October,2020

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI) is a Section 8 Company incorporated under the Companies Act -2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enrol and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee. We are established with a vision of providing quality services and adhere to fair, just and ethical practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavour to disseminate information in aspect of Insolvency and Bankruptcy Code to Insolvency Professionals by conducting Round tables, webinars and sending daily newsletter namely "IBC Au courant" which keeps the insolvency professionals updated with the news relating to Insolvency and Bankruptcy domain.

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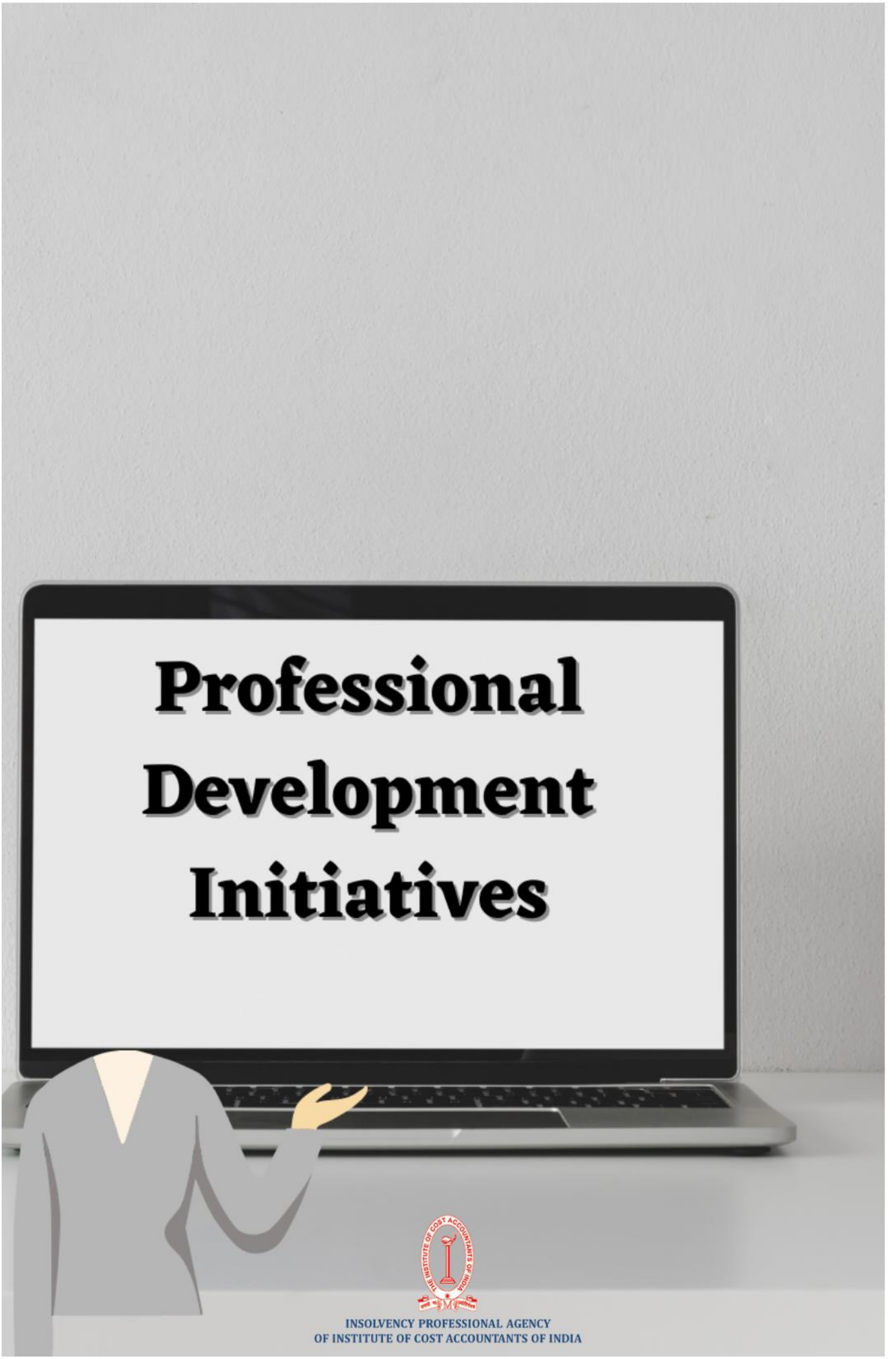
CEO MESSAGE

