <li>➤ <b>AA's order-</b> the Adjudicating Authority shall, <b><u>within thirty days of the date of such intimation from CoC,</u></b> pass an order to <b><u>terminate PPIRP,</u></b> appoint <b><u>the interim resolution professional,</u></b> subject to submission of written consent by such resolution professional (if RP fails to give written consent to be an IRP -AA make reference to IBBI for recommendation.)</li> <li>➤ <b>Effect of AA order-</b> Where the Adjudicating Authority passes an order under sub-section (2) —       <ul style="list-style-type: none"> <li>(a) such order shall be deemed to be an <b><u>order of admission of an application under section 7 and shall have the same effect;</u></b></li> <li>(b) the <b><u>CIRP shall commence from the date of such order;</u></b></li> <li>(c) the proceedings initiated for avoidance of transactions under Chapter III or proceedings initiated under section 66 and section 67A, if any, <b><u>shall continue during the CIRP.</u></b></li> <li>(d) for the purposes of sections 43, 46 and 50, references to <b><u>“insolvency commencement date” shall mean “pre-packaged insolvency commencement date”;</u></b> and</li> <li>(e) in computing the relevant time or the period for avoidable transactions, the <b><u>time-period for the duration of the pre-packaged insolvency resolution process shall also be included,</u></b> notwithstanding anything to the contrary contained in sections 43, 46 and 50.</li> </ul> </li> </ul>
<p><b>54 P. <u>Application of provisions of Chapters II, III, VI, and VII to this</u></b></p>	<p><b>Application of Chapter II, III, VI and VII of Part II shall apply to PPIRP</b></p> <p><b>Interpretation of certain terms-</b></p>

Chapter	<p>(a) <b><u>“insolvency commencement date”</u></b> shall be construed as references to <b><u>“pre-packaged insolvency commencement date”</u></b>;</p> <p>(b) <b>“resolution professional”</b> or <b>“interim resolution professional”</b>, as the case may be, shall be construed as references to the <b><u>resolution professional</u></b> appointed under this Chapter;</p> <p>(c) <b>“CIRP”</b> shall be construed as references to <b>“PPIRP”</b></p> <p>(d) <b>“insolvency resolution process period”</b> shall be construed as references to <b><u>“pre-packaged insolvency resolution process period.”</u></b></p>
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### **Regulation 17 IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**

**First Meeting of Creditors:** The interim resolution professional shall hold the first meeting of the committee within **seven days of filing the report** as mentioned above.

Where the appointment of resolution professional is delayed, the interim resolution professional shall perform the functions of the resolution professional **from the fortieth day of the insolvency commencement date till a resolution professional is appointed under section 22.**

### **Regulation 18 of the of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Revised NOV 2022)**

(1) A resolution professional may convene a meeting of the committee as and when he considers necessary.

(2) A resolution professional may convene a meeting, if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing at least thirty-three per cent of the voting rights.

(3) A resolution professional may place a proposal received from members of the committee in a meeting, if he considers it necessary and shall place the proposal if the same is made by members of the committee representing at least thirty-three per cent of the voting rights.”

### **Regulation 25 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.**

#### **Voting by the committee**

The resolution professional shall take a vote of the members of the committee present in the meeting, on any item listed for voting after discussion on the same.

At the conclusion of a vote at the meeting, the resolution professional shall announce the decision taken on items along with the names of the members of the committee who voted for or against the decision, or abstained from voting.

**Regulation 25A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.****Voting by Authorised Representative.**

The authorised representative shall cast his vote in respect of each financial creditor or on behalf of all financial creditors he represents in accordance with the provisions of sub-section (3) or sub-section (3A) of section 25A, as the case may be.

**Regulation 40A and 40B (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. (Important)**

Vide Circular No. IBBI/CIRP/41/2021, DATED 18-3-2021, under **Regulation 40A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('CIRP regulations')** provides a model timeline for carrying out various activities envisaged in a (CIRP).

**Regulation 40B of the CIRP regulations require an interim resolution professional (IRP)/resolution professional (RP) to file a set of forms (CIRP 1 to CIRP 6) within seven days of completion of specific activities to enable monitoring progress of CIRP.** This implies that a Form (CIRP 1 to CIRP 6) would not be filed until the related activity is not completed for whatever reason. This makes monitoring of progress difficult. Regulation 40B of CIRP regulations require filing of **Form CIRP 7 within three days of due date of completion of any activity stated in column (2) of the table below is delayed, and continue to file Form CIRP 7 every 30 days, until the said activity remains incomplete.**

Sl. No.	Activity requiring filing of Form CIRP 7, if not completed by the specified date	Timeline for filing Form CIRP 7 for the first time	Timeline for subsequent filing of Form CIRP 7
(1)	(2)	(3)	(4)
1	Public announcement is not made by T+3rd day	Date specified in column (2) + 3 days	X+30th day, X+60th day, X+90th day, and so on, till the activity is completed.
2	Appointment of RP is not made by T+30th day		
3	Information memorandum is not issued within 51 days from the date of public announcement		
4	RFRP is not issued within 51 days from the date of issue of information memorandum		
5	CIRP is not completed by T+180th day		

T = Insolvency commencement date, and

X = Date of filing of Form CIRP 7 for the first time under column (3).

This circular is applicable for all the processes ongoing as on the date of this circular.

## **NOV 2022 Amendment**

**(i) Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2022 - Amendment in Regulation 44 (28.04.2022)**

### **Regulation 44-Completion of liquidation.**

(1) **The liquidator shall liquidate the corporate debtor within a period of \*one year from the liquidation commencement date**, notwithstanding pendency of any application for avoidance of transactions under Part II of the Code, before the Adjudicating Authority or any action thereof:

Provided that where the sale is attempted under sub-regulation (1) of regulation 32A, the liquidation process may take an additional period up to ninety days.

(2) If the liquidator fails to liquidate the corporate debtor within **\*one year**, he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation.

**Explanation.- In relation to the liquidation processes commenced prior to the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 , (25/07/2019) the requirements of this regulation as existing before such commencement, shall apply.**

**Note : \* this period of one year was two years before 25/07/2019**

## 6.Foreign Exchange Management Act, 1999

### Important definitions:

<p><b>Person</b> <b>[Section 2(u)]</b></p>	<p>"person" includes-</p> <ul style="list-style-type: none"> <li>(i) an individual,</li> <li>(ii) a Hindu undivided family,</li> <li>(iii) a company,</li> <li>(iv) a firm,</li> <li>(v) an association of persons or a body of individuals, whether incorporated or not,</li> <li>(vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and</li> <li>(vii) any agency, office or branch owned or controlled by such person;</li> </ul>
<p><b>Person Resident in India</b> <b>[Section 2(v)]</b></p>	<p>"Person resident in India" means-</p> <ul style="list-style-type: none"> <li>(i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include- <ul style="list-style-type: none"> <li>(A) <b>a person who has gone out of India or who stays outside India, in either case-</b> <ul style="list-style-type: none"> <li>(a) for or on taking up employment outside India, or</li> <li>(b) for carrying on outside India a business or vocation outside India, or</li> <li>(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;</li> </ul> </li> <li>(B) <b>a person who has come to or stays in India, in either case, otherwise than-</b> <ul style="list-style-type: none"> <li>(a) for or on taking up employment in India, or</li> <li>(b) for carrying on in India a business or vocation in India, or</li> <li>(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;</li> </ul> </li> </ul> </li> </ul>
	<ul style="list-style-type: none"> <li>(ii) any person or body corporate registered or incorporated in India,</li> <li>(iii) an office, branch or agency in India owned or controlled by a person resident outside India,</li> <li>(iv) an office, branch or agency outside India owned or controlled by a person resident in India;</li> </ul>



**Important clarification in PRI given in study material**

**If a person comes in India on 1st June 2019 for employment, business or circumstances which indicate his intention to stay in India for an uncertain period, he will be a resident from 1st June 2019.**

Residential status is not for a year. It is from a particular date that a person will be a resident or a non-resident. This is different from income-tax law. Under income-tax law, a person has to pay tax. Even if his status is known at the end of the year, it will only affect his tax. It will not affect his transactions. FEMA is a regulatory law. One has to know the person's status at the time of undertaking a transaction.

