# Resolution of Corporate Disputes, Non-Compliances & Remedies.(Some Important Questions & Answers)

For-CS Professional Programme (New Syllabus)

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## Lesson 1. Shareholders' Democracy & Corporate Disputes

1. "Articles of the company are the protective shield for the majority of shareholders". Comment.
   Answer:- The general principle of company law is that every member holds equal rights with other members of the company in the same class. The scale of rights of members of the same class must be held evenly for smooth functioning of the company. In case of difference(s) amongst the members the issue is decided by a vote of the majority. Since the majority of the members are in an advantageous position to run the company according to their command, the minorities of shareholders are often oppressed. The company law provides for adequate protection for the minority shareholders when their rights are trampled by the majority. But the protection of the minority is not generally available when the majority does anything in the exercise of the powers for internal administration of a company. The court will not usually intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of a company by its directors so long they are acting within the powers conferred on them under the articles of the company. In other words, the articles are the protective shield for the majority of shareholders who compose the board of directors for carrying out their object at the cost of minority of shareholders. The basic principle of non-interference with the internal management of company by the court is laid down in a celebrated case of ***Foss* v. *Harbottle* 67 E.R. 189; (1843) 2 Hare 461** that no action can be brought by a member against the directors in respect of a wrong alleged to be committed to a company. The company itself is the proper party of such an action.
2. What is class action suits and what reliefs can be sought under class action suits by the applicant under class action suits?
   Answer:- A class action suit is a lawsuit where a group of people representing a common interest may approach the Tribunal to sue or be sued. It is a procedural instrument that enables one or more plaintiffs to file and prosecute litigation on behalf of a larger group or class having common rights and grievances.
   The initiation of class action suits is one of the major changes introduced by the Companies Act, 2013. The major objective behind the provision of class action suits is to safeguard the interests of the minority shareholders. So, class action suits are expected to play an important role to address numerous prejudicial and abusive acts committed by the Board of Directors and other managerial personnel as it has been statutorily recognized under the Companies Act, 2013.
   Any member or depositor who files the Class Action Suits can seek all or any of the following reliefs from NCLT:
   (a) To restrain the company from:
      - Doing an act which is contrary to the provisions of this Act or any other law for the time being in force;
      - Taking action contrary to any resolution passed by the members;
      - Committing an act which is ultra vires the articles or memorandum of the company;
      - Committing breach of any provision of the company's memorandum or articles;

(b) To declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by misstatement to the members or depositors;
    - To restrain the company and its directors from acting on such resolution;

(c) To claim damages or compensation or demand any other suitable action from or against–
    (i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;
    (ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or
    (iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part.

3. State the persons against whom the class action suit can be filed.

Answer: -A class action suit is a new mechanism to claim the loss caused to the specified stakeholders (as discussed hereinbefore) of the company not only from the company but also from other entities.

Various persons/ entities against whom such actions can be taken are:

- A company or its directors for any fraudulent, unlawful or wrongful act or omission;
- An auditor including audit firm of a company for any improper or misleading statement of particulars made in the audit report or for any unlawful or fraudulent conduct.
- An expert or advisor or consultant for an incorrect or misleading statement made to the company.

The Companies Act, 2013 in the same spirit as followed in the counterparts, allows the specified stakeholder to implead even consultants/advisors/experts also for issuing/giving any misleading statement/certificate etc., or for any other fraudulent or wrongful or like nature conduct or act. It is pertinent to note that neither in Act nor in Rules definitions of advisors or consultants or experts are provided, thus the definitions of the same will be derived from judicial precedence and use of the same in common parlance.

## Lesson 2 Fraud under Companies Act, 2013 and Indian Penal Code, 1860

**1.** "Intention is one of the essential ingredients to commit a fraud". Elaborate.

Answer: -According to the act, intention is one of the essential ingredients to commit a fraud. In this regard it may be noted that the Hon'ble Supreme Court of India held in the matter of *Dr Vimla Vs Delhi Administration* in the year 1962, in the context of the matter that fraud has to satisfy two conditions viz., (a) deceit or injury to the person deceived (b) intention to deceive.

In the matter of *The State of Mysore Vs. Padmanabhacharya* etc., the Hon'ble Supreme Court of India held a view that the intention can be assumed. In the case under reference the matter relates to certain smuggling activities involving violation of the Sea Customs Act, 1887. In this matter the Hon'ble Supreme Court of India held considering the facts of the case that the intention to defraud continues even after the actual importation of goods and continues in the hands of the subsequent purchasers also. Thus, intention has been accorded a wider amplitude and applicability.

