

Chapter 1 – Appointment and Qualification of Board of Directors

Never count the number of pages when the chapter is as important as director!

Board or "Board of Directors" [Section 2(10)] means the **collective body** of the directors of the company

Why do we need Board of Directors (BOD)?

1. Co. is an **artificial** person having separate legal existence but no body or mind of its own.
2. **Huge** numbers of shareholders (especially in case of listed companies)
3. Requirement of **Sec 149**

Directors are both **agent** as well as **trustee** of the company.

1. Agent - They bind co. as their principal as soon as they enter into various transactions on its behalf
2. Trustee - They are required to **take care** of properties, moneys, trade secrets, etc. of co.

Section 149: Company to have BOD

1. Co. to have BoD:

- Consists of **individuals**
- **Minimum** - Public (3), Private (2) and OPC (1)
- **Max** - 15 directors (To appoint > 15 directors - Pass **SR**)
[N.A. to Govt co and Sec 8 companies provided compliance with Sec 92 (AR) and 137(F.S.)]

AoA may provide for a **lower** limit of maximum directors.

Companies as may be prescribed shall have at least one **woman director**.

Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014

1. Provision of Woman Directors applies to following cos.:

- **Listed** company, or
- Any other public company
 - **PUSC** > = Rs. **100** crores **OR**
 - **Turnover** (T/O) > = Rs. **300** crores

PUSC and T/O as per last date of latest audited F.S.

2. Intermittent vacancy - 3m or immediately next BOD meeting - WI **Later**
3. Newly incorporated co. - Comply within **6 months** (**Refer QB - 53**)

Example - Women Director - Death on 17th March 2022. Next BOD meeting - 25th June 2022. Co. is required to fill vacancy by 25th June or 16th June 2022 **WE Later** i.e., 25th June.

Is it mandatory for a woman director to be independent? - No. there is no such provision

2. Transition provision

3. Resident Director - **At least 1** (stay in India for > = **182** days during FY)
Take proportionate to 182 days in case of newly incorporated co.

4. Independent Director (I.D.) (N.A. to Private companies)

Listed Public Company - At least 1/3rd of total no. of directors to be independent [Fractions = 1]

Unlisted Public Company - As may be prescribed - At least 2 I.D.

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

Following unlisted public co. to have at least 2 I.D:

PUSC \geq 10 crores	T/O \geq 100 crores	O/S Loan, Debentures and Deposits (in aggregate) $>$ 50 crores (If = Rs. 50 crores, then N.A.)
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PUSC, T/O and O/S as per last date of latest audited F.S.

Above provision shall **not apply** to - (a) Joint Ventures (b) WoS and (c) Dormant co. u/s 455

Section 149 vs 177:

If higher no. of I.D. required due to composition of A.C. (**Sec 177**), such higher no. of I.D. applicable under this section. [Ex. In an unlisted public co. having PUSC of Rs. 100 crores, if A.C. has 7 directors, 4 of them have to be I.D. (sec 177). So, as per Sec 149, the minimum no. of I.D. shall be 4 (and not 2)]

Intermittent vacancy - 3m or **immediately next BOD** meeting - WI **Later**

Not required to appoint I.D. if ceases to fulfil conditions (PUSC, T/O, O/S) for 3 consecutive years

Definition of Listed Company: [Sec 2(52)]

Listed company means a co. which has **any of its securities** listed in Recognized Stock Exchange (RSE).

The following classes of cos. shall **NOT** be considered as listed companies, namely:

- Public** companies (equity not listed) having listed their following securities issues on **Private placement** basis as per SEBI regulations:
 - Non-convertible **debt** securities, or
 - Non-convertible redeemable **preference** shares
 - Both categories of (i) and (ii) above.
- Private** companies which have listed their non-convertible **debt** securities on **private placement** basis on a RSE as per SEBI Regulations;

5. Transition provision

6. Who can become an ID? (**IMP DOGS FVNK**)

Director other than a MD, WTD or a nominee director fulfilling all the following criteria:

- Integrity** and has relevant expertise and experience in opinion of Board
(or Ministry of CG/SG administratively in charge of the co.)
- Not is/was **Promotor** of CASH
 - Not related to promotor or director of CASH (*restricts promotor of CASH but not director of CASH*)
- Has no pecuniary (**M**onetary) relationship with CASH or their P/D during last 2 FY + CY (*N.A. to Govt. co provided 92 and 137*)

Following will not be considered pecuniary relationship:

1. **Remuneration** as such director,
2. Transaction $< = 10\%$ of his total income or
3. Transaction in **Arm's Length price** in the Ordinary Course of Business (OCOB)]

d. None of whose relatives:

- Holds any **Security** or interest in CASH during last 2 FY + CY
(Note: May hold in company of face value not exceeding 50 lakhs or PUSC upto 2% of CASH)
- **Indebted** to CASH or P/D **in excess of** such amount as may be prescribed (Rs. 50 lakhs) - 2 FY + CY
- Given **Guarantee** or provided security for indebtedness of any third person to CASH or P/D of such holding co. for **Rs. 50 lakhs** - 2 FY + CY
- Any **other** pecuniary relationship with CASH $\geq 2\%$ of its Gross T/O or Total income [in aggregate] (P/D not covered)

e. Neither himself nor relative:

- Is/was **KMP** or employee of CASH - Last 3 FY
(Exception: Relative can be an employee in past 3 yrs)
- Employee/Proprietor/Partner in CY + Last 3 FY
 - **Firm** of auditors or CS in practice or Cost auditors of CASH
 - Legal/Consulting **Firm** having transaction with CASH of $\geq 10\%$ of Gross T/O
- Holds (with relative) $\geq 2\%$ of **Voting power** of Co. (**Not CASH**)
- Is the CEO/Director of **NPO** that
 - **Receives** $\geq 25\%$ of its receipt from CASH or P/D or
 - Holds VP $\geq 2\%$ of company

f. Possesses such other qualification as may be **prescribed**

(Rule 5 - I.D. shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management etc.)

Can Mr. A be appointed as I.D. in a company be appointed as I.D. in subsidiary company? - Yes, no such restriction u/s 149(6)

7. I.D. to **declare** that he meets criteria of independence:

First BOD Meeting in which he participates as director

First BOD Meeting **every FY**

any **change** in circumstance which may affect his status as ID

8. I.D. to abide by prov. of **Schedule IV**

9. I.D. shall **not** be entitled to **Stock Option**. I.D. may receive **remuneration** by way of:

Fees u/s **197 (5)**

Reimbursement of expenses for participation in meetings

Profit related commissions - as may be approved by Members

In case of **no profits** or **inadequate profits**, I.D. may receive **remuneration**, excluding fees u/s 197(5), in accordance with the provisions of **Schedule V**

10. Term of I.D. - **Upto** 5 consecutive years (a term of <5 years is possible)

Reappointment - Eligible on passing **SR** + Disclosure of same in BOD Report

11. No ID to hold office for more than 2 consecutive terms

Cooling period - 3 years (shall not be associated with co in any capacity, directly or indirectly)

12. ID and NED (not being KMP/promoter of co.) shall be held liable only in respect of those acts of omission or commission by a co. which had:

occurred with his
knowledge

attributable to
board process

occurred with his **consent** or
where he has not acted **diligently**

13. Sec 152 (6) and (7) N.A. to I.D.

Section 150: Manner of Selection of ID and Maintenance of Databank of ID

- ID may be selected from a **databank** containing details (name, address, educational and professional qualification) of person **ELIGIBLE** and **WILLING** to act as ID.
- CG may notify body, institution or association having expertise in creation and maintenance of such databank (*CG has notified - Indian Institute of Corporate Affairs - **IICA** at Manesar*)
- Responsibility to exercise **due diligence** - Lies with such co.
- Appointment of ID - To be **approved in GM** (ES annexed to notice of GM to include justification)

Rule 6 of Companies (Appointment and Qualification of Directors) Rules, 2014

- Make **online appln (within 13m of commencement)** to IICA for inclusion of name in databank if:
 - Existing ID** (needs to renew till he continues to be ID in any co.)
 - Aspiring ID** - He intends to get appointed as an ID
- Individual **not having DIN** can also **apply**
- Specify in application the period - 1 year, 5 years or Lifetime
- Renewal** application within 30 days of expiry **else** name **removed** (N.A if lifetime fees paid)
- Declaration by ID of compliance of this Rule - Along with declaration u/s **149 (7)**

Online Proficiency Self-Assessment Test (**OPSAT**) -

- Within **2 years** of inclusion of name. Else his name shall stand removed.
- No limit** on no. of attempts. Score **50%** to pass the test
- Test N.A** for person who have served for **> = 3 years (If more than 1 co., count once)** as:
 - a) who is **director** or **KMP** in:

Listed Public
Company

Unlisted Public co.
PUSC >= Rs. 10 cr.

Body Corp.
listed in RSE

Body corp incorp. o/s
India - PUSC >= \$2Mn

Stat. corp
(Ex. LIC)

- b) Pay scale of **Director** or equivalent or above in any **Ministry** or Department of CG/SG having **experience** in handling:

- matters relating to commerce, corp. affairs, finance, industry or public enterprises; or
- affairs related to Govt. cos. or statutory corporations set up under an Act of Parliament or any State Act and carrying on commercial activities. [**Amendment**]

- c) Pay scale of **Chief General Manager** or above in **SEBI, RBI, IRDA, PFRDA** and having experience in handling matters related to corporate/sec/eco. Law

Provided also that the following individuals, who are or have been, for **at least 10 years**:

an **advocate** of court

CA in Practice

Cost Accountant in Practice

CS in Practice

shall not be required to pass the online proficiency SAT [**Amendment**]

Restoration of Name:

Any **indv.** whose name has been removed for not being able to clear OPSAT **within 2 years**, he may apply for **restoration** of his name on payment Rs. 1,000 & IICA shall allow such restoration subj to:

(i) his name shall be shown in a **separate restored category** for **1 year** from such restoration within which, he shall be required to pass OPSAT & thereafter his name shall be included, only, if he passes OPSAT and in such case, the **fees** paid by him at the time of initial registration shall **continue to be valid** for the period for which the same was initially paid; and

(ii) in case he **fails** to pass OPSAT within 1 year from date of restoration, his name shall be **removed** from data bank, and he shall be required to **apply afresh** for inclusion of his name

Section 151: Appointment of Director Elected by Small Shareholders (SSH)

[Read with **Rule 7** of the Companies (Appointment and Qualification of Directors), Rules, 2014]

Applicability	Listed Co. MAY have 1 director elected by SSH (NV \leq Rs. 20,000)
Process	Suo motu or Notice of Intention by SSH (not $<$ lower of 1,000 SSH or 1/10 th SSH)
Time limit	Notice of intention to be given at least 14 days before meeting
Content of notice	- Name, address., no. of shares held (if any) & folio no. (if any) of proposed SSD & - Name, address, no. of shares held and folio no. all the SHs proposing such appt.
Statement	By proposed SSD stating - DIN , not disqualified u/s 164 , his consent to act as dir.
SSD = ID?	SSD considered as ID if eligible u/s 149 (6) and gives declaration u/s 149 (7)
Rotation?	Not liable to retire by rotation
Tenure	3 consecutive years. Not eligible for reappointment.
Cooling off	3 years
Vacate if:	Disqualified u/s 164, Vacation as per 167 or ceases to meet sec 149 (6)
Restriction	Not hold the position of SSD in $>$ 2 companies at the same time. 2 nd co. not in competing or conflicting business.

Section 152: Appointment of Directors

1. First director -

- Appointed as per provisions of AoA. Otherwise, subscribers to MoA (individuals) - Deemed
- Tenure - Till directors duly appointed as per provision of this Act
- OPC - Individual member deemed

2. **Every director** shall be appointed **by the company** in the **GM** (unless otherwise specified)

3. No person to be appointed as dir. unless allotted DIN. (**Minor cannot obtain DIN**)

4. Every Dir. (incl Sec 161) to furnish **DIN** and **Declaration** that he is not disqualified before appt.

5. Furnish **consent** to act as a director - On or before his appt. - **DIR-2** (Director to co.)

Co. to file such consent with RoC within 30 days of such appt. in Form **DIR 12** + Fees.

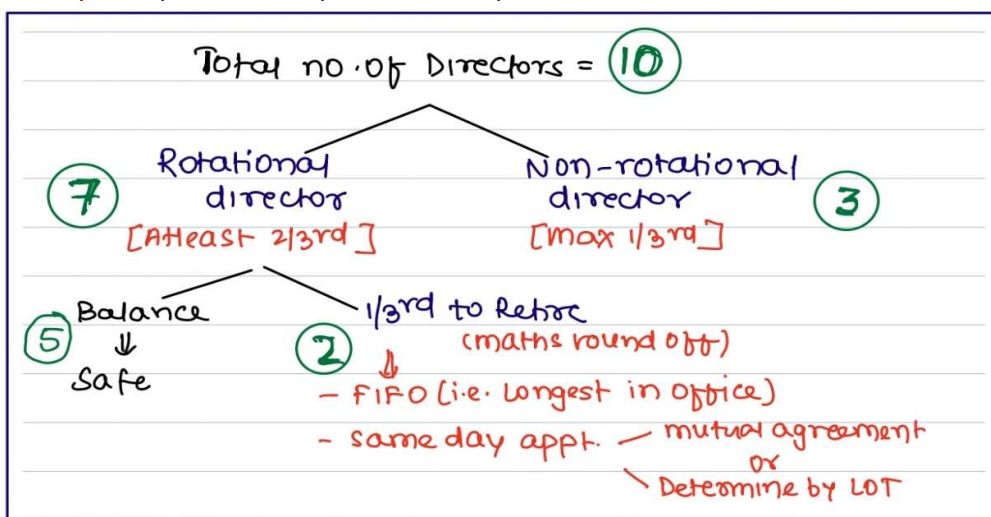
In case of a person who is a national of a country that shares land border with India, necessary security clearance from Ministry of Home Affairs to be attached along with such consent.

Proviso (N.A to S-8 Co.) - For appt. of ID, ES to include a statement of BOD that he fulfils condition specified in the act

6. Retirement by Rotation (RBR):

In case of **public** company, unless AOA specifically provides for RBR of all directors, at every AGM:

- **At least 2/3rd of total number of directors** - Period of office liable to determination by RBR and appt. by co. in GM
- 1/3rd of the above 2/3rd shall retire by rotation
[If fraction is not multiple of 3, no. nearest to 1/3rd (i.e., maths round off)]
- Who retires? - Those who have been **longest in the office since their last appointment**.
- If became directors on **same day** - Longest in office to be determined **by lot**
- Co. **may** fill up the vacancy in office as per sub-section (7)



Note:

- Following director shall **NOT** be included in total no. of director:
 - Independent director and
 - Nominee dir. appt. by a financial inst. set up under Act of parliament (E.g. SBI) (QB 21)
 - Nominee directors appointed pursuant to LIC Act (this is as per LIC Act)
 - Alternate director
- Following director **shall be included** in total no. of director:
 - Nominee dir. appt. by an institution (**not being financial inst.** set up under Act of Parliament)
 - Director appointed by BoD u/s 161 (However, these will be non-rotational directors)
- Only those directors who are appointed in GM can retire in GM
- Directors** appointed by board u/s 161(4) shall be considered **non-rotational** as they are appointed by BoD (irrespective of whether subsequently approved in GM). But, include in total no. of dir.
- MD** and **KMP** may be R/NR depending on terms. But will be counted in total no. of dirs.

7. Adjournment of meeting:

On retirement of a director as per Sec 152 (6), the company has to either:

- **Reappoint** the retiring director
- Appoint a **new** director
- Expressly **resolve** to not fill the vacancy

If vacancy is **not filled** in the AGM and the meeting has not resolved to not fill - Meeting **adjourned** (Next week, same time and place) (If **national holiday** - **Next succeeding day** which is not a holiday)

If in adjourned meeting also - Vacancy not filled + not resolved - Retiring directors **deemed reappointed** (automatic reappointment)

Exception - No deemed / automatic reappointment if [LWR 164 162]:

Resolution put and **Lost**

Expressed his **unwillingness** in writing

Disqualified u/s **164**

OR / **SR** required as per this Act

Sec **162** is applicable to the case (1 dir = 1 resolu)

If AGM is **not held** up to last due date - "Dir. liable to retire" shall vacate office on last due date

Concept clarity check:

What if AGM is extended u/s 96? - **Refer QB 24**

Sec 152 (6) and (7) N.A. to: Unlisted Govt co. ($\geq 51\%$ held by CG/SG) and Subsidiary thereof.

Sec 153: Application for DIN

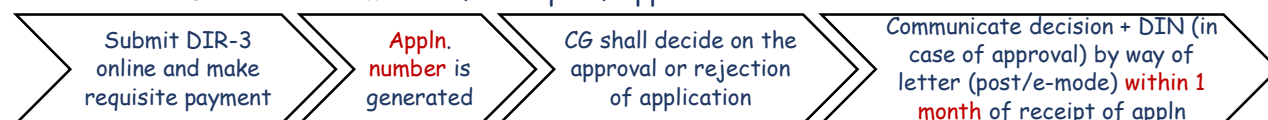
- Indv. intending to be appt. as dir. - Make appln. for DIN /other ID number as may be prescribed
- Application to the CG (Manner and fees - as may be prescribed) - Electronically - **DIR 3**
- LLP Act requires DPIN (DIN can be used as DPIN and **vice-versa**)

Rule 9 of Companies (Appointment and Qualification of Directors) Rules, 2014:

- DIR 3 to be filed by person willing to be appointed as director (Photograph, Identity proof, residence proof, mandatory DSC and certified by full time CS, MD, Directors, CEO or CFO)
- INC-32 (SPICe) to be filed by company being incorporated to get DIN for proposed first director (max 3 directors at once)

Sec 154: Allotment of DIN

- CG shall allot DIN **within 1 month** of receipt of application



Note - No **Application no.** shall be generated in case of a person who is a national of a country that shares land border with India, unless necessary security clearance from Ministry of Home Affairs has been attached along with DIR 3.

- If CG finds any defect/incompleteness in application - Intimate applicant - **Website** and by **email**.
- Applicant to rectify and resubmit within **15 days** of such placing on the website/email.
- On receipt of above rectification order:

<u>Case where:</u>	<u>CG's order</u>
Defects are rectified to the satisfaction of CG	CG to Allot DIN and communicate to applicant
Defects are not removed within given time	Treat & label such appln. as invalid in e- record
Defect rectified partially , or info given is still defective	Reject the application and ask applicant to file fresh appln. with correct and complete info

Concept clarity check:

"**Put Under Resubmission**" means that an application is NOT rejected. Applicant is just required to file additional documents for the application to be processed (Refer QB 25)

Sec 155: Prohibition to obtain more than 1 DIN

Sec 156: Intimation of DIN by director to co:

Every existing dir. to intimate (Form **DIR 3B**) DIN to co.(s) wherein he is a dir. **within 1 m** of receipt

Sec 157: Intimation of DIN by co. to ROC:

Within 15 days of receipt of intimation u/s 156 (Form **DIR-3C**)

If defaulted, then co. and each OID - Fine 25k + Rs. 100/day up to max Rs. 1 lakh

Sec 158: Obligation to indicate DIN - In all returns, info or particulars by director or company.

Sec 159 - Contravention of Sec 152,155,156 - Fine up to Rs. 50,000 + Up to Rs. 500 per day

Other points:

- DIN may be **cancelled** or deactivated by CG (Regional director) if:

DIN is
duplicated

Obtained in a wrongful
or fraudulent manner

death

unsound mind

adjudicated
insolvent

application to **surrender (DIR-5)** made by DIN holder along with
declaration that said DIN has never been used for filing any document.

- Intimation of changes in particulars of DIR-3 (Rule 12):
 - Intimate such change to CG **within 30 days** in Form **DIR-6**
 - CG to verify such changes and incorporate such changes.
 - Once changes are incorporated, CG to intimate - Applicant + **Concerned ROC**
 - Director also to intimate above changes in DIN to co. **within 15 days** of such change.

Sec 160: Right of person other than retiring director to stand for directorship [Read with Rule 13]

A person shall be eligible for appointment as director if:

- He himself or any member** intending to propose him as director
- sends a **notice** in writing at least **14 days** before meeting at the **registered office** of co.
- along with **deposit of Rs. 1 lakh** or such other sum prescribed

Deposit:

- Refunded** if proposed candidate gets **elected** or **> 25%** votes of total valid votes casted
- Deposit not required** in case of:

Appointment
of an ID

Director recommended by
NRC

Director recommended by BOD, in case
co. is not required to constitute NRC.

Company to inform candidature to members:

- At least **7 days** before GM
- Inform by way of - Serving individual notices (email or in writing) **AND** place notice on website
- It shall not be necessary to serve individual notices where it **advertises** such candidature at least 7 days before meeting in newspaper. Language - Vernacular + English

Modifications:

- Nidhi** companies - Deposit of Rs. 10,000 instead of Rs. 1 lakh
- In case of **S-8** companies, BOD has to decide whether deposit made by person failing to secure 25% votes is to be forfeited or refunded (discretion of BOD)
[i.e., BOD of S-8 companies can refund the money even if proposed candidate got $\leq 25\%$ votes]

Exemptions:

The provision of this section shall not apply to (subject to 92+137):

- **Private** company
- **Sec 8** companies whose AOA provides for election by ballot
- 100% **Govt.** co. and subsidiary thereof.

Sec 161: Appointment of Additional Director, Alternate Director and Nominee Director1. Additional Director:

- **Articles** may confer the power to **BOD** for appointment of additional directors **at its discretion**
- This director can be any person other than who **fails to get appointed** as director in **GM**
- **Tenure** - Next AGM or Last due date of AGM whichever is earlier
- Appointed by passing a resolution in **BM** or **Resolution by Circulation**.

Conceptual clarity check!

1. Can the members pass OR/SR authorizing BOD to appoint additional director?
No. The power can only be conferred by AoA.
2. What will be tenure of additional director if AGM is extended by ROC beyond due date u/s 96 of Companies Act?
AD to vacate his office on extended last due date on which AGM should have been held.
3. Can an AD be MD/WTM? - **Yes.**
4. After the end of AD's tenure, if co. intends to appoint him as a normal director, is compliance of Sec 160 needed? - **Yes.**
5. Can same person be appointed as AD again and again? - **Yes (there is no such restriction)**
6. Additional directors are directors appointed by Board and hence **non-rotational**. However, they shall be **included** while calculating **total no. of directors**.
7. A company has 7 directors. Can a company appoint 4 more additional director in BoD meeting? - **No, max limit of non-rotational director is 1/3rd.**

2. Alternate Director:

- Appointed by BOD only if authorized by - **Articles or Resolution passed in GM**
- To act in place of Original Director (OD) - **absence** of OD from India for **> = 3 months**.
- A person cannot be appointed as AD if:
 - He is **holding** any AD for any **other director** in the co. or
 - Holding directorship in the same co.
- Alternate for ID has to be **independent** as per 149(6)
- **Tenure:** Original term of OD or OD returns to India - whichever is earlier
- Automatic reappointment - Only OD. Not AD

Note: AD is **not a proxy to OD**. AD is a director in his own capacity and considered as normal dir.

Conceptual clarity check!

1. Can the Alternate Director be appointed by OD? - **No**
2. Can BOD appoint Alt. D on behalf of regular director going out for **less than 3 months**? - **No.**
3. Can Alt. D be appointed for MD/WTM also? - **YES**
4. Alt. Dir shall **NOT** be included in total no. of dir. Only OD shall be included [**Refer QB 30**]

3. Nominee Director:

- Subject to the AOA, the BOD may appoint
- any person as a director nominated by any institution
- in pursuance of - (1) law or (2) agreement or (3) CG/SG by virtue of shareholding in a Govt. co.

4. Casual Vacancy:

- If office of a director appointed by the co. in GM is vacated before expiry of term in normal course, it results in casual vacancy (CV)
- Such CV shall be filed by the BOD at the board meeting (no RBC)
- Needs to be subsequently approved by members in immediately next GM
- Tenure - Date up to which dir. in whose place he is appt. would have held office if not so vacated.

Conceptual clarity check:

1. Can vacancy in office of director appointed u/s 161 (4) be again filled u/s Sec 161(4)? No [CV in office of dir. appointed by co. in GM can only be filled u/s 161(4)]
2. If a dir. declined to assume office after appointment u/s 160, will it be casual vacancy? - No
3. Is dir. appointed under this Section a rotational dir. u/s 152(6)? - No (not appointed in GM)

Summary table for Section 161:

Criteria	(1) Additional	(2) Alternate	(3) Nominee	(4) Casual Vacancy
Appointed by	Board	Board	Board	Board
Ratification by SH?	Not required	Not required	Not required	Yes. In immediately next GM
Power conferred by	AoA/ OR	AoA/OR at GM	AoA	Law
Tenure	Next AGM/last date for AGM	Earlier of - Tenure of OD or OD returns to India	As per law/agreement	Tenure of director whose office vacated.
Resolution passed at	BoD meeting/RBC	BoD meeting/RBC	BoD meeting/RBC	Only Board meeting
Who cannot be appt?	Person who failed to be appt. as director in GM	a. Acting as Alt. dir. for any other director in the co. b. Person holding directorship in same co.	No such provision	No such provision
Additional points	-	AD of ID to comply with sec 149(6) AD cannot be automatically reappointed	--	--
Included in Total no. of dir. [152(6)]	✓	X	X (Fin. Inst & LIC) ✓ (Others)	✓
Non-Rotational?	✓	-	-	✓

Sec 162 - Appointment of Directors to be Voted Individually

1. At a **General Meeting**, a motion for appt. of ≥ 2 persons as directors by a **single resolution** shall not be moved **unless** a proposal to move such a motion has first been **agreed** to at the meeting **without any vote being cast against it**.
2. Resolution moved in contravention of above shall be **void**, whether/not any objection was taken when it was moved

Conceptual clarity check!

In a BOD meeting, can 2 or more additional director be appointed by a single resolution of BOD?

Yes, this provision is applicable only to appointments made in GM and not BOD meeting.

Sec 163 - Option to Adopt Principle of Proportional Representation (PR) for Appointment of Directors

- Notwithstanding anything contained in this Act,
- **AOA** may provide for a
- **Appointment** of not less than **2/3rd of total dirs.** of co.
- by way of Proportional Representation (whether by a **single transferable vote** or by a system of **cumulative voting** or otherwise)
- Such appointments may be made once in **3 years**
- In case of proportional representation, **casual vacancy** to be filled as per Sec 161(4)

Sec 164 - Disqualifications for Appointment of Director

1. A person shall not be eligible for appointment as a director of a company, if:
 - a. declared to be of unsound **mind** by competent court
 - b. undischarged **insolvent**
 - c. application to be adjudicated as **insolvent** is pending
 - d. convicted by court of an **offence** (involving moral turpitude or otherwise) + Sentenced to imprisonment for ≥ 6 months and 5 years has not lapsed from expiry of the sentence
(what if appeal is filed?)
If imprisonment for ≥ 7 years, then not eligible for appointment. (forever disqualified)
 - e. **order** of disqualification passed by court/tribunal + order is in force
 - f. not paid any **calls** in respect of any shares of the co. held by him (whether alone/jointly) + 6 months have lapsed from last day fixed for payment
 - g. convicted of offences dealing with RPT u/s **188** at any time during last preceding 5 years
 - h. Not complied with Sec **152(3)** [DIN]
 - i. Not complied with Sec **165(1)** [Max. no of directorship]

Provided that. disqualification under clause (d), (e) and (g) shall continue even if appeal is filed.

2. A person who is/has been director of a company shall NOT be eligible to be **re-appointed** as director of **that co.** or **appointed** in any **other co.** for a period of **5 years**, if the co. in which he is a director, has:
 - a. Not filed FS or Annual Returns for continuous period 3 FY.
 - b. Failed to repay deposits + Interest (or) redeem debentures on due date + intt. (or) pay declared dividend AND such **failure continues for 1 year** or more

Provided that where a person is appointed as a director of a company which is in default under this

sub-section, he shall not incur the disqualification for a period of **6m** from the date of his appointment.

3. AOA of **Pvt.** co. may provide additional grounds for disqualification. (Public co. can't provide additional grounds)

Additional points:

- What if default is made good by the co. later on? - **Doesn't matter. 5 years cooling period.**
- If new directors are appointed to the company which have already made the default, does the new dir. also get disqualified? **No**, as per proviso, the newly appt. dir. shall not be disqualified for **6 m**
- Default in **repayment of loan** from any PFI will not attract disqualification as Sec 164(2) only covered debentures, deposits and dividend.
- Directors to inform company whether or not disqualified u/s 164(2) - Form **DIR 8**
- Whenever co. defaults u/s 164 (2), it shall within 30 days of the date of default intimate **registrar** in **DIR 9** details of directors during relevant FY.

Sec 165 - Number of Directorship: [N.A. to Sec 8 Co.]

1. No person shall hold office of director (incl. alternate) in more than **20 companies** at the same time.

Provided that, max no. of **public** co. in which a person can be director shall not **exceed 10**.

For reckoning limit of **10** public cos. - **Pvt. co. that are holding/subsy of public co. shall be included.**

For reckoning limit of **20** cos., **directorship in dormant company shall NOT be included.**

Example:

Whether directorship in these co. to be included?	Limit of 10	Limit of 20
A Private Ltd (not subsy/holding of any public co.)	No	Yes
B Ltd.	Yes	Yes
C Pvt. Ltd. (Dormant)	No	No
D Ltd. (Dormant)	Yes	No

Point being - Dormant company is to be excluded while reckoning limit of 20 but dormant public company will not be excluded while reckoning limit of 10.

2. The members of co. may by a **SR**, specify a lesser no. of cos. in which a dir. of the co. may act as a dir. [they cannot specify higher no.]
3. If a person accepts appt. as a dir. in violation of this sec, penalty - **Rs. 2,000/day up to Rs. 2 lakhs**

Sec 166 - Duties of Directors:

1. Act in accordance with **AoA**
2. Act in good **faith** to promote objects of the co. for the benefit of all the stakeholders
3. Exercise duties with due and reasonable **care**
4. Not involve in situations which may possibly **conflict** with the interest of the co.
5. Not attempt to achieve **undue gain** or advantage - If found guilty, liable to pay such amt. to co.
6. Not **assign** his office - If assigned, **void**.

Contravention of duties - Fine Rs. 1 lakh to Rs. 5 lakhs.

Sec 167 - Vacation of office of Directors:

1. The office of dir. shall be vacated in following cases:

a) incurs disqualification u/s 164

Provided that, if disqualification u/s 164(2), vacate office in all cos other than defaulting co.

b) absents from BOD meetings held during 12 months with or w/o leave of absence

c) acts in contravention of Sec 184 relating to entering into contracts/arrangement in which he is directly interested

d) fails to disclose interest in contravention of sec 184

e) disqualified by an order of court or tribunal

f) convicted by court of an offence (involving moral turpitude or otherwise) + Sentenced to imprisonment for ≥ 6 months

g) removed under any provision of this Act

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

Provided that, office shall not be vacated in case of orders referred in (e) and (f) above:

- for 30 days from the date of order
- if appeal/petition is preferred against the order within the aforesaid 30 days, until expiry of 7 days from date on which appeal/petition is disposed of.
- if further appeal/petition preferred within 7 days - Until such further appeal is disposed of.

2. In case if director continues to function even when office is vacated, fine - Rs. 1 lakh to Rs. 5 lakhs.

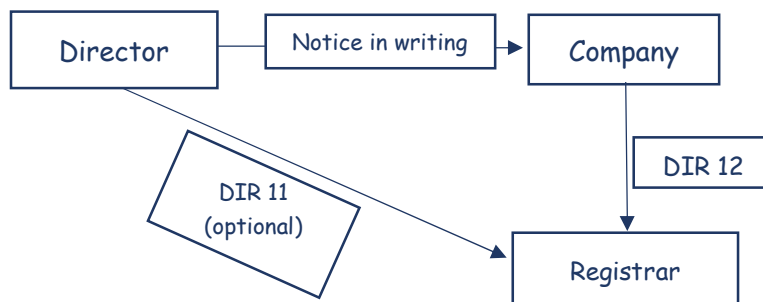
3. Where all the directors vacate their office, the promotor/CG shall appoint required no. of directors who shall hold office till directors appt. by co. in GM

4. AOA of private co. may provide for additional grounds of vacation.

Additional points:

- No opportunity of being heard (OOBH) in case of vacation u/s 167
- Automatic vacation happens u/s 167 i.e., no board resolution required
- Board cannot waive any grounds of vacation [Refer QB 45]

Quickly refer - Penalty u/s 207 [If a person is convicted u/s 207 - Vacate office + Disqualified]

Sec 168 - Resignation of Director:

- A director may resign - by giving notice in writing to co.
- Director may also forward copy of resignation along with detailed reason therefor to the RoC within 30 days from the date of resignation in Form DIR-11.

In case of a **foreign director**, if co. has already filed DIR 12, the foreign director may authorize (in writing) CA/CS or cost accountant or **any other resident director** to sign Form DIR 11 on his behalf.

- On receipt of such resignation notice:
 - Board to take note of the same.
 - Co. to intimate ROC in Form **DIR 12** within 30 days
 - Co. to post the info. on the website
 - Co. to place the fact of such resignation in BOD report in immediately following GM
- Resignation to be **effective** from - date on which notice is **received** by co. or date **specified** in notice (if any) whichever is **LATER**.
- Director to remain **liable** for offences which occurred during his **tenure** despite the resignation
- If all directors resigned, promotor/CG to appoint directors till dirs. duly appointed in GM

Note: Resignation will take effect **without** any **need for its acceptance** by BOD or co. in GM. Even if Board doesn't accept or co. **fails to intimate RoC** (Form DIR 12), the resignation shall still be **effective**.

Sec 169 - Removal of Director:

- Company may remove a director **before expiry of his tenure** by passing **OR** + Giving him **OOBH**.
- **ID re-appointed** for second term u/s 149 (10) can be removed only by passing **SR** + OOBH
- A **special notice** of a resolution to remove the director or appoint someone in place of a director so removed is required.
[As per **Sec - 115** - Special notice is to be given **at least 14 days** before meeting (but not earlier than **3 months**) by members holding lower of **1% of VP** or **PUSC of Rs. 5 lakhs**]
- On receipt of the special notice, the co. shall forthwith send a **copy to director** concerned.
- The director shall be entitled to be:
 - **heard** on the resolution at the meeting
 - make **representations** in writing to the company
 - request the co. to **notify** the representation to the **members**
- The company shall, if time permits,
 - in the notice given to members, **state the fact** the representation has been made
 - send a **copy** of the representation to every member
 - if copy of representation couldn't be sent, director may require the representation to be **read out** at the meeting (without prejudice to his right to oral representation)
- If on an application either by co. or person aggrieved, the **Tribunal** is satisfied that right to make representation is abused to **secure needless publicity for a defamatory matter**, tribunal may order:
 - Not to send the WR to members
 - Not to read out the WR
 - Cost incurred of making such application to tribunal be paid by director concerned.
- **Vacancy** created on removal of the director to be **filled** at the meeting provided **special notice** of intended appointment is given.
If not so filled, it can be filled u/s 161(4) (provided the dir. so removed is not reappointed by BOD)
- **Dir. so appt. shall hold office till the date predecessor would have held if he had not been removed.**
- Removal under this section shall **not deprive** a person of **CFLO**, if eligible, as per his terms of appt.
- Directors that **cannot be removed** u/s 169:

- Note: Grounds for removal/reason for proposing a resolution to remove the director is not mandatory to be stated in the special notice [LIC vs Escorts Ltd]

- Register to contain details of **securities** held by each of directors & KMP in **CASH** and Co-subsiidiary
- Register to be kept at **registered office**
- Co. to file with **RoC** a return containing such particulars within **30 days** of appointment of every director or KMP and any change taking place.

- Open for inspection during **Business hours** and kept open at **AGM**
- Right to take extract/copies:
If application made by member, co. to provide within **30 days** - **Free of cost**

If default under provision for which no specific penalty is provided, the co. and every OID shall be liable to fine Rs. 50,000 and in case of continuing failure - Rs 500 /day subject to maximum of Rs. 3 lakhs (for co.) and Rs. 1 lakh (for OID)

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Chapter 2 - Meeting of Board and its Power

A technically sound chapter which will make you realize that you are studying CA Final!

Sec 173 - Meeting of Board

Section 173(1) and 173(5):

<u>Type of company</u>	<u>Provision relating to board meeting</u>
General Rule for all companies	<ul style="list-style-type: none"> First BOD meeting - within 30 days of date of incorp. Subsequent BOD meeting - Min. 4 meeting in each calendar year (as per SS-1); max gap between 2 meeting = 120 days [Sec 173(1)]
Section 8 (subject to Sec 92 & 137)	At least 1 meeting in every 6 calendar months
<ul style="list-style-type: none"> OPC (>1 dir.) Small co. Dormant co. Pvt co. (startup and 92 + 137) 	At least 1 meeting in each half of calendar year and gap is NOT LESS THAN 90 days [Sec 173(5)]
OPC (=1 director)	No board meeting required. Provision of Sec 173(5) & 174 - N.A.

Concept clarity check:

Is it mandatory for a director to attend all the Board meetings?

No. However, as per sec. 167, a director shall have to vacate his office if he absents himself with or without obtaining leave of absence from the board, from all the BOD meetings held within a period of 12 months.

If a company is incorporated on 1st Jan, 2022 - As per Law. How many minimum meetings would be required in Calendar Year 2022? - 5 meetings (1 within 30 days + More 4 in the CY)

COVID Relaxation - Gap may be extended to 180 days instead of 120 days (till 30/09/20)

Section 173(2): Participation in BOD meeting:

A director may attend BOD meeting:

1. in **person**; or
2. through **video conferencing (VC)**, or
3. through other **audio-visual (AV)** means, as may be prescribed

An audio-visual means should be capable of-

1. Recording and recognizing the **participation** of the directors; and
2. Recording and storing the **proceedings** of such meetings along with date and time.

Rule 3 of the Co. (Meetings of Board and its Powers) Rules, 2014 - Meeting of BOD through VC or other AV means:

1. Co. to make necessary arrangements to **avoid failure** of VC or AV **connection**.
(There are no exceptions to this. Every co., whether private or public, shall make such arrangements)
2. CP and the CS, if any, shall take due and **reasonable care to [IFRS DHS]**-

- a) safeguard the **integrity** of meeting by ensuring sufficient security and identification procedures;
 - b) ensure availability of proper VC or other AV equipment or **facilities** for providing transmission of the communications for effective participation of directors and other authorized participants;
 - c) **record** proceedings and prepare the minutes of the meeting;
 - d) **store** for safekeeping and marking the tape recording(s) or other e-recording mechanism as part of the records at least before the time of **completion of audit** of that particular year.
 - e) ensure that no person other than **concerned dir.** is attending/has access to the proceedings of the meeting through VC mode or other AV means; [differently abled person may request for a companion]
 - f) ensure that participants attending the meeting through AV means are able to **hear** and **see** the other participants clearly during the course of the meeting.
3. Notice of meeting to be sent as per Sec 173(3)
 4. Roll call - To be taken at commencement of meeting by the **CP** (not **CS**). Every director attending via VC or AV to state -
 - a) **Name**
 - b) Place - **Location** from where he is participating
 - c) Thing - **Agenda** and relevant material of meeting received
 - d) State that **no one** other than him is attending/has access to this meeting.
 5. Quorum - After roll call, **CP/CS** to state names of **person other than directors attending such meeting** and confirm that required quorum is present
Note - For quorum, director participating through VC/AV shall be included.
 6. Venue of meeting - As mentioned in notice convening the meeting
 7. Sign of stat. registers - **Deemed** signed by dir. (through VC) **if consent** provided + Recorded in minutes.
 8. For the record, participants to **identify** himself before speaking
 9. If a motion is **objected** & needed to be put to vote, **CP** to **call roll** + Note vote of each dir.
 10. No person shall access the place where any director is attending the BOD meeting
 11. At the end of each agenda item, **CP** (not **CS**) to announce **summary of decision** made along with name of dissenting directors.
 12. Minutes of the meeting:
 - The minutes shall disclose particulars of dir. who attended the meeting via VC/AV means
 - Draft minutes shall be preserved till their confirmation
 - Draft minutes shall be **circulated** among **all dir.** **within 15 days** of meeting either in

writing/e-mode .

- On receipt of above draft, **every dir. who attended meeting** (personally or via VC/AV) shall **within 7 days** of receipt (or such reasonable time prescribed by BoD), confirm or give comments in writing, about **accuracy** of draft minutes failing which his approval shall be **presumed**
- Minutes shall be entered in the **minute book signed** by the **CP** (not CS).

Section 173(3): Notice of BOD meeting

- Notice to be given in **writing at least 7 days** before the meeting
- To **ALL** directors at his address **registered** with the co (India/Abroad)
- Send by - (a) hand delivery or (b) post or (c) electronic means.
- BOD meeting may be called on a **shorter notice (i.e., <7 days)** provided:
 - Such meeting is to transact **urgent** business
 - At least 1 **ID, if any**, shall be present in the meeting.
If no ID attends such meeting, decision taken in such meeting shall be - (a) **circulated** to ALL directors, and (b) **ratified** by at least 1 I.D.
 - If co. has not appointed ID, shorter notice is valid if such meeting is to transaction urgent business (no need of ratification by ID)
- **Notice** to include following points related to **VC/AV** means:
 - A statement informing directors regarding **option** to participate via VC/AV means
 - Director intending to participate via VC/AV means to **communicate his intention** to the CP/CS and give **prior intimation** to co. to enable the co. to make suitable arrangements.
 - Director intending to participate via VC/AV - **Intimate** about such participation at beginning of each **Calendar Year**. Such declaration shall be **valid for 1 year**. Such declaration **not to debar** him from attending **in person** if he intimates sufficiently in advance.

Section 173(4): Penalty for failing to send notices:

Officer whose duty is to give notices and fails - **Penalty of Rs. 25,000**

Additional points:

1. **Who sends** the **notice** of BOD meeting? - CS or any person auth. by BOD
2. Can notice for BOD meeting be sent via **email**? - Yes, of course.
3. Is it necessary to mention the **agenda** of the BOD meeting in notice? - Unless mandated by AoA, it is not mandatory. However, as a good secretarial practice, one should include agenda.
4. What if notice is not sent to few directors? [*Parmeshwari Prasad Gupta v Union of India*]
If concerned person fails to send notice to one or more director, then the **meeting** **MAY** be considered **void**, and all **resolution** passed may be declared **invalid**. (unless ratified by such director to whom notice wasn't sent)
5. **Notice for adjourned meeting** - Adj. meeting is merely a continuation of original meeting and therefore fresh notice is not needed for adj. meeting unless: (a) AoA provides for fresh

- notice or (b) meeting is adjourned sine die (for indefinite period)
6. Notice is to be sent to directors even if they have **waived off their rights** to receive notices.
 7. In case of **alternate** director, **notice is to be served to both AD and OD.**
 8. Similarly, notices need to be sent to all the **interested director** as well.
 9. Is it required to have BOD meetings each **quarter?** - No such requirement.
 10. Can a BoD meeting be held **o/s India** - Yes. No such restriction.
 11. Can a BoD meeting be held through audio mode (without video facility?) - **No. Video is must**

Section 174: Quorum [N.A. to OPC having only 1 director]

1. Quorum of BOD meeting = **Higher** of - (a) $1/3^{\text{rd}}$ of total strength of directors or (b) 2 directors
In case of **Sec -8** co. (92+137) - Quorum shall be **lesser** of: (a) 8 members or (b) 25% its strength

Note:

- Any fractions shall be rounded off as 1
 - **Articles** of company may provide for a **higher** number of quorum
 - **Directors** participating through VC/AV shall be counted for purpose of Quorum
 - Quorum to be present throughout the meeting (**not just start**).
 - Total strength of directors not to include those whose office are vacated.
2. If the number of continuing directors is reduced below the quorum fixed **by the Act** for BOD meeting, the **continuing director(s)** may act only for the purpose of (and for no other purpose):
 - a. **Increase** the no. of directors to that fixed for quorum, or
 - b. **Summoning** a GM of the co.
 3. Where **interested** director $\geq 2/3^{\text{rd}}$ of total strength of directors, quorum shall be **higher** of:
 - a. No. of non-interested director present at such meeting
 - b. 2 directors
 Interested director - As per Sec 184(2)

Exception - In case of a **private** company(92+137), the interested director **may participate** in such meeting and shall also be counted in quorum subject to disclosure of interest u/s 184
 4. If meeting could not be held for want of quorum - **Automatic adjournment** to next week, same day, time and place. [If national holiday - Next succeeding day which is not national holiday]

Additional points:

1. Can the BOD meeting be initially scheduled on a **national holiday?** - Yes. The provision of national holiday applies only to automatically adjourned meeting. The original meeting can be held on a **national holiday**. In fact, meetings voluntarily adjourned by BoD may be held on a national holiday.
2. Sunday is not a national holiday. We wish it was. But it isn't.
3. Would Alternate dir. be included in quorum? - **Yes**, because he holds the office of OD. (**QB - 13**)
4. In a VC board meeting, assume a scenario where original director (OD) and alternate director both are present, in such case, the presence of OD shall be counted for the purpose of quorum and voting. However, AD shall continue to hold office.
5. Can the AoA provide cap of **maximum** number of directors for Quorum? - **No**.

Section 175: Passing of Resolution by Circulation (RBC):

1. RBC shall be deemed to have passed if:

- Circulated in **draft** together with necessary papers to all directors/members of the committee
- at their **address** registered with co. **IN INDIA**
- by hand delivery, post or by courier or prescribed **e-mode (Email / Fax)**
- **approved** by majority of directors who are **entitled** to vote on the resolution (i.e., interested director's vote not to be considered).

Provided that if **> = 1/3rd** of ~~entitled~~ total directors require that this resolution must be decided at a meeting (and not by RBC), Chairperson shall put up such resolution in the meeting.

2. RBC shall be **noted at a subsequent meeting** as a part of the minutes.

Certain sections in Act specify that resolution can be passed only at meeting (i.e., RBC not allowed).
Example: 161(4) - Casual Vacancy; 179 (Power of Board); 182 (Political contribution); 186 (LGS and Investment); 188 (RPT)

Concept clarity check:

Can committee of directors (say, **Audit Committee**) **pass RBC**? - Yes, absolutely.

Section 176: Defects in appointment of director not to invalidate actions taken:

Acts of director shall **not be deemed invalid** merely on the grounds that it was **subsequently noticed** that:

- i. his appointment was invalid by reason of any "**defect**" or "disqualification" or
- ii. had **terminated** by virtue of any provision contained in this Act or in the Articles of the company

Provided that - If co. had noticed that such appt. has become invalid - Act not Valid.

Section 177: Audit Committee [Read with Rule 6/6A of Co. (Meeting of Board and its power) Rule, 2014]

1. Following companies are required to constitute audit committee (AC):

- **Listed** Public Companies
- Unlisted public co having:
 - **PUSC** \geq 10 crores
 - **T/O** \geq 100 crores
 - **O/S** loan, debentures, and deposits (in aggregate) $>$ 50 crores

Note:

1. Exemptions - JV/WOS/Dormant co
2. If ceases to fulfil conditions for 3 consecutive years - Provision not applicable
3. Limits to be checked as existing on last date of latest audited financial statement.

2. **Composition:**

- **Min. 3 directors**
- **Majority I.D.** (N.A. to Sec 8 prov. 92+137)
- **Majority including CP** - Ability to read and understand FS.

3. Transition provision

4. AC to act as per "term of reference" specified by BOD which shall, inter-alia, include [A3 SAFE RPT]:

- a) Auditor - Recommend for appt., remuneration & terms of appt.

[In case of Govt co (92=137), AC to only recommend rem. & not terms of appt.]

- b) Auditor - Review and monitor
- independence**
- and performance & effectiveness of
- audit process**
- .

- c) Auditor's Report - Examination of
- financial statement**
- and auditor's report thereon

- d) RPT - Approval & subsequent modification thereof [provided AC may provide
- omnibus**
- approval]

Provided that, for transactions **other than RPTs u/s 188**, if AC doesn't approve it, it shall **recommend** it to BoD.

Provided also that, in case if **any transaction** (not just RPT u/s 188) **< = Rs. 1 crore** is entered into by director/officer of co. **w/o approval of AC** - **May be ratified** by AC **within 3 months**. If not ratified within 3m, it shall be **voidable** at option of AC.

If such transaction is **with RP** to any dir. or authorized by any dir., he shall **indemnify** co.

Provided also that this provision shall not apply to transaction (other than 188) between **Holding and WoS**.

- e) Scrutiny of inter corporate loans and investments

- f) Valuation of the company's
- Asset/undertaking**

- g)
- E**
- valuation of Internal Financial Control and risk management system

- h)
- F**
- unds- Monitoring end use of fund raised through public offers or related matter.

Omnibus approval (OA) for RPTs:

- All RPTs shall require **approval** of AC.

- AC may provide OA for RPTs subject to following conditions:

- AC shall, **after approval of BoD**, **specify the criteria** for making omnibus approval including:

Max. value of transaction (in aggregate)	Max value per transaction	Extent & manner of disclosure for omnibus approval	Review RPTs made under this approval (at interval as AC deems fit)	Transactions which cannot be subject to OA
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- AC shall consider following factors while specifying the above criteria:

- **Repetitiveness** of transactions
- **Justification** of need for omnibus approval

- AC shall satisfy itself on **need of OA** for transaction of **repetitive nature** and that such OA is in **interest** of the company

- OA shall indicate the following:

Name of RPs	Nature & duration of transaction	Max amount of transaction	Indicative based price or current contracted price	Other relevant info.
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Provided that, where the need for OA cannot be foreseen and aforesaid detail is not available, omnibus approval may be made for transactions **not > Rs. 1 crore per transaction**.

- **Validity** of OA - **Not > 1 FY**. Require fresh approval each expiry of such FY
- No OA shall be made in respect of **selling or disposing of undertaking** of the co.

5. Rights of AC:

AC may:

- Call for **comments** of auditor about internal control system, scope of audit, observations,
- **Review** FS before submission to board
- **Discuss** related issue with internal and stat auditors & management of co.

6. AC may **investigate** matter referred to it by BOD and may obtain **professional assistance** for the same.

7. **Auditors & KMPs** have **right to be heard** in ACMs when it considers Auditor's report **but no right to vote**.

8. BoD report shall **disclose**:

- composition** of AC and
- where BoD had not accepted any **recommendation** of AC, the same shall be disclosed along with reason therefor.

9. Vigil Mechanism -

Who is required to set up?

Listed co.

Co. having **deposits** from public

Co. having borr. from Banks/PFI > **Rs. 50 crores**

Purpose - For directors and employees to **report genuine concerns**.

Oversight- **AC**. In case if AC is not required, BoD to **nominate director for oversight**.

Vigil mechanism to provide for **adequate safeguards** against **victimization** of person who use of such mechanism & make provision for **direct access** to CP of AC in appropriate/exceptional cases.

In case of **repeated frivolous complaints** being filed by director/employee, the AC or nominated director may take **suitable action** including reprimand.

Details of Vigil Mechanism to be disclosed in - (a) **Website** and (b) **Board Report**

10. Sec 178(8) - Contravention of Sec 177 - **Penalty** of Rs. 1 lakh for OID and Rs. 5 lakh for the co. **[Amendment]**

Concept Check - Can Audit Committee be constituted voluntarily even if limit not breached? - Yes

Sec 178 - Nomination Remuneration Committee (NRC) & Stakeholder Relationship Committee (SRC):

[N.A. Sec -8 provided 92 +137]

NRC:

1. Who is required to constitute NRC? - **Same as AC** and Section 149(4)

2. Composition -

- 3 or more **NEDs**
- **Not less than $\frac{1}{2}$ I.D** (not majority)
- **CP** of co. (executive or NED) can be appointed as member of NRC but cannot chair NRC

3. Function of NRC:

- Identify person for **appointment** as director/senior management or for removal
Senior management - Management people **one level below** executive directors **incl. dept heads**
- Evaluate **performance** of BoD, individual director and its committees
- Formulate **criteria** for **determining performance**, independence, etc. of directors
- Recommend board a **policy** relating to **remuneration** of directors, KMPs, other employees.
- Place** the policy in its **website** and disclose **salient features** in **board report**.

In case of **Govt co.** (92+137), **NRC** shall apply only to **senior management**/employees and not for directors

SRC

1. Who is required to constitute SRC?

Co. having **> 1,000** shareholders, debenture holders, deposit - holders, **AND** any other security holder at any time during a FY (**Bole toh, 1,000 se jyada investors**)

2. Composition:

Chairperson - **NED**

Other members - As may be decided by Board

3. Purpose - Consider and resolve **grievances** of security holders of co.

Common points:

- CP**/Person authorized by CP of NRC and SRC to **attend GM**.
- Penalty** for contravention of Sec 177/178 - Co. - Rs. 5 lakhs and OID - Rs. 1 lakh.
- Inability** to resolve grievances by SRC in **good faith** shall not be considered contravention.

Section 179 - Power of Board

- BoD is entitled to exercise all such powers and do all such acts/things as the co. is authorised to exercise/do. Subject to the provision of this Act, AoA, MoA and other regulations.

The BoD shall not exercise such power which as per Act/MoA/AoA is to be exercised by the co. in the GM.

- No regulation** made by co. in GM shall **invalidate** any **prior act** of BoD which would have been valid if regulation had not been made (i.e., changes in regulation cannot be implemented retrospectively)

3. Following power of the board to be exercised on at BoD meeting (and not by RBC):

Cash inflow	Cash outflow	FS	Badi Baatein	Others (Rule 8)
<ul style="list-style-type: none"> Calls on SH for unpaid money Issue securities incl. debt in India/outside Borrow monies[Clause (d)] 	<ul style="list-style-type: none"> Buyback u/s 68 (upto 10% of PUESC + FR) Invest funds of co. [Clause (e)] Grant loans / give guarantee or sec. [Clause (f)] 	<ul style="list-style-type: none"> Approve F.S and BoD report 	<ul style="list-style-type: none"> Diversify business Approve M&A, reconstruction Take over of co. or acquire controlling stake 	<ul style="list-style-type: none"> to make political contribution to appoint or remove KMP appoint or remove internal & secretarial auditors.

*Sec 8 co. (92+137) can exercise power to **borrow money, invest fund and grant loans** via RBC.

Provided that, BoD may, by a **resolution passed at a meeting** (not RBC), **delegate** the powers specified in clauses (d), (e) and (f) above to:

any **committee** of directors

the **MD** or manager

any other Principal Officer (**PO**) of co.

PO of **branch** office, if any

In case of **banking co.**, following shall not be considered as **borrowing monies or granting loans**:

- Accepting of **deposit** from public in OCOB
- Placing of deposit by a banking co. with another banking co.
- Borrowing** by one banking co. from another banking co. or RBI, SBI, etc.

- SH may, by passing resolution at **GM**, **impose restriction** on powers of board (prospectively)

Points worth noting:

- Sec 179(3)(d) - Borrow monies shall mean arrangement made with bankers for OD/CC or otherwise and **not actual day to day operation** of such OD/CC accounts
- Generally, SHs are not allowed to interfere in the way the BoD operates. But in the following 3 cases, **SH are empowered to exercise power of BoD**:

BoD has been acting **malafide**

All dirs. are **interested** in particular transaction

Deadlock in management

- Certain other power of BoD that needs to be exercised only in a meeting (not RBC):

188 - Approval of RPTs

186 - Giving loans/making investment

203 - Appointing a person as MD in one more co.

Section 180 - Restriction on power of Board [N.A. to Private Co.]

Board can exercise the following power only with the consent of co. by way of **SR**: [SALE]

- Sell**, lease or otherwise dispose of whole or substantially the whole of **undertaking** of the co.

Note:

- Undertaking - In which investment of co. **>20%** of its **net worth** or generates **>= 20%** of total **income** of co. (both during previous FY)
- Substantially means **>=20%** of such undertaking
- SR not required** if such sale/lease is in **OCOB**
- Right of buyer/lessee** not affected if purchased in **good faith** and exercised due care/diligence

- Invest** the **compensation** received from any merger/**Amalgamation**
SR not required if such money is being invested into **Trust securities** as per Indian Trust Act.

- Borrow** money if money to be borrowed + Already borrowed **>** PUSC + FR + SP (**Loan**)

Note:

- SR to specify amt.** up to which BoD can borrow. Else SR void. (i.e., can't grant unlimited power)
- If BoD borrow in excess of limits specified, **SH may ratify**.
- Borrowing in contravention of this section shall not be valid unless lender proves that it was made in **good faith and w/o knowledge** that limit is exceeded.
- PUSC to include **both - Equity** as well as **preference**
- SR not applicable in case of **temporary loans** (payable on **demand**/within **6m**) obtained from co.

bankers in OCOB.

- Temporary loan does not include loan raised to finance capex
- Banking co. accepting public deposit shall not be considered borrowing for this provision

d. Remit, or give time for repayment of any debt due from director (Extension)

Concept clarity check:

1. Can AoA provide BoD with power to do any of the above 4 activities w/o SR? - No. No such exception is given u/s 180.
2. Is SR enough or BoD resolution also required for above 4 activities? - BR + SR is also required
3. Free reserve shall not include Debenture Redemption Reserve (as it is not available for dividend)

Section 181 - Company to contribute to bonafide and charitable funds, etc.:

- Applicable to both public and private company
- Can contribute any sum to charitable fund.
- Prior permission of company in GM (by passing OR) - For contribution in a FY of sum > 5% of Average Net Profit of 3 immediately preceding FY.

Concept clarity check:

- It is not needed for the co. to have profit in the current year to make such contribution. What needs to be considered is the net profit for last 3 FY.
- An amt. spent in relation to biz. of co./welfare of employee is not charitable contribution
- Is Board Resolution required if contribution < 5% limit? - Yes

Section 182 - Prohibitions and Restrictions Regarding Political Contributions (PC):

- Co. is allowed to contribute any amount, directly/indirectly towards PC (no limits)
Resolution authorizing PC has to be approved in the BoD meeting (RBC not allowed)
- Co. prohibited from PC - (a) Govt. co and (b) Co. in existence < 3 FY
- Deemed political contribution:
 - a. donation/payment to a person carrying on activity likely to affect public support of a PP
 - b. Advertisement in any publication (souvenir, brochure, pamphlet) of PP
- Disclosure in P/L - Total amount contributed under this section to any PP
- Contribution to Electoral trust company - Need not disclose as per Sec 182. It would suffice if the Accounts of the co. disclose the amount released to an Electoral Trust Company
- Mode - A/C Payee cheque or bank draft or through ECS
- Penalty for contravention of this section - Co (Up to 5x the contribution) and OID (Jail up to 6m AND fine up to 5x the contribution)

For this section - Political party = party registered u/s 29A of Representation of People Act, 1951.

Important Note on Financial Year - FY can never be less than 3 months or more than 15 months.

Example: If a co. is incorporated on 1st Jan 2001, then the first FY shall end on 31st March 2002 (and not 2001)

Section 183 - Power of BoD & Other Persons to Make Contributions to National Defence Fund (NDF), etc.:

- Notwithstanding anything contained in any provision of this Act/MoA/AoA or any other instrument of co,
- BoD or person exercising power of BoD or power of the co. in GM may
- Contribute such amount to NDF or other fund approved by CG for national defence

Disclosure - In P/L - **Total amt** contributed to these funds.

Summary of Sec 181, 182 and 183:

SN	Concept	181	182	183
1	Over-riding Provision	None	Entire Companies Act	Entire Cos. Act, MoA and AoA of the Co.
2	Approving Authority	BoD (when amt. within limit) Beyond limit - SHs to approve by OR	Only BoD	i. BOD, ii. Person exercising power of BoD, iii. person exercising power of company in GM
3	BoD limit	5% of Avg. net profit of past 3 FYs	Unlimited	Unlimited
4	Exception	Contribution > 5% of Avg. net profit requires OR	i. Government Company ii. Less than 3 FY since incorporation	None
5	Mode of payment	Not specified	A/C payee cheque, A/C payee bank draft and ECS or other pres. instruments	Not specified
6	Disclosure	None	In P&L - Total amt. paid during FY	In P&L - Total amt. paid during FY
7	Penalty	None	Co. - 5x Amt. contributed. OID - Jail 6 months + 5x amt. contributed	None
8	RBC	Allowed	Not allowed	Allowed

Section 184 - Disclosure of interest by director (Read with Rule 9 of Companies (MBP) Rule, 2014)

1. General disclosure -

Every director shall disclose his concern or interest (including shareholding interest) in co./BC/AOI or firms by way of **written notice** in **Form MBP-1**

When to disclose? - First BoD meeting:

In which he participates

Every FY

Where there is a change in disclosures already made

It shall be **duty of director** to ensure that such notice of interest is **disclosed** at meeting of BoD

Notice of interest - To be kept at **registered office** of the co. in **custody** of CS/person auth. by BoD for **8 years** from end of FY to which it relates.

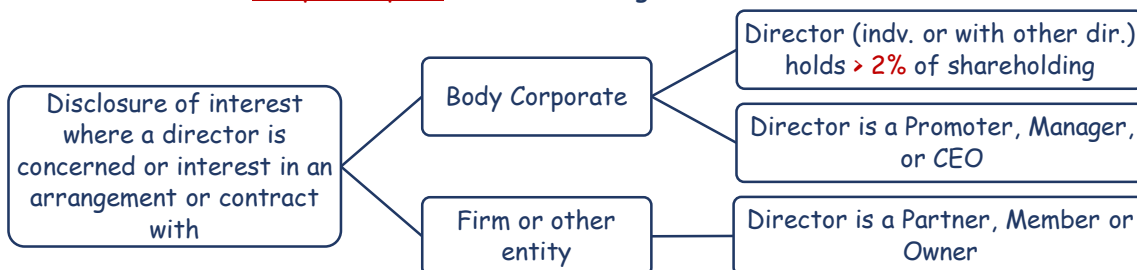
Every Dir. or KMP shall, **within 30 days** of his **appt.**, or **relinquishment** of office - Disclose the particulars specified in 184(1) relating to his concern or interest in other associations which are required to be included in register under Form MBP -1 or such other info. as may be prescribed. [Section 189(2)]

2. Specific disclosure -

Every dir. who is directly/indirectly concerned/interested in any contract/arrangement (C/A) with

- a body corporate (BC) in which such director + other directors holds >2% shareholding of such BC or is a promoter, manager, CEO of such BC
- a firm/other entity in which he is partner/owner/member.

shall disclose the nature of his concern/interest in the BoD meeting in which such C/A is being discussed and shall not participate in such meeting.



If a director is not concerned or interest in a C/A at the time of entering into it but **later becomes interested** - **Disclose** at first BoD meeting held **immediately after** he becomes concerned/interested

3. C/A entered into in contravention of Sub section (2) shall be **voidable** at the option of the **co.**

4. If director contravenes provision of this section, **penalty of Rs. 1 lakh**

Exception: Sec 184(2) shall:

1. Apply to **Sec-8 cos.** (92+137) only if C/A is with **Related Party** for an amount > Rs. 1 lakh
2. Apply to **Pvt. co.** (92+137) with exception that interested dir. may participate **after disclosure**.
3. **Not apply to** any C/A entered into or to be entered into between two companies where **any of the Directors** of one company **or two or more of them** together hold(s) **not > 2% of PUSC** in the other co. or BC

Concept clarity check:

Will interested director be counted for quorum? - **No, (except in case of a private company)**

Can an interested dir. vote in GM in the capacity of shareholder? - **Yes, Sec 184 does not apply to GM**

Section 185 - Loan to directors, etc.

1. Prohibition:

- No company shall (directly/indirectly)
- LGS - Advance **loan** (incl. book debt) to, give **guarantee** or provide **security** in respect of loan by:

Dir. of co./holding co.
(such directors)

Partner/Relative of
such directors

Firm in which such
directors/relative is a **partner**

2. Restriction:

Co. may provide LGS to any **person in whom director of co. holding is interested** provided that:

- **SR** is passed at **GM**
- ES to notice of **GM** to include particulars of such loan and purpose for which such loan is proposed to be utilized.
- Loans are utilized by borrowing co. for **principal business activity**

Person in whom director of the company is interested bole toh?

Pvt co. in which such director is director/member

Body Corp (BC) in which dir./two or more such dir. holds $\geq 25\%$ VP

BC - BoD, MD or mgr. is accustomed to act as per direction of BoD/dir. of lending co.

3. Non applicability of this section:

- a. Loan given to MD/WTB
 - As a part of condition of **service** extended to all Employees
 - Pursuant to a **scheme** approved by SR
- b. Co. giving LGS in OCOB provided rate of **interest** is not less than rate prevailing on Govt. security of tenor closer to that of loan (1 year, 3 years, 5 years, 10 years)
- c. LGS given by holding co. to **WOS**
- d. ~~Loan~~/G/S given in respect of loan given by Bank/PFI to its **subsidiary** company (not WOS)

Provided, Loan in point (c) and (d) above is utilized by subsidiary/WOS for **Principal Business Activity**.

4. Contravention Penalty:

	Company	Officer in Default	Person to whom LGS is given
Fine	Rs. 5 to 25 lakhs	Rs. 5 to 25 lakhs	Rs. 5 to 25 lakhs
Imprisonment	N.A	Up to 6 months	Up to 6 months

Exemptions - Provision of Sec 185 N.A. to:

- **Govt co.** (92+137) provided **approval** of concerned Ministry of CG/SG obtained.
- **Private co.** (92+137) subject to following condition:
 - No other BC has invested in its **share cap.**
 - **Borrowings** from bank/PFI/BC is < Lower of [(2xPUSC) or Rs. 50 crores]
 - No default in repayment of such **borrowing** is subsisting
- **Nidhi co.** - Provided loan is given to director/relative in **capacity** as members + **disclosed** in annual accounts

Concept notes:

1. Sec 185 cannot be applied **retrospectively** i.e., when a loan is made by co. to a person not covered in this sec, but later, such person becomes a person specified in this section, provisions shall not apply retrospectively.
2. **Advances** made to directors **for expenses** in OCOB is **not covered**.
3. Whether **security deposit** for **residential accommodation** taken on lease by company for the director amount to loan? - No.
4. Whether contravention of section 185 leads to **vacation** of office of director u/s 167? - No.
5. **Can a co. give loan to the directors of its subsidiary?** - **Yes**. Only directors of holding co. is prohibited.
6. Can a co. give loan to firm in which director's partner is a partner but the director himself is not a partner? **Yes**. Sec 185 only covers firm in which relative of director or the director himself is a partner. It does not cover partner of director.
7. Would sec 185 be applicable if **loan** is given by **co. to its subsidiary co?** - **Yes**. Sec 185 would

still apply as Sec 185(3) only excludes guarantee and security on behalf of suby and not loan given to suby.

8. Would **part payment of a sale of flat** made by co. to its dir. (at arm's length) and balance payment to be done in EMIs amount to loan u/s 185? - **No**. Loan is **advance** of money upon an understanding that it shall be returned back

Section 186 - Loan and investment by company

1. Max 2 layers of investment co (IC):

Unless otherwise prescribed, a co. shall make investment through **not more than 2 layers** of IC

IC means a co. whose principal business is acquisition of securities/debentures/other sec. (**SDO**).

A co. shall be **deemed** to be IC if:

- **Assets** in form of investment in SDO \geq 50% of total assets, **or**
- **Income** from such investments \geq 50% of Gross total income

Provided that, this provision shall not affect:

- a co. **acquiring** a co. incorp. o/s India having beyond 2 layers of IC as per law of such country
- Subsy. company from having **investment** suby. for meeting requirement of law.

2. Limit on amount of loan/investment that can be made:

No company shall, directly/indirectly:

- Loans - Give Loan or give G/S in connection with loan of **any person*/BC**
- Investment - Acquire by way of subscription or purchase, securities of **any BC**



* "Person" does not include individual who is in **employment** of the co.

3. Where LGS/investment already made + LGS/investment proposed to be made exceed above limit, **SR** is to be passed **prior** to making such LGS/investment

SR not required if - LGS is made to **WOS/JV** or **investment** is made in **WOS/JV** (However, these LGS/I shall be included for calculating the aggregate of LGS/I already made to determine limits)

4. Co. shall disclose - (a) **Full particulars** of LGS/I and (b) **purpose** of utilization.

5. No LGS/I (irrespective of the limit) shall be made unless:

- Resolution sanctioning it is passed at BoD meeting with consent of all the directors present at the meeting (**unanimous resolution**)
- Prior approval of **PFI** concerned where any term loan is subsisting
Provided that, prior approval of PFI shall not be required if LGS/I existing + proposed is within limit of this section and there is no default in repayment of loan installment.

Concept Clarity Check:

1. Can BR be passed by way of **RBC**? - No. It is mandatory to be passed at BoD meeting.

2. Can such discussion be taken up via **VC**? - Yes. All items can now be taken up via VC.
3. Is it necessary for **notice** of meeting to **state** about this business? - No. **Giving agenda is not mandated** by Law
4. Is **approval** of PFI required in case if **loan agreement** with PFI doesn't mention any such approval? - Yes. This is requirement of law
5. A company has total 7 directors. Out of such directors, 5 are present in the board meeting. In a resolution to invest the funds of company, 3 directors votes in favor and 2 directors **abstained** from voting. Is unanimous resolution passed? - No, all the directors present must vote in favour for unanimous resolution u/s 186. i.e., all 5 directors must vote in favor

6. Co. registered u/s 12 of SEBI Act shall NOT take inter corporate loans/deposits exceeding prescribed limits and furnish details in FS
7. No loan shall be given under this section at rate of **interest** < prevailing yield of Govt. sec closest to tenor of such loan (1/3/5/10 years)

Provided that, this subsection shall N.A. in case of **S-8 co.**, where **>=26%** of PUSC is held by **CG/SG/both** and loan is provided for **funding industrial R&D** projects in furtherance of objects as per MoA.

Note - No violation of this sub-section if **effective yield on tax free bonds** is greater than the prevailing yield of such Govt. security

8. No co. which is in default of repayment of deposit or interest thereon shall give an LGS/Investment **till such default subsists**
9. Co. making LGS/I shall maintain **register** as may be prescribed
10. Above mentioned register shall be kept at **registered office** of co. and open for inspection. It shall be made available to members on payment of prescribed fees.

Rule 12 of Companies (MBP) Rules, 2014:

- Particulars of LGS/I to be maintained in **Form MBP - 2**
- Entry to be made in register **chronologically** within **7 days** of making LGS/I.
- Entries to be **authenticated** by CS/person auth. by BoD
- Kept at RO in **custody** of CS/person auth. by BoD
- **Preserve permanently**
- Furnish to member on payment of **fees** as per AoA **not > Rs. 10 per page.**

11. Sec N.A. to:

- a. LGS/I made in **OCOB** by:

Banking co.

Insurance Co.

Housing Finance Co.

Co. engaged in business of financing **industrial** enterprises and providing **infrastructural** facilities

b. Investment:

Made by an
ICMade in pursuance of shared
allotted u/s 62(1)(a)Made by NBFC whose principal business
is acquisition of sec.

12. Penalty for contravention:

	Company	Officer in Default
Fine	Rs. 25,000 to Rs. 5 lakhs	Rs. 25,000 to Rs. 1 lakh
Imprisonment	Not applicable	May extend to a term of 2 years

Exemption:

- Govt. co engaged in defense production
- Unlisted Govt co. (92+137) provided approval of concerned Ministry of CG/SG obtained.

Concept Clarity Check -

Can the power of investment be delegated to MD? - No! (Refer Section 179 vs 186)

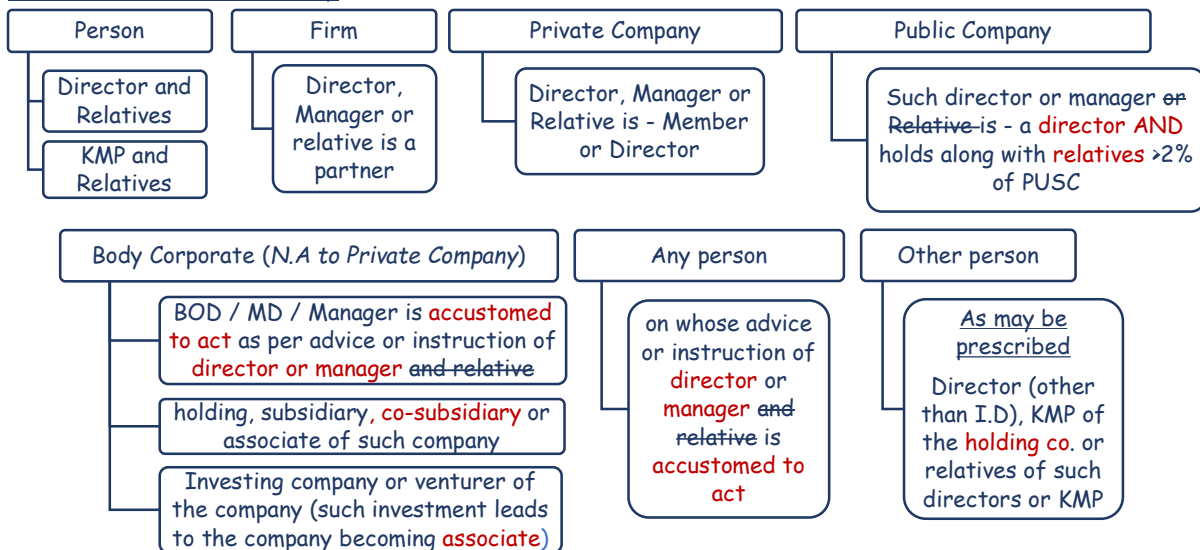
Section 187 - Investment of company to be held in its own name:

- All inv. made/held in property, securities and other assets shall be made/held in its own name. Co. may hold inv. in subty in name of nominees to ensure no. of members in subty co. meets the stat. limit
- Exceptions to 187(1):
Nothing above shall be deemed to prevent the co. from:
 - depositing shares/sec. with bankers of co. for collection of div/interest
 - depositing/trf. /holding shares/sec. in the name of bankers (SBI/Scheduled bank) for trf thereof (If trf. not made within 6m, get it back in the name of co.)
 - depositing/transferring any share/sec. with/to any person as a security for repayment of loan/performance of obligation
 - holding investment in name of depository where co. is the beneficial owner.
- Co. to maintain register for investment made by co. not held in own name - Open for inspection w/o charge.