**Author Note: This view taken by ICAI is highly debatable. As per the author's opinion, the condition of 182 days in previous year must also be complied.**

### PTR:

The Reserve Bank notifies debit cards, ATM cards or any other instrument by whatever name called that can be used to create a financial liability, as 'currency' **Current Account Transactions (Section 5)**

Schedule 1-Rule 3	Schedule 2-Rule 4	Schedule 3-Rule 5
Prohibited Coat's	CG approval needed	RBI approval needed
<ul style="list-style-type: none"> <li>+ Transaction specified in Sch 1 or Travel to Nepal /Bhutan or transaction with person resident in Nepal/Bhutan.</li> <li>+ Remittance of               <ul style="list-style-type: none"> <li>a) income from racing /riding</li> <li>b) purchase of lottery tickets, banned /Prescribed magazines, football pools, sweepstakes etc.</li> <li>c) interest income on funds held in Non-Resident</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>+ Remittance of               <ul style="list-style-type: none"> <li>a) freight of vessel chartered by a PSU</li> <li>b) Multi-modal transport operators to their agents abroad</li> <li>c) hiring charges of transponders by TV channels/Internet Service Providers.</li> <li>d) container detention charges exceeding the rate prescribed by Director General of Shipping</li> <li>e) prize money/sponsorship of sports activity</li> </ul> </li> </ul>	<p>1. 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 limits for the following purposes shall require prior approval of RBI.</p> <ul style="list-style-type: none"> <li>+ Private visits to any country (except Nepal and Bhutan).</li> <li>+ Gift or Donation.</li> <li>+ Going abroad for employment</li> <li>+ Emigration</li> <li>+ Maintenance of close relatives abroad,</li> <li>+ Business travel, or attending a conference or specialized training or for maintenance expenses of a patient going abroad for</li> </ul>

<p><b>Special Rupee (Account) Scheme.</b></p> <p>d) Dividend by a company to which requirement of dividend balancing is applicable.</p> <p>+ Payment of</p> <p>a) Commission on exports-towards equity investment in J.V./WOS abroad in Indian Co's</p> <p>b) Commission on exports under Rupee State Credit Route except commission up to 10% of invoice value of tea and tobacco.</p> <p>c) Call back services of Telephone</p>	<p>abroad by a person other than International / National / State Level sports bodies, if the amount involved exceeds USD 100,000.</p> <p>f) Remittance for membership of P&amp;I Club</p> <p>+ Cultural Tours</p> <p>+ Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding USD 10,000) by a State Government and its Public Sector Undertakings</p> <p>+ Payment of import through ocean transport by a Govt. Department or a PSU on c.i.f. basis (i.e., other than f.o.b. and f.a.s. basis</p>	<p>medical treatment or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/check-up.</p> <p>+ Meeting expenses for medical treatment abroad</p> <p>+ Studies abroad</p> <p>+ Any other current account transaction</p> <p><b>Exceptions:</b></p> <p>a) higher exchange facility can avail under Liberalized Remittance Scheme for emigration/ medical treatment / education if so, required by a country of emigration, medical institute offering treatment or the university, respectively</p> <p>b) a person who is a resident but not permanently resident in India and is a citizen of foreign state (other than Pak) or Indian citizen on deputation of such foreign country may make remittance up to his net salary.</p>
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## 2. Facilities for persons other than individual-

The following remittances by persons other than individuals shall require prior approval of RBI.

- Donations exceeding one per cent of their foreign exchange earnings during the previous three financial years or US\$ 5,000,000, whichever is less, for: -
  - (a) creation of Chairs in reputed educational institutes,

(b) to funds(not being an investment fund) promoted by educational institutes;  
and  
(c) 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 5% of the inward remittance whichever is more.
- Remittances exceeding five per cent of investment brought into India or US\$ 1,00,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.
- Remittances exceeding US\$10,000,000 per project for any consultancy services in respect of infrastructure projects and US\$ 1,000,000 per project, for other consultancy services procured from outside India.  
***Infrastructure project' is those related to –Power, Telecommunication, Railways, Roads including bridges, Sea port and airport, Industrial parks, and Urban Infrastructure (water supply, sanitation and sewerage)***

No person shall draw foreign exchange for a transaction included in the Schedule III without prior approval of the Reserve Bank;

Provided that Schedule II and III Rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

#### **CAPITAL ACCOUNT TRANSACTIONS:**

Section 2(e)-Definition

"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 liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6 i.e. transfer of share, deposits between PRI and PROI, transfer of immovable property export, import or holding of currency or currency notes; borrowing; lending .

**Any PROI cannot establish a place of business of India without the prior approval of RBI. For such approval, application shall be made in Form No. FNC 1.**

**The following are the objects for which RBI permits companies engaged in manufacturing and trading activities abroad to set up a Branch Office in India.**

1. Consultancy.

2. Import/Export Trading activities.

3. Software Development.

4. Sales & After Sales Service/Technical support to products supplied by partners/group activities.

5. Promote technical collaborations between Indian Companies and Overseas Companies.

6. R&D in areas where parent company is engaged.

#### Schedule I

See Regulation 3

#### Classes of capital account transactions of persons resident in India

- 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 favor 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) Undertake **derivative contracts**.

#### Schedule II

See Regulation 3

#### Classes of capital account transactions of persons resident outside India

- a) **Investment in India by a person resident outside India**, that is to say,
  - i) **issue of security** by a body corporate or an entity in India and investment therein by a person resident outside India; and
  - ii) 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 persons 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.
- h) Undertake derivative contract

#### Transactions with no restrictions

- Amortization of loan and
- Depreciation of direct investments in ordinary course of business.
- When drawl is of the purpose of repayment of loan instalments

#### **Prohibited Capital Account Transactions**

No person resident outside India shall make investment 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 –

- a) in the business of chit fund, or
- b) as Nidhi Company, or
- c) in agricultural or plantation activities or
- d) in real estate business, or construction of farm houses or
- e) in trading in Transferable Development Rights (TDRs).

**Note- Registrar of Chits or an officer authorized by SG in this behalf, may in consultation with SG, permit any chit fund to accept subscriptions from NRI's. NRI's shall be eligible to subscribe, through banking channel and on non-repatriation basis to such chit funds, without limits subject to conditions stipulated by RBI from time to time.**

For the purpose of this regulation, 'real estate business' shall not include development of townships, construction of residential/commercial premises, roads or bridges and bridges and Real Estate Investment Trusts (REITs) Regulations 2014”.

#### **Section 7-Export of Goods and Services**

1. Every exporter of goods shall 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 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 a market outside India.

**Note-Such declaration should contain true and correct material particulars.**

## 2. Export declaration should be submitted in the following forms;

Form	When it is applicable
a)	<b>Form EDF</b> -Export Declaration Form for all types of export of goods from Non-EDI ports (Non-EDI means where bills are generated manually)
b)	<b>Form Softex</b> - Export of software in single or in bulk

## 1. Export without furnishing declaration

a)	trade samples of goods and publicity material supplied free of payment;
b)	personal effects of travelers, 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)	goods or software accompanied by a declaration by the exporter that they are not more than <b>five lakhs</b> rupees in value;
e)	by way of gift of goods accompanied by a declaration by the exporter that they are not more than <b>five lakh</b> rupees in value;
f)	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;
g)	goods imported free of cost on re-export basis;
h)	Goods send outside India for testing subject to re-import into India;
i)	Replaced goods exported free of charge in accordance with provisions of Exim.
j)	defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorized dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.

Note: In the Principal Regulations, in regulation 4, for sub-regulation (ea), the following shall be substituted, namely: -

“(ea) re-export of leased aircraft/helicopter and/or engines/auxiliary power units (APUs), **either completely or in partially knocked down condition** repossessed by overseas lessor and duly de-registered by the Directorate General of Civil Aviation (DGCA) on the request of Irrevocable Deregistration and Export Request Authorisation (IDERA) holder under ‘Cape Town Convention’ or **any other termination or cancellation of the lease agreement between the lessor and lessee** subject to permission by DGCA/Ministry of Civil Aviation for such export/s.

Period within which export value of goods/software to be realized: -	
	The amount representing the full export value of goods or software exported shall be realized and repatriated to India <b>within nine months</b> from the date of export.
	Provided that where the goods are exported to a warehouse realization period is 15 months.
	Provided further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorized dealer may, for a sufficient and reasonable cause shown, extend the said period of <b>nine</b> months or fifteen months, as the case may be.

**Note : (Added in May 2022)**

**1. Foreign Exchange Management (Export of Goods and Services) Regulations, 2015**

**Regulation 15- 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:

- (i) the shipment of goods is made within 1 year from the date of receipt of advance payment;
- (ii) **the rate of interest, if any, payable on the advance payment shall not exceed 100 basis points above the London Inter-Bank Offered Rate (LIBOR) or other applicable benchmark as may be directed by the Reserve Bank, as the case may be; and**

the documents covering the shipment are routed through the authorised dealer through whom the advance payment is received:

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within 1 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.

