



LEX NEWSLETTER ZONE

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- The Insolvency and Bankruptcy (Second Amendment) Act, 2018

-Raghav Gaind, Associate

The Insolvency and Bankruptcy (Second Amendment) Act, 2018 (hereinafter referred to as "Act") got nod from the President of India on 17th August, 2018. These new provisions replace the 6th June, 2018 ordinance.

The amendments provided in the Act are intended to provide relief to homebuyers and Micro, Small and Medium Enterprises by recognizing their status as financial creditors, thus giving them due representation in the Committee of Creditors (CoC) and making them an integral part of the decision-making process. Further, the Government has lowered the voting threshold for various decisions of the committee of creditors for important decisions and for routine decisions.

Major Amendments

The said amendments resolve numerous issues that are coming in the way of smooth working of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "Code") and plugs innumerable loopholes in the code. Some of the changes can be described as follows:

- A new sub section 5A of Section 5 of the Code has been introduced in the Act which defines the term "Corporate Guarantor". It states that a corporate guarantor is a person who is the surety in the contract of guarantee to a corporate debtor.
- Under Section 5(8)(f) of the Code, an explanation has been introduced which states that an amount raised by the allottee under the real estate project within the ambit of the commercial borrowing having financial debt.

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- A new Section 24A under section 24 of the Code has been introduced in the Code which defines the term related party. The said definition includes the following as related party:
 - > Any relative of the individual or its spouse;
 - ➤ A partner of a Limited Liability Partnership in which the individual is also the partner;
 - ➤ A trustee of the trust in which the individual is the beneficiary or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual:
 - A private company in which the individual is the director and such individual along with is relatives also holds more than 2% of the share capital;
 - A public company in which the individual is the director and such individual along with is relatives also holds more than 2% of the share capital;
 - A body corporate in which the Managing Directors, Directors or the Managers in the ordinary course of the business acts on the advice of the individual;
 - A Limited Liability Partnership in which the partners or the employees in the ordinary course of the business acts on the advice of the individual;
 - A person on whose advice the individual is accustomed to act;
 - A company in which the individual along with its related party holds more than 50% of the share capital or controls the appointment of the board of directors of the company.
- The amendment includes within the ambit of the term financial creditors in Section 7 any other person on behalf of the financial creditor, as may be notified by the Central Government.

- The amendment substitutes sub section 3 of Section 10 of the Code with new section 10(3). It states that the corporate applicant along with application shall furnish the following:
 - The information related to its books of accounts and such other documents for such period as may be prescribed;
 - the information relating to the resolution professional proposed to be appointed as an interim resolution professional; and
 - the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least threefourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.
- A new section 12A under section 12 of the Code has been inserted. As per the new section, the Adjudicating Authority may allow the withdrawal of the application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of 90% voting share of the committee of the creditors, in such a manner as may be prescribed.

Extension to the filing of DIR -3 KYC: Sigh of Relief

-Sindhuja Kashyap, Associate

Ministry of Corporate Affairs ("MCA") vide its notification dated July 05, 2018 decided to conduct KYC of all directors of all companies through introduction of a new form called DIR-3 KYC ("Form") on an annual basis. Therefore, every director who has been allotted DIN on or before March 31, 2018 and whose DIN stands Approved by MCA, have been mandated to file the Form on or before August 31, 2018. After this update, there was a huge havoc in the world of directors with each one of them running around to file the Form within the time



period and struggling with the same. In pursuance of this struggle, MCA vide its notification dated August 21, 2018 made an amendment to the Companies (Registration Offices and Fees) Rules, 2014 which is now referred to as Companies (Registration Offices and Fees) Fourth Amendment Rules, 2018. As per this notification, for the current financial year i.e. 2018 - 2019, no fee shall be chargeable till September 15, 2018. However, INR 5000 shall be charged on or after September 16, 2018. Therefore, if the directors have failed or missed to file Form till date can heave a sigh of relief and ensure the filing is done before September 15, 2018 to avoid implication of fees.

Streamlining the process of public issues: a drop down from 12 to 6

-Sindhuja Kashyap, Associate

Security and Exchange Board of India ("SEBI") vide its circular dated August 16, 2018, issued in exercise of the powers conferred under Section 11(1) of the SEBI Act, attempts to streamline the process of public issue under the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 ("SEBI ILDS"), SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013, SEBI (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008 and SEBI (Issue and Listing of Debt Securities by Municipalities) Regulations, 2015. While at present 12 working days are required for listing after the closure of the issue, as per the circular, all the Securities opening on or after October 01, 2018, should be listed within 6 working days after the closure of the issue. This has therefore brought in a strict timeline to be followed to ensure avoidance of delayed timeline.