Rule 14 of Companies (MBP) Rules, 2014:

- Form MBP - 3
- Entry of investment not held in own name to be made in register chronologically along with the reason for not holding in its own name and relation/contract under which investment is held in name of other person.
- Entries to be authenticated by CS/person auth. by BoD
- Kept at regt. Office in custody of CS/person auth. by BoD
- Preserve permanently

- Penalty for contravention - Co - Rs. 5 lakh ; OID - Rs. 50,000

Section 188: Related Party Transaction:**Sec 2(76) - Related Party****Sec 2(77) - Relative:**

Anyone who is related to another and covers the following:

- they are members of a HUF (Hindu Undivided Family);
- they are husband and wife; or
- one person is related to the other in the prescribed manner as under:

Father (including step-father);	Mother (including step-mother);	Son (including step-son);	Son's wife;
Daughter (including step-daughter);	Daughter's husband;	Brother (including the step-brother);	Sister (including the step-sister).

- Following C/A with Related parties shall be considered as RPT & provision of this section to apply:
 - Sale/purchase/supply of **goods** or material
 - Selling/disposing/buying **property** of any kind
 - Leasing **property** of any kind
 - Availing or rendering of **services**
 - Appointment of **agent** for purchase/sale of goods materials, services or property;
 - such related party's appointment to any **office or place of profit** in the company, subsidiary, **holding** or associate; and
 - underwriting** the subscription of any securities or derivatives thereof of the company;

Office/place of profit means -

- where such office is held by **director** and receives remuneration in excess of entitled rem.
 - where such office is held by **person** (individual/firm/Pvt. co/BC) **other than director** and receives anything from co. as remuneration, salary, fee or commission
- RPT can be done only **after**:
 - Obtaining **consent of BoD** by way of resolution at **BoD meeting** and

- Approved of **shareholder** where the amount of RPT exceeds prescribed limits (by way of OR)
- subject to other prescribed conditions.

Rule 15 of Companies (Meeting of Board and its power) Rule, 2014:

1. The agenda of the meeting shall disclose the following matters:

Name of RPs and nature of relation	Nature/duration of the C/A	Material terms of C/A including value	Advance paid/received for the C/A
Manner of determining pricing and other commercial term	Whether or not all relevant factors have been considered	Other relevant info.	

2. **Interested director** not to be present during such discussion in the Board Meeting

3. Prior approval of co. (**OR**) shall be required where the RPT **exceeds** below specified limit:

Where the transactions during the FY relating to:	Limit
Sale/purchase/supply of goods/materials, directly or via agent	> = 10% of T/O
Selling/disposing/buying property of any kind, directly or via agent	> = 10% of NW
Leasing of property of any kind	> = 10% of T/O
Availing/rendering of any services, directly or via agent	> = 10% of T/O
C/A relating to appointment to any office or place of profit in the company, its subsidiary company or associate company	Rem. p.m. > 2.5 lakh
C/A relating to underwriting the subscription of any securities or derivatives of the company	> 1% of NW

*The T/O and net worth shall be as per audited FS of the preceding FY.

- Approval of shareholders for RPT shall **NOT** be required in following cases:
 - Transaction b/w **holding and WOS** whose account is **consolidated** with such holding co. and placed in GM
 - **Govt co.** in respect of C/A with other Govt co. or CG/SG
 - **Unlisted Govt co.** (92+137) provided approval of concerned Ministry of CG/SG obtained.
- **Explanatory Statement** annexed to notice calling for GM shall include following details:

Name of RPs	Name of Director/KMP who is related	Nature of relationship	Nature, material terms and value of C/A	Other relevant info.
-------------	-------------------------------------	------------------------	---	----------------------
- A **member** of co. who is a **related party** w.r.t. C/A shall not vote on such resolution. Provided that - This provision shall **NOT apply** to a company in which >= 90% of the members, in number, are **relatives of promoters** or are **related parties**

Exception to the above restriction: That is, every member can vote even if he is related party:

 - **Pvt. co** (92+137)
 - **Govt co.** in respect of C/A with other Govt co. or CG/SG
 - **Unlisted Govt co.** (92+137) provided approval of concerned Ministry of CG/SG obtained.
- Where a C/A which is a RPT is entered into by a director/employee **without approval of BoD/Shareholders** as the case may be (**no limit** of Rs. 1 crores as in case of Sec 177):

- It can be **ratified** by the BoD/SH **within 3 months** of entering into such C/A
- If not ratified, it shall be **voidable** at the option of BoD/SH
- If such C/A is with a related party to a director, the director concerned to **indemnify** co.
- Co. may **proceed against** the director/employee who entered in such C/A for **recovery of loss** if any.
- **Disclosure:** All RPTs to be disclosed in board report along with justification for entering into such C/A
- **Non applicability** - This section is N.A. to those RPTs entered in **OCOB at Arm's Length Price**
The expression "arm's length transaction" means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.
- **Punishment for contravention:** Director/employee of co. who authorized such C/A shall be liable to a fine of:
In case of listed co. - Rs. 25 lakhs
In case of other co. - Rs. 5 lakhs

Concept Clarity Check:

1. Is approval of Audit Committee required if RPT is in OCOB at Arm's Length Price - **Yes**, Sec 177 only exempts transaction between Holding and WOS from its purview. Rest all RPT require approval of AC
2. Conceptual understanding of Section 177 vs 188.

Section 189: Register of Contracts or Arrangements in which directors are interested

1. **Register** containing particulars of all C/A u/s 184(2) and 188 to be maintained in the **prescribed** manner. Such registers shall be placed in the next meeting of **Board** and signed by all directors present.

Rule 16 of Companies (MBP) Rule, 2014:

- Register to be maintained in Form **MBP - 4**
- Include particulars of:
 - C/A entered into with BC or other entities as mentioned u/s **184(2)** or with RP u/s **188**
 - Companies/BC/Firms/AOI in which director has interest/concern as mentioned u/s **184(1)**,

Note - Provided that the particulars of BC in which director himself (+ any other director) holds $\leq 2\%$ of PUSC would not be required to be entered in the register;
- Entry to be made in register **chronologically** whenever there is a cause to make entry.
- Entries to be **authenticated** by CS/person auth. by BoD
- Kept at regt. Office in **custody** of CS/person auth. by BoD
- Preserve **permanently**
- Furnish to member within **7 days** of req. on payment of fees as per **AoA** not $>$ Rs. 10 per page

2. Every director / KMP shall **within 30 days** of appointment/relinquishment of office, disclose his interest **u/s 184(1)** which needs to be included in the register u/s 184(1) [i.e., Form MBP -1]

3. Register to be kept at **RO** of the co. and **open for inspection during business hours**. Extracts may be provided to members in manner prescribed
4. Register to be produced at **every AGM** and remain open and accessible to person who has right to attend such meeting. [Refer QB 45]
5. Nothing in this section shall apply to following C/A:
 - a. Sale/purchase/supply of goods/materials/services if **amount <= Rs. 5 lakhs** in aggregate in a year
 - b. **Banking** co. for **collection** of **bills** in OCOB
6. Penalty - Director - Rs. 25,000

Note: For S-8 companies, this section shall apply in case the transaction u/s 188 exceeds Rs. 1 lakh.

Form MBP-1 vs MBP -4 While **Form MBP-1** captures details of the interest or concern of each directors, Form MBP - 4 only captures particulars of companies/BC in which such director is interested.

Section 190: Contract of Employment with Managing or Whole-Time Directors [N.A. to Private co.]

1. Co. to keep at **registered office**:
 - a. Where a contract of service with MD/WTM is in **writing** - Copy thereof
 - b. If no contract in writing, **written memorandum (WM)** setting out its terms
2. **Copies** of contract/WM - open for inspection to member **without any fees**
3. Penalty for contravention - For each default - Co - Rs. 25,000 and OID - Rs. 5,000

Section 191: Payment to Dir. for Loss of Office, etc., in Connection with trf. of Undertaking, Property or Shares

General Rule - No CFLO can be paid to a director unless it is approved by Shareholders by OR in GM.

1. Events in which CFLO becomes payable under this section:
 - transfer of whole/part of **undertaking/property** of the company
 - transfer to any person all or any **shares** of company resulting from:
 - offer made by **general body** of SH
 - offer made by a BC with a view of making the co. its subsidiary or subdy of its holding
 - offer made by individual with a view to obtain control or exercise > = 1/3rd of VP at GM
 - any other offer which is conditional on acceptance
2. Who pays such compensation? CFLO/Consideration for retirement from office may be **paid by**:
 - Such company
 - Transferee of such undertaking/property
 - Transferee of such shares
 - From any other person not being such company
3. Condition for payment of such CFLO to directors - Disclosure and approval of compensation:
Payment under this section can be made only after it is disclosed to members and **approved by**

resolution at GM. (If such GM is adjourned for want of quorum, no deemed approval)

Disclosure:

Name of director	Amt. proposed to be paid	Event due to which compensation becomes payable	date of Board meeting recommending such payment;	
basis for the amt. determined;	reason/justification for payment;	manner of payment (cash or otherwise) and how;	sources of payment; and	Other relevant info.

4. Prohibition on payment of compensation:

In case of MD/WTD/Mgrs, the amount of CFLO shall **not exceed the limit** prescribed u/s 202.

No CFLO to MD/WTD/manager of co. (except 'notice pay' and 'statutory payments'), in the following cases where the co. has defaulted in payment/repayment of:

- public deposits** or payment of interest thereon;
- debentures** or payment of interest thereon;
- any **liability**, secured or unsecured, payable to any **bank**, PFI, etc.
- any dues towards income **tax**, service tax or any other tax or duty, payable to CG/SG, statutory authority or local authority unless company has disputed such liability.
- o/s statutory dues to the **employees** or workmen of the company which have not been paid by the company **unless** company has **disputed** such liability and
- dividend** on **preference shares** or not **redeemed** preference shares on due date.

5. Payment made in contravention of this section - Director deemed to have received it in **trust** for the co.

6. Penalty on directors for contravention - **Rs. 1 lakh**.

Section 192: Restriction on Non-cash Transactions involving Directors:

1. No co. shall enter into an **arrangement** by which:

- dir. of CASH or person associated with him acquires assets from co. for consideration other than cash
- Co. acquires asset from such person for consideration other than cash,
Unless **prior approval** by way of resolution at GM.

If the dir./connected person is a **dir. of holding co.**, then **resoln** is to be passed at GM of **holding co. as well**.

2. **Notice** of GM of co./holding co. for above resolution to include **particulars** of arrangement along with value of such assets involved duly calculated by a registered valuer.

3. Arrangement in contravention of this section - **Voidable** by the company (shareholders), **unless**:

- restitution** of any money/other consideration which is the subject matter of the arrangement is **no longer possible** and the co. has been **indemnified** by any person for any loss/damage caused to it; or
- any **rights** are **acquired bona fide** for value and **without notice of the contravention** of the provisions of this section by any other person.

2. In case where such terms are recorded in the minutes of BoD meeting, co. shall inform RoC about such contract within 15 days of approval by BoD.

Chapter 3 – Appointment and Remuneration of Managerial Person

Certain Key Definitions:

1. Key Managerial Personnel (KMP) [Sec 2(51)] in relation to a co. means:

CEO/MD/Manager	CS	WTD	CFO	Officers in whole time employment, not > 1 level below dirs., designated as KMP	Officers as may be pres
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Author's Note - Only MD and WTD are considered as KMP. No other director is KMP.

2. Manager [Sec 2(53)] - **Individual**, who subject to **superintendence, control and direction of BoD**, has the mgt. of **whole** or substantially the **whole** of the affairs of co.
3. Managing Director (MD) [Sec 2(54)] - **Director** who is entrusted with **substantial the-whole power of mgt.** of affairs of the co. by virtue of:

AoA	Agreement with co.	Resolution passed at GM	Resolution passed at BM
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Explanation - Power to do administrative acts of a routine nature shall not be deemed to be included in substantial power of management. For example:

Power to affix common seal to any doc.,	draw/endorse any cheque or NI of co.,	sign a share certificate or	direct registration of transfer of shares
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4. Whole-Time Director (WTD) [Sec 2(94)] - Director in whole time employment of co.
5. Remuneration [Sec 2(78)] - Money/Equivalent given or passed to any person for service and includes **perquisites** as per Income Tax Act, 1961

Concept clarity check:

- Can a non-director be appointed as MD? - **No**
- Can an additional director be appointed as MD/WTD? - **Yes**
- Can a MD/WTD be rotational director? - **Yes, depends on the terms of appointment**
- Kaun bada? - MD or BoD? - **BoD**.

196 - Appointment of MD/WTD or Manager

1. **No co.** shall employ or appoint a **MD** and a **Manager** at the **same time**.
2. No co. shall appoint/reappoint MD/WTD or Manager for a **term** > 5 years at a time
Provided that, **reappointment** shall **not** be made **earlier than 1 year** before expiry of term
3. No co. shall **appoint/continue** with a MD/WTD/Manager who is:

<u>Age:</u> Below 21 or Attainted 70	<u>Insolvent:</u> Undischarged insolvent Adjudged insolvent	<u>Creditors:</u> suspended payment to crs., makes/made composition	<u>Convicted</u> convicted by a court, and sentenced for > 6m
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To appoint person of age > 70 years:

- Pass **SR** and ES annexed to notice to include justification.
- If no SR could be passed but **votes cast in favor > against** (i.e., OR) and **CG**, on application, is **satisfied** that such appt. is **beneficial** to co., appointment can be made.

Additional Eligibility Conditions for MD/WTD/Manager as per Part I of Schedule V (without seeking approval of CG):

- Not sentenced to **imprisonment** for **any period** or to **fine > Rs. 1,000** for conviction of any offence under 19 Acts.
(Excise, Cos. Act, SEBI, SCRA, Income Tax, Custom, FEMA, PMLA, IBC, GST, etc.)
- Not been **detained** for any period under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (**COFEPSA**)

If approval of **CG** is sought once to appoint a person disqualified under (a) or (b), no further approval will be required to appoint such person unless convicted/detained again

- Completed **age** of 21 and not attained 70
Provided that, if SR passed to appoint person who has attained 70, then no **CG** approval required)
- Resident** in India [*N.A. to companies in SEZ*]
Resident in India includes **person staying in India** for a continuous period of **> 12m** immediately preceding date of such appointment **and** who has come to stay in India:
 - for taking up **employment** in India; or
 - for carrying on a **business** or **vocation** in India.

- Subject to Sec 197 and Schedule V, the **T&C** of appointment **and remuneration** payable to MD/WTD/Manager shall be **approved** by:
 - BoD** at a **meeting**
 - SH** at the next **GM** (E.g., Eicher Motors)
 - CG** - only if terms vary from Part I of Sch V (Form **MR-2** within **90 days** of appointment)

Notice for such BM/GM to **include** such **T&C**, remuneration payable and other relevant info.

A return in Form **MR-1** to be filed with RoC within **60 days** of such appointment

- Where appt. of MD/WTD/Manager is not approved by SH in GM, **acts** done by then before approval shall be deemed **valid** (i.e., it will not be void)

Non Applicability	196(1)	196(2) Term	196(3)	196(4) Approval	196(5) Acts valid
Private co. (92+137)	Applicable	Applicable	Applicable	N/A	N/A
Govt co. (92+137)	Applicable	N/A	Applicable	N/A	N/A

Concept Clarity Check:

- Can a co. have MD and WTD at the same time? - **Yes**
- Can a co. have two MDs at the same time? - **YES!** MDs can have substantial powers but need not

be whole power and hence multiple MDs can be appointed.

3. Can a co. have two managers at the same time? - **No**. (This answer is correct, don't worry!)
4. A Ltd. has Mr. A appointed as MD in the co. After 6m, A Ltd wants to appoint Mr. B as Manager to head the finance department. Is it valid u/s 196(1) of the Act? - **Yes**. Cause, head of one dept cannot be considered as Manager as per Sec 2(53) and therefore 196(1) not attracted
5. Can a person be appointed as MD for life? - **No**. A term can be of max 5 years.
6. Can a person of age < 21 be appointed as director (Not MD)? - **Yes**. But less than 18 - **No**.
7. Can a person who is an undischarged insolvent be appointed as Manager with approval of CG? - **No**, approval of CG works only in case of variance with Sch V Part I. CG cannot approve variance from Sec 196
8. Can a person disqualified u/s 164 be appointed as MD? - **No**, MD should be qualified u/s 164
9. Can a person of age < 21 be appointed by SR? - **No**, it is applicable only for age > 70

Sec 197 - Overall Maximum Managerial Rem and Managerial Rem in Case of Absence or Inadequacy of Profits [N.A. to Private co and Govt. co]

This sec. talks about remuneration to all dir. including MD/WTD and Manager (managerial person) and IDs also.

1. **Total managerial remuneration** payable by a **public co.** to all directors shall be **< = 11%** of Net Profit (as per Sec 198 without deducting director's remuneration from Gross Profit)

For payment exceeding 11%, **approval** of SH (OR) in GM required and subject to **Schedule V**

Except with prior approval in GM by **SR**,

- a. Rem. to any one MD/WTD/Manager shall not be **> 5% of NP AND** if there is more than one such director, rem. shall not be **> 10% of NP** (in aggregate)
- b. Rem. to directors other than MD/WTD shall not exceed:
 - i. **1% of NP** if there is a MD/WTD/Manager
 - ii. **3% of NP** in other case

In case of a **Nidhi co**, rem. to director (other than MD/WTD/Mgr) for performing special services to the Nidhi as per AoA may be paid by way of **monthly** payment subject to approval in GM and Sec 197.

No approval in GM required where:

- a. Nidhi does not have MD/WTD/Manager
- b. Rem. to all directors < 10% of NP or Rs. 15 lakhs, WEL and such rem. is approved by SR.

Where the co. has **defaulted in payment of dues** to any:

- i. Bank/PFI
- ii. Non-convertible debenture holder (DH)
- iii. Secured creditor (SC),

Approval of concerned Bank/PFI/DH/SC shall be needed **prior** to approval of **SH** in GM

Summary of summary (:D)

Remuneration Payable to:	Limit:	Above Limit?
All the directors + Manager	11% of Net Profit	<ul style="list-style-type: none"> • OR and • Subj. to Sch V • PFI approval
One MD/MTD/Manager	5% of Net Profit	SR and PFI approval
More than 1 MD/MTD/Mgr.	10% of Net Profit	
<u>Dir. other than MD/MTD:</u> <ul style="list-style-type: none"> • In case there is a MD/MTD/Manager • In case there is no MD/MTD/Manager 	1% of Net Profit 3% of Net Profit	

2. Above % shall be **exclusive** of fees u/s 197(5)
3. Subject to Sch V, if in any FY, the co. has **no profit** or inadequate profits, the co. shall **not pay** its directors (incl. MD/MTD/Mgr./NED/ID) any **remuneration** except fees u/s 197(5) **except in accordance with Sch V**
4. Remuneration payable to director shall be **determined**, in accordance with prov. of this section, by:
- | | | |
|-----|-----------------|-------------------------------------|
| AoA | OR passed at GM | If AoA so requires, SR passed at GM |
|-----|-----------------|-------------------------------------|

Author's Note - The Board has no power to fix remuneration.

Rem. so determined above shall be **inclusive** of rem. payable to director in any **other capacity**. However, rem. provided in other capacity shall not be so included if:

- Services rendered are of **professional nature, AND**
 - In **opinion** of **NRC** (if no NRC, **BoD**) - Dir. possesses **requisite qualification** for practice of profession.
5. **Sitting fees:** A dir. may receive rem. by way of fees for attending meetings of BoD or committees thereof.

This fees shall be such sum as decided by BoD **not exceeding Rs. 1 lakh per meeting** of BoD/Comm.

Provided that for **ID and WD**, sitting fees shall **not be less** than that of other directors.

Author's Note -

- Sitting fees is payable even if director attends via VC/AV means.
 - Where a Board Meeting (BM) is adjourned (for quorum or otherwise), the director who were present to attend such Board meeting shall be entitled to receive the sitting fees.
An adjourned meeting is a continuation of original meeting. Therefore, where a BM is held and is adjourned to a later date, the **sitting fees cannot be paid twice**, since it is counted as one BM only.
 - Is sitting fees payable to **manager**? - No!
6. **Manner** of payment of Rem:

Monthly	Specified % of NP, or	Partly one way and partly another
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7. Omitted

8. NP for this section = NP as per Sec 198
9. What if director draws/receives **rem. in excess of limit** or without necessary approvals?
- He shall **refund** such excess sums to co. **within 2 years** or lesser period as allowed by co.
 - Until such sum is refunded, hold it in **trust** for the co.
10. Can company **waive off** the sum refundable under above subsection? - **Cannot waive off** unless:
- Approved by co. by **SR** within 2 years from the date it becomes refundable
 - **Approval of banks/PFI/DH/SC** where co. has **defaulted** in payment of dues has been obtained **prior** to approval of co.

Author's Note - Recall Sec 180. Remittance or extension of any debt due from directors requires SR. And hence, such waiver would mandatorily require a SR.

Bell vs Lever Bros:

Facts of the case - Mr. Bell was MD in one of the companies of Lever Bros Ltd. Mr. Bell traded some personal profit during his tenure. Without knowledge of this, Lever Bros terminated his contract for some other reason and paid him huge sum as CFLO. Later on, when Lever Bros came to know about this fraud. They argued that this concealment & misconduct was breach of his duty that was detailed in his employment contract and the compensation should be refunded.

Held that - a director was not legally bound to disclose any breach of his fiduciary obligations so as to give the company an opportunity to dismiss him and hence compensation cannot be refunded.

11. Sch V overrides MoA, AoA or agreement or any resolution passed at GM or BM.
In case of no profit or inadequate profit, the amount of remuneration shall be as per provision of Sch V.
12. Disclosure for listed co. in Board Report
- Ratio** of rem. of each director to the median rem. of employees of the co. for the FY;
 - the **% increase** in rem. of each director, CFO, CEO, CS or manager, if any, in the FY;
 - the **% increase** in the median rem. of employees in the FY;
 - the no. of **permanent employees** on the rolls of co.;
 - Avg. **percentiles increase in salaries** of employees other than managerial personnel in last FY and its **comparison** with percentile increase in managerial rem. and **justification** of difference.
 - Affirmation** that the remuneration is as per the **remuneration policy** of the company.

Report shall include a statement showing name of **top 10 employee** in term of rem. drawn and name of **employee** who:

- If employed throughout the FY, rem. **> = Rs. 1.02 crores**
- If employed for part of FY, rem. per month **> = Rs. 8.50 lakhs**
- Receives rem. > Rem. drawn by MD/WTD/Manager **and** holds (himself + spouse + dependent children) **> = 2%** of Equity shares of co.

For the above statement, include following details of employee:

Rem. received	nature of employment	qualification and experience	date of commencement of employment	age
last employment held by such employee before joining co.,	% of eq. shares held by the employee in co.	whether any such employee is relative of any dir./mgr. of co. and if so, name such dir./mgr.		

13. Insurance premium not to be included in calculating rem. :

- Where any **insurance** is taken by a co.
- on behalf of its managerial person, CEO, CFO or CS,
- for **indemnifying** any of them
- against any liability w.r.t., any negligence, default, misfeasance, breach of duty/trust
- for which they **may** be guilty in relation to the company,
- the **premium** paid on insurance shall **not be** treated as part of the rem. payable to any such personnel.

Provided that if such person is proved to be **guilty**, the **premium** paid on such insurance shall be **treated** as part of the remuneration.

14. If any director is receiving any commission from co, he shall not be disqualified from receiving rem./comm from Holding/subsy co. subject to **disclosure** in Board Report

15. **Contravention** of this section - Person - Rs. 1 lakh and Co. - Rs. 5 lakhs.

16. **Auditor's Report** u/s 143 to make a statement whether rem. paid to directors is in accordance with this section and whether excess rem. is paid to any directors.

Schedule V - Part II - Remuneration [Amended w.e.f. 18th March 2021 to include NED and ID]

This schedule is divided into 5 sections.

Sec I: Rem.
payable by co.
having profit

Sec II: Rem. payable
by co. having no profit
or inadequate profit

Sec III: Rem. payable by
co. having no profit or
inadequate profit in
special circumstances

Sec IV: Perqs
not includes
in Managerial
Rem.

Sec V - Rem.
payable to
KMPs in 2 cos.

Section I: Co. having profit in FY may pay rem. to Managerial persons (MPs) or **other dir.** within limits u/s 197

Section II: Where in any FY, the co. has no profit or inadequate profit, it may pay rem. to MP or other directors not exceeding the limits under (A) and (B) given below subject to approvals as mentioned below:

Limit under (A):

Where the Effective Capital (EC) is:	Limit of yearly remuneration payable shall not exceed (in any FY)	
	In case of Mgr Person (MP)	In case of other directors
Negative or < Rs. 5 crores	60 lakhs	12 lakhs
5 cr. & above but < Rs. 100 crores	84 lakhs	17 lakhs
100 cr. & above but < Rs. 250 cr.	120 lakhs	24 lakhs
250 cr. & above	120 lakhs + [0.01% * (EC - 250 cr.)]	24 lakhs + [0.01% * (EC - 250 cr.)]

If **period < 1 year**, pro-rate managerial remuneration

Remuneration in excess of above limit may be paid if **Special Resolution** is passed by Shareholders

Calculation of Effective Capital ("EC"):

Add	Deduct
1. PUSC (excl. share application money/advances against share)	1. Accum. losses & preliminary exp. not w/off.
2. Credit of share premium account	2. sum of any investments (except investment by Investment co.)
3. R&S (excl. revaluation reserve)	
4. Long term loans and deposits repayable after 1 year (excl. short term arrangement such as bank OD, guarantees, etc.)	

Note -

1. Where appt. of MP is made in the year in which co. has been incorporated, EC shall be calculated as on date of such appt.
2. In any other case - As on last date of FY in which appt. of MP is made.

Limit under (B):

In case a MP/Dir. is acting in professional capacity, rem. as per Limit (A) may be paid if MP/Dir. has:

1. No **interest** in capital* of CSH, and
2. Not interest, directly or indirectly or **related** to director or promotor of CSH during last 2 years before or on or after the date of appointment
3. Possess graduate level **qualifn** with expertise & specialized knowledge in field which co. operates

* Employee holding shares of company upto **0.5% of PUSC** under any scheme such as ESOP shall be deemed to be a person **NOT** interested in capital of co.

In case of no profit /inadequate profit, rem. can be paid as per limits under (A) & (B) only if:

- i. Approved by **BoD + NRC** (if applicable)
- ii. No default in repayment of dues to **Banks/PFI/DH/SC**. **If defaulted** - Obtain approval prior to SH approval
- iii. **OR/SR as** the case may be for payment as per (A) and **SR** in case of (B) at the **GM** for a period not > 3 years
- iv. **Notice** calling for **GM** contains statement containing relevant info such as:
 - **General** information of the company - Nature of industry, financial performance, etc.
 - Info. about **appointee** - Background, past remuneration and proposed remuneration, etc.
 - **Other** information - Reason for loss or inadequate profits, steps for improvement, etc.
 - **Disclosures** that shall be made in the board's report.

Section III: In following circumstances, a co. may pay rem. in excess of amt specified in Sec II:

- i. Where such rem. in excess of Sec I or II is paid by any "**other company**" and such other co. is:
 - a. either a **foreign co.**, or
 - b. has taken **approval of SH** for making such payments, and treats such payment as MR u/s 197 and total MR paid by such co. incl. this payment is within limit u/s 197.
- ii. The following co. may pay **any amount of rem.** to its MP/other directors for following period:
 - a. **Newly** incorp co. for 7 years

- b. **Sick** company for whom scheme of revival ordered by BIFR for 5 years from date of sanction of scheme
- c. Co. for which Resolution Plan is approved by NCLT under **IBC** for 5 years from date of approval.
- d. Where rem. exceeds limit u/s II but rem. fixed by **BIFR** or **NCLT**

Provided that rem. under this section may be given subject to meeting the following condition in **addition** to conditions specified under Sec II:

- a. Except as under point (i) above, MP/~~other director~~ is **not** receiving rem. from any other co.
- b. Auditor/CS of Company/ CS in whole time practice **certifies** that all **secured crs. and term lenders** have stated in writing that they have no **objection**, and such certificate is filed along with the **return u/s 196(4)**
- c. Auditor/CS of co./ CS in whole time practice **certifies** that there is **no default** on payment to any crs. or deposit holders

Section IV: Perquisites not included in Managerial Rem.

- a. Contribution to **PF**, **Super AF**, **AF** (to extent not taxable under Income tax)
- b. **Gratuity** Payable (not $> \frac{1}{2}$ a month salary for each completed year)
- c. **Leave** encashment

In addition to above, the following perquisites to an expatriate MP shall not be included in rem:

Children Edu. Allowance (max 12k p.m. per child for 2 children)

Holiday Passage

Leave Travel Concession

Section V: Subject to provisions of **Sec I to IV**, a MP shall draw rem. from one or both companies, provided that:

Total rem. drawn from the cos. $<$ **Higher maximum limit** admissible from any one of the cos. of which he is a MP.

Note: Section V is applicable also in case of sufficient profit i.e., Section I.

Concept clarity check:

1. Are the provisions of Sec 197 and Sch V applicable to CEO, CFO and CS? - **No, not applicable to all KMPs.**
2. Does Guarantee commission paid by co. to NED for guaranteeing a term loan taken by co. amount to remuneration u/s 197? **No, it is a service not in capacity of director. This will not be included in remuneration**

Part III - Schedule V

1. Appt. and rem. under Part I and II shall be subject to **approval** of SH in GM
2. The auditor/CS of co. / CS in WTP shall **certify** that the requirement of this Schedule have been **complied** with **and** such co. to file such certificate with ROC along with filings u/s 196(4)

Part IV - Schedule V - CG may exempt cos. from requirement of this Schedule

Section 198: Calculation of Net Profits (NP)

Following adjustments need to be made to arrive at NP

- Credit shall **be given** (i.e., include in NP) for **bounties**/subsidies received from Govt. or public authorities unless otherwise directed by Govt
- Credit shall **not** be given for following:

Premium on shares/debentures of co. (unless it is an IC)	Profit on sales of forfeited shares	Profit of capital nature - Such as profit on sales of undertaking
Profit on sale of immovable prop. or fixed asset of capital nature unless in OCOB If sale value > WDV, include profits upto original cost - WDV in net profit		
Change in carrying value of Asset or Liab. for measuring at Fair Value	Amt. representing unrealized gain, notional gain, or revaluation of assets	

Post above adjustments, following adjustments shall be made:

Following shall not be deducted	Following shall be deducted
income-tax and super-tax payable under the Income-tax Act, 1961 (other than those allowed specifically) [PBT lena, PAT nahin]	all the usual working charges
any compensation , damages or payments made voluntarily (not bound legally)	directors remuneration
loss of a capital nature including loss on sale of undertaking (except upto WDV - sales proceed)	bonus or commission paid or payable
any change in carrying amount of an asset or of a liability on account of fair valuation.	any tax notified by the CG as being taxes on abnormal profits
	any tax on business profits imposed for special reasons
	interest on debentures issued by the company
	interest on mortgages executed by the company
	interest on loans and advances secured by a charge on assets
	interest on unsecured loans and advances
	payments inclusive of contributions made u/s 181
	expenses on repairs (not of a capital nature)
	depreciation to the extent specified in section 123
	the excess of expenditure over income in any previous year
	any compensation /damages to be paid in virtue of any legal liability including breach of contract
	any sum paid by way of insurance (premium)
	debts considered bad and written off

Section 199: Recovery of Remuneration in Certain Cases

- Where a co. is required to **re-state** its FS
- due to **fraud** or **non-compliance** with the prov. of this Act,
- Co. shall **recover** from past/present MD/WT/Manager or CEO (not NED/ID), who during such period for which FS is re-stated received remuneration,
- in excess of what would have been payable to him as per re-stated FS.

Section 200: Company to fix limit with regard to remuneration

- A co. may, while according to its approval u/s 196 or 197 (no profit or inadequate profit),
- fix the remuneration at such amount or % of profit of co. as it may deem fit
- And while fixing such rem. shall have regard to:

Financial position of co	Rem. drawn by indiv. in other capacity	Rem. drawn from other cos.	Prof. qualification and experience	Other prescribed matters
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Section 201: Forms of, and Procedure in Relation to, Certain Applications

1. Application made to CG u/s 196 shall be in **Form MR-2** and shall be made within **90 days** of such appointment
2. Before making any such application to CG:
 - Issue a **general notice** to members indicating the nature of application proposed to be made.
 - **Publish** notice in **newspaper** - one in principal language and one in English.
 - Copies of the notice shall be attached to the application.

Section 202: Compensation for Loss of Office of Managing or Whole-time Director or Manager

1. Company can make payment to MP, **but not to any other director** as:
 - Compensation for Loss of Office (**CFLO**)
 - Consideration for Retirement from Office (**CFRO**)
 - In connection with such loss or retirement
2. No payment under this section in following case [**R2VGWI**]:
 - a. Director **Resigns** as a result of **reconstruction** or amalgamation and is **appointed** as MP/other officer in reconstructed/amalgamated company
 - b. Director **Resign** from office otherwise than on reconstruction or amalgamation
 - c. Office **Vacated** u/s 167
 - d. Where co. is wound up, provided that **WUP** was due to negligence/default of director
 - e. Director is **Guilty** of fraud/breach of trust or gross negligence or management in conduct of affairs of **C&SH**
 - f. Where the director has **Instigated**, or has taken part in bringing about, the termination of his office.
3. Payment not to exceed what he would have earned if he had been in the officer for remainder period or 3 years whichever is **shorter**.

Calculation of payment: Avg. remuneration of last 3 years or shorter period if held office for **< 3 years**:

Payment = Average remuneration * Period (balance period of office or 3 years whichever is shorter)

Provided that, **no payment if WUP** commence before or within **12 months** after he ceases to hold office and assets is not sufficient to repay the share capital

4. Nothing in this section prohibits directors from receiving remuneration under this Act.

Section 203: Appointment of Key Managerial Personnel

1. Companies shall have "whole time KMP" - **Listed co. AND Public co. having PUSC > = Rs. 10 crores**

Whole time KMP bole toh?

- MD/Manager/CEO or in their absence WTD,
- CS, **and**
- CFO

Moreover, every **private co. having PUSC > = Rs. 10 crores** shall have a whole time CS.

An Indv. shall **not** be appt. as **Chairperson** of co. as well as **MD/CEO** of the co. at **same time unless**:

- AoA provides otherwise, or
- Co. does not carry multiple business (i.e., if company has single business, the CP can be MD/CEO too)

Above proviso (i.e., Chairman and MD/CEO cannot be same person) shall be **N.A** to public companies:

- Having PUSC > = Rs. 100 crores, **and** Annual turnover > = Rs. 1,000 crores
- Co. is engaged in multiple business **and**
- Has appointed one or more CEO for each such business.

PUSC and T/O as per latest audited FS.

- Whole time KMP to be appointed by **resolution** of **Board** containing T&C of such appt.
- A whole time KMP shall **not hold office in more than one co. at the same time** except in **subsy co.**

Nothing in this section shall disentitle a ~~whole time~~ KMP from becoming a director in any co. with the permission of Board.

Can a person be MD in two companies at the same time?

If a person is MD/manager in one other company, it is permissible for a company to appoint him as its MD. The following conditions needs to be satisfied:

- Such person should be MD/Manager of **one**, and of **not more than one**, other company.
- Approved by resolution passed at BM with the **consent** of **all the directors present and voting**. (similar to Sec 186)
- Specific notice** of such meeting, and of the **resolution** to be moved thereat has been given to all the directors then in **India** (i.e., agenda required)

Author's Note:

- Approval of **all dirs. present** in meeting is required. If dirs. abstain from voting, this resolution cannot be passed. E.g., If co. has 8 dirs. and 6 dirs. are attending the meeting, **all 6 should vote in favor**.
- Prior to this section, Sec 188 had mandated for the agenda of the meeting to be sent to BoD.

- Vacancy** in office of whole time KMP, to be filled by BoD within **6m** of vacancy
- Penalty** - Co. - Rs. 5 lakhs, Director/KMP in default - Rs. 50K + Rs. 1,000 per day, Max. Rs. 5 lakhs

In case of a Government co, this section shall not apply to MD/Manager/CEO or in their absence WTD For e.g., vacancy in the office of MD/etc. need not be filled within 6m.

Concept Clarity Check - Can a person who is already a CFO in A Ltd. be appointed as CS as well in A Ltd? - No! Three individuals required to fill three positions of whole time KMP (**Refer QB 23**)

1. Following cos. to annex **Secretarial Audit Report** (by CS in practice) to the BoD Report u/s 134(3):
 - Listed co.
 - Public co. having **PUSC** >= Rs. 50 crores
 - Public co. having **T/O** >= Rs. 250 crores
 - Every co. having o/s **loan** or borrowings from bank/PFI > = Rs. 100 crores

2. Duty of co. to give **assistance** and facility to CS in P for auditing such records
3. BoD Report to **explain** in full any **observation** or **qualification** made in secretarial audit report

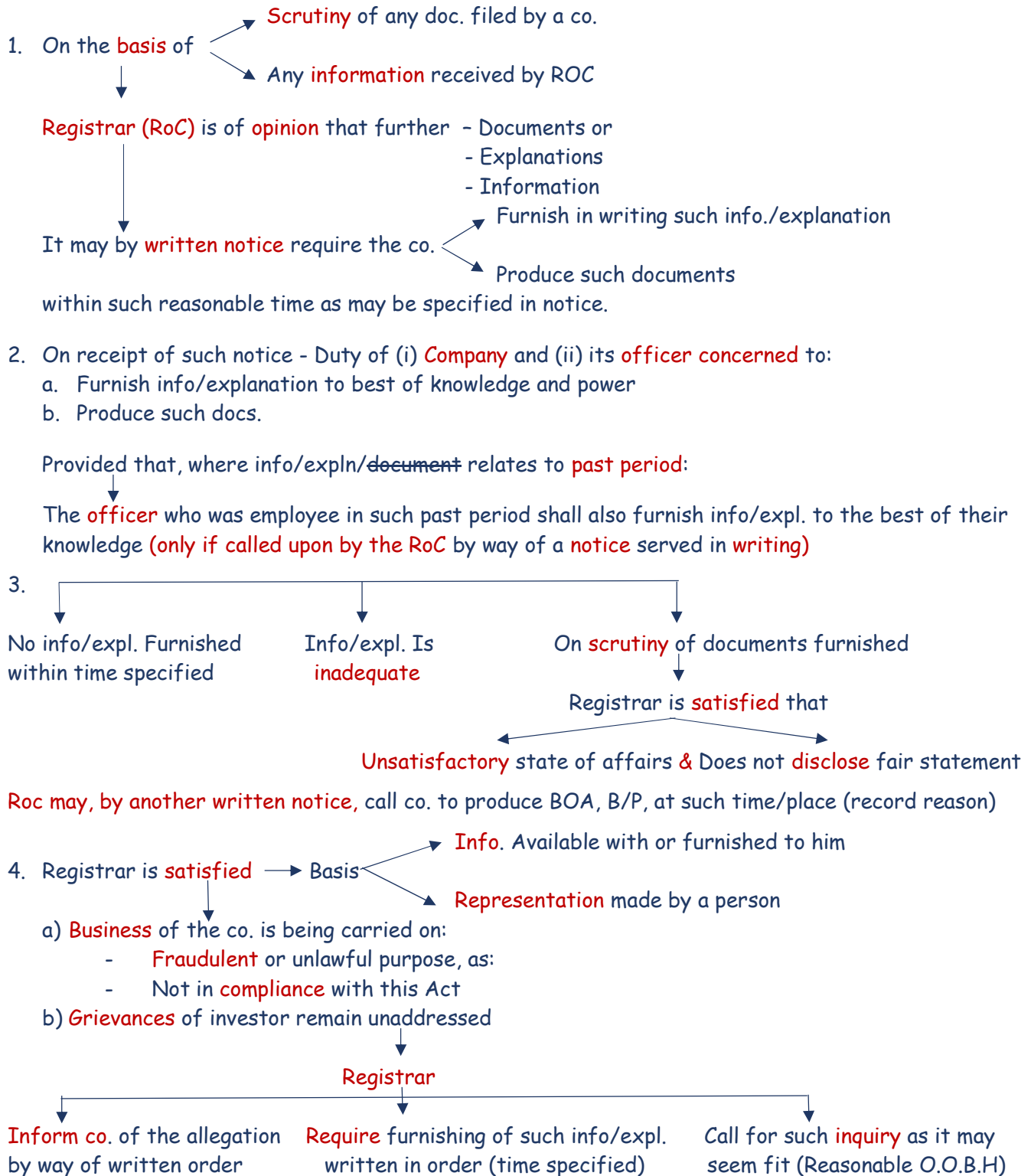
- Report to BoD about **Compliance** with Act/Rules/Other law
- Ensure co. **Complies** with applicable **SS**
- Discharge prescribed duties
 - Provide **Guidance** to director of co. w.r.t. duties and power
 - Facilitate convening of **Meeting**, attend BoD/committee or **GM** and maintain minutes thereof
 - Obtain **Approvals** of BoD/SH/Govt as per this Act
 - **Represent** before various regulator and other auth. under this Act
 - Assist BoD in conduct of **Affairs**
 - **Other** duties as may be assigned time to time.

Student's Notes:

[illegible]

Chapter 4 – Inspection, Inquiry & Investigation

Sec 206 – Power to call for information, inspect Books and Conduct Inquiries



Provided that CG may, if it is **satisfied** that circumstances so warrant, **direct** RoC or inspector to carry out the inquiry.

Provided that - In case of fraud, OID shall be liable U/S **447**

5. **CG** → If satisfied that circumstance so warrant.

↓
Direct **inspection** of books and papers

↓
By inspector appointed

6. **CG** may
 ↗ General order
 ↘ Specific order
 → **Authorise stat authority** to carry such inspection.

7. **Punishment** - Co. and OID - **Rs.1 lakh + additional** fine Rs.500/day after the first.

Sec 207 - Conduct of Inspection and Inquiry

Duty of co, director, officer & other employees

- To **produce** such docs.
- Furnish info/expl.
- **Render** such **assistance** to

↙ RoC ↘ Inspector

Power of Registrar or inspector

- Make **copies**
- Place **identification** marks as token of inspection

↓
All powers as **vested in civil court** by CCP, 1908

Powers vested in Civil Court by Code of Civil Procedure, 1908: **[PAOI]**

- Discovery and **production** of BoA and other docs at specified place & time;
- summoning and enforcing the **attendance** of persons and
- examining them on **oath**; and
- **inspection** of any books, registers and other docs. of co. at any place.

Penalty for contravention:

1. Director/Other officers of co. - **Imprisonment** upto 1 year **AND** fine Rs. 25,000 to 1 lakh
2. Director convicted of offence under this section shall be deemed to have **vacated office** and shall be **disqualified** from holding office in any co.

Sec - 208 Report on Inspection Made:

Registrar/Inspector shall, after inspection/inquiry u/s 206 or 207 send a report in **writing** to **CG** along with relevant docs. In the report, it may recommend further investigation along with reasons.

Sec 209 - Search and Seizure:

If based on info. in possession/**otherwise**, the RoC/**inspector** has Reasonable Ground to Believe (**RGTB**) that Books and Papers of:

Company, or KMP/Director Auditor CS in Practice

are likely to be - **DAMFS**

Destroyed

Altered

Mutilated

Falsified

Secreted

the inspector may after obtaining the approval of special court :

- a. Enter (with assistance) and **search** the place where such books are kept
- b. **Seize** such books and papers as he may consider necessary after allowing co. to take copies.

Custody of seized B&P:

- **Period** not later than **180 days** from the date of seizure and thereafter return it.
- B&P may be called for a further period of 180 days by way of order in writing if needed again.
- **Before returning**, inspector may take **copies**/extract or place **identification** marks

Sec 210 Investigation into Affairs of Company:

1. Where **CG** is of opinion that it is necessary to **investigate** affairs of co, based on:
 - a. **Report** u/s 208
 - b. Intimation of **SR** passed by a co. that affairs ought to be investigated
 - c. in **public** interest
 it may order such investigation (**inv.**)
2. Where order of inv. is passed by Court/Tribunal, **CG** **shall** pass an order of inv.
3. On passing such orders, **CG** shall appoint **inspector** for the inv. and reporting to **CG**

Note - The power of **CG** to order investigation is **discretionary** and not mandatory (Refer QB 8)

Sec 211 Establishment of Serious Fraud Investigation Office (SFIO)

1. **CG** to establish SFIO to investigate **frauds** relating to co.
2. SFIO to be headed by "**Director**" appointed by **CG** (Officer **>= Joint Secretary** to GoI)
3. SFIO to consist of experts from various fields appointed by **CG**.
Fields such as Audit (Forensic), Banking, Corp. Affairs, Capital Market, Tax, Info tech, law, etc.

Sec 212 Investigation into affairs of co. by SFIO

1. Where **CG** is of opinion that affairs ought to be investigated by SFIO based on:

Report u/s
208

Intimation of **SR** passed by co.
that affairs ought to be inv.

in **public** interest

on **req.** of dept.
of **CG/SG**

CG **may** be order, assign such inv. to SFIO and Director, SFIO to designate **inspectors** for inv.

2. Where case is assigned to SFIO - No other investigating agency (CBI,IB) to **initiate** inv. for offence under this Act
If inv. had **already** been **initiated** - Not be proceeded with & **trf.** all relevant docs to SFIO.
3. SFIO to do inv. as per this chapter and submit **report** to **CG**
4. Director, SFIO shall appoint **investigating officer** (IO) having power of inspector (Sec 217)
5. Co./Officers and employees responsible to provide info/explanation/docs to IO.
6. Offence covered within **Sec 447** of this act shall be - "**Cognizable and Non-bailable**"

No person accused u/s 447 shall be released on **bail** or on his own bond **unless**:

- a. Public Prosecutor (PP) has been given an opportunity to **oppose** the appln. for release **and**
- b. Where PP opposes such appln., court is satisfied that **RTB** that he is **not guilty** of such offence and that he is **not likely to commit offence** while on bail

Provided that, following person **may** be released on bail **if Special court so directs** -

Age < 16; Woman, Sick/Infirm person

Special court shall take **cognizance** of above offence only upon complaint in writing by

- a. **Director**, SFIO
- b. Officer of CG authorised by CG

7. Above limitation on bail is in addition to limitation as per CCP, 1973

8. Subsection (8) to (10) - **Arrest** of a person by SFIO:

Where on the basis of material in his possession ~~or otherwise~~, **officer >= Asst. Director** of SFIO has reason to believe (RTB) that person is guilty of offence u/s 447, he may arrest such person and:

1. **Inform** the person being arrested of the grounds for such arrest
2. **Forward** copy of arrest order + material in his possession to SFIO in sealed envelope
3. Within 24 hours, take the arrested person to **Special Court or Magistrate** (Judicial/Metropolitan)
24 hours not to include **time taken for journey** from place of arrest to court/magistrate

10. SFIO shall submit **interim report** to CG if so directed.

12. SFIO to submit **investigation report** to CG on completion of invg.

13. Person may obtain **copy** of this report - By application in the **court**

14. On receipt of above report, CG may, after **examination** of reports, direct SFIO to initiate **prosecution** against co/officers/employees

If report states **fraud** has taken place in co and due to such fraud, any **director/KMP/other officer** has taken undue benefit (in form of prop., asset, cash or others), CG may apply to **NCLT** for orders w.r.t:

- a. **Disgorgement** of such property/asset/cash and
- b. Holding such dir./KMP/officer **personally liable** without any limitation of liability

Sharing is caring: In case SFIO is invg. under this Act, any other invg. agency, SG, police, Income Tax auth. having info/documents related to such offence shall provide it to SFIO and Vice-versa

Sec 213: Investigation into Company's Affairs in Other Cases

Tribunal may order investigation in following cases:

On an application (supported by evidence showing reasons for invg.) made by:

1. Co. having **share capital** - Not less than 100 members or 1/10th of VP
2. Co. **not having share capital** - Not less than 1/5th of persons on register of members

On an appln made by any person, NCLT is satisfied that:

1. **Business** is being conducted:
 - a. With intent to defraud crs/members/others
 - b. For a fraudulent/unlawful purpose (FUP)
 - c. Manner oppressive to members of co.
2. Co. **formed** for fraudulent and unlawful purpose
3. **Person** concerned with formation/mgt. of co. is guilty of fraud, misfeasance or other misconduct
4. **Members** not given all info. (incl. commission to KMP)

Additional points:

- **Prior** to such order, **ROBH** to be given to co.
- Where such order is passed by Tribunal, **CG shall appoint inspectors to carry invg.** and report.
- If after investigation, it is proved that business/company/person concerned are involved in fraud (points in the right box), **OID** and concerned **person liable u/s 447**

Sec 214: Security for Payment of Costs and Expenses of Investigation

Before appointing inspector for investigation u/s 210 (only **SR** case) or 213, **CG** may require the applicant to give the below **security** for payment towards cost and expenses of investigation.

Turnover as per previous year balance sheet (Rs.)	Amount of security
Upto 50 crores	Rs. 10,000
50 - 200 crores	Rs. 15,000
Above 200 crores	Rs. 25,000

Above security shall be **refunded** to the applicant if the investigation results in **prosecution**.

Note - Sec. deposit is not required if invg. ordered u/s 210 based on report u/s 208 or in public intt.

Sec 215: No firm, body corporate or other association shall be appointed as an inspector**Sec 216: Investigation of Ownership of Company**

Where **CG has a reason to do so**, it may appoint inspector to investigate and report on matters relating to co. and its members to determine the true person:

Financially interested in success/failure of co.

Who controls/materially influences the policies of co.

Has beneficial interest in share or is beneficial owner of co.

If instead of **CG**, **Tribunal** orders investigation of ownership of co., **CG shall appoint** inspectors to carry such investigation.

While appointing inspector, **CG shall define scope** of investigation w.r.t:

- a. **matter/period** to which it extends
- b. Limit matters to **particular shares/debentures**

Subject to T&C of appt. of an inspector, his powers shall extend to investigation of any circumstances suggesting the existence of any **arrangement** or understanding which, though **not legally binding**, is or was observed or is likely to be observed in practice and which is relevant for the purposes of his investigation.

<u>Sec 217: Procedure, Powers, etc., of Inspectors</u>	
Duty of co. and its officer/employee/agents	<ol style="list-style-type: none"> To preserve and produce books and paper (B&P) Give inspector assistance in connection with such invg.
BC other than BC under investigation may be required to furnish info.	Inspector may require BC other than BC under invg. to furnish such info or produce such docs which may be relevant or necessary for invg. (No approval of CG required)
Period of custody	Not more than 180 days . Return on or before 180 th day Call again by way of order in writing for further 180 days
Examine on oath	<ol style="list-style-type: none"> Any officer/employee/agents of co. being invg. (without CG approval) Any other person - With prior approval of CG (or Director, SFIO where investigation is done u/s 212) <p>For such examination, inspector may require them to appear before him personally.</p> <p>Notes of such examination to be in writing, read over and signed by the person examined and can be used as evidence in court.</p>
Inspector shall have all power vested in CCP, 1908 [PAIO]	<ul style="list-style-type: none"> Discovery and production of BoA and other docs at specified place & time; summoning and enforcing the attendance of persons and examining them on oath; and inspection of any books, registers and other docs. of co. at any place.
If director/officer disobeys directions of RoC or inspector	<ol style="list-style-type: none"> Director/officers. - Imprisonment upto 1 year AND fine Rs. 25,000 to 1 lakh Director convicted of offence under this section shall be deemed to have vacated office and shall be disqualified from holding office in any co.
If person fails without reasonable cause or refused to:	<ul style="list-style-type: none"> Produce B&P Furnish info. Appear personally for examination Sign the notes of examination <div style="border: 1px solid black; padding: 5px; width: fit-content;"> Imprisonment upto 6m AND Fine - 25k to 1 lakh Further fine - Rs. 2,000/day </div>
Officer of CG/SG/Police to provide assistance	Where the inspector may require, with the prior approval of CG [E.g., Inspector may enter premises with such assistance]
Reciprocal Arrangements (RA)	<ul style="list-style-type: none"> CG may enter into agreement with Govt of foreign state for RA to assist in Insp, Inq. And Invg. under this Act or corresponding law of that foreign state <p><u>Procedure for seeking help from country o/s India:</u></p> <ul style="list-style-type: none"> Application to be made by inspector to competent court in India stating evidence in relation to an invg. may be available in a country o/s India Such court may issue a letter of request to competent auth. in such country to: <ul style="list-style-type: none"> Examine any person Record his statement Require such person to produce docs

- **Forward** above statements and docs to competent court in India (deemed to be evidence collected during invg.)

Procedure for helping a country o/s India:

- Upon receipt of Letter of Request (LoR) from competent authority o/s India
- for examination of any person or production of any document
- in relation to affairs of co. under investigation in that country,
- **CG** shall forward such letter to **competent court in India** which shall:
 - **Summon** the person
 - **Record** his statement
 - Require production of **docs**
 - Send that LoR to **inspector** for investigation and submission of **report** (within **30 days** or period specified by court)
- Evidence so collected shall be - **Forwarded to CG** for transmission to person who sent LoR

Sec 218: Protection of Employees During Investigation

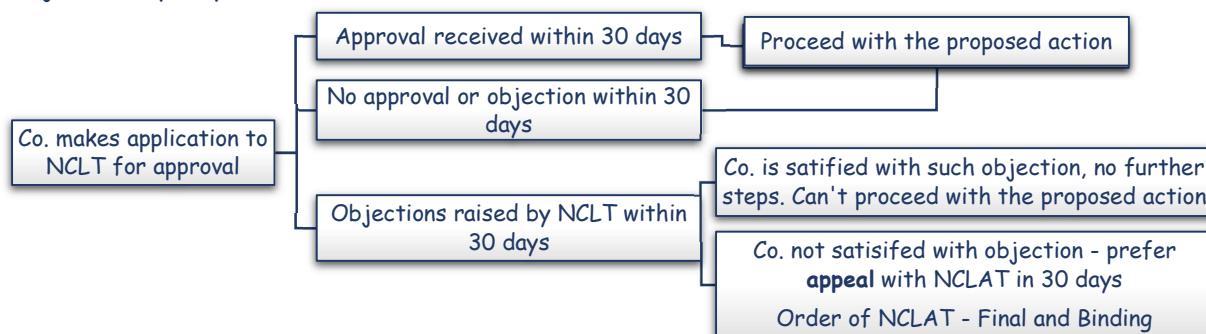
1. If during the **course** of

- Investigation** u/s 210,212,213,216 or 219 or
- Pendency of **proceeding** under Chap XVI (Prevention of Oppression and Mismanagement)

if such company, other BC or person (being invg. or against whom proceedings are conducted), **proposes:**

- to discharge or **suspend** any employee; or
- to **punish** him, whether by dismissal, **removal**, reduction in rank or otherwise; or
- to change the **terms** of employment to his **disadvantage**,

Co./BC/Other person shall **obtain approval of Tribunal** of the action proposed. Tribunal may raise objection by way of notice.



Note: The above provision is application during the course of investigation/proceedings. In case where the invg./proceedings are concluded, this action can be taken w/o approval of Tribunal.

Sec 219: Power of Inspector to Conduct Investigation into Affairs of Related Companies, etc.

If the inspector appointed for investigation u/s 210, 212, 213, ~~216~~, considers it necessary for the purpose of investigation to investigate affairs of following person, it may do so with the **prior approval of Special Court CG**:

- Other BC which is or has been company's **S, H or S of its H company**
- Other BC which is or has been managed by a **MD/Manager** who is or was MD/Manager of co.
- Other BC whose BoD consists of **Nominee Director** of co.
- Other BC whose BoD is **accustomed to act** as per direction or instructions of co. or its director
- Any **person** who is/was MD/Manager/Employee of the co.

Sec 220: Seizure of Documents by Inspector

During course of investigation, the **inspector** has Reasonable Ground to Believe (**RGTB**) that B&P of:

Company, or	MD	Manager	Other body corporate
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are likely to be - **DAMFS**

Destroyed	Mutilated	Altered	Falsified	Secreted
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the inspector may ~~after the approval of special court~~ :

- Enter (with assistance) and **search** the place where such B&P are kept
- Seize** B&P as he may consider necessary after allowing co. to take copies.

Custody of seized B&P:

Period not later than **conclusion** of investigation and thereafter return it.

Before returning, inspector may take **copies/extract** or place **identification** marks

Note - There is no provision related to calling such B&P for any further period

Sec 221 - Freezing of Assets of Company on Inquiry and Investigation

1. Where it appears to the **Tribunal**:

On a reference made by CG	or on inquiry or invg. under this Chapter	on complaint made by such numbers of members as specified u/s 244(1)	on complaint made by crs having > Rs. 1 lakh outstanding	on complaint made by person having RGTB
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that:

- Removal**, disposal or transfer of
- Funds, **assets** or properties of co. is likely to take place
- in a manner **prejudicial** to interest of - Co., SH, Crs., Public interest

the Tribunal may order that:

- such transfer shall **not take** place during such **period not > 3 years** as may be specified in the order or
- such transfer **may take** place subject to such **T&C** as the Tribunal may deem fit.

2. **Penalty** for transfer made in contravention of this section:

Company - Rs. 1 lakh to Rs. 25 lakhs; **OID** - Fine - Rs. 50,000 to Rs. 5 lakhs **or** Jail upto 3 years or Both.

Sec 222 - Imposition of Restrictions Upon Securities [E.g., Amazon vs Future Group vs Reliance]

1. Where it appears to the **Tribunal**:
 - a. In connection with investigation u/s 216 (ownership) or
 - b. On complaint made by any person (E.g., amazon)
 that:
 - a. there is good **reason** to find out **relevant facts** about securities issues/to be issued by the co., and
 - b. such facts cannot be found out unless **restrictions** are imposed,**Tribunal** may by order - Impose **restrictions** on such securities for period not > 3 years
2. If securities are transferred in **contravention** of such restriction, penalty:

Co. - Rs. 1 lakh to Rs. 25 lakhs

OID - Jail upto 6m or Fine - Rs. 25,000 to Rs. 5 lakhs or both.

Sec 223 - Inspector's Report [N.A. to investigation by SFIO u/s 212]

1. Inspector to submit **interim report** if directed by CG and **final report** on conclusion of investigation to CG
 2. Report to be in **writing** / printed
 3. **Copy** of report may be obtained by members/creditors, person likely affected by making **application to CG**
- Author's Note: SFIO report can be obtained by anyone on appln. to Court (not CG)
4. Report of inspector to be **authenticated** by:
 - a. Either the **seal** of co. being investigated or
 - b. By a **certificate** of public officer having the custody of report

Sec 224 - Actions to be Taken in Pursuance of Inspector's Report**Based on the report u/s 223**

	Scenario 1	Scenario 2	Scenario 3
If it appears to the CG that:	Any person in relation to co/BC being investigated is guilty of offence for which he is criminally liable	If any co/BC is liable to be wound up under this Act or IBC and it is expedient to do so,	In public interest, proceedings ought to be brought by the co/BC investigated for recovery of: <ol style="list-style-type: none"> a. Damages in respect of fraud, misfeasance w.r.t. form/mgt. of affairs b. Property of co/BC which has been misapplied or wrongfully retained
Following action may be taken	CG may prosecute such person and it shall be duty of officers of Co/BC to give necessary assistance	CG may: <ol style="list-style-type: none"> a. Make a petition for WUP on grounds that it is just & equitable, or b. Application u/s 241 c. Both 	CG may itself bring proceedings for WUP in the name of Co/BC CG to be indemnified by the co./BC in respect of cost for bringing such proceedings.

If the report states **fraud** has taken place in co and due to such fraud, any director., /KMP or other officer has taken undue advantage/benefit, whether (in form of property, asset, cash or others) , - CG may file an appln. before Tribunal for orders w.r.t:

- Disgorgement** of such property/asset/cash and
- Holding such dir./KMP/officer **personally liable** without any limitation of liability

Sec 225 - Expenses of Investigation

<u>Cases</u>	<u>Who pays the expenses?</u>	<u>To what extent?</u>
Where person is convicted on a prosecution instituted u/s 224	Such convicted person or such person who is ordered to pay damages or restore properties	The extent such person is ordered to pay
	The co/BC in whose name proceedings are brought (scenario 3 of Sec 224)	The extent of amt recovered by it
If no prosecution is instituted u/s 224	<ul style="list-style-type: none"> Any Co./BC/MD/Manager dealt with in the report of inspector and Applicants of the investigation 	As CG may direct

Sec 226 - Voluntary Winding up of Company, etc., Not to Stop Investigation Proceedings

The investigation under this chapter shall in no way be impacted because of the following:

Application is made u/s 241

Co. has passed SR for WUP

Other WUP proceeding- Pending before Tribunal

If WUP order is passed by NCLT, **inspector to inform the NCLT** about pendency of such investigation

Sec 227 - Legal Advisers and Bankers Not to Disclose Certain Information

Nothing in this Chapter shall require disclosure to Tribunal/CG/RoC/Inspector by:

- legal adviser**, of any privileged communication made to him in that capacity (except name and address); or
- bankers** of any co./BC/other person, of any info. as to affairs of any customers (other than such co./BC).

Sec 228 - The provisions of this Chapter shall apply mutatis mutandis to inspection, inquiry or investigation in relation to foreign companies.

Sec 229- Penalty for Furnishing False Statement, Mutilation, Destruction of Documents

Such offence shall be considered as offence u/s 447 (fraud)

Student's Notes:

Chapter 5 - Compromises, Arrangements and Amalgamations

Acronyms Used:

CAA	Compromise, Arrangement, Amalgamation	Mem.	Members
Crs.	Creditors	OG	Official Gazette
DH	Debenture Holders	OL	Official Liquidator
ES	Equity Shares	PS	Preference Shares
M&A	Merger or Amalgamation	SH	Shareholders

Definitions

Compromise: Peaceful and Willful settlement of a dispute by mutual adjustment and concession

Existence of dispute is a key for making compromise

Arrangement: There is no dispute, but arrangement **modifies rights**.

Section 230: Power to compromise or make arrangement with Crs. & Mem.

1. Where a Scheme of Compromise and Arrangement ("Scheme") is proposed between:

☐ Co. and its creditor, or ☐ Co. and its members

The Tribunal may on an application by:

☐ Company ☐ Creditors ☐ Members ☐ In case co. is wound up - Liquidator

Order a **meeting** of the creditors or members to be - **Called, Held and Conducted**

Note- Arrangement includes Reorganisation of share capital (E.g., Consolidation/ Division)

2. Applicant above shall **disclose** the following to the Tribunal:

- **Material Facts** related to co:

☐ Latest financial Position ☐ Latest Auditor's Report ☐ Pendency of any investigation.

- **Reduction** in share capital if any, included in the scheme
- Any scheme of Corporate Debt Restructuring (CDR) **consented by > = 75%** of Secured Creditor in **value** including [VSCAR]:
 - Creditor **Responsibility** Statement in Form CAA-1
 - **Safeguards** for protection of other SC and UnSC
 - **Auditor's** report that funds required after CDR shall confirm to liquidity test based on estimates by BoD
 - A statement that co. proposed to adopt CDR **guidelines** specified by RBI
 - **Valuation** report of ALL assets by Registered Valuer

3. Where meeting of creditors/members is to be called, the notice of such meeting shall be:

- **All** the creditors **and** members **and** debenture holders
- Individually at **address registered** with company
- **Accompanied** with:

- a statement disclosing **details** of the Scheme
- copy of **valuation** report and their **effect** on creditors, members(promotor/otherwise), debenture holders and KMPs
- effect of Scheme on **material interest of directors** or debenture trustees
- At least 30 days prior to meeting, such notice + other docs to be
 - Placed on **Website** of co., and
 - If listed co, **SEBI** and **Stock Exchange's** website, and
 - Published in **Newspaper** (English and Vernacular)

4. Notice shall provide for **voting** either:
- at the meeting in **person** or **proxy** or
 - postal **ballot** (within 1m) for adoption of Scheme

Objections to Scheme can be only by:

- Members** having $\geq 10\%$ of PUSC or
- Crs** having debts o/s $\geq 5\%$ of total

5. Notice + Docs to be sent to:

- CG
- Income Tax Auth
- RBI

- SEBI
- Recognized Stock Exc
- Official Liquidator

- Registrar
- Competition Commission of India
- Other likely to be affected

Require them to make **representation within 30 days** of receipt of notice. Failing which, presume no representation.

6. At the meeting:
Majority of person representing **3/4th** in value agree to the Scheme [Present and voting]  **Tribunal** by order **sanctions** such scheme  Scheme shall be **binding** on:
 Crs, Mem., Co., Liquidator and Contributories

Note - Where the scheme is required to be approved by members, Pref. SH also to be considered

7. Order of Tribunal **shall** provide for the following:

Where Scheme includes **conversion** of PS in ES, option to PSH to obtain **arrears** of dividend in cash/equivalent ES

Protection of any class of creditors

If Scheme results in **variation** of rights, effect u/s 48

If Scheme is agreed by Crs., proceedings before **BIFR** shall abate

Other matters incl. **exit offers** to dissenting SH

No Scheme shall be sanctioned by Tribunal unless **certificate** from **company's auditor** that proposes accounting treatment for Scheme is in conformity with AS u/s 133 is filed with Tribunal

- Order of Tribunal - File with **ROC** within **30 days**
- Tribunal may **dispense** with calling of meeting of Crs. ~~and members~~ if $\geq 90\%$ of Crs in **value** agree and confirm to the Scheme by affidavit.
- No Scheme in respect of **buy back** of sec. shall be sanctioned unless in compliance with **Sec 68**.
- Scheme may include **takeover** offer. In case of listed co.- Comply with SEBI regulations

12. **Aggrieved** party - Make an application to Tribunal (not NCLAT)

Sec 66 - N.A. to reduction in SC if such reduction is in pursuance of Tribunal's order

Section 231: Power of Tribunal to enforce compromise or arrangement

1. Where tribunal sanctions Scheme u/s 230, it shall have power to:
 - i. **Supervise** the implementation of such Scheme
 - ii. Give such direction or make such **modification** as may be necessary for proper **implementation**

2.

Where NCLT is satisfied that the Scheme cannot be implemented with or w/o modification	+	Co. unable to pay debt as per Scheme	=	Tribunal shall order WUP of co. (deemed to be order u/s 273)
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Section 232: Merger and Amalgamation of Companies

1. Where an **application** u/s 230 is made to Tribunal and it is **shown** that such application is:
 - i. in connection with scheme of **reconstruction** involving merger/amalgamation, **and**
 - ii. involves **transfer** of whole or part of undertaking, property or liabilities (**U/P/L**) of any co. (TOR co.) to another co. (TEE co.) or divided among two or more companies,
 Tribunal shall **order** for **meeting** of Crs/Mem. to be called, held and conducted and provision of **Sec 230(3) to (6)** shall apply mutatis mutandis.
2. **Merging companies** (ToR) to circulate the following for meeting of crs./mem. (in addition to Sec 230 (3)) [**TEVAR**]
 - a. Draft of proposed **Terms** drawn up and adopted by BoD
 - b. Confirmation that draft is filed with **Registrar**
 - c. Report (adopted by BoD)
 - o explaining **Effect** of Scheme on shareholders (Promoters/otherwise) or KMP
 - o laying out share exchange ratio and specify valuation difficulties
 - d. Expert's report regarding **Valuation**
 - e. Supplementary **A/C** statement if last annual accounts relates to FY ending **6m** before the first meeting summoned for approving this Scheme
3. Tribunal may, by order, sanction the Scheme and **may** make provision for following matters [**DIL DENA LOD R**]:

<u>Gist</u>	<u>Detail</u>
<u>D</u> ate of Transfer	Trf. of whole or part of U/P/L to TEE company on date as determined by parties unless Tribunal decides otherwise (reason in writing)
<u>I</u> nstruments	Allotment by TEE co. of shares/debentures or other instrument as per scheme <u>Provided that</u> , TEE co. shall not, as a result of Scheme, hold any shares in its own name or in the name of any trust and any such shares shall be cancelled;
<u>L</u> egal proceeding	Continuation by/against TEE co. of legal proceeding pending by/against TOR co.
<u>D</u> issolution	Dissolution without WUP of TOR co.
<u>D</u> issenting	Provisions to be made for person dissenting from such Scheme

<u>Non Resident SH</u>	Where Share is held by NR as per FDI norms as per law, allotment of shares of TEE to such SH shall be in the manner specified in order
<u>Employees</u>	Trf. of the employees of TOR to TEE co.
<u>Listed</u>	Where TOR is listed and TEE is unlisted: 1. TEE shall remain unlisted unless it gets listed 2. If SH of listed co decides to opt out, prov. for payment of value of shares as per pre-determined price formula Provided that payment under this clause should not be < As specified under SEBI Regulation
<u>Authorised SC</u>	Fees paid by TOR on its ASC shall be available for set off by TEE co.
<u>Other</u>	Such incidental, consequential and supplemental matters

No Scheme shall be sanctioned by Tribunal unless **certificate** from **company's auditor** that proposed accounting treatment for Scheme is in conformity with AS u/s 133

4. If Scheme provides for trf. of **property free** from any **charge**, such property shall be transferred **free of charge**.
5. Certified **copy** of order - **RoC** - Within 30 days
Failure to file with RoC - Co & OID - Penalty of Rs. 20,000 + Rs. 1,000/day upto Rs. 3 lakhs [232(8)]
6. Scheme to clearly indicate an **appointed date** for the Scheme to be become effective and such Scheme shall be deemed to be **effective** from such date.
7. Co. to file **statement** with RoC → **Every year** until completion of scheme → **Certified** by CA/Cost Acc/CS showing **compliance** with the order of tribunal

Explanation - Property includes assets, rights and interests of every description and liabilities include debts and obligations of every description.

Section 234: Merger or Amalgamation of Company with Foreign Company (Sec 233 covered after 234)

Unless otherwise specified in any other law, the prov. of this chap shall mutatis mutandis apply to

Co. incorporated under this Act



Co. incorporate in countries as may be notified by CG

Provided that **CG + RBI** may make **Rules** in connection with M&A under this section

A foreign co. may merge with a co. registered under this Act or vice versa subject to following:

1. Prior **approval** of RBI
2. T&C of Scheme to provide for **payment** of consideration to SH in Cash / Depository receipt or partly both

Author's note - For this section, foreign co. doesn't mean the foreign company as per 2(42). It means any co./ BC incorporated outside India whether having a place of business in India or not.

Section 233: Merger or Amalgamation of Certain Companies [Fast track mode of M&A of certain cos.]

1. Notwithstanding provision u/s 230 and 232, scheme of M&A between:

- Two or more **small** cos.
- Holding co. and its WOS co.
- Such **other** class of cos. as may be prescribed

Rule 25 of Companies (Compromise, Arrangement and Amalgamation) Rules, 2014):
M&A between the following companies can be done u/s 233:

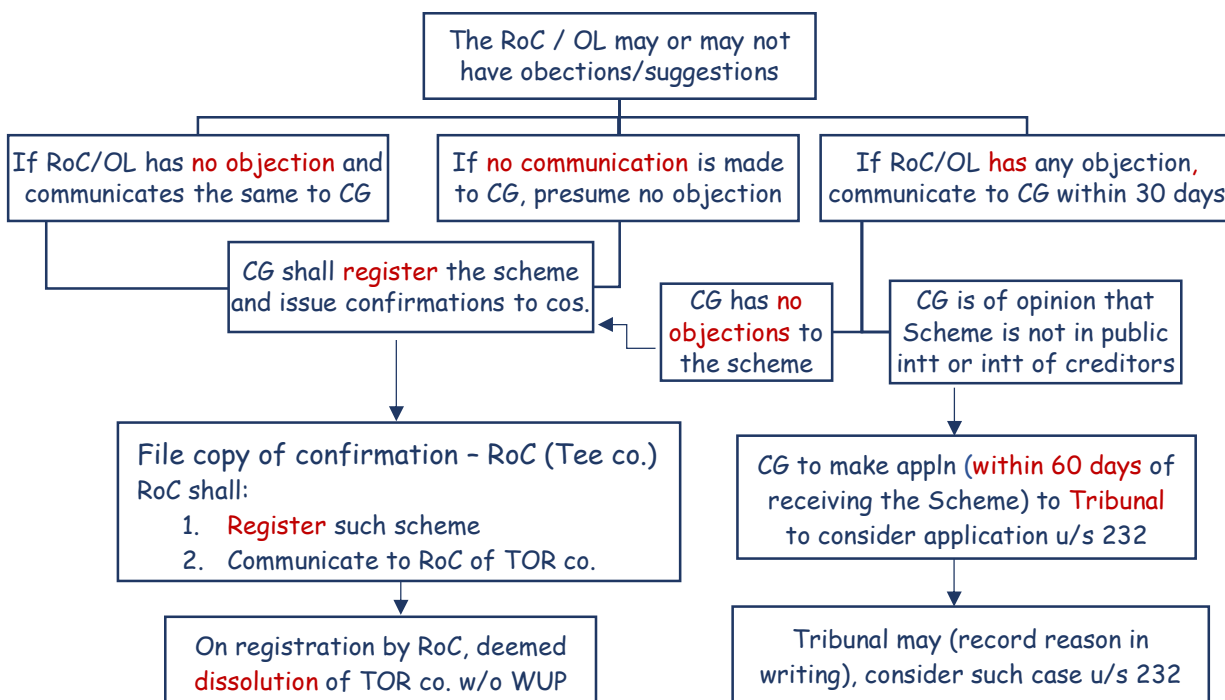
1. Two or more **start-up** companies
2. One or more start up cos. with one or more **small cos.** [Amendment]

may be entered into, subject to **all the following condition:**

1. Notice inviting obj./suggestion **within 30 days** to proposed Scheme is issued by TOR+TEE cos
 - a. to RoC and OL
 - b. to Person affected by such scheme
2. Obj./Suggestions received are to be **considered in GM** of respective cos. and scheme is **approved by members** at GM holding **> = 90% of total no. of shares**
3. Each of the co. involved in merger files "**Declaration of Solvency**" with concerned RoC
4. Scheme approved by Crs - **Majority** representing **9/10th in value** of respective companies
Approval of creditors can be:
 - a. Either in a **meeting** (notice for meeting - 21 days)
 - b. Or approval in **writing**

Note - Above steps have to be complied by **all** companies involved **independently**. After the above steps, necessary steps have to be taken only by TEE co.