An unintentional and mere accidental omission or commission generally will not stand the test of legal scrutiny in establishing a fraud. Intention can be provided by looking into the attendant factors relating to the impugned fraudulent act. In this regard it is relevant to note the following decision of the Hon'ble Securities Appellate Tribunal,

The Hon'ble SAT, in *Ketan Parekh Vs. Securities & Exchange Board of India* (Appeal No. 2 of 2004) dated July 14, 2006, observed that, *Whether a transaction has been executed with the intention to manipulate the market or defeat its mechanism will depend upon the intention of the parties which could be inferred from the attending circumstances because direct evidence in such cases may not be available. The nature of the transaction executed, the frequency with which such transactions are undertaken, the value of the transactions, whether they involve circular trading and whether there is real change of beneficial ownership, the conditions then prevailing in the market are some of the factors which go to show the intention of the parties. This list of factors, in the very nature of things, cannot be exhaustive. Any one factor may or may not be decisive and it is from the cumulative effect of these that an inference will have to be drawn."*

**2.** What are the essential ingredients of the offence of criminal breach of trust?

Answer:- The essential ingredients of the offence of criminal breach of trust are as under :

1. The accused must be entrusted with the property or with dominion over it,
2. The person so entrusted must use that property, or;
3. The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation,
   - (i) of any direction of law prescribing the mode in which such trust is to be discharged, or;
   - (ii) of any legal contract made touching the discharge of such trust.

The Supreme Court of India in *V.R. Dalal* v. *Yugendra Naranji Thakkar*, 2008 (15) SCC 625, has held that the first ingredient of criminal breach of trust is entrustment and where it is

missing, the same would not constitute a criminal breach of trust. Breach of trust may be held to be a civil wrong but when *mens-rea* is involved it gives rise to criminal liability also. The expression 'direction of law' in the context of Section 405 would include not only legislations pure and simple but also directions, instruments and circulars issued by authority entitled therefor. In a landmark judgment of *Pratibha Rani* v. *Suraj Kumar*, AIR 1985 SC 628, the appellant alleged that her stridhan property was entrusted to her in–laws which they dishonestly misappropriated for their own use. She made out a clear, specific and unambiguous case against in–laws. The accused were held guilty of this offence and she was held entitled to prove her case and no court would be justified in quashing her complaint.

The Supreme Court in *OnkarNath Mishra* v. *State* (NCT of Delhi), 2008 CrLJ 1391 (SC), has held that in the commission of offence of criminal breach of trust, two distinct parts are involved. The first consists of the creation an obligation in relation to property over which dominion or control is acquired by accused. The second is a misappropriation or dealing with property dishonestly and contrary to the terms of the obligation created. In another case, *Suryalakshmi Cotton Mills Ltd*. v. *Rajvir Industries Ltd*., 2008 (13) SCC 678, it was held that a cheque is property and if the said property has been misappropriated or has been used for a purpose for which the same had not been handed over, a case under Section 406 of the Code may be found to have been made out.

In *S.K. Alagh* v. *State of U.P.and others*, 2008 (5) SCC 662,where demand drafts were drawn in the name of company for supply of goods and neither the goods were sent by the company nor the money was returned, the Managing Director of the company cannot be said to have committed the offence under Section 406 of Indian Penal Code. It was pointed out that in absence of any provision laid down under statute, a director of a company or an employer cannot be held vicariously liable for any offence committed by company itself.

After analyzing all the cases we may conclude that for an offence to fall under this section all the four requirements are essential to be fulfilled.

1. The person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them or to put him in position of trustee.
2. The accused must be in such a position where he could exercise his control over the property i.e; dominion over the property.
3. The term property includes both movable as well as immovable property within its ambit.
4. It has to be established that the accused has dishonestly put the property to his own use or to some unauthorized use. Dishonest intention to misappropriate is a crucial fact to be proved to bring home the charge of criminal breach of trust.

**3.** What are the main ingredients of cheating under Indian Penal Code, 1860?

Answer: - The main ingredients of cheating are as under:

1. Deception of any person.

2. (a) Fraudulently or dishonestly inducing that person
   (i) to deliver any property to any person; or
   (ii) to consent that any person shall retain any property; or
   (b) Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

The Supreme Court in *Iridium India Telecom Ltd*. v. *Motorola Incorporated and Ors.,* (2005) 2 SCC 145, has held that deception is necessary ingredient under both parts of section. Complainant must prove that inducement has been caused by deception exercised by the accused. It was held that non-disclosure of relevant information would also be treated a misrepresentation of facts leading to deception.

The Supreme Court in *M.N. Ojha and others* v. *Alok Kumar Srivastav and anr,* (2009) 9 SCC 682, has held that where the intention on the part of the accused is to retain wrongfully the excise duty which the State is empowered under law to recover from another person who has removed non-duty paid tobacco from one bonded warehouse to another, they are held guilty of cheating.

In *T.R. Arya* v. *State of Punjab*, 1987 CrLJ 222, it was held that negligence in duty without any dishonest intention cannot amount to cheating. A bank employee when on comparison of signature of drawer passes a cheque there may be negligence resulting in loss to bank, but it cannot be held to be cheating.

**4.** An unintentional and mere accidental omission or commission generally will not stand the test of legal scrutiny in establishing a fraud. Comment.

Answer: -An unintentional and mere accidental omission or commission generally will not stand the test of legal scrutiny in establishing a fraud. Intention can be provided by looking into the attendant factors relating to the impugned fraudulent act. In this regard it is relevant to note the following decision of the Hon'ble Securities Appellate Tribunal,

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## Lesson 3 Regulatory Action

1. What are the objective for conducting inspection and under what circumstances the inspection can be ordered by the Registrar of Companies?