▲ Liquidation of corporate debtor stayed on hearing a plea of eight hundred employees -Chandni Barak, Associate

Jyoti Structures Limited, a company engaged in the business of power sector including power transmission and distribution projects. The company has been declared bankrupt and owes lenders about INR 7,625 crore. The company was among one of the 12 companies which the Reserve bank of India had directed to Bankruptcy Court in the month of June 2017, and the same got admitted to NCLT in the Month of July 2017, Mumbai Bench.

As the lenders of the corporate debtor failed to finalize the resolution plan within the prescribed period of 270 days, the NCLT ordered the corporate debtor liquidation making corporate debtor, the first company to face liquidation under new bankruptcy law.

A group of investors led by Sanghi and 800 (Eight Hundred) employees of corporate debtor filed a plea before NCLAT on August 20th, 2018 for stay on liquidation, pursuant to which the NCLAT directed NCLT, Mumbai bench to not take any steps to sell assets of the corporate debtor and also directed the resolution professional "to ensure the company remains ongoing concern" hence, putting interim stay on the liquidation process.¹

India Government of entered into agreement with World Bank to facilitate India become more energy efficient

- Chandni Barak, Associate

Energy Efficient Services Limited (EESL), an energy service company of Government of India on 28th day of August 2018, signed a

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¹ Company Appeal (AT) (Insolvency) No. 464 of 2018.





\$220 million Loan Agreement and \$80 million Guarantee Agreement, the first ever International Bank for Reconstruction and Development (IBRD) guarantee in India, with The World Bank, to facilitate India's Energy Efficiency Scale-Up Program.

The said project which is implemented by EESL and will also contribute in India's climate change as the said program shall aim at reduction of the emission of carbon oxide by deploying 219 million LED bulbs and tube lights, 5.8 million ceiling fans, and 7.2 million street lights as assured by EESL, which will be supplied by private sector manufacturer and suppliers, with the purpose of saving energy in residential and public sectors. And the said program will also increase EESL's capacity for commercial financing.

The said program will also help in development of sustainable business models for emerging market components such as efficient air conditioner, agriculture water pumping systems, refrigerator, and industrial motors, strengthen individual capacity of EESL. The Acting World Bank Country Director of India, Mr. Hisham Abdo, said that "The additional guarantee from the World Bank will support EESL to access new sources of commercial funding, diversify its investor base, and establish a track record for future access to financial markets".

In conclusion, the said program will increase the participation of private sector in making India more energy efficient, including but not limited to private sector energy service companies and will also attract investors. ²

http://www.worldbank.org/en/news/press-release/2018/08/28/agreement-scale-up-indias-energy-efficiency-program.

 Suspended director of a corporate debtor is at liberty to attend COC but cannot insist to provide confidential information

- Chandni Barak, Associate

In the present case, Resolution Professional denied the participation of the suspended director (applicant herein) of a corporate debtor to participate in COC meeting. Aggrieved by the same applicant moved an application before the NCLT, Mumbai Bench, stating that the Applicant has been deprived of his legal rights and that the Resolution Professional has violated the provision of law by denying the access to information or participating in the COC.

The Hon'ble NCLT before discussing the issue stressed on the definition of Participant which states "participant means a person entitled to attend a meeting of the committee under section 24 or any other person authorized by the committee to attend the meeting".

As per the regulation and the code, any person or suspended director other than COC, will be considered as a participants and shall not be considered as members of COC, therefore, the suspended board of directors and the participants are entitled to receive information but where the information is of confidential nature and is limited to the member of COC only, such information need not be given to participants.

The Hon'ble, NCLT observed that the Applicant has raised a plea that Resolution Professional has violated the provision of law and that the Adjudicating Authority shall declare meetings, resolution plan null and void. The Hon'ble NCLT while deciding the said Application, observed as below that:

 No adverse interest of the Applicant has been affected by non-disclosure of such information,

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- No loss will be faced by the Applicant, if the Applicant is deprived of any such information,
- No benefit shall be derived by the Applicant from such disclosure of information.

In the view of the above, NCLT disposed of the application filed by the suspended director due to lack of merits and stated that if such applications are entertained, there will be unnecessary delay in finalizing the resolution plan which needs to be completed within 270 days. However, NCLT gave liberty to the Applicant to attend the COC meeting, but cannot insist upon the COC or the Resolution Professional to provide information which is considered confidential by COC or the Resolution Professional.³

Takeaway from MCA Committee's 'Final Report on Review of Penal provisions of Companies Act, 2013

- Spruha Kulhalli, Associate

The MCA Committee was established by the Government of India ("GOI") in July, 2018 to review the existing framework dealing with 'offences and related matters' under the Companies Act, 2013 ("Act") and to make recommendations to promote better corporate compliance. The report was presented to the Union Minister for Finance and Corporate Affairs, Shri Arun Jaitley, secretary, Ministry of Corporate Affairs, Shri Injeti Srinivas, who chaired the committee on 14 August, 2018.