2. TEE co - File a **copy** of approved scheme with
 - CG
 - Registrar
 - Official Liquidator
3. On receipt of the above copy of scheme:



4. Effects of registration of scheme by RoC [NCLT]:
- Transfer** of properties or liabilities of TOR co. to TEE co.
 - Charges** on the property of ToR co. applicable and enforceable on Tee Co. (Tribunal not involved so can't free up property from charges as u/s 232)
 - Legal** proceeding by/against ToR co. to be continued by/against Tee co.
 - Unpaid amount to **dissenting** SH or creditors shall become liability of Tee co.

TEE co. shall **not**, as a result of scheme, hold any **shares** in its **own name** or in the name of any **trust** and any such shares shall be **cancelled**;

5. TEE co. shall file an **application** with the **RoC + Revised ASC** and pay fees due on revised capital. Fees paid by TOR on its ASC shall be available for **set off** by TEE co.

A company covered under this section **may use the provisions of section 232** for the approval of any scheme for merger or amalgamation.

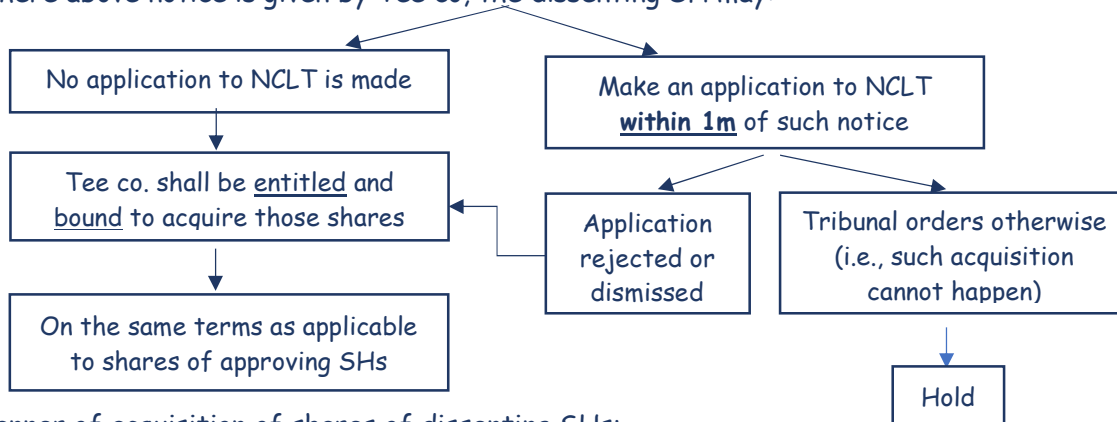
Note - Fast track merger is **optional** in nature and not a compulsion to the co. If a co. covered under this section wants to make application for merger as per section 232, it can do so.

Section 235: Power to Acquire Shares of SHs Dissenting from Scheme or Contract Approved by Majority [Imagine ToR co to be Vodafone and Tee co. to be Jio i.e., Jio wants to take over Vi]

1. Offer to dissenting SH

- Where a **scheme/contract involving transfer** of shares in ToR co. to Tee co.
 - has been **approved** by shareholder* $\geq 9/10^{\text{th}}$ of value **within 4 months** of offer by Tee Co.
 - Tee. co. **may**, **within 2m** after expiry of said 4m
 - Give **NOTICE** to dissenting SH that it desires to acquire his shares.
- *Shareholders other than shares held by nominee of Tee co./subsy co.

2. Where above notice is given by Tee co, the dissenting SH may:



3. Manner of acquisition of shares of dissenting SHs:

Tee co. shall forward the following to Tor co.:

- Copy of the **notice** (sent to dissenting SH)
- Instrument** of trf. to be executed by person appointed by ToR co. **on behalf of dissenting SH**
- Pay**/trf. the amount representing price payable by the Tee co. to dissenting SHs.

On receipt of above, the ToR co. shall:

- Register** Tee co. as holder of those shares
- Within 1m** of registratn, inform dissenting SH of such registration & receipt of consideration

4. **Sum** received by the ToR co shall be:Paid into a **separate** bank accountHeld by the co. in **trust** of dissenting SHsDisbursed to entitled SH within **60 days**

Now please go and read Sec 238 and then come back to 236

Section 236: Purchase of minority shareholding (For this section, ToR co. means Co. whose shares are being trfd.).1. In the event of:An acquirer becoming holder of **> = 90% of Issued ESC**, orAny person becoming **90% majority** or holding **> = 90% of Issued ESC**, by virtue of amalgamation, share exchange, conversion, etc.Such acquirer/person **shall notify the co. (not minority)** of their intention to buy remaining ES2. The acquirer/person shall **offer** the **minority** shareholders for buying their ES at a **price** determined on valuation by **Registered Valuer** as per the Rules (there was no requirement of RV u/s 235)3. Suo moto offer by minority SHs - Without prejudice to above provisions, minority SHs may offer to the majority SHs to purchase the minority ESH of the co. at price determined as per Rules.4. The majority SHs shall **deposit** an **amount** = Value of shares to be acquired:

- In a **separate** bank account
- **Operated** by Co. (TOR) for **at least 1 year** for payment to minority
- Amount to be **disbursed** to entitled SHs **within 60 days**

Provided that - Such **disbursement** shall **continue for 1 year** if:

- For some reason, disbursement had not been made within 60 days, or
- Disbursement made but SH fails to receive/claim such amount (E.g., Cheque not encashed)

5. ToR co. to act as "**Transfer Agent**" (i.e., Receive & Pay **Price** ; Taking & making **delivery** of shares)6. If physical **shares not delivered** to ToR co. within time specified:such share certificates **deemed** to be **cancelled**Co. shall be authorized to issue shares **in lieu** thereofand **make payment** to minority on such cancellation7. Where any of the minority shareholder is **dead** or **ceases to exist** and their heir, successors or assignees have not been brought on record - The right of such shareholders to make offer for sale shall continue to be **available for 3 years** from date of minority acquisition by majority.8. Where shares of minority SHs have been acquired and as on or prior to date of trf. following such acquisition, the SHs holding **> = 75% minority ESH** **negotiate** on a higher price for any trf. of shares held by them without disclosing the fact or likelihood of trf. taking place on basis of such negotiation, majority SHs (majority of minority) shall share such **additional compensation** with such minority SHs on a pro rata basis9. When a SH or the majority equity SH fails to acquire full purchase of the minority equity SHs, then, provisions of this section shall **continue to apply** to residual minority equity SHs**Sec 237: Power of Central Government to Provide for Amalgamation of Companies in Public Interest**1. Amalgamation order by CG:

- Where CG is satisfied that, it is essential in **public interest**

- To **amalgamate** two or more cos.
 - It may be **notification** in OG
 - **Order** for **amalgamation** of such cos. into single co. and specify rights & liabilities of such single company
2. Such order **may** provide for:
 - Continuation by/against Tee co. of any **legal proceedings** by/against ToR co.
 - Such **other** provision as may be necessary to give effect to amalgamation
 3. Every mem/creditors (incl. DH) of ToR co. to have **same interest/rights** in TEE Co. In case **if** the interest/rights in TEE co. is **less** than interest/rights in ToR co., he shall be **entitled to compensation** (to be assessed by prescribed authority + **Published in OG**) and such compensation shall be **paid** to concerned crs/mem. by **TEE co.**
 4. Person **aggrieved** by above assessment of compensation may make an **appeal** to Tribunal **within 30** days of publication thereof in OG. Thereupon, Tribunal shall make assessment.
 5. **No order** for amalgamation shall be made unless:
 - a. Copy of **draft orders** sent to each concerned co.
[Concerned Co. to file objections or suggestion within period specified by CG (not < 2m)]
 - b. **Time** for preferring **appeal** u/ss 4 has **expired** or where appeal is preferred, such appeal is disposed
 - c. CG has **considered & made modification** to draft order (discretion of CG) as per obj./ suggestions by concerned co.
 6. **Copies** of **order** under this section to be laid before each **HOP**

Sec 238: Registration of Offer of Schemes Involving Transfer of Shares

In relation to **every offer** of "Scheme involving trf. of shares u/s 235", every **circular** containing such **offer** and **recommendation** by **directors** of ToR co. to accept such offer shall be:

- a. Accompanied by prescribed info.
- b. Contain a **Statement** showing necessary steps that TEE co. has taken to ensure necessary **cash** shall be available.
- c. Registered with **Registrar** prior to issuing it.

RoC may (reason record in writing) **refuse** to register such circulars if info. is missing or gives false impression. If Registrar refuses to register - **Appeal may be filed with Tribunal**

If circular issued w/o such registration - Director **penalty** of Rs. 1 lakh

Sec 239: Preservation of Books and Papers of Amalgamated Companies

The B&P of amalgamated co. (dissolved co.) shall not be disposed of w/o **prior permission of CG**

Before granting permission, **CG** shall **appoint** a person to **examine B&P** to ascertain whether they contain evidence of **commission of offence** in connection with:

- **Promotion**/formation or management of affairs of co.
- **Amalgamation** or acquisition of shares

Sec 240: Liability of Officers in Respect of Offences Committed Prior to Merger, Amalgamation, etc.
Shall continue to be liable after such merger/amalgamation

Chapter 6 – Prevention of Oppression and Mismanagement

Introduction: In this chapter, we are going to talk about two things:

(a) Prevention of Oppression and (b) Prevention of Mismanagement

Summary of case laws:

<u>Name of the case law</u>	<u>Summary of decision</u>
Foss V. Harbottle	Two principals were established based on this judgement: 1. Proper Plaintiff Rule - Co. and shareholders are two separate identity and individual shareholder cannot sue for wrong doings against the co. 2. Majority Rule which laid down that if the alleged wrong can be confirmed or ratified by a simple majority of members in GM, then in those cases the court will not interfere .
Elder v. Elder & Watson Ltd	Oppression should, at the lowest, involve <u>visible departure</u> from the standards of <u>fair dealing</u> , on which every shareholder who entrust his money to the company is entitled to rely.
Rao (V.M) v. Rajeshwari Ramakrishna	Oppression complained of must affect a person in his capacity as a member . Harsh or unfair treatment in other capacity, e.g., as dir. or crs. is o/s purview of this chapter
Ashok Betelnut Pvt Ltd vs. M K Chandrakanth	Continuous losses by co. is not oppression against members
Thoman Veddon v. Kuttanad Robber Ltd.	Failure to declare dividend does not amount to oppression
Rajamundhry Electric Corporation Vs. V. Nageswar Rao A.I.R	Consent to be given by a SH is reckoned at the beginning of proceedings. Withdrawal of consent during course of proceeding shall not affect the maintainability of petition
Worldwide Agencies Pvt. Ltd. and another vs. Margaret T. Desor and others	The legal heir of a deceased member is entitled to file a petition under Section 241 of the Act for relief against oppression and mismanagement, even though the name of the deceased member is still recorded in the register of members
Sudha M Singh vs Eagle Cones Pvt Ltd	Decision relating to operation of company's bank A/c is a part of managerial power of director & mere fact that director is not being associated with operation of a company bank a/cs does not constitute oppression
Lalita Rajya Lakshmi vs Indian Motor co	Mere Denial of inspection of documents/ books of accounts - whether during the pendency of petition or before it, does not amount to oppression

Section 241: Application to Tribunal for Relief in Cases of Oppression, etc.

1. Any **member** (not director) of co. who complains that **either**:

Affairs of co. have been/are being conducted in manner prejudicial to:

1. **Public** interest
2. **Member** himself or other members
3. Interest of **company**, or

Material change (not in interest of Crs/DH or members) in the mgt/control of co. has taken place by alteration of:

- a. **BoD/Manager**
- b. **Ownership** of cos. share
- c. **Membership** (if no share cap)

and as a result of such change - Affairs are likely to be prejudicial to interest of **members**.

Such member may **apply to Tribunal** for order under this chapter subject to Section 244

2. **CG** may apply to Tribunal if opinion - Affairs of co. is conducted in manner prejudicial to **public int.**

3. Where in **opinion** of CG: [**Boring GIF**]

- a. Person concerned with management of affairs of co. is **guilty** of fraud, misfeasance or breach of trust
- b. Business of the co. is NOT conducted by such person with sound **business principle &** prudent commerce practices
- c. Co. is managed by such person in manner likely to cause serious **injury** to int. of **trade/** industry/biz.
- d. Biz. is conducted (by such person):

With intent to **defraud** crs./members or other person

For **fraudulent** or unlawful purpose

In manner prejudicial to **public** interest

CG may **initiate** a case against such person and refer such to Tribunal.

Tribunal to then inquire and decide whether such person is fit and proper to hold office of director/other office connected with mgt. of affairs of co.

4. Such person u/ss (3) shall be "respondent" to the application
5. Application u/ss (3) shall:
 - a. Include **concise statement** of circumstance and relevant materials for inquiry as per CG
 - b. Be **signed** and verified as per CCP, 1908

Conceptual Clarity Check:

1. Can application be made for oppression that had happened in the **past**? - **Yes**.
2. A **director cannot** make application under this section. But in his capacity as shareholders, he can.
3. Shareholder cannot claim that 1 director being paid < the other director is an oppression on them.
4. Matter of selection and appt. of **dealers of cos. product is not** within ambit of Sec 241
5. Oppression does **not include mere domestic disputes** between dir. and members.
6. Where a person without being so appointed, was **acting as MD** & discharging functions with or w/o knowledge of members, can member file application to Tribunal claiming as act of Oppression? - **No!**
7. Mere **Lack of confidence** among members themselves resulting in certain acts of irregularities or illegalities **can't** be held to be **oppressive**.
8. Writing off bad debts is commercial decision - does not require judicial interference.
9. Power to issue shares should be exercised bonafide in the interest of the company and not benefiting the directors/ any other group. If exercised solely for personal benefits- Tribunal may

interfere and prevent directors from doing so. Issue of further shares by the directors for purpose of converting a majority to minority is grave act of oppression

Now go and read Sec 244, then come back to 242

Section 242: Power of Tribunals

1. If on receipt of appln u/s 241, Tribunal is of opinion that:

Affairs is conducted in manner prejudicial to:

1. **Public** interest
2. **Member** himself or other members
3. Interest of **company**, **AND** -->

Facts would justify passing of WUP order under the grounds that it is J&E to WUP but **WUP would unfairly prejudice** such members

Tribunal may - With a view to bring end to matters complained off - **Pass order** as it may deem fit.

2. Without prejudice to generality of above, order may provide for **[memory technique below]**:

- a. Purchase of **shares** of members by other members or co.
- b. In case of purchase of shares by co. - **Reduction** in share capital thereof
- c. Restriction on transfer/allotment of **shares** of co.
- d.

- Termination
 - Modification
 - Setting Aside

↗

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Agreement between Co. and MD/other dir./Mgr.

Agreement between Co. and any other person*

↗

↘

Upon T&C that is J&E in opinion of Tribunal

*No termination, etc. of agreement with other person shall be made except after **due notice** and obtaining **consent** of parties concerned

- e. Setting aside any action of transfer, delivery, payment etc. relating to a property made **within 3m** before date of appln u/s 241 which would, if done in case of insolvency, would be deemed **fraudulent** preference
- f. **Removal** of MD/manager/other dir. of the co.
- g. Manner of **appointment** of MD/manager/~~other director~~ in place of removed MD/Mgr.
- h. Manner of **appt.** of such no. of directors as Tribunal directs to report to Tribunal
- i. **Recovery** of undue **gains** made by MD/manager/other dir. during their tenure and **manner of utilization** of such recovery include trf. to **IEPF** or **repayment** to identifiable victims
- j. **Regulation** of conduct of affairs of co. in future
- k. Imposition of **cost** as it may deem fit
- l. **Other** matter as may be J&E

Memory technique for above points:

Shares (a), (b) (c)

Agreements (d) (e)

MD/Mgr (f) (g) (h)

General(j) (k) (l)

3. Co. to file certified **copy** of NCLT order with **RoC** within **30 days** of order
4. On appln. by any party to proceeding, NCLT may make **interim order** to regulate conduct of affairs.

On conclusion of hearing of case u/s 241(3), **NCLT** shall record its decision as to whether the respondent is a **fit and proper person** to hold office of director or any other office connected with conduct & management of any company. [Section 242(4A)]

5. Where order of NCLT makes **alteration to MoA, AOA** of co:
Notwithstanding any other prov. of this Act, the co. shall not have power to make any alteration to MoA/AoA which is inconsistent with order of NCLT **except with the leave of Tribunal**
Contravention → Co - Fine - Rs. 1 lakh to Rs. 25 lakhs and OID - Fine - Rs. 25,000 to Rs. 1 lakh
6. Alteration made to MoA/AoA by such order shall have same effect as if duly made as per prov. of this Act
7. Certified copy of order altering or giving leave to alter MoA/AoA to be filed with **ROC** by Co. **within 30 days***. After such filing, RoC shall register the same.

***Author's Note:**

ICAI's interpretation with respect to timelines for filing with RoC seems to be incorrect.

As per Sec 242(7) in Bare Act - A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same

As per ICAI - A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall be filed by the company with the Registrar who shall register the same within 30 days after the making thereof.

Note - Director appointed u/s 242 by the Tribunal cannot be removed u/s 169.

Section 243: Consequence of termination or modification of certain agreements

1. Where order u/s 242 terminates, modifies or sets aside an agreement:
 - a. Such order shall **not give rise to any claims** by any person for damages/CFLO
 - b. **MD/manager/other director** whose agreement is so terminated/set aside shall be **disqualified** to be appointed as MD/mgr./director for **5 years**, except with the leave of Tribunal

Tribunal shall **not grant leave** unless notice of intention to apply for such leave is **served to CG** and **CG** has been given reasonable OOBH

Where a person is ordered to be not fit and proper u/s 242(4A), such person shall not hold office of dir. or other office of mgt. for **5 years**. Provided that - **CG** may, with **leave of tribunal**, permit such person to hold such office **before expiry of 5 years**

Notwithstanding anything, person removed by such order shall not be eligible for CFLO

2. If removed person knowingly continues to act as MD/Mgr/Dir - Such person and director who is party to such act - **Fine upto Rs. 5 lakhs** [**Amendment**]

Section 244: Rights to apply u/s 241:

1. Following members shall have right to apply u/s 241:

Co. having **share capital** - **Not less** than:

1. Lower of 100 mem. or 1/10th of total no. of mem.
2. Such members holding 1/10th of issued SC of co. (provided all calls are paid)

Co. **not having SC** - **Not less** than 1/5th of persons on register of members**Note:**

1. **Tribunal** may, on appln. on this behalf - **Waive off** above req. to enable member to apply u/s 241
2. Joint shareholders = One member

2. If members entitled u/ss (1), any one or more may obtain consent (writing) of rest of them and make appln. on behalf and for benefit of all.

Concept clarity check:

1. ABC Ltd. has 8 SHs. Can a member holding < 1/10th of issued SC apply? - **Yes (1/10th of mem. = 1)**
2. A Ltd has Issued SC of Rs. 5 crores (5 lakh shares of Rs. 100 each) held by 500 members. 80 members applied for such order u/s 244 but 40 members later withdrew their application. Will the application be tenable? **The consent to be given by a shareholder is reckoned at the beginning of the proceedings.**

The withdrawal of consent by any shareholder during the course of proceedings shall not affect the maintainability of the petition [*Rajamundhry Electric Corporation Vs. V. Nageswar Rao A.I.R.*]

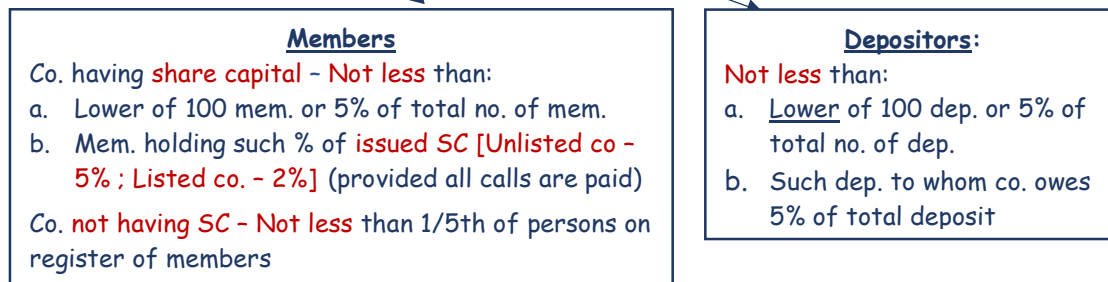
3. Can **majority** shareholders make application u/s 241? - **Yes**

Section 245: Class Action: [N.A. Banking Cos]

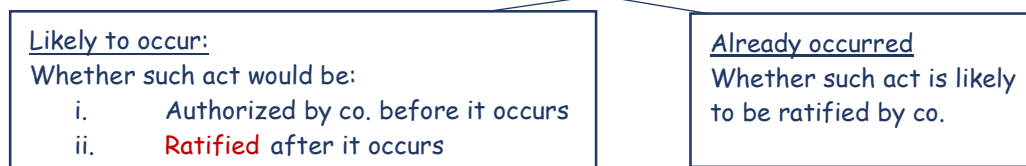
1. Where members/depositors are of the opinion that affairs of co. are being conducted in manner prejudicial to interest of co, its mem/depositor ~~or public int.~~, such mem/dep. may file appln [subject to limit u/ss (3)] with Tribunal seeking following order [Restraining Order]:

Restrain co. from act which is (a) Ultra vires to MoA/AoA (b) Breach of provision of MoA/AoA (c) Contrary to prov. of this Act or other law (d) Contrary to any resoln passed by co.	Where a resolution altering MoA/AoA of co. is passed: • Declare void if passed by suppression of material facts / mis-statement • Restrain co./dir. from acting on it	To claim compensation/other suitable action for any fraudulent, unlawful and wrongful act from: • Co. and its directors • Auditor incl. audit firm of co. (for incorrect/ misleading statement in Audit Report) [Liability shall be of firm as well as each partner involved] • Expert or advisor (for incorrect/misleading statement to co.)	Seek other remedy as NCLT may deem fit.
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2. The Requisite number of mem/depositors shall be as follows:

3. While considering application u/ss (1), Tribunal to consider following: **[FIVOR]**

- Whether M/D is acting in **good Faith** in making such appln
- Any evidence w.r.t., **Involvement** of any person other than dir./officers of co.
- Whether cause of action can be pursued by M/D in his **Own** right rather than class action
- Views** of M/D who have no personal interest in matter being proceeded hereunder
- Where cause of action is an act or omission that is:



4. Where application u/s 245 is admitted, Tribunal shall have regard to following:

- Serve **public notice** to all members/dep.
- Similar appln in any jurisdiction to be **consolidated** into single appln. and Members/Depositors shall choose **lead applicant**. If M/D unable to come to consensus - NCLT to appoint lead applicant
- 2 class action application for same cause not allowed
- Cost** of expense of class action - **Defrayed by co.** or other person responsible for oppressive act

5. Order of NCLT **binding** on: (a) Co. (b) Mem./Depositor (c) Auditor/Audit firm (d) Expert/Advisors6. **Failure** to comply with NCLT order -

Co. - Rs. 5 lakhs to Rs. 25 lakhs ; OID - Jail upto 3 years **and** fine - Rs. 25,000 to Rs. 1 lakh

7. In case of **frivolous** or vexatious appln., NCLT may reject appln and direct applicant to pay opp. party such cost (not > Rs. 1 lakh)**Section 246: Application of certain provisions to proceedings under section 241 or section 245**

Provisions of sec 337 to 341 (both inclusive) - Apply mutatis mutandis, in relation to appln u/s 241 or section 245.

Chapter 7 - Winding Up

Section 2(94A) Winding Up (WUP) means:

- Winding up as per this Act, or
- Liquidation as per IBC

This chapter is divided into 4 parts

<u>Part I</u> WUP by Tribunal [270-303]	<u>Part II</u> Voluntary WUP [Omitted]	<u>Part III</u> Common provision to all WUPs [324 - 358]	<u>Part IV</u> Official Liquidator [359 - 365]
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Part I: Winding Up by the Tribunal

Section 270: Provision of Part I shall apply to WUP by Tribunal

Section 271: Circumstance in which co. may be wound up by Tribunal [**FIR DJ**]

A co., may on petition u/s 272, be wound up by Tribunal if:

- Co. has resolved so by **Special Resolution**
- Co. has acted against:

Interest of Sovereignty
and Integrity of India

Friendly relations
with Foreign States

Security of
the state

Public
Order

Decency or
Morality

- On application made by Registrar/Person Auth. by CG, Tribunal is of opinion that:

- **Affairs** of company - **Fraudulent**
- Company **formed** - Fraudulent/unlawful purpose
- **Person** concerned in formation/mgt. are guilty of fraud/misconduct



It is **Proper** that co. be wound up

- Co. has made **Default** in filing **FS or A/R** for last **5** consecutive FY
- Tribunal is of opinion that it is **Just and equitable (J&E)** that co be WUP

Section 272: Petition for Winding Up

Petition to the Tribunal for WUP may be filed by:

- Company** (accompanies by statement of affairs)
- Contributories** - Notwithstanding that:
 - He may be holder of fully paid up shares or
 - Co. has no asset at all or
 - Co. may have no surplus assets for Shareholders

Provided that, application only when the share(s) in respect of which he is a contributory was:

Originally **alloted** to him

Held and registered in his name for
6m in last 18m before WUP, or

Devolved to him on death
of formal holder

- Registrar** - Except on ground u/s 271(a) [i.e., SR by co.]
- Person authorised by CG
- CG/SG in case of Sec 271(b)** i.e., Interest of state, etc.

In any case, copy of petition to be submitted to RoC. RoC shall (in **60 days**) submit its view to NCLT.

Section 273: Power of Tribunal:

On receipt of petition u/s 272, Tribunal may, **within 90 days**:

Dismiss it, with or without cost

Make an interim order

Appoint a Prov. Liquidator [PL] till order of WUP (Give notice to Co. + Grant reasonable OOBH)
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Order WUP, with or without cost

Other order as it may deem fit.

Where petition is on ground that it is J&E that co. be WUP, NCLT may **refuse** order of WUP if opinion that:

(a) Other remedy is available **and** (b) Applicant is acting unreasonable by seeking WUP

Section 274: Direction for filing statement of affairs:

- a) On receipt of petition, if Tribunal is satisfied that it is prima facie case of WUP, it may:
 - a. Direct co. to file - **Objection & Statement of Affairs (SOA)** - Within **30 days** (+30 in special circumstance)
 - b. Direct petitioner to make security deposit (for cost of WUP)
- b) If co. fails to file SOA - Right to oppose petition stands forfeited and Dirs./officers punishable u/ss (4)
- c) Where order is passed u/s 273(1)(d) - Co. to submit BoA audited upto date of order **within 30 days** of order
- d) Directors/officers **punishable** for non-compliance of this section:
Jail upto 6 months and/or **Fine** Rs. 25,000 to Rs. 5 lakhs
- e) Complaint for non-compliance may be filed with **SpC** - By Registrar, PL, CL or person authorised by NCLT

Section 275: Company Liquidator and their Appointment:

1. For the purpose of WUP, the Tribunal shall at the time of passing order for WUP:
Appoint - Official Liquidator (**OL**) or Insolvency Profession (**IP**) - To act as a Company Liquidator [**CL**]
2. PL to have same **power** as CL unless Tribunal restricts power via order.
3. T&C of appointment and fees payable to PL and CL decided based on:

Task to be performed	Size of a co.	Liquidator experience and qualification
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4. **Within 7 days** of appointment, PL/CL to file declaration disclosing:
 - a. Conflict of interest, or
 - b. Lack of independence
5. Tribunal may appoint PL as CL while passing WUP order

Section 276: Removal or Replacement of Liquidator

1. Tribunal may, for reason recorded in writing, remove PL/CL on grounds of [**CFA ID**]:

Mis- Couduct

Fraud/ Misfeasance

Prof. incompetence/ failure to exercise DD

Inability to Act as PL/CL

Conflict of Interest/ lack of independence during his term

2. In the event of **death**, resignation or removal of CL, **transfer** work to another CL
3. Where Tribunal is of opinion that Liq. is responsible for causing loss/damage to Co. → Tribunal may recover such loss/damage from Liquidator
4. Before order in this section - Reasonable OOBH to Liq.

Section 277: Intimation to PL/CL and RoC and Effect of order (WUC)

1. When NCLT makes order for **appointment** of PL or WUP of co. → Intimate to PL/CL **and** RoC **within 7 days**
2. On receipt of above order, the RoC shall:

Make an endorsement in its records

Notify in OG

If listed co. - Intimate stock exchange
3. Order of WUP = **Deemed notice of discharge** to Officers, Employees & Workmen unless biz. is continued
4. **Within 3 weeks** of passing WUP order:

CL

Application for constitution of WUP committee (WUC)

→ Tribunal

To assist and monitor the liq. proceeding

Comprising of:

 - (a) OL attached to Tribunal
 - (b) Nominee of Sec. crs
 - (c) Prof. nominated by NCLT
5. CL shall be convenor the meetings of WUC. WUC shall assist and monitor in following:

<ul style="list-style-type: none"> ○ Taking over assets ○ Sales of asset ○ Recovery of cash, property or other 	<ul style="list-style-type: none"> ○ Examination of SoA ○ Review of accounts and audit reports ○ Payment of dividends 	<ul style="list-style-type: none"> ○ Finalization of list of Crs. and contributories ○ Claims - Compromise, Abandonment and Settlement ○ Other functions as per Tribunal
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6. CL to place before Tribunal **minutes of meetings** on monthly basis duly signed by members present → Till submission of **final report** for **dissolution** of co.
7. CL to submit **draft final report** for consideration and approval of WUC
8. **Final Report** approved by WUC - Submit to NCLT for dissolution order

Section 278: Effect of WUP Order (Favorable for all creditors)

Order of WUP shall operate in favor of ALL Crs & contributories, as if made out of joint petition

Section 279: Stay of Suits, etc. on WUP Order:

1. Where an order of WUP or Appt. of PL has been passed:
 - a. No **suits** or legal proceedings shall be initiated
 - b. If pending shall not be proceeded with

Provided that any application to NCLT seeking leave shall be disposed of within 60 days.
2. Above provision not applicable to Appeal pending in SC/HC

Section 280: Jurisdiction of Tribunal

The Tribunal shall have jurisdiction to entertain/dispose of:

- a. Any suits or proceeding by/against the co.
- b. Any claims made by/against the company (including its branches in India)
- c. Application u/s 233
- d. Question of priorities or law or fact including those related to asset, business, rights,

obligation, etc.

irrespective of whether before or after the order of WUP

Section 281: Submission of Report by CL [similar to Info. Memorandum]

1. Within 60 days of order WUP and Appt. of CL, the CL shall furnish a **report to Tribunal** containing:
 - a. Nature & details of **assets** of co. including location and value (by a Reg. valuer) including cash balance (in hand) and bank and details of Neg. Instruments (if any)
 - b. Amount of **capital** issued, subscribed and paid up
 - c. Existing and contingent **liability** of co. (incl details of secured & unsecured crs and details of security given to SC)
 - d. **Debts** due to the company (along with details)
 - e. **Guarantee**, if any, by the company
 - f. List of **contributories** and dues if payable by them **and** details of **unpaid calls**
 - g. Details of trademark and **intellectual property** owned by company
 - h. Details of subsisting **contracts**, JV, etc.
 - i. Details of holding and **subsy.** co
 - j. **Legal** cases by/against the co
 - k. **Other** info directed by tribunal

Table to byheart above points:

<u>Asset</u>	<u>Liability</u>	<u>Equity</u>	<u>Others</u>
Assets, cash, Negotiable Inst.	Existing secured and unsecured crs	Capital - I, S and PU	Subsisting cont. & JV
Debt due to co.	Contingent	List of contributories	Hold. And subsy co.
Trademark and IPs	Guarantee	Details of unpaid calls	Legal cases and other

2. CL shall include in report:
 - Manner in which company promoted and formed
 - Opinion on whether fraud committed by person in promotion/formation
3. CL shall also make report on
 - Viability of the business
 - Steps necessary for maximizing value of asset
4. Crs/Cont. entitled to inspection of above report (fees as prescribed)

Section 282: Direction of Tribunal on Reports of CL:

1. Tribunal shall, based on report of CL, fix time limit to complete entire proceedings & dissolve co.

On examination of report of CL and after hearing the CL/Crs/Cont, Tribunal may **revise time limit** if opinion that → It is advantageous and economical to continue proceeding
2. On examination of report of CL and after hearing the CL/Crs/Cont, Tribunal may order **sale of company** or its assets or part thereof **as going concern** [NCLT may form sale committee to assist]

3. Where a report is received from CL/CG/any person stating that **fraud is committed** w.r.t, company,
Tribunal may order investigation u/s 210 (w/o prejudice to WUP order)
Based on investigation report → Tribunal to issue direction u/s 339 to 342 or direct CL to file **criminal_complaint** against person involved
4. Other directions, including orders to protect preserve or enhance value of assets of company.

Section 283: Custody of Company Properties

1. CL/PL shall take custody of → Property, Effects, Actionable and Claims to which company is entitled.
2. All Prop. & effects of co. shall be **deemed** to be in **custody** of Tribunal from date of order of WUP
3. Tribunal may require any:

Contributories	Banker	Trustee Receiver	Agent	Officer	Other Employee of Co.
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 to pay, deliver, surrender and trf. any money, prop., B&P in his custody/control to which co. appears be entitled.

Section 284: Promoters, Directors, etc. to Co-operate with CL:

1. Promoters, Directors, Officers, Employees to **extend full support** to CL in discharge of his D&P
2. If anyone doesn't co-operation, CL to make an application to NCLT.
NCLT shall then pass necessary order asking co-operation.

Section 285: Settlement of list of Contributories and Application of Asset

1. After passing the WUP order, the tribunal shall:
 - a. **Settle** the list of cont. (Need **not settle** if not necessary to make calls or adjust rights)
 - b. Cause **rectification** of Register of members (if required)
 - c. Cause assets of company to be applied for discharge of liabilities
 2. In setting list of cont., **distinguish** cont. in own rights and cont. as representative of others
 3. While setting list of cont., Tribunal shall include **any person** who is/has been member **and liable** to contribute to assets of co. for:
 - (a) payment of debts/liabilities and cost of WUP and
 - (b) for adjustment of right of cont. among themselves
 subject to following **condition**:
 - a. A person who has been a member (i.e., **Ex-member**) shall **not** be liable to contribute:
 - If ceases to be a member for **> = 1 year** preceding WUP
 - In respect of debts + liabilities **contracted after** he ceased to be a member
 - b. No ex-member shall be liable to contribute **unless present members** unable to satisfy required cont.
 - c. Co. limited by **Shares** - Liable for **unpaid amount** on shares held
 - d. Co. limited by **Guarantee** - Liable for amount undertaken to be contributed in event of WUP
- If a company limited by guarantee has share capital, treat it as a company limited by shares

As per Section 2(26) "**Contributory**" means a person **liable** to contribute towards the **assets** of the company in the event of its being wound up.

Explanation: A person holding **fully paid-up shares** in co. shall be considered as **contributory** but shall have **no liabilities** of a contributory under the Act whilst retaining rights of such a contributory

Section 286: Obligation of Directors and Managers:

In case of a limited company, any director/manager with unlimited liability, shall contribute in course of winding up **as if** he were member of **an unlimited company**

Provided that, director or manager shall **not** be **liable**:

1. **Ceased** to hold office **1 year** or more prior to commencement of winding up
2. **Debt** / Liability was contracted **after** he ceased to hold office
3. Unless **Tribunal** deems necessary to satisfy debt or liability of company or cost of winding up

Section 287: Advisory Committee (AC)

1. While passing WUP order, Tribunal may direct to form **Advisory Committee** -
 - a. To **advise** CL, and
 - b. **Report** to NCLT
2. **Constitution** → **< = 12 members** → Contributories/creditors/other person as NCLT made a direct
3. **Within 30 days** of WUP order - CL shall **convene meeting** of crs./contributory (as per books) to enable Tribunal to determine member of AC
4. AC have a **right to inspect** books of accounts, other documents, asset in property of company
5. Meeting of AC to be **chaired by CL**

Section 288: Submission of Periodical Reports to NCLT:

CL to make periodical report including quarterly report on progress of WUP to NCLT

Section 290: Powers and Duties of CL (Similar to that of IRP & RP)

CL to exercise following powers subject to overall control of the Tribunal:

- a. To carry on the **business** of the company for beneficial WUP;
- b. To do all acts & **execute deeds**, receipts, other docs, and for that purpose, to use, the cos. **seal**;
- c. To sell immovable **property** and actionable claims of the co. by public auction or private contract;
- d. To sell the whole of the undertaking of the company as a **going concern**;
- e. To **raise** any money required on the security of the assets of the company;
- f. To institute or defend any **suit**, prosecution or other legal proceeding;
- g. To invite and settle **claim** of crs, employee or other claimant & distribution sale proceeds as per this Act;
- h. To **inspect** the records and returns of the co.;
- i. To **prove rank** and claim in the insolvency of any contribution for any balance against his estate;
- j. To draw, accept, make and endorse any **negotiable inst.** incl. cheque, bill of exch., hundi or promissory note;
- k. To obtain any **professional assistance** from any person in discharge of his duties, obligations and responsibilities and for protection of the assets of the company;

- l. To take **all such actions** as may be necessary
 - For **WUP** of the company;
 - For **distribution** of assets;
 - In discharge of his **duties** and obligations and functions as CL ; **and**
- m. To apply to the Tribunal for such other orders as may be necessary for WUP.

Section 291: Professional Assistance to CL

1. CL may, with sanction of Tribunal, appoint one/more - CA, CS, CMA, Legal practitioner, others **to assist** him in performance of duties
2. Appointed person shall forthwith disclose conflict of **interest** or lack of **independence** to NCLT.

Section 292: Exercise and Control of CL's Power:

1. CL shall, in administration of assets & distribution thereof → Have regard to directions by:
 - a. Resolution of crs & cont. at any GM or
 - b. Advisory committee [in case of **conflict** → **Crs/cont. to override AC**]
2. Summoning meetings of crs/cont.
CL may **summon** meetings:
 - a. **suo-moto** to ascertain wishes or
 - b. shall summon if directed by **resolution** or requested in writing by 1/10 the in value of crs/cont.
3. Person aggrieved by act of CL may apply to Tribunal → Tribunal may confirm, modify, reverse.

Section 293: Books to be kept by CL

1. CL shall keep proper book which includes MOM
2. Books open to inspection by co./crs.

Section 294: Audit of CL's Account:

1. CL shall **maintain** proper BOA including details of receipts & payments (R&P)
2. CL shall **present** accounts of R&P to **Tribunal** at times (prescribed) but **not < twice** each year during tenure
3. Tribunal shall cause **audit** of BOA maintained by CL & CL shall provide necessary information for such audit.
4. Once accounts are audited → Copy to be sent to Tribunal/ROC (open for insp. by crs./cont./ intt. person)
If Govt. co. - Copy also to be sent to CG or SG or Both (only if members)

Section 295: Payment of debt by Contributory and Set Off

1. Tribunal may after passing WUP order, direct any cont. on the list, to **pay** any money due to co. from him or from estate of person he represents **exclusive** of any money payable by virtue of any call.
2. In making such order above, the Tribunal may
 - a. In case of an **unlimited co.** → Allow the contributory, by way of set off, any money due to him from co. for independent dealing / contract **but not as member of co.**
 - b. In case of limited co. allow any director/ mgr. with unlimited liab. such set-off.

3. In case of Limited co. - when All crs. are paid in full such set-off may be allowed on subsequent calls.

Section 296: Power of Tribunal to make Calls:

Tribunal may any time after passing WUP order, before or after ascertaining sufficiency of assets:

1. Make calls on cont.(in the list) → For payment of money to the extent of liabilities to:
 - a. satisfy debts/ liabilities of companies & cost of WUP and
 - b. adjustment of rights of cont. amongst themselves
2. Make an order for payment of call so made.

Section 297: The Tribunal shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto

Section 298: In event of assets of a co. being insufficient to satisfy its liabilities, Tribunal may make an order for payment of costs of winding up, in such order of priority inter as the Tribunal thinks just and proper.

Section 299: Power to Summon persons suspected to have Property of Co.

1. Tribunal may, any time after order of WUP or Appt. of PL, summon any officer/person:
 - a. known / suspected to have property / B&P of co. or to be indebted to co.
 - b. capable for giving info. about co.

For examination on oath:

by word of mouth or (reduce to writing & make him sign)

Written interrogation

Affidavit

2. Tribunal may require the person summoned to produce BoA in his custody.
In claims of lien → Production w/o prejudice to Lien

3. Tribunal may require CL to file report on property in possession of others

4. Tribunal may require:

person indebted to pay (fully or partly)

person in possession of prop - To deliver to PL/CL

Section 300: Power to order Examination of Promoters, Directors, etc. in case of Fraud:

1. Where CL in his report states that in his opinion, fraud has been committed in promotion, formation or conduct of affairs of co. → Tribunal may direct such persons to attend before it for examination on oath
2. CL shall take part in such examination & may employ legal assistance (if sanctioned by NCLT)
3. A person examined under this section:
 - shall be furnished CL'S report (at his cost)
 - may employee CA/CS/CMA/Legal pract., etc. as representative
4. If such person applies to NCLT to be exculpated from charges
Duty of CL to attend the hearing & call the attention of NCLT to relevant matter.

Section 301: Arrest of Person absconding India:

Any time either before or after passing WUP order, if NCLT is satisfied that:

- A **contributory**, or
- A person having property, B/P of co. in his possession

is about to:

- leave India or
- otherwise abscond, or
- remove or conceal any of his property, for evading payment of calls

The Tribunal may cause:

- Contributory to be **detained** until such time as Tribunal orders, **and**
- His B&P and movable prop. to be **seized** and safely kept as Tribunal may order.

Section 302: Dissolution of company by Tribunal

1. When the affairs of the co. have been completely wound up, CL shall make an application to NCLT for dissolution of co.
2. On receipt of application if NCLT find it just and reasonable → Order the dissolution of co. and company stands dissolved from date of order
3. Copy of order within 30 days to RoC and CL

Part III - Provision applicable to all types of Winding up**Section 324 - Debts of all descriptions to be admitted to proof**

In every WUP (subject to IBC),

- a. all debts payable on a contingency, and
- b. all claims against the co., present/future, certain /contingent, ascertained or sounding only in damages,

shall be **admissible to proof** against the company.

A just estimate being made of the value of such debts or claims may not bear a certain value.

Section 326 - Overriding preferential payments

In case of WUP, the following debts shall be paid, in priority to all other debts in following sequence:

- a. **workmen's dues** (excluding payment for death/disability and PF/Gratuity etc) payable for **2 years** preceding the WUP shall be paid **within 30 days** of sale of assets;
- b. The following shall be paid **pari passu**:
 - a. **Workmen's comp** other than (a) and
 - b. where a **secured creditor** has **realised** a secured asset, **lower** of:
 - a. such **debts** due to such secured creditor as could **not be realised** by him or
 - b. the **amount** of **the workmen's portion** in his security (if payable under the law)

Illustration given in the Act:

The value of the security of a secured creditor of a co. is Rs. 1,00,000. The total amount of the workmen's dues is Rs. 1,00,000. The amount of the debts due from the company to its secured

creditors is Rs.3,00,000. The aggregate of the amount of workmen's dues and the amount of debts due to secured creditors is Rs. 4,00,000. The workmen's portion of the security is, therefore, $\frac{1}{4}$ th of value of security, that is Rs. 25,000.

Notes (based on ICAI May 2017 question)

Any cost incurred by liquidator towards cost for preserving the security of secured creditor shall be borne by Workmen and SC in the ratio of their debt.

For example: CL incurred Rs. 10,000 to preserve the secured asset in above illustration. The cost shall be borne as follow - Workmen (Rs. 2,500) and SC (Rs. 7,500)

Definition:

"**Workmen's dues**" means aggregate of the following sums due from the company to its workmen, namely:

- (i) all **wages** or salary incl. wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to co. and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947;
- (ii) all **accrued holiday remuneration** becoming payable to any workman;
- (iii) all amt. due in respect of any **compensation** under the said Act w.r.t, the **death** or **disablement**;
- (iv) all **sums** due to any workman from the **PF**, the **pension** fund, the **gratuity** fund, etc.

Section 327 - Preferential payments

"**Relevant date (RD)**" means the date of **appointment** of PL or the date of **WUP** order, as the case may be.

1. In a WUP, subject to sec 326 and subject to retention of such sums as may be necessary for the cost and expenses of the winding up, following shall be paid in **priority** to all other debts, **equally ranked**:
 - a) all revenues, taxes, cesses and rates **due to the CG or a SG** or to a local authority at the RD, and having become due and payable within the **12m** immediately before;
 - b) all **wages** or salary due for a period **not exceeding 4m within the 12m** immediately before the RD including wages payable for time or piece work and salary earned by way of commission of any employee; [Example - An employee can get max. of 4 months' salary in one go here]
 - c) all **accrued holiday remuneration** becoming payable to any employee;
 - d) amt. due in respect of **contributions payable in 12m** immediately before RD by co. under ESI Act, 1948
 - e) all amt due in respect of **compensation** for death or disablement of any employee of the co.
 - f) all sums due to any employee from **PF & GF** or other fund maintained for welfare of the employees; and
 - g) the **expenses** of any investigation u/s 213 & 216, in so far as they are payable by company.
2. Where any payment has been made to any employee out of money advanced by some person (Haan Bank Ltd.) for that purpose, Haan Bank Ltd. shall, in a winding up, have the same right of priority as the employee would have been entitled to had the payment not been made.

3. The debts enumerated in this section shall have priority over the claims of debentures holders under any floating charge created by the company and be paid accordingly out of any property subject to that charge.
 4. In the event of a landlord or other person distraining (seize) any goods or effects of the co. **within 3m** immediately before the date of a WUP order, the priority debts as per this section shall be a **first charge** on goods/effects so distrained on or the proceeds of the sale thereof; Provided that, in respect of any money paid under any such charge, the landlord/other person shall have the same rights of priority as the person to whom the payment is made.
 5. Any **holiday remuneration** on medical grounds through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period.
 6. Sections 326 and 327 shall be N.A. in the event of liquidation under the IBC, 2016
- Explanation: For the purposes of this section, the expression employee does not include a workman.

<u>Sequence of Payment as per Winding up</u>	<u>Sequence of Payment as per IBC</u>
1. Workmen's due (2 years) Other workmen dues + Unpaid Realised SC	1. IRP and Liquidation Cost
2. Cost and expenses of winding up	2. Workmen dues (24m) + Relinquished SC
3. Equally ranked: <ul style="list-style-type: none"> CG/SG dues (12m) Salary (due <4m in last 12m) Accrued holiday rem. Contributions under ESI (12m) Compensation for death/disablement PF/GF/Other fund to EE Investigation expense u/s 213,216 	3. Salary to EE other than workmen (12m)
	4. Financial Debts - Unsecured
	5. CG/SG dues (2 yrs) and Unpaid Realised SC
	6. Remaining debts and dues
	7. Preference Shareholders
	8. Equity
4. Crs/Debenture holders having floating charge	
5. Unsecured Creditors	

Section 328 - Fraudulent Preference

1. Where a co. has given **preference** to a creditors/surety/ guarantor (CSG) of the co., and does anything which has the **effect** of putting that person into a **position** which, in the event of liquidation, will be **better** than the position he would have been in if that thing had not been done **prior to 6m of WUP** application (i.e. within 6m preceding the date of making the petition for WUP and not order of WUP by Tribunal), Tribunal may order for **restoring the position** to what it would have been if co. had not given that preference.
2. If the Tribunal is **satisfied** that there is a preference:

transfer of property, movable or immovable, or

any delivery of goods,

execuion made, taken or done by/against co.

payments

within 6m before WUP appln., NCLT may declare such transaction invalid & restore position.

Note - A transaction shall amount to fraudulent preference only if there is any **element of dishonesty** i.e., there is a malafide intention to give undue advantage to the creditors over others.

[Example - Preference given to bank to increase the loan limit few months prior to WUP application may not be a FP as the intention was to give advantage to the company and not the creditor]

Section 329 - Transfer not done in good faith to be void

Any **transfer** of:

- **property**, movable or immovable, or
- any delivery of goods,

made by a **company**:

- not in the OCOB or
- not in favour of a purchaser or encumbrance in good faith and for valuable consideration, if made **within 1 year** before petition u/s 272 shall be void against the CL.

Section 330 - Any **transfer** by a co. of all its prop./assets to **trustees** for benefit of all its crs. shall be **void**

Section 331 - Liabilities and rights of certain persons fraudulently preferred

1. In the event of WUP of a co., where a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt (Mr. Secured Creditor) is made, then, the person preferred (Mr. Jugaadu) shall be subject to the same rights and liabilities as if he had undertaken to be personally liable as a surety for the debt, to the extent which is lower of:
 - a. the charge on the property or
 - b. the value of his interest (as on date of preference as if it were free of all encumbrances).
2. On an application made to the Tribunal w.r.t any payment being a fraudulent preference of a surety or guarantor (S/G), the Tribunal shall have jurisdiction to:
 - determine any questions w.r.t the payment arising between person to whom payment was made & S/G
 - and to grant relief in respect thereof and
 - for that purpose, may give leave to bring in the S/G as a third party for the recovery of the sum paid.

Section 332 - Effects of floating charge

- Where a co. is being wound up,
- a floating charge on undertaking/property of co. created **within 12m** immediately preceding commencement of WUP,
- shall be **invalid**,
- **unless** it is proved that the company immediately after the creation of the charge was **solvent**

What will not be invalid? The amount of any cash paid to the company in consideration for the charge together with interest on that amount at the rate of 5% p.a. or such other rate (CG)

Samjho: If you gave loan to company against a floating charge on the receivables of the company, the charge shall be invalid except to the extent of money you paid shall be valid and shall be paid back to you along with int. @5% p.a.

Section 333 - Disclaimer of onerous property

1. Where any part of the property of a company consists of--

land of any tenure,
burdened with
onerous covenants

shares or
stocks in
companies

any other **property** - not saleable/readily
saleable cause the possessor thereof is
bound either to performance of any **onerous**
act or to payment of any money

Unprofitable
contracts

the CL may, with the **leave** of the Tribunal, by writing signed by him, at any time within 12m after the commencement of WUP, disclaim the property, notwithstanding that he has:

- **endeavored** to sell or
- taken **possession** of the property or
- exercised any act of **ownership**

If CL was **unaware** of existence of such property **within 1m** from comm. of WUP, can **disclaim within 12m** from the date he became aware.

2. Such disclaimer of property shall **not affect** the **rights**, interest or liabilities of any other person.

3. The **Tribunal**, before or on **granting** leave to disclaim, may require such notices to be given to persons interested, and impose such T&C of granting leave as the Tribunal considers just and proper.

4. The ~~CL~~ shall **not be entitled** to disclaim any property in any case where:

- a. an **appln** in writing has been made to him by any person interested in property requiring him to decide whether he will or will not disclaim **and**
- b. the CL has not, **within 28 days** after the receipt of the application, given a notice to applicant that he **intends** to apply to the Tribunal for leave to disclaim, **and**
- c. in case the **property** is under a contract (unprofitable contract), if the CL after such an application does not within the said period disclaim the contract,
- d. he shall be **deemed** to have **adopted** it.

5. On the **application** of any person who is entitled to the benefit or subject to the burden of a contract, the **Tribunal** may make an **order rescinding the contract** on such terms as to payment of damages for the nonperformance of the contract, or otherwise as it may deem just and proper, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

6. The **Tribunal** may, on an application by any person who:

- either claims any **interest** in any disclaimed property (DP) or
- has undischarged liability under this Act in respect of any DP,
- make an **order for vesting** of the property on such terms as the Tribunal considers just and proper in
 - any **person entitled** thereto or
 - to whom it may **seem just** that property should be delivered as compensation for such liability,

Provided that where the property disclaimed is of a **leasehold nature**, the Tribunal shall not make a vesting order in favour of any person claiming under the co., whether as under-lessee

(sub-tenant) or as mortgagee or holder of a charge by way of demise, **except upon the terms of:**

- a. making that **person subject to same liab. & obligations** as those to which co. was subject under lease;
 - b. if Tribunal thinks fit, making the person subject only to same liabilities and obligations as if the lease had been assigned to that person at that date,
- and in either event as if the lease had comprised only property comprised in the vesting order

7. Any **person affected** by disclaimer under this section shall be **deemed** to be a **creditor** of the co. to the amt. of compensation/damages payable w.r.t, such effect, and may accordingly prove amt. as a debt in WUP.

Section 334 - Transfers, etc., after commencement of winding up to be void

In the case of a WUP,

- any disposition of property including actionable claims, of the co. and
- any transfer of shares in the company or
- alteration in the status of its members,

made after the commencement of the WUP shall be void, unless the Tribunal otherwise orders.

Section 335 - Certain attachments, executions, etc., in winding up by Tribunal to be void

1. Where any company is being wound up by the Tribunal, after the commencement of WUP:
 - a) any attachment, distress or execution put in force against the estate or effects of the company; or
 - b) any sale of any of the properties or effects of the company without the leave of Tribunal, shall **be** void.
2. Section N/A to any proceedings for the recovery of any tax or any dues payable to Government.

Section 336 - Offences by officer of companies in Liquidation

1. If an officer of a company which is being wound up or which is subsequently ordered to be wound up:
 - a) does not fully and truly disclose all the property (**M/IM**), of the co. and details of disposal of any part thereof, except where disposed in OCOB;
 - b) does not deliver all such part of the property (**M/IM**) and books and papers of the company as is in his custody or control;
 - c) within 12m immediately before the commencement of the WUP or at any time thereafter:
 - i. conceals any part of property (\geq value of Rs. 1,000), or conceals any debt due to/from the co.;
 - ii. fraudulently removes any part of property (\geq value of Rs. 1,000);
 - iii. conceals, destroys, mutilates or falsifies, or is privy to the same of, any books and papers affecting or relating to, the **property or affairs** of the company;
 - iv. makes any false entry in any B/P affecting or relating to, the property/affairs of co.;
 - v. fraudulently alters or makes any omission in any B/P affecting/relating to property or affairs of the co.;
 - vi. by any false rep. or pretence that the co. is carrying on its business or any other

- fraud, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for;
- vii. pawns, pledges, or disposes of any property which has been obtained on credit and has not been paid for, unless in OCOB
 - d) makes any material omission in any statement of affairs of the company;
 - e) knowing that a false debt has been proved by any person under the WUP, fails for 1m to inform the CL;
 - f) prevents the production of any B/P affecting or relating to the property or affairs of the company;
 - g) 12m before the commencement of WUP or after commencement, attempts to account for any part of the property of the company by fictitious losses or expenses; or
 - h) is guilty of any false representation or fraud for the purpose of obtaining **the** consent of **the** creditors, to an agreement with reference to **affairs** of the company or to the WUP, he shall be punishable with imprisonment 3-5 years and with fine (Rs. 1 lakh to Rs. 3 lakhs)

Provided that it shall be a good defense if the accused proves that he had no intent to defraud or to conceal the true state of affairs of the company or to defeat the law.

2. Where any person pawns, pledges or disposes of any property as mentioned above, every person who takes in pawn or pledge or otherwise receives the property, knowingly, shall be punishable with imprisonment 3-5 years and with fine (Rs. 3 lakhs to Rs. 5 lakhs)

Summary:

Officer of company fails to:

1. Doesn't disclose property of company
2. Fails to deliver property or B/P
3. Within 12m before WUP - Conceals, removes prop (\geq Rs. 1000)
4. Material omission
5. Doesn't inform false debt proved for one month
6. Prevents production of B/P
7. Attempts to account for fictitious losses or expenses
8. Guilty of fraud or false rep.

Section 337 - 343 - Excluded - Thanks, ICAI

Section 344 - Statement that company is in liquidation

Where a company is being wound up, every invoice, order for goods or business letter being a document on or in which the name of the company appears, issued by or on behalf of:

- a) the company or
- b) a CL,
- c) or a receiver
- d) or manager of the property of the co.,

shall contain a statement that the company is being wound up.

Contravention: Fine Rs. 50K - Rs. 3 lakhs
<p><u>Section 345 - Books and papers of company to be evidence</u></p> <p>Where a company is being wound up, all B/P of the co. and of the CL shall be prima facie evidence of the truth of all matters purporting to be recorded therein.</p>
<p><u>Section 346 - Inspection of Books and papers by Crs/Cont.</u></p> <ol style="list-style-type: none"> After comm. of WUP, any C/C of the co. may inspect the B/P only in accordance prescribed rules. Nothing in this section shall exclude or restrict any rights conferred by any law: <ol style="list-style-type: none"> on the CG/SG; on any authority or officer thereof; or on any person acting under the authority of aforementioned person
<p><u>Section 347 - Disposal of books and papers of company</u></p> <ol style="list-style-type: none"> When affairs of a co. is completely wound up and it is about to be dissolved, the B/P of such company and CL may be disposed of in such manner as the Tribunal directs. After the expiry of 5 years from the dissolution of the company, no responsibility shall devolve on the company, the CL, or any person to whom the custody of the books and papers has been entrusted, by reason of any B/P not being forthcoming to any person claiming to be interested therein. The CG may, by rules,; <ol style="list-style-type: none"> prevent for such period as it thinks proper the destruction of B/P of co. and CL; and enable any C/C to make representations to the CG in respect of the above matters and to appeal to the Tribunal from any order made by the CG. Contravention - Fine up to Rs. 50K (No jail)
<p><u>Section 352 - Liquidation Dividend and Undistributed Assets Account</u></p> <ol style="list-style-type: none"> Where any co. is being wound up(not yet dissolved) and the liquidator has any money representing: <ol style="list-style-type: none"> dividends payable to any creditor unpaid for 6m after the date on which they were declared; or assets refundable to any contributory undistributed for 6m after date on which they become refundable, the liquidator shall forthwith deposit the said money into a separate special account to be known as the "Company Liquidation Dividend and Undistributed Assets Account (CLDAUAA)" maintained in a scheduled bank. The liquidator shall, on the dissolution of the co., pay into the CLDAUDA, any money representing unpaid dividends or undistributed assets in his hands at the date of dissolution. The liquidator shall, when making any payment to CLDAUAA, furnish to the Registrar, a statement in the prescribed form, setting forth, in respect of all sums included in such payment,

the nature, the names and addresses, the amount and such other particulars as may be prescribed.

4. The liquidator shall be entitled to a receipt from the scheduled bank for any money paid into CLDAUAA, and such receipt shall be an effectual discharge of the CL in respect thereof.
5. Ignore cause voluntary WUP - Where a co. is being wound up voluntarily, the CL shall, when filing a statement u/s 348(1), indicate the sum of money payable to CLDAUAA during the 6m preceding the date on which the said statement is prepared, and shall, within 14 days of the date of filing the said statement, pay that sum into CLDAUAA.
6. Any person claiming to be entitled to any money paid into the CLDAUAA may apply to the Registrar for payment thereof, and the Registrar, if satisfied that the person claiming is entitled, may make the payment to that person of the sum due:

Provided that the Registrar shall settle the claim of such person within a period of 60 days from the date of receipt of such claim, failing which Registrar shall make a report to Regional Director giving reasons.

7. Any money paid into the CLDAUAA, which remains unclaimed thereafter for a period of 15 years, shall be transferred to the general revenue account of the CG, but a claim to any money so transferred may be preferred and shall be dealt with as if such transfer had not been made and the order, if any, for payment on the claim will be treated as an order for refund of revenue.

Unclaimed funds in CLDAUAA account for
15 years



Transfer to General Reserve A/c of CG

8. Any liquidator retaining any money which should have been paid by him into CLDAUAA shall:
 - a. pay interest on the retained amount @12% p.a. and also pay such penalty as determined by Registrar
Provided that the CG may in any proper case remit the amount of interest payable under this clause
 - b. be liable to pay any expenses occasioned by reason of his default; and
 - c. where the winding up is by the Tribunal, also be liable to have all or such part of his remuneration, as the Tribunal may consider just and proper, to be disallowed, and to be removed from his office by the Tribunal.

Section 353 - Liquidator to make returns, etc.

1. If any CL who has made any default in filing, delivering or making any return, account or other document, or in giving any notice which he is by law required to file, deliver, make or give, fails to make good the default within 14 days after the service on him of a notice requiring him to do so, the Tribunal may, on an application made to it by any C/C of the company or by the Registrar, make an order directing the CL to make good the default within such time as may be specified in the order.
2. Any order under sub-section (1) may provide that all costs of, and incidental to, the application shall be borne by the CL.

Section 354 - Meetings to ascertain wishes of creditors or contributories

1. In all matters relating to the WUP, the Tribunal may:
 - a. have regard to the wishes of C/C of the company, as proved to it by any sufficient evidence;
 - b. if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the C/C to be called, held and conducted in such manner as the Tribunal may direct; and
 - c. appoint a person to act as chairman of any such meeting and to report the result thereof to the Tribunal.
2. While ascertaining wishes of creditors above, regard shall be had to the value of each debt of the creditor.
3. While ascertaining the wishes of contributories, regard shall be had to the **number of votes** which may be cast by each contributory.

Section 355 - Court, tribunal, or person, etc., before whom affidavit may be sworn

1. Any affidavit required to be sworn for the purposes of this Chapter may be sworn:
 - a. in India before any court, tribunal, judge, or person lawfully auth. to take and receive affidavits; and
 - b. in any other country before any court, judge or person lawfully authorised to take and receive affidavits in that country or before an Indian diplomatic or consular officer.
2. All tribunals, judges, Justices, commissioners and persons acting judicially in India shall take judicial notice of the seal, stamp or signature, as the case may be, of any such court, tribunal, judge, person, diplomatic or consular officer, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Chapter.

Section 356 - Power of Tribunal to declare dissolution of company void

1. Where a co. has been dissolved, the Tribunal may at any time within 2 years of the date of the dissolution, on appln. by CL or by any other person who appears to Tribunal to be interested, make an order declaring the dissolution to be void, and thereupon such proceedings may be taken as if co. had not been dissolved.
2. The Tribunal shall:
 - a. forward a copy of the order, within 30 days to Registrar who shall record the same; and
 - c. direct the CL or the person on whose application the order was made, to file a certified copy, within 30 days, with the Registrar who shall record the same.

Section 357 - Commencement of winding up by Tribunal

The WUP of a co. by the Tribunal shall be deemed to commence at the time of the presentation of the petition for the WUP.

Section 358 - Exclusion of certain time in computing period of limitation

Notwithstanding anything in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application in the name and on behalf of a company which is being wound up by the Tribunal, the period from the date of commencement of the winding up of the company to a period of 1 year immediately following the date of the winding up order shall be excluded.

Chapter 8 – Companies incorporated outside India

(Foreign Company)

Read with Companies (Registration of Foreign Companies) Rules, 2014
[Section 379 to 393A and Sec 2(42)]

Acronyms Used:

AR	Authorised Representative	IDR	Indian Depository Receipts
BC	Body Corporate	POB	Place of Business
Biz	Business	PRI	Person Resident in India
Co.	Company	STO	Share Transfer Office
DH	Debenture Holders	SRO	Share Registration Office
FC	Foreign Company		

Foreign Company [Sec 2(42)]:

FC means a company/body corporate **incorporated outside India** which:

- has a **POB** in India (itself/agent, physical/e-mode), **AND**
- conducts any **business** activity in India in any manner

Conceptual Clarity Check:

- Would a company incorporated outside India conducting biz in India w/o having POB in India be considered as a FC? - **Yes**. On literal interpretation of the definition, the word "**and**" shows that both POB and conduct of activity is needed. But this sec is to be interpreted under **Exception Construction**. i.e., the word "**and**" in definition is to be read as "**or**".
- FC is not a co. u/s 2(20) but is a BC u/s 2(11) because FC is incorporated o/s India
- Which Registrar has jurisdiction over FCs? - **Registrar having jurisdiction over New Delhi**
- A FC has POB in West Bengal. To which RoC will it file necessary docs to? - **New Delhi RoC**
- If BoD of a co. incorporate outside India meets and executes business decision in India, would it make it a FC? - **No**.
- If a co. incorporated o/s India authorizes Mr. X in India to find customers and enter into contract on behalf of co., Is such co. a FC? - **Yes**. Such arrangement establishes **POB in India through agent**.
- Place of business includes **Share Transfer Office** and **Share Registration Office**
- If a person not being a FC carries on biz or trade as FC - **Liable** for investigation u/s 210.

Place of Business via electronic mode bole toh?

Carrying out following **biz electronically**, whether or not the main server is in India or o/s **[TDS OC]**:

- B2B or B2C **Transactions** (E.g., Udaan, Amazon), data interchange or other digital supply transaction (E.g., Netflix).
- Offering to accept, inviting or accepting **Deposits** or subscription to securities in India or from Citizen of India

- Following **Services**:

Fin. settlement (E.g. Paypal)

Web based mkt. [E.g. Google Ads]

Advisory and trans. service

Database services

Supply chain Mgt.

- Online services**:

Telemarketing

Telecomuting

Telemedicine [Online doc consultation]
--

Edu & info research

- All related data **Communication** via email/social media/mobile, etc.

Note - E-offering of securities, subscription, and listing of securities in IFSCs shall not be construed as an electronic mode for Foreign Cos. [**Amendment**]

Section 379: Application of Act to foreign companies

- Sec 380-386 and 392/393 shall apply to FCs (i.e., 387 to 391 - N.A.) [**Amendment**]
- Where **not less than 50%** of PUSC (Equity/Preference) of **Foreign co.** is held (singly/aggregate) by:
 - 1 or more **citizen** of India
 - 1 or more companies or BC **incorporated** in India
 - a AND b,
 such co. shall comply with provision of this Chapter, in respect of its Indian business, as if it were company incorporated in India

Conceptual Clarity:

- An Indian citizen incorporated a co. in Singapore for biz in Singapore. Is it a FC? - **No**. The fact that founder/promotor/owner of a co./BC is Indian would not impact the decision whether it is a FC or not.
- A co. is incorporated in India having 100% Foreign Shareholding. Is it a FC? - **No**. Co. incorporated in India is a company u/s 2(20) and not FC.

Section 380: Documents, etc., to be delivered to Registrar by foreign companies

- Every FC shall **within 30 days** of establishment of POB in India deliver the following to **RoC** (New Delhi) for registration [**CA&R PDC**]:

Certified Charter Docs - MoA/AoA or any other instrument defining constitution [Certified translation in English language]
--

Full Address of principle office of co. (not in India)
--

Full Address of office of co. deemed to be principal POB in India
--

List of all Directors /secretary of co. [Name, Father's Name, DOB, Address, nationality, passport, PAN, DIN, etc]
--

Name and Address of PRI auth. to accept notices/other docs served on co. [Auth. <u>Representative</u>]
--

Particulars of Opening/Closing of POB in India in earlier occasions

Declaration that none of director/AR (not secretary) are Convicted /debarred from formatn of co./mgt. thereof - India/Abroad
--

Other prescribed info.

2. **Alteration** to docs already submitted to RoC - Inform RoC **within 30 days** of alteration **Form FC-2**

Companies (Registration of FC) Rules, 2014:

1. Above info. to be filed with RoC in **Form FC - 1**
2. Above application to be supported with an attested copy of:
 - a. **approval of RBI** under FEMA and approval from other **regulators** if required **or**
 - b. declaration from AR that no such approval is required
3. If a FC **ceases** to have POB in India, it shall **forthwith** give notice to RoC and from date of such notice, obligation to file docs with RoC ceases, provided no other POB.

Section 381: Accounts of foreign company

1. Every FC shall, in every **CALENDAR YEAR**,
 - a. **Make** BS, P&L in prescribed forms, particulars and annexures
 - b. Deliver a **copy** to RoC
 CG may exempt FC from applicability of this.
2. If not in English - **Certified Translation** thereof in English to be annexed
3. Along with above docs, FC to send to RoC - **List of POB** in India as on BS date (**in Form FC-3**)

Companies (Registration of FC) Rules, 2014:

1. FC to prepare FS for its Indian business operation **as per Sch III** for each **Financial** year
2. **Docs** to be annexed to FS - As per Chap **IX** - Accounts of Companies [Sec 128-138]
3. Docs relating to **Consolidated FS** of Parent FC also to be submitted (if not in English, certified translation)
4. Annex following additional docs/statements, **along with FS**:
 - Statement w.r.t, **RPT**
 - Statement of **Repatriation** of Profit
 - Statement of **Transfer** of Funds (incl. Dividend)
5. Time limit for delivery of above docs to RoC:
 - **Within 6m** from close of FY
 - RoC may on application, extend the time limit **by 3m**
6. **Audit** of books of Indian biz ops - By practicing **CA** or Firm/LLP of CAs
7. Provision of **Chap X** (Sec 139-148) i.e., Audit and Auditors shall apply mutatis mutandis

Note: Who can authenticate the translations of docs to be submitted to RoC? [Refer QB - 11]

Where a translation is to be made within India, it shall be authenticated by:

- a. an **advocate**, attorney or pleader entitled to appear before any **High Court**; or
- b. an **affidavit**, of a competent person having, in the opinion of the Registrar, an adequate knowledge of the language of the original and of English.

Note regarding filing of **annual return** of the Indian operations of the foreign company:

As per Companies (Registration of FC) Rules, 2014, every FC shall prepare and file **Annual Return** in **Form FC-4** + prescribed fees, within **60 days** from last day of FY i.e., by 30th May, **to RoC** containing particulars as on close of FY.

Section 382: Display of name of Foreign Companies:

<u>Every FC shall conspicuously exhibit:</u>		
Where?	Outside of every office or POB in India	Business letters, bill-heads, letter papers, & all notices and other publications,
What?	<ul style="list-style-type: none"> • Name of the co. • Country of incorp. • State whether liability of members of co. is limited 	<ul style="list-style-type: none"> • Name of the co. • Country of incorp. • State whether liability of members of co. is limited
Language?	<ul style="list-style-type: none"> • Letters easily legible in English, and • Language used in locality - POB is situated 	<ul style="list-style-type: none"> • Letters easily legible in English, • Local Language

Section 383: Service on Foreign Company: [Refer Q 14]

- Any notice/other docs required to be served on FC
- shall be **deemed** to be sufficiently served if:
 - **Addressed** to Auth. Representative of such FC (as per Sec 380), **and**
 - Left at or **sent** by post or **e-mode** at such address

Section 384: Debentures, annual return, registration of charges, books of account and their inspection

Following provision of Companies Act shall apply to Foreign Co.:

Section	Provisions related to:	Applicable to Indian business of FCs
71	Debentures	Mutatis Mutandis
92 & 135	Annual Return and CSR	Subject to Exceptions, Modifications & Adaptations as per Rules
128	BoA to be kept by Co.	To the extent that BoA to be kept at POB in India
Chap VI	Registration of Charges	Mutatis Mutandis
Chap XIV	Insp., Inq. and Investigation	Mutatis Mutandis (Sec 228)

Section 385: Fee payable to RoC for registration of documents - As may be prescribed

Section 386: Interpretation

1. "Certified" means certified to be a true copy or correct translation
2. "Director" w.r.t., FC includes person on whose direction or instruction, BoD is accustomed to act.
3. "Place of Business" includes Share Transfer Office and Share Registration Office (**STO and SRO**)

Section 387: Dating of prospectus and particulars to be contained therein.

1. No **prospectus** offering to subscribe to any securities shall be issued or circulated by a Co. incorporated o/s India (**not FC**) unless such prospectus:
 - a. is dated and signed
 - b. contains particulars w.r.t., following matters [**Instrument Incorp.** karne ke liye **ACP** ko bulaya]:
 - i. **Instruments** defining constitution of the co.