   Answer: - Section 206 does not specify the circumstances or pre conditions which must be satisfied to invoke these provisions. Some of the objectives of conducting such inspections may be thus:

   1. To detect concealment of income by falsification of accounts.
   2. To secure knowledge about the mismanagement of the business of a company and transactions entered into with an intent to defraud creditors, shareholders or otherwise for fraudulent or unlawful purposes.
   3. To ascertain whether the statutory auditors have discharged their functions and duties in certifying the true and fair view of a company's accounts and their proper maintenance.
   4. To enable the Government to ascertain the quantum of profits accrued but not adequately accounted for.
   5. To detect misapplication of funds leading a company to a state of perpetual financial crisis.
   6. To keep a watch on performance of a company.
   7. To detect misuse of fiduciary responsibilities by the company's management for personal aggrandizement.

   Inspection is intended to be a routine and not ad hoc or special affair. However, if sufficient evidence suggests that of the company's affairs are being mismanaged and/or managed in fraudulent way manner, then inspection can lead to orders for investigation into the affairs of the company.

   According to Section 206(3), Inspection may be ordered by the Registrar, where –

   - If no information or explanation is furnished to the Registrar within the time specified under sub-section (1); or
   - if the Registrar on an examination of the documents furnished is of the opinion that the information or explanation furnished is inadequate; or
   - if the Registrar is satisfied on a scrutiny of the documents furnished that an unsatisfactory state of affairs exists in the company and does not disclose a full and fair statement of the information required.

The Registrar may by another written notice, call on the company to produce for his inspection such further books of accounts, books, papers and explanations as he may require at such place and at such time as specified in the notice.

In this written notice, the Registrar shall record his reason in writing for issuing the notice for inspection.

2. Describe the provisions relating to Search and Seizure under the Companies Act, 2013
   Answer: - Section 209 of the Companies Act, 2013 deals with the provisions relating to Search and Seizure. The Registrar or inspector may, after obtaining an order from the Special Court for the seizure of such books and papers, –
   (a) enter, with such assistance as may be required, and search, the place or places where such books or papers are kept; and
   (b) seize such books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books or papers at its cost.

   The Special court may order such seizure where, upon information in his possession or otherwise, has reasonable ground to believe that the books and papers of a company, or relating to the key managerial personnel or any director or auditor or company secretary in practice if the company has not appointed a company secretary, are likely to be destroyed, mutilated, altered, falsified or secreted.

   The Register or inspector shall return the books and papers within one hundred and eighty days after such seizure to the company from whose custody or power such books or papers were seized. These books and papers may be called for by the Registrar or inspector for a further period of one hundred and eighty days ay an order in writing if they are needed again.

   Registrar or inspector may, before returning such books and papers, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such other manner as he considers necessary.

   The provisions of the Code of Criminal Procedure, 1973 relating to searches or seizures shall apply, mutatis mutandis, to every search and seizure.

3. Under what circumstances the tribunal makes order for the investigation in to the affairs of the company.
   Answer: - **Investigation into the Company's Affairs on Application made by Members or other Persons (Section 213)**
   The Tribunal may order after giving a reasonable opportunity of being heard to the parties concerned that affairs of a company ought to be investigated. Where such a order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company and to report thereupon.

The tribunal may make this order on an application made by –

(a) not less one hundred members or members holding not less than one – tenth of the total voting power, in case of a company having a share capital; or

(b) not less than one – fifth of the persons on the company's register of members, in case company having no share capital

and supported by evidence showing good reason for seeking and order for conducting and investigation into affairs of the company.

The Tribunal may also make such order on an application made to it by any other person or otherwise, if it is satisfied that the circumstance suggest that –

(a) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;

(b) person concerned in the formation of the company or the management of its affairs have been guilty of fraud, misfeasance or other misconduct towards the company or towards its members; or

(c) the members of the company have not been given all reasonable information including information relating to the calculation of commission payable to a managing or other director or the manager of the company.

If after investigation it is proved that –

(a) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or

(b) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud,

then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud under Section 447.

**4.** What are the preparatory steps for the company secretary to face investigation?

Answer: - Before an inspector commences investigation into the affairs of a company, it is advisable for the Secretary to prepare a report touching upon various aspects of the activities of his company particularly those transactions in respect of which fraud or misfeasance or mismanagement is alleged. This exercise will enable the secretary to handle the investigation into the affairs of his company with courage and confidence.

The aspects which should be considered by the secretary include:

1. Basic information about the company – Name of the company; date of incorporation; location of the registered office, branches, factories and other offices; status of the company – public or private; objects of the company – capital structure; voting rights attached to the shares; shareholding pattern of the company.
2. Business activities – Nature of existing business, licensed and installed capacities, expansion programme and sources of finance, whether the company belongs to a particular group; if so the names of other companies falling within the same group.
3. Debentures, bank finance and deposits.
4. Foreign collaboration agreements.
5. Management—Brief history of past management set up; existing management set up; composition of Board of Directors; whether the terms and conditions of the appointment of managerial personnel are being adhered to; details regarding appointment of directors and their relatives to an office or place of profit.
6. Whether all the statutory registers including minute's books are being maintained up-to-date?
7. Whether the internal checks and internal control system is being properly followed?
8. Working results and financial position – General assessment of working of the company, evaluation of the level of performance and efficiency of the management, a review of the profits of the company, performance data, financial position of the company in the context of its working results for the last three years.
9. Compliance by the company and its officers with the provisions of the Companies Act, 1956/2013.
10. Compliance with the provisions of other Acts applicable to the company.
11. Whether the loans taken and loans advanced to Directors, the firms in which they are partners or companies in which they are Directors are in accordance with the provisions of the Act.
12. The investments made by the company.
13. Sole selling agency agreement.
14. Instance of mismanagement and other irregularities.
15. Acquisition/disposal of substantial assets.
16. A scrutiny of abnormal/heavy expenditure items.
17. Complaints, if any, against the company and its management and steps taken to redress them.
18. Brief particulars of the litigations against the company and the reasons thereof.
19. Management's relations with the employees and labour.
20. Shareholders—Instance of oppression of minority shareholders, allegations of non-receipt of dividend, notices of meetings, accounts, share certificates, etc.; illegal forfeiture of shares, etc. and steps taken to redress Investors, complaints.
21. Auditors—Name and address of Statutory auditors, Secretarial Auditor and Cost Auditor, compliance as per the provisions of Companies Act, 2013.

5. What are the power of the Investigation authority under the SEBI (Prohibition of Fraudulent And Unfair Trade Practices relating to Securities Market) Regulations, 2003.

Answer: **-** Regulation 6 of the SEBI (Prohibition of Fraudulent And Unfair Trade Practices relating to Securities Market) Regulations, 2003 deals with Powers of Investigating Authority.

Without prejudice to the powers conferred under the Act, the Investigating Authority shall have the following powers for the conduct of investigation, namely :–

(1) to call for information or records from any person specified in section 11(2)(i) of the Act;

(2) to undertake inspection of any book, or register, or other document or record of any listed public company or a public company (not being intermediaries referred to in section 12 of the Act) which intends to get its securities listed on any recognized stock exchange where the Investigating Authority has reasonable grounds to believe that such company has been conducting in violation of these regulations;

(3) to require any intermediary or any person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or record before him or any person authorized by him in this behalf as he may consider necessary if the furnishing of such information or the production of such books, or registers, or other documents, or record is relevant or necessary for the purposes of the investigation;

(4) to keep in his custody any books, registers, other documents and record produced under this regulation for a maximum period of one month which may be extended upto a period of six months by the Board;

(5) Provided that the Investigating Authority may call for any book, register, other document or record if the same is needed again;

(6) Provided further that if the person on whose behalf the books, registers, other documents and record are produced requires certified copies of the books, registers, other documents and record produced before the Investigating Authority, he shall give certified copies of such books, registers, other documents and record to such person or on whose behalf the books, registers, other documents and record were produced;

(7) to examine orally and to record the statement of the person concerned or any director, partner, member or employee of such person and to take notes of such oral examination to be used as an evidence against such person;

(8) Provided that the said notes shall be read over to, or by, and signed by, the person so examined;

(9) to examine on oath any manager, managing director, officer or other employee of any intermediary or any person associated with securities market in any manner in relation to the affairs of his business and may administer an oath accordingly and for that purpose may require any of those persons to appear before him personally.

The Investigating Authority may, after obtaining specific approval from the Chairman or Member also exercise all or any of the following powers, namely :–

(1) to call for information and record from any bank or any other authority or board or corporation established or constituted by or under any Central, State or Provincial Act in respect of any transaction in securities which are under investigation;
(2) to make an application to the Judicial Magistrate of the first class having jurisdiction for an order for the seizure of any books, registers, other documents and record, if in the course of investigation, the Investigating Authority has reasonable ground to believe that such books, registers, other documents and record of, or relating to, any intermediary or any person associated with securities market in any manner may be destroyed, mutilated, altered, falsified or secreted;
(3) to keep in his custody the books, registers, other documents and record seized under these regulations for such period not later than the conclusion of the investigation as he considers necessary and thereafter to return the same to the person, the company or the other body corporate, or, as the case may be, to the managing director or the manager or any other person from whose custody or power they were seized.
(4) Provided that the Investigating Authority may, before returning such books, registers, other documents and record as aforesaid, place identification marks on them or any part thereof;
(5) save as otherwise provided in this regulation, every search or seizure made under this regulation shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to searches or seizures made under that Code.

## Lesson 4. Adjudication, Prosecutions, Offences and Penalties

1. Describe the Power of process of Adjudication under the Companies Act, 2013.

Answer: - Section 454(4) and Rule 3 of the Companies (Adjudication of Penalties) Rules, 2014, provides

(1) The central government may appoint any of its officers, not below the rank of Registrar, as adjudicating officers for adjudging penalty under the provisions of the Act.
(2) Before adjudging penalty, the adjudging officer shall issue a written notice in the specified manner, to the company, the officer who is in default or any other person, as the case may be, to show cause, within such period as may be specified in the notice (not being less than fifteen days and more than thirty days from the date of service thereon), why the penalty should not be imposed on it or him.
(3) Every notice issued under sub-rule (2), shall clearly indicate the nature of non-compliance or default under the Act alleged to have been committed or made by such company, officer in default, or any other person, as the case may be and also

draw attention to the relevant penal provisions of the Act and the maximum penalty which can be imposed on the company, and each of the officers in default, or the other person.