**2.Liberalized Remittance Scheme (LRS):** Under the Liberalized Remittance Scheme (LRS), all resident individuals, including minors, are allowed to freely remit up to USD 250,000 per financial year (April – March) for any permissible current or capital account transaction or a combination of both. This is inclusive of foreign exchange facility for the purposes mentioned in Para 1 of Schedule III of Foreign Exchange Management (CAT) Amendment Rules 2015, dated May 26, 2015.

**In case of remitter being a minor,** the LRS declaration form must be countersigned by the minor's natural guardian. The Scheme is not available to corporates, partnership firms, HUF, Trusts etc.

**Consolidation of remittance of family members -** Remittances under the Scheme can be consolidated in respect of family members subject to individual family members complying with its terms and conditions.

**Exception:** clubbing is **not permitted** by other family members for **capital account transactions** such as opening a bank account/investment/purchase of property, if they are not the co-owners/co- partners of the overseas bank account/investment/property.

**Section 9-Exemption from realization and repatriation in certain cases.- 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 upto such limit as the Reserve Bank may specify;(Every resident can hold foreign currency up to 2000 US \$ and foreign coins without limit)
- (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 thereon 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, services, 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



### Contraventions and Penalties in Brief

Section No.	Contravention	Quantum of Penalty
<b>Section 11</b>	Authorized person contravenes any direction by RBI or failure to file any return as directed by RBI	<ul style="list-style-type: none"> <li>• Up to ₹ 10,000.</li> <li>• If continuing offence additional penalty up to ₹ 2,000 per day.</li> </ul>
<b>Section 13</b>	Of any provision of the Act, or any rule, regulation, notification, direction or order or of any condition subject to which an authorization issued	<ul style="list-style-type: none"> <li>• Up to three times, the sum involved, if it is quantifiable.</li> <li>• If not quantifiable up to ₹ 2 lacs.</li> <li>• If continuing, further penalty up to ₹ 5,000 per day after first day.</li> </ul>
<b>Section 14</b>	Failure to pay penalty as above <ul style="list-style-type: none"> <li>– where demand is of an amount exceeding ₹ 1 crore.</li> <li>– in any other case</li> </ul>	Civil imprisonment. <ul style="list-style-type: none"> <li>• Up to 3 years</li> <li>• Upto 6 months.</li> </ul>

Section No.	Obligation	Time Limit
<b>Section 14</b>	<b>Full</b> penalty to be paid	Within 90 days from the date on which notice for payment of penalty is served.
<b>Section 15</b>	Compounding of Contravention under section 13	Within 180 days of receipt of application by Directorate of Enforcement.
<b>Section 16</b>	Complaint under section 16(1) to be dealt by Adjudicated	Within 1 year of receipt of complaint.

<b>Section 17</b>	Appeal to Special Director (Appeals)	Within 45 days from receipt of order.
<b>Section 19</b>	Appeal to Appellate Tribunal	Within 45 days from receipt of order.
<b>Section 19(5)</b>	Appeal to be dealt with by Appellate Tribunal	Will try to dispose of the appeal within 180 days from receipt of appeal.
<b>Section 35</b>	Appeal to High Court	Within 60 days of communication of order or decision.

<b>Compounding of Offences(Section 15)</b>	
<b>Contraventions that can be compounded</b>	Contravention punishable u/s13 can be compounded.
<b>Time limit for compounding</b>	The Compounding Authority shall compound the offence within 180 days from the date of application.
<b>Authorities appointed for compounding</b>	RBI if contravention is related to foreign exchange or foreign security and Directorate of Enforcement if related to any other contravention.
<b>Amount must be quantifiable</b>	No contravention shall be compounded unless amount involved in such contravention is quantifiable.
<b>Similar offences</b>	Similar offences cannot be compounded within 3 years.

### Some important regulations

1. Issue of equity shares to PROI is a permissible CAT. NRI may purchase shares of an Indian Company which is not engaged in Print Media Sector on non-repatriation basis without any limit.
2. NRI may transfer shares of Indian Companies to another NRI by way of sale. (Not gift)
3. NRI may transfer shares of Indian Companies to PRI by way of gift.

## Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015 w.e.f.

Acquisition and Transfer of Immovable Property outside India:-

1. A person resident in India may acquire immovable property outside India, -
  - (a). by way of gift or inheritance from a person on or before 8th July 1947 and continued to be held by him with the permission of the Reserve Bank.
  - (b). by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (Foreign Currency accounts by a person resident in India) Regulations, 2015;
    - ©. jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India;
2. A person resident in India may acquire immovable property outside India, by way of inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.
3. A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

### Explanation:

For the purposes of these regulations, 'relative' in relation to an individual means husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

**Space for notes:**

# 6

## Foreign Exchange Management Act, 1999

### Addition/Changes in FEMA

- Section 6
- Overseas Direct Investment { Study Material }
- External Commercial Borrowings { RTP May 2020 }
- Import of Goods and Services { Study Material }
- Borrowing and Lending in Foreign currency by persons other than authorized dealer

Section 6 of the Foreign Exchange Management Act, 1999 vide Finance Act, 2015 w.e.f. 15.10.2019.

Amended section with the changes marked in bold, is as follows: -

- 1** Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.
- 2** The Reserve Bank may, in consultation with the Central Government, specify-
  - a** any class or classes of capital account transactions, involving debt instruments, which are permissible
  - b** the limit up to which foreign exchange shall be admissible for such transactions.
  - c** any conditions which may be placed on such transactions.

[Provided that the Reserve Bank or the Central Government shall not impose any restrictions on the drawal of foreign exchange for payment due on account of amortisation of loans or for depreciation of direct investments in the ordinary course of business.

**2A** The Central Government may, in consultation with the Reserve Bank, prescribe—

- a) any class or classes of capital account transactions, not involving debt instruments, which are permissible.
- b) the limit up to which foreign exchange shall be admissible for such transactions; and
- c) any conditions which may be placed on such transactions.

For the purposes of this section, the term "debt instruments" shall mean, such instruments as may be determined by the Central Government in consultation with the Reserve Bank.

In a nutshell, RBI has the power to specify class of transactions involving debt instruments as Capital Account Transactions and CG has power to specify class of transactions as Capital Account Transactions, not involving debt instruments. {Earlier such classification was not there. RBI exercise the power to specify class of transactions as capital account transactions for both debt and non-debt instruments}.

**Section 6 (3) has now been omitted.**

## Overseas Direct Investment (ODI)

### Relevant Definitions:

"Direct investment outside India" means investments, either under the **Automatic Route** or the **Approval Route**, by way of:

- a Contribution to the capital or subscription to the Memorandum of a foreign entity, or
- b 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

### 'Joint Venture'

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.

### "Wholly Owned Subsidiary (WOS)"

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.

### "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.

### NOTE

In the definition of Indian Party, resident individual is not covered. Resident individual will be separately covered later on.



### “Host Country”

means the country in which the foreign entity receiving the direct investment from an Indian Party is registered or incorporated.

### “Financial Commitment”

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.

### Please Note

An Indian Party can make overseas direct investment in any bonafide activity. Real Estate and Banking business are prohibited sectors for overseas direct 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 under the Liberalized Remittance Scheme.



### Mode of direct investment outside India

a

#### Automatic route for direct investment or financial commitment outside India

Under the Automatic route, an Indian Party does not require any prior approval from the Reserve Bank for making overseas direct investment in a JV/WOS abroad. He should approach an Authorized Dealer Category - 1 bank with prescribed application and documents.

All the transactions relating to investment in a JV/WOS must be routed through one branch of the authorized dealer to be designated by the Indian Party.

The total financial commitment (FC) of Indian Party in overseas JV/WOS shall not exceed 400 % of its networth { as per the last audited Balance Sheet }. { Currently 400 % has been revised to 100 percent by RBI but not yet notified by ICAI. Please check the RTP before your attempt to confirm whether there are changes applicable for your exams }.

Net worth here means aggregate of paid up capital and free reserves.

FC made out of balances held in EEFC account of the Indian Party or out of the funds raised through ADR's/GDR's will not be taken into consideration for the purpose of the aforesaid calculation.

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**Foreign Exchange Management Act, 1999**

However, if the financial commitment exceeds 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 given under the automatic route.

Overseas JV/WOS shall carry out bonafide activity permitted as per the laws of the host country.

Indian Party shall not be on the Reserve Bank's exporter's caution list/list of defaulters/under investigation by the Director of Enforcement or any investigative agency or regulatory authority.

ODI in Pakistan is allowed under the approval route only. ODI in Nepal can be only in Indian Rupees. ODI in Bhutan is allowed only in Indian Rupees and in freely convertible currencies.

