

**COMPENDIUM**

**on**

**WEEK WITH THE LEGENDS 2020**

**2nd March -6th March**

## SEMINAR I

# Directors' Duties & Vulnerable Transactions

### Esteemed Panelists



Shri UK Sinha



HH James Pickering



Shri Ashwini Mehra\*

&  
Shri Pulkit Deora (Moderator)

Date: 2nd March 2020

Time: 10:00 AM-1:00 PM

Venue: Indian Institute of Corporate Affairs,  
Ministry of Corporate Affairs, Manesar

To be Confirmed\*

# Directors' Duties & Vulnerable Transactions

Section 166 of the Companies Act, 2013 ("Act") prescribed duties of the directors of any company irrespective of its nature or its size of operations which include that the directors of a company have duty to act in the best interests of the company, its employees, the shareholders, the community and for the protection of environment. Unlike section 172 of the UK Companies Act, 2006 which casts duty on the directors to consider or act in the interests of creditors of the company in certain circumstances, the Act does not impose any duty on the director towards the creditors of the company. However, section 66 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") casts personal liability on a director if such director did not exercise due diligence and failed to take reasonable steps to minimise the potential loss to the creditors when he knew or ought to have known that there is no possibility of avoiding the commencement of insolvency proceedings.

The trigger for commencement of insolvency proceedings in India is 'default' by the corporate debtor. Default with any lender is a lagging indicator of financial stress faced by the corporate debtor and this zone of stress is referred to in insolvency parlance as "twilight zone". The Code is silent on laying any specific trigger or period to identify the commencement of the twilight zone. However, we can infer from Section 66(2)(a) of the Code that the twilight period triggers when the director knew or ought to have known that there was no reasonable prospect of avoiding the commencement of insolvency proceedings under the code. In the United Kingdom, the Court of Appeals in *BTI v. Sequana* found that twilight zone is triggered when the company is or is likely to become insolvent (i.e., it is of dubious solvency).

Once the insolvency proceedings are commenced, the powers of the board of directors of the corporate debtor are suspended and the same shall be exercised by the insolvency professional. Even though the powers are suspended, the duties of such directors shall continue to exist. At this juncture, if any executive director resigns, it becomes contentious as the committee of creditors ("CoC") might want him/her to continue and rejecting such resignation might lead to infringement of fundamental right of such director to practise any profession. In the matter of *Reliance Communications Ltd.*, the CoC rejected the resignation of Mr Anil Ambani (Chairman) and three other executive directors and asked them to continue at least till the completion of insolvency proceedings. This was not contended by any of those directors.

The code identifies certain vulnerable transactions which are avoidable or shall be reversed, viz. preferential, undervalued (both with and without intent to defraud creditors), extortionate credit transactions and transaction involving fraudulent and wrongful trading. Transactions which are output of wrongful trading are the ones which are particularly entered during the twilight zone. For such transactions, the code provides for an objective test to look into the personal liability of the director, unlike Section 246ZB(4) of the UK Insolvency Act, 1986, which also provides for a subjective test.

In this background, the following issues need further deliberation:

- Twilight Zone and the duties of directors
- Role of directors during insolvency proceedings
- Vulnerable transactions – examination, investigation and identification
- Role of an insolvency professional when the criminal proceedings are pending against the corporate debtor during CIRP

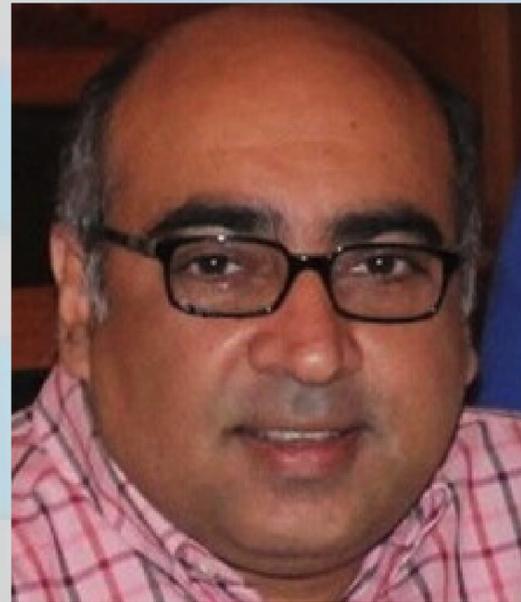
# SEMINAR II

## Employees' Claims in Insolvency

### Esteemed Panelists



HH James Pickering



Shri Vivek Sibal

&

Shri Pulkit Deora (Moderator)

Date: 3rd March 2020

Time: 10:00 AM-1:00 PM

Venue: Indian Institute of Corporate Affairs,  
Ministry of Corporate Affairs, Manesar

# Employees' Claims in Insolvency

Though the Insolvency statute has placed certain claims of workmen to rank *pari passu* with that of a secured creditor and employees' to rank third in the waterfall mechanism embedded under section 53, the Courts have conflicting opinions as to where the employees or workmen dues, as the case may be, fall in the liquidation waterfall.

The Employees' Provident Funds And Miscellaneous Provisions Act, 1952, ("EPF Act") empowers the employees to have super senior charge over the assets of the company to recover employee dues. However, The NCLT, Chennai has categorised EPF dues to fall under section 53 (f) as other dues and the rationale being that the Insolvency code in Section 238 contains a non-obstante clause which overrides any other laws inconsistent with the Code, including the super senior charge under the EPF Act. Notably, the Employees' Provident Funds And Miscellaneous Provisions (Amendment) Bill, 2019 attempts to amend the provision and reiterate the legal position creating first charge on assets of a company and to be paid in priority over all other debts. Also, in other jurisdictions in the event of fund deficits in an insolvency distribution scenario, the state sponsored funds, guarantee funds, insurance funds and the like come to aid the employees to satisfy their remaining claims which could not be recovered under the liquidation waterfall. Similarly, is it time for India being a 'socialist' republic as engraved in its Constitution, to conceptualise a mechanism for employees to fall back on in the event their dues are not settled.