- ii. Enactments/provisions under which co. was **incorporated**
 - iii. **Address** where (i) and (ii) above or English translation thereof can be **inspected**
 - iv. Date and **country** of incorporation
 - v. Whether co. has estb. POB in India. If so, address of **principal POB**
- c. states matter specified u/s **26** (Matters to be stated in Prospectus)

Note: Points of b (i),(ii) and (iii) N.A. if prospectus is issued **> 2 years after** co. is entitled to commence business [Agar nayi taazi co. (<2 years) hai to declare karo, warna mat karo]

2. Compliance with conditions mentioned u/ss (1) **cannot be waived off** on any grounds.
3. **Application forms** for securities of a Co. incorp. o/s India shall be **issued** subject to following:
 - Such appln is **issued with prospectus** which is in compliance with this Chap
 - Such issue **does not contravene** provision of sec 388 (Expert's consultation)

Exception: Where such form for appln. is issued to a person to enter into underwriting agreement.
4. Sec 387 **N.A.** (except for dating of prospectus) to issue of prospectus:
 - relating to issue of sec. of co. to **existing members or DH**, or
 - offering securities which is **uniform** with sec. previously issued and listed on RSE

Section 388: Provisions as to expert's consent and allotment:

1. Where the prospectus includes **expert's statement**, no such prospectus shall be issued or circulated by a Co. incorporated o/s India (**not FC**), unless such expert:
 - has given **written consent** to issue
 - has **not withdrawn**, before delivery of the prospectus for registration, such written consent
 - a **statement** appears in the prospectus that expert's written consent is given and not withdrawn
2. A statement shall be **deemed included** in prospectus, if it is contained in any report/memorandum appearing on the face thereof or by reference incorporated therein.

Section 389: Registration of prospectus: [Refer Q5]

No prospectus shall be issued/circulated unless all the following conditions are satisfied:

- a. A certified copy has been delivered for **registration** to **RoC**
Certification to be done by Chairperson **and** 2 dir. (as approved by resoln. of managing body)
- b. Prospectus **states** on the face that a copy has been so delivered,
- c. **Consent** (of **expert**) to issue the prospectus is attached.
- d. Such **other** prescribed docs is attached

Companies (Registration of FC) Rules, 2014: [EC2UA]

Following docs to be annexed to prospectus:

- a. **Expert's** consent u/s 388
- b. Copy of **contract** or memorandum for appt. of **MD/Manager**
- c. Copy of **material contracts** in last 2 years **not** in OCOB
- d. Copy of **underwriting** agreement
- e. Copy of **power of attorney** if prospectus is signed by auth. agent of directors

Section 390: Offer of IDRs

CG may make rules relating to procedure, disclosure and manner of dealing with IDRs.
Co. incorp. o/s India shall comply with SEBI (ICDR) and RBI directions for issue of IDRs.

Section 391: Provision of Sec 34 to 36 and Chap XX (Winding up) shall apply to FC

Section 392: Punishment for Contravention **[Very important penalty]:** If a FC contravenes prov. of this chapter:

	Foreign Co.	OID
Fine	Rs. 1 lakh to Rs. 3 lakhs	Rs. 25,000 to Rs. 5 lakhs
Additional Fine	Rs. 50,000/day	NA
Jail	NA	NA [Amendment]

Section 393: Co's failure to comply with prov. of this Chapter not to affect validity or contracts, etc entered into by such co. or its liability to be sued in respect thereof, **but the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim** or institute any legal proceeding in respect of any such contract, dealing or transaction, **until** the company has **complied** with the provisions of this Act applicable to it. **[Refer QB -1]**

Section 393A: Exemption by CG

CG may, by notification, exempt from prov. of this chap:

- FC
- Co. incorp o/s India whether or not having POB

insofar as they related to offering of securities, relating to prospectus or incidental matters in the International Financial Service Centers set up u/s 18 of SEZ Act, 2005

Copy of such notification should be laid before HoP.

Student's Notes:

Chapter 9 – Miscellaneous Provisions

In this chapter, we are going to cover following provisions:

1. Registered Valuer
2. Removal of name from Register of Companies
3. Government Companies
4. Nidhi Companies
5. Punishment for Fraud
6. Dormant Company

Registered Valuer [Section 247]

Read with Companies (Registered Valuer and Valuation) Rules, 2017

Section 247: Registered Valuer

1. Where valuation is required to be made w.r.t:

Property	Stock, Shares	Debentures	Securities	Goodwill	Other assets
Net worth of co.	Liabilities				

Such valuation shall be done by person:

- Having such **qualification** and **experience** as may be prescribed
- Is a Registered Valuer (RV) and is a member of Registered Valuer Organization (RVO), and
- Appointed by **Audit committee** or BoD (in absence of AC)

Examples of Sections which requires RV to do valuation - Sec 192, 230, 232 and 236

2. Role of RV: [FDI Rules]

- Make impartial T&F valuation
- Exercise **DD**
- Make valuation as per prescribed **Rules**
- Not undertake valuation of asset if **Interested** (direct/indirectly) - During **3 years prior** to appointment and **3 years after** valuation is conducted.

3. Contravention by Valuer:

No intention to defraud - Fine - Rs. 50,000

Intention to defraud co./members - Jail upto 1 year and Fine - Rs. 1 lakh to Rs. 5 lakhs

4. Where RV is convicted u/ss (3):

- a. **Refund** remuneration received by him and
- b. Pay for **damages** arising to co./others for his incorrect/misleading statement in his report.

Companies (Registered Valuer and Valuation) Rules, 2017

Asset class: Means distinct group of assets displaying similar characteristics that can be classified and requires separate set of valuers for valuation

Asset Class 1: Securities and fin. assets	Asset Class 2: Plant and Machinery	Asset Class 3: Land and Building
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Authority - IBBIEligibility for Registered Valuer (RV):

1. **Person** shall be eligible to become RV if he
 - a. Valuer **Member** of RVO
 - b. **Recommended** by RVO for registration as a RV
 - c. Passed the valuation **Examination** (**within 3 years** before application for registration)
 - d. Possess prescribed **Qualification** and Experience
 - e. Not a **Minor**
 - f. Not declared to be of unsound **Mind**
 - g. Not an undischarged **Bankrupt** or not applied to be adjudged as bankrupt
 - h. is a person **Resident** in India (same as sec 2(v) of FEMA)
 - i. Not convicted of **offence** (jail > 6m) or offence involving MT and period of 5 years not lapsed.
Provided - If convicted for **> = 7 years** - Forever disqualified
 - j. Not levied penalty u/s 271J of **IT Act**, 1961 [False report by profession] and 5 years not lapsed
 - k. Is a **Fit** and proper person [Integrity, no conviction order, financial solvency]
2. **Partnership entity or company** shall **NOT** be eligible if:
 - a. Set up for **objects** other than rendering professional service, financial or valuation services or if such co./firm is a **subsy**, JV or associate of another co/BC
 - b. Is undergoing **insolvency resolution process** or undischarged bankrupt
 - c. All Partners/Directors are **not eligible** above [except (a) and (b)]
 - d. Lower of (3 or all partners/directors) are **not RV**
 - e. None of its Partners/Directors is RV for **Asset Class** for which it seeks to be RV.
 - f. **It is not a member of RVO.**
Provided that - It shall not be member of more than 1 RVO at a given point of time
Transition provision to comply with this point - 6 months

Qualification and Experience (to be eligible to be a RV):

SN	Degree	From?	AND Experience (at least)
1	PG Degree/ Diploma	From university or institute incorp. by Law in India in Specified discipline	3 years
2	Bachelor's degree		5 years
3	Membership of prof. institute - Establishment under act of Parliament		3 years

Condition of Registration:

On an **application** made by eligible individual/entity to **IBBI**, Registration may be granted subject to following:

- Possess relevant **Qualification** and experience at all times
- Comply with applicable **Law**
- Not conduct valuation for **Class** other than for which registration is granted
- Prior permission of Auth. before **Shifting** membership of RVO
- Comply with RVO's **Code** of conduct
- Take adequate steps to address **Grievances**

- Maintain **Records** of assignment for 3 years from completion
- If RV is a P firm/Co.:
 - Allow only Partners/Directors who is RV to **sign** and act on its behalf
 - **Disclose** to co. concerned - Capital contributed to firm/co. by signing Partners/Directors
 - Immediately inform IBBI on **removal** of Partners/Directors who is RV along with reasons
- If RV is a P firm - All Partners - jointly and severally **Liable**
- If RV is a co. - Co. **Liable** along with signing director

Rule 7A: Intimation of changes in personal details by RV to Authority: [Amendment]

RV shall **intimate** the authority for change in:

- **personal** details, or
 - any modification in **composition** of partners or directors, or
 - any modification in any **clause** of partnership agreement or MoA,
- which may **affect registration** of RV, after paying **fee** as per the Table -I in Annexure V.

Conduct of Valuation:

1. RV to conduct valuation as per **standard** to be notified [Valuation Standards (VS)]
Unless notified, valuation as per:
 - a. Internationally accepted VS
 - b. VS adopted by RVO
2. In case of **inputs/valuation by other RV** (Mr. B) - RV (Mr. A) to disclose details in his report.
Liability remains of first RV (Mr. A).
3. RV shall **state the following in his report:**

<ul style="list-style-type: none"> • Identity of valuer and other experts • Date of appt., valuation date and date of report • Disclosure of interest and conflict, if any • Background info. of asset being valued • Purpose of valuation 	<ul style="list-style-type: none"> • Investigation/inspection undertaken • Nature and source of info. • Procedures adopted • Major Factors considered • Conclusion
<ul style="list-style-type: none"> • Caveats, limitations, and disclaimers to explain the limitations faced and not for limiting responsibility 	

Temporary Surrender of Certificate of Registration (CoR):

1. RV may surrender CoR as per RVO's regulation and **inform Authority** (IBBI) for taking such info. on record
2. RVO shall also inform IBBI **within 7 days** of approval of such appln. [for surrender/revival]
3. RVO to place on **website** details of such surrender/revival

Registered Valuer Organisation (RVO):

1. An org. may be **Recognised** as RVO for valuation of specific Asset Class if:
 - a. **Registered** u/s 8 of Co. Act 2013 with sole object of dealing with matters related to regulation of Valuers
 - b. It is a **prof.** institute estb. by parliament enacted for purpose - Regulation of profession

2. Organisation under sub-rule (1) shall be recognized only if:

- Conducts **educational** courses in valuation
- Grants **membership** or Certificate of Practice (CoP)
- Conducts **training** before CoP
- Lays down and enforces **Code of Conduct**
- Provides continuous **education** to members
- Monitors and reviews Quality of **Service**
- Has mechanism of **disciplinary** proceedings

Complaint against RVO/RV:

- Complaint may be filed by any person with Authority **with Rs. 1,000 non-refundable fees**.
- On receipt of such complaint, Authority shall **examine** and take necessary steps
- If complaint is against an RV who is Partner/Director, IBBI to **refer** such complaint to **concerned RVO** for handling.

Valuation Standard:

- To be **notified** by CG
- To be **recommended** by **committee** [Committee to advise on valuation matters]
- Composition** of committee: [Tenure = Max. 2 tenures of 3 years each]

CP	1 MCA	1 IBBI	1 Legislative Dept	Upto 4 - By CG representing auth. which allow valuation by RV
Upto 4 - By CG representing RVO		Upto 2 - By CG representing Industry		President of ICAI/CS/Cost as ex-officio members

Punishment:

For contravention of this Rules = Liable u/s 469(3) [upto Rs. 5,000 + upto Rs. 500 per day]

Additional Points (based on Q33 of Integrated Case Study)

- A partnership entity or company eligible for registration as a registered valuer, make an application to the authority along with a **non-refundable application fee** of Rs. 10,000
- On receipt of communication from IBBI regarding reasons for rejection of application, the applicant shall submit an explanation as to why his/its application should be accepted **within 15 days** of the receipt of the communication to enable the authority to form a final opinion.

Removal of Name of Company from Register of co. [Sec 248-252]:

Section 248: Power of Registrar to Remove Name

1. Removal of name (suo motu)- Where RoC has RGTB that:

- Co. has failed to **commence** business within **1 year** of incorporation
- Co. has not been **carrying** business - Preceding **2 FY** and has **not filed** application u/s **455**
- Subscribers** to MoA has **not paid subscription** (undertaken to pay) and declaration to this effect not filed within 180 days of incorporation [Sec 10A(1)]
- Co. is **not carrying** biz/ops as revealed after physical verification u/s 12(9)

Registrar to send Notice of intention to remove name to **Co. + All dir.** & require **representation within 30 days**

2. Application by co. for removal of name:

A co. may file an application to Registrar for removal of name after:

- Extinguishing all **liability**, and
- By **SR** or **obtaining consent of 75% members in PUSC** (other than in **GM**)
- If co. is regulated under Special Act (E.g., IRDA) - Approval of such regulatory body required

On receipt of such appln, Registrar to issue **public notice**.

3. On expiry of time mentioned in notice u/ss (1), unless contrary is shown by co, Registrar shall:

- Strike off** the name, and
- Publish **notice** thereof in **OG**. On such publication - Co. stands **dissolved**.

4. Before such order for strike off, Registrar to **satisfy** himself that:

- Sufficient **provision** are made for - (i) **Realization** for asset and (ii) **Discharge** of liability & obligation
- If necessary, obtain **undertaking** from MD/other in charge

5. Nothing in this section shall affect power of **NCLT** to **WUP** a co.

Section 249: Restriction of making application u/s 248

Application u/s 248 shall not be made if at any time during last **3 months**, the co. has [**PAT and NW**]:

- Changed **Name** or Shifted RO
- Has disposed (for value) of any rights/**Property** held by it
- Has engaged in **Activity** other than one necessary for:
 - Application u/s 248
 - Concluding affairs of co.
 - Complying with stat. requirement
- Made an application to **Tribunal** for sanction of CAA and such matter is not concluded
- Being **Wound up** under Co. Act or IBC

Violation of this section - Fine **upto Rs. 1 lakh**

Section 250: Effect of company notified as dissolved:

Cease to operate as co., and Certificate of incorporation deemed cancelled

No effect on: - (a) Liabilities of person involved (b) Realisation of asset (c) Discharge of liability

Registrar may also recommend **prosecution** against person making such application.

1. Person **aggrieved by order of RoC** notifying a co. dissolved - **Appeal** to NCLT **within 3 years** of date of order. On such appeal, if Tribunal is satisfied that removal of name not justified in view of absence of grounds, Tribunal may:
 - a. Order to **restore** name after giving reasonable **OOBH** to co/person involved
 - b. **Co.** to file copy of order - **RoC** within 30 days for restoration and issue fresh **CoI**
2. If **RoC** satisfied that name is struck **inadvertently** or on the basis of incorrect info. and believes that restoration is required, Apply to Tribunal **within 3 years** - Seeking restoration.
3. **Aggrieved person** such as co./member/cr. or workmen may apply to Tribunal - **Within 20 years** of publication in **OG**.
If Tribunal **satisfied** that it is just to restore name - Order such restoration.

Student's Notes:

Government Company:

Section 2(45): Government Company

"Government company" means any co in which:

- a. $\geq 51\%$ of PUSC is held by CG or SG (s) or partly by CG and partly by one or more SG, and
- b. includes a company which is a subsidiary company of such a Government company

Note:

1. PUSC means aggregate of Equity and preference shares
2. In case where shares with differential voting rights are issued, PUSC = Total voting power

Concept clarity check:

Decide whether A Ltd is a Govt co., if:

1. CG holds 20%, SG of Maharashtra holds 20% and ONGC (Govt. co) holds 20% - No. It is neither falling in case (a), nor in case (b). Hence, not a Govt co.
2. A Ltd. is a subsidiary of Govt. co but not WoS - Yes, A Ltd. becomes a Govt. co.

Section 394: Annual Report of Govt co.

Where CG is a member of Govt co.:

CG shall, within 3m of AGM, cause Annual Report on working and affair of co. to be prepared

Lay before both HoP:

- a. Copy of Annual Report
- b. Copy of Audit Report
- c. Comments upon audit report made by CAG

Where SG is a member in addition to CG:

SG shall cause a copy of Annual Report to be laid before House or both Houses of State Legislature along with Audit report and comment of CAG thereupon

Section 395: Annual reports where one or more SG are members of companies (no CG)

Where CG is not a member of Govt co, the member SG shall:

- a. cause Annual Report on working and affair of co. to be prepared within 3m of AGM,
- b. Lay before House or both the houses of State Legislature:
 - Copy of Annual Report
 - Copy of Audit Report
 - Comments upon audit report made by CAG

Provision of Section 394 and 395 shall apply to Govt. co. in liquidation as well.

Nidhi Company:

Section 406: Power to Modify Act in its Application to Nidhis

1. Nidhi company or Mutual Benefit Society (MBS) means a co. which CG by notification in OG **declares** as Nidhi.
2. CG may, **by notification** in OG, direct any provision of this Act shall not apply or apply with such Exception, Modification or Adaption to Nidhis or MBS
3. Copy of such **proposed** notification shall be laid before both HoP for total **30 days** while it is in session. Notification not to be issued if **disapproved** by both HoP
4. In reckoning 30 days, exclude period when House is adjourned for > 4 consecutive days
5. **Copies** of notification issued (final) to be **laid before each HoP**

Nidhi Rules, 2014

(Amended as per Nidhi (Amendment) Rules, 2022 w.e.f. 19th April 2022)

1. Nidhi company means a company incorporated with the object of:
 - a. Cultivating the **habit of** thrift and **savings** amongst its members
 - b. Receiving **deposits** from and lending to its member only for their mutual benefit
2. Applicability- Every company incorporated or declared as Nidhi u/s 406 of Co. Act 2013.
3. Relevant definitions:
 - **Net Owned Fund (NoF)** - Paid up **Equity** Share Capital + FR - Acc. Losses - Intangible Asset
 - **NPA** - Borrowal account w.r.t., interest income or principal amount **unrealized > 12m**
 - **Doubtful asset** - Borrowal account which is **NPA > 2 years** but **< 3 years**
 - **Loss asset** - Borrowal account which is **NPA > 3 years**
4. Incorporation:
 - Public co. with min. PUESC of **Rs. 5 lakhs** **Rs. 10 Lakhs** (w.e.f. 19/04/2022)
Provided that - Every Nidhi existing on the date of commencement of this Rule shall comply with this requirement within 18m of such commencement.
 - No Nidhi shall issue **preference shares**.
 - **Object** of Nidhi co. - No object other than those defined (habit of thrift, deposit).
 - Nidhi shall have "**Nidhi Ltd**" as last words in its name
5. Minimum no. of members and NoF:
 - Every Nidhi shall, **within 1 year (FY)** of date of incorporation, ensure that it has:

Not < 200 members	NoF of >= Rs. 10 lakhs	Unencumbered term deposit of > = 10% of the o/s deposit and	NoF to Deposit of not > 1:20
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Please note - The limit of NoF in Rule 5 has not been changed. It is only changed in Rule 9.
 - In case of non-compliance with (a) 200 members or (d) 1:20 ratio above,
 - Nidhi shall **within 30 days** of close of first FY
 - Apply to Regional Director (RD) in **Form NDH -2** + Prescribed fees for extension of time (**upto 1 year**), and
 - RD may consider such application and pass extension order **within 30 days** of application.
 - Return of Statutory Compliances (**Form NDH - 1**)

- Within 90 days from close of first FY after incorporation or where applicable, 2nd FY,
- Nidhi shall file return of stat. compliances in Form NDH -1 + Fees to the RoC
- Duly certified by CA/CS/CMA in practice
- If Nidhi fails to comply with this Rule beyond second FY, stop accepting further deposits till compliance made and get itself declared u/s 406 (again).
- Rule 5(5) - The provisions of this rule shall not be applicable for the companies incorporated as Nidhi on or after the commencement of the Nidhi (Amendment) Rules, 2022

Extra for knowledge:

On and after commencement of Nidhi (Amendment) Rules, 2022, public company desirous to be declared as a Nidhi shall apply, in Form NDH-4, within 120 days of its incorporation for declaration as Nidhi, if it fulfils the following conditions, namely:

- a. it has not less than 200 members ; and
- b. it has Net Owned Funds of Rs. 20 lakhs or more.

6. General Restrictions or Prohibitions

Prohibitions: No Nidhi shall:

- | | |
|---|---|
| <ol style="list-style-type: none"> a. Carry on business of: <ul style="list-style-type: none"> • Chit fund, • hire purchase Finance, • leasing Finance, • Insurance or • acquisition of securities issued by any body corporates b. Issue preference shares, debentures or other debt Instruments c. Opening current account with members d. acquire or purchase sec. of any other co. or control composition of BoD of any other co. in any manner whatsoever or enter into any arrangement for change of its mgt. (not even with SR or approval of RD) e. carry on any Biz. other than biz. of borrowing or lending in its own name. | <ol style="list-style-type: none"> f. Accept Deposits from/lending to any person other than members g. take Deposits from/lend money to body corporate; h. pledge any of the assets lodged by its members as security i. enter into any partnership arrangement in its borrowing or lending activities; j. issue any advertisement to solicit deposit
[Note - Private circulation of FD scheme amongst members carrying words "For Pvt. circulation to members only" not considered as advt.] k. pay brokerage/incentives for mobilizing deposit l. raise loans from banks or FIs or any other source for the purpose of advancing loans to members |
|---|---|

Nidhi which has adhered to all prov. of these rules may provide locker facilities on rent to its members subject to Rental income from such facilities not > 20% of gross income (not net profit) at any point of time during a FY.

7. Share Capital and Allotment:

- Nidhi shall issue fully paid up equity shares of NV not less than Rs. 10 each

- No service charge levied on issue of shares
- Nidhi to allot **each deposit holder lower** of:
 - At least 10 shares or
 - Shares equivalent to Rs. 100
- **Savings A/C** holder and recurring deposit A/C holder to hold at least 1 share of Rs. 10 each

8. Membership:

- Body Corporate or trust - cannot be members
- Not reduced below 200 at any time
- **No minor shall be member.**
Proviso - Deposit may be accepted in name of minor if made by legal guardian who is a member of Nidhi
- **A member shall not transfer > 50% of his shareholding (as on date of availing of loan or making of deposit) during subsistence of such loan or deposit, as the case may be.**
Provided that member shall retain min. no. of shares as per Rule 7 at all times

9. Net Owned Fund: Every Nidhi shall maintain NoF of ~~= Rs. 10 lakhs~~ **Rs. 20 lakhs** or higher amt. as CG may specify

Note - Existing Nidhi co. to comply with this rule within **18m** of commencement of this Rule.

10. Branches (Q 40 of Case Study):

- Nidhi **may open** branches, only if it has earned **net PAT** continuously during **preceding 3 FYs**.
- If a Nidhi proposes to **open > 3 branches** within a district or any branch outside the district, it shall:
 - Obtain **prior permission** of **RD** and
 - Intimate to **RoC** about opening of every branch **within 30 days** of such opening.

11. Acceptance of Deposits by Nidhi:

Nidhi shall **not** accept deposits **> 20 times** of its NOF as per last audited Financial Statement.

12. N.A.

13. Deposits

- Fixed Deposits - Minimum 6m and Max - 60m
- Recurring Deposits - Minimum 12m and Max - 60m
- **Max interest** rate on FD/RD = Max. rate prescribed by RBI that **NBFCs** can pay on their **public deposit**
- In case of **recurring deposits relating to mortgage loans**, max. period of deposit = Repayment period of such loan
- Max. balance in **savings A/C** qualifying for interest = **Rs. 1 lakh** and Interest Rate not > [Interest on such account by nationalized bank + 2%]
- **Foreclosure** of FD/RD account:
 - Nidhi shall **not repay** any deposit within **3m** of its acceptance
 - On request of depositor, if Nidhi agrees to repay **after 3 months**, **no interest upto 6m** from deposit
 - On request, if Nidhi agrees to repay **before expiry** - **Rate of interest shall be reduced by**

2% from rate which Nidhi would have ordinarily paid for the period for which deposit ran
In case of death of depositor - Repay with interest at rate which Nidhi would have ordinarily paid for the period for which deposit had run.

14. Un-encumbered Term Deposit:

- Every Nidhi co. shall
- Invest and continue to keep invested
- In unencumbered TD with
 - Sch. Commercial bank (except co-op bank or Regional Rural B)
 - Post office
- Amount \geq 10% of deposit o/s at the close of business on the LWD of 2nd preceding month.

RD may give exception (temporary withdrawal) subject to ensuring restoration of amount.

Application to RD to be made in Form NDH-2 along with prescribed fees.

15. Loans - Only to members subject to following limits:

Where total amt. of deposit from all its members	Loan to each member
< Rs. 2 crores	Rs. 2 lakhs
Rs. 2 - 20 crores	Rs. 7.5 lakhs
Rs. 20 - 50 crores	Rs. 12 lakhs
> 50 crores	Rs. 15 lakhs

- Where Nidhi has no profit in any of last 3 FY, above limit to be reduced to 50%
- If any member has defaulted in payment of loan - He shall not be eligible for further loan
- Loan can be given to members only against following security:
 - Gold, Silver or Jewelry [provided repayment period does not exceed 1 year]
 - Immovable property

Provided that:

Repayment
 \leq 7 years

Loan \leq 50% of
value of such IP

Total loan against IP \leq 50% of overall o/s
loan as on date of BoD approval

- FDRs, NSCs or other Govt. securities or insurance policies
Provided that - Such securities are duly pledged with Nidhi and maturity date do not fall beyond loan period or 1 year whichever is earlier.
- Note: In case of loan against FDs, the period of loan shall not > unexpired period of FD.
- In case of Joint in case of joint shareholders, the loan shall be provided to the member whose name appears first in the Register of members

16. Rate of interest (RoI):

- RoI on loan by Nidhi - Not > (Highest RoI offered on deposit by Nidhi + 7.5%) on Reducing Balance Method
- Nidhi shall charge same RoI on borrowers w.r.t, same class of loans and RoI of all classes shall be prominently displayed on the notice board at the RO and each branch office.

17. Directors

- Shall be a member of Nidhi [Deposit u/s 160? - Yes]
- Term - Upto 10 consecutive year
- Re-appointment only after expiry of 2 years from ceasing to be a director

- Provision of Sec 152(4) [Declaration] and 164 shall apply.

18. Dividends [Amendment]:

- ~~Not~~ declare dividend > 25% or
- ~~such higher amt. approved by RD (reasons recorded in writing)~~
- ~~Dividend (within limit or above limit) shall be subject to following:~~

Equal amt.
trnf. to ~~GR~~

No ~~default~~ in repayment of
matured deposit and intt.

~~Complied~~ with all rules
applicable to Nidhi

19. Auditor:

- No Nidhi shall appoint/re-appoint an **individual** as auditor for > 1 term of 5 consecutive years.
- No Nidhi shall appoint/re-appoint an **audit firm** as auditor for > 2 term of 5 consecutive years.
- Reappointment (individual/audit firm) - After expiry of 2 years from completion of term

20. N.A.

21. Nidhi Co. shall file **half yearly (calendar year)** return in Form NDH -3 + Fees within 30 days of conclusion of each half year **duly certified** by CA/CS/Cost accountant in practice

22. Auditor's Certificate

- Auditor to furnish **certificate every year** that co. has **complied** with all provision of this Rules
- Such certificate to be **annexed** to audit report
- In case of **non-compliance** - Specify the **rules** which have not been complied with

23. N.A.

24. Penalty - Nidhi co. and OID - Fine upto Rs. 5,000 and further fine of Rs. 500/day

Punishment/Penalty [Section 447, 448 and 450]

[Read with Company (Miscellaneous) Rules, 2014]

Sec 447: Punishment for Fraud

Without prejudice to any liability including repayment of any debt under this Act or any other law in force, any person guilty of fraud shall be liable as follows:

Amount involved in the fraud	<u>At least</u> Lower of: a. Rs. 10 lakhs b. 1% of T/O	<u>At least</u> Lower of: a. Rs. 10 lakhs b. 1% of T/O	<u>Less than</u> Lower of: a. Rs. 10 lakhs b. 1% of T/O
Fraud involves public interest	No	Yes	No
Jail	6m - 10 years	3 years - 10 years	Upto 5 years
And/or	AND	AND	OR
Fine	Up to 3x amt involved	Up to 3x amt involved	Upto Rs. 50 lakhs or both

Fraud bole toh?:

Act	Ommission	Concealment of Fact	Abuse of position
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Committed with:

Intent to decieve	Gain undue advantage	Injure intt. of co/SH/crs/others
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Whether or not there is a wrongful gain/loss

Sec 448: Punishment for False Statement

If in any of the following:

Return	Report	Certificate	FS	Prospectus	Other docs
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Any person makes any statement which:

1. is **false** in any material particulars, knowing it to be false or
2. **omits** any material fact, knowing it be material

Such person shall be liable u/s 447

Sec 450: Punishment where no specific penalty or punishment is provided:

If a co./officer of co./any other person contravenes any provisions of this Act/rules and for which no penalty or punishment is provided elsewhere, such co. and OID shall be:

	Company	OID or any other person
Fine	Rs. 10,000	Rs. 10,000
Further penalty	Rs. 1,000/day	Rs. 1,000/day
Maximum	Rs. 2 lakhs	Rs. 50,000

Dormant Company [Section 455]

[Read with Company (Miscellaneous) Rules, 2014]

Who can apply to become Dormant Company ("DC")?

Co. formed and registered under this Act for:

1. **Future projects**, or
2. To hold an **asset**/Intellectual property.

AND

has **no significant accounting transactions** ("SAT")

Inactive co. i.e., a co. which has:

1. not been carrying on **biz./ops**, ~~or~~ **and**
2. not made **SAT** - Last 2 FY
3. not filed **FS/AR** - Last 2 FY

Make application to RoC (in **Form MSC-1 + Fees**) to obtain status of DC.

Prior to such application:

1. Pass **SR** at **GM**, **or**
2. Issue notice to all **SHs** of co. & obtain **consent of at least 3/4th SH** (in value)

Significant accounting transaction means **any transaction other than:**

- a. payment of **fees** by company to RoC;
- b. payments made to fulfil req. of this **Act** or any other law;
- c. **allotment** of **shares** to fulfil the req. of this Act; and
- d. payments for **maintenance** of its office and records.

Compliance

Maintenance

Additional condition to be eligible to apply for status of DC:

[IPL mein **Deposit** ko leke **Dispute** hua **Govt** aur **Workmen** ke beech. **Stock** girne lage]

1. No Insp., Inq. or Inv. (**III**) has been ordered/taken up
2. No **Prosecution** - initiated and pending
3. No o/s public **Deposit** and no default in payment
4. No o/s **Loan** (sec/unsec)
Exception - If o/s unsec. loan, co. may apply to lenders for approval to obtain status of DC

5. No **Dispute** in Mgt/ownership of co.
6. No o/s dues to **CG/SG**/Local auth.
7. No default in **Workmen** dues
8. Securities - Not **Listed** in stock exchange (India/Abroad)

- After considering the appln., RoC may allow status of DC and issue certificate in **Form MSC - 2**
- File "**Return of DC**" **annually** including financial position (in **Form MSC -3**) **audited** by CA within 30 days of end of FY. **Rotation** of auditors shall not apply to Dormant Co.
- RoC to **maintain register** of dormant companies.
- If a co. **fails to file AR/FS for 2 FY** consecutively, RoC to **issue notice** and **enter its name in register of DC**
- Min. **directors** in DC - 3 (Public), 2 (Private) and 1 (OPC)

1. Apply to RoC in **Form MSC - 4** (along with return in **Form MSC -3**)
2. RoC to consider appln and issue certificate of active co. in **Form MSC - 5**
3. Where a co. does an act affecting its status of DC, directors to file an application with RoC to obtain status of active co. **within 7 days**

RoC to initiate process of strike off name from Register of dormant cos. if co. remains DC for **5 years** consecutively.

Student's Notes:

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Chapter 10 – Compounding of Offence, Adjudication and Special Court

Acronyms Used:

AO	Adjudicating Officer
CCP	Code of Criminal Procedure, 1973
EM	Executive Magistrate
HC	High Court
JM	Judicial Magistrate
MM	Metropolitan Magistrate
SCN	Show Cause Notice

Common terms

- Offence: Commission of an **act** i.e., contrary to any law or forbidden by the law & is not confined to commission of crime only. It is punished via penalty.
- Types of penalties:

Fine only	Imprisonment only	Imprisonment or Fine	Imprisonment or fine or with both	Imprisonment and fine
-----------	-------------------	----------------------	-----------------------------------	-----------------------
- Compoundable offences: **Complainant** enters into a compromise and agrees to have charges **dropped** against accused.
- Non-Compoundable offences: Those which are not compoundable because of grievous nature of offence.
- Cognizable offence: Police has authority to make an **arrest without a warrant** and start investigation with or without permission of a court.
- Non-cognizable offence: Police without any warrant has **no authority to arrest**.

Section 435: Establishment of Special Courts (SpC)

- CG** may, for the purpose of **speedy trial of offences** under this Act (except u/s 452), establish as many special court as may be necessary.
- SpC shall consist of:

Where offence under this Act is punishable:	SpC court shall consist of:	Appointed by?
With imprisonment > = 2 years	Single Judge holding office as session judge (SJ) or Additional SJ	CG + Chief Justice of HC of concerned jurisdiction
Other case	MM or JM of the First Class	

Section 436: Offence Triable by SpC

- Notwithstanding provision of CCP, 1973
 - Which SpC shall try the offence specified u/s 435(1)?
 - SpC established in the area where reg. office of the respective co is located.
 - If >1 SpC in such area - Concerned HC to specify.

- b) A person accused of/suspected of committing offence under this Act is forwarded to Magistrate. It may order detention in such custody (≤ 15 days if JM & ≤ 7 days if EM) Where Mag. believes detention is not necessary - Forward such person to SpC

2. Power of SpC = That of Mag.

3. SpC may, upon perusal of police report, take cognizance of offence w/o accused being committed for trial.

4. SpC may also try an offence under the CCP against the accuse at the same trial

5. Summary trial

a) SpC can try a summary trial when any offence under this Act is punishable with ≤ 3 years

b) Sentence in a summary trial should be limited to ≤ 1 year

c) At commencement or during the summary trial, SpC opines that -

- i. the nature of the case is such that >1 year sentence of imprisonment may have to be passed, or
- ii. it is undesirable to try the case summarily

SpC, after hearing the parties, record an order to that effect and proceed to hear or rehear the case in like a regular trial.

Section 437: Appeal and Revision

HC may exercise all power conferred by CCP, 1973 as if a Special Court = Court of Session

Explanation - SpC will be treated as Court of session and like you can file appeal against order of court of session with the HC, similarly, you can file appeal against SpC order with HC

Section 438: Application of Code to proceedings before SpC

1) CCP, 1973 provisions apply to the proceedings before a Special Court

2) SpC = Deemed Court of Session or court of MM/JM and

Person conducting a prosecution = Deemed Public Prosecutor.

Section 439: Offences to be Non-Cognizable

1) Every offence under this Act [except u/s 212(6)] shall be deemed to be non-cognizable

2) Court shall take cognizance of any offence

a) Under Co. Act: Only on written complaint by Registrar, a shareholder/member, or person auth. by CG

b) Issue and trf of sec. and non-payment of dividend - On written complaint by person auth. by SEBI

3) Not applicable to:

a) Prosecution by a company of any of its officers

b) Any action taken by the liquidator of a company w.r.t. Winding up related provisions. The liquidator of a company shall not be deemed to be an officer of the company.

4) The presence of Registrar/ CG authorized person before the Court trying the offences shall not be necessary unless the court requires his personal attendance at the trial

Section 442: Mediation and Conciliation Panel

- 1) A panel of experts maintained by CG having qualifications for mediation b/w parties during the pendency of any proceedings before authority (CG, tribunal, Appellate tribunal)
- 2) Any of the parties, at any time may approach the authority or the authority suo-moto may refer the matter to the Mediation and Conciliation Panel
- 3) The panel shall follow such procedure as may be in Rule 11 of the Special Courts (Companies Mediation and Conciliation) Rules, 2016, and dispose of the matter in ≤ 3 months from the date of such reference and forward its recommendations to the respective authority
- 4) Any party aggrieved by the recommendation of the Panel may file objections to the respective authority

Section 443: Power of Central Government to appoint Company Prosecutors

The CG may appoint one/more persons, as company prosecutors for conduct of prosecutions, generally, or for any case, or in any case, or for any specified class of cases in any local area. Powers & privileges same as conferred by the Code on Public Prosecutors

Section 444: Appeal against Acquittal

The Central Government may, in any case arising under this Act, direct any-

- 1) company prosecutor or
- 2) authorize any other person either by name or by virtue of his office, to present an appeal from an order of acquittal passed by any court, other than HC, and an appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the appellate court.

Section 445: Compensation for Accusation without reasonable cause -The provisions of section 250 of CCP, 1973 shall apply mutatis mutandis

Section 446: Application of Fines

The court imposing any fine under this Act may direct that the fines shall be applied towards:

- (a) payment of the **costs** of the proceedings or
- (b) **reward** to the person on whose information the proceedings were instituted.

Section 446A: Factors for determining level of punishment

SpC while deciding the amount of fine or imprisonment should consider:

size of the company	nature of business carried on by co.	injury to public interest	nature of the default	repetition of the default
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Section 446B: Lesser Penalties for some Companies

If non-compliance is by OPC/ Small Co./Startup company/ Producer Co. fails to comply with any provision of this Act, such company and officer in default shall be liable to a penalty not $> \frac{1}{2}$ of penalty specified in such provisions subject to max. of Rs. 2 lakhs (for Co.) and Rs. 1 lakh (for OID)

[Amendment]

Section 454: Adjudication of Penalties

- 1) **CG** can, by order in **OG**, appoint as many **CG** officers (not below rank of Registrar) as Adjudicating Officers (**AO**)
- 2) **AO** may pass an **order** to:
 - a. impose a **penalty** (after reasonable **OOBH**) and
 - b. require to **rectify** the default or non-compliance.

Provided that in case default relates to non-compliance of Sec **92/137** and default is **rectified** either prior to, or **within 30 days** of, the issue of notice by **AO**, **no penalty** shall be imposed and all proceedings shall be **deemed** to be **concluded**.

Rules relating to imposition of Penalty:

- **AO** to issue written **SCN** via email to Company, **OID** & any other person to Show Cause why **penalty** should not be **imposed**.
 - Show cause within period specified in notice (**not < 15 and not > 30 days**). **AO** may **extend** by not more than 15 days on sufficient reasons.
 - **SCN** to clearly **indicate** the nature of non-compliance/default alleged to have been committed and also draw attention to relevant penal provisions of Act and **maximum penalty** which can be imposed.
 - If considering reply received above, **AO** is of **opinion** that **physical appearance** is required, he shall **issue notice**, within **10 working days** from receipt of reply, fixing a date for appearance through its **AR**, or officer of such company.
 - If recipient can make **oral** representation and **AO** to allow it
 - The **AO** shall pass an **order**:
 - a. within **30 days** from expiry of time to reply, if physical appearance was **not required**
 - b. within **90 days** of the date of issue of **SCN** if physical appearance was required
 - Any **delay** (by **AO**) should have the reasons recorded by **AO** and delay doesn't result in invalidity of the order.
 - Order to be duly **dated** & **signed** by **AO** & state **reasons** for req. physical appearance, if any
 - **AO** to send a **copy** of order to the **Co.**, **OID**, any other person, **CG** & uploaded on the **website**.
 - The **AO** shall have the **power** to:-
 - a. Summon and enforce **attendance** of any person
 - b. Order for evidence or to produce any relevant document
 - **Failure to reply** or refuses to appear may result in penalty from **AO** considering following factors:
 - a. Factors u/s **446A** (size of co., nature, etc.)
 - b. the **amount** of disproportionate gain/ unfair advantage/loss to investors or crs, wherever quantifiable, made as a result of the default.
 - The penalty has to be **paid** via **MCA portal** & is credited to the **Consolidated Fund of India**.
- 3) Any person aggrieved by an order made by **AO** may prefer an **appeal** to the **Regional Director** (**RD**) having jurisdiction in the matter **within 60 days** from the date on which copy of **AO** order is received.

- When a default is committed for the second time within 3 years from the date of order imposing such penalty is passed by AO/RD, he shall be liable for the second or subsequent defaults for an amount equal to twice 2x the amount of penalty provided for such default under the relevant provisions of this Act.

[illegible]

Chapter 11 - National Company Law Tribunal and Appellate Tribunal

[Section 407 and 419 to 434]

Acronyms Used:

AT	Appellate Tribunal
CP	Chairperson
JM	Judicial Member
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
P/CP	President or Chairperson
PONJ	Principles Of Natural Justice
TM	Technical Member
T/AT	Tribunal / Appellate Tribunal

Section 407: Basic Definitions

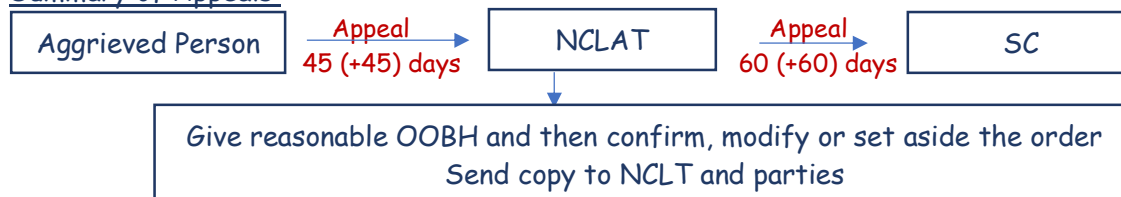
1. Chairperson (CP) - Chairperson of NCLAT
2. Member - Judicial & Technical of both NCLT or NCLAT and includes President/CP as the case may be
3. Judicial Member - Member of NCLT or NCLAT appointed as such and **includes President or CP**
4. Technical Member - TM of the Tribunal/Appellate Tribunal appointed as such

Section 420: Order of Tribunal (NCLT)

1. Tribunal to pass orders only after giving reasonable OOBH to parties involved
2. Amendment of order
 - **Within 2 years** from order,
 - the Tribunal may,
 - to rectify any **mistake apparent from record** (identified Suo motu or brought to notice by parties),
 - amend an order

No amendment allowed if appeal preferred
3. Copy of order - Send to parties concerned

Summary of Appeals:



Section 421: Appeal against Tribunal Order(NCLT)

1. Person aggrieved by order of NCLT - Prefer an **appeal** with AT
2. **No appeal** shall lie to AT if order was made with **consent** of parties
3. Appeal shall be filed **within 45 days** from date on which a copy of order is made available to person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed.

Provided that AT **may entertain** an appeal after **the expiry** of the said 45 days from date aforesaid, but within a further period not exceeding 45 days, if it is **satisfied** that appellant was **prevented by sufficient cause** from filing the appeal within that period.

4. On receipt of Appeal, NCLAT shall give reasonable OOBH and, **confirm, modify or set aside** the order
5. **Copy** of order - To NCLT and parties concerned.

Section 422- Expeditious disposal by Tribunal and Appellate Tribunal:

1. Tribunal and AT shall deal with petition/appeal **as expeditiously as possible**, and every endeavor shall be made to dispose **within 3 months**
2. If not disposed within 3m, **record reasons** and P/CP may extend the period upto 90 days

Section 423- Appeal to SC

- Aggrieved person may, **within 60 days** of receipt of copy of order, file appeal with SC on "**Question of Law**"
- **Condonation** for delay - **60 days**

Section 424 - Procedure before Tribunal and AT

1. Not bound by procedure of CCP, 1908 but **guided by Principal of Natural Justice (PONJ - adequate notice, fair hearing and no bias)** and provisions of this Act, Rules and IBC.
2. Power of T/AT - Same power as vested in Civil Court w.r.t., [**PARCER2O (Spanish word for Bro!)**]
 - Requiring discovery or **Production** of docs.
 - Summoning and enforcing **Attendance** of any person and examination on **Oath**
 - **Requisitioning** any public record or document or a copy of such record or document from any office
 - issuing **Commissions** for the examination of witnesses or documents;
 - receiving **Evidence** on Affidavits
 - dismissing a **Representation** for default or deciding it ex parte;
 - setting aside any order of dismissal of any **Representation** for default or any order passed by it ex parte; **and**
 - any **Other** matter which may be prescribed.
3. Order of T/AT to be enforced as if it were a **decree of court**. It shall be lawful to send these orders for execution to court within the local limit of whose jurisdiction:
 - a. In case of co. - Registered office is situated
 - b. In case of person - Person resides/carries on business or work for gain
4. Proceeding of T/AT = Deemed judicial proceedings and T/AT = Deemed Civil Court

Section 425 - Power to punish for contempt of court

Same as that of High Court

Section 426 - Delegation of Power

T/AT may, by general or special order, direct any officer/employee/other auth. person to:

- **Inquire** into matter relating to petition/appeal and
- **Report** to it

<p><u>Section 427 - President, Members, officers, etc., to be public servants</u> P/CP/JM/TM - Deemed public servant u/s 21 of IPC</p>
<p><u>Section 428 - Protection of action taken in good faith</u> No suits, prosecution or other legal proceeding shall lie against:</p> <ul style="list-style-type: none"> • Tribunal, President, Mem. and other employees • AT, CP, members and other employees • Liquidator or any other person auth. by T/AT <p>w.r.t., loss or damage caused or likely to be caused by an act done in good faith.</p>
<p><u>Section 429: Power to seek assistance of Chief Metropolitan Magistrate, etc.</u></p> <div style="display: flex; align-items: center; justify-content: space-around;"> <div style="border: 1px solid black; padding: 5px; text-align: center;">Tribunal may, during WUP or IBC proceedings</div> <div>→</div> <div style="border: 1px solid black; padding: 5px; text-align: center;">In order to take custody of prop, BoA, other docs</div> <div>→</div> <div style="border: 1px solid black; padding: 5px; text-align: center;">Request in writing Chief MM/JM or District collector</div> <div>→</div> <div style="border: 1px solid black; padding: 5px; text-align: center;">To take possession of such prop, BoA, docs</div> </div> <div style="text-align: center; margin-top: 10px;"> ↓ <div style="border: 1px solid black; padding: 5px; display: inline-block;">On such req., auth. shall take possession and handover to NCLT</div> </div> <p>Act of CMM/CJM/DC under this section- Not to be questioned in any court</p>
<p><u>Section 430: Civil court not to have jurisdiction</u> (Ek baar yahan se pura bare act padhlo)</p> <div style="display: flex; justify-content: space-between;"> <div style="border: 1px solid black; padding: 5px; width: 45%;"> No civil court shall have jurisdiction to entertain any suit/proceeding w.r.t, any matter which T/AT is empowered to determine as per this Act/any other law and </div> <div style="border: 1px solid black; padding: 5px; width: 45%;"> no injunction shall be granted by any court or other authority w.r.t, any action taken by T/AT in pursuant to this Act/Law </div> </div>
<p><u>Section 431: Vacancy in Tribunal or Appellate Tribunal not to invalidate acts or proceedings</u> No act of T/AT shall be questioned/invalid on ground of existence of any vacancy/defect in its constitution.</p>
<p><u>Section 432: Right to legal representation</u> Party to proceedings - Appear either in person or authorise CA/CS/CMA or legal practitioner to present his case</p>
<p><u>Section 433: Limitation</u> Prov. of Limitation Act, 1963 shall apply to proceedings/appeals before T/AT</p>
<p><u>Section 434: Transition</u></p>

Chapter - SEBI Act, 1992 and SEBI (LODR) Regulations, 2015

AO	Adjudicating Officer
DAMFS	Destroyed, Altered, Mutilated, Falsified, Secreted
OOBH	Opportunity of Being Heard
IA	Investigating Authority
IPASM	Intermediaries or Person Associated with Securities Market
RSE	Recognised Stock Exchange

Introduction:

- SEBI was established in 1988 and got legal character in **1992**
- Prime **objectives** of the SEBI Act, 1992 are:
 - Protecting interests of **investors** in securities;
 - Promoting the **development** of the securities market, and;
 - Regulating** the securities market

Establishment (Sec 3)

- Body Corporate** (Perpetual Succession, Common Seal, Hold Property, Sue or be sued)
- Head Office - Nariman Point, Mumbai

Constitution (Sec 4)

- The general superintendence, direction and mgt. of affairs of Board shall vest in **Board members**
- SEBI Board consists of:

A Chairperson
(nominated by
CG*)

2 members -
Officers of
Ministry

1 member -
From **RBI**

5 members (atleast 3
Whole time) -
Nominated by CG*

*CG shall nominate a person of Integrity, Ability & Standing (IAS) who has

- Shown **capacity** in dealing with problems relating to securities market
- Special **knowledge** or experience in law, finance, economics, accounts, admin/other discipline

Terms of Office and other Conditions (Sec 5)

(1) Term of Office for Chairman & Whole-time members

- **5 years**
 - Eligible for reappointment
- Not hold office after the age of **65**

(2) CG shall have right to terminate - CP, 5 members (Appointed by CG)

↓
Any time before expiry of tenure by:

- (a) **Notice** ≥ **3months** in writing **OR**
- (b) 3 months **salary** in lieu thereof

(3) Right to **Relinquish** - Chairman

- All Other Members

3m notice in writing → CG

Removal of Members (Section 6)

CG shall have power to remove any member (after reasonable OOBH) if he **[I M OFF ABUSED]**:

Adjudicated
Insolvent

Declared of
Unsound **mind**

Convicted of **offence**
involving moral turpitude

has in the opinion of CG so **abused** his
position as to render his continuance in
office detrimental to the **public interest**

Meetings (Section 7)

- No. of times / Rules of meeting / Quorum - As may be prescribed
- If Chairman unable to attend meeting - Choose **member** (By and Amongst members present) to **Preside** over the meeting
- Decision by **majority**. If equal votes - Chairman/Presiding Officer - **Second/Casting Vote**

Members not to participate in the meeting in certain cases (Sec 7A)

A member who is:

- Director** of a company, and
- Has any **pecuniary interest** in a matter coming up for consideration at a meeting of SEBI

Shall **disclose** the nature of interest and **not participate** in any decision w.r.t that matter

Vacancies not to invalidate proceedings (Sec 8)

The following shall not invalidate proceedings of Board:

Vacancy in
SEBI

Defect in
constitution of SEBI

Defect in **appointment**
of member

Irregularity in procedure not
affecting merits of the case

Powers and Function of SEBI (Sec 11)**Duty:**

- Protecting interest of investors in securities;
- Promoting the development of securities market, and;
- Regulating securities market

Power of the SEBI:

(1) **Regulate** the business in **stock exchange** and other securities market

(2) Registering & **regulating** the working of:

- Person registered u/s 12(1)
- Venture Capital Fund (VCF)
- Collective Investment Scheme (CIS) including Mutual Fund

(3) **Promoting** and regulating self-regulatory organisation (AMBI, AMFI)

(4) **Promoting** - Investors Education

- Training of intermediaries

(5) **Prohibit** - Fraudulent & Unfair trade practices

- Insider Trading

(6) **Regulating** - Substantial acquisition of shares

- Takeover of company

(7) Call info, conduct - **Inquiry**, Inspection, Audit (Stock exch., MF, Intermediary, Associate person)

(8) For inquiry/investigation by SEBI, Call info from - Banks

- Other auth. constituted under CG/SG

(9) Call info/provide info for prevention/detection of violation of securities law from SEBI

counterparts - In India/ Outside India (Prior approval of CG)

(10) Powers as per SCRA, 1956

(11) Levying Fees & Conducting research for the purpose of this section

(12) Other prescribed function

Power to Inspect Listed co, etc.:

In case of a **Listed Co or a Public Company** which intends to get its securities listed, where Board has **RGTB** that such co. is indulged in:

- Insider Trading (IT)
- Fraudulent & Unfair trade practices (FUTP)

SEBI may undertake measures for inspection of books, register and other docs

Powers of Civil Court exercisable by SEBI - Similar to PARCERO (Refer Chapter 12 - NCLT)

Sec 11(4) - Powers of SEBI during Inspection or Inquiry

With an **intent to protect the interest of investors** or securities market → SEBI may, **during pendency of I/I or on Completion of such I/I**, pass the following orders [*I am SoAD Access Chingaya*]:

Suspend trading of any security in RSE

Restrain persons from **Accessing** securities market, and Prohibit any person associated with sec. market to buy/sell/deal in sec.

Suspend Office bearer of stock exchange/self-regulatory organisation

(e) **Impound** & retain - Proceeds of securities from transaction under investigation

(d) Direct any intermediary or associated person → Not to **Dispose** or alienate an asset forming part of transaction under investigation

(f) **Attach** (for <90 days) bank accounts or other property (so far as it relates to proceeds actually involved) of any intermediary or any person associated with securities market and involved in contravention of Act/Rules, etc.*

*Provided that - **Within 90 days** - Board to obtain confirmation of **Special Court** (Sec 26A). On such confirmation - Attachment to continue during pendency of proceedings

Note: Measures under clause (d), (e), (f) against listed co/public company intend to get listed may be taken only if insider trading/fraud involved.

Sec 11(5) - Disgorged Funds

Disgorged funds shall be **credited to IPEF (not IEPF)** & utilised by Board as per Regulation

Sec 11A - Regulation or prohibition of issue of prospectus, etc.

For the **protection** of investors, SEBI may:

- **Regulate** matters related to - issue of capital; transfer of securities & other incidental matters and manner of such disclosure
- **Prohibit** and **restrict** any co. from - issuing prospectus, offer docs or advertise soliciting public money.

Sec 11AA - Collective Investment Scheme (CIS)

(1) CIS means any scheme or arrangement (S&A) under which [**P MODI**]:

- i. Contribution made by investors are **Pooled & utilized** for the purpose of S&A
- ii. Contribution is made by investors with a view to receive:

Profit	Income	Produce	Property (movable or imm.)
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- iii. Property/Contribution/Investment - **Managed** on behalf of investors
- iv. Investors do not have control or management over **Day-to-day** operations of S&A
- v. Satisfies such **other** condition as may be specified

(2) Following S&A shall not be CIS:

Co - operative society	NBFC	Contract of Insurance	Pension Scheme / Insurance Scheme under EPF & Misc. Provision Act, 1952		
Deposits under Co. Act, 2013	Deposits accepted by Nidhi cos/MBS	Chit Business	Subscriptions to a Mutual Fund	Other notified by CG	

Deemed CIS: Any pooling of funds under any S&A, which is not registered with Board or is not covered in above exception, involving a **corpus amount of $> =$ Rs. 100 crores** or more shall be **deemed** to be CIS

Sec 11B - Power to issue directions & Levy Penalty

1. SEBI may issue directions, if after making **inquiry**, if it satisfied that it is necessary in the interest of investors or **orderly development** of securities market
 - a. to prevent **affairs** of any intermediary or persons u/s 12 from being conducted in manner **detrimental** to interest of investors or sec market or
 - b. to secure the **proper management** of any such intermediary or persons

Directions may be issued to persons u/s 12 or IPASM or company in respect of matter u/s 11A

2. SEBI may levy **penalty** (reason recorded) u/s 15A - 15H incl. 15EA, 15EB, 15HA, 15HAA, 15HB

Power to issue direction **includes power to order disgorgement** of amt of wrongful gains/loss averted

Sec 11C - Power of SEBI to order investigation

1. Grounds: SEBI may appoint a person to investigate affairs of IPASM if SEBI has RGTB that:
 - Transaction in securities are being dealt with in a manner **detrimental** to investors/securities market
 - IPASM has **violated** provisions of Acts/Rules/Regulation

2. Duties of Officers of IPASM:



3. Period of custody - **6 months**. May call for it if needed again.

4. Examination on oath: IA may examine on oath, following personnel of IPASM:

(a) Manager (b) MD (c) Officer/Employee

For this purpose, IA may require the person to appear before it **personally**5. Notes of examination - Taken down in writing

- Read over to and signed by - person examined

- May thereafter be used as evidence against him

6. On failure (w/o cause) of any person to:

- **Provide** books/records/other info to IA
- **Appear** before IA personally or answer any question
- **Sign** any notes of examination

Jail up to 1 year and/or
Fine up to Rs. 1 Crore + 5
lakhs/day

7. Search and Seizure:While in the course of Investigation, IA has RGTB books, register, etc. of IPASM shall **DAMFS**.

- IA may make **application** to Magistrate/Judge of designated court (Mumbai)
- For **order of seizure** of such records

After considering the application, **Judge may authorise** the IA to **Enter, Search and Seize**IA may seek **assistance** of police or officer of CG for such search/seizure

Such seizure shall NOT be authorised for Listed Company or Public company intending to get securities listed unless such co. indulges in insider trading or market manipulation.

8. Custody of impounded or seized docs - **Till conclusion of investigation**Sec 11D - Cease and Desist Proceedings

- If SEBI finds (after Inquiry) that a person has **violated/likely to violate** - Prov. of Act/Rules/Reg
- it may pass an order requiring such person to **cease and desist** from committing such violation

Such order shall not be passed for Listed Company or Public company intending to get securities listed unless **insider trading** or **Fraud** involvedSec 12 - Registration Certificate

1.

- Stock-Broker
- Sub Broker

- Share Trf. Agent
- Trustee of trust deed

- Banker to an issue
- Merchant Banker
- Underwriter

- Portfolio manager
- Investment advisor

Other intermediaries who may be associated with Securities market

Shall buy, sell or deal with securities as per T&C mentioned in **CoR** obtained from the Board

<p>2.</p> <table border="1" data-bbox="224 201 1380 331"> <tr> <td> <ul style="list-style-type: none"> • Depository • Participant • Custodian </td> <td> <ul style="list-style-type: none"> • Foreign Inst. Investor • Credit Rating Agencies • Other intermediaries who may be associated with Securities market </td> </tr> </table> <p>Shall buy, sell or deal with securities as per T&C mentioned in CoR obtained from the Board</p> <p>3. No person shall sponsor or carry on activities of:</p> <ul style="list-style-type: none"> • Venture Capital Fund • CIS including MF • Alternate Investment Fund • Business trust as defined u/s 2(13A) of Income Tax Act, 1961 <p>4. Application for COR → As prescribed</p> <p>5. Suspend or Cancel CoR → As per regulation after reasonable OOBH</p>	<ul style="list-style-type: none"> • Depository • Participant • Custodian 	<ul style="list-style-type: none"> • Foreign Inst. Investor • Credit Rating Agencies • Other intermediaries who may be associated with Securities market 	<p>Unless obtain COR</p> <p><u>Sec 12A - Prohibition of Manipulative and Deceptive Devices, Insider Trading and Substantial Acquisition of Securities or Control</u></p> <p>No person shall directly/indirectly do the following, in contravention of this Act/ Rules/ Regulations:</p> <ol style="list-style-type: none"> use any manipulative/deceptive device, in connection with issue/purchase or sale of listed sec. employ any device to defraud in connection with issue or dealing in listed securities; engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in listed securities engage in insider trading; deal in securities while in possession of material or non-public information or communicate such material or nonpublic information to any other person acquire control of any co. or securities > % of equity share capital of a listed sec. in contravention <p>Here, Listed Securities = Securities listed or proposed to be listed on a Recognised Stock Exchange</p> <p><u>Sec 13 - Grants by the CG</u></p> <p>CG may after due appropriation made by Parliament → Grant such sum to Board as it may think fit</p> <p><u>Sec 14 - Fund</u></p> <ul style="list-style-type: none"> • A fund called "SEBI General Fund" shall be constituted • Amount to be credited to SEBI General Fund: <ul style="list-style-type: none"> ◦ All grants/fees/charges received ◦ Sums received from other sources • Utilisation of sums in the fund <ul style="list-style-type: none"> ◦ Salaries/Remuneration of officers, employee, members ◦ Expense in discharge of function u/s 11 ◦ Expense towards purpose/object of this Act <p><u>Sec 15 - Accounts and Audit</u></p> <ol style="list-style-type: none"> Board to prepare annual FS → Manner as prescribed by CG + CAG Audit → CAG and Expense borne by Board Certified Accounts + Audit Report → Forwarded annually to CG → Lay before both HOP
<ul style="list-style-type: none"> • Depository • Participant • Custodian 	<ul style="list-style-type: none"> • Foreign Inst. Investor • Credit Rating Agencies • Other intermediaries who may be associated with Securities market 		

Summary of Penalties from 15A to 15HB:		
Sec	Kind of Failure:	Penalty
15A [Accounts]	a. Fails to furnish any document, return or report to the Board or furnishes or files false, incorrect or incomplete information, return, report, books or other documents. b. Fails to file any return or furnish any information, books or other documents within time specified or who furnishes or files false, incorrect, or incomplete info, return, report, books or other documents. c. Fails to maintain books of account or records.	Rs. 1 lakh + Rs. 1 lakh / day up to Rs. 1 Crore.
15B	If any person registered u/s 12 is required by the Act to enter into an agreement with his client , fails to enter into such agreement	Rs. 1 lakh + Rs. 1 lakh / day up to Rs. 1 Crore.
15C	If any listed co. or person registered u/s 12, after having been called upon by the Board, to redress grievances of investors , fails to redress such grievances within time specified by Board	Rs. 1 lakh + Rs. 1 lakh / day up to Rs. 1 Crore.
15D	If any person, who is: a. required u/s 12 to obtain a CoR for sponsoring or carrying on any CIS (incl. MF) - sponsors/carries on such activity w/o obtaining such CoR b. registered as a CIS u/s 12 but fails to a) comply with the T&C of CoR b) to make an application for listing of its schemes as provided for in the regulations governing such listing c) dispatch unit certificates of any scheme as per Regulations d) refund the application monies paid by the investors within the period specified in the regulations e) Invest money collected by such CIS as per regulations	Rs. 1 lakh + Rs. 1 lakh / day up to Rs. 1 Crore
15E	Where any AMC of a MF registered under this Act, fails to comply with any regulations providing for restrictions on activities of AMC, such AMC:	Rs. 1 lakh + Rs. 1 lakh / day up to Rs. 1 Crore
15EA	Where any person fails to comply with the regulations in respect of, • alternative investment funds, • infrastructure investment trusts, and • real estate investment trusts or or fails to comply with the directions issued by the Board, shall be liable to	Rs. 1 lakh + Rs. 1 lakh / day up to (Higher of Rs. 1 Crore or 3 times of the gain made out of such failure)
15EB	Where investment adviser /research analyst fails to comply with regulation or directions issued by the Board, such adviser or analyst	Rs. 1 lakh + Rs. 1 lakh / day up to Rs. 1 Crore
15F	<u>If any person, who is registered as a stockbroker under this Act:</u> a) fails to issue contract notes in the form and manner specified by the stock exchange of which such broker is a member	Rs. 1 lakh +Rs. 1 lakh / day up to Rs. 1 Crore

	<p>b) fails to deliver any security or fails to make payment of the amount due to the investor as per the regulations</p>	Rs. 1 lakh + Rs. 1 lakh / day up to Rs. 1 Crore
	<p>c) charges an amount of brokerage which is in excess of the brokerage specified in the regulations</p>	Rs. 1 lakh + Rs. 1 lakh / day upto (5x brokerage charged > specified brokerage)
15G	<p>If any insider who:</p> <p>a. either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price-sensitive information; or</p> <p>b. communicates any unpublished price-sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or</p> <p>c. counsels, or procures for any other person to deal in any securities of any body corp. on the basis of unpublished price-sensitive information</p>	Rs. 10 lakhs up to (Higher of Rs. 25 Crores or 3X amount of profit made)
15H	<p>If any person, who is required under this Act/rules/regulations, fails to:</p> <p>a. disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or</p> <p>b. make a public announcement to acquire shares at a minimum price; or</p> <p>c. make a public offer by sending letter of offer to SHs of concerned co.;</p> <p>d. make payment of consideration to the shareholders who sold their shares pursuant to letter of offer</p>	Rs. 10 lakhs up to (Higher of Rs. 25 Crores or 3X amount of profit made)
15HA	<p>If any person indulges in fraudulent and unfair trade practices relating to securities</p>	Rs. 5 lakhs up to (Higher of Rs. 25 Cr. or 3X profit made)
15HAA	<p>Any person, who:</p> <p>a. knowingly DAMFS any info., record, document (including e-records) required to be maintained as per the Act, so as to impede, obstruct, or influence the III, Audit, or proper administration of any matter within the jurisdiction of Board.</p> <p>b. without being authorised to do so, access or tries to access, or denies or modifies access parameters, to the regulatory data in the database;</p> <p>c. without being authorised to do so, downloads, extracts, copies, or reproduces the regulatory data maintained in the system database;</p>	Rs. 1 lakh + Rs. 1 lakh / day up to (Higher of Rs. 10 Crores or 3X amount of profit made)

	d. knowingly introduces any computer virus or other contaminant into the system database and brings out a trading halt; e. without authorisation disrupts the functioning of system database; f. knowingly damages, destroys, deletes, alters, diminishes in value or utility, the regulatory data in the system database; or g. knowingly provides any assistance to or causes any other person to do any of the acts specified in clauses (a) to (f)	
15HB	Person fails to comply with any provision of this Act/Rules/Reg/directions issued by the Board for which no separate penalty has been provided	Rs. 1 lakh + Rs. 1 lakh /day up to Rs. 1 Crore

Sec 15I - Power to Adjudicate

For adjudging a person u/s 15A - 15HB (excluding 15HAA):

- Board shall appoint a person for inquiry (\geq Division Chief) - Adjudicating Officer.
- AO shall have the power:

Summon Attendance

Produce Docs

Satisfied about non-compliance - **Impose** penalty

- Board may **enhance penalty**: If Board considers that order passed by AO is **erroneous** to the extent it is **not in interest of sec. market**, it may, after inquiry, pass an **order enhancing quantum** of penalty.

Provided that **Reasonable OOBH** is given.

Provided further that, no order enhancing penalty can be passed **after** expiry of:

- 3 months from **date of order** passed by AO or
- disposal of **appeal** u/s 15T

Earlier

Sec 15J - Factors to be considered while deciding Quantum of Penalty

Amount of Disproportionate **gain/unfair advantage** as a result of default

Amount of **loss** caused to **investors** as a result of default

The **repetitive** nature of default

Sec 15JA - All penalties to be credited to Consolidated Fund of India**Sec 15JB - Settlement of Administrative and Civil Proceedings**

- Person, against whom proceeding **initiated/may be initiated** u/s 11, 11B, 11D, 12(3), 15I, may file **application** to Board proposing **settlement**
- Board **may** agree for settlement:
 - After considering - **Nature, Gravity** and **Impact** of Defaults
 - Agree for settlement on payment of such sum (as per Regulation)
- No appeal** u/s 15T against order in this section

- Settlement amount
Less: Disgorged amount
Less: Legal Cost

→ **Consolidated Fund of India**

SECURITIES APPELATE TRIBUNAL (SAT)

Sec 15K - Establishment: CG to establish SAT

Section 15L - Composition:

Presiding Officer (PO)

Judicial Member
(At least 1)

Technical Member
(At least 1)

Sit at **Mumbai** and other places to be notified. PO may transfer JM & TM from one bench to another

Section 15M - Qualification

Presiding Officer

- Judge of SC, or
- CJ of HC, or
- Judge of HC > = 7 years

Judicial Member

Judge of HC > = 5 years

Technical Member

- Secretary or Additional Secretary of Ministry/CG dept or equivalent position
- Person of proven IAS having knowledge/professional exp. >= 15 years in finance sector (Sec. mkt, Insurance, PFs, etc)

Appointed by CG in consultation with CJI

Appt. by **Search Cum Selection Committee**

Section 15N - Tenure (PO, JM, TM)

- **5 years**
- Eligible for reappointment max. 5 years
- No office after he has obtained **age of 70 years**

Composition

- **Chairperson** → PO of SAT
- **3 members:** Secretary, Dept of:
 - Economic Affairs (Convenor)
 - Financial Services
 - Legal Affairs

Section 15MC - Validity of Appointment

1. No appointment of members of SAT invalid due to vacancy/defect in constitution of the committee
2. Person disqualified from becoming member of SAT:
 - **Member** or part time member of - SEBI or IRDA or PFRDA
 - Person at **senior management** level equivalent to Executive Director of Board

Disqualified during such **service + 2 years** from ceasure

Section 15O - Salary - As may be prescribed

Section 15P - Vacancies in the Office of Members

1. **Vacancies** for reasons other than temporary absence (i.e., in case of permanent vacancy)
 - **Filed by CG**
 - Proceeding may be continued from the stage where vacancy filed (i.e., not from start)
2. In case of vacancies, in the office of **presiding officer** only (due to **death, resignation** or otherwise):

Senior most judicial member → To act as PO until new PO appointed as per this Act

Section 15Q - Resignation and Removal**Resignation:**Notice in **Writing**

PO/Any other member -----> Addressed to **CG**
Resign from office

Unless permitted by **CG** to relinquish sooner, hold office, until:

- 3m from date of **receipt** of notice
- Duly appointed **successor** enters office
- Expiry of his **term** of office

Earliest**Removal:****CG** may (after **order** by **Judge of SC**), remove a member if he:is/was
InsolventPhysically/**mentally**
incapable of acting
as a memberConvicted of
offence
involving MT**Abused** position to render
continuation detrimental
to public interestAcquired **financial**
interest - Prejudicially
affects functions**Sec 15QA:** Appt, Qualification, etc of Members to be governed by Sec 184 of Finance Act, 2017**Sec 15R:** Orders constituting SAT to be **FINAL** and not to invalidate its proceedings**Sec 15S:** Staffs - **CG** to provide employees to discharge duty under general supervision of PO**Sec 15T: Appeals to SAT**Question of **Law**

Any person aggrieved by order of -----> **SAT** -----> **SC**
 Board/AO/IRD/PFRA 45 days (+Ext.) (6m) 60+60 (Sec 15Z)

- On receipt of such application, SAT shall, after reasonable **OOBH**, confirm, modify or set aside the order.
- **Copy** of order to all parties involved
- Dealt with as expeditiously as possible. Endeavour to **dispose within 6m**.

<u>Sec</u>	<u>Provision:</u>
15U	<u>Procedures and Power of SAT:</u> <ul style="list-style-type: none"> • Not bound by CCP. Guided by PONJ • Power vested by Civil Court - PARCERO • Diff. of opinion - Refer case to PO who may hear himself or refer. Then, decide by majority
15V	Right to Legal Representation (of Appellant)
15W	Limitation Act, 1963 shall be Applicable to Appeal made to SAT
15X	PO, Members, Officers, Employee of SAT to be Public Servant (Sec 21 of IPC)
15Y	Civil Court to have no jurisdiction
15Z	<u>Appeal to SC</u> - Against order of SAT to SC , only if question of Law . Within 60 days (+60 days)

Section 16 Power of CG to issue direction

1. Board shall be bound by the directions of CG on questions of policy
2. Board shall be given opportunity to **express views** before any directions
3. Decision of **CG** as on one is a question of policy or not is **final**

Section 17: Power of CG to supersede Board (*Supersede means to take position of others*)

If at any time, CG is of the **opinion** that:

1. On account of **grave emergency**, Board is **unable to discharge duties** as per provision of this act
2. Board has persistently made **default** in complying with **directions** issued by CG or discharge of its duties/ functions **and** as a result of such default **financial position** of board has deteriorated
3. Circumstance exists which renders it in **public interest** to do so

CG may, by notification, **supersede** Board for **not > 6 months**

Effect of such notification

Upon publication of such notification superseding the Board:

1. **Members** - All members shall as on date of suppression **vacate** their office
2. **Power** - All power, function & duty of Board to be discharged by **person as CG** may direct till board is reconstituted.
3. **Property** - All prop owned/controlled by Board shall **vest** with CG until board is reconstituted

On expiry of period of suppression, CG may **reconstitute** the Board by **fresh appointment** and any person who vacated their office shall **NOT be deemed disqualified** during such reappointment.

Notification to be laid before HoP:

CG shall cause a **copy** of notification issued, **full report of action** under this section and **circumstances** leading to such action to be laid before each HOP

Section 18: Returns and Reports

1. Board to furnish to CG returns and statements as may be specified
2. **Within 90 days of end of FY** - Submit to CG report showing true and full activities during FY
3. CG to lay such report before HOP

Section 20 - Appeals - Person aggrieved by the order of board made before commencement of Securities Law Second Amendment Act, 1999 may file appeal with CG in manner prescribed

Section 20A - Bar on jurisdiction - Civil court not to have jurisdiction

Section 22 - Members, Officers, Employee to be Public Servant (as per Section 21 of IPC)

Section 23 - Protection for act done in Good Faith

No suits, prosecutions or other legal proceedings shall lie against:

1. CG or its officers
2. Board or its officers/employer

for anything done/intended to be done in **good faith** under this Act/Rules/Regulations

Section 24: Offences

Without prejudice to any award of penalty by board/AO:

Contravention	Imprisonment	And/or	Fine
If a person contravenes /attempts to contravene provision of act/rules/regulations	Up to 10 years		Upto Rs. 25 crores
If a person fails to pay penalty imposed by board/AO or fails to comply with any directions or orders	1 month to 10 years		Upto Rs. 25 crores

Section 24B: Power to grant Immunity

CG may:

1. On recommendation of board **AND**

2. Alleged person has made true and full disclosure

grant **immunity** to any person from:

1. prosecution of any offence or

2. from imposition of penalty

Provided that **no such immunity** should be granted **if** proceedings for **prosecution initiated** before date of receipt of application

Withdrawal of immunity by CG

1. If such person **fails to comply with T&C** on which immunity was granted

2. CG is satisfied that person had given **false evidence**

Note - Recommendation of SEBI is required to grant immunity and recommendation shall not be binding on CG (Refer Q 12)

Section 24A - Composition of certain Offences

Notwithstanding CCP, 1973, any offence punishable under this Act, not being offence punishable with imprisonment only, or with imprisonment and also with fine, may **before/after institution** of proceeding, be **compounded by a SAT or a court** before which such proceedings are pending

Section 26: Cognizance of Offence:

No court shall take cognizance of any offence punishable under this Act/Rules/Regulations made thereunder, save on a complaint made by the Board

Special Courts (SpC)

Section 26A: Establishment:

1. For purpose of **speedy trial** of offence under this act, CG may by notification, establish SpC

2. SpC shall consist of **single judge** appointed by CG + CJ of HC

3. **Qualification** of Judge of SpC - At least **Session judge** or **additional Session Judge**

Section 26B: Offence triable by SPC

Notwithstanding anything contained in CCP, 1973, all offences under this Act shall be taken cognizance of and **tried by the Special Court** established for the area in which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified by High Court concerned.