(4) The reply to such notice shall be filed in electronic mode only within the period as specified in the notice;

Provided that the adjudicating officer may, for reasons to be recorded in writing, extend the period referred to above by a further period not exceeding fifteen days, if the company or officer in default or any person as the case may be, satisfies the adjudicating officer that it or he has sufficient cause for not responding to the notice within the stipulated period or the adjudicating officer has reason to believe that the company or the officer or the person has received a shorter notice and did not have reasonable time to give reply.

(5) If, after considering the reply submitted by such company, its officer, or any other person, as the case may be, the adjudicating officer is of the opinion that physical appearance is required, he shall issue a notice, within a period of ten working days from the date of receipt of reply fixing a date for the appearance of such company, through its authorised representative, or officer of such company, or any other person, whether personally or through his authorised representative;

Provided that if any person, to whom a notice is issued under sub-rule (2), desires to make an oral representation, whether personally or through his authorised representative and has indicated the same while submitting his reply in electronic mode, the adjudicating officer shall allow such person to make such representation after fixing a date of appearance.

(6) On the date fixed for hearing and after giving a reasonable opportunity of being heard to the person concerned, the adjudicating officer may, subject to reasons to be recorded in writing, pass any order in writing as he thinks fit including as order for adjournment;

Provided that after hearing, adjudicating officer may require the concerned person to submit his reply in writing on certain other issues related to the notice under sub-rule (2), relevant for determination of the default.

(7) The adjudicating officer shall pass an order,-

(a) within thirty days of the expiry of the period in sub-rule (2),or of such extended period as referred therein, where physical appearance was not required under sub rule (5);

(b) within ninety days of the date of issue of notice under rule (2),where any person appeared before the adjudicating officer under sub rule (5);

Provided that in case an order is passed after the aforementioned duration, the reasons of the delay shall be recorded by the adjudicating officer and no such order shall be invalid merely because of its passing after the expiry of such thirty days or ninety days as the case may be.

(8) Every order of the adjudicating officer shall be duly dated and signed by him and shall clearly state the reasons for requiring the physical appearance under sub-rule (5).

(9) The adjudicating officer shall send a copy of the order passed by him to the concerned company, officer who is in default or any other person or all of them and to the Central Government and a copy of the order shall also be uploaded on the website.

(10) For the purposes of this rule, the adjudicating officer shall exercise the following powers, namely:-

(a) to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case after recording reasons in writing;

(b) to order for evidence or to produce any document, which in the opinion of the adjudicating officer, may be relevant to the subject matter.

(11) If any person fails to reply or neglects or refuses to appear as required under sub-rule (5) or sub-rule (10) before the adjudicating officer, the adjudicating officer may pass an order imposing the penalty, in the absence of such person after recording the reasons for doing so.

(12) While adjudging quantum of penalty, the adjudicating officer shall have due regard to the following factors, namely:-

(i) size of the company;

(ii) nature of business carried on by the company;

(iii) injury to public interest;

(iv) nature of the default;

(v) repetition of the default;

(vi) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; and

(vii) the amount of loss caused to an investor or group of investors or creditors as a result of the default;

Provided that, in no case, the penalty imposed shall be less than the minimum penalty prescribed, if any, under the relevant section of the Act.

(13) In case a fixed sum of penalty is provided for default of a provision, the adjudicating officer shall impose that fixed sum, in case of any default therein.

(14) Penalty shall be paid through Ministry of Corporate Affairs portal only.

(15) All sums realized by way of penalties under the Act shall be credited to the Consolidated Fund of India.

*Explanation 1* - For the purposes of this rule, the term “specified manner” shall mean service of documents as specified under section 20 of the Act and rules made thereunder and details in respect of address (including electronic mail ID) provided in the KYC documents field in the registry shall be used for communication under this rule.

*Explanation 2* - For the purposes of this rule, it is hereby clarified that the requirement of submission of replies in electronic mode shall become mandatory after the creation of the e-adjudication platform.

It pertinent to point out here as per Rule (4)&(5) above, there is a rider for the adjudicating officer in the matter of giving opportunity of being heard. Based on the response to the show cause notice, if the adjudicating officer is of the opinion that physical appearance is required, he will give an opportunity to the appearance of such company, through its authorised representative, or officer of such company, or any other person, whether personally or through his authorised representative of being heard. But the Act will always override the Rules. There is no such rider in section 454(4). Therefore, the adjudicating officer forming an opinion whether an inquiry has to be held or not is of no concern. Whether he likes it or not he has to give to the defaulting company and its officer an opportunity of being heard.

However, in addressing the prayers in a compounding application by the Regional Director or NCLT, the compounding authority need not give any opportunity to the defaulting parties of being heard since the section does not provide for any such opportunity to be given to the defaulting parties though natural justice demands such an opportunity.

