



The Companies Bill, 2009 has made a paradigm shift by addressing the pitfalls of SICA, 1985 and aligning the Indian Law relating to “Revival and Rehabilitation of Sick Companies” on lines of the global bankruptcy laws. This article has analyzed the relevant provisions of the Companies Bill, 2009 relating thereto.

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Revival & Rehabilitation of Sick Companies - A Paradigm Shift

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Background of SICA, 1985

In the wake of the widespread industrial sickness during the eighties, the Government of India enacted a special legislation namely the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) for determining the preventive, ameliorative, remedial and other measures which were required to be taken in respect of sick industrial companies and for expeditious enforcement of the measures determined. Companies (other than those exempted under the Act) whose net-worth was eroded fully, fall under the purview of this legislation. It was expected that by either reviving/closing the sick industrial companies the idle/locked up investment would be put to productive use/get released for productive use elsewhere. The Act also envisaged that measures for effective remedy would be found expeditiously by a Board of experts and equally speedily would the rehabilitation scheme be enforced on the concerned companies.

Unfortunately, as often happens with many such laudable measures, there was a wide gap between the aim and the performance. Though the Board for Industrial and Financial Reconstruction (BIFR) was set up under SICA and started functioning from 1987 to deal with revival and rehabilitation of sick Industrial companies, in actual practice the whole process became very slow and painful for all the genuine stakeholders and this lengthy process, lack of timely commencement of proceedings and poor enforcement mechanism defeated the basic purpose of the Act. On the other hand, for defaulting borrowers BIFR became a safe haven and they rushed to BIFR only to get statutory protection from the creditors wanting to recover their dues and to take relief from Govt./Banks/other Statutory authorities. It was observed that more than being interested in reviving the sick industrial undertakings, companies were keener to get the shelter of the overriding provisions of the SICA as a shield against the legitimate dues of the creditors and other stakeholders. These pitfalls of SICA brought an adverse economic impact as the legislative intent of revival and rehabilitation of sick companies could not be fulfilled and in most of the cases the creditors got entangled in the procedural web of SICA.

Chapter XI of U.S. Bankruptcy Law

It is pertinent to mention that the Bankruptcy provisions in the United States are governed by Chapter XI. When a business is unable to service its debt or pay its creditors, the business or its creditors can file with a federal bankruptcy court for protection under Chapter XI. Bankruptcy affords the debtor in possession a number of mechanisms to restructure its business. A debtor in possession can acquire financing and loans on favorable terms by giving new lenders first priority on the business' earnings. The court may also permit the debtor in possession to reject and cancel contracts. Debtors are also protected from other litigation against the business through the imposition of an automatic stay. While the automatic stay is in place, most litigation against the debtor is stayed, or put on hold, until it can be resolved in bankruptcy court, or resumed in its original venue.

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Companies Bill, 2009

The provisions relating to revival and rehabilitation of sick companies have been completely modified and refined in the Companies Bill, 2009 on lines of the global bankruptcy laws with suitable modifications as there was an urgent need to change laws relating to revival of sick companies in India. India has been consistently ranked quite low by International agencies so far as ease of setting up, closing or revival of business is concerned (world bank ranked India 121 in terms of setting up business and 140 in

terms of closing). The law and procedures for handling of insolvency remain outdated and not at all in tune with the changing needs of the economy. It is believed that the passing of Companies Bill, 2009 will be a big leap in creating a law-friendly image of India in the Global Platform in order to retain the investors, creditors and faith of all stakeholders of the corporate sector.

The comparative provisions of the SICA, 1985 and Chapter XIX of Companies Bill, 2009 relating to revival and rehabilitation of sick companies are presented in the following table.