Section 26C: Appeal:

High Court may exercise power as per CCP 1973 as if SpC were court of session in his jurisdiction

Section 26D: Application of CCP,1973:

SpC deemed court of session

Person conducting prosecution deemed public prosecutor. CCP 1973 is applicable to proceedings of SpC

Section 27 Contravention by Companies - Same as every Act**Section 28A: Recovery of Amount:**

If a person fails to:

pay penalty under this act	comply with directions of Board for return of monies or for disgorgement order	Fails to pay any dues to the Board
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Recovery officer (officer of Board empowered by order) may **draw up a statement** specifying the amount and proceed to recover such sum in following manner:

Attachment and sale of person's property (movable or immov.)	Attachment of person's bank A/C	Arrest of such person & his detention in prison	Appointing a person for mgt. of person's property
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and provision of **Income Tax Act, 1961** shall apply

Recovery officer is empowered to seek **assistance** of **local administration** for such recovery.

Explanation - For purposes of this sub-section, the person's movable or immovable property or monies held in bank accounts **shall include** any property or monies held in bank accounts **on or after the date** when the amount specified in certificate had become due, which has been **transferred directly or indirectly** by the person to his **spouse** or **minor child** or **son's wife** or **son's minor child**, **otherwise than for adequate consideration**.

So far as movable or immovable property or monies held in bank accounts so transferred to his minor child or his son's minor child is concerned, it shall, even after the date of attainment of majority by such minor child or son's minor child, as the case may be, continue to be included in the person's movable or immovable property or monies held in bank accounts for recovering any amount due from the person under this Act.

Section 28B - Refer Question 18 of QB for comprehensive understanding

SEBI (LISTING OBLIGATION AND DISCLOSURE REQUIREMENT), 2015

(Notified - 2nd sept, 2015 by SEBI)

Objective: To consolidate all norms relating to listing of different segment of Capital Market

Applicability: (Amendment)

To the **Listed Entity** who has listed any of the following **Designated securities** on RSE(s):

- specified securities listed on **main board** or **SME Exchange** or **Innovators Growth Platform**;
- non-convertible **securities**
- Indian Depository Receipts;
- Securitized debt instruments;
- security receipts**;
- units issued by mutual funds;
- any other securities as may be specified by the Board

Provisions of these regulations which become applicable to listed entities on the **basis of market capitalization/outstanding listed debt securities** criteria **shall continue to apply** to such entities **even if they fall below such thresholds**.

Regulation 17: Board of Directors

Composition:

- Optimum** composition of Executive and Non-Executive Directors (NED)
- NED to be **not less than 50%** of BoD (i.e., if total directors = 6, NED cannot be less than 3)
- At least 1 Women Director
- No. of Independent directors

If chairperson of BOD is a NED - At least **1/3rd** to be ID

If Chairperson is

- Not** a regular NED **or**
 - Is a regular NED but is a Promoter of the entity **or** ***Related to promoter** or person occupying mgt. position
- At least **$\frac{1}{2}$** of BoD to be ID

***If promoter** is a company, "Related to promoter" would mean directors, nominees and employees. However, in case if promoter is a listed entity, ID not to be considered as related.

- Top **2,000 companies** shall comprise of **not < 6** directors
- Top **1,000 companies** to have **at least 1 independent woman director**

Top companies to be identified basis market capitalization as at end of last financial year

Age

- All directors → Minimum 21 years
- NED **Max. 75** years (If > 75 years, **SR** and Explanatory statement)

Board Meeting:

- At least **4 times** in a year
- Maximum gap of **120 days**
- **Quorum** (for top 2000 companies) - **1/3rd of total strength** or **3 directors** whichever is **higher including at least one ID**
- Participation by AV means to be included for quorum

Review of Compliance Report:

Board shall **periodically review** the compliance report pertaining to all laws applicable to listed entity, **prepared by the company and** steps taken to rectify instances of non-compliance

Evaluation of ID:

The evaluation of ID shall be done by the **entire** BoD which shall **include**:

- **performance** of the directors; and
- fulfillment of the **independence criteria** as per this Regulation

Provided that in the above evaluation, the **directors who are subject to evaluation shall not participate.**

Regulation 17A: Maximum Number of Directorship - Applicable only to directorship of listed companies:

Max no. of directorships, including **alternate directorships** that can be held by them **at any time**:

1. **Director** in listed entities - **Max 7** (w.e.f. 1st April, 2020) (Note - Limit was 8 from 2019 to 2020)
2. **ID** in listed entities - **Max 7**
3. If **MD/WTID** in any Listed entity, then **ID** in **max 3** listed entity

In this section, listed entity shall only mean those entity whose **equity** is listed on stock exchange

Regulation 18 Audit Committee - Company will form a qualified and independent Audit CommitteeRegulation 24: Corporate Governance w.r.t, Subsidiary of Listed company

1. At least **1 ID** on BoD of listed entity should be **director** on board of unlisted "**Material Subsidiary**"

"Material subsidiary" means a subpy whose **income/net worth is > 20%** of consolidated income/net worth of company in immediately preceding accounting year

2. The **Audit Committee** of listed entity shall **review financial statement** of unlisted ~~material~~ subsidiary company, in particular, investment made by subpy co.
3. **Minutes** of BoD meeting of unlisted ~~material~~ subsidiary - Placed for review before Board of listed company
4. The management of a unlisted subsidiary shall bring to the notice of board of listed entity statement of all **significant transactions and arrangement** entered into by Unlisted ~~material~~ subpy company

Significant transaction & arrangement → Individual transactions **> 10%** of total I/E/A/L of

unlisted subsidiary for the immediately preceding accounting year.

5. Listed company not to **dispose** of shares in **material** unlisted subsidiary company resulting in reduction of SH to **<= 50% or cease to exercise control** over subdy **w/o passing special resolution** in GM (except scheme approved by court or tribunal or approved resolution plan u/s 31 of IBC + Event disclosed to RSE within 1 day of RP being approved)
6. Selling or disposing or leasing **assets amounting > 20%** of total asset of **material** subdy shall require prior approval of shareholders by a **special resolution** (except one scheme approved by Court/Tribunal or RP + Event disclosed to RSE within 1 day of RP being approved)
7. Where a listed entity has a **listed subsidiary**, which is itself a holding company, the prov. of this regulation shall apply to the listed subsidiary in so far as its unlisted subsidiaries are concerned.

Summary Da Summary!

Material Subsidiary:

1. One ID to be director
2. Dispose shares < = 50% or lose control (SR)
3. Dispose asset > 20% of total (SR)

Unlisted Subsidiary (either material or not):

1. AC to review FS
2. Board to review Minutes
3. Significant transaction and arrangement

Regulation 26: Restriction on number of Memberships (of various committees)

1. Not be member in **> 10 comm.** or act as **CP of > 5 comm.** across all **listed entities** in which he is a director.

The no. of 10/5 above shall be calculated as follows:

- a. **Include - Public limited companies**, whether listed or not
- b. **Exclude - All other companies** including Pvt. limited companies, Foreign company, **high value debt listed entity** and Section 8 co.;
- c. **Include** chairpersonship and membership of **Audit Committee** and **SRC alone**. Exclude other committees.

2. Director to **inform listed entity** about the committee positions he or she occupies in other listed entities.

Various disclosure

1. Accounting Treatment - When in preparation of FS, a treatment different from the **AS** as applicable - Explanation of the same in FS is required
2. Proceeds from IPO:
Where money is raised through IPO, **disclose** to the **audit committee:**
 - a. the **uses**/application of funds - Major category wise (Quarterly declaration)
 - b. On an annual basis - **Deviation** (Certified by statutory auditors)
 - c. Monitoring agency report to audit committee
3. Remuneration: All pecuniary relationship of **NED** vis-à-vis Co. to be **disclosed** in **annual report**

4. Management discussion & analysis report - Include in **Annual Report** (within competitive limits)

Industry structure and development	Opportunity and threats	Risk and concerns	Outlook
Discussion on financial performance	Segment wise product wise performance	Internal control system and adequacy	Mat. development in HR/industrial relation

5. Biz. Responsibility Statement to be included in Annual Report - Showing steps taken from **Environment, Social and Governance** perspective6. Disclosure in case of appt./reappt. of director:

Brief Resume	Nature of expertise	Name of co. in which he holds dir./membership	Shareholding in the co. (in case of NED)
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7. CEO and CFO shall **certify** to board that FS/Consolidated FS statement is **true and correct**Type of committees under LODR1. Audit committee:

Listed entity should have **qualified and independent** audit committee

- Min. 3 members
- **At least** 2/3 to be **independent** (In case of outstand SR equity shares, all directors = ID)
- All - Financially literate. **At least 1** - Accounting or Financial management expertise
- **Chairperson to be independent director** and present in AGM to answer questions
- CS of company to be secretary to AC
- AC may, at its own discretion, invite:

<ul style="list-style-type: none"> ○ Head of finance/finance director ○ Head of Internal audit ○ Representative of stat. auditor 	To be present in ACM
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Meeting of Audit Committee

- At least **4 times** in a year
- Max. gap **120 days**

Quorum - 1/3rd of members or **2 members** whichever is **higher** (**At least 2 ID mandatory**)

Power of AC:

Investigate any activity within its term of reference	Seek info. from employee	Obtain outside legal/prof. advice	Secure attendance of outsiders with relevant expertise
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Comparison of Audit Committee as per LODR vs Sec 177 of Companies Act, 2013

Particulars	As per LODR	As per Sec 177 of Co. Act, 2013
Applicable to	All listed companies	All Listed Companies Unlisted Public Co. with: <ul style="list-style-type: none"> • Paid up share capital ≥ 10 crores or • Outstanding loans, debentures, deposits > 50 crore or • Turnover ≥ 100 crore *Limit once applicable to - Apply for 3 consecutive years

Min. no. of directors	3	3
Min. Indep. Dir	2/3 rd	Majority
Financial Literacy	All (At least 1 expert)	Majority including chairperson - Ability to read & understand FS
Chairperson	ID + Present at AGM	Ability to read & understand FS
Secretary	CS of co. to be the secretary	No such provisions
Meetings	At least 4 times in a year with a maximum gap of 120 days	
Quorum	2 or 1/3 rd , whichever is higher with minimum 2 ID to be present	
Additional requirements	The committee may invite finance executives to the meeting.	

2. Nomination and Remuneration Committee (NRC):

	<u>SEBI LODR</u>	<u>Companies Act, 2013 (Sec 178)</u>
Constituted by:	Board of Directors	Board of Directors
No. of directors	At least 3	3 or more NEDs
ID	At least 2/3rd	Not less than 1/2
Chairperson	Must be an ID	No such provision
Quorum	1/3 rd of member or 2 member whichever is higher (At least 1 ID mandatory)	
Meeting	At least 1 in a year	
Common Points:	1. Chairperson to attend AGM to answer SH queries (not necessarily himself) 2. CP of Listed entity (whether ED/NED) may be appointed as member of NRC but shall not chair the NRC	

3. Stakeholder Relationship committee

Constituted to look into various aspects of interest of SH, debenture holder and other secured holders.

- At least 3 directors
- At least 1 ID
- Chairperson to be **NED (not ID)** and to be **present** at AGM
- BoD to decide **other members** of SRC
- **Meets at least 1 in a year**

4. Risk management committee (RMC) [Amendment] - Applicable to top **1,000** companies

- Constituted by BoD.
- Minimum 3 members + Majority to be member of BoD
- **At least 1 ID**. In case of outstanding SR Equity shares **>= 2/3rd IDs**
- CP - To be a director and Senior executives of co. may be members
- Meet at least **twice** in a year

- **Quorum** - 1/3rd of total or 2 members, whichever is **higher** (at least 1 director to attend)
- Max **gap** between two consecutive meeting - **180 days**
- BoD to define roles and responsibility of RMC
- RMC shall have powers to seek info. from any employee, obtain outside legal or other professional advice and secure attendance of outsiders with relevant expertise, if it considers necessary.

Summary of all committees as per SEBI LODR:

	Audit Committee	NRC	SRC	RMC (App. to Top 1,000 co.)
Number of members	Minimum 3	At least 3, All NED	Min. 3 directors	Min 3 members . (Majority - Dir.)
Number of ID	2/3rd	At least 2/3%	At least 1	At least 1*
Chairperson	ID	ID	NED	Director
Meeting	At least 4	At least 1 in a year	At least 1 in a year	At least 2 in a year
	Max gap 120 days			Max gap 180 days
Quorum	Higher of 1/3rd or 2 members	Higher of 1/3 rd or 2 members	Not mentioned in Regulation	Higher of 1/3 rd or 2 members
	At least 2 ID mandatory	At least 1 ID		At least 1 Dir.
Additional Points	All Members - Financial Literate At least 1 member - Financial Mgt. expertise	Chairperson of co. may be appointed as member but not chair NRC	This committee looks into complaints of the investors	Senior Executives (Non-director) may be a member

* In case of outstanding SR equity shares, RMC shall have minimum 2/3rd IDs

Quarterly Compliances:

Within ___ days from end of each quarter	Statement / Reports to be filed with RSE by Listed Entity
21 days	Report on Corporate Governance in format specified by BOD
21 days	Statement showing number of investor complaint : 1. Pending at the beginning of the quarter 2. Received during the quarter. 3. Disposed of during the quarter. 4. Remaining unresolved during the quarter
21 days	Statement showing holding of securities and shareholding pattern separately for each class of securities. (Also, to be disclosed 1 day prior to listing and within 10 days of any capital restructuring scheme of listed entity resulting in change >2% of total PUSC)

45 days (other than last quarter)	Quarterly and YTD standalone financial statement
For such period till which the issues proceeds are fully utilized or purpose achieved	Quarterly statement for public issue, right issues, preferential issues , etc. a. indicating deviations in the use of proceeds from the objects stated in offer documents or ES to the notice of GM b. indicating variations (category wise such as Capex, Sales and Marketing, working capital, etc.) between projected utilization of fund made in Offer Document vs actual utilization of fund
Prior intimations to RSEs:	
Intimation to RSE at least ____ days before meeting (excl. date of intimation & date of meeting)	Where the following proposal is due to be covered in the BOD meeting:
2 working days	<ul style="list-style-type: none"> Proposal for buyback of securities Proposal for voluntary delisting Fund raising by way of FPO, ADR, GDR, Convertible Bonds, Debt issue, preferential issues, etc. Declaration / Recommendation to declare dividend Issuance of convertible securities incl. convertible debentures. Declaration of bonus securities
5 days	Financial Results viz. quarterly, half yearly, or annual
7 working days prior to record date	<p>Notice of Record date and the purpose of record date</p> <p>Record date could be for - Dividend, Rights or bonus issue, conversion of debenture, etc., corporate actions such as merger, demerger, or other purpose as specified by stock exchange</p> <p>Listed entity to declare dividend and/or cash bonus at least 5 w. days (excl. date of intimation and record date) before record date</p>
11 working days (don't exclude day of intimation and BoD meeting here)	<ul style="list-style-type: none"> Alteration in form of securities or rights of holder thereof Alteration in date on which the interest or redeemable amount of debenture will be payable
Annual Compliances:	
Time Limit	Compliance with Stock Exchange
Within 60 days from end of FY	Entity to submitted AUDITED standalone financial results for the FY along with audit report and Statement on Impact of Audit Qualificatn (applicable for audit report with modified opinion)
Not later than the day of commencement of dispatch to SH	Submit to stock exchange + Publish on website - A copy of annual report sent to shareholders along with notice for AGM
Within 48 hours of AGM	In the event of any changes to Annual Report , revised copy along with detailed explanation for such changes

Role of Compliance Officer

- (1) A **listed entity** shall appoint a **qualified CS** as the compliance officer.
- (2) The compliance officer of the listed entity shall be **responsible** for-
- ensuring conformity with the **regulatory prov.** applicable to listed entity in letter and spirit.
 - co-ordination with & **reporting** to Board,
 - ensuring that correct procedures have been followed that would result in **correctness** of info., filed by the listed entity under these regulations.
 - monitoring email address of **grievance** redressal division

Disclosure Requirements

Disclosure about relationship between directors inter se shall be made in the:

Annual Report	Notice of appt. of director	Prospectus	Letter of offer for issuance	Related filings made to RSE where co. is listed
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Note:

- Where there is any change in the content of website of a listed entity, it shall update the same in its website within 2 days (for e.g., - address of the entity)

The following disclosures shall be made in the section on the corporate governance of the annual report:

Stakeholders' relationship committee

- name of the non-executive director heading the committee;
- name and designation of the compliance officer;
- number of shareholders' complaints received during the financial year;
- number of complaints not solved to the satisfaction of shareholders;
- number of pending complaints.

Risk management committee:

- brief description of terms of reference;
- composition, name of members and chairperson;
- meetings and attendance during the year;

Chapter 1 – Foreign Exchange Management Act, 1999

[Effective from 1st June, 2000]

"No one studies this chapter; everyone regrets not studying this chapter!"

Short forms used:

AD	Authorized Dealer	Fin Sec	Financial Securities
AIFI	All India Financial Institution [NABARD/EXIM/SIDBI/NHB]	FTP	Foreign Trade Policy
AP	Authorized Person	FTZ	Free Trade Zones
BOA	Branch, Offices and Agencies	GCP	General Corporate Purpose
BOE	Bill of Entry	IC	Indian Currency
BOE	Bills of Exchange	IDERA	Irrevocable Deregistration and Export Request Authorisation
CAT	Capital Account Transaction	IDPMS	Import Data Processing and Monitoring System
CCPS	Compulsorily Convertible Preference Shares	IOSCO	International Organization of Securities Commissions
CDF	Currency Declaration Form	LIBOR	London Inter Bank Offered Rate
CMP	Custom Manual Ports	LoC	Letter of Credit
CUAT	Current Account Transaction	LoU	Letter of Undertaking
DGCA	Director General of Civil Aviation	LRS	Liberalised Remittance Scheme
DGFT	Directorate General of Foreign Trade.	N&B	Nepal and Bhutan
DSIM	Department of Statistics and Information Management	NCD	Non-Convertible Debentures
ECB	External Commercial Borrowing	NoC	No Objection Certificate
EEFC	Exchange Earners' Foreign Currency	ODI	Overseas Direct Investment
EHTPs	Electronic Hardware Technology Parks	PRI	Person Resident In India
FATF	Financial Action Task Force	PROI	Person Resident Outside India
FC	Foreign Currency	RFC	Resident Foreign Currency Account
FCCB	Foreign currency convertible bond	SEZ	Special Economic Zones
FCEBs	Foreign Currency Exchangeable Bonds	SOP	Standard Operating Procedure
FDIs	Foreign Direct Investment	STPs	Software Technology Parks
FEMA	Foreign Exchange Mgt. Act, 1999	TC	Travellers' cheque
FEV	Full Export Value	TCA	Trade Control Authority
Forex	Foreign Exchange	UE	Untraceable Entities
Forse	Foreign Securities	WCP	Working Capital Purpose
FPI	Foreign Portfolio Investors		

Purpose of the Act:

An Act to **consolidate** and amend the law relating to foreign exchange with the **objective** of:

- **facilitating** external trade and payments and
- for **promoting** the orderly **development** and **maintenance** of forex market in India

With liberalization of Indian economy in 1991, the flow of Forex into India increased thus increasing the Foreign Exchange Reserve (FER) substantially. This act enables mgt. of FER for the country.

Enforcement of the Act - Directorate of Enforcement (ED)

Forex Regulation Act 1947, 1973 vs FEMA 1999:

	<u>FERA</u>	<u>FEMA</u>
Objective of Act	Conserve Forex	Promote and develop the forex
PRI	Based on citizenship	Based on stay in India
Strictness	Forex transaction is prohibited unless permitted	Forex transaction is permitted unless restricted
Mens-rea (guilty mind)	Presumption of existence of mens-rea	Mens-rea not presumed. Responsibility of prosecution to prove
Compounding of offence	Not allowed	All offences are compoundable

Broad Division of Act:

Preliminary [Sec 1-2]	Reg and Mgt. of Forex [Sec 3-9]	Authorised Person [Sec 10-12]	Contravention and Penalty [Sec 13-15]	Adjudication and Appeal [Sec 16-35]	Directorate of Enforcement [Sec 36-38]	Misc. [Sec 39-49]
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Sec 1: Applicability

This Act extends to **whole of India**. Also applies to all BOA **outside India** owned or controlled by **PRI**

Sec 2: Definition

- Authorised Person [Sec 2(c)] means an:

Authorised Dealer (AD)	Money Changer	Off-shore banking unit	Other person auth. u/s 10 to deal in Forex or Forse
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- Foreign Currency [Sec 2(m)] means any currency other than Indian Currency

- Foreign Exchange [Sec 2(n)] means Foreign Currency and includes:

Deposits, credits and bal. payable in any FC	Draft, TC, LoC, BoE drawn in IC but payable in FC	Drafts, TC, LoC, BoE drawn by Banks or Person outside India but payable in IC
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- Foreign Security [Sec 2(o)] means:

- Any **security** in form of - Stock, shares, bond, debentures or other inst.
- **Denominated** in FC,
- And includes - Sec. denominated in FC but redemption or returns (int./div) payable in IC

- Capital Account Transaction [Sec 2(e)]: means a transaction which **alters**:

- Asset or Liabilities (incl. contingent liability) o/s India of PRI
- Asset/Liability in India of PROI

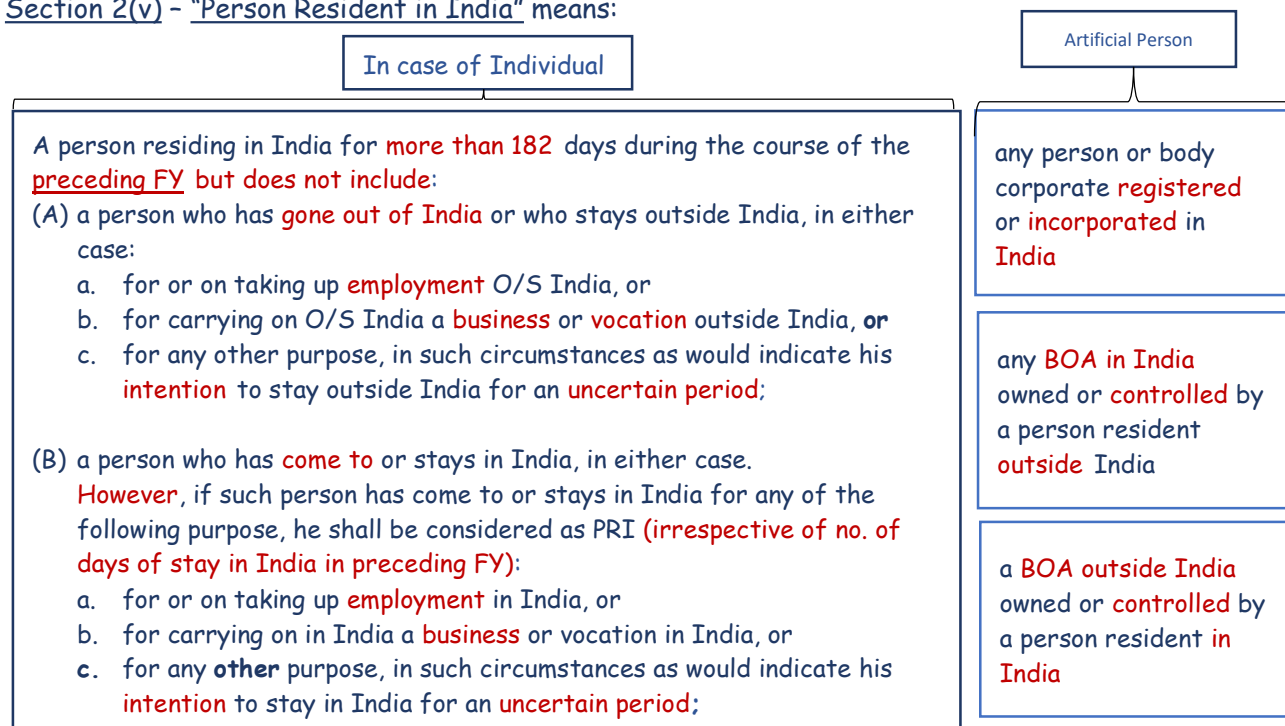
- Current Account Transaction [Sec 2(j)] means transaction other than CAT
Without prejudice to the generality of the definition, CUAT includes:

Payments w.r.t., foreign trade, current business, services, & short-term banking & credit facility in OCOB	Payments w.r.t., interest on loans & as net income from investments	Remittances for living expenses of parents, spouse and children residing abroad	Expense w.r.t. foreign travel, education and medicare of parents, spouse and children
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Section 2(u) - "Person" includes:

- | | |
|-------------------|--|
| i. an individual, | v. an association of persons or body of indiv., (incorporated or not) |
| ii. a HUF, | vi. every artificial juridical person, and |
| iii. a company, | vii. any agency, office or branch owned or controlled by such person; |
| iv. a firm, | |

Section 2(v) - "Person Resident in India" means:



Section 2(w) - "Person Resident outside India" means a person who is not Resident in India

Concept Clarity Check:

1. **Citizenship** is not relevant for determining PRI or PROI
2. If in FY 2019-20, a person resides in India for 200 days. On 1st June 2020, the person leaves India for employment o/s India. Determine whether PRI or PROI? - **For the period 1st April 2020 to 1st June 2020, such person shall be PRI and from 2nd June 2020 onwards, he will be a PROI (irrespective of the fact that he resides for more than 182 days in preceding FY)**
3. Mr. S comes to India on 1st June 2019 for visiting his parents. However, his parents fall sick and

he is certain that he will not be able to return for an year. He ends up staying with them till 31st July 2020. Is he a PRI in FY 20-21? - No, in FY 20-21, Mr. S will be considered as PROI. Even though he resided in India for more than 182 days in FY 19-20, he has not come for any of the 3 purpose (employment, business or uncertain period) and hence he is not a PRI in FY 20-21

4. Residential status is **not for a year**. It's on a particular date. (Unlike Income Tax Act, 1961)
5. Is it mandatory for a person to reside in India for more than 182 days in the previous FY to be considered as PRI? - Umm, No. If he resides for ≤ 182 days in preceding FY, but comes to India in the current year for the 3 purpose, he will become PRI in current year.
6. Where a student is leaving India for **higher studies**, RBI has clarified that they shall be **treated as PROI** majorly because of their intention to stay outside India for an uncertain period and the fact that they start working there to take care of their expenses

Sec 3: Dealing in Foreign Exchange, etc.

No person (PRI & PROI) shall:

Deal in or transfer
Forex or Forse to any
person other than AP

make any
payment to/for
credit of PROI

Receive any payment from
PROI otherwise through an
AP*

Enter into **Financial Transaction**
in India as consideration for
acq. of asset o/s India

*Where any such payment is received without **corresponding inward remittance**, it shall be **deemed** to be received through **person other than AP**

However, the above restricted transactions may be carried on:

- i. If otherwise provided in this Act, Rules or Regulation, **or**
- ii. With **permission of RBI** (general or special)

Note -

1. For this section - **Financial transaction** means:

payment to/credit of
any person or

receiving payment for or on
behalf of any person or

to draw/issue/
negotiate any BoE or

trf. security or
acknowledge debt

2. Purpose of this section is to regulate inflow and outflow of Forex in regulated manner and through APs only.

Sec 4: Holding of Forex - Except as provided in this Act, no PRI shall Acquire, Hold, Own, Possess or Transfer [HA! TOP] any Forex, Forse or **Immovable Property situated o/s India**.

Sec 5: Current Account Transactions:

Any person may sell or draw Forex to or from an authorised person if such sale or drawal is a CUAT.

CG may, in consultation with RBI, impose **reasonable** restrictions on CUAT.

Note: RBI cannot, on its own, impose any restriction on current account transaction. Restrictions can be imposed only by CG (in consultation with RBI)

Examples of CUAT:

1. Import in India of machinery for installation in factory from a UK vendor by payment in cash
2. Import in India of machinery for installation in factory from a UK vendor on credit for 3 months

(this is CUAT because short term banking and credit facilities covered as CUAT)

3. Gift (say \$1,000) by a PRI to PROI (note: Gift is given in FC)
4. Gift (say Rs. 1,000) by a PRI to PROI in India - This will be a CAT and not CUAT as this results in alteration of asset of the PROI in India. Although it is a CAT, such gifting is permitted as per Rules.

General Rule:

CUAT is **freely permitted** unless specifically restricted.

Schedules of FEM(CUAT) Rules, 2000

Schedule I - Drawal of forex by any person for following purpose is prohibited:

1. Remittance out of **lottery** winnings,
2. Remittance of income from **Racing/riding** etc. or any other hobby,
3. Remittance for **purchase** of lottery tickets, banned magazines, football pools, sweepstakes etc.,
4. Payment of **commission** on exports made towards equity investment in JV / WOS abroad of Indian cos.,
5. Remittance of **dividend** by any co. to which the requirement of dividend balancing is applicable,
6. Payment of **commission** on exports under Rupee State Credit Route, **except** commission upto **10%** of invoice value of exports of tea and tobacco.
7. Payment related to "**Call Back Services**" of telephones,
8. Remittance of **interest income** on funds held in Non-Resident Special Rupee Account Scheme

[i.e., if any of the above remittance/payments is to be done by a PRI to a PROI, the PRI cannot go to AP and draw \$s because these are **prohibited**]

Schedule II - Transactions which require prior approval of GoI for drawal of forex

Purpose of Remittance	Ministry / Dept. of GoI who approval is required
Cultural Tours	Ministry of Human Resources Development, Dept. of Education and Culture (Now known as Ministry of Education)
Advt. in foreign print media by a SG & its PSUs > \$ 10K Except where such advt. is for the purposes of promotn of tourism , foreign investments and international bidding <u>Note: PSUs of CG not covered!</u>	MoFinance, Dept. of Economic Affairs
Remittance of freight of vessel chartered by a PSU	MoSurface Transport, Chartering Wing
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)	MoSurface Transport, Chartering Wing
Multi-modal transport Operators making remittance to their agents abroad	Registration Certificate from Director General of Shipping
Remittance of hiring charges of transponders: a. TV Channels	Ministry of Info and Broadcasting

b. Internet service providers	Min. of Communication & Info. Tech
Remittance of container detention charges > the rate prescribed by Director General of Shipping	Ministry of Surface transport (Director General of Shipping)
Remittance of prize money / sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies, if the amt. involved > US\$ 100,000	Ministry of HR Development, Dept of Youth Affairs & Sports (Now - Mo Youth Affairs and Sports)
Remittance for membership of P & I Club (protection and indemnity insurance)	Ministry of Finance (Insurance Division)

Schedule III - Transactions which in excess of limits require prior approval of RBI for drawal of forex: [Liberalised Remittance Scheme]

1. Individuals - Avail forex facility for the following purpose within limit of **USD 2,50,000 only**. Additional remittance **beyond limit** shall **require prior approval of RBI**:

- a. Private **visits** to any country (**except Nepal and Bhutan**)
- b. **Gift** or **donation**
- c. Going abroad for **employment**
- d. **Emigration** (**permanently settling in a country**)
- e. Maintenance of close **relatives** abroad
- f. **Travel** for:

business	attending a conference	specialized training	for meeting expense of medical treatment/check up abroad or accompanying a patient
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- g. Expenses in connection with **medical treatment** abroad

- h. **Studies** abroad

- i. Any other current account transaction

Provided, for (d), (g) and (h), individual may avail forex facility > \$2,50,000 if it so required by country of emigration, medical institute offering treatment or the university, respectively

Provided further that, where individual "**Remits**" any amount under this scheme in a **FY**, the applicable limit shall be **reduced from \$250K** by such amount remitted (**i.e., the limit of \$250,000 is aggregate in FY**)

Provided also that for a PRI but not permanently resident in India and

- a. is a **citizen** of a foreign State other than Pakistan; or
- b. is a citizen of India, who is on **deputation (to India)** to the office or branch of a foreign co. or subsidiary or JV in India of such foreign co.,
may make remittance up to his **net salary** (after deduction of taxes, PF, etc.)

Explanation: For this schedule, a PRI on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which is not > 3 years, is a resident but not permanently resident.

2. Facilities for person other than individuals: Following shall require **prior permission** of RBI:

Particulars	Purpose	Limit
Donation	Donation for: a. creation of Chairs in reputed edu. Inst., b. contribution to funds (not being an invst. fund) promoted by educational Inst; and c. contribution to a technical inst./body in the field of activity of the donor co	> Lower of 1% of Forex Earnings during last 3 FY or \$5Mn
Sale of flats/ plots in India	Commission (per transaction) to agent abroad for sale of residential flats or commercial plots in India	> Higher of \$25,000 or 5% of Inward Remittance
Consultancy per project	Remittance for any consultancy w.r.t Infra projects and	> \$10Mn per project
	For other consultancy procured from o/s India	> \$1 Mn per project
Pre-incorp expense	Remittance as reimbursement of pre-incorporation expense	> Higher of 5% of Investment brought into India or \$100K

Note - Limit of \$250,000 is irrelevant in case of person other than individuals

Additional Note:

1. Procedure for Drawal/remittance of Forex under Sch III shall be same as applicable under LRS
2. Approval for transaction under Sch II and III shall **not be required** where remittance is from:
 - a) RFC A/C
 - b) EEFC A/C (except for remittance for membership of P&I club under Sch II and payment commission/pre-incorp under Sch III)
3. If a person is **on visit abroad**, he can incur expenditure stated in **Sch III** if he incurs it through **International Credit Card** (to the extent of limit on the card)

Note - If a transaction is not listed in any of the three schedule, it can be freely undertaken.

Import of Goods and Services (G&S)

- Import of G&S is allowed by virtue of Sec 5 read with FEMA (CUAT) Rules, 2000 and is regulated by Master Direction 17 (issued by RBI)

Master Direction 17 (of RBI)

- Regulation
 - Import trade is regulated by **DGFT** (under Ministry of Commerce and Industry)
 - **AD - 1** should ensure that imports in India is in conformity with - Foreign Trade Policy, FEMA (CUAT) Rules, 2000, Directions issued by RBI

General Guidelines for imports:

- AD-1 banks should adhere to **KYC guidelines** issues by RBI
- AD-1 may allow **remittance** for making payments for imports after ensuring:
 - All requisite **details** are made available by Importer
 - Remittance is for **bona fide** trade transaction

- **Obligation of Purchaser of Forex:**
 - In terms of sec 10(6) - Person acquiring Forex is permitted to **use** it either for:
 - **Purpose declared** with AP or
 - Any **other** purpose for which Forex acquisition is permissible.
 - Where Forex acquired is utilized for import, **AD - 1** shall:
 - Ensure that importer furnishes **evidence of import** viz:

IDPMS, or	Postal Appraisal Form, or	Custom Assessment certificate
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 - Satisfy itself that **good worth value of remittance is imported**
 - **Mode of payment for imports:**
PRI may make payment:
 - in **forex** through an International Card held by him
 - in **Rs.** through Intl. debit/credit card through the serving bank against a charge slip signed by the importer, or
 - as **prescribed** by RBI

In essence, payment has to be made through **banking channels**
 - **PRI** can also make payment:
 - In **Rs.** for expenses of boarding/lodging & **travel** to/from India for a **PROI** (on visit to India)
 - By **crossed cheque** /draft as consideration for purchase of **gold/silver** (as per law)
 - A **Co/PRI** may make payment in **Rs.** to its **Non- WTD** who is **PROI** + on visit to India for co. work + Entitled to sitting fees/rem - Provided compliance with law.
- **Time limit for settlement of import payments:**

Normal imports -

 - Remit **within 6m** of date of **shipment** (**except** where payment held as **guarantee** for performance)
[For **COVID** - Payment can be done upto 12m if import done before 31st July, 2020]
 - Interest on delayed payments?
AD-1 banks may permit delayed payments due to **financial difficulties /disputes**. However, **interest** on delayed payment shall only be paid **upto 3 years** from date of **shipment**.

Deferred Payment Arrangements (DPA)

 - DPA (including suppliers' and buyers' credit) for upto **5 years** are treated as trade credits
 - For such arrangement, follow - Master circular for ECB and Trade Credits
- **Extension of time for settlement of import dues:**
Power of AD-1 to provide extension:
 - **Up to 6m** at a time (**max 3 years**)
 - Irrespective of value of invoice
 - **Reason** for extensions could be:

disputes about
quantity/quality

non-fulfilment of
terms of contract

financial
difficulties

importer has filed suit
against the seller

AD-1 to ensure following while granting extension:

- Concerned Import transactions are **not under investigation** by ED/ CBI or others
- While considering **extension > 1 year** (from the date of shipment), **total O/S** of importer should be < [Lower of: \$1 Mn or 10% of the avg. import remittances during last 2 FY]; and
- Report above **extension** in IDPMS as per message "BOE Extension" and mention date in "Extension Date" column.

○ Import of Forex/INR:

- Except as otherwise provided in Regulation, **no person shall, w/o prior permission of RBI**, bring any FC into India
- RBI may allow person to bring INR subject to T&C as RBI may stipulate

Import of Forex into India:

A person may:

- **Send into India, w/o limit**, forex in any form (other than currency note, bank notes and TC)
- **Bring into India from o/s India, w/o limit**, forex (other than unissued notes) provided **declaration** made to Custom in CDF

Provided that - No declaration to custom required if **aggregate** of Forex in form of **Currency Notes, Bank notes or TC** at **one time** is < = \$10,000 and/or aggregate value of foreign **currency notes** (cash portion) at one time is < = \$5,000 or equivalent

Import of India Currency & Currency Notes:

1. A **PRI** who had gone o/s India (except N&B) on temporary visit may bring Indian currency **up to Rs. 25,000**
2. A **person** may bring from **N&B**, Indian currency notes **for any amount** in denominations upto Rs. 100/-

○ Issue of Guarantee by an Authorized Dealer (AD):

<u>Case</u>	<u>AD may give:</u>	<u>On behalf of</u>	<u>Owed to:</u>	<u>Nature</u>	<u>As per:</u>
1	Guarantee	Debt/obligation/ Liability of PRI importer	PROI	For import on deferred payment terms	Approval of RBI for such import
2	Guarantee, Letter of Credit	Debt/obligation/Liability of a PRI importer	PROI (overseas supplier)	Import of Goods	Foreign trade policy + T&C of RBI
3	Guarantee in OCOB	Resident service importer	NR service provider	Import of Services*	T&C of RBI

***Limit on guarantee in case of import of service:**

<u>Where the service importer is:</u>	<u>No guarantee > below amount shall be issued:</u>
Other than Public Sector co. / Dept of CG or SG	\$500,000
Public Sector co. / Dept of CG or SG	\$100,000 (w/o prior approval of MoF)

AD may permit issue of corp. guarantees:**CAPITAL ACCOUNT TRANSACTION (SEC 6)**

Capital Account Transaction [Sec 2(e)]: means a transaction which **alters**:

- Asset or Liabilities (**incl. contingent liability**) o/s India of PRI
- Asset/Liability in India of PROI
- ~~Includes transaction referred u/s 6(3)~~

1. Subject to (2), a person may sell or draw forex to/from AP for CAT

2. RBI (+CG) specify:

- Class of CAT - **involving Debt** instruments, which is **permissible**
- Limits** for such permissible transactions
- Conditions** placed on such transactions

Provided that, RBI **or** CG shall not impose restriction on drawal of forex for:

- Payment due on account of **amortization** of loans or **repayment** of loans
- Depreciation** of direct investment in OCOB

Subsection (2A):

CG (+RBI) specify:

- Class of CAT - **Not involving debt** instruments, which is **permissible**
- Limits** for such permissible transactions
- Conditions** placed on such transactions

3. Omitted

4. **PRI** may hold, own, transfer or invest in:

Foreign Currency

Foreign Security

Immovable Property Outside India

Provided that it was

- acquired**, held or owned by such person when he was **PROI**, or
- inherited** from a **PROI**

As per RBI Clarification:

The following transaction are covered u/s 6(4):

1. **FC accounts** opened and maintained by PRI when he was PROI
2. **Income** from employment/business/vocation when o/s India taken up when he was **PROI**, or from investment when he was PROI or from **gift/inheritance** received when he was PROI
3. Forex held o/s India by a PRI acquired by way of **inheritance** from **PROI**
4. PRI may freely **utilize eligible assets** abroad or income/sales proceed therefrom after their return to India for making payment/fresh investments abroad **without approval of RBI**.
Provided that, cost of investments is met completely out of eligible assets.

5. **PROI** may hold, own, transfer or invest in:

Indian Currency

Indian Security

Immovable Property in India

Provided that it was

- **acquired**, held or owned by such person when he was **PRI**, or
- **inherited** from a **PRI (not PROI)**

6. RBI may impose restrictions on BOA of PROI

7. Debt instrument means such instrument as determined by CG (+RBI) [**Amendment**]

CAT is broadly split into following categories as per **FEM (Permissible CAT) Regulations 2000**:

Permissible
Transaction for **PRI**
[**Schedule I**]

Permissible
Transaction for **PROI**
[**Schedule II**]

Transactions on which restriction
cannot be imposed (**amortisation and depreciation**)

Prohibited
CAT

Permissible Transaction for PRI [Schedule I] [SLAP CG in CID style that O2 kamm pad jaye]

Investment by PRI in ForSe	FC Loans raised in India and abroad by a PRI	Acq./ Transfer of IP o/s India by a PRI	Guarantees issued by a PRI in favour of a PROI
Loans and Overdrafts (borrowings) by a PRI <u>from</u> a PROI	Export, import and holding of Currency /currency notes	Maintenance of FC Accounts in India and o/s India by a PRI	Taking out of Insurance policy by a PRI from an insurance co. outside India
Loans and Overdrafts by a PRI <u>to</u> a PROI	Remittance outside India of Capital assets of a PRI	Undertake Derivative contracts	

Note - PRI may draw forex **not > \$250k** per FY or such amt as decided by RBI for CAT in **Sch I**

Note - Drawal of forex as per Sch III (Facilities for individual) of FEM(CUAT) Rules, 2000 shall be **subsumed** within the above limit. (i.e., Sch I + Sch III = Max \$250K)

Provided further that no part of the forex of \$ 250,000 drawn above shall be used for remittance to **non-co-operative countries** and territories (notified by Financial Action Task Force (FATF))

Permissible Transaction for PROI [Schedule II] [IPC ke baad GD doge to Achi Co. Degi offer]**Investment** in India by a PROI, i.e.,

- a. issue of security by a BC/entity in India and investment therein by PROI
- b. investment by a PROI to the capital of a firm/proprietorship concern/AOP in India.

Acquisition and transfer of **IP** in India by a PROIEXIM of **Currency**/currency notes into/from India by a PROI.**Guarantee** by a PROI in favour of a PRI**Deposits** between a PRI and a PROI.FC **Accounts** in India of a PROIRemittance o/s India of **Capital** assets in India of a PROIUndertake **Derivative** contractProhibited CAT [Regulation 4]:

- No PROI shall make **investment** in India in any co/partnership firm/proprietary or any entity which is engaged or proposes to engage [**CARTN**]:

in the business of **Chit** fund, or**Nidhi** Company**agricultural** or plantation activities**real estate** businessconstruction of **farm** housestrading in **TDRs**Explanation:

For the purpose of this regulation, 'real estate business' shall not include:

development of **townships**,**construction** of residential/commercial premises, roads or bridges andregistered **REITs**.

Note - PROIs are restricted from investment in business of **Chit Funds** but may be eligible to subscribe to such chits provided approval of **Registrar of chits** or **officer of SG** concerned is sought and in compliance with RBI T&Cs

- No PRI shall undertake any CAT with a **citizen/** resident/entity of **Democratic People's Republic of Korea ("North Korea")**, unless approval from **CG**
- Any **existing investment transactions** with North Korea by a PRI shall be liquidated/**settled within 180 days** from the date of issue of this Notification, **unless** there is specific **approval** from the **CG** to continue beyond that period

Frameworks for raising loan through External Commercial Borrowings (ECBs):Definitions:

All-in-Cost: It includes rate of interest, other fees, expenses, charges, guarantee fees, whether paid in foreign currency/INR **but will not include:**(a) **commitment fees**; (b) **withholding tax payable in INR**.

Provisions as per Master Direction of RBI related to ECB:

- ECB are commercial loans raised by eligible resident entities from recognised NR entities.

Recognised Non-Resident Entities

Commercial Loans

Eligible Resident Entities

- ECB comes in 2 configuration - Foreign Currency ECB (**FCY ECB**) & Indian Currency ECB (**INR ECB**)

The framework is as shown below:

Parameters	FCY denominated ECB	INR denominated ECB															
Currency of Borrowing	Any Freely Convertible FC (unlike Brazil Currency)	INR															
Forms of ECB	<ul style="list-style-type: none"> Loans including bank loan Floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments) Trade Credit > 3 years FCCBs, FCEBs and Finance Lease <p>*FYI - Conversion is optional in FCCBs</p>	<ul style="list-style-type: none"> Loans including bank loan Floating/ fixed rate notes/ bonds/ debentures / Pref. shares (other than fully and compulsorily convertible instruments) Trade Credit > 3 years FCCBs, FCEBs and Finance Lease Plain vanilla Rupee Denominated Bonds 															
Eligible Borrowers (to raise ECBs)	<ul style="list-style-type: none"> Entities eligible to receive FDI. Port Trusts; Units in SEZ; SIDBI; and EXIM Bank of India. 	<ul style="list-style-type: none"> a) Entities eligible to raise FCY ECB (left hand side); and b) Registered entities engaged in micro-finance activities, viz., registered NPO companies, registered societies/trusts/ cooperatives and NGOs. 															
Recognised lenders	<ul style="list-style-type: none"> Resident of FATF or IOSCO compliant countries, or Multilateral and Regional Financial Inst. where India is a member country (WHO, World Bank, etc.) Individuals only if they are foreign equity holders (of borrower) or for subscription to bonds/debentures listed abroad Foreign branches / subsidiaries of Indian banks (only for FCY ECB, except FCCB, FCEBs) i.e., FCY ECB de sakte hai! 																
Minimum Average Maturity Period (MAMP)	<ul style="list-style-type: none"> MAMP of ECB = 3 years Call/Put options not to be exercised prior to completion of MAMP For specified cases, separate MAMP: <table border="1"> <thead> <tr> <th>ECB raised</th><th>Purpose</th><th>MAMP (in years)</th></tr> </thead> <tbody> <tr> <td>By manufacturing co.</td><td>of amount <= \$50 Mn/FY</td><td>1</td></tr> <tr> <td>From a Foreign Eq. holder</td><td>WCP, GCP or Repayment of Rupee loans</td><td>5</td></tr> <tr> <td>For Purpose 1</td><td>(i) WCP or GCP (ii) on-lending by NBFCs for WCP/ GCP</td><td>10</td></tr> <tr> <td>For Purpose 2</td><td><u>repayment</u> of Rupee loans availed domestically for capex or on-lending by NBFC for the same</td><td>7</td></tr> </tbody> </table>		ECB raised	Purpose	MAMP (in years)	By manufacturing co.	of amount <= \$50 Mn/FY	1	From a Foreign Eq. holder	WCP, GCP or Repayment of Rupee loans	5	For Purpose 1	(i) WCP or GCP (ii) on-lending by NBFCs for WCP/ GCP	10	For Purpose 2	<u>repayment</u> of Rupee loans availed domestically for capex or on-lending by NBFC for the same	7
ECB raised	Purpose	MAMP (in years)															
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For Purpose 2	<u>repayment</u> of Rupee loans availed domestically for capex or on-lending by NBFC for the same	7															

	For Purpose 3	<u>repayment</u> of domestic Re. loans availed for purpose other than capex or on-lending by NBFCs for other than capex	10
	For (b) to (e) above, ECB cannot be raised from foreign branches / subsidiaries of Indian banks		
All-in-cost ceiling per annum	Benchmark rate + 500 bps spread. (i.e., 5% spread) [Amended] One-time adjustment - AIC revised upwards by 100 basis points.		
Other costs	Prepayment charge/ Penal interest , if any, for breach of covenants, not > 2 % over and above the contracted rate of interest on the o/s principal amount and will be outside the all-in-cost ceiling .		
End-uses (Negative list)	ECB proceeds cannot be utilized for the following: [CREW LOG] a) Real estate activities. b) Investment in capital market. c) Equity investment. d) WCP , except in case of ECB mentioned at v(b) and v(c) above. e) GCP , except in case of ECB mentioned at v(b) and v(c) above. f) Repayment of Rupee loans , except as mentioned in v(d) and v(e) above. g) On-lending to entities for above activities, except as per v(c), (d) & (e)		
Exchange rate (for change of currency i.e., FCY to INR or vice versa)	Rate prevailing on date of agreement for such change or rate less than the rate prevailing on such date, if consented to by the ECB lender	For conversion to Rupee, the exchange rate shall be the rate prevailing on the date of settlement .	
Hedging provision	ECB Borrowers are reqd. to: <ul style="list-style-type: none">Follow hedging guidelines w.r.t., forex exposure. (Infra Cos to have BoD approved risk mgt. policy)Mandatorily hedge 70 % of ECB exposure where MAMP is < 5 years.Designated AD-I bank to verify that 70% hedging requirement is complied with & report the position to RBI (Form ECB 2)	Overseas investors are eligible to hedge their exposure in Rupee through permitted derivative products with AD-I banks in India. The investors can also access the domestic market through: a) branches/subsidiaries of Indian banks abroad or b) branches of foreign banks with Indian	
	<u>Applicable only for FCY ECB Bonds:</u> Following operational aspects w.r.t, hedging should be ensured: <u>Coverage:</u> Cover the principal as well as the coupon through financial hedges throughout the period of ECB.		

	<u>Tenor and rollover:</u> Min. tenor of 1 year for the financial hedge with periodic rollover <u>Natural Hedge (in lieu of financial Hedge):</u> Considered only to the extent of offsetting projected cash flows / revenues in matching currency, net of all other projected outflows . For this purpose, an ECB may be considered naturally hedged if the offsetting exposure has the maturity/cash flow within the same accounting year .	
Change of currency of borrowing	Change from one freely convertible FC to any other freely convertible FC as well as to INR is freely permitted .	Change from INR to any freely convertible foreign currency is not permitted .
ECB framework is not applicable w.r.t., investments in NCD in India made by Registered Foreign Portfolio Investor		
<u>Limit and leverage:</u> <ul style="list-style-type: none"> Eligible borrowers can raise ECB up to \$750 Mn or equivalent per FY under automatic route. In case of FCY ECB raised from direct foreign eq. holder, ECB liability-equity ratio for ECB raised under automatic route cannot exceed 7:1. [Ratio N.A. if o/s ECB (total incl. proposed) < \$5Mn] Borrowing entities to be governed by guidelines on debt equity ratio, issued by concerned regulator. 		
<u>Author's Note</u> - FCY ECB can be used for repayment of Rupee loans availed domestically. But, Refinancing of INR ECB with FCY ECB is not permitted.		
3. Issuance of Guarantee by Indian Banks, AIFI or NBFC w.r.t., ECB is not permitted . Further, Indian banks, AIFI or NBFCs shall not invest in FCCBs or FCEBs .		
4. ECB proceeds are permitted to be parked abroad as well as domestically in manner given below:		
<u>Parking abroad:</u> ECB proceeds meant only for FC exp. can be parked abroad <u>pending utilisation</u> in following liquid assets: (a) deposits or other products offered by banks rated > AA (-) by S&P/Fitch IBCA or Aa3 by Moody's; (b) T-bills and other inst. (1 year maturity) having min. rating as indicated above and (c) deposits with foreign branches/subsidiaries of Indian banks abroad		<u>Parking Domestically:</u> ECB proceeds meant for Re. expenditure should be <u>repatriated immediately</u> to AD-1 bank. Allowed to park in unencumbered term deposits with AD-I banks for max. 12m cumulatively.

5. Procedure of raising ECB:Automatic Route:

All ECB can be raised under the automatic route if they conform to the parameters of this framework.

Entities desirous to raise ECB under the automatic route may approach an **AD-I bank** with their proposal along with duly filled in **Form ECB**.

Approval Route:

The borrowers may **approach** the **RBI** with an application in Form ECB for **examination** through their AD-I bank.

RBI to consider keeping in view the **overall guidelines, macroeconomic situation & merits** of specific proposals.

ECB proposals of > certain threshold limit - Place before **Empowered Committee(EC)** set up by RBI, consider its recommendation and **RBI will take a final decision**

6. Reporting Requirements:

Loan Registration Number (LRN): **Draw down** of ECB allowed only after obtaining LRN from RBI.

To obtain the LRN:

- submit duly certified **Form ECB** in **duplicate** to the designated **AD-I bank**
- AD-I bank will forward a copy to the **Director**, RBI (DSIM, ECB Division, BKC)
- copies of **loan agreement NOT required** to be submitted to RBI.

Changes in terms and conditions of ECB: Any changes in T&C of ECB (incl. **reduced repayment by mutual agreement**) to be reported to DSIM, RBI through **revised Form ECB at the earliest** (not later than **7 days** from the **changes effected**)

Monthly Reporting of actual transactions: Borrower to report **actual** ECB transactions in **Form ECB 2 Return** via AD-I bank on **monthly** basis so as to reach **DSIM** in **7 working days** from close of month. Changes in ECB parameters to be incorp. in Form ECB 2 Return (**in addition to revised Form ECB above**)

Late Submission Fee (LSF) for delay in reporting:

Type of Return/Form	Period of delay (from due date)	Applicable LSF
Form ECB 2	Up to 30 days	INR 5,000
Form ECB 2/Form ECB	Up to 3 years from submission/drawdown	INR 50,000 per year
Form ECB 2/Form ECB	Beyond 3 years from submission/drawdown	INR 100,000 per year

LSF to be paid via **Demand Draft** in favor of RBI

SOP for Untraceable Entities ("UE"):

What is untraceable entity (UE)?

ECB borrower will be treated as UE if entity/auditors/promoters are **not reachable/responsive for > 2 Quarters after >= 6** documents comms/reminders and fulfils **both** the following condition:

- Entity **not** found to be **operative** at the regt. office address as per records avl. with AD Bank, **and**
- Entities have **not** submitted **Stat. Auditor's Certificate** for last **> = 2 years**

Action to be undertaken by Designated AD-1 bank w.r.t., UE: **[FF AWE]**

- File **Revised Form ECB**, if required, and last **Form ECB 2 Return** w/o certification from co. with 'UE' written in bold on top. The O/S amount of **ECB** will be treated as **written-off** from

external debt liability of country **but** may be retained by lender in books for recovery through judicial, etc. means;

- **No fresh** ECB application by the entity should be examined/processed by the AD bank;
- **ED** should be informed whenever any entity is designated 'UE'; and
- No **inward remittance**/debt servicing will be permitted under **auto route** (**block incoming funds**)

7. Powers delegated to AD-I banks to deal with ECB cases

The designated AD-I banks can approve any requests from borrowers for changes w.r.t, ECB, except for FCCBs/FCEBs, ensuring compliance with extant **ECB norms** and that changes are with **consent** of lender(s).

Further, the following can also be undertaken under the **automatic route**:

- **AD-I bank can be changed** subject to obtaining **NoC** from the existing AD-I bank.
- **Cancellation of LRN**: Designated AD-I banks may **directly** approach **DSIM** for **cancellation** of LRN provided that **no draw down** against the said LRN has taken place + **monthly ECB-2** returns till date w.r.t, allotted LRN have been submitted to DSIM.
- **Refinancing** of existing ECB by fresh ECB by eligible borrower provided that:
 - **O/S maturity** of the original borrowing (existing ECB) is not reduced and
 - **All-In-Cost** of fresh ECB < that of existing ECB (equal to hoga toh nahi chalega)
- **Conversion of ECB into equity [ACGRPLE]**:
Conversion of ECB, **incl. matured but unpaid ECB**, into equity is permitted subject to following:
 - a) **Activity** of borrowing co. is covered under **auto route** for FDI **or** CG approval is received per FDI norms
 - b) The conversion (with lender's consent & without additional cost) should **not breach sectorial cap**;
 - c) Applicable **pricing guidelines** for shares are complied with;
 - d) In case of partial/full conversion of ECB into equity, the **reporting** to **RBI** will be as under:

Conversion	Form
Partial	Report converted portion in Form FC-GPR + Monthly Form ECB 2 Return with remarks
Full	Report entire portion in Form FC-GPR + Monthly Form ECB 2 Return with remarks. Subsequent filing of ECB 2 not required
Phases	Report in Form FC-GPR and ECB 2 will also be in phase

- e) If ECB Borrower has availed **other credit facilities** from the Indian banking system, incl. foreign branches/subsy of Indian banks, comply with applicable **prudential guidelines**;
- f) **Consent** of other lenders, if any, to the same borrower is **available** or at least information regarding conversions is exchanged with other lenders of the borrower.
- g) **Exchange rate** prevailing on the **date** of the **agreement** for such conversion, or any **lesser rate** can be applied with a **mutual agreement** with the ECB lender.

Note - The **fair value** of the eq. shares to be issued to be worked out w.r.t, **date of conversion only**.

- Security for raising ECB:

AD-I banks are permitted to allow **creation of charge** on immovable/mov. assets/Finsec and issue guarantees in favour of lender **to secure ECB** provided that:

- a. the underlying ECB is in **compliance** with the extant ECB guidelines,
- b. there exists **security** clause in **Loan Agreement** requiring ECB borrower to create/cancel such charge
- c. **NoC** from the **existing lenders in India** has been obtained

Once the above conditions are met, the AD-I bank may permit creation of charge subject to following:

1. Creation of Charge on Immovable Assets:

- a. Subj. to FEM (Acq. and Trf. of IP in India) Reguln, 2017
- b. Permission **not to** be construed as **permission to acquire IP in India**
- c. In the event of **enforcement** of charge, the IP will have to be **sold only to a PRI** and sale proceeds shall be repatriated to liquidate O/S ECB (and not any other borrowings).

2. Creation of Charge on Movable Assets: In case of enforcement of charge, claim of lender will be **restricted to o/s claim against ECB**.

Note - Encumbered movable. assets may be taken out of country subject to **NoC** from domestic lenders

3. Creation of Charge over Finsec: The arrangements may be permitted subj to following:

- a. **Pledge of shares** of borrower co. (E.g. RIL) held by promoters (E.g. Ambani) or shares of domestic associate cos. (Ex. Jio) of borrower is **permitted**.
Pledge on other Finsec., viz. bonds and debentures, Govt. fin, Govt. Savings Certificates, deposit receipts of securities and units of UTI or of MF, held by borrower/promotor is also **permitted**.
- b. **Security interest** over all current and future **loan assets** and all **current assets** including CCE, including Rupee accounts of borrower with ADs in India, standing in the name of the borrower/promoter, can be used as security for ECB. The **Rupee accounts** of the borrower/promoter can also be in form of **escrow arrangement** or **debt service reserve A/C**.
- c. In case of **invocation** of pledge, transfer Finsec as per extant FDI/FII policy.

4. Issue of **Corp. or Personal Guarantee:** The arrangement shall be subject to obtaining the following:

- a. A copy of **Board Resoln.** specifying **name** of officials auth. to execute guarantees.
- b. **Specific req.** from **individuals** to issue personal guarantee indicating detail of ECB.
- c. ECB can be guaranteed by overseas party **only** if they fulfil criteria of **Recognised lender**.

Such security shall be **subject** to provisions contained in the FEM (Guarantees) Regulations, 2000

- **Additional Requirements:** While approving changes to ECB, AD-I banks should ensure that:
 - a. Changes are in **conformity** with the appl. ceilings/guidelines and in compliance with appl. guidelines.
 - b. Changes are reported to DSIM and reflected in **Form ECB 2** appropriately.

8. Special Dispensations under the ECB framework

- ECB Facility for Oil Marketing Companies (IOCL/BPCL):
 - Public Sector OMCs can raise ECB for WCP with **MAMP of 3 years** under **auto route w/o** mandatory **hedging** and individual limit requirements.
 - The **overall ceiling** for such ECB shall be **\$10 billion** or equivalent (**this is not per annum**)
 - OMCs should have a **Board approved** forex mark to market procedure and **risk management policy**.
 - All other provisions under the ECB framework will be applicable to such ECB.
- ECB facility for Startups - AD-I banks are permitted to allow Startups to raise ECB under **automatic route** as per the following framework:

Eligibility	Entity recognized as Startup by the CG as on date of raising ECB
MAMP	3 years
Recognised lender	Resident of a FATF (IOSCO) compliant country. However, Foreign br/subsy of Indian banks and overseas entity in which Indian entity has made ODI will not be Recog. lender
Forms	Loans/Non-convertible , optionally convertible or partially convertible preference shares
Currency	Any freely conv. Currency/INR /combination thereof. In case of INR ECB, NR lender to mobilise INR through swaps/outright sale undertaken through AD-I bank in India.
Amount	The borrowing per Startup will be limited to \$3Mn or eq. per FY (in any currency)
All-in-cost	Mutually agreed between borrower and lender
End uses	Business expense of borrower
Conversion into equity	Freely permitted subject to relevant Regulation
Security	<p>Choice of security is left to the borrowing entity. Compliance with norms is necessary</p> <p>Issuance of guarantee is allowed. NR can issue guarantee only if NR qualifies as recognized lender under ECB for Startups.</p> <p>Issuance of guarantee, LoC, LoU, etc. by Indian bank, AIFO and NBFCs is not permitted.</p>
Hedging	In case of INR ECB, overseas lender will be eligible to hedge its INR exposure through permitted derivative products with AD- I banks. They can also access

	domestic mkt. through br./subsy of Indian banks abroad or br. of foreign bank with Indian presence <u>Note:</u> Startups raising ECB in FC are exposed to currency risk due to exchange rate movements and are advised to ensure having an appropriate risk management policy
Conversion rate	In case of borrowing in INR, the FC- INR conversion will be at the market rate as on the date of agreement .
Other Provisions	Same as per ECB framework. However, provisions on leverage ratio and ECB liability: Equity ratio will be NA Further, the Strt-ups can also raise ECB under the general ECB route/ framework .

9. Borrowing by Entities under Investigation:

All entities against which investigation/adjudication/appeal (IAA) by the law enforcing agencies for **violation of FEMA is pending**, may raise ECB, if they are otherwise eligible, **notwithstanding the pending investigations, etc.** without prejudice to the outcome of such IAA

Borrowing entity shall **inform** about **pendency** of such IAA to **AD-I bank/RBI**. Accordingly, AD-I Banks/RBI shall, while approving proposal, **intimate the agencies** concerned by endorsing a copy of the **approval letter**.

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

An entity which is under a CIRP can raise ECB only if specifically **permitted** by the **resolution plan**.

Eligible corporate borrowers (in Mfg./Infra Sector) who have availed Rupee loans domestically for capex 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**. Lender banks are also permitted to **sell such loans (to NR)** to eligible ECB lenders.

Foreign branches/ overseas subsidiaries of Indian banks are **not eligible** to lend for the above purposes.

Eligible borrowers, who are participating in the CIRP under IBC, 2016 as resolution applicants, can **raise ECB** from all Recognised 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**

11. Dissemination of info.: For greater transparency, info. w.r.t, name of borrower, amount, purpose and maturity of ECB under both Auto. and Approval routes are **put on RBI's website monthly**, with 1m lag.

12. Compliance with the guidelines: The **primary responsibility** is of **borrower** concerned. Any contravention will invite **penal action under the FEMA**.

The designated AD-I bank is also expected to ensure **compliance** with ECB guidelines by their **constituents**.

ODI by Resident Individuals read with FEM (Transfer/Issue of Any Foreign Security) Reg, 2004:

This Regulation is suppressed because of the new Overseas Investment regulation inserted w.e.f. 22nd August 2022. Refer last pages of this chapter. I have not fully deleted it from my notes here because I don't want you to get confused when you compare this material with ICAI Module.

Definitions:

1. "Direct investment outside India" means investment by way of:

- contribution to the capital or
- subscription to MoA of a foreign entity ("FE") or
- purchase of existing shares of FE entity either by mkt purchase/pvt. placement/stock exch.,
- but **does not include portfolio investment;**

2. "Financial Commitment" ("FinCom") means the amount of direct investment by way of

- | | | | |
|------------------------|------|----------------------------|--|
| contribution to equity | loan | 100% of amt. of guarantees | 50% of performance guarantees issued by Indian Party to/on behalf of its overseas JV/WOS |
|------------------------|------|----------------------------|--|

3. "Joint Venture (JV)" means a FE formed/registered/incorporated as per laws of host country in which the IP makes a direct investment;

4. "Wholly Owned Subsidiary (WOS)" means a FE formed/registered/incorporated as per laws of host country whose entire capital is held by the IP;

5. "Indian Party" means a Company/Body created under an Act of Parliament or P. firm/LLP making investment in a JV/WOS abroad;

6. "Host country" means the country in which FE receiving the direct inv. from IP is registered/incorporated;

Mode of direct investment outside India:

1. **Automatic route:** Indian Party is permitted to investment/undertake FinCom in overseas JV/WOS within limits

Prior approval of RBI not required if total FinCom is:

1. Upto \$1 Bn per FY and
2. Upto 100% of Networth (PUSC + FR) of Indian Party (as per last audited BS)

Total FinCom of IP in all JV/WOS shall comprise of the following:

- a. 100% amt. of **equity** shares and/or CCPS
- b. 100% amt. of other **pref.** shares;
- c. 100% amt. of **loan**;
- d. 100% amt. of **guarantee** (other than performance guarantee) issued by Indian Party;
- e. 100% amt. of **bank guarantee** issued by resident bank on behalf of JV/WOS of Ind. party provided the bank guarantee is backed by a counter guarantee/collateral by Ind. party;
- f. 50% amt. of **performance** guarantee issued by Ind. party provided that if the outflow on account of invocation of performance guarantee results in breach of the limit of the FinCom in force, **prior permission** of the RBI is to be obtained before executing remittance beyond the limit for FinCom.

Requirements for ODI under the Automatic Route is as under:

1. The Indian party (IP) can invest up to the prescribed limit of its Networth in JV/WOS for any **bonafide activity** permitted as per the law of the host country.

The \$1Bn limit vis-a-vis the NW will **not be applicable** where the investment is made out of:

- balances held in the **EEFC A/C** of IP or
- Funds raised through **ADRs/GDRs**;

2. The IP is not on the RBI's:

- exporters' **caution** list or
- list of **defaulters** to the banking system published CIBIL/RBI/other similar co. or
- under **investigation** by the ED/any investigative agency or regulatory authority;

3. The IP routes all the transactions relating to such investment through only **1 branch of AD**.

Process: The IP should approach AD with an application in **Form ODI** and + Presc. Docs for effecting the remittances towards such investments.

Investments (or FinCom) in JV/WOS abroad by Indian Parties via SPV

Permitted under Automatic Route if IP is not in caution list, under investigation or defaulter

2. Approval route:

(i) Prior approval of RBI (**in Form ODI via AD-1**) required in all other cases of ODI.

(ii) RBI would, inter alia, take into account the following factors while considering such applications:

- a) Prims facie **viability** of the JV / WOS outside India;
- b) Contribution to **external trade** and other benefits which will accrue to India through such ODI
- c) **Financial position** and business track record of the **IP** and the foreign entity; and
- d) **Expertise & experience** of IP in same/related line of activity as of JV/WOS outside India.

A resident **individual** may make ODI in the equity shares and CCPS of JV/WOS o/s India within the overall limit prescribed by RBI under **Liberalised Remittance Scheme** (i.e., \$250,000 per FY).

Restrictions on ODI by IP in FE (i.e., Requires prior approval of RBI):

- (a) Engaged in **real estate** (meaning buying & selling of real estate or trading in TDRs but does not include development of **townships**, constrn of **residential/commercial premises**, roads or bridges)
- (b) Engaged in **banking business**;

An overseas entity, having direct/indirect **equity participation** by an IP, shall not offer financial products linked to INR (e.g., non-deliverable trades involving FC, Re. exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the Reserve Bank.

Section 7 - Export of Goods and Services:

1. Every Exporter of **Goods** shall:
 - a. Furnish to RBI - A **declaration** containing true and material particulars including the amt. representing **full export value (FEV)**.
Where **FEV** is not ascertainable at the time of export, the value that the exporter expects to receive on sale of such goods in market o/s India.
 - b. Furnish such info. to RBI as may be required to ensure realization of export
2. Exporter of **service** - Furnish to RBI, a declaration containing true particulars w.r.t, payment.

Foreign Exchange Management (Export of Goods & Services) Regulations, 2015**Definitions:**

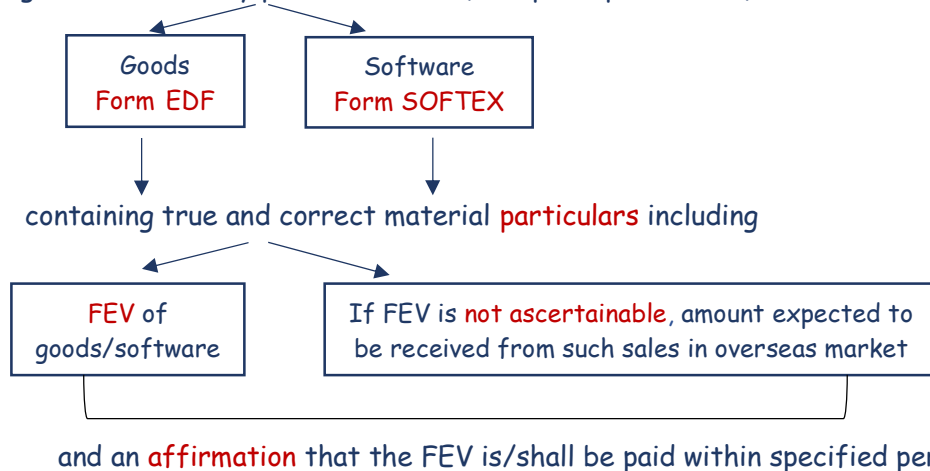
1. 'Export' includes:

taking/sending out of goods	by land, sea or air,	consignment or sale, lease, hire- purchase or any other arrangement	In case of software - includes transmission through any e-media
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2. 'Export Value' w.r.t, export by way of lease/hire-purchase/similar arrangement, includes the **charges** payable in respect of such **arrangement**;
3. 'Software' means any computer programme, database, drawing, design, AV signals, any information by whatever name called in or on any medium other than in or on any physical medium
4. Forms means **Form EDF** or **Form SOFTEx**

Declaration of Exports to RBI/Prescribed Authority:

- Exports through Customs to any place o/s India (except Nepal/Bhutan)



- Export of **Services** (other than software) - **No Declaration** required as no Form specified but liable to realize and repatriate the amount to India.