In a nutshell, The total financial commitment of the Indian Party in JV/WOS in any country is upto USD 1 (one) billion { or 100 million}(or its equivalent) in any one financial year or 400 % of net worth whichever is lower and investment is a lawful activity permitted by a host country.

**b**

### Approval Route

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

## Prohibitions on direct investment in abroad by an Indian party

- 1** 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.
- 2** 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.

## Meaning of Financial Commitment {Understanding with help of a case study}

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
- 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.

## CASE STUDY 1:

- An Indian Company {I Ltd} formed a WOS in USA {U Ltd, an Limited Liability Company}.
- I Co remitted sum as under to U Co on various dates:-
  - Subscription to Equity Shares-USD 100
  - Subscription to Redeemable Preference Shares-USD 250
  - Extended Corporate Guarantee on behalf of U Co with Midtown Mutual Bank to the extent of USD 50 (value of loan extended by the Bank to U Co)
  - Performance Guarantee on behalf of U Co-USD 50





## Question

What is the Financial Commitment of I Co?

## Answer

Financial Commitment of I Co is USD 100(Equity) + USD 250(Preference Shares) + USD50 {Corporate Guarantee} + USD 25 {Performance Guarantee}=USD 425.

### CASE STUDY 2:

**1** Can an Indian Party issue performance guarantee in favour of overseas JV/WOS?

Yes, the Indian Party is permitted to issue performance guarantee and 50 % of the amount of the performance guarantees will be reckoned for the purpose of computing financial commitment.

**2** Can an Indian Party extend guarantee to an overseas entity without any equity participation in that entity?

No, Indian Party can extend Loan and guarantee to an overseas entity only if there is already an existing equity participation by way of direct investment.

**3** Can an Indian Party make foreign direct investment in real estate?

Real Estate sector and Banking are the prohibited sectors for overseas investment. { Real estate business means buying and selling of real estate or trading in transferable development rights but does not include development of township, construction of residential/commercial premises, roads and bridges.

**4** Can ECB raised be utilized for ODI?

Yes, ECB raised can be utilized for ODI.

### Overseas Direct Investments by resident individuals

Resident individuals 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 {LRS}, as prescribed by the Reserve Bank from time to time. { i.e. USD 2,50,000 per Financial year}

Investment from EEFC and RFC Account shall also be included in the limit of USD 2,50,000 under the provisions of LRS.



## External Commercial Borrowing

- New Guidelines w.r.t ECB were introduced in the Revised Study Material for May 2020 and Nov 2020.
- However, within 2 months of issue of new edition, the guidelines have been again Amended in RTP for May 2020.
- The guidelines for ECB has been given in a very detailed manner in RTP. However, a few guidelines have been simplified in this amendment sheet and a few has been omitted from this Amendment Sheet and the amendment sheet has been strictly made from Exam point of view. Student can refer May 2020 RTP for more details.
- It has been decided, in consultation with the Government of India, to rationalise the framework for ECB and Rupee Denominated Bonds in light of the experience gained to improve the ease of doing business.

### Meaning of ECB's

ECB's are commercial loans raised by eligible resident entities from recognized non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc.

The term 'All-in-Cost' includes rate of interest, other fees, expenses, charges, guarantee fees whether paid in foreign currency or Indian Rupees (INR) but will not include commitment fees, pre-payment fees / charges, withholding tax payable in INR.

### Salient features of the New Guidelines

- Merging of Track 1 and II as "Foreign Currency Denominated ECB "and merging of Track III and Rupee Denominated Bonds framework as "Rupee Denominated ECB"
- List of Eligible borrowers has been expanded to include all entities eligible to receive FDI. Additionally, Port Trust, Units in SEZ, SIDBI, EXIM Bank , registered entities engaged in micro-finance activities and non-government organizations can also borrow under this framework.
- The lender shall be resident of FATF {Financial Action Task Force} or IOSCO {The International Organization of Securities Commissions} compliant country. Multilateral and Regional Financial Institutions, Individuals and Foreign branches/subsidiaries of Indian banks can also be lenders.
- Minimum Average Maturity Period will be 3 years for all ECB's. However, in special cases it may be different.



## Framework on Raising Loans through ECB's

The framework for raising loan through ECB comprises of the following 2 options:-

- 1 FCY denominated ECB {Foreign currency risk is involved}
- 2 INR denominated ECB {Foreign currency risk is not involved}

## Eligible Borrowers

All entities eligible to receive FDI are eligible to raise funds via ECB. Further, the following entities are also eligible to raise ECB:

- Port Trust
- Units in SEZ
- SIDBI
- EXIM Bank
- Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/cooperatives and Non-Government Organizations (permitted only to raise INR ECB).

↓ **Minimum Average Maturity Period.**

↑ **Minimum Average maturity period will be 3 years.**

Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity.

Category	MAMP
ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year	1 Year
ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans	5 Year
ECB raised for working capital purposes or general corporate purposes & on-lending by NBFCs for working capital purposes or general corporate purposes.	10 Year
ECB raised for repayment of Rupee loans availed domestically for capital expenditure & on-lending by NBFCs for the same purpose	7 Year
ECB raised for repayment of Rupee loans availed domestically for purposes other than capital expenditure & on-lending by NBFCs for the same purpose	10 Year



## Available routes for raising ECB

### a Automatic Route

- No approval of RBI is needed to raise funds via ECB upto USD 750 million or equivalent per Financial Year.
- The application to raise funds under Automatic Route shall be examined by Authorized Dealer Category -I Bank.
- The designated AD Category 1 bank while considering the ECB proposal is expected to ensure compliance with applicable ECB guidelines.
- ECB liability -equity ratio for ECB raised under the Automatic Route cannot exceed 7: 1

**b** Approval Route-To raise funds , above exceeding the limits given in automatic route, borrowers shall approach RBI to seek its approval. RBI shall submit the proposal before the Empowered Committee set by RBI . The RBI shall take a final decision based on the recommendation of Empowered Committee.

### NOTE

Authorized Dealer category 1 banks are basically authorized money changers approved by RBI under section 10 of FEMA,1999.Examples-SBI,Canara Bank, Axis Bank.

## Negative List w.r.t ECB

The negative list, for which the ECB proceeds cannot be utilised, would include the following:

- Real estate activities
- Investment in capital market
- Equity investment
- Working capital purposes
- General corporate purposes
- Repayment of Rupee loans

### NOTE

However, if the ECB was raised specifically for Working Capital Purposes/General corporate Purposes/Repayment of Rupee Loans, the proceeds realized can be utilized for the same

## Hedging Provisions w.r.t. ECB

- 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 Riskmanagement policy.

- Further, such companies are required to mandatorily hedge 70 per cent of their ECB exposure {principal as well as the coupon} in case the average maturity of the ECB is less than 5 years.
- Overseas investors are eligible to hedge their exposure in Rupee through permitted derivative products with AD Category I banks in India.

### 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.

### Loan Registration Number

- Funds can be raised via ECB Route only after obtaining the Loan Registration Number from the Reserve Bank.
- To obtain the Loan Registration Number, borrowers are likely to submit duly certified FORM ECB, which also contains terms and conditions of the ECB, in duplicate to the designated AD Category 1 Bank.
- AD Category 1 bank will forward one copy to the concerned department in RBI.

### Monthly Reporting of Actual Transactions

The borrowers are required to report actual ECB transactions through FORM ECB 2 Return through the AD Category 1 bank on monthly basis so as to reach DSIM {Department of Statistics and Information Management} 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 for delay in reporting

S.L. NO	Type of return/form	Period of delay	Applicable LSF
1	Form ECB 2	Upto 30 calendar days from due date of submission	INR 5,000
2	Form ECB 2/Form ECB	Upto 3 years from due date of submission	INR 50,000 per year
3	Form ECB 2/Form ECB	Beyond 3 years from due date of submission	INR 1,00,000 per year



## 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 of untraceable entities

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: -

**a**

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;

**b**

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';

**a**

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;

**b**

No fresh ECB application by the entity should be examined/processed by the AD bank.

**c**

Directorate of Enforcement should be informed whenever any entity is designated 'UNTRACEABLE ENTITY'; and

**d**

No inward remittance or debt servicing will be permitted under auto route

### Conversion of ECB into equity

Conversion of ECB, including those which are matured but unpaid, into equity is permitted subject to the following conditions; -

**o**

The activity of the borrowing company is covered under the automatic route for FDI or Government approval is received.