Comparative Provisions of SICA,1985 and Companies Bill, 2009

Sr. No.	Topic	SICA 1985		Chapter XIX: Clauses 229 to 244 of the Companies Bill, 2009	
1	Sick Industrial Company	Section 3(1)(o)	SICA was enacted for timely detection and revival of the Sick Industrial Companies and matters connected therewith. For this, Industrial Company must be Registered for minimum period of Five years and which has at the end of any F.Y. accumulated Losses equal to or exceeding its entire net worth	Clause 229(1)	The relevant provisions of Companies Bill, 2009 deal with revival and rehabilitation of sick companies. However it is pertinent to mention that the concept of Industrial company/undertaking and criterion of Net Worth (as was there in SICA) has been dropped under this Companies Bill . Sickness has now been linked with cash flows and the rights of majority Secured Creditors are being protected under these provisions. If any Company has failed to pay/secure/compound their debt within 30 days of notice to company, they may file an application to Tribunal for determination of company as sick company. Further, Section 229 (4) authorizes company to file an application on ground mentioned above
2	Reference	Section 15	Reference to BIFR can be made either by Board of Directors or Central Government or State government or Reserve Bank of India or Public Financial Institution or State level institution or Schedule bank	Clause 229(1) & Clause 229(4)	Reference to Tribunal can be either made by Secured creditor or Company
3	Jurisdiction and Power	Section 4	Jurisdiction and power under this Act lies with BIFR	Clause 229(1)	Jurisdiction and power lies with Tribunal
4	Provision regarding SARFAESI Act, 2002	2nd Proviso to Section 15 (1)	Absolute prohibition for reference being made to BIFR, if financial assets have been acquired by any securitization or reconstruction company u/s 5(1) of that Act	Proviso to Clause 230(2)	If the financial assets have been acquired by securitization or reconstruction company, then application for revival and rehabilitation can be made with the consent of three-fourth of secured creditors in value.
5	Appointment of Interim Administrator	Section 16	There was no provision for Interim administrator. BIFR appointed Operating Agency for conducting	Section 231(1)(b)	Where the Tribunal determines the Company as Sick and where the company has no draft scheme for its revival and rehabilitation, the Tribunal may direct the Interim administrator to take over the management of

			inquiry into working of sick industrial companies.		the Company. Interim Administrator is also appointed to convene meeting of creditors. Interim Administrator shall be appointed by Tribunal from a panel maintained by The Central Govt. consisting of CS/CA/CWA/Adv./other professionals as may be notified by Central Govt.
6	Committee of creditors		No such provision	Clause 232(1)	A committee of creditors shall be appointed by the Interim Administrator which shall not exceed seven members to represent as far as possible each class of creditors in that committee
7	Order for Winding-up	Section 20(1)	BIFR can only recommend winding up of company but the actual order for winding up is to be passed by High Court	Clause 233(a)	Winding up order can be initiated by Tribunal if on consideration of report of interim administrator and satisfaction of 75% of creditors in value the tribunal comes to a conclusion that Revival and rehabilitation of such company is not possible
8	Appointment of Company Administrator	Section 16	Operating Agency is appointed by BIFR for preparation of scheme of revival and its implementation	Clause 234(1)	In case the Tribunal is satisfied that the sick company may be revived, it may appoint a Company Administrator to prepare a scheme of revival and rehabilitation/take over the management of the Company. Company Administrator shall be appointed by Tribunal from a panel maintained by Central Govt. consisting of CS/CA/CWA/Adv./other professionals as may be notified by Central Govt.
9	Approval of Scheme	Section 18	Board will sanction the scheme presented by the OA in light of suggestions and objections received from sick company, OA, Creditor, Employee of such company	Clause 237	The scheme shall be presented by Company Administrator before Tribunal for approval in case it gets approved by 25% of the Unsecured Creditors in value and 75% of the Secured Creditors in value. If such approval is not granted it shall be ordered to be wound up
9a.	In case of Amalgamation of Sick company	Proviso to Section 18(3)	In case of Amalgamation, approval of Shareholders of Sick company and the other company is required	Proviso to Clause 237(2)	Approval of Shareholders of Sick company and the other company is required
10	Duty of promoters, Directors		No such provision	Clause 241	In the course of scrutiny or implementation of scheme, if it appears to Tribunal that fund have been misapplied or any of the Promoters/Management person is guilty of misfeasance, Tribunal may direct any past or present director/officer to restore that money or property with/without Interest
11	Revival and Rehabilitation fund		No such provision. However such provision was there under section 441A of the Companies Act,1956 and it was applicable to every Company	Clause 244	A Rehabilitation and Insolvency fund is to be set up for the purpose of Rehabilitation, Revival and Liquidation of Sick Company. However as per the existing provisions it is not mandatory for any Company to transfer any such amount
14	Rehabilitation by	Section 19	Provision was there to provide any preventive,		No such special exemption available under the Companies Bill, 2009. However for effective