The enactment of the code has helped to enforce discipline in the country's credit culture. IBC has created a credit culture that discourages defaults. There has been a change in the business culture as well: there is now an understanding that when things go wrong, companies will not get an automatic rescue package from the taxpayer funds. The objective of IBC was to create conditions so that credit could be generated from the domestic market and investments drawn from the international market. In order to achieve those objectives, it was necessary to create a culture of deterrence against default**.** The practice of dragging lenders to court to delay the repayments of outstanding loans is slowly coming to and end. India's Insolvency and Bankruptcy Code is ensuring that lenders get repaid on time and this is making India a more attractive investment destination.

Prior to IBC the lack of an effective resolution framework discouraged lenders from lending their money because they were unsure of their recovery of debt which in a way reduced finance availability and in turn supported only a fewer viable project. The culture of not paying back loans and getting away without any punishment had to be broken. If IBC was not there, the borrower would have no incentive to repay. As a percentage of claims, banks recovered on average 42.5% of the amount filed through the IBC in the financial year 2018-19, against 14.5% through the Sarfaesi resolution mechanism, 3.5% through Debt Recovery Tribunals and 5.3% through Lok Adalats. Against Rs 1.66 lakh crore claims involved under IBC, the recovery was Rs 70,819 crore.

Barely one in 18 companies undergoing liquidation have been fully dissolved under the process. And more than a third of the 955 such companies breach the statutory timeline of one year for dissolution under the Insolvency and Bankruptcy Code. That's according to the latest report of the Insolvency and Bankruptcy Board of India. Delays to liquidation can reduce the realizable value of such assets. Delays to liquidation can reduce the realizable value of such assets.

To address the issue, the bankruptcy regulator has proposed that liquidators must be allowed to assign the beneficial interest in these assets to third parties. Creditors, too, must be allowed to transfer their debts during liquidation and move on without awaiting the final sale.



INSOLVENCY PROFESSIONAL AGENCY
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EVENTS

OCTOBER,2020	
DATE	**EVENTS**
03rd October, 2020	Roundtable on CIRP Form – Personal Guarantors to Corporate Debtors
03rd October, 2020 to 05th October, 2020	Preparatory Education Course on Limited Insolvency Examination (Virtual)
10th October, 2020 to 16th October, 2020	Pre-Registration Educational Course
16th October, 2020 to 18th October, 2020	Master Class on Personal Guarantors to Corporate Debtors

IBC AU COURANT

Updates on insolvency and bankruptcy code

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INSOLVENCY PROFESSIONAL AGENCY
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ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
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VOLUNTARY LIQUIDATION UNDER IBC 2016

Satyanarayana Veera Venkata Chebrolu
Insolvency Professional

Voluntary liquidation is the process of liquidating the company with the approval of its members. While insolvent companies can choose for exit section 10 of the Insolvency and Bankruptcy Code 2016 via CIRP later liquidation, solvent companies have the advantage of choosing voluntary liquidation for exit as per section 59 of the IBC 2016.

Companies choose exit due to so many reasons which includes funds stuck into non-operational company, Non commencement of business, completion of the project or object for which the company has been formed, not carrying on business operations etc.

As per the statistics given by IBBI in their quarterly journal for the quarter ending June 2020, while 692 cases of voluntary liquidation were admitted till June 30, 2020, the reasons for these initiators are available for 678 cases which are as under:

Sl.No.	Reason for voluntary liquidation	No. of corporate persons
1	Not carrying business operations	451
2	Commercially unviable	81
3	Running into losses	15
4	No revenue	24
5	Promoters unable to manage affairs	15
6	Purpose for which company was formed accomplished	14
7	Contract termination	5
8	Miscellaneous	73
	Total	**678**

Details of 684 liquidations: (excludes 8 withdrawals)

(Rs. In crores)

S.No.	Details of	No.of liquidations	Paid- up capital	Assets
1	Liquidations for which final reports submitted	250	845	3091
2	Ongoing liquidations	434	3798	1693
	Total	**684**	**4643**	**4784**

It is stated that most of these corporates' persons are small entities. 429 of them have paid up equity capital of less than Rs.1 crore. Only 84 of them have paid up capital exceeding Rs.5 crores.

