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IBC GOVERNANCE TOWARDS STRESSED HOUSING FINANCE COMPANIES AND NON-BANKING FINANCIAL COMPANIES

❖ INTRODUCTION:

The Ministry of Corporate Affairs (the "MCA") in consultation with the Reserve Bank of India (the "RBI") through the notification dated 18th November, 2019 (the "Notification"), regarding the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (the "Rules"),[1] has made an attempt towards enabling the resolution of finance companies and Non-Banking Financial Companies (NBFCs) in a fast track manner.

The Notification extends the applicability of the Rules to NBFCs, including housing finance companies which have an asset size of rupees five hundred crores or more (per their last audited balance sheet) ("Financial Service Providers/FSPs"). Now, through this Notification, the insolvency resolution and liquidation proceedings of the said categories of NBFCs will be done in accordance with the Insolvency and Bankruptcy Code, 2016 ("IBC") and the Rules.

❖ OVERVIEW:

In accordance to the rules framed, a Standing Order Number S.O. 4139(E) was notified. Subsequently, the IBC under Section 227 was *extended* to apply the resolution and liquidation proceedings to the said category of FSPs.[2] For the said purpose the Notification has enforced certain regulations on NBFCs including the housing finance companies:

1. These rules and regulations provided under Section 227 of the IBC shall not apply to Banks.
2. This amendment will allow any creditor involved with the company to initiate the insolvency process where they have insight of default by the company or where a corporate governance issue lies within the company.
3. For this purpose, an appropriate authority/regulator, which in most cases is the RBI, has the power to appoint an administrator and advisory committee to look after the whole resolution process.
4. An interim moratorium shall be applicable on and from the date of filing of the application till its admission or rejection.
5. The provisions of the interim moratorium or moratorium shall not be applicable on third party assets and or properties that are in custody of the FSP including other assets required to be held in trust for the benefit of the third parties. Rather, the administrator shall take control of them and deal with them in the manner as notified by the Central Government under Section 227.
6. According to the Rules, the registration and license of such institutions shall not be put on hold or get cancelled while the interim-moratorium and the resolution process continue.
7. Approval of the resolution plan from the Committee of Creditors is essential for a "No-Objection" by the appropriate regulator in accordance with section 29A and 30(4) of the IBC is required.[3]
8. For the purpose of approval of the resolution plan, a new concept of "deemed" no-objection, under Rule 5 (d) (iv) is also incorporated which shall operate within 45 (forty-five) days from its submission.
9. The total timeline for such a resolution process shall be of 330 days.

[1] https://www.ibbi.gov.in/legal-framework/notifications.
[2] https://pib.gov.in/Pressreleaseshare.aspx?PRID=1591728, Press Information Bureau Government of India Ministry of Corporate Affairs, published on :15 November 2019 by 3:43PM by PIB Delhi

[3] http://www.mca.gov.in/Ministry/pdf/InsolvencyBankruptcy_15112019.pdf, page number 09, published on 15th November, 2019.

❖ **IMPACT:**

1. The Amendment was brought about in order to liberate the working of non-banking lenders in the country. This can be taken as a step to ensure overall financial stability in the management of FSPs.

2. The insolvency process will be initiated by an application by the regulator instead of a creditor. However, Rule 8 still permits voluntary initiation of the insolvency process by the FSP with the prior approval of the Regulator.

3. For the purpose of resolution, the administrator shall be proposed by the regulator i.e., RBI and approved by the adjudicating authority. By virtue of RBI overseeing the process of the CIRP, this will ensure that the financial system in India is not destabilized and would also protect the interests of all the stakeholders

4. An administrator might not be competent to handle the business operation of an FSP and RBI by constituting an Advisory Committee to advise the administrator will ensure that the FSP is able to maintain its business operations on a going concern basis, which was upheld in the Order of the NCLT Bench (Mumbai) in Dewan Housing Finance Corporation Ltd (DHFL).[4]

5. A list of financial service providers that will not fall under the definition of FSPs is expected to be clarified by the Government.

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[4] https://www.ibbi.gov.in/uploads/whatsnew/cf302150e9c38c99624c2540655c9fd4.PDF, Press Release by Reserve Bank of India, published on 22nd November, 2019.

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OVERVIEW OF COMPANY LAW COMMITTEE REPORT FOR RECATEGORIZATION OF CRIMINAL OFFENCES TO CIVIL WRONGS

❖ INTRODUCTION:

The Ministry of Corporate Affairs (the "MCA") on 18th September 2019, set up a Company Law Committee (the "Committee") to make recommendations, *inter alia*, on the re-categorization of certain 'criminally compoundable offences' to 'civil wrongs' in order to facilitate and promote the ease of doing business and ease of living of corporates & other stakeholders in India.

The Committee, *inter alia*, proposed amendments in 46 (forty-six) penal & compoundable offences under the Companies Act, 2013, through a report submitted to the Union Minister of Corporate Affairs, Mrs. Nirmala Sitharaman on 14th November, 2019 (the "Report").

❖ OVERVIEW:

The purpose of this Report is-

- to decriminalize non-compliances of minor, technical or procedural nature,
- to facilitate and promote ease of doing business,
- ease of living for law abiding corporates and other stakeholders, and
- to de-clog the criminal justice system.