**2.** Write a note on the decriminalization of offences through Companies (Amendment) Ordinance, 2018.

Answer: - After the coming into force of the Companies (Amendment) Ordinance, 2018, the Companies Act, 2013 has undergo a major change in the manner of dealing with the offences and penalties and the introduction of e-adjudication will begin a new chapter in the history of Indian corporate world and will speed up the disposal of ongoing and upcoming cases. To further promote the drive of the ease of doing business in India, the concept of "**settlement of civil matters**" as is currently existing under the securities law may also be introduced under the Companies Act, 2013 enabling the companies and officer in default to voluntary accept the occurrence of defaults and to settle the same in accordance with the settlement term agreed between the companies/officer in default and the ROC.

The amendment brought in by the Companies (Amendment) Act, 2017 and the Companies (Amendment) Ordinance, 2018 has struck a proper balance between the object of promoting ease of doing business in India by decriminalizing procedural or technical defaults, reducing penalties for One person company and Small Company to half of the amount payable by normal companies, expanding the jurisdiction of regional director for entertaining compounding applications and the object of ensuring better corporate compliance by mandating the timely compliance of the Act and disallowing benefits to defaulting companies and the Company Secretary will have to play a crucial role in achieving these objectives. The Companies (Amendment) Ordinance, 2018 has

re-categories the 16 offence out of 81 which are in the category of the compoundable offence to an in house adjudication framework wherein the defaults are subject to a penalty levied by an adjudicating officer.

3. List out the Offences tribal by Special Courts under Prevention of Money Laundering Act, 2002.

Answer: - **Offences triable by Special Courts (Section 44)**

**(1)** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),**–**

**(a)** an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed;

Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or

**(b)** a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under section 3, without the accused being committed to it for trial;

**(c)** if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (*b),* it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

**(d)** a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973 ( 2 of 1974) as it applies to a trial before a Court of Session.

**(2)** Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (*b*) of sub-section (*1*) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under section 43.

4. Discuss the Enforcement of the orders of Adjudicating Authority under Foreign Exchange Management Act, 1999

Answer: - **Enforcement of the orders of Adjudicating Authority (Section 14)**

**(1)** Subject to the provisions of sub-section (*2*) of section 19, if any person fails to make full payment of the penalty imposed on him under section 13 within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he shall be liable to civil imprisonment under this section.

**(2)** No order for the arrest and detention in civil prison of a defaulter shall be made unless the Adjudicating Authority has issued and served a notice upon the defaulter

calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Adjudicating Authority, for reasons in writing, is satisfied–

(a) that the defaulter, with the object or effect of obstructing the recovery of penalty, has after the issue of notice by the Adjudicating Authority, dishonestly transferred, concealed, or removed any part of his property, or

(b) that the defaulter has, or has had since the issuing of notice by the Adjudicating Authority, the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.

**(3)** Notwithstanding anything contained in sub-section (1), a warrant for the arrest of the defaulter may be issued by the Adjudicating Authority if the Adjudicating Authority is satisfied, by affidavit or otherwise, that with the object or effect of delaying the execution of the certificate the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Adjudicating Authority.

**(4)** Where appearance is not made pursuant to a notice issued and served under sub-section (1), the Adjudicating Authority may issue a warrant for the arrest of the defaulter.

**(5)** A warrant of arrest issued by the Adjudicating Authority under sub-section (3) or sub-section (4) may also be executed by any other Adjudicating Authority within whose jurisdiction the defaulter may for the time being be found.

**(6)** Every person arrested in pursuance of a warrant of arrest under this section shall be brought before the Adjudicating Authority issuing the warrant as soon as practicable and in any event within twenty-four hours of his arrest (exclusive of the time required for the journey);

Provided that, if the defaulter pays the amount entered in the warrant of arrest as due and the costs of the arrest to the officer arresting him, such officer shall at once release him.

*Explanation.* – For the purposes of this sub-section, where the defaulter is a Hindu undivided family, the *karta* thereof shall be deemed to be the defaulter.

**(7)** When a defaulter appears before the Adjudicating Authority pursuant to a notice to show cause or is brought before the Adjudicating Authority under this section, the Adjudicating Authority shall give the defaulter an opportunity showing cause why he should not be committed to the civil prison.

**(8)** Pending the conclusion of the inquiry, the Adjudicating Authority may, in his discretion, order the defaulter to be detained in the custody of such officer as the Adjudicating Authority may think fit or release him on his furnishing the security to the satisfaction of the Adjudicating Authority for his appearance as and when required.

**(9)** Upon the conclusion of the inquiry, the Adjudicating Authority may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest;

Provided that in order to give a defaulter an opportunity of satisfying the arrears, the Adjudicating Authority may, before making the order of detention, leave the defaulter in the custody of the officer arresting him or of any other officer for a specified period not exceeding fifteen days, or release him on his furnishing security to the satisfaction of the Adjudicating Authority for his appearance at the expiration of the specified period if the arrears are not satisfied.

**(10)** When the Adjudicating Authority does not make an order of detention under sub-section (9), he shall, if the defaulter is under arrest, direct his release.

**(11)** Every person detained in the civil prison in execution of the certificate may be so detained,–

(a) where the certificate is for a demand of an amount exceeding rupees one crore, up to three years, and

(b) in any other case, up to six months

Provided that he shall be released from such detention on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison.

**(12)** A defaulter released from detention under this section shall not, merely by reason of his release, be discharged from his liability for the arrears, but he shall not be liable to be arrested under the certificate in execution of which he was detained in the civil prison.