	giving Financial Assistance		ameliorative, remedial and other measures w.r.t. any sick industrial co. It entitled such a company for grant of relief from Govt./Banks/any other authority subject to review of the Board		implementation of the revival scheme , Sec 239(1) gives power to Tribunal to enforce, modify or terminate any contract entered into by Company with any other person
15	Protection of Properties/ Stay on suits for recovery	Section 22/ Section 22A	Notwithstanding Companies Act, 1956 or any other law where any inquiry/scheme is under implementation/pending, in the interest of Sick Industrial Co./creditors/ shareholders/public, the Board may direct that no proceedings for winding up or for execution, distress or like against any of the properties of the Industrial Company and no suit for recovery of money/enforcement of security shall lie to be proceeded with except with permission of the Board. Further it may be directed that no assets can be disposed except with consent of the Board	Clause 229(2)/ Section 229(5)(a)	A Secured Creditor may file an application for stay of any proceedings for winding up or for execution, distress or like against any property and assets of the company or for appointment of receiver thereof and that no suits for recovery of any money or for the enforcement of any security against the company shall lie or be proceeded with. Further it may be directed that no assets can be disposed except with consent of the Board

Key Points-

(a) Sick Company

- The Companies Bill, 2009 has proposed fundamental changes in the applicability of the law relating to revival of sick companies. Earlier an application for revival could be filed only in relation to a sick Industrial Company. Now it can be filed for any sick Company. Further the requirements of minimum registration period and Net Worth erosion have been done away and the sickness has been linked with the event of default in payment to secured creditors. By doing so the lawmakers have made a paradigm shift to align the Indian insolvency provisions with global insolvency provisions with suitable modifications.
- Linking sickness of a Company with its cash flows seems to be a more practical and realistic approach. However with this, a situation might arise where a Company having a positive Net worth but suffering from legitimate cash crunch may also have to go through this legal process if it fails to settle/compound the debt of secured creditors

within the specified time. Thus the reasons of sickness must be analyzed and evaluated by the Tribunal as there might be a situation where due to technological obsolescence or adverse market conditions or any other justified reasons a Company may default in payment to its secured creditors. The idea is to address the interest of its stakeholders and not to prolong the legal process.

- The definition of debt and the procedure of determining the sickness of the Company have not been made clear in the Bill.

(b) Jurisdiction and Power

- Another fundamental change which is proposed by the Companies Bill, 2009 is the Constitution of Tribunal. Jurisdiction and Power would lie with the Tribunal under Companies Act and not the BIFR which was set up under SICA.
- Under SICA, though the BIFR has the power to revive the business, in case it found that the business cannot be revived the process of winding up was under the jurisdiction of

respective High Court. Now both these powers are being entrusted to the Tribunal.

- It is expected that for revival of sick companies the changes in power from BIFR to Tribunal will give a new zeal to the whole process and hopefully more reliability will be on Tribunal in comparison with BIFR.

