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In This Issue

Article-	COVID-19	DISTRESS
	MANGEMENT, LEGAL DUE	DILIGENCE
	AND BUSINESS RESTRUCTURE	
Page		1-3

LAW IN FOCUS

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ARTICLE:

**COVID-19 DISTRESS MANGEMENT, LEGAL DUE DILIGENCE AND BUSINESS RESTRUCTURE\*\***

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Many businesses have become distressed due to COVID-19. In the USA only, retailers, airlines, restaurants etc. and thousand companies declared bankruptcy as reported by Bloomsburg. They include plenty of big, iconic names e.g. Hertz and J.C. Penney etc. explicitly linked the virus to their filing. Different industries like travel, lodging and leisure, telecoms, media and technology, energy, equipment and parts creating etc. are in the frontline of filing.

The Indian Government raised the threshold of default for filing of an insolvency petition under the Insolvency and Bankruptcy Code, 2016 from Rs 1 Lakh to Rs 1 Crore. Any petitions cannot be filed in respect of payment of defaults below Rs 1 crore. This is intended to help medium and small industries who have been hit the hardest by COVID-19.

In Bangladesh several stimulus packages announced for industries and CSME etc. by Govt to help businesses to tackle the business disruption and moratorium period of loan repayment was granted. Recently, the Central Bank asked lenders to implement the lion's share of the stimulus packages within July 2020 and the remaining portion by August.

In the rapidly-changing COVID-19 situation, one wrong move can seriously impact corporate performance and value. Few local factories in Bangladesh are facing non-payment situations and cash crisis due to cross-border insolvency of foreign buyers. While companies are at stress, one needs to see it through legal lenses.

The options available for a business which is under distress are:

- **Restructuring:** restructure a company by merger, demerger, acquisition, by scaling down, management restructuring, seeking investment etc.
- **Liquidation:** In a fit situation the distressed company may commence voluntary or involuntary, court assisted winding up/liquidation process.
- **Cross-border insolvency:** Apply the legal mechanism to effectively deal with cross-border insolvency and recover dues.
- **Insolvency/Bankruptcy:** understand the extent of the problem and possible way-out and if necessary, initiate insolvency process and/or bankruptcy process to secure way-out.

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Restructure, liquidation, insolvency, bankruptcy are complex processes. The absence of the involvement and participation of legal and other related professionals possessing appropriate knowledge and skills can impact the quality and efficiency of the entire process.

Insolvency or Bankruptcy is the situation where the individual or a company is unable to pay back for its creditors. Both the concepts deal with a crisis situation; however, insolvency is mostly financial management with less legal involvement and bankruptcy is also financial management with significant reliance on legal mechanism. On the other hand, the Insolvency Process provides for a statutory mechanism for creditors and debtors with the help of the professionals to renegotiate a repayment plan while the debtor enjoying moratorium period and bankruptcy provides for liquidation/sale of debtor's assets but this can only be set into motion when the insolvency process fails. By using the legal existing tools, it is possible to make lenders and borrowers sit at the table as are happening globally.

In any restructuring process, the professionals try to find the following answers:

- Should the company downsize? Is downsizing going to solve all the problems?
- Should the company restructure its work profile, systems or even management within the company?
- Should the company look for another company to acquire it if it's in financial trouble?
- Should the company look for another company to acquire its Assets?
- Should the company look for a private investor for further allotment or investment from capital market?
- Should the company look for another company for merger? Or should it try to demerger? Or should it look for Spin-offs? Or a slump sale is a better option?
- Should the company voluntarily wind up? Or should the company go for winding up under just and equitable ground through court?
- Should the company go through the insolvency process?
- Should the company file bankruptcy?

Successful restructuring and reorganization of an organization require good preparation in advance, good planning which will address all the programmatic needs, support services which are needed to advance those organizational goals, good planning of the workforce and brilliant communication skills.

Due to COVID-19 many companies are not only exposed to several business risk but also several legal risks demanding immediate attention as follows:

- Whether too much of its business invested in one particular sector?
- Has the company going to face foreign exchange risk and the dangers posed by recessions?
- Is the company going to sustain net losses?
- Are they paying tax at high-corporate-tax-rate?
- Is there duplication of functions such as accounting, purchasing, and marketing efforts within each group? Are they paying high business functions expenses?
- Chances of going out of business or going into bankruptcy due to reduction of demand.
- Is there a lack of efficiency?
- Are there needs to keep technology up to date?
- Is the company working in low gross margin even before COVID-19?
- Are there poor internal communication mechanism and bad work methodology?
- Is the company running at a higher cost of operating?
- Is the company running at low or bad cash flow?
- Is there a lack of proper designs of processes?
- Are there high labour costs?
- Whether the company is following new trends in the consumer/client sector Implementing strategies that redefine the market?
- Is the share value of the company going to decrease?

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In order to assess the risk a team of lawyers, chartered accountants, finance and insolvency professionals are required to do as follows:

- Feasibility study on financial forecasting, operational efficiency, tax implication, compatibility of corporate cultures and management motives, study on financial statements, possible impact on public or for listed company public shareholders etc.
- Legal Due Diligence based on the finding of feasibility study report comprising reviewing insolvency laws, bankruptcy laws, different winding up options, legal aspects of possible schemes and share pricing, securities laws, FOREX and sector specific laws, other rules and regulations, guidelines, and policy decisions which may also be applicable, regulatory compliance, cross-border issues, transition period etc.
- Legal Due diligence on the cross-border insolvency issue and assist in the process of scheduling debt and participating in the payment process under foreign legal regime.

Feasibility study, legal due diligence report will suggest possible distress management options.

In conclusion, it can be said that much awareness initiatives are required to introduce businessman with the corporate opportunities which are available in our laws.

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