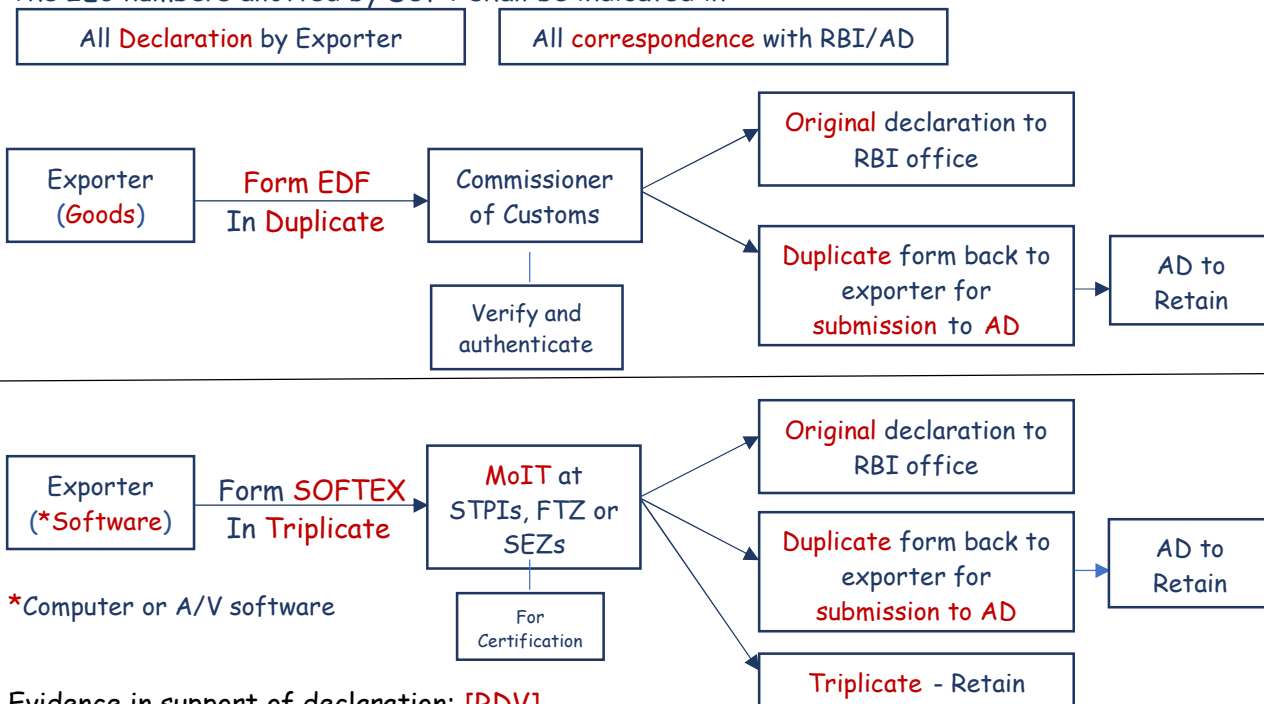
Exemptions for export of goods/software i.e., Export w/o declaration: [DATE GF CSR | RBI | SEZ]

- S - trade **samples** of goods and publicity material supplied free of payment
- F - goods imported **free** of cost on **re-export** basis
- E - **personal effects** of traveler, whether accompanied or unaccompanied
- C - ship's **stores**, trans-shipment **cargo** & goods supplied for military, naval/air force requirement;

- **Gift** of goods accompanied by declaration (general decl.) by exporter that **value < = Rs. 5 lakhs** [If value of goods > Rs. 5 lakhs - Declare in Form EDF, otherwise, general declaration]
- **A** - Aircrafts/aircraft engines/ spare parts for **overhauling** and/or **repairs abroad** subject to their **reimport** into India **within 6m** from date of **export**
- **A - Re-export** of leased **aircraft**/helicopter/engines/APUs **re-possessed** by overseas lessor and duly de-registered by the DGCA on request of IDERA holder under Cape Town Convention or any cancellation of lease agreement subject to permission of DGCA/MoCA [**Amended**]
- **R - replacement goods** exported free of charge as per FTP
- **T** - goods sent outside India for **testing** subject to re-import into India
- **D - defective** goods sent o/s India for **repair** and **re-import** provided accompanied by **certificate** from AD in India that export is for repair and re-import
- **RBI** - Exports permitted by **RBI**, on **appln.** made to it, subject to T&C stipulated in permission
- **SEZ - Re-export** of following **imported goods** permitted by SEZ, EHTP, STP or FTZ:
 - found **defective**, for replacement by the foreign suppliers; or,
 - from foreign suppliers on **loan basis**; or
 - from foreign suppliers **free** of cost, **found surplus** after production operations.

Indication of Importer-Exporter Code (IEC)

The IEC numbers allotted by DGFT shall be indicated in:



Evidence in support of declaration: [RDV]

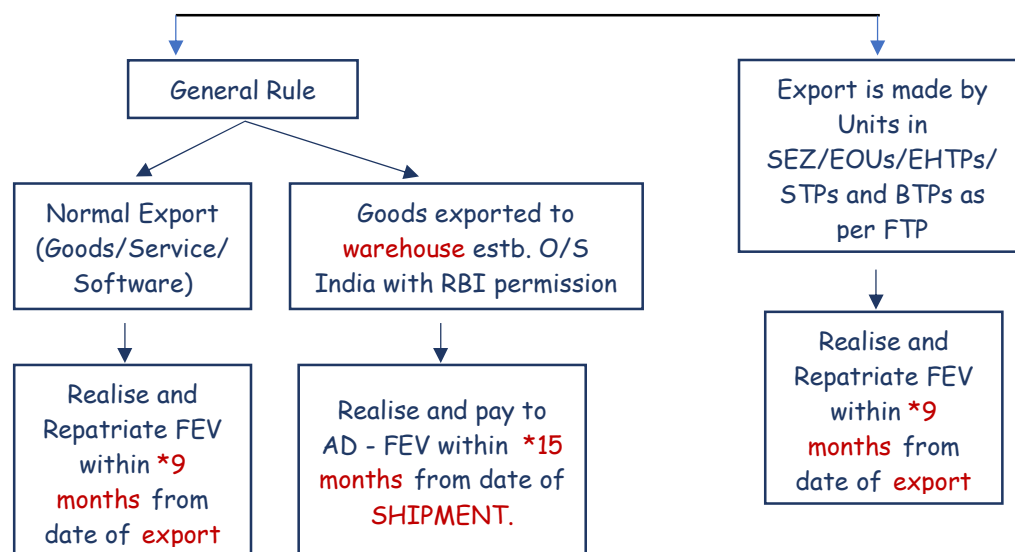
Specified authority may require evidence to establish that:

- Exporter is **PRI** and has **POB** in India
- Destination declared is **final destn.** (i.e., country where goods cleared through customs)
- Value** stated in decl. represents **FEV** or value expected to receive (if **FEV** is not ascertainable)

Manner of payment of export value of goods

FEV must be paid **through AD** as per FEM(Manner of Receipt and Payment) Regulations, 2000

Note - **Re-import** into India within the realization period shall be **deemed realization** of **FEV**

Period for realization of Export Value:

*RBI/AD may for sufficient and reasonable cause extend the period

Note - If software exported in other than physical form, Date of Export = Date of invoice

Submission of Export Documents:

- Docs (as mentioned in declaration form) pertaining to export to submitted to AD
 - Within 21 days from date of export (goods) or date of certification of SOFTEx form (software)
- AD may accept docs after expiry of 21 days, for reasons beyond exporter's control.

Transfer of Documents (Invoice/BoE):

AD may accept shipping docs incl. invoices/BoE from his constituent for negotiation or collection Provided that, AD may require the constituent to sign declaration.

Payments for Export:

Except with approval of RBI/AD, no person shall do or refrain from doing any action which causes:

- Payments to be made otherwise than in specified manner [Mode]
- Payment to be delayed beyond specified period [Delay]
- Proceeds of sales does not represent FEV [Part payment]

Export that require prior approval :

Export under Special Arrangement between CG and Govt. of Foreign state or under Rupee Credits shall be governed by T&C issued by Trade Control Authority and RBI instructions

Export under Line of Credit extended to foreign Bank/FI by EXIM bank for financing exports from India shall be governed by RBI via AD

Delay in receipt of payment of FEV:

Where the payment for export is not received within the specified period (9m/15m + Extension), the RBI may issue directions to person who has sold/entitled to sell such goods/software for the purpose of securing:

- Payments, if goods/software is sold and
- Sale of goods and payment thereof if goods/software is not sold, or re-import into India

Provided that **omission of RBI** to give directions shall **not** have the effect of **absolving** the person committing the contravention from the consequences thereof.

Advance payment against Export:

If exporter receives **advance payment** (with or w/o interest) from a buyer named in export declaration, the exporter shall be obligated to ensure that:

- Shipment** of goods is made **within 1 year** of date of receipt of advance payment
- Rate of **interest** on advance payment < **LIBOR (or other applicable benchmark) + 100 bps**, &
- Docs** covering shipment are routed through AD through whom advance payment is received.

If shipment **not** made **within 1 year**, no remittance towards refund of advance payment or interest shall be made after expiry of 1 year, w/o **prior approval of RBI**

Note - The export **agreement** may itself provide for shipment of goods beyond 1 year from receipt of advance payment and such agreement shall be **valid**.

Directions by RBI

In order to ensure timely realization of FEV, RBI may, by general or special order, direct exporters:

- To cover payment of exports by an **Irrevocable LoC**
- To take **prior approval of AD** before submission of any declaration to specified authority
- Copy of **declaration** to be submitted to such org. to **certify the valuation** of goods/software

Project Exports:

- Where an export of goods/services is proposed to be made on:

deferred payment terms or **in execution of a turnkey project** or **a civil construction contract**,

the **exporter** shall submit **proposal to Approving authority (EXIM bank or AD)** for prior approval.

- In case a **guarantee** is required to be given for performance, or for availing of credit facilities from bank/FI o/s India w.r.t., execution of such project, the same may be issued by:

AD Bank **a PRI being an export co.**

provided that the contract/Letter of Award stipulates such requirements (of guarantee).

Section 8: Realisation and Repatriation of Forex:

Save as otherwise provided in this Act, where any amt. of forex is **due /has accrued** to any **PRI**, such person shall take reasonable steps to realise & repatriate to India within period specified by RBI.

Section 9: Exemption from realisation and repatriation in certain cases.

Provisions of Sec 4 and 8 shall **not apply** to holding following forex:

Possession of **FC** or **F.Coins**
by any person

FC Account held/operated

Forex acquired by **Gift/inheritance**
by a **PRI**

Forex acq/received before **1947** and
income accruing thereon held o/s India
with RBI permission

Forex acquired from **employment**,
business trade, vocation, gift,
honorary or other legitimate source

Such **other**
receipts as RBI
may specify

Provided that such forex is held within limits specified by RBI in this regard.

Chapter III - Authorised PersonSection 10 - Authorised Person

1. RBI may, on an **application** to it, authorise any person to be known as AP to deal in forex/forse, as an AD, money changer or off-shore banking unit or in any other manner as it deems fit.
2. Authorisation to be in **writing** and subject to T&C
3. RBI may **revoke** authorisation if satisfied that:

it is in public interest	AP has failed to comply with T&C or contravened FEMA/Rules/Reg.
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 Reasonable **OOBH** to be given prior to revoking authorisation
4. AP to **comply with all directions** of RBI in their forex/forse dealings. For deviation - Seek RBI's permission
5. Before undertaking any forex transaction, AD shall require that **person to make declaration** that this transaction will not lead to contravention of FEMA.
If that person fails to make such declaration - AD shall refuse to undertake such transaction in writing and report matter to RBI (if RGTB that contravention is contemplated)
6. Where a person has drawn forex, utilize it for declare purposes or other permitted purpose - Else **deemed contravention** of FEMA

An Off-Shore Banking Unit (OBU) shall NOT undertake any transaction with PRI. It may undertake transaction with **any AD in India on Principal-to-Principal basis**. OBU are meant to facilitate units in SEZ and may undertake transactn in Forex with unit in SEZ to extent the latter is eligible to undertake such transactn

Section 11: RBI powers to issue directions to AP:

To **secure compliance** with provisions of Act/Rules/Reg/Directions etc., RBI may direct APs

- a. W.r.t, making payment/the **doing or desist** from doing any act relating to forex/forse
- b. to **furnish such information**, in such manner, as it deems fit.

Penalty after giving AP reasonable OOBH:

AP contravenes Directions of RBI or fails to file returns - **Penalty** upto Rs. 10,000 + Additional Rs. 2,000 per day (~~after the first~~) for default

Section 12: Power of Reserve Bank to inspect APs

RBI may, where it appears necessary to do, cause **inspection** of APs (by officer auth. by RBI) for purpose of:

verifying correctness of RIP filed by RBI

Obtain info/part. which AP has failed to furnish
--

Securing compliance with Act/Rules/Reg/etc.

On such inspection, every AP (and its directors, partners, officers) is duty-bound

- (i) to **produce** such BoA and other docs in his custody/power, and
- (ii) to **furnish** any statement relating to the affairs of such person, company or firm.

Summary of Contravention and Penalties:

Sec No.	Nature of contravention	Quantum of Penalty
11	AP contravenes Directions of RBI or fails to file returns	Upto Rs. 10,000 + Additional Rs. 2,000 per day (after the first) for default
13	Any person contravenes any provision of Act/Rules/Reg/etc. or AP contravenes T&C subject to which authorisation was issued	<ul style="list-style-type: none"> Upto 3x sum involved if amt is quantifiable Upto Rs. 2 lakhs if amount is not quantifiable, If continuing, addn. 5,000/day after first AA may order confiscation by CG
13 (1A) and (1C)	Any person acquired Forex, Forfe or IP o/s India of aggregate value > Limit u/s 37A	<ul style="list-style-type: none"> Upto 3x sum involved and Confiscation of equivalent in India and Jail upto 5 years and fine
14	Failure to pay penalty u/s 13 within 90 days from notice and the penalty amount is:	Civil Imprisonment: Upto 3 years
	a. More than Rs. 1 crore b. Other case	Upto 6 months

Section 14: Enforcement of orders of AA:

- If a person (defaulter) fails to make payment of penalty within 90 days of issue of **notice** for such payment - Liable for **civil imprisonment**.
- Prior to order for arrest and **detention** of defaulter:
 - AA to serve a **notice** of defaulter calling upon him to appear before AA and **show cause** why he should not be committed to civil prison **and**
 - AA is **satisfied** that:
 - Defaulter has, after issue of such notice, **dishonestly** trf. his property to avoid such payment, or
 - Defaulter **has means** to make such payment **but refuses**/neglects such payment
- AA may issue **arrest warrant** if:
 - AA is satisfied that defaulter is likely to **abscond**, or
 - Defaulter fails to **appear** before AA on serving notice
- Arrested person to be brought before concerned AA asap within **24 hrs** (excl. time travel for journey)
Provided that: If defaulter **pays amt.** entered in warrant + cost of arresting officers - **Release immediately**
- In case of HUF, Defaulter = Karta
- Where person appears before AA on receipt of above notice, AA to give defaulter **opportunity** to Show Cause why not civil prison?

7. **Pending** conclusion of inquiry - AA may **order detention** of such defaulter and release on furnishing security
8. Upon **conclusion** - AA may order **detention in civil prison** and arrest him (if not already arrested)
9. To give an **opportunity** to defaulter **to make payment**, AA may prior to order of detention in prison, leave defaulter in custody of such officer for **not > 15 days**
10. Period of detention in civil imprisonment - **Upto 3 years** (if amount > Rs. 1 crore) or **upto 6m** (otherwise)
Release default if amount is paid.

Section 14A: Power to recover arrears of penalty: (Note: Arrest u/s 14A runs parallelly with recovery u./s 14A)

AA may authorize officer (of ED) > = **Asst. Director** of ED to recover arrears of penalty and such officer shall exercise power similar to those conferred on **IT Auth.** in relation to recovery of tax.

Section 15: Power to compound contravention

For **contravention** u/s 13 - On an appln by person committing contravention - **ED** or **officers** of ED/**RBI** auth. by **CG** may compound such contravention **within 180 days** of date of receipt of appln.

Where contravention is compounded - **No further proceedings** to be initiated/continued w.r.t., such contravention.

Process of Adjudication u/s 13:

Order by AA:

- **CG** to appoint AA (by notification in **OG**)
- AA to deal with complaint as **expeditiously** as possible and endeavor to dispose **within 1 year** from date of receipt of the complaint (else record reason in writing)

Appeals to Special Directors (Appeal):

- Appeals against order of **AA (Asst Dir. or Deputy Dir. of ED)** to be heard by 1/more **SD(A)** appt. by **CG**
- Appeal to be made by aggrieved person **within 45 days** of receipt order of AA
- **SD (A)** may entertain appeal **beyond 45 days** - **If satisfied** there was sufficient cause

Appeals to Appellate Tribunal (AT):

- **AT of FEMA** = AT as per Sec 12 of Smugglers and Forex Manipulator Act
- **CG** or aggrieved person may prefer appeal to AT against order of:
 - AA (other than Asst./Deputy Director of ED)
 - **SD(Appeals)**
- Appeal **within 45 days** of receipt of order (AT may entertain appeal after **45 days** if sufficient cause)
- AT to **dispose** of appeal **asap** not **later than 180 days** from date of receipt (else record reason)

Appeals to High Court (HC):

- Appeal against **order of AT** lies with HC
- Within **60 days** of comm. of order (+60 days)
- Only where there is a **question of law** arising out of such order.

Section 36: Directorate of Enforcement (ED)

1. CG to establish ED with a director and officers (called **officers of Enforcement**)
2. CG may authorise Director, ED or Add. Director or Special Director or Deputy Director to appoint officers < Rank of Asst. Director
3. Power and duties of ED and officers - As per this Act

Section 37: Officer > Rank of Asst. Director may take up investigation u/s 13

Check Amendment Relevant w.e.f May'23 in Next Page

Foreign Exchange Management (Overseas Investment) Rules, 2022**About the Rules:**

- Issue by Ministry of Finance w.e.f. **22nd August 2022**
- Led to **suppression** of the following two regulations:
 - FEM (Transfer or Issue of Any Foreign Security) Regulations, 2004
 - FEM (Acquisition & Transfer of Immovable Property O/S India) Reg, 2015

Important Definitions:**Foreign Entity:**

Entity **incorporated outside India** (including IFSC) with **limited liability**.

Provided that - Restriction of limited liability shall **not apply** to entity with **core activity** in a strategic sector (E.g., green energy or natural resources).

Overseas Investment (OI) - Financial Commitment and Overseas Portfolio Investment (OPI) by **PRI**

Financial Commitment: Aggregate amount of investment by PRI by way of:

ODIs	Debts other than Overseas Portfolio Investments	Non-fund based facilities
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Overseas Direct Investment (ODIs)

Investment by way of:

- **Acquisition** of **unlisted** equity capital of a foreign entity or
- **Subscription** as a part of MoA of foreign entity, or
- Investment in **≥ 10%** of PUE SC or
- Investment with **control** where investment is **<10%** of **listed foreign entity**.

OPI -

- Investment, other than ODI, in foreign securities
- but **not** in **unlisted debt instrument** or
- any securities issued by a **PRI who is not in an IFSC**

Financial service Regulator - RBI, SEBI, IRDA and PFRDA

Indian entity means:

- Company under Companies Act
- Body corporate incorporated by any law
- LLPs under LLP Act
- Partnership firm under IPA, 1932

Strategic Sector includes **energy** and **natural resources** sectors such as oil, gas, coal, mineral ores, submarine cable system and **start-ups** and any other sector as deemed necessary by **CG**.

"Subsidiary" or "step down subsidiary" of a foreign entity means an entity in which the foreign entity has **control** (not necessarily **≥50%** holding)

"Control" means:

- the right to appoint **majority of dirs.** or
- to **control management** or policy decisions exercisable by a person acting individually or in concert **including** by virtue of their **shareholding** or mgt. rights or shareholders' agreements or voting agreements that entitle them to **>= 10%** of voting rights or in any other manner.

"Net worth" - Same meaning as Sec 2(57) of Companies Act. (i.e., SPA included now)

3. Administration of these Rules:

- Administered by RBI
- RBI may issue direction and instructions as it may deem necessary for effective implementation

4. Non applicability:

These rules and relevant regulations shall **not apply** to:

- Investment made outside India by a **financial institution in an IFSC** (e.g. JP Morgan in GIFT City)
- Acquisition or **transfer** of any investment o/s India made:
 - Out of **Resident Foreign Currency (RFC) Account** or
 - Out of FC resources held o/s India by a person **employed in India** for specific duration irrespective of length thereof or for a specific job duration of which is **< 3 years**.
 - In accordance with section 6(4) of this Act

Section 6(4) - **PRI may hold foreign currency**, foreign security or IP situated o/s India **provided that** it was held by such person when he was **PROI** or **inherited** from a PROI

5. Debt instrument and non-debt instrument:

Following shall be debt and non-debt instruments as determined by CG u/s 6(7):

(A) Debt instruments (RBI has power to regulate)

Govt Bonds	Corporate Bonds	All non-equity tranches of securitization
Borrowing through Loans	Depository receipts with underlying debt securities	

(B) Non-debt instruments:

Investment in equity of incorporated entities	Capital participations in LLPs	Immovable prop
Instruments recognised in FDI policy	Equity tranche of Securitisation	Contribution to trust
Depository receipts against equity	Investment in MF and ETF which invest >50% in equity	
Investment in units of AIFs, ReITs and Infra investments trusts		

6. Continuity of existing investment:

Any **investment** or **financial commitment** made o/s India as per FEMA Rules and Reg. and held as on date of publication of this Rule in Official Gazette - **Deemed to be in compliance** of this Rule.

7. Rights issue and Bonus Shares

- Any **PRI** who has acquired & **continues to hold equity of foreign entity** (as per Rules & Reg) may:
 - Invest in equity capital issue by such entity as **rights issue**, or
 - May be granted **bonus** subject to T&C of these rules.
- PRI** referred above may **renounce** such rights in favour of **PRI** or **PROI**.

8. Prohibition on investment o/s India:

Save as otherwise provided in Act, Rules or Regulation, **no PRI** shall make or transfer investment or financial commitments outside India.

9. Overseas Investment (OI):**1. Investment outside India:**

- Any investment made outside India by a **PRI**
- shall be made in a **foreign entity** engaged in **bona fide business activity**,
- directly** or through **step down subsidiary** or **SPV**
- subject to limits and conditions of these rules and regulations

Provided that - **OI** or **transfer** thereof (including swap) of securities in foreign entities incorporated in **Pakistan** or **other CG notified jurisdiction** - Requires **prior approval** of **CG**

2. Notwithstanding these Rules and Regulations:

- CG** may, on application made to it through **RBI**, **permit** financial commitments in **strategic sectors or geographics**, above the **limits** subject to T&Cs.
- RBI** may, on application made to it through **designated AD Bank**, **permit** a **PRI** to make or transfer investment or financial commitment outside India subject to T&C.
Provided that - **OI** by **PRI** shall **not** be made in **foreign entity located in country** as may be decided by **CG**.

3. RBI may, in consultation with CG,:

- Stipulate **ceiling** for aggregate outflows in a FY on account of **OI** (i.e., **FinCom** or **OPI**)
- Stipulate **ceiling** beyond which amount of **Financial commitment** (not **OI**) by a **PRI** in a FY shall require **prior approval** of **RBI**.

10. No objection certificate:**1. A PRI who:**

has an NPA account	classified as wilful defaulter by any bank	under investigation by financial service regulator or Indian investigative agencies - CBI or ED or SFIO
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shall, before making any **Fincom** or undertaking regulations, obtain a **NOC** from the concerned lender **bank** or **regulatory** body or investigative **agency** by making an application in writing.

Where the concerned **bank** or agency **fails** to furnish **NOC** within **60 days** of application - **Presume no objection** to the proposed transaction.

- NOC** issued by bank, agency, etc. shall be **addressed** to the **designated AD bank** with an endorsement to applicant.

Rule 11 onwards:

Rule	Heading	In the manner and subject to T&C Prescribed in :
11	Manner of ODI by Indian Entity	Schedule I
12	Manner of OPI by Indian Entity	Schedule II
13	Manner of ODI by Resident Individual	Schedule III
14	OI by PRI other than Indian Entity and Resident Individual	Schedule IV
15	OI in IFSC by PRI	Schedule V

16. Pricing Guidelines:

- Unless otherwise provided herein, the **issue** or **transfer** of **equity capital**:
 - From PROI or PRI **to a PRI** who is eligible to make such investment, or
 - From a PRI **to a PROI**
 shall be subject to a price arrived on **Arm's Length basis** (ALP)
- In such transaction, **AD bank** shall ensure compliance with **ALP** taking into consideration the **valuation** as per internationally accepted method.

17. Transfer or Liquidation:

- Unless provided in these rules, **PRI** holding **equity capital** as per these rules, may transfer such investments as per the Regulations.
- PRI** may transfer equity capital by way of sale to a "**Eligible PRI**" or **PROI**
- In case such transfer is on account of **merger**, **amalgamation** or demerger or **buyback**, such trf or **liquidation** shall have approval of **competent authority** as per laws of India or host country.
- Where the **disinvestment** by **PRI** pertains to **ODI**:
 - Transferor**, in case of full disinvestment other than by way of liquidation, shall **not** have any **dues outstanding for receipt** from foreign entity (as an investor in equity or debt)
 - Transferor must have **stayed** invested for **at least 1 year** from date of making ODI

Provided that, **above condition** shall **N.A.** in case of:

 - merger, demerger or amalgamation between 2 or more foreign entities that are **wholly owned** by the Indian entity or
 - where there is **no** change or **dilution** in aggregate holding of Indian entity in the new entity.
- The holding of any investment or transfer thereof shall not be permitted if initial investment was not permitted under the Act

18. Restructuring:

PRI who made **ODI** in a foreign entity may permit **restructuring** of balance sheet by such entity:

- which has been incurring **losses** for previous **2 years** as evidenced by last audited BS
- subject to **compliance** with reporting, documentation requirements, and
- subject to **diminution** in the total value of o/s dues towards such PRI on accounts of investment in equity or debt after such restructuring **not > proportionate amount of accumulated losses**.

Certification of diminution in value:

In case where the **original investment is > \$10 mn** or where amount of **diminution > 20%** of total o/s, the diminution in value shall be **duly certified** on an ALP by:

- **Registered valuer** under Companies Act,
- Corresponding valuer registered with regulatory authority in host jurisdiction,
- **Certified Public Accountant** in host jurisdiction.

The **certificate** dated **not > 6 months** before date of transaction - Submit to **designated AD** bank

19. Restrictions and prohibition

(1) Unless otherwise provided, no PRI shall make **ODI** in foreign entity engaged in:

- Real estate** activity
- Gambling** in any form
- Dealing with **financial products** linked to INR **w/o specific approval** of RBI.

Note - Real estate activity means:

- Buying or selling of **real estate**
- Trading in Transferable Development Rights (**TDRs**)
- but **does not include development** of townships, construction of residential or commercial premises, roads or bridges **for selling or leasing**.

(2) Any ODI in **start-ups** recognised under laws of host country shall be made by an:

- **Indian entity** - Only from **internal accruals** whether from Indian entity or group or associate cos. in India
- **Resident individuals** - From **own funds** of such individuals

(3) No **PRI** shall make financial commitment in **foreign entity that has invested or invests into India**, at the time of making it or any time, thereafter, **resulting** in a structure with **> 2 layers** of subsidiaries. **[Round tripping]**

Such **restriction** shall **not apply** in case of:

Banking co.	Systematically important NBFC as per Sec 45-I of RBI	Insurance co.	Govt co. u/s 2(45) of Companies Act
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20. Requirements to be specified by RBI:

Mode of payment, deferred payment of consideration, reporting, realisation and other requirement for OI by PRI shall be as per regulations made by **RBI**.

21. Restriction on acquisition or transfer of immovable property outside India (IPOI)

(1) Save as other provided in the Act, no PRI shall **acquire or transfer IPOI** without general or special **permission of RBI**.

Provided that above provision shall **not apply** to property:

- (i) Held by PRI who is a **national** of a foreign state.
- (ii) Acquired by a PRI on or **before 8th July 1947** and continued to be held by such person with permission of RBI
- (iii) Acquired by PRI on **lease not > 5 years**.

(2) Notwithstanding above:

- (i) **PRI** may acquire IPOI by way of:

Inheritance	Gift	Purchase from PRI who acquired such IPOI as per forex provision in force at that time
-------------	------	--

- (ii) PRI may acquire IPOI from a **PROI** by way of:

Inheritance	Purchase out of forex in RFC A/C	purchase out of remittance sent under LRS scheme of RBI*
jointly with a relative who is PROI	out of income or sales proceeds of overseas assets other than ODI	

*Provided that such **remittance** under LRS **may be consolidated** in respect of **relatives** if such relative being PRI comply with T&C of the scheme.

- (iii) An **Indian entity** having **overseas office** may acquire IPOI for the **business and residential purpose** of staff as per RBI directions.
- (iv) PRI who has acquired IPOI as per forex provision in force at such time **may**:
 - (a) **Transfer** it by way of **gift** to eligible PRI **or** by way of **sale**
 - (b) Create **charge** on such property as per Act, Rules, Regulations or RBI directions.

(3) Holding of investment in IPOI or transfer thereof shall not be permitted if initial investment was not permitted.

Author's Note -

Impact of these rules: Global economic **meltdown** due to inflation and war, may present **good opportunities** for Indian parties to acquire strategic assets at an **attractive valuation**.

Schedule I - Manner of ODI by Indian Entity1. Manner of making ODI:(1) Purpose - Undertaking **bonafide business activity**.

(2) ODI may be made or held by way of:

Subscription or purchase of equity	Acq. through bidding or tender	Acq. by way of right issue or bonus issue	swap of securities
capitalisation of any amt. due to be received, remittance of which is permitted under Act or does not require prior permission of CG/RBI			merger, demerger or amalgamation

2. ODI in financial services activity:(1) An **Indian entity engaged in financial services** activity in India may make ODI in a foreign entity engaged in such activity provided that the Indian entity:(i) has posted **net profits** during the last **3 FYs**(ii) is **registered** with financial service regulator in India(iii) has obtained **approval** from financial service regulators **both** in India and host country.(2) An **Indian entity not engaged in financial services** activity in India may make ODI in a foreign entity engaged in such activity, except banking or insurance, provided that the Indian entity has posted **net profits** during the last **3 FYs**.

Provided that an Indian entity **not engaged in insurance sector** may make ODI in **general and health insurance** where such insurance business is **supporting the core** activity undertaken overseas by such an Indian entity.

(3) If **net profit** condition above is not met from 202-2021 to 2021-22 due to **COVID**, then **exclude** these periods.3. Limit of financial commitment (FinCom):(1) **Total FinCom** by an **Indian entity** in all foreign entities **taken together** shall be **<= 400% of Net worth** as on date of last audited FS or as directed by RBI + CG(2) Total FinCom shall **not include capitalisation** of retained earning (e.g., bonus) **but include:**i. Utilisation of the amount raised by issue of **ADRs** or **GDRs** or stock swap.ii. Utilisation of proceeds from **ECBs** to the extent the corresponding pledge or creation of **charge on** asset to raise such borrowings has not already been included in limit.

Provided that FinCom made by **Maharatna** or **Navratna** or **Miniratna** or subdy. of such **PSUs** in foreign entity o/s India **engaged in strategic sectors** shall **not be subject** to above limits

Schedule II - Manner of OPI by Indian Entity:1. An **Indian entity** may make **OPI <= 50% of net worth** as on date of last audited FS2. **Listed** Indian co. may make OPI including by way of **reinvestment**.3. **Unlisted** Indian entity may make OPI only under selective clauses of **Schedule I** (i.e., unlisted foreign entity cannot do OPI)

Author's Note (Let it go if you didn't understand)

A **Listed** Indian entity can make total investment of **450%** of NW (i.e., 400% in ODI & 50% in OPI.

But for an **unlisted** Indian entity, the **50%** in OPI is **subsumed** within the limit of **400%**, hence **max investment of 400% can be done**.

Schedule III - Manner of making OI by Resident Individual:1. Manner of making OI:

(1) Any resident individual may make ODI or OPI **subject to overall ceiling** under **LRS** of RBI.

(2) Resident individual may make or hold OI by way of:

(i) **ODI** in an operating foreign entity:

- **not engaged** in financial service activity **AND**
- where the resident indv. has **control**, such foreign entity **does not have** subty or step down subty.

(ii) **OPI**, including by way of reinvestment.

(iii) **ODI** or **OPI**, by way of:

Acq. by way of right issue or bonus issue	swap of securities due to merger, etc.	Gift	(e) Inheritance	(f) Acquisition of squat eq. shares
capitalisation of any amt. due to be received, remittance of which is permitted under Act or does not require prior permission of CG/RBI				(h) Acq. of shares under ESOP scheme

(g) acq. of **minimum qualification share** for holding mgt. position

Provided that - **ODI** w.r.t. clause (e), (f), (g), (h) shall be made **irrespective** of whether or not such foreign entity is engaged in financial service activity or has subty or step down subty where resident individual has **control**.

Provided further that - Acquisition of **< 10% of equity** **without** control under clause (f), (g) and (h) shall be treated as **OPI**.

2. Acquisition of foreign securities by way of Gift or inheritance:

(1) A resident individual may, **without any limit**, acquire foreign securities by way of **inheritance** from **PRI** is holding such securities as per this Act **or** from a **PROI**.

(2) A resident individual, **without any limit**, may acquire foreign securities by way of **gift** from a **PRI** who is a **relative** and holding such securities as per this Act.

(3) A resident individual may acquire foreign securities by way of **gift** from a **PROI** as per FCRA Act and Regulations made thereunder.

3. Acquisition of shares or interest under ESOP or Sweat Equity shares:

(1) A resident individual, who is an **employee** or **director** of an:

- office in India or branch of an **overseas entity** or
- **subsidiary** in India of an overseas entity or
- Indian entity in which the overseas entity has direct or indirect eq. holding may **acquire, without limit**, shares under ESOPs or sweat equity shares **offered by such overseas entity** provided that such ESOPs are being **issued globally on uniform basis**.

(2) Notwithstanding above, a resident individual may acquire **ESOPs** under any **scheme of CG**.

Schedule IV - OI by PRI other than Indian entity and resident individual**1. ODI by Registered trust or society**

A person being a registered trust, or a registered society engaged in the **educational** sectors, or which has set up **hospitals** in India may make **ODI** with **prior approval** of **RBI** subject to following conditions **[E-SLAP]**:

- (i) Foreign entity is engaged in **same Sector** as that of the Indian trust or society,
- (ii) Trust or society should be in **Existence** for **at least 3 FYs** before the year of investment
- (iii) Trust **deed** or MoA or Rules or bye-laws shall **Permit** proposed ODI
- (iv) Such investment has **Approval** of trustees (trust) and governing body (society)
- (v) In case the trust or society requires special **Licence** either from **MHA, CG** or local authority, such license has been obtained and submitted to designated AD.

2. ODI by Mutual Funds (MFs), Venture Capital Fund (VCFs) or Alternative Investment Fund (AIFs)

(1) A MF or VCF or AIF may **acquire** or **trf.** foreign sec. as per **SEBI** and subject to T&C of RBI. Provided that - **Aggregate** limit of such investment - **RBI + CG** to decide.

Provided further that - **Individual** limits of such investment shall be as per **SEBI**.

- (2) Every transaction of purchase or sale here shall be **routed** through designated **AD bank**
- (3) Investments **by** MF, VCFs and AIF to be treated as **OPI**.

3. Opening of Demat Accounts by SEBI approved clearing corporations (CCs) of stock exchanges and clearing members (CMs):

May acquire, hold, and transfer foreign securities, offered as **collateral** by **foreign portfolio investors** and subject to SEBI, shall:

- (i) Open and maintain **demat** account with **foreign depositories**.
- (ii) **Remit** the proceeds arising due to such action, if any, and
- (iii) Liquidate such foreign securities and **repatriate** the proceeds thereof to India.

4. Acquisition and transfer of foreign securities by domestic depositories:

May acquire, hold and transfer foreign securities of a foreign entity, being the **underlying security** to issue Indian Depository Receipts (**IDRs**) as may be **authorised** by such foreign entity or its overseas custodian bank and the **person investing** in IDRs **may either sell or continue** to hold foreign securities as per these regulations **upon conversion** of such depository receipts.

5. Acquisition and transfer of foreign securities by AD Bank:

An AD bank **including its overseas branch** may acquire or transfer foreign securities in accordance with the terms of the **host country** in the **normal course of its banking** business.

Schedule V - Overseas Investment in IFSC by PRI

1. Subject to these rules and regulations, **PRI** may make OI in **IFSC** in India **within limit**.

2. A **PRI** may make **OI** in an IFSC in manner laid down in Sch I to IV provided that:

- (i) In case of an **ODI** made in IFSC, **approval** by concerned **financial service regulator** shall be decided within **45 days** from date of application, failing which - **deemed approved**.
- (ii) An **Indian entity** not engaged in financial service activity in India, making ODI in foreign entity, **except banking and insurance**, who does **not meet net profit** condition, may make ODI in an **IFSC**.

- (iii) PRI may make contribution to an investment fund or vehicle set up in an IFSC as an OPI
- (iv) Resident individual may make ODI in foreign entity including an entity engaged in financial services activity, (except in banking and insurance), in IFSC if such entity does not have subsidiary or step-down subsidiary outside IFSC where the resident individual has control in the foreign entity.

3. Recognised stock exchange in IFSC shall be treated as RSE outside India for these rules.

Foreign Exchange Management (Overseas Investment) Regulations, 2022

About the Regulation:

Issue by Reserve Bank of India w.e.f. 22nd August, 2022

2. Important Definitions - None

3. FinCom by Indian Entity by modes other than equity capital:

The Indian entity (IE) may lend or invest in:

- any debt instrument issued by a foreign entity or
- extend non-fund-based commitment to or on behalf of foreign entity including overseas step-down subsidiaries of such Indian entity.

subject to following conditions:

- IE is eligible to make ODI;
- IE has made ODI in the foreign entity;
- IE has acquired control in such foreign entity at time of making FinCom.

4. FinCom by Indian entity by way of Debt

IE may lend or invest in any debt instruments issued by foreign entity subject to condition that:

- Such loans are duly backed by loan agreement and.
- Rate of intt. shall be charged on an arm's length basis (unrelated + no conflict of interest).

5. FinCom by Indian entity by way of Guarantee (Non-fund based)

1. Following guarantees may be issued to or on behalf of a foreign entity or step-down subty in which IE has control through FE:

- (i) Corporate guarantee or performance guarantee by such IE
- (ii) Corporate guarantee or performance guarantee BY group company of such IE in India being holding co. (>= 51% stake in Indian entity) or subty co. (in which IE holds >=51%) or promotor group co. which is a BC
- (iii) Personal guarantee BY the resident individual promoter of the IE
- (iv) Bank guarantee, backed by counter-guarantee or collateral by IE or its group co. and issued by bank in India.

2. Where guarantee is **extended** by **group co.**, it shall be **counted** towards utilisation of its **FinCom limits independently**, and

In case of **Resident individual promoter**, same shall be **counted** in **FinCom** limit of the **IE**.

Provided that, where commitment under sub-regulation (1) is extended by **group co.**, any **fund-based exposure** to or from the **IE** shall be **deducted from net worth** of such group co. for computing its **FinCom** limit.

Provided further that where the guarantee under sub-regulation (1) is extended by a **promoter**, which is a body corporate or an individual, the **IE** shall be a **part of promoter group**.

3. **No** guarantee shall be **open-ended**.
4. The guarantee, to the extent of the **amount invoked**, shall **cease** to be a part of the **non-fund based** commitment but be considered as **lending**.
5. Where a guarantee has been extended **jointly and severally** by two or more **IEs**, 100% of the **amount** of such guarantee shall be **reckoned** towards the **individual limits** of **each** of such **IEs**.
6. In case of **perf. guarantee**, 50% of amount of guarantee shall be reckoned towards **FinCom** limit.
7. **Roll-over** of guarantee shall **not** be treated as **fresh FinCom** where **the amt.** on account of such roll-over **does not exceed** the amount of **original** guarantee.

6. FinCom by way of pledge or charge

An **IE**, which has made **ODI** by way of investment in **equity capital** in a foreign entity, may:

- (a) Pledge such **equity** in favour of **AD bank** or **PFI** in India or an **overseas lender**, for availing fund-based or non-fund-based facilities **for itself** or for any foreign entity in which it has **ODI** or step down subsidiary thereof or in **favour of debenture trustee** registered with **SEBI** for availing fund-based facilities for itself.
- (b) Create **charge** by way of mortgage, pledge, hypothecation, etc. on:
- i. its asset **in India** (incl. assets of group co., associate co., promoter or director) in favour of **AD bank** or **PFI** in India or an **overseas lender** as **security** for availing fund-based or non-fund-based facilities ~~for itself or for any foreign entity in which it has ODI or step down subsidiary thereof or in favor of debenture trustee registered with SEBI for availing fund-based facilities for itself.~~
 - ii. the assets **outside** India of the foreign entity in which it has made **ODI** or its step down subdy outside India, in favour of **AD bank** in India or **PFI** in India ~~or an overseas lender~~ as **security** for availing fund-based or non-fund based facilities **for itself** or for any foreign entity in which it has **ODI** or step down subsidiary thereof or in **favor of debenture trustee** registered with **SEBI** for availing fund-based facilities for itself.

Provided that:

- i. Value of pledge or charge or amount of facility - Whichever is **LESS**, shall be considered as **FinCom limits** provided such facility has already not been included in FinCom limit and **excluding cases where the facility has been availed by the Indian entity for itself**;
- ii. Overseas lender in whose favour there is such a pledge or charge shall **not** be from any country or jurisdiction in which FinCom is not permissible under FEMA Rules.

Note - The "**negative pledge**" or "**negative charge**" created by an IE, or a **bid bond guarantee** obtained as per these regulations **for participation** in a bidding or tender procedure for acquisition of foreign entity shall **not be reckoned** towards FinCom limit **referred** to in Reg. 3(1).

7. Acquisition or transfer of equity capital by way of deferred payment:

1.

Where a PRI acquires equity cap. by subscription or purchase from PROI

Where PROI acquires equity capital by way of purchase from PRI

and where such equity cap. is reckoned as **ODI**, the **payment** of amount of consideration **may be deferred** for such **definite period** from date of agreement as provided in such agreement subject to following:

- (i) **Foreign securities equivalent** to amount of total consideration shall be **transferred** or issued upfront by the seller to the buyer.
- (ii) Full consideration finally paid shall be compliant with **pricing guidelines**.

Provided that - **Deferred part** of consideration in case of acquisition of equity capital of a foreign entity by PRI shall be treated as **non-fund based** commitment.

2. **Buyer may be indemnified by the seller** up to such amount and subject to such T&C as may be **mutually agreed** upon and laid down in the agreement.

Provided that, such agreement is in compliance with provision of the Act, etc.

8. Mode of payment: (for both debt and non-debt instrument)

A PRI making OI may make payment:

- i. By remittance made through **banking** channels.
- ii. From funds held in **accounts** as per this act.
- iii. By **swap** of securities.
- iv. By using proceeds of **ADRs, GDRs**, or stock swap of such receipts or **ECBs**.

9. Obligation of a PRI:

1. A **PRI** acquiring equity capital in foreign entity which is reckoned as **ODI** shall **submit** to **AD Bank** share certificates or other relevant docs as per law of host country, as **evidence** of such investment, **within 6m** from:
 - date of effecting **remittance** or
 - date on which the dues to such person are **capitalized** or
 - date on which amount was allowed to be capitalised, as the case may be.

2. PRI, through its designated AD bank, shall obtain a **Unique Identification Number (UIN)** from RBI for the foreign entity in which ODI is intended to be made **before sending outward remittance or acquisition** of equity capital, whichever is **earlier**.
(Note: In case of deferred payment, acquisition is earlier)
3. A PRI making ODI shall **designate** an AD bank and **route ALL transactions** related to a particular UIN through such AD.
Provided that - Where **>1 PRI** makes FinCom in same foreign entity, **ALL such person** shall route **ALL transactions** relating to that **UIN** through AD bank designated for that UIN.
4. PRI having ODI shall **realise and repatriate** to India:
 - all **dues receivable** from foreign entity w.r.t. investment in such entity, (e.g., Dividend)
 - the amount of **consideration** received on transfer or **disinvestment** of such ODI and
 - the **net realisable value** of assets due to **liquidation** as per laws of host country **within 90 days** from date when such receivables fall **due** or date of such **trf.** or disinvestment or date of actual **distribution** of assets made by official liquidator.
5. PRI who is eligible to make ODI may make **remittance** towards **earnest money deposit** or obtain a **bid bond guarantee** from an AD bank for participation in bidding or tender procedure for **acquisition** of foreign entity.

Provided that - In case of **open-ended** bid bond guarantee, it shall be **converted** to close ended within **3 months** from date of award of contract.

10. Reporting requirements for Overseas Investment:

- (1) All **reporting** by a PRI, as specified, shall be **made** through **designated AD bank** in manner provided in this regulation and in format provided by RBI.
- (2) A **PRI** who has made **ODI** or making FinCom or undertaking disinvestment in a FE shall report:
 - a. **FinCom** at the time of sending outward remittance or making a FinCom, whichever is **earlier**;
 - b. **disinvestment** within 30 days of receipt of disinvestment proceeds;
 - c. **restructuring** within 30 days from the date of such restructuring.
- (3) A **PRI** other than a resident individual making any **OPI** or transferring such OPI by way of sale shall **report** such investment or transfer of investment **within 60 days** from **end of the half-year** in which such investment or transfer is made **as of Sep or March-end**:

Provided that in case of **OPI** by way of acquisition of **shares** or interest under **ESOP**, the **reporting** shall be done by the:

- Office in India or
- Branch of an overseas entity or
- Subsidiary in India of an overseas entity or the Indian entity in which the overseas entity has direct or indirect equity holding where resident individual is an employee or director.

- (4) A PRI acquiring equity capital in a FE which is reckoned as ODI, shall submit an Annual Performance Report (APR) with respect to each foreign entity every year by 31st December and where the accounting year of such foreign entity ends on 31st December, the APR shall be submitted by 31st December of the next year:

Provided that no such reporting shall be required where:

- i. a PRI is holding <10% of the equity capital without control in the FE and there is no other FinCom other than by way of equity capital; or
- ii. a foreign entity is under liquidation.

Explanation: For the purposes of this sub-regulation:

- (a) the APR shall be based on the audited FS of the foreign entity.

Provided that where the PRI does not have control in the FE and the laws of the host country or host jurisdiction, as the case may be, do not provide for mandatory auditing of the books of accounts, the APR may be submitted based on unaudited FS certified as such by statutory auditor of the IE or by a CA where the statutory audit is not applicable;

- (b) in case more than one PRI have made ODI in the same FE, the person holding the highest stake in the FE shall be required to submit APR and in case of holdings being equal, APR may be filed jointly;
- (c) The PRI shall report the details regarding acquisition or setting up or winding up or transfer of a step-down subsidiary or alteration in shareholding pattern in FE during reporting year in APR.
- (5) An IE which has made ODI shall submit an Annual Return on Foreign Liabilities and Assets within such time as may be decided by RBI, to Department of Statistics & Info Mgt., RBI

11. Delay in reporting:

- (1) A PRI who does not submit the evidence of investment within time specified in Regulation 9(1) or does not make any filing within the time specified under Regulation 10, may make such submission or filing, as the case may be, along with Late Submission Fee within such period as may be advised, and at the rates and in the manner as directed by RBI.

Provided that such facility can be availed within maximum 3 years from due date of such submission or filing, as the case may be.

- (2) A PRI responsible for submitting the evidence or any filing relating to OI before date of publication of these regulations in the Official Gazette and who has not made such submission or filing within the time specified thereunder, may make such submission or filing along with Late Submission Fee and at the rates and in the manner as may be directed by RBI, from time to time.

12. Restriction on further financial commitment or transfer:

Student's Notes:

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Chapter 2 – Prevention of Money Laundering Act, 2002

[W.e.f., 1st July 2005]

Short forms used:

AA	Adjudication Authority	ML	Money Laundering
Co-op	Co-operative	OG	Official Gazette
C/BO	Client/Beneficial Owners	PoC	Proceeds of Crime
GoI	Government of India	RE	Reporting Entity
JS	Joint Secretary	SCN	Show Cause Notice
IP	Immovable Property	SpC	Special Court
LoR	Letter of Request	UIDAI	Unique Identification Authority of India
TDF and OSBS - Targeted Delivery of Financial and Other Subsidies, Benefits and Services			

Twin Purpose of the Act:

1. **Prevent** Money Laundering
2. Provide for **confiscation** of property derived from/involved in ML

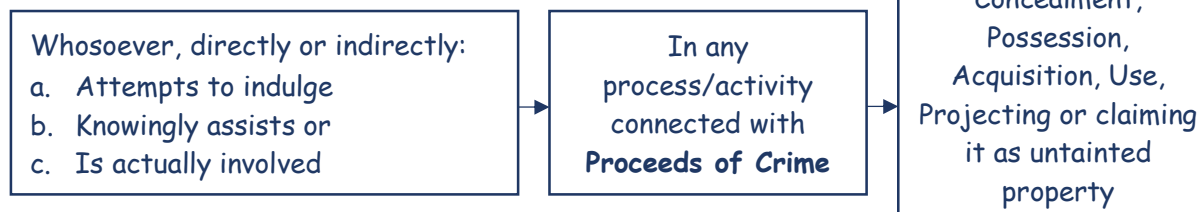
Some ideas of ML (what to do with black money):

1. Smuggle money o/s India and then invest back into India (Round Tripping)
2. Show excess income in cash [Service industry]
3. Pay salaries in Cash
4. Buy a real estate and sell for higher profits
5. Casino Gambling Income
6. Hawala [Robert Vadra Case]

Important Definitions:

1. Money Laundering [Sec 2(1)(p)] - Meaning as assigned in Section 3

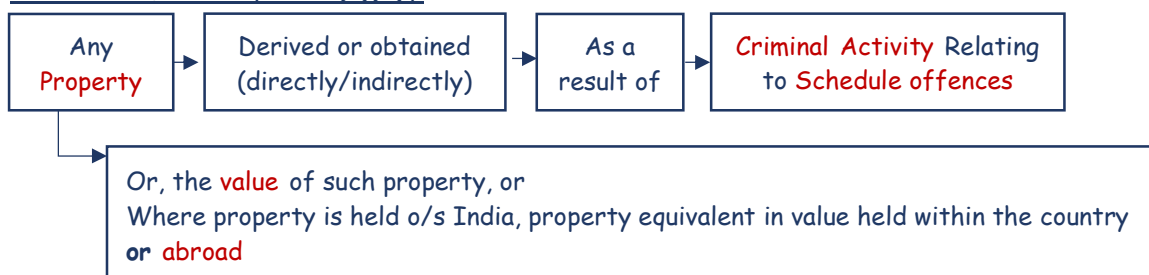
Section 3: Following person shall be guilty of offence of ML:



The process or activity connected with PoC is a **continuing activity**

Process of Money Laundering:



2. Proceeds of Crime [Sec 2(1)(u)]:3. Property [Sec 2(1)(v)]

Means property/asset of every description:

- Corporeal or incorporeal
- Movable or immovable
- Tangible or intangible

And includes

deeds/instruments evidencing title/interest thereof

Property includes property used in commission of offence in this Act (E.g., hammer)

4. Scheduled offences [2(1)(y)]: Offence specified under Part A, Part B (if ≥ 1 crore) or Part C of the Schedule5. Attachment: Prohibition on transfer, conversion or movement of property6. AA: As appointed u/s 6(1)Money laundering vis-a-vis siphoning of funds:

Mere earning of money or income or deriving any property by committing a crime does not amount to money laundering, though it may mount to siphoning of funds. Deriving or obtaining any property by committing a crime which amounts to a Scheduled offence, and then projecting such property as untainted property amounts to money laundering.

Section 4: Punishment for ML:

	Offence of ML	PoC relates to Offence of Para 2 of Part A of Sch. [Narcotic Drugs & Psychotropic Substance Act 1985]
Rigorous imprisonment AND	3 to 7 years, and	3 years to 10 years and
Fine	Without limit	Without limit

Provisions of Attachment, Adjudication and Confiscation:Section 5: Provisional Attachment:1. Order of provisional attachment:

- Where the Director or other officer (not < Deputy Director and auth. by Director)
- Based on material in his possession has reasons to believe (recorded in writing) that:
 - Any person is in possession of proceeds of crime AND
 - Such proceeds are likely to be transferred, concealed or dealt with in manner which is likely to frustrate proceedings related to its confiscation
- It may be order in writing provisionally attach such proceeds (period not > 180 days)

Provided that: **No such order** of attachment shall be made unless, w.r.t. such offence,;

- a. Report → Magistrate under CCP, 1973, or
- b. Complaint filed by authorized person with Magistrate or court for cognizance

Provided further that: If non confiscation is likely to frustrate proceedings - Ignore first proviso.

For the purpose of calculating 180 days - Exclude the period during which proceedings were stayed by HC + **Upto 30 days** from vacation of such order.

2. Immediately after order: Fwd. a copy of order + Material in possession **to AA** in a sealed envelope
3. Validity of order:
Order shall cease to have effect after → **Earlier of** - Expiry of 180 days or order u/s 8 confirming attachment
4. Order under this section not to effect right of person interested to enjoy IP
5. **Complain to AA** stating facts to be filed **within 30 days** of provisional attachment

Section 6: Adjudicating Authority: CG to appoint by notification - 1 Chairperson & 2 other members

Section 8: Adjudication by AA:

1. Serving of notice:

- On receipt of **complaint u/s 5(5)** or application u/s 17 or 18,
- If AA has reasons to believe (**not yet proved**) that:

Offence u/s 3 is committed, or

Person is in possession of PoC

- AA shall serve a notice (SCN) on such person (**not < 30 days**)
- Calling upon the person to indicate following:

Source of income/earning through such prop. was acquired.

Evidence on which AA can rely

SCN - Why should such prop. not be declared as involved in ML and confiscated by CG?

2. AA shall, after considering:

Reply to notice u/ss (1)

Hearing Aggrieved person & other authorized person

All relevant materials

Record findings as to whether property involved in ML?

Provided that: If any prop. is claimed by any other person as well - **OOBH to be given to such other person** to prove property is not involved in ML

3. Where AA decides such property is involved in ML, it shall:

Confirm **attachment** u/s 5, or

confirm **retention** of prop. frozen/seized u/s 17 or 18

Validity of such confirmed attachment:

- **Continue** during investigation [**not > 365 days** (excl. period of stay by any court + ~~30 days~~)] or pendency of proceeding under this Act
- Become **final** on passing an order of confiscation.

4. On confirmation of attachment above, Director or authorised person shall **forthwith take possession**. If possession not possible - **Deemed possession**

5. Post attachment, the case then goes to Special Court (SpC) for Trial:

Case 1 - On **conclusion** of Trial, SpC court finds offence of ML is **committed**:

SpC to order that property involved in ML or used for commission of offence - **Confiscated** by CG

Case 2 - On conclusion of Trial, SpC court finds offence of ML is **NOT** committed:

SpC to order **release** of property to person entitled to receive it

Case3 - Where trial was commenced but **could not be concluded** (for any reason such as death of accused):

SpC shall, on appln of Dir. or person entitled to attached prop. - Pass **appropriate orders** (confiscate/release)

6. Where property is **confiscated** to CG - Special Court may order CG to **restore** such property - To **claimant** with legitimate **interest** who may have suffered **quantifiable loss** [provided claimant has acted in **good faith** and incurred loss despite **reasonable precaution** and **not involved in ML**]

Section 9: Vesting of Property of CG [Car used for smuggling]:

Where an order of confiscation is made, all rights and titles in such property shall vest absolutely in the CG **free of all encumbrances**

However, if Special court/AA is of opinion that **encumbrance** or **leasehold interest** is created with intention to **defeat provision** of this Act - It may declare such interest **void** and property is vested free of such interest

Provided that: Nothing in this section operates to discharge any person of its liability

Section 10: Management of confiscated property:

- On confiscation - CG may by notification in OG appoint officers (not < Joint Secretary to Govt. of India) to act as **Administrator**
- Function of Administrator:
 - Receive** and **manage** such property in prescribed manner
 - Take **measures** as CG may direct to dispose of such property vested in CG u/s 9

Section 11: Powers of AA: Same as vested in Civil Court - **PARCER₂O**

Other definitions relevant from now on:

Reporting Entity	Banking company, financial institution, intermediary or person carrying on designated business/profession
Banking company	Means banking co./co-operative bank to which Banking Regulation Act, 1949 applies
Person carrying designated business [Amendment] [RAP SONG]	a. Person carrying on activity for playing Games of chance for cash/kind (incl. casino) b. Inspector General of Registration appt. u/s 3 of Registration Act, 1908 c. Real estate Agent engaged in providing services in relation to the sale or purchase of real estate (as defined u/s 2(zm) of RERA Act) and having annual turnover of > = Rs. 20 lakhs.

	<p>d. Dealer in Precious metals, precious stones, or other High value goods if they engage in any cash transactions with customer > = Rs. 10 lakhs, carried out in a single operation or in several operations that appear to be linked.</p> <p>e. Person engaged in Safekeeping & administration of cash & liquid securities as notified by CG</p> <p>f. Such other activity as CG may notify.</p> <p>CG hereby notifies the following activity when carried out for or on behalf of another natural or legal person in OCOB:</p> <p>(i) exchange between virtual digital assets and fiat currencies;</p> <p>(ii) exchange between one or more forms of virtual digital assets;</p> <p>(iii) transfer of virtual digital assets;</p> <p>(iv) safekeeping or administration of virtual digital assets or instruments enabling control over virtual digital assets; and</p> <p>(v) participation in and provision of financial services related to an issuer's offer and sale of a virtual digital asset.</p>
Financial Institution	Includes - Chit Fund co., NBFC, Housing finance institution, Department of post, payment system operator and an authorized person.
Intermediary	<p>a. Person registered u/s 12 of SEBI Act, 1992</p> <p>b. Recognised Stock Exchange as per Sec 2 of SCRA, 1956</p> <p>c. Association registered under Forward Contract Regulation Act, 1952</p> <p>d. Intermediary registered under PFRDA</p>
Payment system	<ul style="list-style-type: none"> A system that enables payment to be effected between Payer and Beneficiary And includes - Clearing service, payment or settlement services <p>Includes systems enabling Credit Card, debit card, smart card, money transfer operations, etc.</p>

Section 11A: Verification of Identity by RE:

- Every RE shall verify **identity** of Clients and Beneficial owner (C/BO) by:
 - If RE is banking co. - Authentication under **Aadhar** (TDF and OSBS) Act, 2016
 - Offline** verification under same Act
 - Use of **passport** issued under concerned Act
 - Use any other officially **valid docs** as notified by CG

Proviso - CG + **UIDAI** may permit RE other than banking co. to perform authentication under clause (a)
- Banking co. to make **other modes** of verification (b/c/d) also available to C/BO
- Use of mode of **identification** - **Choice** of C/BO
- For use of mode under clause (a) or (b) - RE shall **not store** - **Core biometric info** or Aadhar No.
- CG may notify additional safeguards on RE

Obligations of RE:Section 12: RE to maintain Records:

1. Every RE shall:
 - a. Maintain record of all **transactions** so as to be able to reconstruct individual transaction [For **5 years from of transaction between client and RE**]
 - b. **Furnish** information to Director w.r.t, such transaction executed/attempted of such nature or value as prescribed
 - c. Maintain records of docs evidencing **identity** of C/BO + Account files and biz. correspondence of client [For **5 years** from after **end** of business relation or close of account W.I.**Later**]
2. Every info → Confidential
3. Time period for maintenance of record: Mentioned above
4. CG may exempt RE, by notification, from obligation under this Chapter

Section 12A: Access to information

- **Director may call** for info u/s 11A or 12 from RE or any additional info
- RE to furnish such info. called for in specified time
- Info to be kept **confidential** by director as well

Section 12AA: Enhanced Due Diligence:

Where a client is undertaking **Specified Transaction**:

1. RE shall:
 - a. Verify **identity** of such client by authentication under Aadhar (TDF and OSBS) Act, 2016
If client is such that it is not required to obtain Aadhar card - Verify via other modes prescribed
 - b. Take additional step to **examine** - (a) ownership (b) Financial Position and (c) Source of fund
 - c. Take additional step to **record** - (a) Purpose of transaction and (b) nature of relationship between parties
2. If above condition not fulfilled - RE shall not allow such Specified Transaction
3. If RE suspects that transaction likely involves PoC - Increase future monitoring of biz. relationship with client
4. Information obtained for enhanced Due Diligence - **Maintain for 5 years** from date of transaction

Specified Transaction means [**C FIR**]:

Withdrawal/deposit in cash exceeding prescribed amount	Transaction in forex exceeding prescribed amount	Transaction in high value imports or remittances	Other transaction where there is high risk of ML or Terrorist Financing
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Section 13: Power of Director to make inquiry and impose fine:1. Inquiry on RE:

Director may, on its **own motion or application** by any person - Make/Cause inquiry to be made of RE w.r.t, fulfilment of its obligation

If **during inquiry** - Having regard to nature and complexity of case - Director is of opinion that **audit of accounts is necessary** - It shall order RE to get accounts audited by **CA** from panel of

CG. Expense of such audit to be borne by CG

2. If during inquiry, Director finds non-compliance of obligation by RE/BoD/Employee, Director may [Measure WIP]:

Issue
warnings in
writing

Direct to comply with
specified instruction

Direct to send reports
on Measures being
taken

Impose monetary Penalty (Rs.
10k to 1 lakh for each
failure)

Copy of order - To all RE who is party to proceedings

Section 14: No civil/criminal proceedings against RE/Dir/Employees for furnishing info. u/s 12(1)(b)

Appellate Tribunal (AT)

Section 25: AT- Sec 12 of Smuggler and Forex Manipulator (Forfeiture of Property) Act, 1976

Section 26: Appeal to AT:

- Who can prefer an appeal to AT?

Director or person aggrieved by order of AA

RE aggrieved by order of Director u/s 13(2)

- Timeline - Within 45 days from date of receipt of order copy
- Condonation for delay - Yes (+45 days No time limit)
- AT may, after OOBH, pass order - Confirming, Modifying or setting aside order of AA
- Copy of Order - AA and parties involved
- AT to deal with such appeal as expeditiously as possible and dispose within 6m from appeal

Section 35: Procedure and Power of AT: (Refer Sec 424 of Companies Act)

- Not bound by CCP, 1908. Guided by PONJ
- Power of Civil Court - PARCER₂O
- Decree of court
- Judicial proceedings

Section 38: Decision by Majority

- If members of any bench differ on any points - Decide as per Majority
- But if members differ in opinion, refer case to Chairperson for hearing by 1/more other members
- And then such point shall be decided by majority of who have heard the case including those who first heard it.

Section 41: Civil court not to have jurisdiction - Same as every act

Section 42: Appeal to High Court:

- Person aggrieved by order of AT may prefer appeal
- Within 60 days (+ 60 days - Condonation for delay)
- On any Question of Law or Fact

For this purpose, HC means -

- HC in whose jurisdiction the agg. Person resides or carries business
- Where CG is agg. Party, HC in jurisdiction of respondent (resides/business)

Special Court

Section 43: Formation of SpC:

- CG + Chief Justice of HC
- For trial of offence under this Act
- Designated one/more court of sessions as Special Court

Section 44: Jurisdiction: (Sec 44 overrides CCP, 1973)

1. Offence punishable **u/s 4** shall be triable by SpC constituted for area where offence committed
2. Cognizance of offence:
 - Upon complaint made by Authorised Authority
 - SpC may take cognizance u/s 3
 - Without the accused being committed to it for trial
3. If any other court has taken cognizance - Transfer to SpC and deal with it from stage at which transferred
4. Trial to be conducted as per CCP, 1973

Section 45: Offence to be cognizable and non-bailable:

No person accused under this Act shall be released on bail or on his own bond **unless:**

- a. Public Prosecutor (PP) has been given an opportunity to **oppose** the appln. for release and
- b. Where PP opposes such application, court is satisfied that RGTB that he is **not guilty** of such offence and that he is not likely to commit offence while on bail

Provided that, following person may be released on bail if **special court** so directs:

Age < 16

Woman

Sick or infirm

Accused of ML of sum < Rs. 1 crore

Special court shall take cognizance of above offence only upon complaint in writing by

- a. Director, ED
- b. Officer of CG/SG authorised by CG

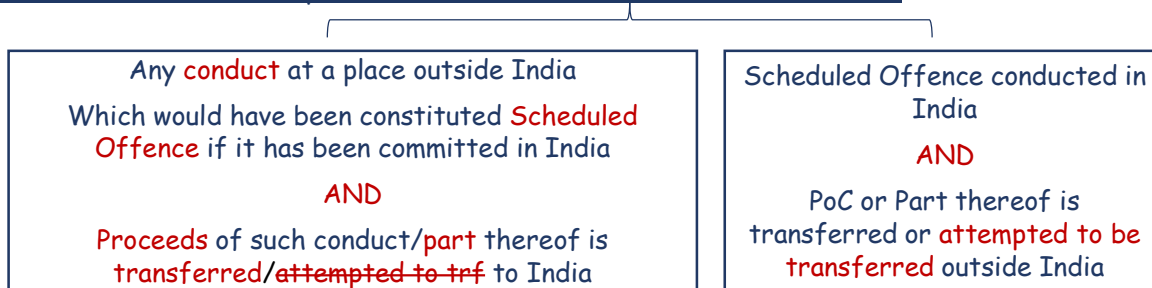
Police officer shall investigate into an offence only when specifically authorised by CG

Reciprocal Arrangement

Important Definitions:

Corresponding Law: Law of foreign country dealing with offence corresponding to any of schedule offences

Offence of Cross Border implication [Sch. Offence karo aur tranfer karo]:



Contracting State - Country or place o/s India with whom arrangement is made by CG (treaty or otherwise)

Section 56: Agreement with Foreign Countries

CG may enter into agreement with Govt. of Foreign country for:

Enforcing provision of this Act	Exchanging Info.
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And by notification in OG make provisions for implementation of such agreement

Section 57: Letter of Request (LoR) to Contracting State in certain cases

- **Application** to be made by **investigation officer/superior to him** to **SpC** stating evidence in relation to an investigation may be available in Contracting State
- SpC, after being satisfied, may issue a **LoR** to competent authority in Contracting State to:
 - **Examine** facts and circumstances
 - Take steps as SpC may specify in LoR
 - **Forward** evidence to SpC (deemed to be evidence collected during invg.)

Section 58: Assistance to Contracting State in certain cases:

On receipt of LoR from cont. state, CG to forward it to SpC/competent auth for execution thereof

Section 58A: Special Court to release the property

On closure of criminal case outside India, where such court finds that offence of ML had not taken place or the property in India is not involved in ML - On application made by concerned person, SpC may release the property

Section 58B: Letter of request of a contracting state for confiscation or release the property:

Where the trial under the corresponding law of any other country cannot be conducted for any reason or having commenced but could not be concluded, the CG shall, **on receipt of a LoR** from a court or authority in contracting State **requesting for confiscation or release of property forward the same** to the **Director to move an application before SpC** and upon such application SpC shall pass **appropriate orders** regarding confiscation or release of such property involved in the offence of ML

Section 59: Reciprocal arrangements for processes and assistance for transfer of accused persons.: From India to Contracting State:

- Where in relation to offence u/s 4,
- SpC desires that Summons (accused person or other person) / Warrants (for arrest or search) issued by it shall be served in contracting state
- SpC shall send **duplicate** of such summons/warrants to - Court/Judge/Mag. via notified auth.
- And such court/judge/mag. shall cause the same to be executed

Section 60 - Attachment, seizure and confiscation, etc., of property in a contracting State or India:

1. Where the Director has made an order for attachment of any property u/s 5 or for freezing u/s 17(1A) or u/s 8 or where a SpC has made an order of confiscation u/s 8(5) or 8(6) and such property is suspected to be in a contracting State, the SpC, on an application by the Director or the Administrator appointed u/s 10(1), as the case may be, may issue a LoR to a court or an authority in the contracting State for execution of such order.
2. Where a LoR is received by the CG from a court/authority in a Contracting State requesting attachment, etc. of property in India, derived or obtained, directly/indirectly from commission

of an offence under a corresponding law committed in that contracting State, the CG may forward such LoR to the Director, as it thinks fit, for execution in accordance with this Act.

(2A) Where on closure of the criminal case or conclusion of trial in a criminal court outside India under the corresponding law of any other country, such court finds that offence of ML under the corresponding law of that country has been committed, SpC shall, on receipt of appln. from Director for execution of confiscation u/ss (2), order that such property involved in ML or which has been used for commission of the offence of ML stand confiscated to the CG.

3. The Director shall then - direct any authority under this Act to take all steps necessary for tracing and identifying such property
4. The steps referred to u/ss (3) may include any inquiry, investigation or survey in respect of any person, place, property, assets, docs, BoA in any bank or PFI or any other relevant matters.
5. Any inquiry, investigation or survey referred to u/ss (4) shall be carried out by an authority mentioned in subsection (3) as per the provision of this Act.
6. The provisions of this Act shall apply to the property in respect of which LoR is received from a court or contracting State for attachment or confiscation of property.
7. When any property in India is confiscated as a result of execution of a LoR, the CG may either return such property to requesting State or compensate that State by disposal of such property on mutually agreed terms that would take into account deduction for reasonable expenses incurred in investigation, prosecution or judicial proceedings.

Section 61: Procedure in respect of LoR:

Every LoR, summons or warrant, received by the CG from, and every LoR, summons or warrant, to be transmitted to a contracting State under this Chapter shall be transmitted to a contracting State or sent to the concerned Court in India in such form and manner as may be prescribed.

Fine and Penalty:

Section 62: Punishment for vexatious search

If any authority/officer in exercise of powers under this Act/Rules, without reasons recorded in writing:

- (a) searches any building or place; or
- (b) detains/searches/arrests any person,

For every such offence - Imprisonment upto 2 years or Fine upto Rs. 50,000 or both.

Section 63: Punishment for false info. or failure to give info, etc.

False info: - Any person willfully or maliciously giving false info. and causing search/arrest to be made - Jail upto 2 years or Fine upto Rs. 50,000, or both

Failure to give info: Any person who is:

- a. Legally bound to answer - Refused to answer
- b. Legally required to sign - Refused to sign a statement
- c. Summoned to attend / produce docs - Omit such attendance/production

Penalty - Fine Rs. 500 to Rs. 10,000 for each default/failure (only after Reasonable OOBH)
<p>Section 64: Cognizance of Offence u/s 62 or 63</p> <ol style="list-style-type: none"> No court shall take cognizance except with prior approval of CG CG to give sanction/refuse within 90 days of request
Section 65: CCP, 1973 to apply in so far as is not inconsistent with provision of this Act
<p>Section 66: Disclosure of information:</p> <ul style="list-style-type: none"> On performance of function under this Act, Director/any person auth. by director obtained info. In opinion of dir./person auth., such info. may be necessary for officer/authority under other law Director/authorized person shall furnish such info. to the officer/authority performing function: <ul style="list-style-type: none"> Under law w.r.t, imposition of tax/duty/cess Dealings with forex Prevention of illicit traffic under Narcotic Drugs and Psychotropic Substance Act, 1985 Other law as may be specified by CG in public interest If Director/other auth. is of the opinion, on the basis of information or material in possession, that the provisions of any other law are contravened, then Director/Authority shall share such info. with concerned agency for necessary action
<p>Section 69: Recovery of Fine/Penalty:</p> <p>If fine/penalty not paid within 6m of imposition, Director may proceed to recover in manner - Same as Sch II of Income Tax Act, 1961 for recovery of arrears. [Power same as - Tax Recovery Officer]</p>
<p>Section 70: Offences by Companies</p> <ol style="list-style-type: none"> Where person committing contravention is a company: <ul style="list-style-type: none"> Every person who, at time of contravn., was responsible to co. for conduct of biz, and Company itself <p>Shall be deemed to be guilty and liable to be proceeded against and punished accordingly</p> <p>Person shall not be liable to punishment if he proves that contravention took place:</p> <ul style="list-style-type: none"> W/o his knowledge or that he exercised all due diligence to prevent such contravention. Where it is proved that contravention has taken place with: <ul style="list-style-type: none"> the consent or connivance of, or is attributable to any neglect on part of } Dir/Mgr/CS/Other officer <p style="text-align: center;">↓</p> <div style="border: 1px solid black; padding: 5px; text-align: center;">Such Dir/Mgr/CS/Other officer shall also be deemed guilty and liable to be proceeded against and punished</div> <p>For the purposes of this section:</p> <ol style="list-style-type: none"> Company means any BC and includes a firm/AOI; and Director, in relation to a firm, means a partner in the firm.

In case of **death/insolvency** of person eligible to prefer an **appeal**, it shall be lawful for the **legal representatives** of such person or the official assignee or the official receiver, as the case may be, to **prefer an appeal** or to continue the appeal

[illegible]

Chapter 3 - Foreign Contribution (Regulation) Act, 2010

[Read with Foreign Contribution (Regulation) Rules, 2011]

Short forms used:

ACS	Articles, Currency, Securities	FH	Foreign Hospitality
BoI	Body of Individuals	FS	Foreign Source
DDT	Donation, Delivery or Transfer	MNC	Multi-National Corporations
FCT	Foreign Country or Territory	PP	Political Party
FC	Foreign Contribution	POB	Place of Business
RPAD - Registered Post with Acknowledgement due			

Applicability of Act:

To whole of India and includes:

1. Citizen of India o/s India, and
2. Associate, branches or subsidiaries o/s India of co./BC incorporated in India

Administered by - Ministry of Home Affairs

Important definitions:

Foreign Company means - A company/BC/**BoI** incorporated **outside** India and includes:

Foreign company u/s 379 of Co. Act, 2013	Subsidiary of Foreign company	Regt. office or principal POB of Foreign co.	*MNCs
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*A corporation **incorporated in foreign country** shall be **deemed to be MNC** if such corporation:

- a. Has **subsy**/branch/**POB** in ≥ 2 countries/territories, **or**
- b. Carries on **business**, or otherwise operates in ≥ 2 countries / territories

Foreign Contribution ("FC") means:

- Donation - Delivery - Transfer (DDT)	made by an Foreign Source	of any of the following: a. Article* b. Currency (INR/FCY) c. Securities (FEMA + SCRA)
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***Article** given as a gift ~~from relative~~ for personal use of mkt. value in India not exceeding **Rs. 1 lakh** → Not termed as a Foreign Contribution.

