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Whether Interim Resolution Professional (“IRP”) or Resolution Professional (“RP”) is required to appoint Independent Director to fulfil provisions of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (“LODR 2015”) or Companies Act, during the Corporate Insolvency Resolution Process (“CIRP”) of the Corporate Debtor (“CD”) ?

Brief Introduction to Independent Director

The role of Independent Directors plays an important role in achieving the aims and objectives of Good Corporate Governance. Independent Directors plays a vital role to improve the proper and impartial working of the corporate companies. Further, the independent directors had control over the internal process, which can help the shareholders and the public at large to know if any mismanagement or fraud is being done by the company. The guidelines, role etc. are broadly set out in a code described in Schedule IV of the Companies Act, 2013.

Therefore, as per Companies Act, 2013 and LODR 2015, the appointment of Independent Director Company is made mandatory. Any company not adhering to the provisions of appointment of Independent Directors in the board will be a Non-Compliant Company and penalty and actions will be imposed as per the Companies Act and LODR 2015 against the said company.

Number of Independent Directors

Companies Act, 2013:-

As per Section 149 (4) of Companies Act, the Number of Independent Directors required in the company is at least one-third of the total number of directors. The relevant part of the said section is quoted below:

Section 149 (4)- “Every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

Explanation.—For the purposes of this subsection, any fraction contained in such one-third number shall be rounded off as one”.

SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 Provisions:-

As per Regulation 17 (1) (b) of LODR 2015, at least half of the board of directors shall comprise of independent directors in case the chairperson of the board is executive director and one third, in case the chairperson of the board as a non-executive director. The relevant part of the said regulation is quoted below:

Regulation 17 (1) (b) - “Where the chairperson of the board of directors is a non-executive director, at least one-third of the board of directors shall comprise of independent directors and where the listed entity does not have a regular non-executive chairperson, at least half of the board of directors shall comprise of independent directors:

Provided that where the regular non-executive chairperson is a promoter of the listed entity or is related to any promoter or person occupying management positions at the level of board of director or at one level below the board of directors, at least half of the board of directors of the listed entity shall consist of independent directors”.

Issue: The question arises whether the IRP or RP is required to appoint Independent Director to fulfil provisions of LODR 2015 or Companies Act during CIRP of the Corporate Debtor.

The Securities and Exchange Board of India through the amendment (SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2018, w.e.f. 31.05.2018) had added regulations by which certain provisions of the LODR, 2015 will not be applicable to the company going under the CIRP under Insolvency and Bankruptcy Code, 2016 (“**IBC**”). The said Regulations are 15 (2A) and 15 (2B).

As per the provisions of regulations 15 (2A) and 15 (2B) of LODR 2015, the provisions of regulations 17 to 21 of LODR 2015, relating to the formation of Board (including the appointment of Independent Director) and the committees, will not be applicable during the insolvency resolution process period in respect of a listed entity which is undergoing CIRP under the IBC.

However, the role and responsibilities of the board of directors as specified under regulation 17 and of the committees specified in regulations 18, 19, 20 and 21 will be fulfilled by IRP or RP in accordance with sections 17 and 23 of the IBC. Regulation 15 (2A) and (2B) of LODR, 2015 is quoted below:

Regulation 15 (2A)- “The provisions as specified in regulation 17 shall not be applicable during the insolvency resolution process period in respect of a listed entity which is undergoing corporate insolvency resolution process under the Insolvency Code:

Provided that the role and responsibilities of the board of directors as specified under regulation 17 shall be fulfilled by the interim resolution professional or resolution professional in accordance with sections 17 and 23 of the Insolvency Code”.

Regulation 15 (2B)- “The provisions as specified in regulations 18, 19, 20 and 21 shall not be applicable during the insolvency resolution process period in respect of a listed entity which is undergoing corporate insolvency resolution process under the Insolvency Code:

Provided that the roles and responsibilities of the committees specified in the respective regulations shall be fulfilled by the interim resolution professional or resolution professional”.

Case Law: Minita Raja Vs. Crystal Clear Veg Oil Refinery Private Limited (2019) [ibclaw.in](https://www.ibclaw.in) 13 NCLT

In case of Insolvency Resolution Process of Crystal Clear Veg Oil Refinery Private Limited, an application under section 60(5) of the IBC was filed by the RP (Minita Raja) praying for various directions to be passed by the bench, one of them being to appoint new directors as the existing directors have been disqualified. The Hon’ble NCLT (Mumbai Bench) held that as per section 17 of IBC, from the date of appointment of IRP, the powers of the board of directors of Corporate Debtor stand suspended and exercised by the IRP. The relevant part of the said order is quoted below:

Para 6 “In my opinion, in the event of commencement of CIRP of a Corporate Debtor, the management of the Corporate Debtor is handed over to the RP as per section 17(1)(b) of the Insolvency & Bankruptcy Code, 2016 (Code), which says that: “17. (1) From the date of the appointment of the Interim Resolution professional:

(a).....

(b) the powers of the board of directors or the partners of the Corporate Debtor, as the case may be, shall stand suspended and be exercised by the Interim Resolution Professional.”

Para 7.... “In this regard, there is no need of appointing any new directors on the board of the corporate debtor as the code gives mandatory power of management to the RP and no one else. Hence, the RP is authorized to do all such acts as would any director be empowered to do had there been any director on the management of the Corporate Debtor immediately prior to commencement of insolvency proceedings of the Corporate Debtor. The RP can very well file the Financial Statements and Annual Returns on behalf of the Company and comply with all the procedural formalities as laid down in the Companies Act, 2013”.

Conclusion

On the basis regulation 15 (2A) and 2(B) of the LODR and further, in light of the above-mentioned order passed by Hon'ble NCLT, it can be concluded that:

There is no need to appoint an independent director to comply with such requirements of Companies Act or LODR 2015, during the CIRP of the Corporate Debtor.

However, the IRP/RP is authorized to do all such acts as may be required to fulfil the roles and responsibilities of Board (Including that of Independent Director) and committees of Board as he well empowered to manage the affairs of the Corporate Debtor as per IBC.

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