**(13)** A detention order may be executed at any place in India in the manner provided for the execution of warrant of arrest under the Code of Criminal Procedure, 1973.

**5.** Discuss the provision relating to Advisory Board under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

Answer:- For the purposes of article 22(4)(A) and 22(7)(c) of the Constitution, –

(a) the Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards each of which shall consist of a Chairman and two other persons possessing the qualifications specified in sub-clause (*a*) of clause (4) of article 22 of the Constitution;

(b) save as otherwise provided in section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board constituted under clause (*a*) to enable the Advisory Board to make the report under sub-clause (*a*) of clause (4) of article 22 of the Constitution;

(c) the Advisory Board to which a reference is made under clause (*b*) shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard in

person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned;

(d) when there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board;

(e) a person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential;

(f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.

## Lesson 5 Relief and Remedies

**1.** Describe the limits of the various Compounding Authority and the procedure for compounding under the Companies Act, 2013.

Answer: -The Regional Director appointed by the Central Government as a Regional Director for the purposes of this Act and the National Company Law Tribunal (*Tribunal*) are the two compounding authorities.

Where the maximum amount of fine which may be imposed for an offence does not exceed Twenty-five lakh rupees, the Regional Director or any officer authorised by the Central Government can compound the offence.

In all other case of compoundable offence(s), the Tribunal is authorised to compound.

Here maximum amount of fine means, fine which is payable for alleged violation of a particular section of the Act. The compounding authority has no power to impose fine which exceeds the maximum amount of fine which may be imposed for offence so compounded. In specifying the sum required to be paid or credited for the compounding of an offence, the sum, if any, paid by way of additional fee under sub-section (*2*) of section 403 shall be taken into account.

**Procedure for Compounding:**

a. Call for a board meeting to decide on compounding as per the CA, 2013.

b. Arrive at the amount of the fine involved as per the relevant section(s).
c. Hold the Board Meeting and pass resolution(s) to compound and provide for preparation and providing necessary authorisation for compounding.
d. Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon, to the Tribunal or the Regional Director or any officer authorised by the Central Government, as the case maybe. The filing with ROC is done in the e-from GNL-1 prescribed for this purpose. Also deliver sufficient number of hard copies of the compounding application to ROC for him to forward it to RD/Tribunal based on the quantum of fee involved.
e. There will be a personal hearing before the Regional Director or Tribunal which will decide the amount to be paid for compounding.
f. Get the order passed by the RD/Tribunal and pay the amount stipulated within the time fixed.
g. File Order of RD/NCLT with ROC in form INC-28 and ROC will take note of the same.

**2.** What are the power of enforcement directorate to compound contraventions under FEMA Act, 1999.

Answer: -If any Person contravenes provisions of Section 3(a) of Foreign Exchange Management Act.

(a) in case where the sum involved in such contravention is five lakhs rupees or below, by the Deputy Director of the Directorate of Enforcement;
(b) in case where the sum involved in such contravention is more than rupees five lakhs but less than rupees ten lakhs, by the Additional Director of the Directorate of Enforcement;
(c) in case where the sum involved in the contravention is rupees ten lakhs or more but less than fifty lakhs rupees by the Special Director of the Directorate of Enforcement;
(d) in case where the sum involved in the contravention is rupees fifty lakhs or more but less than one crore rupees by Special Director with Deputy Legal Adviser of the Directorate of Enforcement;
(e) in case the sum involved in such contravention is one crore rupees or more, by the Director of Enforcement with Special Director of the Enforcement Directorate. Provided further that no contravention shall be compounded unless the amount involved in such contravention is quantifiable.

**3.** Write differences between Mediation and Conciliation.

Answer: -

| | Mediation | Conciliation |
|---|---|---|
| 1. | The term "mediation" has been defined under black law dictionary as "an act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute". | The term "Conciliation" has been defined under black law dictionary as "The process of adjusting or settling disputes in a friendly manner through extra judicial mean". |

| | | |
|---|---|---|
| 2. | Mediation is a structured process. The Mediator assists the disputants to reach a negotiable settlement. The Process results in signed agreement which decides the future behaviour of the parties. Further, the decision of the mediator is called "settlement". | Conciliator brings the disputants to agreement through negotiation. Further, the Concilia- tor is appointed only after the dispute has arisen. The decision of the Conciliator is called "award". |
| 3. | Mediation is a time-bound, private and confidential process. The information shared must be kept confidential by all parties, including the mediator. This facilitates a free and frank discussion on matters in dispute. Equally important, the discussions cannot be brought up before the court if the disputes are not resolved through mediation. | The conciliation process is similar to mediation. But the conciliator suggests terms for settlement on evaluation of the issues discussed by the parties. |

**4.** Discuss the Confidentiality, disclosure and inadmissibility of information under Mediation and Conciliation rules, 2016.

Answer:-

(1) When a mediator or conciliator receives factual information concerning the dispute from any party, he shall disclose the substance of that information to the other party, so that the other party may have an opportunity to present such explanation as it may consider appropriate.

When a party gives information to the mediator or conciliator subject to a specific condition that the information may be kept confidential, the mediator or conciliator shall not disclose that information to the other party.