The voluntary liquidation cases, of late, is observed during the last year increasing every quarter. During the quarter ending March 2020 new voluntary liquidations commenced in respect of 89 companies compared to 66 during the earlier quarter ending December 2019.

However, during the quarter April-June 2020, voluntary liquidation commenced only in respect of 10 cases which can be attributed due to COVID-19 situation.

Under voluntary liquidation the powers of the Board of Directors shall not cease and continue even during the period of liquidation. Further the liability of the directors shall not continue after dissolution of the company as against in respect of other modes of closure or exit of the company.

Initiation and process of voluntary liquidation:

As per Section 59 of the IBC Code read with the Regulations corporate person did not commit any default may initiate a voluntary liquidation proceeding by complying with the following conditions:

1. A declaration by majority of the directors of the company verified by an affidavit stating that:

(i) they have made full enquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full out of the sale proceeds of its assets to be sold under voluntary liquidation and

(ii) the company is not being liquidated to defraud any person.

2. Such declaration to be accompanied by the following documents.

(i) audited financial statements and record of business operations of the corporate person for the previous two years or for the period since its incorporation, whichever is later

(ii) Valuation report of the assets of the corporate person, if any, prepared by a registered valuer;

3. The members of the company as per section 59(3)(c) shall within four weeks of declaration of solvency

(i) **To Pass special resolution:** In general situation **a**pproving the proposal of the company to be liquidated voluntarily and appointing an Insolvency Professional to act as liquidator or

(ii) **To pass ordinary resolution:** As result of expiry of the period of duration of company, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator.

If the company owes any debt to any person then it needs to obtain their approval or consent, which can be by way of letters, representing two third in value of the debt of the company within seven days of the passing of the resolution. If the company is not able to get consent from the creditors, the resolution passed will not have any validity.

Once approval of the creditors is obtained, the voluntary liquidation proceedings in respect of can be deemed to have commenced from the date of passing the resolution.

The corporate person shall intimate ROC within 7 days of such resolution in e-form MGT-14 about such resolution to liquidate the corporate person or the subsequent approval by the creditors as the case may be.

Further the company to intimate IBBI regarding initiation of Voluntary Winding up within 7 days of approval of liquidation of Company or subsequent approval by the creditors owing 2/3rd of the Value of the Debt of the corporate person as the case may be.

Appointment of liquidator:

The corporate person shall appoint an insolvency professional as liquidator while passing resolution of the company, as sated above for voluntary liquidation.

Further, wherever required, the corporate person may replace him by appointing another insolvency professional as liquidator, by passing a resolution on such terms and conditions, including the remuneration payable to liquidator as per the amendment dated 05.08.2020 to regulation 5 of Voluntary liquidation process.

The insolvency professional shall within 3 days of his appointment as liquidator intimate the Board about such appointment as per Reg. 5(2).

Functions of the liquidator in voluntary liquidation:

The liquidator has a key role to play in the voluntary liquidation process. The entire voluntary liquidation process is controlled by the liquidator. Liquidator to follow the provisions contained in section 59 of IBC 2016 besides the provisions in section 35 to 53 of chapter III of part II and voluntary liquidation process regulations.

1. **Public Announcement**: As a first step the liquidator is to make public announcement in Form A of schedule I of the regulations within 5 days of his appointment inviting stakeholders i.e. the stake holders entitled to proceeds from the sale of liquidation assets, to submit their claims within 30 days.

2. **Opening Bank account**: As per regulation 34, the liquidator to open a bank account in the name of the corporate person followed by the word ' in voluntary liquidation' in a scheduled bank for receiving the amount due to the corporate person. The money in the credit of bank account shall not be used for any purpose except as mentioned in section 53(1) of the code.

3. **Intimation to Income Tax Department**: Within 30 days after becoming liquidator a notice as to commencement of liquidation and his appointment to be given to the Income tax Authority as per the provisions of section 178 of Income tax Act, 1961 and to obtain 'No objection certificate'.