- 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.
- Applicable pricing guidelines for shares are complied with
- 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

### 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 favor of overseas lender / security trustee, to secure the ECB to be raised/ raised by the borrower, subject to satisfying themselves that: -

- the underlying ECB is in compliance with the extant ECB guidelines.
- there exists a security clause in the Loan Agreement requiring the ECB borrower to create/cancel charge, in favor of overseas lender/security trustee, on immovable assets/movable assets/financial securities/issuance of corporate and/or personal guarantee, and
- No objection certificate, as applicable, from the existing lenders in India has been obtained in case of creation of charge.

### ECB Facility for Startups

#### Framework

AD Category 1-banks are permitted to allow Startups to raise ECB under the automatic route.

#### Eligibility

An entity recognised as a Startup by the Central Government as on the date of raising ECB.

#### Recognized lender

Lender/Investor shall be resident of FATF compliant country.

#### Forms

The borrowing can be in form of loans or non-convertible, optionally convertible or partially convertible preference shares.

#### Maturity

Minimum Average maturity period will be 3 years.



### Currency

The borrowing should be denominated in any freely convertible currency or in Indian Rupees or a combination thereof.

### Amount

The borrowing per Start-up 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.

### End Uses

For any expenditure in connection with business of the borrower.

### 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. However, issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by Indian banks, all India Financial Institutions and NBFC's is not permitted.

### ECB facility with Oil Marketing Companies

Public sector Oil Marketing Companies can raise ECB's for working capital purposes with minimum average maturity period of 3 years from all recognized lenders under the Automatic Route without mandatory hedging and individual limit requirements.

The overall ceiling for such ECB's shall be USD 10 billion or equivalent.

### ECB by entities under restructuring/ECB facility for refinancing stressed assets:

An entity which is under a restructuring scheme/ corporate insolvency resolution process can raise ECB only if specifically permitted under the resolution plan.

Eligible borrowers under the ECB framework, who are participating in the Corporate Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016 as resolution applicants, can raise ECB from all recognized lenders, except foreign branches/subsidiaries of Indian banks, for repayment of Rupee term loans of the target company. Such ECB will be considered under the approval route.

Eligible corporate borrowers who have availed Rupee loans domestically for capital expenditure in manufacturing and infrastructure sector and which have been classified as SMA-2 or NPA can avail ECB for repayment of these loans under any one-time settlement with lenders.

The applicable MAMP will have to be strictly complied with under all circumstances.





## NOV 2022 Amendment

### External Commercial Borrowings (ECB's) - Changes Due to Libor Transition

Vide A.P. (Dir Series 2021-22) Circular No. 19, Dated 8-12-2021, the following changes have been made in the Master Direction No. 5 dated March 26, 2019, on "External Commercial Borrowings, Trade Credits and Structured Obligations", prescribing the benchmark rates and the maximum spread over benchmark for calculating the all-in cost for foreign currency (FCY) ECBs and TCs.

"In view of the imminent discontinuance of LIBOR as a benchmark rate, the following changes to the all-in-cost benchmark and ceiling for FCY ECBs

i. Redefining Benchmark Rate for FCY ECBs: Currently, the benchmark rate is defined in paragraph 1.5 of the master direction as "benchmark rate in case of FCY ECB/TC refers to 6-months LIBOR rate of different currencies or any other 6-month interbank interest rate applicable to the currency of borrowing, e.g., EURIBOR".

Henceforth, benchmark rate in case of FCY ECB/TC shall refer to any widely accepted interbank rate or alternative reference rate (ARR) of 6-month tenor, applicable to the currency of borrowing.

ii. Change in all-in-cost ceiling for new ECBs/TCs: To take into account differences in credit risk and term premia between LIBOR and the ARRs, the all-in-cost ceiling for new FCY ECBs and TCs has been increased by 50 bps to 500 bps and 300 bps, respectively, over the benchmark rates.

Note: Earlier it was 450 bps for FCY ECBS.

iii. One Time Adjustment in all-in-cost ceiling for existing ECBs/TCs: To enable smooth transition of existing ECBs/TCs linked to LIBOR whose benchmarks are changed to ARRs, the all-in cost ceiling for such ECBs/TCs has been revised upwards by 100 basis points to 550 bps and 350 bps, respectively, over the ARR. AD Category-I banks must ensure that any such revision in ceiling is only on account of transition from LIBOR to alternative benchmarks

### Few Examples

1. Can any other 6-month rate other than LIBOR be a benchmark rate for FCY/ECBs?

Answer: Yes, benchmark rate in case of FCY ECB/TC can be any widely accepted interbank rate or alternative reference rate (ARR) of 6-month tenor, applicable to the currency of borrowing. Example: EURIBOR

2. 6-month EURIBOR rate is 6%. What can be the all-in-cost ceiling for new ECBs/TCs?

Answer: The all-in-cost ceiling for new FCY ECBs and TCs has been increased by 50 bps to 500 bps and 300 bps, respectively, over the benchmark rates.

For ECB, all in cost = 6 % + 500bps = 11%

For TCs, all in cost = 6 % + 300bps = 9 %

3. 6-month EURIBOR rate is 6%. What can be the all-in-cost ceiling for existing ECBs/TCs?

Answer: The all-in-cost ceiling for existing FCY ECBs and TCs has been increased by 100 bps to 550 bps and 350 bps, respectively, over the benchmark rates.

For ECB, all in cost = 6 % + 550bps = 11.5%

For TCs, all in cost = 6 % + 350 bps = 9.5 %

## Contravention of ECB Guidelines and Transparency Requirement

For providing greater transparency, information with regard to the name of the borrower, amount, purpose and maturity of ECB under both Automatic and Approval routes are put on the RBI's website, on a monthly basis, with a lag of one month to which it relates.

The primary responsibility for ensuring that the borrowing is in compliance with the applicable guidelines is that of the borrower concerned. Any contravention of the applicable provisions of ECB guidelines will invite penal action under the FEMA.

## Import of Goods and Services

### Import

The term 'Import' means bringing into India any goods or services.

### Governing Regulation

Section 5 of FEMA Act 1999, read with Foreign Exchange Management (Current Account Transaction) Rules, 2000.

### Guidelines to be remembered

- 1 The Authorized Dealer {AD} shall adhere to "Know Your Customer" (KYC) guidelines issued by RBI while undertaking import transactions.
- 2 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.
- 3 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)
- 4 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



**5** Any person resident in India may also make payment 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

**6** A company or resident in India may make payment in rupees to its non-whole-~~tr~~ 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. However, such payment shall be in accordance with Memorandum of Association or Articles of Association or any agreement entered into by it or any resolution passed in General Meeting or by BOD.

**7** Time Limit for Settlement of Import Payments: -

**a** 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.

**b** Deferred payment arrangements (including suppliers' and buyers' credit) up to five years, are treated as trade credits.

**8** Extension of Time for settlement of Import Payments

**a** 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.

**b** However, Extension cannot be granted by the AD, if the import transactions are under investigation by Directorate of Enforcement / Central Bureau of Investigation or other investigating agencies.

**c** 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 percent of the average import remittances during the preceding two financial years, whichever is lower.

**9** Import for Foreign Exchange into India

**a** A person may **send into India**, without limit, foreign exchange in any form (other than currency notes, bank notes and traveler's cheques).



- (b) A person may **bring into India** from any place outside India, without limit, foreign exchange (other than unissued notes). However, on arrival in India, a declaration must be given to custom authorities about the same. However, declaration is not needed if aggregate value of the foreign exchange in the form of currency notes, bank notes or traveler's cheques brought in by such person at any one time does not exceed USD 10,000 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.

## 10 Import of Indian Currency and Currency Notes

- (a) 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)
- (b) 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/- {The reason for the same is that post demonetization Nepal Government has banned the notes of Rs 200, 500 and 2000}.

## 11 Issue of Guarantees by an Authorized Dealer in favor of importer

- (a) An authorized dealer is permitted to provide a guarantee in respect of any debt, obligation or other liability incurred by a PRI as an importer, in respect of imports undertaken on deferred payment terms in accordance with approval of RBI.
- (b) It is also clarified that AD may give a 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 an overseas supplier of goods, banks, or financial institution in respect of permitted import of goods.
- (c) AD, may subject to the directions of RBI also permit a person resident in India to issue corporate guarantee in favor of an overseas lessor for financing import.
- (d) An AD may also give guarantee in favour of a service importer up to USD 1,00,000 if such service importer is a PSU or a department/undertaking of Government of India /State Government and up to USD 5,00,000 if such service importer is other than PSU or a department/undertaking of Government of India /State Government.