(c) Procedure of Revival

■ Procedure

Once the Tribunal determines the company as sick, the Secured Creditor or the Company itself can apply for the determination of the measures that may be adopted with respect to the revival and rehabilitation of such company along with such particulars as may be prescribed. It is suggested that the reasons for cash crunch namely changes in business, product, company and industry comparative, technological obsolescence, the financial commitment of promoters to come out of sickness and the relief sought from Tribunal must be provided for along with the application for determination of measures for revival of the company.

■ Appointment of Interim Administrator

The interim administrator would be appointed to convene a meeting of creditors of the company to consider whether it is possible to revive and rehabilitate the sick company and submit report to Tribunal within 60 days from the order. The Bill has introduced this new concept that is **appointment of an Interim Administrator (IA)**. The interim administrator shall be appointed by the Tribunal from a panel maintained by the Central Government consisting advocates, company secretaries, chartered accountants, cost and works accountants and such other professionals as may, by notification, be specified by the Central Government.

■ Role of Interim Administrator

The Role of Interim Administrator is very significant and gladly the professionals are going to play this role. How the Job of Internal Administrator shall decide the fate of the Company is the most pertinent question. Actually, Interim Administrator has to submit report to the Tribunal and the Tribunal after considering report of the Interim Administrator and after being satisfied that Creditors representing 3/4ths in value of amount outstanding present and voting have resolved that company cannot revive, may order to initiate the proceedings for winding up or otherwise, the proceeding to revive the scheme shall be initiated.

It is pertinent to note that though the application for determination of sickness and that for taking up measures for revival can be filed only by the secured creditors, however Clause 233 of the Bill states that the meeting of creditors would be convened by the Interim Administrator

and the creditors representing 75% of the amount must resolve in favour of or against the revival scheme. In Clause 233 the word used is creditors and not secured creditors. It appears that the intention of the legislature is to take the unsecured creditors also in the scheme approval process. However this might create some practical difficulties in case the requisite approval from the creditors is not achieved.

■ Appointment of Company Administrator

In order to initiate the proceedings for revival, the Tribunal is obliged by law to appoint a Company Administrator who shall **prepare a scheme for rehabilitation of the sick company**. The company administrator would be appointed by the Tribunal in the same manner as the Interim Administrator.

■ Role of Company Administrator

The Company Administrator is required to prepare all financial records, inventory, list of shareholders, secured and unsecured creditors, valuation of shares and assets, list of workmen and other reports as the Tribunal may ask for. The Tribunal may also direct company administrator to take over the management of sick company and Company Administrator may if required can take the help of experts for better management of sick company.

Company administrator is also required to convene a meeting of secured Creditors and Unsecured creditors for approving the Scheme. The Scheme shall be approved if 25% of the Unsecured Creditors in value and 75% of the Secured Creditors in value give their approval. A new condition of taking approval from 25% of the unsecured creditors and 75% of the secured creditors has been inserted. Initially while determining the scope of revival/rehabilitation of the sick company approval of 75% of the creditors was required. Why at this stage the approval of 25% of the unsecured creditors is sought and why not the same basis as followed by the interim administrator i.e. 75% in total can be re-instated is the question which needs some clarification.

This Scheme of Revival and Rehabilitation shall be presented by Company Administrator before Tribunal and subject to approval prescribed, the scheme shall be sanctioned. If the prescribed approval is not granted then the Tribunal may initiate winding up proceedings.

(d) Professional Opportunity

- With the proposed appointments of the Interim and the Company Administrator new horizons for Professionals have emerged. This would also result in timely execution of these matters and in a professional manner. Under the SICA, all the matters were handled by BIFR through Operating Agency which used to be one of the Banks/

Financial Institution and was mostly overburdened. This is certainly a welcome step for the professionals.

(e) Amalgamation through Tribunal

- There is an additional approval requirement of shareholders by special resolution in case of amalgamation of Sick Company. Again the authority to approve the scheme of amalgamation rests with the Tribunal and thus there is further opportunity for the Professionals.