4. **Preliminary report**: As per Regulation 9 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) the liquidator shall submit a preliminary report to the corporate person within 45 days from the liquidation commencement date detailing the capital structure of the company, the estimate of its assets and liabilities as on the date of liquidation based on the books of the company, whether he intends to make any further enquiry into any matter and proposed plan of action for carrying out the liquidation.

5. **Verification of claims and preparation of list of stake holders:**

The liquidator on receipt of claims shall verify the claims received within a period of thirty dates from the last date by which claims were required to be submitted by the creditors.

After verifying the received claims, the liquidator shall prepare a list of stakeholders on the basis of proofs of claims submitted and accepted under the regulations. The list shall be prepared within forty-five days from the last date of receipt of claims.

6. **Realisation of assets of the corporate person and distribution of realised proceeds:** The liquidator shall endeavour to recover and realize all assets and dues of the corporate person in a time bound manner for maximization of value for the stakeholders. The liquidator shall call the uncalled capital of the corporate person and to collect the arrears if any due to calls made prior to the liquidation commencement date.

The liquidator shall distribute the proceeds from realisation within 6 months from the receipt of the amount to the stakeholders. The liquidation costs shall be deducted before such distribution.

During the distribution of assets if the liquidator comes across any asset that cannot be readily or advantageously sold due to its peculiar nature or any other condition then the liquidator can with the approval of corporate person distribute the same amongst shareholders.

7. **Undistributed proceeds**: As per regulation 39 (2) liquidator shall deposit the amount of unclaimed dividends, if any, and undistributed proceeds, if any, in the liquidation process along with any income earned thereon till the date of deposit, into the Corporate Voluntary Liquidation Account, which is operated and maintained by the Board, within 15 days and before he submits an application under sub-section (7) of section 59.

8. **Completion of liquidation**: In terms of regulation 37, the voluntary liquidation process shall be completed by the liquidator within a period of twelve months to be counted from the liquidation commencement date. The liquidator shall make his best endeavour to complete the liquidation process within the provided duration of twelve months.

If the liquidation process continues for more than twelve months, then in such a situation the liquidator shall convene a meeting of the contributories within a period of fifteen days and thereafter every twelve months till the dissolution of the corporate person.

The liquidator shall present an Annual Status Report(s) indicating progress in liquidation, to which audited accounts of the liquidation to be enclosed, showing the receipts and payments pertaining to liquidation from the commencement date. The annual status report shall include settlement of list of stake holders, details of asset that remain unsold and realised, distribution made to stakeholders, developments in material litigation by or against corporate person and filing of and developments in applications for avoidance of transactions in accordance with Chapter III of Part II of the code.

9. **Preparation of final report:** On completion of the liquidation process the liquidator shall prepare a final report incorporating the audited accounts of the liquidation, a statement

demonstrating that the assets of the corporate person has been disposed of, the debt of the corporate person discharged and a statement of sale.

Once the report is prepared by the liquidator, it shall be sent to the concerned registrar of companies in e-form GNL-2 and to the Insolvency and bankruptcy Board of India as well. The final report to be submitted to the Adjudicating Authority i.e. NCLT along with application for dissolution under section 59(7) of IBC 2016.

10. **Application for dissolution of the corporate person:** The Adjudicating Authority - NCLT shall on an application filed by the liquidator pass an order for the dissolution of the Company.

Copy of such order to be filed as attachment to e-form INC-28 with the Registrar of Companies (ROC) within 14 days from the date of order, to get reflected the name of the corporate person in the Master data as 'dissolved'.

The liquidator shall maintain registers and books, as may be applicable, as per the regulation 10(2) in relation to the liquidation process of the corporate person. Liquidator has to preserve all the reports, records, registers and books of accounts either in physical or electronic form for a period of 8 years after the dissolution of the Company either with himself or with an Information Utility.

To conclude the process of voluntary liquidation provided under the IBC is relatively simpler, independently driven by the liquidator and time bound making closure of solvent companies smoother.