In this background, the following issues need further deliberation:

1. Super senior charge to employees' dues
2. Placement of claims of employee or workmen, as the case may be, in the liquidation waterfall
3. Dealing with fund deficits in an insolvency scenario
4. Role of state in satisfying employees' dues

## **SEMINAR III**

# **Contentious Insolvency and Cross Border Recovery**

## **Esteemed Panelists**



**Shri Ashish Chhawchharia**



**HH James Pickering**



**Shri Suharsh Sinha**

**&**

**Shri Pulkit Deora (Moderator)**

**Date: 3rd March 2020**

**Time: 2:00 PM-5:00 PM**

**Venue: Indian Institute of Corporate Affairs,  
Ministry of Corporate Affairs, Manesar**

## SEMINAR IV

# Contentious Insolvency and Cross Border Recovery

### Esteemed Panelists



HH James Pickering



Dr KP Krishnan



Dr. Mukulita Vijayawargiya



Shri Abizer Diwanji

&

Shri Pulkit Deora (Moderator)

Opening Remarks: Shri G.K. Singh, Joint Secretary, MCA\*

Date: 4th March 2020

Time: 10:00 AM-1:10 PM

Venue: FICCI, Federation House, Tansen Marg,  
Mandi House, New Delhi

## **SEMINAR V**

# **Contentious Insolvency and Cross Border Recovery**

### **Esteemed Panelists**

**Justice A. K. Sikri\***

**HH James Pickering**

**Dr. MS Sahoo\***

**Dr. S Gangopadhyay**

**Shri Ashwin Bishnoi**

**Shri Sajeve Deora (Moderator)**

**Guest of Honour: Shri G.K. Singh, Joint Secretary, MCA\***

**Date: 5th March 2020**

**Time: 4:30 PM-6:20 PM**

**Venue: Vigyan Bhawan, Central Secretariat, New Delhi**

**To be Confirmed\***

# Contentious Insolvency and Cross Border Recovery

The World economy since the past few decades is characterized by the participation of businesses in the development of economies across the global. Such expansion has caused not only growth, but also insolvency beyond borders, thus, giving rise to the dialogue on cross- border insolvency issues. The need for a discussion on the issue primarily arises when the operations, assets or even the creditors of an entity is in more than one nation. India, too being a home to many multinational entities, attempts to come up with a comprehensive framework with respect to cross- border insolvency, thereby aiming to facilitate increased foreign investment, mechanism for cooperation while respecting the different laws of different nations.

With the intent to address the cross- border insolvency issues, the Insolvency Law Committee recommended the adoption of UNCITRAL Model Law on Cross- Border Insolvency with some modifications.

Further, the National Company Law Appellate Tribunal (NCLAT) in *Jet Airways (India) Ltd. V. State Bank of India & Anr.*, via order dated 26th September, 2019, allowed the Dutch administrator to be a part of the Jet Airways's Committee of Creditor meetings and cleared the way for cross-border insolvency protocol for Jet Airways, which was an enabling framework for cooperation between Indian Resolution Professional and the Dutch Administrator.

Though the Committee report and the Judicial Precedent provided some progress with respect to the cross- border insolvency matters, many issues yet remain unaddressed such as those related to contentious cross- border insolvency.

Contentious cross- border Insolvency refers to a situation wherein the Insolvency cases are marred by frauds on the face of it i.e. the parties to the situation have to deal with not only the issue of insolvency resolution but also asset tracing and recovery beyond borders.

Where countries like United Kingdom have a robust comprehensive framework to deal with such issues, India's insolvency regime, still in its nascent stage, is acquainting itself with the issues and tools to address the same.

In this background, the following issues require further deliberation:

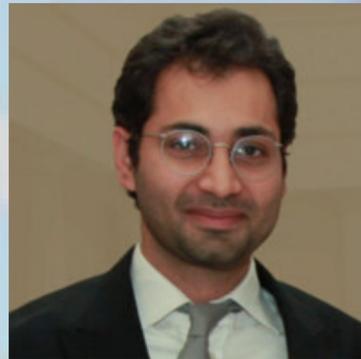
- Unified approach to decide COMI
- Limiting the dependence on courts to decide COMI
- Scope and delimiting the conflict between foreign representative in cross border insolvency
- Access of information on Foreign Assets
- Utilization of Mutual Legal Assistance
- Admissibility of Foreign
- Reports on fraud by Indian Courts and addressing the issue of its non-recognition
- Harmonization of Constructive
- Trust Claims with Rights of Secured Creditors
- Utilization of DTAA for realizing the asset claims

## AND OUR TEAM

• ~ Under the able guidance of ~ •



Dr. Neeti Shikha



Shri Pulkit Deora

• ~ From the GIP Council ~ •



Mr. Prakul Thadi



Mr. Vijay Sekar



Miss Jane Pauline



Miss Roshni Jain



Mr. Gaurav Chaudhary



Miss Ankita Saxena



Mr. Ajit Godara

# Graduate Insolvency Programme 2.0

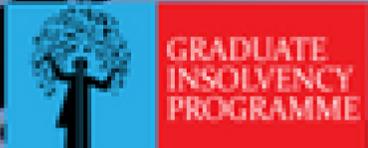
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