(2) The receipt or perusal, or preparation of records, reports or other documents by the mediator or conciliator, while serving in that capacity shall be confidential and the mediator or conciliator shall not be compelled to divulge information regarding those documents nor as to what transpired during the mediation or conciliation before the Central Government or the Tribunal or the Appellate Tribunal or as the case may be, or any other authority or any person or group of persons.

(3) The parties shall maintain confidentiality in respect of events that transpired during the mediation and conciliation and shall not rely on or introduce the said information in other proceedings as to –

(i) views expressed by a party in the course of the mediation or conciliation proceedings;

(ii) documents obtained during the mediation or conciliation which were expressly required to be treated as confidential or other notes, drafts or information given by the parties or the mediator or conciliator.

(iii) proposals made or views expressed by the mediator or conciliator;

(iv) admission made by a party in the course of mediation or conciliation proceedings.

(4) There shall be no audio or video recording of the mediation or conciliation proceedings.

(5) No statement of parties or the witnesses shall be recorded by the mediator or conciliator.

**5.** Discuss the grounds on which the application for settlement under SEBI (Settlement) Regulations, 2018 can be rejected.

Answer: - **Rejection of application (Regulation 6)**

(1) An application may at any time be rejected on the following grounds:

(a) Where the applicant refuses to receive or respond to the communications sent by the Board;
(b) Where the applicant does not submit or delays the submission of information, document, etc., as called for by the Board;
(c) Where the applicant who is required to appear, does not appear before the Internal Committee on more than one occasion;
(d) Where the applicant violates in any manner the undertaking and waivers as provided in Part-C of the Schedule-I;
(e) Where the applicant does not remit the settlement amount within the period specified in clause (a) of sub-regulation (2) of regulation 15 and/or does not abide by the undertaking and waivers.

(2) The rejection under sub-regulation (1) shall be communicated to the applicant.

## Lesson 6 Crisis Management & Risk and Liability Mitigation

**1.** Crisis Management is not a Choice but an indispensable component of the business organisation. Discuss.

Answer:- Crisis Management is not a Choice but an indispensable component of the business organization. Crisis management is the process by which an organization deals with a disruptive and unexpected event that threatens to harm the organization or its stakeholders. **Crisis management** is the identification of threats to an organization and its stakeholders, and the methods used by the organization to deal with these threats. Due to the unpredictability of global events, organizations must be able to cope with the potential for drastic changes in the way they conduct business. Crisis management often requires decisions to be made within a short time frame, and often after an event has already taken place. In order to reduce uncertainty in the event of a crisis, organizations often create a crisis management plan.

Any business, large or small, may run into problems that may negatively impact its normal course of operations. Crises such as a fire, death of a Key managerial personnel, terrorist attack, data breach, or natural disasters, management disputes, litigations, regulatory actions can lead to tangible and intangible costs to a company in terms of lost sales, customers, and a decrease in the firm's net income. Businesses that effectively put a business continuity plan in place in case of unforeseen contingencies can mitigate the effects of any negative event that occurs. The process of having a continuity plan in place in the event of a crisis is known as crisis management.

In order to have a business continuity plan in the aftermath of a crisis, most firms start by conducting risk analysis on their operations. **Risk analysis** is the process of identifying any adverse events that may occur and the likelihood of the events occurring. By running simulations and random variables with risk models, such as scenario tables, a risk manager can assess the probability of a risk occurring in the future, the best- and worst- case outcome of any negative event, and the damage that the company would incur should the risk actually happen. For example, a risk manager may estimate that the probability of a flood occurring within a company's area of operation is very high. The worst-case scenario of a flood will be destroying the company's computer systems and hard drives, thereby, losing pertinent data on customers, suppliers, and ongoing projects.

Once the risk manager knows what s/he is dealing with in terms of possible risks and the impact to the firm, a plan is developed by the crisis management team to contain any emergency if and when it becomes a reality. Following the example above in which a company faces a high probability of a flood damage, a back-up system for all computer systems might be created. This way, if a flood occurs that affects the company, it would still have a record of its data and work processes stored. Although business might slow down for a short period of time while the company purchases new computer equipment, business operations would not be completely halted. By having a crisis resolution in place, a company and its stakeholders can prepare and adapt well to sudden, unexpected, and adverse developments.

Crisis management is not necessarily **the same thing** as risk management. Unlike risk management, which involves planning for events that might occur in the future, crisis management involves reacting to negative events during and after they have occurred. An oil company for example, may have a plan in place to deal with the possibility of an oil spill, but if such a disaster actually occurs, the magnitude of the spill, the backlash of public opinion, and the cost of cleanup can vary greatly and may exceed expectations.

Crisis can either be self-inflicted or caused by external forces. Examples of external forces that could affect an organization's operations include natural disasters, security breaches, or false information about a company that hurts its reputation. Self-inflicted crises are caused within the organization, such as when an employee- smokes in an environment with hazardous chemicals, opens or downloads questionable files on an office laptop, offers poor customer service that goes viral online, or an accounting department cooking the books. Internal crisis can be managed, mitigated, or avoided if a company enforces strict compliance guidelines and protocols regarding ethics, policies, rules, and regulations among employees.