The committee undertook a detailed analysis of all penal provisions, which were then broken into eight categories based on the nature of

 3 Order passed by the NCLT, Mumbai Bench, with the number - MA 518/2018 in CP (IB) 1372 and 1372 (MB)/ 2017.

offences. The committee recommended that the existing rigour of law should continue for serious offences, covering six categories, whereas for lapses that are essentially technical or procedural in nature, mainly falling under two categories may be shifted to inhouse adjudication process. This in turn would reduce the number of prosecutions filed in the Special courts, which would, in turn, facilitate speedier disposal of serious offences.

The report, made recommendations for declogging the National Company Law Tribunal ("NCLT") , through significant reduction in compounding cases before the Tribunal. Further, the Report also deals with certain important factors related to corporate governance such as declaration commencement of business, maintenance of a registered office, protection of depositor's interests, registration and management of charges, declaration of significant beneficial ownership and independence of independent directors.

SEBI enhances monitoring of Qualified Registrars to an Issue and Share Transfer Agents

-Mohana Roy, Associate

The Securities and Exchange Board of India ("SEBI") in pursuance to protect the interest of investors in securities & to promote development of securities market has issued a circular dated 10th August 2018, enhancing the monitoring of qualified registrars to an issue and share transfer Agents (Qualified Registrars means those servicing more than 2 crore folios.) (hereinafter referred as QRTA'S)

By Virtue of the circular the QRTA's have to comply with the enhanced monitoring requirements and reporting requirements within 6 months from the date of the circular. On one hand it will increase the compliance burden upon the QRTAs however on the other hand it will protect the interest of the investors. Some of

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the key compliance requirements under the circular are as follows:

Comprehensive Risk Management policy-

The QRTA's have to establish a risk Management Policy which shall provide a comprehensive view of risks, they also have to prepare a List of all relevant risks and responsibilities and accountability for risk decisions and decision making process in crises & emergencies.

Maintenance of Records & Data protection— The QRTA's have to ensure integrity of the data processing system and also have to maintain accurate up to date records for servicing it to the investors.

<u>Business Continuity Plan</u> - All the QRTA's shall have to maintain a Business Continuity Plan which shall ensure to take over operations without any adverse effect in case of any service failure

Measures for better Investor Servicing- QRTA's have to lay down protocols, processes and controls for extending co-operation to the investors, issuers, custodians, depositories and other QRTA's

Apart, The BoD of QRTs shall keep reports on incidents having an impact on investor protection including data security breaches. Also the QRTA's shall have to carry out stakeholder/investors survey on an annual basis and publish the same on the website for before 31st March every year.

Aforesaid compliances are in addition to half-yearly periodic reporting done by the RTA's as prescribed by the SEBI vide circular dated $5^{\rm th}$ July 2012. on "Review of Regulatory Compliance and Periodic Reporting"

MCA notifies the Companies (Prospectus and Allotment of Securities) (Second Amendment) Rule 2018

-Mohana Roy, Associate

The section 10 of the Companies Amendment Act 2017 which amends section 42 of the Companies Act 2013 has come into force on 7th August 2018. In pursuance of which, the Companies (Prospectus and Allotment) Rules 2014 has also been amended by notifying the Companies (Prospectus and Allotment) (Second Amendment) Rules 2018. (hereinafter referred as "the amendment").

The amendment has simplified the private placement procedural requirements, reduced the penalty but it has enhanced the disclosure requirements for the companies.

The most important and significant change which has been brought by the amendment is that, now the issuer is not permitted to utilise any monies raised through private placement till the allotment is complete and a return of allotment (in Form PAS-3) is not filed with the ROC. Also the timeline for filing return of allotment has been reduced to 15 days from 30 days

Relaxation has been provided with respect to filing of Form PAS-4 & Form PAS-5 with ROC, however the company has to maintain the record of the same with themselves.

By virtue of the amendment now it is permitted to issue Non-Convertible Debentures pursuant to a Board resolution so long as it is within the limits of raising debt as approved under section 180(1)(c) of the Companies Act 2013. Earlier shareholder's resolution was required

Further, the amendment has done away with the minimum investment size of INR 20,000 in face value of securities and also with the private placement offer letter however the offer letter remains as the company has to issue an offer letter in Form PAS-4 with extensive disclosures.

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