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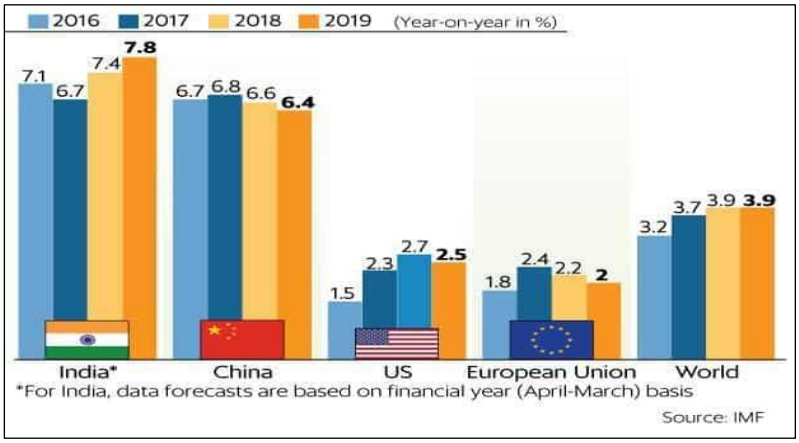
ECONOMIC REVIVAL -ROAD AHEAD

Bibek Chowdhury
Insolvency Professional

Prior to the COVID-19 pandemic, India was on an upward economic curve. As per IMF data, its GDP growth was 7.8% last year against the world's GDP growth of 3.9 %, a testimony to India's ascend to be Asia's most formidable economic force. The credit of this success goes to the relatively young population, brimming with potential for a breakthrough in the coming years. The GDP growth is clearly visible in the graph published by IMF.



Unfortunately, the pandemic hit the Indian economy unexpectedly, far more than any other event in the 21st century. Let's deep dive to know more about this unforeseen economic crisis and possible solutions to mitigate this situation.

The GDP growth is negative 23.9% in the 1st Quarter April-June of Fiscal Year 2021. The components of this GDP decline are Manufacturing, Service and Agriculture excluding MSMEs; the first two being the major contributors to the negative slide.

Government had been able to keep the situation under control for the agriculture sector as of now; not considering the latest Farmer bills introduced. But for the other sectors, especially for MSMEs, government help has been minimal. Majority of MSMEs cannot sustain due to their low net worth/cash flows, and their heavy dependency on the fluctuating demand-and-supply chain. Majority of these micro companies may not even have debts in their Balance Sheet and run by their own funds; which doesn't give an easy inlet for government relief like in case of Agricultural loan waiver.

Due to the lockdown, the demand-supply chain has broken, and the consumer's purchasing power have been dented heavily. The closing of travel, tourism and non-essential retail have impacted MSMEs the most. The biggest challenge is survival of these MSMEs, for sustainability

of the economy. MSMEs have built the foundation for India's largely unheeded manufacturing industry, and it is time for them to come to spotlight for government aid and push for growth.

To come to concrete solutions for reviving the MSMEs in this pandemic, the government must first take cognizance of the current situation. Till now the MSME ministry have no data on how many small and medium businesses have closed during pandemic; this is distressing to the already struggling and largely ignored manufacturing sector. These businesses need the recognition and tracking their activity on a large scale will help predict and mitigate any economic disaster that may gravely affect the MSMEs. Secondly, all establishments having loans with the financial institutions should be given relief; these reliefs should be in proportion to their contributions to the economy through Average Direct and Indirect Taxes payments during last three years. The relief could be in any form; either as increase period of repayment or decrease in rate of interest. For the debtless MSMEs not having funds to restart their businesses, they should be funded through disbursing working capital loans.

For the other aspects that indirectly affect the MSMEs, some more measures need to be implemented for the overall health of the economy. To implement the solutions the financial institutions need capital. This is also a big challenge as the current NPAs are sky rocketing. Here, the government must help recapitalising these institutions. Secondly, much of the population have cash crunch, may be zero cash, in hand; as a result, the demand in the economy has plummeted. The government must print currency and circulate those in the economy through employing this population in various infrastructure projects.