Chapter I of the Report proposes decriminalization of compoundable offences –

i. It is proposed to re-categorize 23 (twenty-three) offences out of the 66 (sixty-six) remaining compoundable offences to be dealt with in-house adjudication framework ("IAM"), wherein the default shall be subjected to the penalty(ies) levied by the adjudicating officer under Section 454 of the Companies Act, 2013 ("Act").

ii. This amendment further proposed omitting seven (7) offences all together and limiting the punishment for eleven (11) compoundable offences to only fine. It also recommended that five (5) offences be dealt with alternative frameworks.

iii. Reduction of quantum of certain penalties that were shifted to the IAM was also proposed.

Chapter II of the Report proposes ease of living related changes for corporates –

i. It includes powers such as to exclude a certain class of companies from the definition of 'listed company' as defined under Section 2(52) of the Act, in consultation with the Securities and Exchange Board of India.

ii. Clarifying the trial court's jurisdiction on the basis of place of commission of an offence under Section 452 of the Act, for wrongful withholding of property of a company by the officers/employees of such company.

iii. Including the provisions of Part IXA (i.e. Producer Companies and the matters related thereto) of the Companies Act, 1956 in the Act.

iv. Proposing setting up of benches of the National Company Law Appellate Tribunal.

v. Provisions for allowing payment of adequate remuneration to non-executive directors in case of inadequacy of profits.

vi. Relaxation of the provisions related to the imposition of higher additional fees under third proviso to Section 403(1) of the Act, i.e. fee for filing etc.

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vii. Extending the applicability of Section 446B (i.e. lesser penalties for small companies and one person companies) to all civil provisions which attract monetary penalties and promoting ease of living for small corporates like producer companies and start-ups.

viii. Exclusion of certain companies/bodies corporate from the applicability of Section 89 (i.e. declaration of beneficial interest in shares) and Chapter XXII of the Act (i.e. companies incorporated outside India).

ix. Reduction of timelines for speeding up rights issues under Section 62 of the Act.

x. Extension of exemptions for filing of certain resolutions to certain classes of non-banking financial companies registered under chapter III-B of the RBI Act, 1934, under the second proviso of Section 117 (3) of the Act, in consultation with the RBI.

xi. Providing power to modify the thresholds which trigger the applicability of Corporate Social Responsibility provisions.

xii. Non-levy of penalties for delay in filing of the annual returns and financial statements in certain cases.[5]

Additionally, the Committee suggested a wider consultation on the matters such as appeal against the orders of the Regional Directors before the NCLT, exemption of private placement requirements for Qualified Institutional Placements, disqualification of directors, debarment of audit firms in the future.

❖ **IMPACT:**

The measures to decriminalize some of the compoundable offences would greatly contribute to the present Government's intention to ease the way of doing business. This shall promote an environment where the company, instead of focusing on its criminal liability, will be able to pay off dues and rectify defaults. Further, decriminalization of technical or procedural compoundable offences would help the companies to save time and cost.

Furthermore, the recommendation of handling the compoundable offences through an in-house adjudication mechanism would significantly reduce the burden of the Tribunals and the Courts which already have a heavy case load pertaining to different matters of law, so ensuring an effective and efficient process of prosecution and deliverance of justice.

❖ **CONCLUSION:**

In view of the above, it can be concluded that by the amendments proposed in the Report as mentioned above, the Committee has tried to draw a healthy balance between civil and criminal sanctions. By, *inter alia*, decriminalizing certain criminal offences and reducing the quantum of penalties, it tries to ensure that there is expeditious deliverance of justice rather than time consuming criminal litigation. Although, keeping in mind their current relevance and gravity, matters like disqualification of directors and debarment of audit firms seem to be of urgent nature and should have been addressed first, it can still be deduced that it would be beneficial for the Government to adopt the existing recommendations as proposed by the Committee by way of this Report. Furthermore, the Government should strive towards achieving a more favorable balance between effective corporate governance and ease of doing business.

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[5] http://www.mca.gov.in/Ministry/pdf/CLCReport_18112019.pdf

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1. Central Government makes new rules to amend the Companies (Meetings of Board and its Powers) Rules, 2014

The Central Government effected an amendment to the Companies (Meetings of Board and its Powers) Rules, 2014 vide a notification published in the Gazette of India, dated 18th November 2019 which has altered certain transaction thresholds with respect to related party transactions that may be authorised by the Board. This amendment affects contracts including those relating to sale, purchase and supply of goods and disposal/buying of property and leasing of property.

[*For details refer to:* http://www.mca.gov.in/Ministry/pdf/Comp2Amndt_18112019.pdf]

2. Certain Provisions of Insolvency and Bankruptcy Code, 2016 brought into force

By means of a notification in the Gazette of India dated 15th November 2019, the Central Government, determined 1st December 2019, as the date on which certain provisions of the Insolvency and Bankruptcy Code, 2016 with respect to the personal guarantors of corporate debtors would come into force.

[*For details refer to:* http://www.mca.gov.in/Ministry/pdf/Notification_18112019.pdf]

3. Amendment to Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016

For the purpose of the present rules, the RBI amended the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016, vide notification dated 13th November 2019 to include the definition of a Special Non-Resident Rupee (SNRR) Account that is referred to in Regulation 5(4) of Foreign Exchange Management (Deposit) Regulations, 2016 and other matters incidental to payments from and to an SNRR Account.

[*For details, refer to:* https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11737&Mode=0]