## Borrowing and Lending in Foreign currency by persons other than authorized dealer

Borrowing in foreign currency by persons other than an authorised dealer: The circumstances and the conditions regarding borrowing in foreign currency by persons other than an authorised dealer are mentioned below:

**i** For execution of projects outside India and for exports on deferred payment terms: A person resident in India may borrow, whether by way of loan or overdraft or any other credit facility, from a bank situated outside India, for execution outside India of a turnkey project or civil construction contract or in connection with exports on deferred payment terms, provided the terms and conditions stipulated by the authority which has granted the approval to the project or contract or export is in accordance with the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000.

**ii** For imports: An importer in India may, for import of goods into India, avail of foreign currency credit for a period not exceeding six months extended by the overseas supplier of goods, provided the import is in compliance with the Export Import Policy of the Government of India in force.

**iii** Borrowing by resident individual: An individual resident in India may borrow a sum not exceeding US\$ 250,000/- or its equivalent from his close relative outside India, subject to the conditions that:-

- a** the minimum maturity period of the loan is one year.
- b** the loan is free of interest; and
- c** the amount of loan is received by inward remittance in free foreign exchange through normal banking channels or by debit to the NRE/FCNR account to the non-resident lender.

Lending in foreign currency by persons other than an authorised dealer: The circumstances and the conditions regarding lending in foreign currency by persons other than an authorised dealer are mentioned below:-

**i** Lending to WOS / JV: An Indian entity may lend to its wholly owned subsidiary or joint venture abroad constituted in accordance with the provisions of Foreign Exchange Management (Transfer or issue of foreign security) Regulations, 2000.

**ii** Lending by Select Institutions: Export Import Bank of India, Industrial Development Bank of India, Industrial Finance Corporation of India, Industrial Credit and Investment Corporation of India Limited, Small Industries Development Bank of India Limited or any other institution in India may extend loans to their constituents in India out of the foreign currency borrowings raised by these institutions with the approval of the Central Government for the purpose of onward lending.



Lending by Indian companies to their employees: Indian companies in India may grant loans to the employees of their branches outside India for personal purposes provided that the loan shall be granted for personal purposes in accordance with the lender's Staff Welfare Scheme/Loan Rules and other terms and conditions as applicable to its staff resident in India and abroad.



## Probable Questions



- Time limit for settlement of import payments and extension of the same.
- What are the routes available for raising ECB's?
- Can ECB raised be utilized for real estate activities?
- Short Note on ECB facility for start up's
- Who are the eligible borrowers to raise funds via ECB route?
- Can ECB raised be utilized for ODI?
- What is the total financial commitment that an Indian Party can make in its overseas JV/WOS?
- Modes of Direct Investment outside India?
- Which authority can prescribe capital account transactions for Non-debt instruments?



Space for Notes

Applicable from May 2022

7

# SARFAESI

SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND  
ENFORCEMENT OF SECURITIES INTEREST ACT, 2002

## Important Definition :-

### Asset reconstruction means:-

- by any securitisation company or reconstruction company.
- of any right or interest of any bank or financial institution in any financial assistance.
- for the purpose of realization of such financial assistance (Section 2(1)(b)].

### Borrower means:-

- Any person who has been granted financial assistance by any bank or financial institution or who has raised funds through issue of debt securities.
- Who has given any guarantee or
- Who has created any mortgage or pledge as security for the financial assistance granted by bank or financial institution.
- and includes a person who becomes borrower of a asset reconstruction company after such reconstruction company acquired the mortgage rights or interest of any Bank or Financial institution in relation to such financial assistance.

### Financial Asset means debt or receivable and includes:-

- a claim to any debt or receivables or part thereof, whether secured or unsecured or
- any debt or receivables secured by, mortgage of, or charge on, immovable property or
- a mortgage, charge, hypothecation or pledge of movable property or
- any right or interest in the security, whether in full or part underlying such debt or receivables or



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# SARFAESI

156

- 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
- any financial assistance.
- 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
- 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;

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.

### Secured creditor means:-

- 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
- debenture trustee appointed by any bank or financial institution; or
- 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
- debenture trustee registered with the Board appointed by any company for secured debt securities; or
- 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.

**Kuch kar gujarne ka junun ho jisme.....  
Aashman ko bhi uske aage jhukna parta hai**



## **Security interest:-**

“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 [Section 2(zf)];

## **Security receipt:-**

“Security receipt” means a receipt or other security, issued by a securitisation company or reconstruction company to any qualified institutional buyer pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right, title or interest in the financial asset involved in securitisation.

## **Asset Reconstruction Companies:-**

### Features and objectives

- ARCs are companies incorporated under the provisions of Companies Act, 1956.
- Their main purpose is reconstruction of assets – mix both the good and bad assets in such a manner as to make them saleable.
- They act as an agent for the bank/FI for the purpose of recovering their dues from the borrowers
- They act as the receiver of properties of any bank / FI
- They act as the manager of the borrowers' assets taken over by the banks/FIs
- They also carry on such other incidental or ancillary business with prior approval of the Reserve Bank of India.

## **Non-Performing Assets [Section 2 (1) (0)]**

Non-performing assets [section 2 (1) (0)] 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 where such bank or FI 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 RBI.

### **Classification of NPAs:-**

NPAs are classified into 3 categories

Sub-standard assets

Doubtful assets

Loss assets

### **Securitisation means:-**

○ Acquisition of financial assets by any securitisation company or reconstruction company from any originator(owner of financial asset-Normally banks)

○ Whether by raising of funds by such securitisation company or reconstruction company from qualified institutional buyers, by issue of security receipts representing undivided interest in such financial assets or otherwise.(The SPV Co issues security receipts to public either by public or pvt placement in exchange of mortgage rights. This securities are also called Mortgage Backed securities.

○ The lending bank/PFI converts its undivided rights into "mortgage-backed securities" and then issues such securities to the investors either by way of a public issue or by way of private arrangement.

It is the process by which the originators of assets transfer the assets to a special purpose vehicle (SPV) which, in turn, issue tradeable liquid securities to the investors.

### **Registration of Securitisation Companies or Reconstruction Companies (Section 3)**

Every asset reconstruction company is required to make an application in the prescribed form and manner to the Reserve Bank of India.

Asset reconstruction company cannot commence or carry on securitization or reconstruction business without-  
obtaining a certificate of registration and having a net owned fund of not less than **100 crore** or such higher amount as the RBI may specify by notification.

Existing SRCs are required to make an application to the RBI within 6 months from the commencement of business as such and carry on such business until a certificate of registration is granted or until application for grant of registration is rejected, as the case may be.

The following conditions must be fulfilled or satisfied for issue of registration certificate by the RBI:-

- a** The SRC should not have incurred losses in any of the 3 preceding financial years.
- b** It has made adequate financial arrangements for realization of financial assets acquired for securitization / reconstruction and shall be able to pay periodical returns and redeem on the respective due dates the investments made by the QIBs or any other persons in the company.
- c** The directors of the SRC have adequate professional experience in matters relating to finance, securitization and reconstruction.
- d** None of its directors should be convicted of any offence involving moral turpitude.
- e** that a sponsor of an asset reconstruction company 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;
- f** The SRC has complied with or is in a position to comply with the prudential norms specified by the RBI.
- g** The SRC has complied with one or more conditions specified in the RBI guidelines for the said purpose.

On being satisfied of fulfilment of prescribed conditions, the RBI may grant a certificate of registration to such SRC. Additional conditions may also be imposed by the RBI, if it deems fit.

Before rejecting an application, the applicant shall be given a reasonable opportunity to be heard and the reasons for rejection shall be communicated to the applicant.



## Section 4-Cancellation of Certificate of Registration by RBI

- When ARC ceases to receive or hold any investment from qualified institutional buyer or
- ceases to carry on asset reconstruction company or
- fails to comply with its direction
- Before cancelling registration, RBI shall give an opportunity of being heard
- A securitisation company or a reconstruction company aggrieved by the order of rejection or cancellation of certificate of registration may prefer an appeal to CG(Ministry of Finance) within 30 days.



## Section 5- Acquisition of rights or interest in financial assets

Acquiring of financial assets of any bank or financial institution: Any ARC may acquire financial assets of any bank or financial institution through issuing debentures /bond /any other security as consideration by an agreement between company and bank/financial institution through an agreement for transfer of financial assets to company.

Exemption from stamp duty: 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 securitisation shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899.

Such exemption is provided in order to encourage banks or FIs to resolve non performing assets (NPA) issues by offloading it to ARCs.



## Section 6- Notice of 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.

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.