Deemed Foreign Contribution:

1. DDT of ACS by any person who has **received** it from any **foreign source**
2. **Interest** accrued on FC deposited in any bank u/s 17(1)
3. **Other income** derived from FC or interest thereon (other income)

Exclusion from definition of FC:

- i. Amt. charged by **Edu. Institute** in India from Foreign Student
- ii. Amount by way of **fees** (for training, workshop, seminars, etc.)
- iii. Amount received by way of **COGS or services** in **OCOB** in or O/S India (Covered in FEMA)

Person **includes** - Indv., HUF, Association and Company

Foreign Hospitality means

- any offer in cash or kind
- by a foreign source
- for providing a person with:
 - the costs of **travel** to any FCT or
 - with free **boarding**, lodging,
 - Free **transport** or
 - Free **medical** treatment;

Does **not** include offer which is purely **casual** one

Foreign Source means

Govt. of FCT or agency of such Govt.	Any international agency Exclude - UN, World Bank, IMF, other notified	Foreign Company	Corp. other than Foreign co. incorp. in FCT	MNC	Citizen of Foreign country (Not NRI)
Co. incorp. in India and > 1/2 of Nominal value* of Share Cap is held by either: a. Govt. or Citizens of FCT b. Foreign co. or Corp. incorp. in FCT c. Trust/societies in FCT		Trade union (whether or not regt.) in FCT	Foreign Trust/ Foundation	Trust/Found ations mainly financed by FCT	Society, Club, Association regt. o/s India

*If investment in share capital is within limits of foreign invst. as per FEMA - Don't consider FS

Relative means as per Companies Act

Political Party - Association/BoI registered as such u/s- Section 29A of Representative. of People Act

Concept clarity check:

1. Can a co. incorporated in India having operations in more than 4 countries be called MNCs? - **No!**
2. Can foreign contribution be received in Rs.? - **Yes**
3. Is donation by NRI considered FC? - **No. Foreign Source does not include citizen of India (NRI)**
4. A Ltd. is an Indian co. in which a foreign co. has 100% investment (investment amount is within limit allowed as per FEMA). Would donation by A Ltd. be considered as FC? - **No. as investment is within FEMA limits, A Ltd. NOT to be considered FS.**

Bird's Eye View of Act: [54 sections]

Preliminary [Sec 1-2]	Regulation of FC or FH [Sec 3-10]	Registration [Sec 11-16]	Accounts and Audit [Sec 17-22]	Search and Seize [Sec 23-27]	Adjudication and Appeals [Sec 28-32]	Penalties and Misc. [Sec 33-54]
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Section 3: Prohibition on acceptance of FC:

1. No foreign contribution shall be accepted by any:
 - a) **candidate** for election;
 - b) Following people of a Registered **Newspaper**:

- Correspondent	- Editor	- Printer
- Columnist	- Owner	- Publisher
- Cartoonist		

c) Association or company engaged in (a) **production** or (b) **broadcast** of:

Audio News

AV news or

Current Affairs programmes through e-mode/other mode of mass communication;

d) Following people of above association or company:

- Correspondent
- Columnist
- Cartoonist

- Editor
- Owner

~~- Printer~~
~~- Publisher~~

e) Government related:

Public Servant
(Sec 21 of IPC)

Judge

Govt. Servant

Employee of any corp./body
controlled/owned by Govt.

f) Member of any **Legislature**;

g) **Political party** or office-bearer thereof;

h) **Organisation** of a political nature u/s 5

2. Following **indirect acceptance** of FC is also **prohibited**:

Who is prohibited?	Prohibited from what?	On behalf of/to whom?
PRI and [PROI who is citizen of India]	Accepting FC or Currency from FS	1. PP 2. Any person u/ss (1)
PRI	Deliver any currency (FCY/INR) accepted from FS	To any person if he has RGTB that such person will deliver it to PP or person u/ss (1)
PROI who is citizen of India	Deliver any currency (FCY/INR) accepted from FS	1. PP or person u/ss (1) 2. To any person if he has RGTB that such person will deliver it to PP or person u/ss (1)
Any person	Deliver any currency accepted from FS on behalf of person u/s 9	To any person other than for which it was received

Section 4: Person to whom Sec 3 not applicable:

Person referred to u/s 3 can accept FC where such FC is by way of [**Salary/Stipend R2 BAD**]:

- **Salary**, wages or other rem. due to him OR
- Payment in OCOB **in India** by FS

Payment in course of international trade or OCOB outside India

as an Agent of FS w.r.t, transaction by such FS with CG/SG

Gift/presentation - As a member of Indian **Delegation** (subject to CG Rules)

from his **relative***

Remittance in OCOB through Post office / AP as per FEMA

scholarship / **stipend** or payment of like nature

*Note - Any person receiving FC from relative > Rs. **10 lakhs** in FY - Inform CG in **FC - 1** within **3 months**

Section 5: Procedure to notify an Organisation of Political Nature:

1. CG, if satisfied that an organisation is of political nature based on its **activities** or **ideology propagated**, it may by order in OG, specify such organisation to be of political nature

Following organisations can be declared as org. of political nature:

Which Organisation?	Objective / Activity?
Any	Political objective as per MoA
Trade union	Promoting Political goals
Voluntary Action Group	Political nature or participates in political activities
Front or mass org. - Students union, workers union, Youth Forum and Women's wing of PP	
*Org. of Farmers, workers, student, youth based on caste, community, language, etc.	Not directly aligned to any PP but objective includes steps towards adv. of political interest as per MoA/activities gathered through material evidence
*Any organisation	habitually engages itself in or employs common methods of political action like 'bandh' or 'hartal', 'rasta roko', 'rail roko' or 'jail bharo' in support of public causes

*To be considered org. of political nature only if they participate in **active politics or party politics**

2. Before passing order u/ss (1), CG shall give a notice (writing) to such org. and **inform grounds**.

Organisation to make **representation within 30 days (+condonation if sufficient cause)** giving reason for not specifying such organisation to be of political nature

After considering representation - CG to pass order in **120 days + 60 Days (reasons recorded)** of notice

Section 6: Restrictions on acceptance of Foreign Hospitality:

The following person shall not accept FH, **except with prior approval of CG**, on their visit to a FCT:

Member of
Legislature

Office bearer
of a PP

Judge

Govt. Servant

Employee of any corp./body
controlled/owned by Govt.

Exception: No such permission is needed for **emergent medical aid** on account of **sudden illness** contracted **during a visit outside India**.

However, person receiving such FH **shall within 1m** from date of receipt - Give intimation to CG as to:

- the **receipt** of such FH, and
- the **source** from which, and the **manner** in which, such hospitality was received by him
- Approximate INR value

No need of intimation if emergency medical aid **is up to Rs. 1 lakh**

As per Rule 7 of FC(R) Rules 2011: Procedure for obtaining prior approval of CG to accept FH:

- Apply in **E-Form FC - 2** - Must reach Ministry of Home Affairs **ordinarily 2 weeks before** dep. date
- Application to be accompanied by:
 - Invitation** letter from host/host country, or
 - Administrative **clearance** of concerned ministry in case of sponsored visit
- In case of emergency medical aid - Intimate CG **within 1 m** of receipt (only if value > Rs. 1 lakh)

As per Guidelines - Following **cases** need not be submitted to MHA for permission to accept FH:

- Entire expense of foreign visit is met **by CG/SG/PSUs**
- Foreign visit is undertaken by person in his/her **personal capacity** & **entire exp.** is met by person concerned.

- c. Where the FH is being provided by an **Indian national living in FCT**.
- d. Acceptance of an **assignment** on salary, fee or remuneration etc.
- e. **Funding** offered by an **agency/organization** mentioned in Annexure-2.
- f. Visits undertaken by Members of an **Indian Parliamentary delegation** under bilateral exchange.
- g. Visits undertaken basis **bilateral agreement** between GoI and of other country approved by MoF.
- h. Long term/short term foreign **training courses** approved by the Ministry of Personnel and Public Grievances.

Section 7: Prohibition to transfer foreign contribution to other person:

No person who:

- (a) is **registered** and granted a certificate or has **obtained prior permission** under this Act; **AND**
 - (b) **receives** any FC
- shall transfer such FC to **any other person** (irrespective of whether regt. or not)

Section 8: Restriction to utilise foreign contribution for administrative purpose:

FC received as per this act shall be utilized as follows:

1. Primarily utilize for purpose for which it is received
2. Not be used for **Speculative Business**

Rule 4 of FCR Rules 2011 defines Speculative Business:

any **activity/investment** - Having an element of risk of appreciation or depreciation of original investment - **Linked to market forces**, including investment in **MF / Shares**

participation in any **scheme** that promises high returns like investment in **chits/land/similar assets not directly linked to aims and objectives of org.**

A **debt-based secure investment** shall **not** be treated as **speculative investment**.

3. **Not** defray **sum > 20%** of total contribution in FY to meet **admin expense**
Provided - May defray > 20% after **prior approval** of CG

What constitutes administrative expense [AWLR SUV]

- **Salaries/wages/remuneration** or travel expenses of:
 - a. Members of executive committee/governing council
 - b. Personnel responsible for management of activities (incl. hiring expense)
- Expenses w.r.t, Consumables/**Utilities** - Electricity, water, telephone, repair, etc.
- **Accounting** cost
- Running and maintenance of **Vehicle**
- Reports - **Writing** and filing cost
- **Legal** and professional fees
- **Rent** and repair

What **does not** constitute administrative expense

- **Salaries/rem.** of personnel engaged in (a) training or (b) collection/analysis of field data of an association primarily engaged in **research or training**
- Expenses incurred **directly** in **furtherance** of stated objectives of **welfare oriented organisation** such as salaries to doctors of hospital, salaries to teachers of school etc.

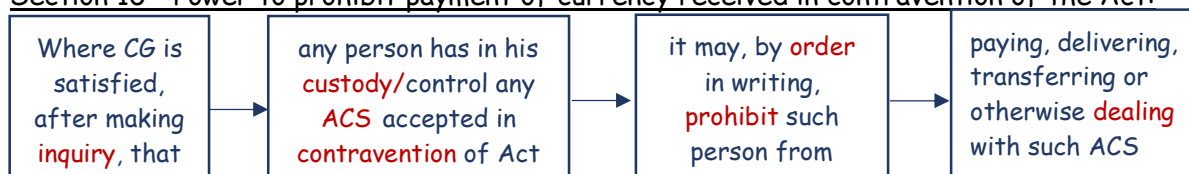
Section 9: Power of CG to prohibit receipt of FC, etc., in certain cases

CG is empowered to make following orders:

- **Prohibit** person (not covered u/s 3) from obtaining FC
- Require a person to obtain **prior permission** for FC / FH
- Require a person to furnish **information** related to FC / FH

Such orders to be passed only if CG satisfied that acceptance of FC/FH likely to prejudice [HI EPF]:

- sovereignty and **Integrity** of India; or
- **Public** interest; or
- freedom or fairness of **Election** to any Legislature; or
- **Friendly** relations with any foreign State; or
- **Harmony** between religious, racial, social, regional - groups, castes or communities

Section 10 - Power to prohibit payment of currency received in contravention of the Act:

Copy of such order → Serve upon the **person so prohibited**.

Provision of Sec 7 of Unlawful Activities (Prevention) Act, 1967 shall become **applicable**

Section 34: If person who is so prohibited u/s 10 - deals with such ACS - Jail upto 3 years or fine or both. Court may also impose additional fine = Market value of such ACS

Rule 8 states manner of serving prohibitory order on such person:

1. **Delivering** or **tendering** it to that person or to his duly authorised agent; or
2. Sending by "RPAD" or **Speed Post** to last known address of residence or business
3. If cannot be served - Affix on **outer door** of residence/biz. + Written report witnesses by 2 person

Section 11 - Registration of certain persons with CG

1. Person having a definite [RECS]:

Cultural

Economic

Educational

Religious

Social

Programme shall not accept FC unless such person:

- a. Obtains **CoR** from CG [e- **form FC - 3A** + Affidavit executed by each office bearer], or
 - b. Obtains **prior permission** of CG [e- **Form FC - 3B** + Affidavit executed by each office bearer]
2. Based on info available or inquiry, if CG has RGTB that person who has been granted permission has **contravened provision** or if otherwise any person is found **guilty** of this section - **Unutilized or Unreceived** amount shall not be utilized or received w/o **prior approval** of CG
 3. CG may be notification in OG specify:

- a. **Person** who shall obtain prior approval
 - b. **Areas** in which FC can be
 - c. **Purpose** for which FC can be utilized
 - d. **Source** from which FC can be accepted

With prior approval
of CG

Additional Rules:

Where prior permission is being obtained for receiving **FC > Rs. 1 crore**, CG may permit receipts in **installment**.

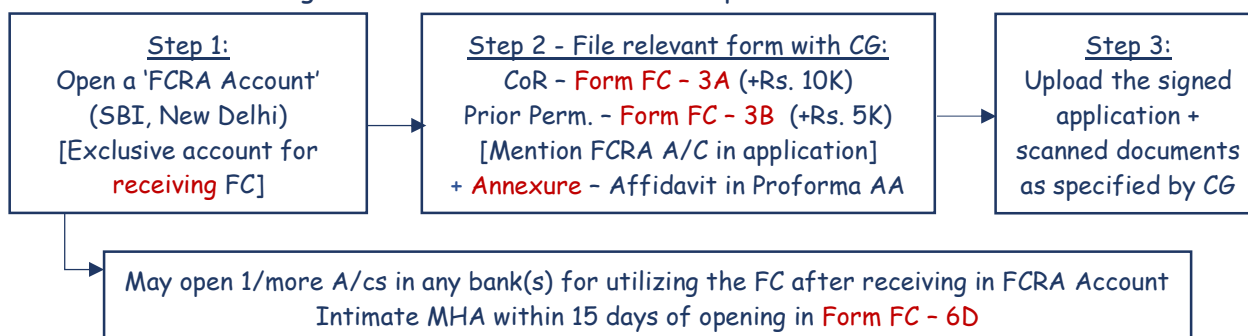
However, the second and subsequent installment shall be released only after **utilisation of 75%** of FC in previous installment and after **field inquiry** of such installment.

Conceptual Clarity Check:

1. Can Pvt. limited co./partnership firm/HUF get registration/PP? - **Yes! There is no such restriction**
2. Bodies established under Central Act or State Act requiring to have their accounts audited by CAG are exempted from operation of provision of FCRA.

Section 12 - Grant of certificate of registration

Procedure for obtaining CoR or Prior Permission to accept/receive FC:

Rejection of Application:

If application is **not in prescribed form** or contain particulars prescribed - Record reason and **reject** such application - Furnish copy to applicant.

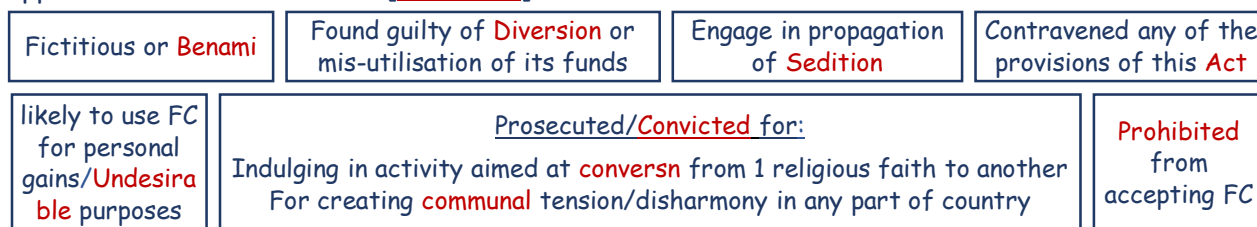
Grant of CoR or Permission:

- On receipt of application, and
 - After making such **inquiry** as it may deem fit,
 - If CG is opinion that condition u/s **12 (4)** is satisfied,
 - CG shall **within 90 days** - Register and grant CoR or give prior permission
- If > 90 days - Communicate reason thereof

A person shall not be eligible if CoR/Prior permission granted earlier is **suspended** & suspension continues as on date of appln.

Section 12(4) Conditions for grant of CoR/Prior permission[7 conditions]:

1. Applicant is not/has not been **[ABC2D PSU]**:



2. Applicant has undertaken reasonable **Activity** in its chosen field for benefit of society

3. Applicant has prepared a reasonable **Project** for the benefit of the society
4. If applicant is **Indv.** - Neither **convicted** under any law nor any **prosecution** is pending against him
5. If applicant is **other than Individual** - None of its directors/officer bearers - Neither convicted under any law nor any prosecution is pending against him
6. Acceptance of FC is not likely to affect **prejudicially**: - Election, Public Interest, S&I of India, etc.
7. Acceptance of FC shall not:
 - (i) Lead to incitement of an **offence**;
 - (ii) **Endanger** the life or physical safety of any person.

Validity:

CoR - 5 years

Prior Permission - Valid for specific amount or specific purpose proposed

No person shall prefer second application for CoR/PP **within 6m** after submitting an application for CoR/prior permission for **same project**.

Rule 17A: Intimate to CG about various changes:

Changes intimated via Form 6A to 6E to be effective only after approval of CG

Section 12A - Power of CG to require ID Proof: [Amendment]

CG may require that person:

Seeking Prior Perm. u/s 11

Making application for CoR u/s 12

Seeking renewal of CoR u/s 16

to provide **Aadhaar number** of all its office bearers/Directors under Aadhar (TDF&OSBS) Act, 2016 **or** copy of **Passport** or Overseas Citizen of India **Card**, in case of a foreigner.

Section 13 - Suspension of CoR:

Pending consideration of cancellation of CoR u/s 14, if **CG** is **satisfied** that it is necessary to **suspend** such CoR, it may by order in writing (reasons recorded) - Suspend CoR for 180 days (**+180 days**)

Consequences of suspension:

- Shall not **receive** FC during such suspension
CG, on application, may allow receipt of any FC on specified T&C
- **Utilise** FC in custody only with prior approval of CG

Rule 14: Rules for utilization of FC in case of suspension of CoR:

- **Upto 25%** - With **prior approval** of CG for declared aims and **objects** for which FC received
- **Remaining 75%** shall be utilised only **after revocation** of suspension (**can't spend with CG permission also**)

Section 14 - Cancellation of CoR:The CG may, by order, cancel the CoR if holder of CoR has **[TAPID]**:made false/**Incorrect** statement during application/renewal of CoRviolated **T&C** of CoR/renewal thereofviolated provision of **Act/Rules**it is necessary in **public interest**

not been engaged in any reasonable activity in its chosen field for the benefit of society for 2 consecutive years or has become **defunct**

No order of cancellation unless **OOBH** given to concerned person.
Cooling period i.e., Not eligible for seeking CoR/ Prior permission for **3 years**

Section 14A - Surrender of CoR: [Amendment]

Step 1: Person may make application to CG to surrender CoR [in **Form FC - 7**]

Step 2: CG shall make inquiry to satisfy itself that:

- no **contravention** under this Act, and
- management** of FC/asset created out of such FC vests with authority u/s 15

Step 3: If satisfied - CG may permit surrender.

Note: **Validity** of CoR surrendered - Deemed to have **expired** on **date of acceptance** of request by CG

Section 15 - Management of FC of person whose CoR is cancelled or surrendered

Vesting:

- Where CoR of a person is cancelled or surrender,
- FC or asset created out of such FC in custody of such person
- Shall vest with **prescribed banking authority**

Role of authority: If necessary, in public interest:

- Manage activities** of such person as CG may direct
- Utilise FC/dispose assets** if adequate fund not available for such activity

Authority to return FC/Asset if person subsequently registered.

Section 16 - Renewal of CoR

Renew within 6m before expiry

Rule 12: Procedure for renewal:

Application to	CG
Form	FC-3C + Affidavit
Timeline	Within 6m before expiry of CoR
Fees	Rs. 5,000 (via Payment Gateway)
Condonation for delay	Upto 1 years - With late fees of Rs. 5,000
Consequence of non-application	CoR deemed to have ceased to exist w.e.f., 5 years from date of grant of reg.
Consequence of ceasure of validity of CoR	<ul style="list-style-type: none"> Cannot receive/utilise FC (not even with permission of CG) FC and asset related to FC shall vest with prescribed authority Fresh request for CoR may be made out to CG
Post cease	<ul style="list-style-type: none"> Apply for renewal (if within 1 year) Apply for fresh CoR

Example: A CoR granted on 1st Jan 2012 shall be valid till 31st Dec, 2016 & request for renewal of CoR shall be submitted in e-form + requisite fee **after 30th June, 2016 & within 31st Dec, 2016.**

Procedure by CG after receiving application:

- CG **shall** renew certificate ordinarily **within 90 days (else communicate reason)** from date of receipt of appln

- CG may make inquiry to ensure compliance with Sec 12(4)
- Validity - 5 years

Conceptual Clarity check: Can CG refuse to renew? - **Yes**, if person has violated provision of Act/Rule

Accounts, Intimation, Audit and Disposal of assets, etc.

Section 17: Foreign contribution through scheduled bank

1. FC shall be received only in account designated as "**FCRA Account**" by the bank

FCRA Account to be opened for remittance of FC with **SBI**, New Delhi (Main branch - Sansad Marg)

For the purpose of holding/utilizing such FC received in the FCRA A/C with SBI, New Delhi - **One more FCRA Account** or multiple Normal account can be opened thereafter

2. No funds other than FC shall be received in **any such account**

3. Reporting:

- The Bank [SBI New Delhi or Sch. Bank with which FCRA Account is opened]
- Shall **report** to CG **within 48 hours**
- Any **transaction** w.r.t, receipt/utilization of such FC
- Whether or not - Registered/PP

Note - FC cannot be mixed with local receipts

Section 18: Intimation

1. Every person granted CoR/PP and receiving FC shall **intimate** to CG:

- a. **Amount** of each FC received
- b. **Source** and manner of receipt
- c. **Purpose** and manner of utilisation

Rule 17: Annual Return: ◀

1. Person having CoR/PP to submit a signed **report (Certified by CA)** [in Form **FC -4**] along with:

- a. Income and exp. statement
- b. Receipt and payment accounts
- c. BS for every FY

Within **9m** from close of FY

2. **Annual return**[FC - 4] to reflect FC received in **exclusive bank A/C** and funds trf to other A/Cs for utilisation
3. If FC relates only to **Articles/Securities** - Submit Annual Return in **FC -1** [i.e., FC 4 is only in case of currency]
4. FC - 4 to be duly accompanied by **copy of bank a/c statement** where the exclusive FC amount is maintained - Duly certified by officer of such bank [**preserve such statement for 6 years**]
5. Nil report to be furnished if no FC **received** [i.e., FC 4 to be filed independent of receipt of FC]

In case **no FC** is received **or** utilised during FY - No need to attach anything to FC - 4 [BS, etc.] and CA declaration also not needed.

Rules - Person receiving such FC to put details of such FC received on its website **within 15 days** of end of **quarter** in which such FC is received.

Section 19: Maintenance of Accounts

Every person who has been granted CoR/ Prior permission u/s 12 shall maintain separate set of accounts and records exclusively for FC received and utilised

Section 20: Audit of Accounts

Where a person granted CoR/PP:

- Fails to furnish intimation under this Act
 - Furnish intimation not in accordance with law, or
 - Furnish intimation but after inspection, CG is of opinion that FCRA is contravened,
- CG may, by order, authorise such gazetted officer - To **audit** BoA of such person

Such officer has right to **enter** any premise at any **reasonable hour** - **before sunset & after sunrise** for such audit.

Section 21: Intimation by candidate for election [Read with Rule 18]

- Every candidate for election who received FC **within 180 days** immediately preceding date of nomination (as such candidate)
- Shall **within 45 days** of such nomination
- Intimate CG/prescribed authority about such FC [Amount, Source, Purpose] in **Form FC -1**

Section 22: Disposal of assets created out of foreign contribution:

- Where a person was permitted to accept FC - (a) **Ceases** to exist or (b) Becomes **defunct**
- All assets of such person shall be **disposed** of as per this Act
- In absence of provision - CG to notify

Adjudication for confiscation

Section 28: Confiscation of ACS obtained in contravention of the Act:

Any ACS which is **seized** u/s 25 shall be liable to **confiscation** if such ACS has been adjudged u/s 29 to have been received or obtained in contravention of this Act.

Section 29: Adjudication of confiscation:

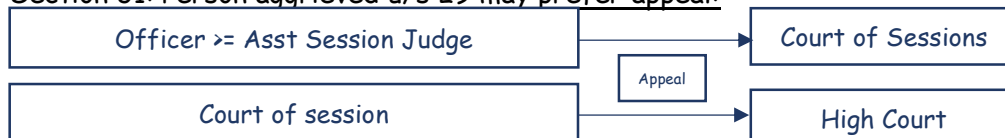
(1) Confiscation u/s 28 may be adjudged by:

<u>Where value of article or amount of currency is:</u>	<u>Confiscation can be adjudged by:</u>
Without limit	Court of Session (in jurisdiction of seizure)
Upto Rs. 10 lakhs	Judicial Officer >= Rank of Asst. Session Judge

(2) When an adjudication u/s (1) is concluded, the concerned Judge may make an order for disposal or **delivery** of seized ACS to any person who claims to be entitled thereto.

Section 30: No order of confiscation unless OOBH given

No order of adjudication of confiscation shall be made unless a reasonable opportunity of making a representation against such confiscation has been given to the person from whom any ACS has been seized.

Appeal and Revision**Section 31: Person aggrieved u/s 29 may prefer appeal:****Appeal within 1m (+1m)**

Person aggrieved with **order of CG** u/s 5, 12, 14 - Appeal to HC **within 60 days**

Section 32: Revision of order by CG

- CG may - on its **own motion** or application (**in e-form only**) by person registered under Act:
 - Call** for and examine orders of proceedings under this Act
 - Make **inquiry**
 - And pass such **Revision** orders as it thinks fit
- CG shall **not**, on its own motion, revise order made **> 1 year ago**
- Application for revision to be made within 1 year of receipt of order (condonation - yes)
- Such order shall not be made where appeal against the order lies but has not been made and: Time limit not expired or rights to appeal not waived.

Rules - Application for Revision to be made to Secretary, MHA + **Rs. 3,000 (via payment gateway)**

FAQs related to Section 32 covered at the end of this Chapter [Amendment]

Offence and Penalty:

Sec	Offence	Penalty
33	- Person giving false intimation u/s 9 or 18 - Seeks CoR/ Prior permission by fraud, false representation or concealment	Jail upto 6m or fine (no limit) or both
34	Refer Section 10	--
35	Accepts FC in contravention of this Act	Jail upto 5 years / fine (no limit)
36	A person who does/omits to do an Act making ACS in his possession liable to confiscation, the court trying such person may	Fine < = 5x value of ACS or Rs. 1,000 whichever is higher if ACS not available for confiscation
37	No separate punishment provided	Jail upto 1 year / fine (no limit)
38	Whoever, having been convicted u/s 35/37 is again convicted for such offence	Shall not accept FC for 5 years from date of subsequent conviction

Section 39: Offence by companies - Same as PMLA

Section 40: No court shall take cognizance of offence under this Act except with prior approval of CG

Section 41: Compounding of certain offences:

1. Offence punishable under this Act (not with only imprisonment) - **Before institution of prosecution**
- Be compounded by authorities notified by CG
2. Above provision not applicable for offence committed by person **within 3 years** from date on which similar offence committed by it/him was compounded.
For the purposes of this section, any second or subsequent offence committed **after expiry of 3 years** from date on which offence was previously compounded, shall be **deemed to be a first offence**
3. Where any offence is compounded before the institution of any prosecution, **no prosecution** shall be instituted in relation to such offence, against the offender in relation to whom the offence is so compounded

Rules - Application for Compounding to be made to Secretary, MHA + **Rs. 3,000 (via payment gateway)**

FAQs regarding Online submission of revision application u/s 32

Who is eligible?	Person registered under FCRA + Aggrieved by order of CG
How to make such application?	Application to Secretary, MHA, Government of India in e-form only.
Can application be sent through physical mode ?	W.e.f. 15 th Aug 2022, NO.
Procedure	Upload a scanned copy of its application on the FCRA web portal. Go to - "Services under FCRA" >> "Revision Application against Section 32, FCRA 2010"
Is there a need to send physical copy of revision appln. filed online?	Bola na nahin? Samajh nahin aaaraha? :D Nahin chahiye physical copy.
Any specific format for such application?	No. Scanned copy of duly signed application on plain paper is acceptable
Is applicant required to submit justification for revision of order?	Yes. It must be submitted along with supporting document, if any
Fee	Rs. 3,000 - Paid through payment gateway as specified by CG
Time limit	Within 1 year from date on which the order in question was communicated or date on which it otherwise came to know of it, whichever is earlier

The Ranker's Way (By Shubham Singhal - AIR 4)

Chapter 5 - The Arbitration and Conciliation Act, 1996

Enforced w.e.f. 22nd Aug, 1996

[Read with Indian Contract Act, 1872]

Short forms used:

AA	Arbitration Agreement	DA	Domestic Arbitration
ADR	Alternate method of Dispute Resolution	ICA	International Commercial Arbitration
AT	Arbitrator or Arbitral Tribunal	JA	Judicial Authority

Objective of the Act:

To consolidate and amend the law relating to:

- domestic arbitration,
- international commercial arbitration and
- enforcement of foreign arbitral awards

as also to define the law relating to conciliation and for matters connected therewith or incidental thereto

Summary of Case Laws:

Salem Advocate Bar Association, Tamil Nadu v. Union of India	All courts <u>shall direct parties</u> to alternative dispute resolution methods like arbitration, conciliation, judicial settlement or mediation.
A.K. Balaji v. Government of India & others	Foreign lawyers <u>cannot be debarred</u> to come to India and conducting arbitration proceedings w.r.t., disputes arising out of a contract relating to <u>international commercial arbitration</u>
SBP v. Patel Engineering	A Judicial Authority is not defined in Act. It would certainly include Court defined u/s 2(e) of Act and would also include <u>other courts</u> and may even include a <u>special tribunal</u> like the Consumer Forum.

Structure of the Act:

Part I - Arbitration	Part II - Enforcement of Certain Foreign Awards	Part III - Conciliation	Part IV - Supplementary provisions
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Alternate Methods of Dispute Resolution (ADR):

Arbitration	Conciliation	Mediation	Judicial settlement	Lok Adalat
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Part I - Arbitration

Section 2: Definitions

- "Arbitration" means - Any arbitration whether or not administered by permanent arbitral institution
- "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- "Arbitral Award" **includes** an **Interim Award**
- "International Commercial Arbitration (ICA)" means an **arbitration** relating to **disputes** arising out

of **legal relationships** considered as **commercial** under law in India and where **at least one of the parties** is:

- an **individual** who is national of or resident in, any **country other than India**; or
- a **BC** which is incorporated in any country other than India; or
- an association or **BoI** whose central mgt and control is exercised in any country other than India; or
- the **Government** of a foreign country

Basic Features of Arbitration:

1. Arbitration Agreement (AA) - Discussed in detail later
2. Arbitrator: Also known as the Arbitral Tribunal and is similar to a judge of the court.
3. Seat of arbitration: The legal system which would supervise the arbitration (whether Indian courts or outside courts)
4. Party autonomy and procedure - Enormous flexibility to choose the type and kind of procedure
5. Finality of outcome: Usually there is no appeal against an arbitral award.
6. Confidentiality
7. Arbitral Awards - Decision by the Arbitrator
8. Enforcement of arbitral awards - Easily enforceable in foreign countries under International Treaty

Difference between Litigation and Arbitration:

Grounds of Difference	Litigation	Arbitration
Place	Takes place in Court	Place is chosen by parties
Judge	Assigned by Court	Arbitrator(s) selected by parties
Procedure to be followed	Fixed - CCP, 1908	Adequate flexibility to choose
Confidentiality	Open to Public	Very confidential
Appeals	Subject to numerous appeals	Can be challenged on limited grounds
Enforcement of judgement	Difficult in foreign countries	Much easier and is governed by int. treaties

Authorities under this Act:

1. Judicial Authority ("JA"):
 - Not defined in Act
 - Wider concept - Every court would be a JA, but every JA would not be a court.
2. Court: Performs Supervisory function such as granting interim measures, challenge an AT, etc.
 - For ICA - Court means High Court
 - For other Arbitrations - Court means District Court and High Court exercising original jurisdiction.
3. Supreme Court/High Court/or any designated person/institution:
 - SC to appoint Arbitrator in case of ICA
 - HC to appoint Arbitrator in case of Domestic Arbitration

Arbitration Agreement (AA):

- It means an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not.
- AA may be in form of an "**Arbitration Clause**" in a contract or in the form of a separate agreement. It shall be in **writing** (i.e., contained in docs signed by parties or exchange of letters, etc. incl. e-mode)
- The **reference** in contract to a doc containing an arbitration clause constitutes an AA if the contract is in **writing** and the reference is such as to make that arbitration clause part of the contract.

The reference **must leave no doubt** in mind of reader that the parties indeed wanted to incorporate the AA into the agreement between them.

- Types of AA:
 - a) Arbitration clause - Clause contained within a principal contract. The parties undertake to submit disputes **that may arise in future** to arbitration.
 - b) Submission agreement - Agreement to refer **disputes that already exist** to arbitration. Such an agreement is entered into after the disputes have arisen.

General Principles of AA:

1. **Enforceable** - AA is enforceable under the law and is a valid contract
2. **Consent (consensus ad idem)**: Parties have to **clearly** give their consent to arbitration. If words used are ambiguous - No consensus ad idem
3. **Ouster of jurisdiction**: Once parties agree to arbitrate the matter, neither of them can litigate that matter.
4. **Doctrine of separability**: AA is independent of the main contract. AA would not be rendered invalid merely because the principal contract was invalid.

Requirements of a valid arbitration agreement: [WC Final SL Dispute AS]

1. Mandatorily in **Writing** (can't be oral)
2. **Consensus ad idem**
3. Defined **Legal relationship** i.e., only dispute arising from **legal** relationship can be submitted to arbitration.
4. **Final** and binding award
5. Use of **Specific words** such as Arbitration, etc. **not necessary**
6. There must be present/future existence of **Dispute**
7. **Arbitrability** - The disputes must lawfully be Arbitrated. There are certain disputes that the law retains exclusively for the court, and the same cannot be submitted for arbitration (e.g. - criminal offences, etc.)
8. **Signature** - Only required when AA is contained in a contract

Termination of AA:

1. Mutual consent
2. Termination of principal contract - If Principal contract is terminated through discharge or

novation, the AA terminates too. However, if principal contract is **breached**, then AA survives because of doctrine of separability.

3. Death of parties: AA is **NOT** discharged by death of parties. It shall be enforceable by/ag. LR

4. Operation of Law: - This extinguishes Right of Action.

Arbitral Tribunal or Arbitrator - "AT" - Neutral and Fair to all the parties involved in the arbitration

Who can be an AT?	Any person capable of contracting
Appointment:	Party autonomy means 'freedom to choose' - The procedure, venue, seat or arbitrators
No. of ATs	Decided by Parties provided that such number shall not be an even number . <u>Problem</u> with having > 1 AT - Difficulty faced in coordinating for timings <u>Benefits</u> of > 1 AT - greater discussions improving quality of awards, greater expertise. <u>Narayan Prasad Lohia v. Nikunj Kumar Lohia</u> - Even nos. of AT are allowed assuming they will come to consensus rather than disagreement. But this practically doesn't happen.
Procedure for Appt	Parties can decide upon any procedure for choosing ATs. It can be as simple as a toss of coin. <u>Common Procedures</u> : a. Parties will jointly appoint. b. Each party will appoint one and the two arbitrators would appoint the presiding AT c. Appt. would be made by an unrelated person/inst., E.g., President of ICAI / FICCI, etc. <u>In case where parties jointly agree for sole AT, the general process is:</u> <ul style="list-style-type: none"> 1 party writes to other party forwarding a list of names of potential AT. If the other party approves 1 name from the list, then that individual would be AT. If not, then other party would propose new names to first party. This would go on till both parties agree upon 1 name. Where Parties unable to decide - Approach Designated Auth. - SC (for ICA) and HC (for DA)
Requirements of AT	<ol style="list-style-type: none"> 1. Could be of any Nationality 2. AT should be capable of contracting 3. There should be lack of Biasedness. AT should be Independent and Impartial "Ranjit Thakur v. Union of India" - Test of bias is whether a reasonable person, in possession of relevant info., would have thought that bias was likely.
Section 12: Grounds of Challenge	When a person is approached for his possible appointment as an AT, he shall disclose in writing: <ol style="list-style-type: none"> a. Circumstances such as existence of any past/present relationship with or interest in any of the parties or the subject matter in dispute, in any manner,

	<p>which is likely to give rise to justifiable doubts as to his independence or impartiality; and</p> <p>b. Circumstances which are likely to affect his ability to devote sufficient time to arbitration and in particular his ability to complete the entire arbitration within 12 months.</p> <p><u>Direct question in May 21:</u> As per Section 29A, the parties may, by consent, extend this 12m by further 6m!</p>
Duties and liabilities	<ol style="list-style-type: none"> 1. Conduct the Arbitral proceedings without delay - As expeditiously as possible 2. Remain at all times impartial i.e., treat both parties equally 3. Keep all matters confidential 4. Deliberation - AT should discuss the matter with each other thoroughly and through a majority render the award 5. Avoid unilateral communication with one party (to Arbitration) 6. Ensure all docs & comms received from one party is communicated to other party 7. Ensure that the award and all other decisions comply with legal requirements 8. Ensure that he/she himself at all times comply with legal requirements associated with AT
Termination, Removal and Substitution	<p>Substitution/Removal of AT can be done in <u>4 instances</u>:</p> <ol style="list-style-type: none"> 1. AT leaves voluntarily 2. All parties involved agree that AT should be removed through unanimous decision 3. Operation of law <ol style="list-style-type: none"> a. AT unable to perform his functions or for other reasons fails to act w/o undue delay b. Arbitration process ends in either of following ways: <ul style="list-style-type: none"> • Final Award has been made • Failure to make award within 12 months • Parties decide to no longer continue with Arbitration 4. Court decides to remove AT
Challenge against AT	<ul style="list-style-type: none"> • First challenge must be raised before the AT itself • Only after that → Challenge can be raised before: <ul style="list-style-type: none"> ○ District Court - For domestic arbitration and ○ High Court - For ICA

Arbitral Award ("Award")

- Award is conclusive determination as to questions, issues /disputes that are put forward before AT
- Arbitral award is similar to a judgment given by a court of law.
- It represents a resolution of dispute between the parties.

Challenge against Award:

- Only a party to AA can challenge an Arbitral Award
- Authority before which award can be challenged -
For DA - District Court or HC
For ICA - Only HC
- Challenge to be made **within 3 months** of receipt of award by the party. (Max. **extension - 30 days**)

- No automatic stay on the enforcement of Award. Party will have to specifically request

Types of Award:

<u>Final Award</u>	<u>Interim Award</u>	<u>Settlement Award</u>	<u>Additional Award</u>
An award that is made as per law and finally adjudicates on the issues submitted to arbitration	There can be 2 types of interim awards: 1. Which <u>remains in force till final award</u> is rendered, 2. It is <u>final as regards the matters</u> it deals with. The latter is referred to as interim, because when it was rendered while there were still other pending issues	AT could assist parties in arriving at the settlement. If a settlement is arrived at, and AT has no objection with it, then terms of the settlement could be made part of an award	After final award has been rendered, but it is later found that certain claims were not adjudicated, parties can request AT to make an additional award covering those issues. Such request to be made within 30 days from receipt of final award

Requirements of an Arbitral Award:

An Award must be:

1. A decision by the **majority**
2. **Complete** concerning all issues that are submitted for adjudication
3. Made in **writing**, and is **signed** by majority of AT in agreement of the Award and it should be **dated**
4. **Reasoned** i.e., State reason for award [Exception - When parties have agreed that no reasons need be given for the award]
5. Must **not be Vague** or unclear. It should not seem like a recommendation
6. Capable of being performed i.e., **realistic**
7. Not be illegal (against public policy)

Grounds for challenging an Award:

1. Challenge of **bias** against AT - First raise before AT.
2. **Overstepping** of jurisdiction by AT - AT gets to first decide on this challenge of any party.
3. Specific grounds for reviewing an award - There are 7 grounds!

Grounds in which challenge is specifically raised by a party:

1. Party is under some **incapacity** (such a minor)
2. Invalid **AA**
3. Party is not given proper **notice** about appt. of AT or Arbitral Proceedings
4. Award deals with **disputes** not submitted to Arbitration
5. AT or procedure was not in accordance with necessary requirements under the **law**

Grounds on which court can look at its own motion:

1. the subject matter of the dispute is not capable of settlement by arbitration (**arbitrability**).
2. Award is in contravention of the **public policy** of India.

Consequences of challenging an Award:

The court may -

Set Aside i.e., Award has no legal consequence

Confirm i.e., there is nothing legal wrong with award of AT

Modify (instead of set aside)

Remit Back to AA (to rectify some defect, else set aside)

Enforcement of an Award: - Where time for challenging award has expired, or when such appln was made but rejected → The award can be enforced under CCP, 1908 as if it were a **decree of the court**.

Conciliation

Definition:

A process of getting parties to come to an agreement about a common problem/dispute through confidential discussion and dialogue.

Characteristics of Conciliation:

1. **Voluntary** i.e., all parties have to agree to get the dispute conciliated
2. **Non-Adversarial** - Parties do not behave as adversaries. Instead of focusing on win- lose, the attempt is to find a solution to the problem that best suits all the parties involved
3. **Assisted procedure** - In order to assist the parties at all times in arriving at a solution, the conciliator(s) are present
4. **Finality of settlement** - The outcome i.e., settlement as an end result is final and binding between the parties
5. **Confidentiality**

Conciliation in India

- Any dispute arising out of a legal relationship, whether contractual or not, can be conciliated
- **No. of conciliators** - Depends on parties but **maximum 3**
- **Appointment** of Conciliators - Appointed by party concerned. While appointment, it must be ensured that independent and impartial conciliators are selected
- **Procedure** of Conciliation -
 - Both parties are required to submit their statements in **writing**, supply docs & evidence to Conc.
 - Conc. then provides a copy of statements, docs and other evidence of one party to other.
 - Conc. is then required to encourage and assist parties to engage in discussions based on the info. to **arrive at a settlement**
- Bar on judicial or arbitral proceedings - When conciliation proceedings are ongoing - Parties cannot start arbitration proceedings or approach a court regarding the same dispute

Mediation vs. Conciliation

Grounds for differences	Mediation	Conciliation
Role played	Mediator plays a <u>facilitative role</u> and attempts to <u>guide</u> parties towards a solution.	The Conciliator plays more <u>proactive role</u> . He acts a facilitator, evaluator and intervener.
Solution	Solution should come from parties themselves	Conciliator can also along with the parties suggest solutions
Outcome is -	An agreement between the parties.	Settlement agreement
Enforceable?	Agreement reached by the parties is a contract enforceable by law	Settlement agreement = Arbitral award = Executable as a decree of civil court.
Governing Section	Sec 89 of CCP, 1908.	Part III of this Act

Confidentiality	Based on Trust	Defined by law. Breach could be fatal to the entire process
Breach of Agreement	Proceed in the usual process adopted for breach of contract.	This Act provides mechanisms for enforcing arbitral award and recourse in instances the award is not followed.

The Supreme Court of India in "Salem Advocate Bar Association v. UOI" held that **conciliation is a bigger concept than mediation**.

Settlement Agreement:

Initial Process:

- Attempt of conciliation is to resolve dispute and **arrive at a settlement**
- Settlement could be based on **suggestions** made by the Conciliator or the Parties
- When it appears to conciliator that settlement is possible, he should identify possible terms of settlement and submit them to parties for their observations and suggestions.
- The parties may also make suggestions as to contents of the agreement.

Agreement

- If parties reach a settlement, then it has to be written down as an agreement (Settlement Agreement)
- Conciliator is required to authenticate the agreement without which it would have no legal sanctity (Mysore Cements Ltd. v. Svedala Barmac Ltd.)

Enforcement:

- Settlement Agreement = Same as Arbitral Award
- Final and binding on the parties
- Award can be challenged before a court

Confidentiality:

Conciliation proceedings and its outcome are subject to **stringent confidentiality** requirements:

- Both conciliator and parties are required to keep all matter relating to proceedings and settlement agreement **confidential**. [Only exception - When disclosure becomes necessary for implementation and enforcement of settlement agreement]
- Conciliator cannot act as an arbitrator or representative** of any of the party in arbitral or judicial proceedings in respect of the dispute that was subject of conciliation proceedings.
- None of the views expressed, suggestions made, admissions by parties, or proposals made could be relied upon or introduced as **evidence in arbitral** or judicial proceedings, irrespective of whether or not those proceedings relate to dispute that was the subject of arbitral or judicial proceedings.

Breach of confidentiality would vitiate the arbitral or judicial proceedings they are attempted to be utilised in.

Chapter 6 - Insolvency Bankruptcy Code, 2016

AA	Adjudication Authority	IP	Insolvency Professional
ARC	Asset Reconstruction Company	IRP	Interim Resolution Professional
BRP	Base Resolution Plan	LEA	Liquidation Estate Assets
CA	Corporate Applicant	OC	Operational Creditor
CD	Corporate Debtor	OD	Operational Debt
CIRP	Corporate Insolvency Resolution Process	PA	Public Announcement
CIS	Collective Investment Schemes	PIM	Preliminary Information Memorandum
CP	Corporate Persons	PPICD	Pre-Package ICD
CSG	Creditor, Surety, Guarantor	PPIRP	Pre-Package IRR
ECT	Extortionate Credit Transaction	PT	Preferential Transaction
FC	Financial Creditor	RA	Resolution Applicant
FSP	Finance Service Provider	RP	Resolution Professional
IBBI	Insolvency and Bankruptcy Board of India	RFRP	Request for Resolution Plan
IBC	Insolvency Bankruptcy Code	SC	Secured Creditors
ICD	Insolvency Commencement Date	UnSC	Unsecured Creditors
IM	Information Memorandum	UT	Undervalued transaction

Introduction to the IBC 2016:



Purpose of the code:

- An Act to **consolidate** and amend the laws relating to reorganization and insolvency resolution of **corporate persons, partnership firms and individuals**
- in a **time-bound manner** for maximization of value of assets of such persons,
- to promote entrepreneurship, availability of credit and
- balance interests of all stakeholders incl. **alteration** in order of priority of payment of Govt. dues &
- to establish an Insolvency and Bankruptcy Board of India (**IBBI**), and
- for matters connected therewith or incidental thereto.

Insolvency vs Bankruptcy vs Liquidation:

- Insolvency is a **state** of not being able to pay off debts due to insufficient cash flow.
- Insolvency can be treated with appropriate resolution mechanism
- If left untreated, insolvency results into Bankruptcy (for individuals) or liquidation (for company)

Structure of this Code:



4 Pillars of this code:



Sec 2 - Applicability of the CodeAny **company**
incorporated in
Co. ActOther co.
governed by
special Act**LLP** incorp.
under LLP
Act 2008**BC** as
notified by
CGPersonal
Guarantor
to CD**Partner/**
Proprietor
ship firm**Indv**

in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

Applicability of this Code to Finance Service Provider ("FSP"):

- As per Section 3(7) - Corporate Person doesn't include FSP (i.e., banks, FI, Insurance co., ARC, MFs, CIS)
- However, as per Sec 227, CG has power to notify FSP to whom IBC may be applicable
- CG vide notification notified that IBC shall be applicable to **NBFC (incl. Housing Fin. Co.) with asset size >= Rs. 500 crores** as per last audited BS

Sec 3 - Definitions - Read towards end and add some more from ICAI Mat.**Part II - Insolvency Resolution and Liquidation for Corporate Persons****Section 4: Applicability of this Part****Minimum** amt of Default = Rs. 1 lakh or such **HIGHER** amount as may be prescribed by CG (max. 1 cr.)W.e.f. 24th March, 2020 - Amount of default to initiate this process stands increased to **Rs. 1 crore**Provided that - CG may, by notification, **specify min. amount of default** of higher value (not > Rs. 1 crore) for matters relating to "PPIRP" of CD under Chapter III-A**Section 6:** If a CD commits default, CIRP may be initiated by Financial Creditor (FC), Operational Creditor (OC) or the Corporate Debtor (CD) itself.**Section 7: Initiation of CIRP by a FC****Financial Creditor**
(Itself or jointly with other
FCs/Person notified by CG)Application (presc. Form)
Against **CD** for initiating **CIRP**

Adjudication Authority (NCLT)

Following person are **notified by CG** and may file an application on behalf of FC:

Guardian

executor or administrator of
an estate of FCtrustee including
debenture trusteeperson duly authorized by
BOD of a company

- Applicant shall serve **copy** of such application to registered office of **CD** and to **Board** by register post, speed post, or hand delivery or e-mode **BEFORE** filing with AA. **[Amendment]**
- Default includes a default w.r.t. a FD owed not only to applicant FC but to any other FC of the CD.
- Documents to be enclosed:

Record or **evidence** of default
with IU or others**Name** of proposed IRP**Other** info as may be
specified by Board

- AA to **ascertain default within 14 days** (otherwise record reason) based on record / evidence
- Admit application** if:

Default has occurred

Application complete

No pending disciplinary proceedings against
proposed IRP

- **Reject** if either of the above not satisfied
- AA shall communicate such order (admission/rejection) to FC **within 7 days** of order
- However, where AA intends to reject the application on grounds that it is **incomplete**, give notice to applicant to **rectify** defects **within 7 days** of such notice from AA.
- CIRP to commence from date of admission of application by AA - Insolvency Commencement Date

Note (Read after Sec 21:

For FC referred under Clause (a) and (b) of Sec 21(6A), CIRP application shall be **jointly** filed by **not less than LOWER** of:

100 creditors in same class, OR 10% of total crs. in same class

Where FCs are allottees under a **Real Estate** (RE) project, application shall be filed jointly by **not less than LOWER** of:

100 such allottees in same RE Project, OR 10% of total allottees in same RE Proj.

When application is made by OC u/s 9, AA be like:



Ruko zara! Sabar Karo!

Section 8 - Insolvency Resolution by OC

- OC to deliver **Demand Notice** and copy of invoice to CD **demanding payment**
- CD shall **within 10 days**, bring to notice of OC:
 - Existence of a **dispute** (amount, quality, breach) **or** record of pendency of suit or arbitration filed before receipt of such notice
 - **Payment** of OD by attested copy of electronic transfer or record that OC has encashed a cheque

Section 9 - Initiation of CIRP by OC



- Furnish along with application: [**NAI FO**]
 - Copy of **invoice or demand Notice**
 - Copy of certificate from **Financial Institution** of OC, if available, confirming non payment
 - **Affidavit** to the effect that no notice of dispute or payment given by CD
 - Copy of record from **IU**, if available
 - **Other proofs** confirming non-payment
- AA shall **within 14 days** admit the application and communicate it to **OC and CD** if:
 - Invoice or demand **notice** was **delivered** to CD
 - No **payment** of unpaid OD
 - No **notice of dispute** and no record of payment in **IU**
 - **Application is complete**
 - No **disciplinary proceeding**

- Otherwise reject and communicate to **OC**. However, give **7 days to rectify**
- CIRP to commence on date of admission - **Insolvency Commencement Date**

Section 10 -Initiation of CIRP by CD itself

Where a CD has committed a **default**, CA to file an application with AA. Furnish along with application:

- **Information** relating to BOA and others as may be prescribed
- Information of Resolution Professional **proposed as IRP**
- **SR** (for co.) or **resolution by >= 3/4th of partners** (for LLP) of CD approving filing of such application

AA shall **within 14 day**:

- **Admit application** if - Default occurred + Application complete + no pending disciplinary proceeding against proposed IRP
- **Reject** if either of the above not satisfied. However, give **7 days** to rectify application.

CIRP to commence from date of admission of application by AA - **Insolvency Commencement Date**

Summary of Section 7,9 and 10

Particulars	Section 7	Section 9	Section 10
Application by:	Financial Creditor	Operational Creditor	Corporate Applicant
Apply when:	Default has occurred	Default + Sec 8 complied	Default has occurred
Proposed IRP	Mandatory Obtain consent of IP for appointment as IRP	Optional	Mandatory Obtain consent of IP for appt as IRP
AA to ascertain default	Within 14 days of receipt of application (and then communicate order in 7 days)		
Annexure to application:	<ul style="list-style-type: none"> • Record of default (IU) • Name of prop IRP • Other info 	<ul style="list-style-type: none"> • Copy of demand notice • Affidvt of no reply from CD • Cert. from FI • Record of IU • Other proofs 	<ul style="list-style-type: none"> • BoA or other docs • Proposed IRP • Resolution (SR or 3/4th partners)
Accept Application if → Otherwise reject	Default + Application complete + No disciplinary proceeding	Demand notice + No payment + No dispute + Appln complete + No disciplinary proc.	Default + Appln complete + No disciplinary proc.
Period for rectification	Within 7 days of receipt of notice from AA		
Initiation of CIRP (ICD)	Date of admission of application by AA		

Section 10A - Suspension of initiation of CIRP

Applicability of Sec. 7,9 and 10 **suspended** w.r.t, **default arising on/after 25th Mar,2020 for 1 year** (till 24/3/21)

Note: No application shall **ever** be filed for initiation of CIRP of CD for said default occurring during said period.

Section 11 - Person not entitled to make application to initiate CIRP:

CD undergoing CIRP or PPIRP	FC/OC of CD undergoing PPIRP	CD whose Resoln Plan is approved 12m prior to appln
CD which completed CIRP 12m prior to appln	CD/FC who violated terms of resoln plan approved 12m before appln	CD whose liquidation order is made

Explanation - Nothing in this section shall prevent a CD referred above from initiating CIRP against another CD.

Note - This section restricts an applicant from filing application u/s 10. He can still file application u/s 7 or 9

Section 11A - Included with PPIRP portion**Section 12 - Time Limit for Completion of CIRP**

- **Within 180 days** from date of **admission** of application
- **Extension:**
 - After resoln is passed at CoC by vote of **>=66%** voting share, RP may apply to AA seeking extn.
 - If AA is satisfied that CIRP cannot be completed in 180 days, it **may** further extend - **Not > 90 days but only once.**

Note: CIRP to be **mandatorily** completed **within 330 days of ICD** including extension and time taken in legal proceedings

Section 12A - Withdrawal of Application admitted u/s 7,9,10

On application made with the approval of **90% voting share of CoC**, AA may permit withdrawal.

Summary of Withdrawal of Applications [Sec 12A of Code, Rule 8 and Regulation 30A]

Stage at which appln. is withdrawn	Process
Before admission by AA (AA has to admit or reject in 14 days)	AA may permit such withdrawal on application for withdrawal
Application admitted but CoC not formed	AA may permit on application made through IRP. IRP to apply within 3 days of receipt from applicant
After constitution of CoC but before invitation for EOI Expression of Interest	Withdrawal application to be first approved by CoC by 90% voting shares within 7 days of such withdrawal appln and then IRP/RP to submit application to AA within 3 days of approval from CoC
After invitation of Expression of interest	Same as above with only difference that applicant to state reasons justifying such withdrawal

Section 13 - Declaration of © and Public announcement:

Where an application u/s 7,9 or 10 is admitted, AA shall make an order (on ICD) w.r.t:

- Appointment of IRP as per sec 16
- Cause public announcement of initiation of CIRP & call for submission of claims u/s 15
- Declare moratorium for the purpose referred to in sec 14

Section 14 -Moratorium

On the ICD, AA shall by order declare moratorium prohibiting [RAIES]:

Institution of Suits, Continuation of pending suits against CD, execution of order of any court	Recovery of any property by any owner or lessor which is in possession of CD	Transferring, encumbering or disposing off by CD any Asset	Enforcement of security Interest as per SARFAESI, 2002
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Note:

- A license, permit, registration, quota, concession, clearance, or similar grant or right given by CG, SG, local authority, sectoral regulator, etc., shall not be suspended/terminated on grounds of insolvency, provide that there is no default in payment of current dues arising for use of such license/grant during moratorium.
Example: Jet airways slots allocated by DGCA.
- Supply of essential goods & services not to be terminated, suspended/interrupted (except where dues arising from such supply has not been paid)

Non applicability of moratorium provision:

Provision of section 14(1) shall not apply to:

- Such transactions, agreements as may be notified by CG + Financial Sector Regulator (RBI, SEBI, etc);
- a surety in a contract of guarantee to CD [Question in exam]

Period of Moratorium: Till completion of CIRP. However, it may cease to have effect, if during CIRP:

- AA approves Resolution Plan u/s 31
- Passes order of liquidation u/s 33

Regulation 29 - RP may sell unencumbered assets of CD during CIRP. However, book value of all asset sold during CIRP shall not exceed 10% of total claims admitted by IRP.

Section 15- Public announcement of CIRP: [As per FAQs - within 3 days of appointment of IRP]

AA shall cause public announcement of CIRP containing following info [RAPID₂]:

Name and Address of CD	Name of authority under which CD is incorp./ Regt.	Details of IRP vested with power of management & responsible for claims	Last date for submission of claims	Penalties for false claims	Last date of CIRP (i.e. 180th day from admission. u/s 7,9,10)
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Section 16 - Appointment and Tenure of IRP (Tenure: Till appointment of RP u/s 22)

- The AA shall on ICD appoint an IRP (where the name of IRP is proposed in the application)
- Who shall be IRP?
 - Where appln. u/s 7 & 10, the proposed IRP to become IRP if no disciplinary proceeding is pending.
 - Appln u/s 9 + IRP proposed - The same shall become IRP provided no disciplinary proceeding.
 - However, in case of appln. u/s 9, if no IRP proposed, IRP shall be appointed by AA on recommendation of Board (Board to recommend within 10 days of receipt of such request)

Section 17 - Management of Affairs of CD by IRP

From the date of appointment of IRP :

Management of **Affairs** of CD vests with IRP

Power of **BoD/** Partners - **Suspended** and exercised by IRP

Officers of CD to report to IRP and provide access to all docs and records as required by IRP.

Financial Inst. to act on instruction of IRP & furnish info. avl with them to IRP

The IRP vested with management of CD shall [**DA2LO**]:

act and execute all **deeds**, receipts and documents

authority to **access records** of CD from IU

authority to **access BOA** etc. available with Govt auth., stat auth., accountants, etc.

responsible to comply with **law** on behalf of CD

take such **other** actions as may be specified by Board

Section 18: Duties of IRP [O IC2A2I]

collect all **information** w.r.t., assets, finances and operations of CD for determining the financial position of CD

receive and collate all **Claims** submitted by crs, pursuant to public announcement u/s 15

monitor **Assets** of CD and manage its ops until a RP is appt

constitute a committee of creditors (**CoC**)

file **Info.** collected with IU, if necessary

take control & custody of any **Asset** over which CD has ownership rights

to perform such **Other** duties as may be specified by the Board

Section 20: Management of operation of CD as going concern

IRP shall make every endeavor to:

- protect and preserve the value of the **property** of the CD and
- manage its **operations** as a going concern.

For this purpose, IRP shall have authority to [**CF IPO**]:

appoint accountants, legal or other **professionals** as may be necessary

enter into **contracts** or amend /modify contracts already entered into

raise **interim finance** provided that no security intt. shall be created over any encumbered property of CD w/o prior consent* of crs. whose debt is secured over such property

issue **instructions** to personnel of the CD as may be necessary

take all **other** actions as are necessary to keep the CD as a going concern

***No prior consent** of such crs shall be required where **value of such property is \geq 2x amount of debt.**

Manner of submission of proof of claims to IRP? (Regulation)

Claims with proof by:	Submit to:	How to submit?	Regulation of IBBI (IRP of CP)	Others
OC (other than workmen)	IRP	Form B	Regulation 7	Submit proofs (IU, invoice, etc.)
FC		Form C	Regulation 8	
Workmen and Employees		Form D	Regulation 9	

Additional Points:

- Claims to be submitted with proof on or before **last date mentioned in PA** u/s 15
- IRP shall **verify** claim **within 7 days** from last date of receipt of claim
- Within 2 days** of such verification - **File** report to AA certifying constitution of CoC
- A person who fails to file claim can file claim with IRP/RP on/before **90th date from ICD.**

Section 21 - Committee of Creditors (CoC)	
Constitution - 21(1)	CoC to be constitute by IRP after: Collation of claims + Determination of financial position
Composition - 21(2)	All Financial Creditors. (If no FC - Board to specify) Provided that - FC who is a related party of CD will not have any right of representation, participation or voting in CoC meeting Provided further that , above proviso shall be N.A to FC regulated by financial sector regulator, if it is a related party of CD solely on account of conversion of debt to equity prior to ICD
If No FC	If FC do not exist or all FCs are related party, CoC shall comprise of: 18 largest OCs by Value, 1 representative of all workmen, 1 representative of all employees If number of OCs < 18 - Include all OCs.
Consortium - 21(3)	Each FC shall be part of CoC and voting share based on FD owed to them (Read sec 21(6) after this and come back to 21(4))
Person is FC + OC - 21(4)	Will be considered as both FC and OC and included in CoC with voting share proportionate to the FD owed to such creditor
OC assigns OD to FC - 21(5)	Assignee to be considered as OC to the extent of such assignment
Consortium Agreement provides for single trustee - 21(6)	<u>If consortium agreement provides for single trustee/agent for all FC, each FC may:</u> (a) Authorize that agent/trustee to act on his behalf, or (b) Represent himself (c) Appoint an IP (other than RP) at his own cost to represent him (d) Exercise his right to vote with one or more FC jointly or severally
Who can act as Authorised Representative of FC? - 21(6A)	Where a financial debt is: a. In form of securities or deposits and terms of such debt provide for appointment of trustees/agents - Such trustee/agents shall act on behalf of FC b. Is owed to a class of creditors exceeding numbers as may be specified - IRP make application to AA the list of creditors along with the name of IP for the AA to appoint** c. Represented by a guardian , executor, etc, such person shall act as authorized representative for financial creditor All such above AR shall attend the meeting of CoC and vote on behalf of FC **AR from State/UT having highest no. of FCs In case of Sec 21(6A)(b) - IRP shall offer names of 3 IPs to be voted upon by Crs. Such IPs must be from state/UTs having highest no. of creditors in class as per records of CD. If State/UTs does not have adequate no. of IPs, consider nearby state/UTs.
Decision of CoC - 21(8)	Except as otherwise provided in this code, all decisions of CoC shall be taken by CoC by a vote of not less than 51% of voting share of FC

RP to furnish info. 21(9) & (10)	CoC may require RP to furnish any financial information related to CD any time during CIRP. RP to furnish within 7 days
Quorum of CoC	A meeting of CoC shall quorate if members representing >= 33% of the voting rights are present either in person or by video/audio means . If no quorum - Automatic adjournment to same time and same place - Next day The adjourned meeting shall be quorate with the members of the CoC attending the meeting.
Rights and Duties of AR of FC [Sec 25A]	Rights of AR - Participate and vote in meetings of CoC on behalf of FC he represents as per the prior voting instructions obtained by AR from such creditors Duty of AR - <ul style="list-style-type: none"> • Circulate agenda & minutes of CoC meeting to FC that he represents • Act in the interest of FC he represents and always act as per their prior instructions • If AR represents several FCs, then cast his vote w.r.t, each FC as per instructions received from each FC to the extent of his voting share. • AR to file such voting instructions with CoC. • Abstain from voting if no prior instructions from FC.

Section 22 - Appointment of RP

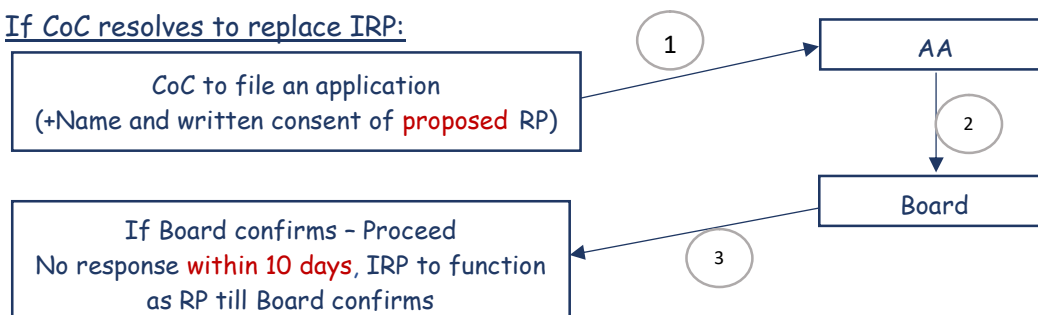
Step 1 - CoC to be constituted by IRP

Step 2 - First CoC meeting to be held **within 7 days** of constitution [Not later than 30 days of ICD]

Step 3 - By majority vote of **>=66% of FC** resolve to either appoint IRP as RP or to replace IRP.

If CoC resolves to appoint IRP as RP - Subject to **written consent** from IRP, CoC to communicate decision to IRP, AA and CD

If CoC resolves to replace IRP:



Where appointment of RP is delayed, IRP to act as RP from 40th day of ICD till RP is appointed u/s 22

Eligibility of IP to become IRP/RP (as per Regulation 3)

IP (not IRP) shall be eligible to be appointed as **IRP or RP** if he and all other partners and directors (P/D) of the **Insolvency Professionals Entity** of which he is a P/D are **independent** of the CD.

Independent to CD bole toh:

1. Eligible to be appointed as Independent Director of CD u/s **149(6)**
2. Not a **Related Party** to CD
3. Not a PPE of firm of **auditors/secretarial auditors/cost auditors** in practice of the CD in **last 3 FY**

4. Not a PPE of **legal/consulting firm** that had any transaction with CD $\geq 5\%$ of Gross T/O of firm in **last 3 FY** (the limit was 10% of Gross T/O in Sec 149(6))

Section 23 - RP to conduct CIRP

- Subject to sec 27 (replacement of RP)
- RP to conduct the CIRP and **manage operations** of CD during CIRP period.
RP to continue to do so after expiry of CIRP until an order is passed by AA u/s 31 or 34
- Powers and duties - As were **vested on IRP**
- **IRP** to provide all records, documents and information related to CD in his possession to **RP**
- **Sec 5(13)** - Fees payable to RP shall be considered as **CIRP** cost

Section 24 - Meeting of CoC

- **Mode** of meeting- **In person** or such e-means as may be specified
- Meetings to be **conducted** by RP.
- Meeting of CoC: [**Amendment**]
 - RP to convene meeting of CoC as and when it considers **necessary**
 - RP to convene meeting on **request** by members of CoC having at least **33%** of voting rights
 - RP **may place proposal** received from member of CoC - If he considers necessary + Such proposal is made by members representing at least **33%** of voting right.
- RP to give **notice** of each CoC meeting to:
 - **Members** of CoC including ARs
 - Members of **suspended BOD** or partners of CD
 - **OC** if the amount of aggregate dues (towards OD) is $\geq 10\%$ of total **debt**
- BOD, partners and **1 rep** of OCs **may** attend the meeting but **no right to vote** and their **absence not to invalidate** proceedings of meeting.
- Period of Notice of meeting
 - Not less than **5 days'** **notice** to all participants
 - CoC may reduce period of notice to **not less than 24 hours** (48 hrs in case if there is any AR)
- FC who is a member of CoC may at his **own cost** appoint an IP (other than RP) to **represent** himself
- **Voting shares** to be based on financial debt owed to such creditor and shall be determined by RP
- **Meeting** to be conducted in such manner as specified

Note - Meetings may be convened till the RP is approved u/s 31 or order for liquidation is passed u/s 33 & decide on matters which do not affect the RP submitted before AA.

Section 25 - Duties of RP - To protect assets and continue business operations of CD

- | | |
|--|---|
| <ul style="list-style-type: none"> • Preserve and Protect the Assets of CD • Take Immediate custody of assets • Represent the CD with third parties • Raise interim Finances subject to CoC approval • Appoint accountants, legal and other professionals • Maintain updated list of claims | <ul style="list-style-type: none"> • Prepare Information Memorandum u/s 29 • Convene all meetings of CoC • Invite prospective resolution applicants (PRA) to submit resolution plans • Present all Resolution Plans to CoC • Such other actions as may be specified by Board |
|--|---|

Section 27- Replacement of RP by CoC

- At any time during CIRP, if CoC is of the opinion that RP is to be replaced
- CoC may by **vote of $\geq 66\%$** of voting shares, make an appln to AA containing name of proposed RP for appt.
- Written consent** of proposed RP required
- AA to **forward** the same to **Board** for confirmation and RP shall be then appointed as per manner laid u/s 16
- If any **disciplinary proceeding** is pending, existing RP to continue till another RP appointed

Section 28 - Approval of CoC for certain actions (RP can't do without approval) [FIT2S(CCD) MCD T2]

Raise any interim finance in excess of amount decided	Instruction to FI for debit Transaction > Amt. decided	Create any security interest over assets	Disposal of shares of any shareholder
Record any change in ownership interest	Change the capital structure	Undertake any Related Party Transaction	Delegate his authorities
Amend any constitutional document	Changes in appt. or terms of contract of such personnel as may be specified	Changes in appointment or terms of contract of stat / internal auditors	Make any changes in the management of CD

- For taking any of above actions, RP to convene meeting and get it approved by **$\geq 66\%$ of CoC**
- Effect of contravention:**
 - Action **void**
 - CoC may **report** to Board for necessary action under this code.

Section 29 - Preparation of Information Memorandum (IM)

- RP to **prepare IM** containing "**Relevant Info.**" as may be specified by Board for **formulating Resolution Plan**
- Duty of RP to provide information to Resolution Applicant, provided he undertakes to:
 - Comply with law related to **confidentiality** and **insider trading**
 - Protect **Intellectual property** of the CD
 - Not to share** Relevant info with third parties unless above 2 conditions are complied with.

Relevant info means any info necessary for preparation of resolution plan such as financial position of CD, disputes and such other matter as may be specified by Board.

Section 29A - Person not eligible to be Resolution Applicant

Resolution Applicant means a **person**, who individually or jointly with any other person, **submits a resolution plan** to the **resolution professional** pursuant to the **invitation** made u/s 25

A person shall not be eligible to submit a resolution plan if such person is [CID AT SEBI 164 Guarantee]:

undischarged Insolvent	wilful Defaulter - As per Guidelines of RBI issued under Banking Regulation Act, 1949	At the time of such submission - Has an Account OR is the promoter or in charge of management or control of a CD who has an account which is classified as NPA AND > = 1 year has lapsed from date of such classification till date of ICD*	
(e) Disqualified u/s 164	Promoter or in mgt./control of CD in which - preferential / undervalued / fraudulent / extortionate credit Transaction has taken place + Order made by AA under this code.	Had executed Guarantee in favor of a creditor in respect of CD undergoing CIRP and the creditor invoked such guarantee and it remains unpaid in full or part.	Prohibited by SEBI from trading in securities or accessing securities market
(d) Has been Convicted of an offence punishable with imprisonment (Eligible after completion of 2 years from release from imprisonment) For >= 2 years under any Act specified in the 12 th Schedule For >= 7 years under any other law for the time being in force		subject to disability in any of above mentioned clauses under any law o/s India (Foreign)	Has a connected person not eligible under above clauses

*Can submit if paid all overdue and interest thereon before submission.

*Moreover, this Clause N.A. if applicant is Financial entity + Not a Related Party

Connected Person means:

- Any person who is Promoter or in Management/Control (PMC) of the **resolution applicant**
- Any person who shall be the P or in M/C PMC of the business of CD during implementation of resolution plan
- ASH or Related party to above referred persons.

Note - Clause (d) [convicted of offence] and (e) [disqualified] above shall not apply in relation to connected person referred to in Clause (iii) above

Section 30 - Submission of a Resolution Plan

- RA to submit R. Plan to RP prepared on basis of IM along with affidavit that RA eligible u/s 29A.
- RP shall examine to confirm that each resolution plan [**COMILO**]:

Provides for payment of Insolvency Resolution Process Cost in priority to other debts of CD	Provides for payment to OC such that it is not less than higher of amt. paid in [1] Liquidation u/s 53 or [2] Distribution u/s 53(1)	Provides for Management of Affairs of the CD after approval of resolution plan
Provides for Implementation & supervision of resolu plan	Does not contravene any provision of Law for the time being in force	Conforms to such Other requirement as may be specified by the Board

- RP to present to CoC for its approval such resolution plan which confirm to Sec 30(2)
- CoC to approve** the plan by vote $\geq 66\%$ voting share after considering
 - feasibility** and **viability**,
 - the **manner of distribution proposed**
 - such other requirements as may be specified by the Board
- CoC shall **not approve** the resolution plan submitted by a resolution applicant ineligible u/s **29A**. However, if RA not eligible under clause (c) of Sec 29A (NPA Account), CoC may allow such RA a

period not exceeding 30 days to clear dues (This ext. will not impact time limit u/s 12 i.e., complete CIRP in 180 days)

(6) Right of RA to **attend** CoC meeting in which plan is considered. But **no right to vote unless RA is FC**
Can RA vote on his own plan if he is a FC? - **Yes**

(7) **RP** to submit approved resolution plan to **AA**

Note: Nowhere during the consideration (and even implementation) of the resolution plan is the approval of **SH of CD** required. Any such approval reqd. for implementation is **deemed to be given on approval of plan by AA.**

Section 31 - Approval of Resolution Plan

1. If AA satisfied that resolution plan meets conditions of **Sec 30(2)** and has provision for effective implementation, it shall, by order **approve** it.

Once approved, it shall be **binding** on the CD, its employees, members, creditors, CG, SG for statutory dues, etc., guarantors and other stakeholders.

2. If not in conformity with Sec 30(2), reject the plan

3. Consequences of approval:

- **Moratorium** u/s 14 ceases to have effect
- RP to forward to the Board all **records** related to CIRP and resolution plan to be recorded in its database

4. RA to obtain necessary approval **within 1 year** of approval of plan by AA (If **CCI** approval needed, obtain **prior** to approval of AA)

Consequence of non-submission of R. Plan within 180 days or extended period - AA may order Liquidation.

Section 32 - Appeal

Appeal against **order approving** Resolution plan shall be as per Sec 61(3) [**Cant's appeal if plan rejected**]

As per Section 61(3), appeal against above order can be made on following grounds:

(similar to **COMILO**)

- a) L - the approved R. plan is in **contravention** of the provisions of any **law**
- b) I - there has been **material irregularity** in exercise of the powers by the RP during the CIRP;
- c) O - the payment to **OD** has not been provided for in R. plan in the manner specified by the Board
- d) C - IRP **costs** have not been provided for repayment in **priority** to all other debts
- e) O - R. Plan doesn't comply with any **other** specified criteria

Section 32A - Liability for prior offences

Notwithstanding anything, the liability of a CD for an offence committed prior to the ICD shall cease, and the CD shall not be prosecuted for such an offence from the date the R. Plan has been approved by the AA u/s 31 provided that the R. Plan results in the change in the management or control of the CD to a person who was:

- a) not a promoter or in the management or control of the CD or a related party of such a person; or
- b) not a person w.r.t whom the relevant investigating authority (IA) has, on the basis of material in its possession, RTB that he had conspired for commission of offence and has submitted report to relevant auth.