(f) Binding Nature of Sanctioned Scheme

- After this whole process, the sanctioned scheme by Tribunal shall be treated as conclusive and admitted as evidence in all the legal proceedings, which signifies that the scope of Tribunal's power is wider. The Scheme on being sanctioned and after coming into operation shall be binding on sick company, Transferee Company (in case of amalgamation), its shareholders, creditors and guarantors.

(g) Modification of the Scheme

- There is a provision related to modification of scheme which shall be exercised if the Scheme is not implemented or if there is any difficulty in the implementation of the scheme. Thereafter, application of company administrator or secured creditor or Transferee Company (in case of amalgamation) is to be submitted to Tribunal, who may modify the Scheme or declare the scheme as failed so that company may be wound up. Tribunal shall pass the order for modification or winding up of company within 30 days of receipt of application along with consent of 3/4th of Secured Creditor. Such a provision makes the procedure fool proof as either the Companies shall get revived or be wound up.

(h) Directors/Promoters Accountability

- The Companies Bill, 2009 has also adopted a more rigorous approach on the Duties of Directors, Promoters and the officers. There is a new provision which provides that if any director or promoter or any other managerial personnel at the time of promotion, formation or management of company has misappropriated any money or property or has been found guilty of misfeasance or breach of trust, Tribunal may direct them to repay the same with or without interest. Moreover this action is without prejudice to any other provision under which any legal action may be taken against that person. After the Satyam fiasco and in the current scenario which give more emphasis on Corporate Governance, such provision is to be accepted wholeheartedly.

(i) Appeal against Tribunal's decision

- It is provided in Companies Bill, 2009 that no appeal can lie in any court and no civil court shall have jurisdiction in respect of the matter where Tribunal is empowered to take

action for revival and rehabilitation of sick companies. The appeal shall lie before the Appellate Tribunal and there after before the Supreme Court. The Bill has proposed to give outright powers to Tribunal which shall make the system more effectual and well-organized.

(j) Rehabilitation and Insolvency Fund

- The Bill provides for the setting up of a Rehabilitation and Insolvency Fund to which contributions can be made voluntarily by companies, which would entitle them to certain drawing rights in case of insolvency. This fund would be used for the purpose of rehabilitation, revival and liquidation of sick companies and would be an independent administrator to be appointed by the Central Government. There was no corresponding provision in the SICA for this purpose. However the source of contribution to this fund is vague as no criteria has been laid down for making contribution to this fund. The source of contribution should be made clear.

(k) Revival by Financial Assistance

- In SICA, 1985, provisions of Rehabilitation by giving Financial Assistance was there to provide any preventive, ameliorative, remedial and other measures with respect to any sick industrial company. Such a company was entitled for grant of relief from Government/Banks/any other authority subject to review of the Board. However no such provision has been made in Companies Bill. This might be due to the fact that some of the Companies started misusing this clause by deliberately coming to the shelter of BIFR and asking for the waiver of loans and other statutory reliefs. However, under the Companies Bill, it is provided that for effective implementation of scheme the Tribunal may enforce, modify or terminate any contract entered into by Company with any other person. To what extent would the Tribunal provide relief needs to be seen and should be taken up on a case to case basis. Again can the term contract used here cover the reliefs from statutory authorities like Income Tax, ROC, SEBI and Stock exchange authorities is an important question.

In terms of the above decision there is immense scope for professionals in matters relating to the revival of sick companies and it is felt that these new provisions can go a long way in meeting the intentions of the legislature as by either reviving/closing the sick companies in a time bound manner, the idle/locked up investment would be put to productive use/get released for productive use elsewhere. With the involvement of professionals, the speedy process of revival/winding up would be done by the Tribunal and the focus of the Government would also be to revive the companies which actually need some genuine relief and not those which came just to take unintended shelter of law. So we should whole heartedly welcome the provisions of this Companies Bill hoping it to be implemented soon. □



Company fails to pay on demand of a Secured Creditor representing 50% or more debt of Company