## Section 7-Measures for asset reconstruction

### 1 Measures for 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.

### 2 RBI has the power to determine policy and issue directions for the purpose of asset reconstruction

**3** It will be the duty of asset reconstruction companies to comply with the policies and directions laid down by RBI

### **Section 11-Resolution of disputes under the SARFAESI Act**

- Such dispute may relate to non-payment of any amount due or interest of any of the parties, namely, the bank, or financial institution, or securitisation company or reconstruction company or QIB.
- Such dispute shall be settled by conciliation or arbitration council as provided in Arbitration and Conciliation Act,1996 if parties have consented in writing.


### **Section 12-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.
- Besides, the Reserve bank may give directions to any ARC in particular as to:
  - ✦ 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 securitisation 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.

### **Section 12 A-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.

### **Section 12 B-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.

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.

As a result of audit or inspection, if 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 or to secure better management of an ARC, RBI may pass an order to remove the Chairman or Director or appoint additional director on the Board of ARC or appoint any of its officers as an observer to observe the working of the board of directors of such ARC after giving opportunity of being heard.

## Section 13-Enforcement of security interest by a creditor

**1** A creditor can enforce his interest in a security under the provisions of Section 13 on default in repayment of instalments

**a** without intervention of the court and

non-compliance with the notice of 60 days after the declaration of the loan as

**b** a non-performing asset. (i.e. the secured creditor will give notice to the borrower to discharge liability within 60 days

**2** If on receipt of notice, the borrower makes any representation or objection the secured creditor shall accept such representation.

**3** If secured creditor comes to the conclusion that such representation is not acceptable or tenable, the secured creditor shall communicate within 15 days the reasons for non-acceptance of representation or objection to borrower

**4** The secured creditor has two options

**a** Transfer the assets to a securitisation or reconstruction company or

**b** Exercise powers under the provisions of SARFAESI Act, 2002.

**5** The following measures are available, after giving proper notice, for the recovery of the secured debts viz:-

**a** Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset.

**b** Take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset.

**c** Appoint any person to manage the secured assets which are taken in possession by the secured creditor.

**c** Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom money is due or may become due to the borrower, to pay the secured creditor, such sum as may be sufficient to satisfy the secured debt

## Points to be remembered

**i**

In case of joint financing under consortium or multiple lending arrangements, if 60% of the secured creditors in value agree to the recovery action, the same is binding on all secured creditors

**ii**

All cost, expenses and charges incurred by secured creditor against borrower for taking action can be recourse first.

**iii**

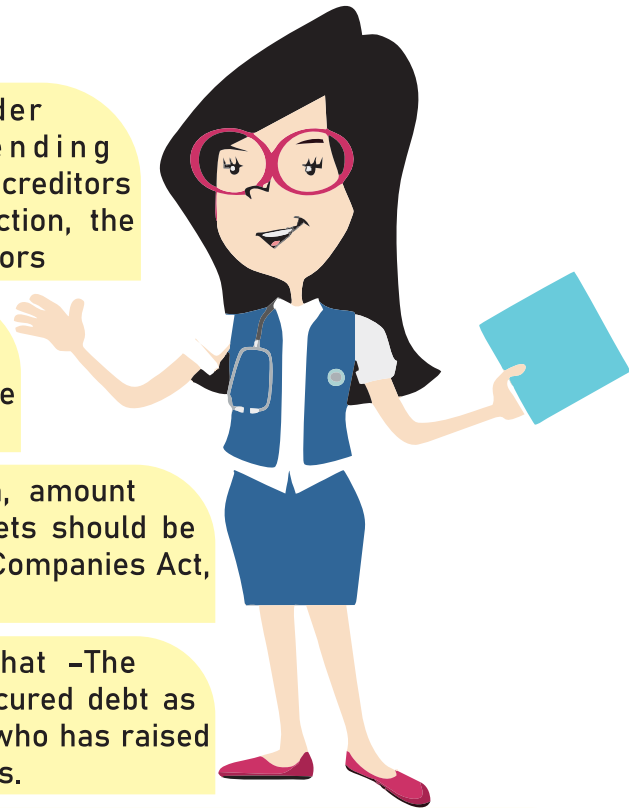
In case of company in liquidation, amount realized from sale of secured assets should be distributed as per Section 529A of Companies Act, 1956/326 of Companies Act, 2013.

**iv**

New proviso inserted provides that –The requirement of classification of secured debt as NPA shall not apply to a borrower who has raised funds through issue of debt securities.

**v**

In case of default in repayment of debt securities , the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;



## Section 15-Manner and effect of take over of management

### Take over of Management:

When the management of business of a borrower is taken over by a securitisation company or reconstruction company under or by a secured creditor, 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.

### On publication of a notice:

- ◆ all persons holding office as directors of the 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 notice shall be deemed to have vacated their offices as such;
- ◆ any contract of management between the borrower and any director or manager thereof holding office as such immediately before publication of the notice shall be deemed to be terminated;

### Restriction on the power of shareholders:

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 in the said Act or in the memorandum or articles of association of such borrower:-

(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.

(d) Where the management of the business of a borrower had been taken over by the secured creditor, the secured creditor shall, on realisation of his debt in full, restore the management of the business of the borrower to him.

### **Recent amendment in the law:-**

Earlier Law- Sub-section (4) to section 15 states that where the management of the business of a borrower had been taken over by the secured creditor, the secured creditor shall, on realisation of his debt in full, restore the management of the business of the borrower to him.

However, the new law creates an exception in this regard. If any secured creditor jointly with other secured creditors or any asset reconstruction company or financial institution or any other assignee has converted part of its debt into shares of a borrower company and thereby acquired controlling interest in the borrower company, such secured creditors shall not be liable to restore the management of the business to such borrower.

### **Section 16-No compensation to directors for loss of office**

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 of any contract of management entered into by him with the borrower.

Moneys recoverable otherwise than by way of such compensation can be recovered.





## Section 17-Application against measures to recover secured debts



Any person aggrieved by the measures taken by secured creditor under Section 13 may make an application to Debt Recovery Tribunal within 45 days from the date of such measure.



Any application made 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. {can be extended by the DRT up to maximum 4 months by recording the reasons in writing



If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified above, any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application.



## Section 18-Appeal against order of DRT



Any person aggrieved by an order of Debt Recovery Tribunal may appeal to Appellate Tribunal within 30 days from date of receipt of order of DRT.



However before filing the appeal 50 % of dues are to be deposited. It can be reduced by Tribunal to amount not less than 25%.



The Debts Recovery Tribunal under section 17 or the Appellate Tribunal under section 18 shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act (RDBFI), 1993 and rules made thereunder.



## Section 18 B-Appeal to High Court in certain cases



A borrower residing in J & K may file an appeal to High Court against order of district court (Section 18 B).



However, before filing the appeal 50 % of dues are to be deposited. (It can be reduced to amount not less than 25%.



## Section 19-Right of the borrower to receive compensation



On an application made to DRT/Appellate Tribunal/High Court under Section 17/18/18 B if it 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, the borrower or any other person shall be entitled to payment of such compensation and costs as may be determined by DRT/Appellate Tribunal/Court.

## Applicability of Act to NBFC's

- ▶ Sarfaesi is applicable to only those notified NBFC which has an asset base of 500 crore or above.
- ▶ SARFAESI is applicable to secured loans only.
- ▶ No secured creditor shall be entitled to exercise the rights of enforcement of securities under Chapter III unless the security interest created in its favour by the borrower has been registered with the Central Registry.
- ▶ NBFCs can invoke SARFAESI for only those cases which are over 1 crore.

### Mind Teasers

#### Case study 1

Can the lender avail the benefit of SARFAESI Act if a winding up petition has been made against the borrower?

#### Answer

Where an insolvency application is launched against the borrower, a secured lender shall not be able to exercise its powers under the SARFAESI Act during the first moratorium granted by the Adjudicating Authority under section 14(1)(c) of the Insolvency and Bankruptcy Code, 2016 for a period of 180 days from the date of admission of the application, which is extendable for another period of 90 days.

#### Case study 2

ABC limited has issued listed bonds five years ago, which is due to be redeemed in the current year worth 50 crore. Market analyst feels that the projected cash flows and profitability seems inadequate to repay the bond value.

The single largest bond holder BH Ltd. holds bonds worth 20 crore, and wants to explore its options under SARFAESI law, in case ABC limited fails to repay the debt.

Please advise whether BH Ltd can have a recourse to the SARFAESI Act.

#### Answer

The definition of secured creditor under section 2(zd) of SARFAESI act has been amended so as to include debenture trustee appointed in respect of debt securities, and corresponding changes have also been made in SARFAESI Act and RDDBFI Act. Hence it shall have recourse to all options available to any secured creditor under the law such as enforcement of security, sale of loans to ARC etc. Unlike NBFC for which a threshold of assets of 500 crore is put for applicability of the SARFAESI act, there is no such limit for debenture holders.