Provided that if prosecution had been instituted during the CIRP against such CD, it shall stand discharged from the date of approval of the R. plan subject to requirements of this sub-section having fulfilled.

Provided further that Designated Partner (DP) or an OID, or any person was in any manner in-charge of the CD for the conduct of its business and who was involved in the commission of such offence as per the report of IA, shall continue to be liable to be prosecuted and punished for such an offence committed.

No action shall be taken against the property of the CD w.r.t an offence committed prior to the ICD, where such property is covered under a R. Plan approved u/s 31, which results in the change in control of the CD to a person, or sale of liquidation assets to a person, who was

- a) not a promoter or in the management or control of the CD or a related party of such a person; or
- b) not a person w.r.t whom the relevant investigating authority (IA) has, on the basis of material in its possession, RTB that he had conspired for commission of offence and has submitted report to relevant auth.

Nothing in this section shall be construed to bar an action against the property of any person, other than CD or a person who has acquired such property through CIRP or liquidation process, against whom such an action may be taken under such law as may be applicable.

Explanation: For the purposes of this sub-section, it is hereby clarified that

- a. an action against property of CD in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to CD;
- b. Nothing in this sub-section shall be construed to bar an action against the property of any person, other than the CD or a person who has acquired such property through CIRP or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable

Reporting of status of ongoing CIRPs through Form CIRP 7 [Amendment]

IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('Regulation')

Regulation 40A - Provides a model timeline for carrying out various activities envisaged in CIRP

Regulation 40B-

- IRP/RP to file a set of forms (Form CIRP 1 to CIRP 6) **within 7 days** of completion of **specific activities** (E.g. Form 1 to be filed within 7 days of Public Announcement)
- Where such specific activities is not completed, such Form need not be filed and that made making monitoring of the progress difficult.
- Hence, Clause (1A) was added to Regulation 40B

Regulation 40B (1A) Where any activity stated in column (2) of table below is **not complete** by the date specified therein, the IRP/RP, as the case may be, shall file **Form CIRP 7** within 3 days of the **said date**, and continue to file (only one) 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	Form CIRP 7 - 1 st time filing	Subsequent filing of Form CIRP 7
(1)	(2)	(3)	(4)
1	Public announcement is not made by T+3 rd day	Date specified in column (2) + 3 days	X+30 th day, X+60 th day, X+90 th day, and so on, till the activity is completed.
2	Appointment of RP is not made by T+30 th day		
3	Information memo. is not issued within 51 days from the PA		
4	RFRP is not issued within 51 days from the issue of Info. Memo		
5	CIRP is not completed by T+180 th 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.

Some practical updates! 6 years to IBC

- Unlike popular perception of financial creditors or lending banks triggering the IBC code for taking defaulters to the cleaners, it is **operational crs**, who have utilised the code for getting money back.
- Most of the cases under the IBC have ended in **liquidation**, which means selling the assets of the company as junk. Out of total disposed cases, almost half the cases resulted in liquidation.
- Real estate & construction** is the biggest sector facing bankruptcy proceedings
- More than **80%** the admitted cases have **overshot the 270 days** deadline for resolution.

CHAPTER III - LIQUIDATION PROCESS**Section 33 - Initiation of Liquidation**

- AA to pass an order to liquidate CD if:
 - Resolution plan is **not received by AA before**:
 - Expiry of **CIRP period** or
 - **Maximum period** for completion u/s 12, or
 - Fast track CIRP u/s 56
 - AA **rejects the resolution plan** u/s 31 for non-compliance
 - RP during CIRP communicates to AA the **decision of CoC (>=66%) to liquidate CD**

- Resolution plan approved by AA (u/s 31 or 54L) is **contravened** by CD and any person whose interests are prejudicially affected makes an **application** to AA for **liquidation order**
- On passing an order for liquidation, AA shall:
 - Issue a **public announcement** that the CD is in liquidation
 - Require such order of liquidation to be sent to the **authority** under which CD is registered
- Effects of liquidation order:
 - No **suits** or other legal proceedings shall be instituted **by or against** CD. (Moratorium Part 2) (However, may be initiated **by the** liquidator on behalf of CD **with prior approval of AA**)
 - Order shall be deemed to be **notice of discharge** to the officers, employees and workmen of the CD (**Except** where the **business** of CD is continued during the Liquidation process)

Liquidation commencement date - Date on which proceedings for liquidation commence u/s 33 or 59

Section 34 - Appointment of Liquidator and Fee to be paid

Appointment of Liquidator:

- On passing of order u/s 33, the **RP** (appointed for CIRP or PPIRP) **to act as liquidator (unless replaced by AA)** subject to submission of **written consent** to AA
- However, AA shall by order replace **RP** if:
 - Resolution plan submitted by RP was rejected for failure to meet the requirements of **Sec 30(2)**
 - **Board** makes **recommendation** to AA that RP should be replaced (**reasons** recorded in writing)
 - RP fails to submit **written consent** to act as a liquidator
- Manner of replacement of RP (except where Board **suo motu** recommends such replacement)
 - AA may **direct the Board** to propose name of IP to be appointed as liquidator
 - Board shall **specify name along with written consent of IP within 10 days**
 - On receipt of such recommendation, **AA to appoint** the IP as Liquidator
- Consequences of appointment of liquidator :
 - Power of BOD, KMP and partners of CD shall **CEASE** to have effect & shall vest with Liq.
 - **Personnel** of CD to extend all **necessary** support and assistance to CD

Fee of the liquidator: Such **proportion** (as specified by Board) to the value of **Liquidation Estate Assets (LEA)** and shall be paid out of proceeds of LEA u/s 53

Section 35 - Power and Duties of Liquidator

- | | |
|---|--|
| <ul style="list-style-type: none"> • Verify claims • Invite and settle claims • Take custody of assets • Protect and preserve assets • Evaluate assets • Carry on business of CD • Power to consult stakeholders entitled to proceeds u/s 53. However, not binding | <ul style="list-style-type: none"> • Sells properties of CD via public auction / private contracts (can't sell to person ineligible u/s 29A) • Draw, accept, make & endorse NI • Obtain professional assistance • Investigate the financial affairs to determine undervalued and preferential transaction • Apply to AA for necessary orders & directions • Perform such other function as specified by the Board |
|---|--|

Section 36 - Liquidation Estate

- Liquidator shall form an estate of assets called the **Liquidation Estate (LE)**
- Liquidator to hold LE in a **fiduciary capacity** for the benefit of **creditors**

LE shall comprise of:

- All assets over which CD has **ownership** right whether in his possession or not (Ownership evidenced in balance sheet or IU or such other means specified by Board)
- **Tangible** assets
- **Intangible** assets (Intellectual prop, financial instruments, securities, insurance policies, etc.)
- Assets subj to determinatn of ownership by court
- Assets in respect of which the secured creditor has **relinquished** security interest
- **Proceeds** of liquidation as and when realized

LE shall NOT include:

- Asset owned by third party but in **possession** of CD (such as - Asset held in trust i.e., fiduciary capacity, bailment contracts, sum due to employee from PF, pension fund, gratuity fund, etc.)
- Assets in **security collateral** held by FSP and are subject to netting and set-off in multi-lateral trading or clearing transaction
- **Personal assets** of SH or partners as the case may be
- Assets of **subsidiary** of CD (Indian/Foreign)

Section 37 - Power of Liquidators to access information

- Liquidator shall have power to access any information system for the **purpose of admission and proof of claims and identification of LEA** relating to CD from following sources:

IU	Information systems (IS) for financial and non-financial liabilities regulated under any law	IS for securities and assets posted as security interest regulated under any law
Credit IS under any law	Any agency of CG, SG, Local govt including registration authorities	Database maintained by Board
		Sources specified by Board

- Any **creditor** may require Liquidator to provide financial info and Liquidator shall **within 7 days** provide such information or provide reasons for not providing such information.

Section 38 - Consolidation of Claims

- Liquidator to collect claims of creditors **within 30 days** of Liquidation Commencement Date (LCD)
- **Submission of claim by FC** - FC to provide records of such claim with an IU. If no such records in IU, then submit as an OC would.
- **Submission of claim by OC** - Such manner and supporting documents as may be specified by Board
- **Partly FC & partly OC** - To the extent of FD - In manner specified above. And for OD, manner specified above
- Creditor may **vary** or **withdraw** his claims **within 14 days** of submission of such claim

Section 39 - Verification of Claims

- The liquidator shall verify the claims **within such time as may be specified by the Board (30 days from the last date of the receipt of the claim)**
- Liquidator may require any creditors/CD/ others to produce any other **evidence** to verify claims.
- **Liquidator shall also verify claims collated during CIPR but not submitted during liquidation, within 30 days from last date for receipt of claims during liquidation & may either admit/reject claim.**

Section 40 - Admission/ Rejection of Claims

- Liquidator may, after verification, **admit or reject a claim, in whole or in part**, as the case may be
- Reasons to be recorded in **writing** for rejections of claim
- Liquidator to **communicate** his decision to creditor & CD **within 7 days** of such admission/ rejection

Section 41 - Valuation of Claims -

Liquidator shall determine value of claims admitted u/s 40 in specified manner

Section 42 - Appeal against decision of Liquidator:

A creditor may appeal to the AA against the decision of the liquidator accepting or rejecting the claims within 14 days of the receipt of such decision.

Preferential Transaction (PT) and Relevant time (Section 43 and 44)

Relevant time?	A preference shall be deemed to be given at a relevant time, if: <ul style="list-style-type: none"> Related Party (other than just employee) - During 2 years preceding ICD Person other than related party - During 1 year preceding ICD
Appln. for avoidance	Such application shall be filed to the AA by Liquidator or RP as the case may be
When is a transaction preferential?	<ul style="list-style-type: none"> Trf. of property or interest for benefit of Creditor, Guarantor or Surety (transferee) w.r.t, antecedent FD/OD/other liab., AND Such trf. transfer puts such transferee in a beneficial position than it would have been in event of distribution u/s 53
Following trf. not to be considered as preferential	<ol style="list-style-type: none"> Transfer in OCOB of CD or transferee; Transfer creating security interest in property acquired by CD to extent that: <ol style="list-style-type: none"> Such interest secures new value and was given at time of signing security agreement that contains description of such property as security interest and was used to acquire such property, AND Such transfer was registered with IU within 30 days of CD receiving possession of prop.
Order of AA [Section 44]	<p>On application by RP or Liquidator, AA may order the following:</p> <ol style="list-style-type: none"> The property so transferred to be vested in CD Property that represents the application of proceeds of sale of prop. so transferred or money so transferred - Vested with CD Release/discharge of security interest created by CD Require any person to pay such sums in respect of benefits received from CD Direct Guarantor (whose FD/OD was released under such preference) to be under such new FD/OD to that person as AA orders Direct for providing security on any property for discharge of FD/OD (other than to which preference given)
Order shall not:	<ol style="list-style-type: none"> Affect interest in prop. acquired in good faith and for value Require a person to pay any sum if such benefit was received in good faith or for value.
Presumption	<p>Where the person to whom preference is given;</p> <ol style="list-style-type: none"> Had sufficient info. of commencement of CIRP or Is a related party, <p>it shall be presumed that interest was acquired otherwise than in good faith.</p> <p>A person shall be deemed to have sufficient info. if a PA u/s 13 has been made</p>

V. Nagarajan (Liquidator) v. Asset Reconstruction Company India Ltd.

The consideration amount for executing of sale deed was paid to the corporate debtor much prior to the execution of sale deed by way of demand draft. The insolvency commencement date (date of

admission) was 16-6-2017, however, the execution of sale deed reached finality on 30-5-2016, which was much prior to one year preceding the insolvency commencement date. Therefore, NCLT rightly rejected the application filed by RP

Undervalued Transactions (Section 45 to 48)

Relevant time?	A preference shall be deemed to be given at a <u>relevant time</u> , if: <ul style="list-style-type: none"> • Related Party (other than just employee) - During 2 years preceding ICD • Person other than related party - During 1 year preceding ICD
Appln. made by	Liquidator or RP
When is transaction said to be undervalued?	Transaction (<u>not in OCOB</u>) where the CD: <ol style="list-style-type: none"> Makes gift to a person Transfers asset for consideration significantly less than value of consideration provided by CD for acquiring such asset
In case where Liq./RP doesn't report such transaction	Where Liq./RP has sufficient info. of an undervalued transaction but has not reported to AA → A creditor/member or partner of CD may make application to AA. On such application, if AA satisfied that UT has occurred and Liq./RP despite having sufficient info. did not report, it may order: <ol style="list-style-type: none"> Restore the position as it existed before such transaction Require Board to initiate disciplinary proceedings
Order of AA	On application by RP or Liquidator, AA may order the following: <ol style="list-style-type: none"> The property so trfd. to be vested in CD Release/discharge sec. intt. created by CD Require any person to pay such in respect of benefits received from CD Require payment of consideration as may be determined by independent expert.

Section 49 - Transactions Defrauding Creditors

Where the CD has entered into an UT u/s 45(2) and AA is satisfied that it was **deliberately** entered into:

- for keeping **assets** of CD beyond reach of any person who is entitled to make a claim against CD; or
- in order to **adversely affect the interests** of such a person in relation to the claim,

the AA shall make an **order**-

- restoring** position as it existed before such transaction as if the transaction had not been entered into; and
- protecting** the **interests** of persons who are victims of such transactions

Provided that an order under this section **shall not**:

- affect** any intt. in prop. acquired in **good faith**, for value & **without notice** of relevant circumstances
- require a person who received a benefit from such in **good faith**, for value and without notice **to pay any sum** unless he was a party to the transaction.

Section 50 - Extortionate Credit Transaction (ECT)

1. Where the CD has been a party to an ECT involving the receipt of FD/OD during the period within **2 years** preceding the ICD, the liquidator or the RP, may make an **application** for **avoidance** of such transaction to the AA if **terms** of such transn **required exorbitant payments** to be made by the CD.
2. The Board may specify the circumstances in which a transaction which shall be covered u/ss(1).

Explanation - For the purpose of this section, it is clarified that **any debt extended** by person providing **financial services** which is in **compliance with any law** in relation to such debt **shall in no event be considered** as an ECT.

Section 51 - Orders of AA w.r.t. ECT

Where the AA after examining application u/s 50(1) is satisfied that ECT has taken place, it shall, by an order:

1. **Restore** the position as it existed prior to such transaction;
2. **Set aside** the whole or part of the **debt created** on account of the such ECT;
3. **Modify** the terms of the transaction;
4. **Require** any person who is, or was, a party to transaction **to repay** any amt. received by such person;
5. Require any **security interest** that was created as part of ECT to be **relinquished** in favour of Liquidator or the RP

Section 52 - Secured Creditors ("SC") in Liquidation proceedings

- A SC in the liquidation proceeding may either:
 - **Relinquish** its security interest to the LEA and receive proceeds for the sale of assets by Liquidator, **or**
 - **Realize** its security interest as per this Section
- If SC intends to **realize** the security interest:

SC to **inform** Liq. about such sec. interest and **identify** the asset



Liq. to **verify** existence of sec. interest (from IU, etc.) and **permit** realisation



SC may then **enforce**/deal with secured asset as per law and **apply proceed** to recover debts due to it

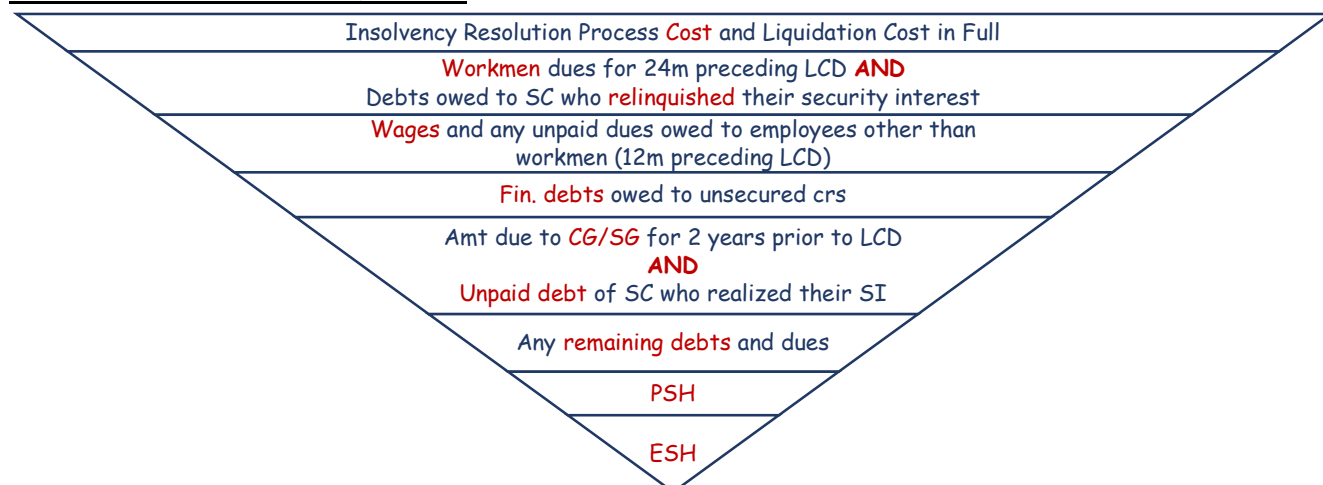
On enforcement:

If Proceeds > Debt Dues (i.e., Surplus)	SC to account for such surplus and tender it to Liq.
If proceeds inadequate to repay debts of such SC	Unpaid debts to be paid u/s 53(1)(e)

Amount of **CIRP cost** to be recovered from proceeds of any realization by SC & it shall be **included** in LEA.

Where SC is facing resistance from CD or any person connected therewith, in taking possession/selling/disposing the secured asset → It shall make an **application to AA** to facilitate realization of Security interest.

On receipt of such application - AA to pass necessary order.

Section 53 - Distribution of Assets

- **Contractual arrangements** between recipients of equal ranking, if disrupting the order of priority, shall be disregarded by the Liquidator
- **Fees** payable to liquidator to be **deducted proportionately** from the proceeds payable to each class of recipients and **the proceed shall be distributed after such deduction**

Requirements for commencement of Distribution (Reg 42 of IBBI (Liquidation Process) Reg, 2016)

- List of stakeholder and the **asset memorandum** has been filed with AA
- The proceeds to be distributed to the stakeholders **within 90 days** of the receipt the amount
- Liquidation and CIRP cost to **deducted** before such distribution is made.

Section 54 - Dissolution of Corporate Debtor

- **On complete liquidation** of assets, Liquidator to make application to AA for **dissolution** of such CD
- On receipt of such application, AA to make an order that the CD is dissolved **from date of order**
- Copy of order to be forwarded **within 7 days** of such order to the authority under which CD is registered

Additional Point (as per Regulation)

Liq. to liquidate CD **within 1 year of LCD**. Else make apply to AA seeking extension along with reason for such delay.

Chapter IIIA - Pre-package Insolvency Resolution Process (PPIRP)

Certain definitions:

"Base Resolution Plan (BRP)" means a resolution plan provided by the CD u/s 54A(4)(c);

"Preliminary information" means a memorandum submitted by CD u/s 54G(1)(b)

"Pre-packaged insolvency date" means date of **admission of application** for initiating PPIRP by the AA u/s 54C(4);

Section 11A - Disposal of applications u/s 54C and u/s 7/9/10

Crux: Application u/s 54C to be given priority over application u/s 7,9 or 10 (provided that CIRP is not initiated)

Situation	Action
Application u/s 54C is pending and during such pendency, application u/s 7/9/10 is filed	AA to pass order for application u/s 54C before considering application u/s 7/9/10
Application u/s 7/9/10 is filed and pending and within 14 days of such application, application u/s 54C is filed	Notwithstanding Sec 7/9/10, AA shall first dispose application u/s 54C (Hadd hai yaar)
Application u/s 7/9/10 is filed and pending and AFTER 14 days of such application, application u/s 54C is filed	AA shall first dispose application u/s 7/9/10

Prov. of this section shall N.A. where appln. u/s 7/9/10 is **pending on date of commencement** of this ordinance

Section 54A: CD eligible for PPIRP

- Application for initiating PPIRP may be made w.r.t, CD classified as **MSMEs** u/s 7(1) of MSME Development Act
- Application may be made w.r.t., MSME CD, who **commits default** referred u/s 4, subject to following **conditions**:
 - it has **not undergone PPIRP** or completed CIRP - During **3 years** preceding the initiation date;
 - it is not **undergoing** a CIRP;
 - no order requiring it to be **liquidated** is passed u/s 33;
 - it is **eligible** to submit a resolution plan u/s 29A;
 - the **FC (other than related party)** of CD have **proposed the name** of the **IP** to be appointed as **RP** (not IRP) for conducting the PPIRP, and FC representing $\geq 66\%$ in value, have **approved** such **proposal**.
If no FC - Such person as may be specified
 - majority** of **directors** or partners of CD, have made a **declaration**, stating, inter alia,
 - that CD shall file an application for initiating PPIRP within a **definite time period** not > 90 days;
 - that PPIRP is not being initiated to **defraud** any person; and
 - the **name of the IP** proposed and approved to be appointed as RP under clause (e);
 - the **members** of the CD have passed a **SR**, or at least $\frac{3}{4}$ of the **total number of partners**, as the case may be, have passed a **resolution**, approving the filing of an application for initiating PPIRP

- The CD shall obtain an approval from its FC ($\geq 66\%$) for the filing of an application for initiating PPIRP.
Provided that if no FC, such person as may be specified.
- Prior to seeking approval from FC above, the CD shall provide such FC with:
 - (a) the **declaration** referred to in clause (f) of sub-section (2) [declaration by directors/partners];
 - (b) the special **resolution** or resolution passed by members/partners
 - (c) a **base resolution plan** which conforms to the requirements referred to in section 54K, **and**
 - (d) such **other information** and documents as may be specified.

Section 54B: Duties of RP before initiation of PPIRP:

- (1) The RP shall have **following duties** from date of approval of IP to act as RP, namely:
 - a. prepare **report** confirming whether CD meets **requirement u/s 54A**, and BRP meets requirement u/s 54A;
 - b. **file** such reports and other docs, with the **Board**, as may be specified; and
 - c. perform such **other duties** as may be specified.
- (2) The duties of the IP above shall **cease**, if the:
 - a. **CD fails to file an appln** for initiating PPIRP within **time period** as stated in declaration by dir./mem; or
 - b. **application** for initiating PPIRP is **admitted or rejected** by the AA, as the case may be.
- (3) **Fees** payable to RP shall be determined and borne in manner specified and shall **form part of PPIRP costs**, if application is admitted.

Section 54C: Application to initiate PPIRP:

- (1) Where a CD meets requirements u/s 54A, a **Corporate Applicant (CA)** thereof may **file application** with AA for initiating PPIRP in the prescribed manner.
- (2) The CA shall, **along with the application**, furnish:
 - a. the **declaration**, **SR** or **resolution**, and **approval of FC** for initiating PPIRP;
 - b. the name and **written consent**, of the **IP proposed** to be appointed as RP and his **report u/s 54B**,
 - c. a **declaration** regarding the **existence** of any **avoidable transactions**;
 - d. information relating to **BOA** of CD and such other documents as may be specified.
- (3) The AA shall, **within 14 days** of receipt of application, by an order:
 - a. **admit** the application, if it is complete; or
 - b. **reject** the application, if it is incomplete (**give 7 days for rectification**)
- (4) The PPIRP shall **commence** from the **date of admission of the application (PPICD)**.

Section 54D: Time limit for completion of PPIRP:

1. **Complete within 120 days** from PPICD.
2. RP shall submit **resoln plan**, as approved by the CoC, to AA u/s 54K **within 90 days** from the PPICD.
3. Where **no resoln plan is approved by CoC** within 90 days of PPICD, the RP shall, on the **day after expiry** of 90 days, file an **application** with AA for **termination** of PPIRP in specified form & manner.

Section 54E: Declaration of moratorium and public announcement during PPIRP:

1. The AA shall, on the PPICD, **along with order of admission u/s 54C**:
 - a. declare a **moratorium** [Sec 14 shall mutatis mutandis apply to proceedings under this Chapter];
 - b. **appoint RP (not IRP)**:
 - i. as named in application - If no disciplinary proceeding is pending against him; or
 - ii. Based on recommendation made by Board- If any disciplinary proceeding is pending against such IP.
 - c. cause a **public announcement** of initiation of PPIRP to be made by RP immediately after his appointment.
2. The order of **moratorium** shall have effect from date of such order **till** date on which **PPIRP comes to an end**.

Section 54F: Duties and Power of RP during PPIRP:

1. The RP shall conduct the PPIRP of a CD during the PPIRP period

2. The RP shall perform the following **duties**, namely:

confirm list of claims submitted by CD u/s 54G	inform creditors regarding their claims	maintain an updated list of claims	monitor mgt. of affairs of CD
constitute CoC & convene & attend all its meetings	inform CoC in event of breach of any obligations of BOD or partners of CD	prepare the Info. Memorandum on basis of PIM submitted u/s 54G and any other relevant info.	
file applications for avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI		such other duties as may be specified	

3. The RP shall exercise the following **powers**, namely:
 - a. access all **BOA**, records and information available with CD;
 - b. access e-records of CD from an **IU** having financial info. of CD;
 - c. access BOA, records & other docs of **CD** avl. with **Govt.** auth., stat. **auditors**, accountant & **other persons**;
 - d. attend **meetings** of members, BOD and committee of directors, or partners, of CD;
 - e. **appoint** accountants, legal or other **professionals** in such manner as may be specified;
 - f. collect all **info. w.r.t., assets, finances and operations** of CD for determining **fin. position** of CD and existence of any avoidable transactions relating to:
 - i. **business** operations for the previous 2 years from date of PPICD;
 - ii. financial and operational **payments** for the previous 2 years from the date of PPICD;
 - iii. list of **assets** and liabilities as on the initiation date; and
 - iv. such **other** matters as may be specified;
 - g. take such **other actions** in such manner as may be specified
4. **Financial institution** maintaining accounts of CD shall furnish info. w.r.t, CD available with them to RP, as required by him.
5. All **personnel** of CD, its promoters and other person associated with its mgt. shall extend all **assistance** and **cooperation** to RP to perform his duties and exercise powers, and Sec 19(2) and (3) shall, mutatis mutandis apply.

6. Fees of RP & any expenses incurred by him for PPIRP shall be determined in such manner as may be specified:
Provided that the CoC may impose limits and conditions on such fees and expenses:
Moreover, the fees and expenses for period prior to constitution of CoC shall be subject to **ratification** by it.
7. The fees and expenses referred to in sub-section (6) shall be **borne** in such manner as may be specified.

Section 54G: List of Claims and Preliminary Information Memorandum (PIM):

1. The CD shall, **within 2 days** of PPICD, submit to RP the **following updated information namely**:
 - a. a list of **claims**, along with details of respective **creditors**, their sec. interest and guarantees, **and**
 - b. a **PIM containing information** relevant for formulating a **resolution plan**.
2. Where any person has sustained any loss or damage as a consequence of the **omission** of any material info. or inclusion of any misleading info. in the **list of claims** or the PIM submitted by the CD, every person who:
 - a. is a **promoter**/director/partner of the CD, at time of **submission** of list of **claims** or **PIM**; or
 - b. has **authorized** the **submission** of the list of claims or the PIM by the CD,
 shall, without prejudice to section 77A, be **liable to pay compensation** to every person who has sustained such loss or damage.
3. **No** person shall be **liable** above, if list of claims or PIM was submitted by CD w/o his **knowledge or consent**.
4. Subject to section 54E, such person, who sustained any loss /damage shall also be entitled to **move a court** having jurisdiction for seeking compensation for such loss or damage.

Section 54H: Management of affairs of CD:

During the PPIRP period:

- (a) the management of affairs of the CD shall continue to vest in the BOD/partners of CD
- (b) the BOD/Partners shall protect & preserve **value of property** and manage its ops as **going concern**;
- (c) the promoters, members, personnel and partners, as the case may be, of the CD, shall **exercise and discharge their contractual or statutory rights and obligations** in relation to the CD, subject to prov. of this Chapter

Section 54I: Committee of Creditors:

1. The RP shall, **within 7 days** of PPICD, constitute a CoC, based on **list of claims** confirmed u/s 54F.
 Provided that composition of CoC shall be altered on basis of updated list of claims and such alteration shall not affect the validity of any past decision of the CoC.
2. The **first meeting** of the CoC shall be held **within 7 days** of its constitution.
3. Provisions of **sec 21**, except 21(1) **thereof**, shall, **mutatis mutandis** apply, w.r.t, CoC in this Chapter.

For this sub-section, references to "**RP**" u/s 21 (9) and (10) shall be construed as references to "**CD or RP**".

Section 54J: Vesting management of CD with RP

1. Where the CoC, at any time during the PPIRP, by a **vote** of $\geq 66\%$ of voting shares, **resolves to vest the mgt. of CD with RP**, the RP shall make **application** in this regard to AA, in such form and manner as may be specified.
2. On receipt of such **application**, if AA is of the **opinion** that during the PPIRP:
 - a. the **affairs** of the CD have been conducted in a **fraudulent manner**; or
 - b. there has been **gross mismanagement** of the affairs of the CD
 it shall pass an order vesting the management of the CD with the RP
3. Notwithstanding anything to the contrary contained in this Chapter, the provisions of following section shall apply mutatis mutandis to proceedings under this chapter:

14(2)	14(2A)	17	18 (e to g)	19	20	25(1)	25(2)	28
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Section 54K: Consideration and approval of Resolution Plan

1. The CD shall **submit** the **BRP**, to RP within **2 days** of ICD, and RP shall present it to CoC.
2. The CoC may provide CD an **opportunity to revise** the BRP prior to its approval or invitation of PRA.
3. The Resolution Plans and BRP, submitted under this section shall conform to requirements u/s 30(1) and **30(2)**, and provisions u/s 30(1), (2) and (5) shall, mutatis mutandis apply to proceedings under this Chapter.
4. The **CoC may approve BRP** for submission to AA if it **does not impair any claims** owed by the CD to OC.
5. Where:
 - (a) the CoC **does not approve** the BRP under sub-section (4); or
 - (b) the BRP **impairs any claims** owed by the CD to the OC,
 the RP shall **invite PRA** to submit a resolution plan(s), **to compete** with the BRP, in such manner as specified.
6. The **RA (not PRA)** submitting R. plans pursuant to invitation shall **fulfil** such **criteria** as may be laid down by RP with approval of CoC, having regard to **complexity and scale** of business ops of CD and other conditions.
7. The RP shall **provide** to the RA:
 - (a) the **basis** for evaluation of R. Plans for the purposes of sub-section (9), as approved by the CoC; and
 - (b) the **relevant information** referred to in section 29, which shall, mutatis mutandis apply
8. The RP shall present to CoC, for its **evaluation**, R. plans which conform to the **requirements u/s 30(2)**.
9. The CoC shall **evaluate the R. Plans** presented and **select** a R. plan from amongst them.
10. Where, on the basis of criteria laid down by it, the **CoC decides** that the **R. plan** selected u/ss (9) is **significantly better than the BRP**, such R. plan may be selected for approval u/ss (12) **Provided that** the criteria laid down by CoC shall be subject to conditions as may be specified.
11. Where the **R. plan selected u/ss (9) is not considered for approval** or does not fulfil the requirements u/ss(10), it shall **compete** with BRP and **one of them shall be selected for approval u/ss(12)**.

12. The resolution plan selected for approval u/ss (10) or (11), may be approved by CoC for submission to AA.
In case where the R. plan selected for approval u/ss (11) is not approved by CoC, the RP to file for termination of PPIRP in manner specified
13. The approval of R. plan u/ss (4) or (12), by CoC, shall be by a vote of $\geq 66\%$ of voting shares, after considering its feasibility and viability, the manner of distribution proposed, and order of priority u/s 53(1)
14. While considering feasibility and viability, if R. plan submitted by CD provides for impairment of any claims owed by CD, the CoC may require promoters of CD to dilute their shareholding/voting/control rights in CD.
Provided that where the R. plan does not provide for such dilution, the CoC shall, prior to the approval of such R. plan record reasons for its approval.
15. The RP shall submit the R. plan as approved by the CoC to the AA.

It is hereby clarified that, CD being a RA u/s 5(25), may submit BRP either indv./jointly with other person.

For the purposes of subsections (4) and (14), claims shall be considered to be impaired where the R. plan does not provide for the full payment of the confirmed claims as per the updated list of claims maintained by the RP.

Section 54L: Approval of Resolution Plan (by AA):

1. If the AA is satisfied that the R. plan as approved by the CoC meets the requirements u/s 30(2), it shall, within 30 days of the receipt of such R. plan, by order, approve it.
AA shall, before approval order, satisfy itself that R. plan has prov. for effective implementation.
2. The approval order shall have such effect u/s 31(1),(3) and (4), which shall, mutatis mutandis apply
3. Where AA is satisfied that the R. plan does not conform to requirements u/ss (1), it may, within 30 days of the receipt of R. plan, by an order, reject the R. plan and pass an order u/s 54N.
4. Notwithstanding anything to the contrary contained in this section, where AA has passed an order u/s 54J(2) and R. plan approved by the CoC u/s 54K, does not result in the change in management or control of the CD to a person who was not a promoter or in mgt. or control of the CD, the AA shall pass an order:
 - a. rejecting such R. plan;
 - b. terminating the PPIRP and passing a liquidation order as per section 33; and
 - c. declaring that PPIRP costs, shall be included as part of liquidation costs.

Section 54M: Appeal against order u/s 54L:

Any appeal from an order approving the R. plan u/s 54L(1), shall be on the grounds laid down in section 61(3)

Section 54N: Termination of PPIRP:

1. Where the RP files an application with AA for termination of PPIRP,
 - (a) under the proviso to section 54K (12); or
 - (b) under u/s 54D (3),

the AA shall, **within 30 days** of date of such application, by an order,

1. **terminate** the PPIRP; and
 2. provide for **manner of continuation** of proceedings initiated for **avoidable transactions** if any.
2. Where the **RP**, at any time before approval of R. Plan intimates the AA of **decision of CoC (66%)** to **terminate** the PPIRP, the AA shall pass an order under sub-section (1).
 3. Where the AA passes an order under sub-section (1), the **CD shall bear the PPIRP costs**, if any.
 4. Notwithstanding anything to the contrary contained in this section, where the AA has passed an order u/s 54J(2) and the PPIRP is required to be terminated, the AA shall pass an order:
 - a. of **liquidation** in respect of the CD as per section 33; and
 - b. declare that the **PPIRP costs**, if any, shall be included as part of the **liquidation costs**

Section 54O: Initiation of CIRP

1. The CoC, at **any time after PPICD but before approval of R. plan**, by a vote of **$\geq 66\%$** , may resolve to initiate a CIRP in respect of CD, if such CD is **eligible** under Chapter II.
2. Where RP **intimates** AA of decision of CoC, AA shall, **within 30 days** of intimation, pass order to:
 - a. **terminate** the PPIRP and **initiate CIRP**,
 - b. appoint the **RP** under PPIRP as the **IRP**, subject to submission of **written consent**
 - c. declare that PPIRP Costs to be included as part of IRP costs for the purposes of the CIRP.
3. Where RP fails to submit **written consent**, AA shall **appoint** an IRP by reference to **Board** u/s 16.
4. Where the **AA** passes an **order** under sub-section (2):
 - a. such order shall be **deemed to be an order of admission of appln. u/s 7**
 - b. the CIRP shall **commence** from the date of such order;
 - c. the proceedings initiated for **avoidable transactions**, shall continue during the CIRP
 - d. for the purposes of sec. **43, 46 and 50**, references to "ICD" shall mean "**pre-packaged ICD**";
 - e. in computing **relevant time** for **avoidable transactions**, the **duration of PPIRP** shall be included

Fast track CIRP (FTCIRP)

Section 55: Fast track CIRP:

An application for fast track CIRP may be made in respect of following CD:

- A **small company** as per Sec 2(85) of Companies Act, 2013
- A **start-up** (other than partnership firm) as defined by the Ministry
- **Unlisted co.** with **total assets**, as per FS of immediately preceding FY, **not > Rs. 1 crore**

Section 56: Time Limit for completion of FTCIRP

- Fast track CIRP to be completed **within 90 days** of ICD.
- RP may file appln to AA for **1 time ext. of 45 days** if CoC resolves **$\geq 75\%$ vote + AA satisfied** that such extension is needed

Section 57: Manner of initiating FTCIRP:

Application for fast track CIRP may be filed by **creditor or CD** along with:

- **proof of existence of default** such as records of IU or such other means as specified by Board
- Such other **info**, to **establish that CD is eligible** for fast track CIRP

Section 58: Applicability of Chapter II to this Chapter

CIRP process u/s sec 4-32 and provisions of offences & penalties under Chap. VII shall apply to fast track CIRP

Section 59 - Voluntary Liquidation of Corporate Persons (CP)

1. A CP who intends to liquidate itself voluntarily and **has NOT committed any default** may initiate voluntary liquidation proceedings under the provisions of this Chapter
2. The voluntary liquidation of CP shall meet such conditions & procedural requirements as specified by Board.
3. Voluntary Liq. proceedings of CP registered as a company shall meet the following **conditions**, namely:

a declaration from **majority of directors** of co. verified by an **affidavit** stating that:

- a) they have made a **full inquiry** into affairs & they are of opinion that either company has **no debt** or that it will be able to pay its debts in full, from the proceeds of assets; **and**
- b) the company is not being liquidated to **defraud any person**;

the declaration under sub-clause (a) shall be accompanied with the following **documents**, namely:

- a) **audited FS** and record of business ops. for **last 2 years** or for period since incorp, whichever is **later**;
- b) a report of **valuation of assets**, if any prepared by **registered valuer**;

within 4 weeks of a declaration, there shall be:

- a) **SR** in **GM** requiring co. to be liquidated voluntarily and appointing IP to act as Liq; **or**
- b) a **resolution** in **GM** requiring co. to be liquidated voluntarily **as a result of expiry of period of its duration** fixed by AoA or occurrence of event w.r.t, which the AoA provide that co. shall be dissolved, as the case may be **and** appointing an **IP** to act as the Liquidator*

*Where co. owes any debt, **crs \geq 2/3 in value** shall **approve** such resolution **within 7 days** of resolution.

4. Co. to notify RoC and Board about such resolution **within 7 days** of resoln/approval of crs. as case may be.
5. Subject to approval of the creditors, the voluntary liquidation proceedings in respect of a company shall be **deemed to have commenced** from the **date of passing of the resolution** by the co.
6. Provisions of **sections 35 to 53** of Chapter III and Chapter VII **shall apply** with necessary modifications.
7. Where CP is completely wound up + Asset liquidated - Liq. to make application to AA for dissolution
8. On receipt of such appln, AA shall pass order that CD shall be **dissolved** from date of that order.
9. Forward copy of order u/ss (8) to auth. with which CP is registered **within 14 days** of date of order.

Replacement of Liquidator - CP may replace liquidator by passing a SR. Such IP shall, within ~~3 days~~ **7 days** of his appointment, intimate IBBI about such appointment

CIRP vs PPIRP

Basis	Corporate Insolvency Resolution Process (CIRP)	Pre-Packaged Insolvency Resolution Process (PPIRP)
Applicability	Any Corporate Debtor	Only to MSME CD
Priority (Section 11A)	Priority to CIRP only if CIRP already commenced	PPIRP gets priority if appln. filed before CIRP or within 14 days of filing of CIRP
Minimum Default	Rs. 1 crore	Rs. 10 lakhs
Preliminary work	None before filing application to NCLT by FC/OC. (Except in case of Sec 10, where SR is required)	Extensive Preliminary work before application
Who can initiate?	FC/OC/CD	Corp. Applicant (on behalf of CD)
Time Limit	180 days (max 330) [Sec 12]	120 days [Section 54D]
Appt. of IRP?	Yes	No, direct appointment of RP
Management of CD	Vests with IRP on ICD	Stays with CD unless fraud involved
Constitution of CoC	Within 30 days of ICD	Within 7 days
Who prepares Info. memorandum?	Resolution Professional	Preliminary IM prepared by CD and finalized by RP
Base Resolution Plan (BRP)	No such provision.	CD may improve BRP and CoC may approve the same if it does not impair operational creditors
What's New	No specific provision for Swiss challenge (no prohibition either)	Introduction of concept of Swiss Challenge to get best possible R. plan
Approval of R. Plan	By AA	By AA

%age	Sec	Provision
66%	12	Extension of time limit of CIRP beyond 180 days\
66%	22	Appointment of IRP as RP or replacing RP
66%	27	Replace RP
66%	28	Approval of CoC for certain actions of RP
66%	30	Approval of resolution plan by CoC
66%	33	Decision of CoC to liquidate the corporate debtor
66%	54A	Approval of proposed insolvency professional to act as RP for PPIRP and approval to file application for PPIRP
66%	54J	Resolution by CoC that management of CD will vest with RP
66%	54K	Approval of Resolution plan by CoC
66%	54N	Resolution by CoC deciding to terminate PPIRP
66%	54O	Resolution by CoC to initiate CIRP by terminating PPIRP
75%	56	Extending time limit of Fasttrack CIRP beyond 90 days
90%	12A	AA may permit withdrawal of CIRP application if resolution passed by CoC
51%	21	All decision of CoC to be taken by resolution of such CoC

Important Definitions: [Please cover other definitions of IBC from the Study Module as well]

Important Definitions - Please cover other definitions of LLP from the study module as well.

Corporate Person (CP)	Company u/s 2(20) Co. Act, 2013, an LLP as per LLP Act, 2008, or any other person incorporated with limited liability under any law but shall not include any FSP										
Corporate Debtor (CD)	CP who owes a debt to any person;										
Corporate Applicant (CA)	<ul style="list-style-type: none">CD; ora member/partner authorized by constitution doc. of CD to make appln for CIRP/PPIRPan individual who is in charge of managing the operations and resources of CD [CEO]; or a person who has the control , and supervision over financial affairs of the CD [CFO];										
Constitutional Doc	Includes AoA, MoA in case of co. and incorporation doc. in case of LLP										
Creditor	Any person to whom debt is owed and includes FC, OC and Decree Holder										
Financial Creditor (FC)	Person to whom a financial debt is owed and includes any person to whom such debt has been legally assigned or transferred										
Financial Debt (FD)	<div>A debt + interest, if any, disbursed against consideration for time value of money and includes:</div> <table><tr><td>money borrowed</td><td>acceptance credit facility</td><td>any note purchase facility</td><td>issue of bonds, notes, debentures, loan stock</td><td>lease or hire purchase contract</td></tr><tr><td>receivables sold/discharged</td><td>derivative transaction</td><td>counter-indemnity obligation</td><td>Amount raised under forward sale or purchase agreement</td><td></td></tr></table> <div>Note - Amount raised from allottee under a Real Estate Project = Deemed to have commercial effect of borrowing [Amendment]</div>	money borrowed	acceptance credit facility	any note purchase facility	issue of bonds, notes, debentures, loan stock	lease or hire purchase contract	receivables sold/discharged	derivative transaction	counter-indemnity obligation	Amount raised under forward sale or purchase agreement	
money borrowed	acceptance credit facility	any note purchase facility	issue of bonds, notes, debentures, loan stock	lease or hire purchase contract							
receivables sold/discharged	derivative transaction	counter-indemnity obligation	Amount raised under forward sale or purchase agreement								
Financial Service Providers	Person engaged in business of providing financial services in terms of authorisation granted by Financial Service Regulators FSP includes - ARCs, Mutual Funds, Insurance co., Pension Funds, CIS, Bank/FI, etc.										
Initiation Date	Date on which application is made by FC or OC or CA to the AA u/s 7,9 or 10										
Insolvency Commencement Date (ICD)	Date of admission of an application for initiating CIRP by AA u/s 7, 9 or 10										
Operational Creditors (OC)	Person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred										
Operational Debt (OD)	a claim w.r.t., provision of goods/services including employment or a debt w.r.t, the payment of dues payable to CG/SG or any local authority										
Voting share	the share of voting rights of a single FC in the CoC which is based on the proportion of the FD owed to such FC in relation to the FD owed by the CD										
Read Definitions of Claim, Financial Product, Financial Service Regulator and Related Party and Relative from Module.											

You are a Rockstar, and you deserve nothing but the best.

All the best to you, Dear Future CA!

Main Content Ends Here!

The Best Part of the Summary Notes Begins after this!

Please extract these pages and paste it in front of your study table for Quick Reference!

Hope you loved the book. If you have any feedback to make this book even better, drop me an email at therankerway@gmail.com

All the Best!
Shubham Singhal

Summary of Forms under Companies Act, 2013

<u>Forms</u>	<u>Section</u>	<u>Purpose</u>
DIR 2	152(5)	Consent given by a person to act as director of the company
DIR 3	153	Application for allotment of DIN before being appointed in an existing co.
DIR 3B	156	Intimation of DIN to the company/companies in which the person is a dir.
DIR 3C	157	Intimation by the company to the Registrar on the DIN
DIR 3 KYC		Application for filing KYC of the director
DIR 5	-	Application for surrender of DIN
DIR 6	-	Intimation of changes in particulars specified in DIN application
DIR-8	164(2)	Intimation by a director to a company about his/her disqualification
DIR 9	164(2)	Disqualification of directors to be intimated to the Registrar by the company
DIR 10	164(2)	Application for removal of disqualified directors
DIR 11	168	Notice of resignation by a director to the Registrar
DIR 12	152(5)	Particulars of Directors and KMP appointed and any changes
MBP 1	184(1)	Disclosures by a director of his interest or concern in any other companies
MBP 2	186	Register of loans, security, guarantee, and acquisition made by the company
MBP 3	187	Register of investments that are not held in its own name by a company
MBP 4	189	Register of C/A with Related Party or in which dir. are interested
MR 1	196(4)	Return for the appointment of a WTD, MD or Manager
MR 2	Rule 7	Appln to CG for approval of appt/reappt./rem. of WTD, MD or Manager
MR 3	204	Format of the Secretarial Audit Report
CAA 1	230	Creditors Responsibility statement
CAA 2	230	Notice of meeting of creditors or members
CAA 10	-	Solvency Declaration
FC-1	380	Doc. to be submitted by FC to RoC within 30 days on estb. of POB in India
FC-2	380	Alteration in docs already submitted with RoC
FC-3	381	FC to send to RoC - List of POB in India as on BS date
FC-4	381	Annual Return within 60 days from last day of FY
NDH-1	Rule 5	Certified Return of Stat. compliances [Within 90 days of end of first/second FY]
NDH-2	Rule 5	Appln. to RD for extension [within 30 days of close 1 st FY]
NDH-3	Rule 21	Co. to file half yearly return with RoC
MSC - 1	Sec 455	Application to ROC for obtaining the status of dormant company
MSC - 2	Sec 455	Certificate of the status of dormant company
MSC - 3	Sec 455	Return of dormant companies
MSC - 4	Sec 455	Application for seeking status of active company
MSC - 5	Sec 455	Certificate by Registrar of Companies allowing an active status for the company

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SHUBHAM SINGHAL

Comparison of Registers - Meeting of Board and its Power

Form No.	MBP-1	MBP-2	MBP-3	MBP-4
Section.	184(1)	186	187	189(188+184(2))
Place	Registered Office.			
Custody	Company Secretary/Person Authorised.			
How to record?	-	Chronologically (in 7 Days)	Chronologically (On occurrence of Event)	
Authenticate.	-	Company Secretary/Person Authorised.		
Preserve	8 Years	Permanently		
Access to Members.	"No"	Yes		
Fees for members		Fees - As per AOA ,Max Rs10/page.	No Fees	Fees - As per AOA ,Max Rs10/page.
Disclosure in Forms.	General Disclosure of Interested Dir.	Details of Loan/G/S & Acquisition Made by Company.	Details of Inv. not in its name.	Details of C/A u/s 184(2) & RPT u/s 188
Special Point				<u>Exemption</u> a. Transaction <= 5Lakh P.A. b. Banking Co. - OCOB - Collection of Bills. Penalty - Rs 25,000

Summary of Forms in Foreign Contribution Regulation Act, 2010

Form	Purpose
FC-1	Intimation of receipt of foreign contri. by way of Gift/as Articles/ Securities/ by candidate for Election.
FC-2	Appln for seeking prior permission of the CG to accept foreign hospitality(FC-2)
FC-3A	Application for FCRA Registration
FC-3B	Application for FCRA Prior Permission
FC-3C	Application for Renewal of FCRA Registration
FC-4	Intimation - Annual Returns
FC-6A	Intimation - Change of name and/ or address of the Association within the State for which CoR/ Prior permission is granted
FC-6B	Intimation - Change of nature, aims and objects and registration with local/relevant authorities of any association
FC-6C	Intimation - Change of bank/ branch or designated FC account number
FC-6D	Intimation - Opening of additional FC-utilisation Bank Account for the purpose of utilisation of foreign contribution
FC-6E	Intimation - Change in original office bearers or Key functionaries of the association
FC-7	Application for surrender of certificate of registration

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Matters Requiring Ordinary Resolution

151	Appointment of Small SH Dir. shall be subject to Sec 152 (and hence Resolution at GM)
152(2)	General Rule - Every director to be appointed by a resolution in the GM
160	To appoint a person other than retiring director as a director
161(2)	To authorise BoD to appoint alternate directors. (If not authorized by AoA)
169(1)	Removal of dir. before expiry of his term of office (special notice required)
169(5)	For appointment of a director in place of the director who is removed.
181	Contribution to Charitable Trust > 5 % of its Avg. Net Profit for 3 immediately preceding FY
188 + Rule 15	Approval for entering into related party transactions exceeding the prescribed limits.
191	Approval for payment of compensation for loss of office w.r.t, trf. of undertaking, etc.
192	Entering into any arrangement involving non-cash consideration
196(4)	Approval of appt., remuneration and other T&C of MD, WTD or manager.
1 st Proviso Sec. 197(1)	To authorize payment of remuneration exceeding 11% of net profits of the company to the directors and manager (subject to Schedule V).
197(4)	To approve remuneration payable to directors or manager (if not approved by AoA)

Matters requiring Special Resolution of the Shareholders

By-heart what all section needs SR. The balance will be Ordinary Resolution

149(1)	Appointment of > 15 directors
149(10)	Reappointment of Independent Director after first term.
165	Members of a co. may, by SR, specify any lesser number of companies in which a director of the company may act as directors.
1 st Proviso to 169(1)	Independent director re-appointed for second term u/s 149(10) shall be removed by co. only by passing a SR
180	Restrictions on power of the Board.
185	To advance any loan, give guarantee or provide security w.r.t, loan taken by any person in whom any director of the co. is interested
186(3)	Loan and Investment by co. > limit u/s 186(2) (Pass SR by postal ballot if Sec 110 applicable)
196 (3)	Appointment of persons aged >= 70 years as MD, WTD or manager.
2 nd Proviso to 197(1)	Payment of remuneration in excess of 5% or 10% or 1% or 3%. (but not 11%)
210	CG may order investigation into affairs of co. on receipt of intimation of SR by the co.
212	SR is required to be passed for intimation to CG that affairs of co. ought to be investigated by SFIO
248	SR required or consent of 75% of shareholder required for making an application to RoC for striking off the name of the company.
271	SR passed resolving winding up of the company by Tribunal.
455	For making an application to RoC for obtaining status of RoC

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Matters requiring - No vote case against the resolution

162	Appointment of >1 director by a Single Resolution can be made only if a resolution that the appointment shall be so made, if first passed w/o any vote being cast against it.
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Resolutions that have to be passed by Postal Ballot (Mandatory)[Only where Sec 110 applies to the company]

180(1)(a)	Approval for sale of the whole or substantially the whole of undertakings of the co.
186(3)	Giving Loans, Guarantee, Securities in excess of limit u/s 186(3)

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Important Limits for Applicability of Various Sections

Section No.	Provision	Limits
2nd Proviso Sec.149(1)	Appointment of Women director	<ul style="list-style-type: none"> Listed companies Unlisted Public co. having PUSC \geq Rs. 100 cr OR T/O \geq Rs. 300 crs
Sec. 149(4)	Independent Directors Not Applicable to - JV, WOS, Dormant co. u/s 455	Listed public companies - At least 1/3 rd of total no. of dirs. Following Unlisted Public Cos - At least 2 Independent Dirs. <ul style="list-style-type: none"> Paid up capital \geq Rs. 10 crores, or Turnover \geq Rs. 100 crores, or Aggregate of o/s loans, debentures and deposits $>$ Rs. 50 crores
Sec. 151	Small Shareholder Dir.	Listed companies
Sec. 177/178	AC and NRC	Same limit as ID limit - 149(4)
Sec. 177 + Rule 7	Vigil mechanism	<ul style="list-style-type: none"> Listed companies Any company which accepts deposits from the public Any company which has borrowed money from banks and public financial institutions $>$ Rs. 50 crores
Sec. 178	SRC	Co. having $>$ 1,000 SH, DH, deposit-holders and other sec. holders.
Sec 203(1) + Rule 8	Mandatory Appointment of KMP	<ul style="list-style-type: none"> Listed companies Public companies having paid-up share capital \geq 10 crore.
Sec. 203	Whole time CS	Every Pvt. Co. having a paid-up share capital \geq Rs. 10 crore.
2 nd Proviso to Sec 203(1)	Chairman may be appointed as MD/CEO	Public cos. having PUSC \geq Rs. 100 crore and T/O \geq Rs. 1,000 cr and engaged in multiple businesses and appointed CEO for each such biz.
Sec. 204 + Rule 9	Mandatory Secretarial Audit	<ul style="list-style-type: none"> Listed companies Public companies having paid up capital \geq Rs. 50 crores Public companies having turnover \geq Rs. 250 crores Every public company having outstanding loans or borrowing from banks or public financial institution \geq Rs. 100 crores.
213	Investigation into Company's Affairs in Other Cases	On an appln. (supported by evidence showing reasons for invg.) by: <ol style="list-style-type: none"> Co. having share cap - Not less than 100 mem or 1/10th of VP Co. not having SC \geq 1/5th of persons on register of members
244	Rights to apply u/s 241	Co. having share capital - Not less than: <ol style="list-style-type: none"> Lower of 100 mem. or 1/10th of total no. of mem. Members \geq 1/10th of issued SC of co. (provided all calls are paid) Co. not having SC - Not less than 1/5 th of persons on reg. of mem.
245	Class Action:	Members: Co. having share capital - Not less than: <ol style="list-style-type: none"> Lower of 100 mem. or 5% of total no. of mem. Mem. holding such % of issued SC [Unlisted co - 5% ; Listed co. - 2%] (provided all calls are paid) Co. not having SC - \geq 1/5 th of persons on register of members Depositors: Not less than: <ol style="list-style-type: none"> Lower of 100 dep. or 5% of total no. of dep. Such dep. to whom co. owes 5% of total deposit

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Important Penalties in the Chapter of Directors [149 to 205]

Sec.	Contravention	Person Liable	Jail?	And/or	Fine
157	Failure of co. to intimate DIN to RoC	Co. and OID	-	-	Rs. 25k + Rs. 100/day up to max Rs. 1 lakh
159	Contravention u/s 152, 155 & 156	OID	-	-	Up to Rs. 50,000 + Up to Rs. 500 per day
165	Max. no. of directorship	Person who holds such dir.	-	-	Rs. 2,000/day up to Rs. 2 lakhs
166	Duties of director	Director	-	-	Rs. 1 lakh to Rs. 5 lakhs
167	If dir. functions post vacation	Such director	-	-	Rs. 1 lakh to Rs. 5 lakhs
172	Contravention of Sec 149 -172 if no specific penalty given	Co.	-	-	Rs. 50k + Rs/ 500/day upto max - Rs. 3 lakhs
		OID	-	-	Rs. 50k + Rs/ 500/day upto max - Rs. 1 lakh
173 (4)	Failure to give notice of BoD Meeting	Officer whose duty to send	-	-	Rs. 25,000
178 (8)	Contravention of Sec 177 and 178	Co	-	-	Rs. 5 lakhs
		OID	-	-	Rs. 1 lakh
182	Contravention of Sec 182	Co.	-	-	Upto 5x amt. contributed
		OID	Upto 6m	AND	Upto 5x amt. contributed
184 (4)	Failure to disclose interest u/s 184	Director concerned	-	-	Rs. 1 lakh
185	Contravention u/s 185 (Loan to Dirs., etc)	Company	-	-	Rs. 5 lakhs to Rs. 25 lakhs
		OID	Upto 6m	Or	Rs. 5 lakhs to Rs. 25 lakhs
		Person to whom LGS is given	Upto 6m	Or	Rs. 5 lakhs to Rs. 25 lakhs
186	Contravention u/s 186 (LGIS)	Company	-	-	Rs. 25,000 to Rs. 5 lakhs
		OID	Upto 2 years	AND	Rs. 25,000 to Rs. 1 lakhs
187	Contravention u/s 187 (Invst. held in its own name)	Company	-	-	Rs. 5 lakhs
		OID	-	-	Rs. 50,000
188	Contravention of sec 188 by entering into RPT	Dir. or employee who entered	-	-	Listed co - Rs. 25 lakhs Unlisted co. - Rs. 5 lakhs
189	Failure to maintain register of C/A in which dir. interested	Directors concerned	-	-	Rs. 25,000
190	Contract of employment with MD/WTD	Co	-	-	Rs. 25,000 for each default
		OID	-	-	Rs. 5,000 for each default
191	Contravention of Sec 191 (CFLO)	Director concerned	-	-	Rs. 1 lakh
197	Contravention of Sec 197	Co.	-	-	Rs. 5 lakhs
		Person conc.	-	-	Rs. 1 lakh
203	Contravention u/s 203	Company	-	-	Rs. 5 lakhs
		OID	-	-	Rs. 50K + Rs. 1,000/day upto Max. Rs. 5 lakhs
204	Contravention u/s 204	Officer of Co./CS in practice	-	-	Rs. 2 lakhs

Note:

- OID stands for Officer of the company who is in default.
- "Jail" is to be read as imprisonment
- Y stands for Year and M stands for month
- K stands for amount in '000
- Highlighted in Light Orange are those penalty which has imprisonment.
- Text in Green are penalties which are recently amended (and hence important)

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ABC Analysis for Last Day Revision

CATEGORY A			
SN	Chapter Name	Est. Marks	Last Day (mins)
1	Appointment and Qualifications of Directors	24	90
2	Meetings of Board and its Powers		120
3	Appointment and Remuneration of Managerial Personnel (including Schedule V)		70
4	Inspection, Inquiry and Investigation	8	60
5	Compromises, Arrangements and Amalgamations		45
6	The SEBI Act and LODR	10	150
7	The Prevention of Money Laundering Act, 2002	9	60
8	Foreign Contribution Regulation Act, 2010	6	90
9	The Insolvency and Bankruptcy Code, 2016	8	150

CATEGORY B			
SN	Chapter Name	Est. Marks	Last Day (mins)
1	Prevention of Oppression and Mismanagement	2	20
2	Registered Valuers	4	20
3	Companies incorporated outside India	4	20
4	Removal of Name of Companies from ROC	4	20
5	Govt Companies	0	10
6	NCLT NCLAT	0	10
7	Miscellaneous Prov. (Nidhi, Dormant, Compounding, etc.)	4	90
8	The Arbitration and Conciliation Act, 1996	2	45
9	The Foreign Exchange Management Act, 1999	6	180

CATEGORY C			
SN	Chapter Name	Est. Marks	Last Day (mins)
1	Winding Up	4	90
2	Corporate Secretarial Practice - Drafting of Notices, Resolutions, Minutes and Reports	2	15

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Exemptions to Private Companies

Relevant section	Exceptions to Private Companies
Section 160 Right of person other than retiring directors to stand for directorship	Shall not apply (Provided that it has complied with sec 92 & 137).
Section 162 Appointment of Directors to be voted individually	Shall not apply (Provided that it has complied with sec 92 & 137).
Section 173(5) Exemptions to certain companies from conduct of Board Meetings.	Pvt co. (startup and 92 + 137), frequency of BoD meeting - At least one in each half of calendar year and max gap - Not less than 90 Days.
Section 174(3) Quorum in case of interested directors.	In case of Private Co., interested director may be counted in quorum if participates after disclosure.
Section 180 Restrictions on powers of Board.	Shall not apply (Provided that it has complied with sec 92 & 137).
Section 184 (2) Disclosure of Specific Interest	Shall apply with exception that directors of private company may participate in such meeting after disclosure of interest
Section 185 Loan to Directors, etc.	This section shall NOT apply to a private co. provided: <ol style="list-style-type: none"> No other BC has invested in its share cap. Borrowings from bank/PFI is < Lower of - (2xPUSC) or Rs. 50 crores No default in repayment of such borrowing is subsisting
Second Proviso to section 188(1) No voting by a related member.	Shall not apply (Provided that it has complied with sec 92 & 137). i.e., member of private company is permitted to vote irrespective of him being a related party.
Section 196 (4) - Procedure for appointment of MP Section 196 (5) - Validity of acts if appt. not approved by SH	Shall not apply (Provided that it has complied with sec 92 & 137).
Section 197 Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits	Shall not apply

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<u>Exemption to Government Companies</u>	
<u>What is a Government Company?</u> As per Section 2(45), Government company means any company in which not less than 51% of the paid-up share capital is held by: <ul style="list-style-type: none"> a) the Central Government, or b) by any State Government or Governments, c) or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company;	
Relevant section and provision of Companies Act, 2013	Exceptions, Modification and Adaptations to Government Companies
Section 149(1)(b) and first proviso to Section 149(1) Max. 15 directors in a company and this limit can be increased by passing a special resolution	Shall not apply to Government company (Provided that it has complied with sec 92 & 137).
Sec 149 (6) (a) Independent Director - a person who in the opinion of the Board is a person of integrity and possesses relevant expertise and experience	In sec 149, in sub-section (6), in clause(a), for the word "Board", the words "Ministry or Department of CG which is administratively in charge of the company, or, SG" shall be substituted.
Sec 149 (6) (c) - Independent Dir. not to have pecuniary relationship with CASH., or their promoter or director	Shall not apply to Government company (Provided that it has complied with sec 92 & 137).
Sec 152 (5) - Director to give consent before acting as director	Shall not apply where appointment of such director is done by CG or State Government, as the case may be. (Provided that it has complied with sec 92 & 137).
152 (6) and (7) Provisions for Retirement of Directors by rotation at AGM and Filling of vacancy of retiring director	shall not apply to :- (a) a Government Company in which the entire paid up share capital is held by the CG, or by any SG or Governments or by the CG/SG; (i.e., wholly owned Govt. co) (b) a subsidiary of a Government company, referred to in (a) above, in which the entire paid up share capital is held by that Government company (100% subsidiary of Wholly owned Govt co.) (Provided that it has complied with sec 92 & 137)
Section 160 Right of person other than retiring directors to stand for directorship	
Section 162 Appointment of Directors to be voted individually	
Section 163 Option to adopt Principle of Proportional Representation for Appointment of Directors	
Section 164(2) - Director of a Company which has not filed FS/AR for continuous 3 yrs./ Not repaid deposits or interest thereon, etc.	Shall not apply to Government company (Provided that it has complied with sec 92 & 137).
Section 170 - Maintenance of Register of Directors and KMPs and their shareholding	Shall not apply to Government company in which the entire share capital is held by CG, or by any SG(s) or by CG or by SG(s). (Provided that it has complied with sec 92 & 137).
Section 171 - Members right to inspect - Register of directors and KMP and their shareholding	
Section 177 (4) (i) Audit Committee to recommend for appointment, remuneration and terms of appointment of the Auditors of the Company	For words "recommendation for appt., remuneration and terms of appt." the words "recommendation for remuneration" shall be substituted. i.e., In case of Govt co., Audit Comm. shall only recommend rem. of auditors. (Provided that it has complied with sec 92 & 137).

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Section 178 (2), (3) and (4) Role and Terms of reference of NRC - to identify persons to be appointed as directors and senior management, +ve attributes, Independence of Director, etc	Shall not apply to Government Company except with regard to appointment of 'senior management' and other employees. (Provided that it has complied with sec 92 & 137).
Section 185 Loan to Directors, etc.	Shall not apply to a Govt. Company in case such company obtains approval of Ministry or Department of CG which is administratively in charge of co./SG before making any loan or giving guarantee/security under the section. (Provided that it has complied with sec 92 & 137).
Section 186 Loans and Investments by Companies. a) Approval of the Board for 60% of PUSC+FR+SP or 100% of FR+SP whichever is more. b) Beyond the above limits - SR at a general meeting	Shall not apply to- (a) A Govt. co engaged in defence production; (b) A Govt. co, other than a listed company, in case such company obtains approval of Ministry or Department of CG before making any loan/giving guarantee/security or investment. (Provided that it has complied with sec 92 & 137).
First and second proviso to Section 188 - Approval of SH by way of SR in case the contract/ arrangement with Related Party exceeds the limits specified (10% of Turnover or 10% of Net worth or 1% of Net worth)	Shall not apply to - (a) A Govt. co in respect of contracts or arrangements entered into by it with any other Govt, or CG or SG or by any combination thereof; (b) A Govt. co, other than a listed company, in respect of contracts or arrangements other than those referred to in clause (a), in case such Co. obtains approval of Ministry or Department of CG which is administratively in charge of co., or, SG before entering into such contract or arrangement. (Provided that it has complied with sec 92 & 137).
Sec 196 (2) - Term of MD/WTD/Manager (MP) Sec 196 (4) - Procedure for appointment of MP Sec 196 (5) - Validity of acts if appt. not approved by SH	Shall not apply to Government company (Provided that it has complied with sec 92 & 137).
Section 197 - Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits	Shall not apply to Government company (Provided that it has complied with sec 92 & 137).
Sub-sections (1), (2), (3) and (4) of section 203 Provisions related to appointment of a whole time KMP	These sub-sections shall not apply to MD/CEO or manager and in their absence, a whole-time director of the Government Company. (Provided that it has complied with sec 92 & 137).
Section 230 to 232.	For the word "Tribunal" wherever it occurs, the words "Central Government" shall be substituted.
Section 439 (2) No court shall take cognizance of any offence under this Act which is alleged to have been committed by any Co. or any officer thereof, except on complaint in writing of the RoC, a SH of co., or of a person auth. by CG	In sub-section (2), the words "the Registrar, a shareholder of the company, or of" Shall be omitted in case of a Government company.

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Exemption to Section 8 Companies

Provisions of the Companies Act, 2013	Exceptions (subject to Sec 92+137)
Section 149(1)(b) - Max. 15 directors and this limit can be increased by passing a SR	Shall not apply
149 (4), (5), (6), (7), (8), (9), (10), (11), (12)(i) and (13).	Shall not apply
Section 150 - Maintenance of Database of ID	Shall not apply
Provision to 152(5) - Appt. of ID to be at GM	Shall not apply
Section 160 - Appointment of Director other than retiring director	Shall not apply to Section 8 companies whose articles provide for election of directors by ballot
Sec 165 (1) - Maximum no. of directorship	Shall not apply
Section 173(1) - Meeting of BoD	Shall apply only to the extent that BoD, of Sec 8 companies shall hold at least 1 meeting within every 6 calendar months.
Section 174 (1) - Quorum of BoD meeting	In case of Sec -8 companies (92+137) - Quorum shall be lesser of: (a) 8 members or (b) 25% its strength
Section 177 (2) - Composition of Audit Committee	In Sec 8 companies, provision that majority should be ID is Not Applicable.
Section 178 - Nomination Rem. Committee and SRC	Shall not apply.
Section 179 - Power of BoD	Sec 8 co. (92+137) can exercise power to borrow money, invest fund and grant loans via RBC.
Section 184(2) - Disclosure of Specific Interest	Section 184(2) shall apply to Sec-8 cos. (92+137) only if C/A is with Related Party for an amount > Rs. 1 lakh
Section 186(7) - No loan shall be given under this section at rate of interest < prevailing yield of Govt. sec closest to tenor of such loan (1/3/5/10 years)	This subsection N.A. in case of S-8 co., where >=26% of PUSC is held by CG/SG/both and loan is provided for funding industrial R&D projects in furtherance of objects as per MoA.
Section 189 - Register of C/A in which directors are interested	For Sec-8 companies, Sec 189 shall apply in case the transaction u/s 188 exceeds Rs. 1 lakh.

Exemption to Nidhi Companies

Relevant Section	Exceptions, Modification and Adaptations to Nidhi Companies
Section 160(1) - Req. of Deposit to stand for directorship.	In case of Nidhi companies - Deposit of Rs. 10,000 instead of Rs. 1 lakh
Section 185 Loan to Directors, etc.	Shall not apply, provided loan is given to a dir./ relative in capacity of members & such transaction is disclosed in the annual accounts by a note.
Second proviso to Section 197(1) Remuneration of a director who is neither managing director nor whole-time director or manager	In case of a Nidhi co , rem. to director (other than MD/WTD/Mgr) for performing special services to the Nidhi as per AoA may be paid by way of monthly payment subject to approval in GM and Sec 197. No approval in GM required where: c. Nidhi does not have MD/WTD/Manager d. Rem. to all directors < 10% of NP or Rs. 15 lakhs, WEL and such rem. is approved by SR.

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Chapter-wise CA Final New Trend Analysis (New)

Chapter	May'19	Nov'19	Nov'20	Jan'21	July'21	Dec'21	May'22	Nov'22
Appointment and Qualifications of Directors	16	20	12	4	8	8	8	10
Appointment and Remuneration of Managerial Personnel	-	6	6	14	10	8	10	4
Meetings of Board and its Powers	-	-	8	8	4	10	8	8
Inspection, Inquiry and Investigation	-	4	-	4	4	4		4
Compromises, Arrangements and Amalgamations	4	4	8	-	4	4	4	4
Prevention of Oppression and Mismanagement	4	-	-	4	-	-	4	
Winding Up	8	4	4	-	4	4	4	4
Companies incorporated outside India	-	8	-	8	4	4	4	4
Miscellaneous Provisions	12	4	12	4	8	4	8	8
Compounding of Offences, Adjudication, Special Courts				-				
National Company Law Tribunal and Appellate Tribunal				4				
The SEBI Act, 1992, and SEBI (LODR) Regulations, 2015	-	4	4	4	8	8	8	8
The Foreign Exchange Management Act, 1999	-	-	3	3	3	6	6	6
The Prevention of Money Laundering Act, 2002	9	9	9	9	6	9	9	9
Foreign Contribution Regulation Act, 2010	6	6	3	3	6	3	3	3
The Arbitration and Conciliation Act, 1996	-	-	3	3	3	3	3	3
The Insolvency and Bankruptcy Code, 2016	9	9	9	9	9	13	9	9

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IMPORTANT SECTIONS OF COMPANIES ACT:

Sec	Name	Sec	Name
149	Company to have BoD	178	NRC and SRC
150	Manner of Selection of ID and Maintenance of Databank of ID	179	Powers of Board
151	Appointment of Dir. Elected by SSH	180	Restrictions on Powers of Board
152	Appointment of Directors	181	Contribution to Charitable Funds, etc.
153	Application for Allotment of DIN	182	Prohibitions and Restrictions Regarding Political Contributions
154	Allotment of DIN	183	Power of Board and Other Persons to Make to National Defence Fund,
155	Prohibition to Obtain More than 1 DIN	184	Disclosure of Interest by Director
156	Director to Intimate DIN	185	Loan to Directors, etc.
157	Company to Inform DIN to Registrar	186	Loan and Investment by Company
158	Obligation to Indicate DIN	187	Investments of Company to be Held in its Own Name
159	Penalty for Default of Certain Provisions.	188	Related Party Transactions
160	Right of Persons Other than Retiring Directors to Stand for Directorship	189	Register of contracts or arrangement in which Directors are Interested
161	Appointment of Additional Director, Alternate Dir. and Nominee Director	190	Contract of Employment with MD/WTD
162	Appt. of Dir to be Voted Individually	191	Payment to dir. for Loss of Office w.r.t transfer of Undertaking, property or Liabilities
163	Option to Adopt Principle of Proportional Repr. for Appt. of Dir.	192	Restriction on Non-cash Transactions Involving Directors
164	Disqualifications for appt. of Director	193	Contract by OPC
165	Number of Directorships	194	Omitted
166	Duties of Directors	195	Omitted
167	Vacation of Office of Director	196	Appointment of MD/WTD/Manager
168	Resignation of Director	197	Overall Maximum Managerial Rem. & Managerial Rem. in Case of Absence or Inadequacy of Profits
169	Removal of Directors	198	Calculation of Profits
170	Register of Dir. & KMP and their SH	199	Recovery of Remuneration in Certain Cases
171	Members' Right to Inspect	200	CG or Company to Fix Limit with Regard to Remuneration
172	Punishment	201	Forms of, and Procedure in Relation to, Certain Appln.
173	Meetings of Board	202	CFLO of MD/WTD/Manager
174	Quorum for Meetings of Board	203	Appointment of KMP
175	Passing of Resolution by Circulation	204	Secretarial Audit for Bigger Companies
176	Defects in Appointment of Directors not to Invalidate Actions Taken	205	Functions of Company Secretary
177	Audit Committee		

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