**Work hard today for a Better TOMORROW...**



## Concept of Central Registry (Only for knowledge)

The Central Government may, by notification, appoint a person for the purpose of registration of transactions relating to securitisation, reconstruction of financial assets and security interest created over properties, who shall be known as the Central Registrar.



A record called the Central Register shall be kept at the head office of the Central Registry for entering the particulars of the transactions relating to:-

- a) securitisation of financial assets;
- b) reconstruction of financial assets;
- c) creation of security interest;

The particulars of every transaction of securitisation, asset reconstruction or creation of security interest shall be filed, with the Central Registrar in the prescribed manner and on payment of the prescribed fees.

The ARC or the secured creditor as the case may be, shall give intimation to the Central Registrar of the payment or satisfaction in full, of any security interest relating to the ARC or the secured creditor and requiring registration under this Chapter, within thirty days from the date of such payment or satisfaction.

A creditor other than the secured creditor filing particulars of transactions of creation, modification and satisfaction of security interest over properties created in its favour shall not be entitled to exercise any right of enforcement of securities under this Act.

No secured creditor shall be entitled to exercise the rights of enforcement of securities under Chapter III unless the security interest created in its favour by the borrower has been registered with the Central Registry.

**THESE 5 AM'S WILL WORK FOR YOU  
DON'T LET YOU DOWN...  
FIGHT BACK**



## Section 31-Non applicability of the Act (Only for knowledge) [Strictly advisable to go through]

The situations in which the provisions of this Act do not apply are as follows:-

- a a lien on any goods, money or security given by or under the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 or any other law for the time being in force;
- b a pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872;
- c creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934;
- d creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958;
- e any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930;
- f any properties not liable to attachment;
- g any security interest for securing repayment of any financial asset not exceeding one lakh rupees;
- h any security interest created in agricultural land;
- i any case in which the amount due is less than twenty per cent of the principal amount and interest thereon.

## CA FINAL ELECTIVE PAPER 6D : Economic Laws

### 15 Important Case Laws : KEY TAKEAWAYS

Chapter & Relevant Section	Case Law no.	Name & Ruling Authority	Key Takeaways
Competition Act,2002 Section 2(r) Relevant Market	1	Re: House of Diagnostics LLP and Esaote Asia Pacific Diagnostic Pvt. Ltd  Competition Commission of India	Relevant market was in question as CCI majority and CCI Chairperson has different opinions ,although the majority view will prevail but dissenting opinion is also published .CCI found the relevant market to be the ‘market for dedicated standing/tilting MRI machines in India’ (‘Relevant Market’) whereas CCI Chairperson considered the market to be all MRI Machines. Abuse of dominance is to be checked upon How the relevant market has been defined.
Competition Act,2002	2	CCI vs Bharti Airtel Ltd  Supreme Court	The Supreme Court clarified that the jurisdiction of the CCI is not excluded by the TRAI Act. <b>The Supreme Court grants to the CCI a ‘follow- on’ jurisdiction.</b> CCI could exercise jurisdiction only after proceedings under the TRAI Act had concluded/attained finality
RERA,2016	3	M/s M3M India Pvt. Ltd. & Anr. v. Dr. Dinesh Sharma & Anr  Delhi High Court	The RERA and Consumer Protection Act,1986 <b>are concurrent</b> . It means that home buyers can commence proceedings under CPA,1986 against developers even after commencement of RERA.
RERA,2016	4	Simmi Sikka v. M/s Emaar MGF Land Ltd.  Haryana RERA	RERA is applicable to all the projects whether registered or unregistered, <b>it’s just that few are not required to be registered but</b>

			<p><b>these are within the ambit of the Act.</b></p> <p>All real estate projects are covered for land title defect liability.</p>
<p><b>Insolvency and Bankruptcy Code,2016</b></p> <p><b>Section 8</b> Insolvency resolution by operational creditor</p>	5	<p><b>Macquarie Bank Limited vs Shilpi Cable Technologies Ltd</b></p> <p><b>Supreme Court</b></p>	<p>“An operational creditor may on the occurrence of a default deliver a demand notice” under Section 8 of the Code must be read <b>as including an operational creditor’s authorized agent and lawyer.</b>” Hence, the court concluded that a lawyer on behalf of the operational creditor can issue a demand notice of an unpaid operational debt.</p>
<p><b>Insolvency and Bankruptcy Code,2016</b></p> <p><b>Section 14 - Moratorium</b></p>	6	<p><b>State Bank of India vs. V. Ramakrishnan</b></p> <p><b>Supreme Court</b></p>	<p><b>Section 14</b> of the Insolvency and Bankruptcy Code, 2016, which provides for a moratorium for the limited period, on admission of an insolvency petition, <b>would not apply to a personal guarantor of a corporate debtor. <i>Personal guarantor has to pay for debts due without any moratorium applying to save him.</i></b></p>
<p><b>Insolvency and Bankruptcy Code,2016</b></p> <p><b>Section 24- Meetings of CoC</b></p>	7	<p><b>K. Sashidhar vs. Indian Overseas Bank &amp; Ors</b></p> <p><b>Supreme Court</b></p>	<p>It clearly means that amendment made by way of reducing the voting share to 66% from 75 % while passing of a resolution plan by CoC is not applicable for the decisions made by CoC earlier. (before the amendment came.) <b><i>NCLAT could not have examined the case on the basis of the amended provision.</i></b></p>

Prevention of Money Laundering Act, 2002	8	M/s. PMT Machines Ltd. vs The Deputy Director, Directorate of Enforcement, Delhi  Appellate Tribunal	The attachment order was passed in relation to <b>mortgaged properties in favour of banks, which were not purchased from "proceeds of crime"</b> , as they were purchased and mortgaged with the banks prior to the crime period. <b>ED is allowed to attach other private properties and all other assets of the alleged accused. The Appellate Authority of the Prevention of Money Laundering Act, 2002 (PMLA) has upheld the prevalence of the IBC over the provisions of PMLA.</b>
Prevention of Money Laundering Act, 2002	9	Chhagan Chandrakant Bhujbal vs. Union of India and Ors  Bombay High Court	No authorization of the Central Government is required for <b>Directors, Deputy Directors and Assistant Director</b> whereas, in respect of other officers, such authorization may be necessary. They are authorised to arrest and initiate proceedings for attachment of property and to launch prosecution in the designated Special Court for the offence of money laundering, if they have reasonable belief to do so based upon the material in their possession.
FEMA,1999 Section 13 -Power to impose fine	10	Mr. S. Bhaskar vs Enforcement Directorate FEMA  Karnataka High Court	The power of confiscation conferred under 13 (2) is in addition to the power to impose penalty under 13 (1).It means penalty and <b>confiscation of currency/security/money or property can be done by AA simultaneously.</b>
FEMA,1999	11	Vodafone International Holding (VIH) v. Union of India (UOI)  Supreme Court	The Supreme court held that in Indian revenue authorities <b>do not have jurisdiction to impose tax on an offshore transaction between two non-residents companies</b> where in controlling interest in a (Indian) resident company is acquired by the non-resident company in the transaction.

FEMA,1999	12	<b>Kanwar Natwar Singh vs Director of Enforcement &amp; Anr.</b>  Supreme Court	The noticee is not entitled to demand to furnish all the documents in possession of the Adjudicating Authority including those documents upon which no reliance has been placed. Supply of relied upon documents would serve the purpose of principles of natural justice.
<b>Prohibition of Benami Property Transactions Act, 1988</b> Section 2(9) - Benami Transaction	13	<b>Smt. P.Leelavathi vs V. Shankarnarayana Rao</b>  Supreme Court	<b>Only financial assistance by the father in purchasing of the property will not confer it to be a benami transaction.</b>
<b>Prohibition of Benami Property Transactions Act, 1988</b>  Section 2(9) - Benami Transaction	14	<b>Bhim Singh v. Kan Singh</b>  Supreme Court	The intention of the transferor matters .An order is passed directing the defendant to deliver possession of the suit house to plaintiff No. 2 (Bhim singh Son) as <b>Bharat singh who purchased the property and handed the pattas (title deeds) to Bhim Singh, his intentions were clear to give property to Bhim Singh's Son.</b>
<b>Prohibition of Benami Property Transactions Act, 1988</b>	15	<b>Niharika Jain W/o Shri Andesh Jain Vs Union of India</b>  Rajasthan High Court	The Rajasthan High Court threw the entire transactions entered by the petitioner before 2016 amendment out of the purview of Benami Act. <b>A legislation is presumed and intended to be prospective.</b>