India has immense potential to come out of this rut. Once the Government recapitalise the banking institutions, print currency and start generating employments through infrastructure projects, the funds will be available in the market. This will ensure the gradual growth in demand which will encourage the manufacturing and service sector, thereby improve the purchasing power of the community. In the end, a well-balanced economic growth must include growth in all the 3 sectors: agriculture, manufacturing and service. The pandemic provides some great lessons for the Indian economy to focus on sustainability rather than great numbers; let's hope that the government looks forward to formulating new policies that aids a steady irreversible growth

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IMPORTANCE OF PF /PENSION/GRATUITY UNDER IBC

Mr. Lakkaraju Srinivas

Advocate & Insolvency Professional

In this article we are going to discuss what is the importance of PF/Pension /Gratuity etc under IBC. Whether these funds are included in the liquidation estate and distribute to the claimants as per Section 53 or these funds are outside the scope of liquidation estate. If these assets are outside, what is the reason? What is the status of these funds in the waterfall mechanism? If there is an attachment on the assets of the Corporate Debtor, before commencement of CIRP what is that Resolution Professional has to do? Whether Section 238 will prevail in such case? If the employer is not contributing his share of contribution, then in such case what liquidator has to do? All these questions were discussed in this article and this article tries dispelling the doubts on the above questions

There are conflicting judgements on the subject by the various benches of the National Company Law Tribunal relating to the status of the Provident fund dues under the Insolvency and Bankruptcy Code 2016 led to lot of confusion on the subject among the stakeholders and also among the Insolvency Professionals and Liquidators as a result these Professionals are not adhering to the guidelines of the code

1. Whether PF/Pension etc. are included in the liquidation Estate?

For discussing the above question, first we have to analyse the Section 36. The Liquidator must acquaint himself with the records of the corporate debtor such as financial statements, fixed assets register, income tax returns, and records available with information utility, records of registry, information available with Registrar of Companies and records of depository to ascertain the assets owned by the corporate debtor. The Section 36 of the Code says that certain assets are not included in the liquidation Estate .Before analysing this Section, one thing is to be kept in mind is that the assets of the Corporate Debtor over which Ownership right are not there, are not included in the liquidation estate .

The Section 36 will have five subs –sections. 36 (4) (a) (i) says that if an asset is lying in trust with Corporate Debtor for the benefit of the third party are excluded from the liquidation estate. Under 36(4) (a) (ii) says that the bailment contracts. Suppose any person under contract of bailment has delivered certain goods to the corporate debtor for a specific purpose and after accomplishment of that purpose the goods will be returned to the owner. In such case even

though goods are in the possession of the Corporate debtor but he does not have any ownership rights over the assets. Hence such assets are excluded from the liquidation estate. Under Section 36 (4) (a) (iii) the dues payable to workmen and employees from the Pension fund, PF fund and gratuity fund are not included in the liquidation estate because these assets are belonging to workers and not the assets of the Corporate Debtor. Under Section 36(4) (a) (IV) says that goods transferred to the corporate debtor under contractual arrangement. Under this contract, title on the assets will not be transferred. Only assets will be transferred for the purpose of usage. In such case, these assets are not included in the liquidation estate because the corporate debtor is not the owner for these assets. Under Section 36(4) (a) (v) which says that any asset notified by the Central Govt in consultation with Financial Sector regulator will not be included in the liquidation estate.

2. Why PF/Pension / Gratuity etc were excluded from liquidation estate?

Pension /PF /Gratuity are the assets belonging to the Workers. The amounts due under Employees Provident funds and Miscellaneous Provisions Act, 1952 are statutory dues ultimately owed to the Workers. It forms an intrinsic part of their right to life. These are assets of the workers in the hands of Corporate Debtor. It is an accepted view that the workers due to their lower socio-economic backgrounds do not necessarily understand the complexities of Insolvency proceedings and consequently remain more exposed to the bankruptcy of the corporate debtor. Sometimes Strategic bankruptcies may be used as a way of unscrupulous employers to evade the statutory dues and to re-negotiate the wages and other rights of the workers. Strategic bankruptcy means a business unit declares bankruptcy without actually being insolvent. Strategic bankruptcy occurs where bankruptcy is a strategic choice rather than an unavoidable condition. So strategic bankruptcy method will be used by the unscrupulous Promoters to evade the payment of statutory obligation of payment of PF/ Pension etc. . . .Hence the Govt of India has felt that there is an need to incorporate sufficient safeguards for payment of Provident fund and allied dues. Hence the Section 36 (4) was introduced to safeguard the payment of Provident fund and allied dues. According to the Section which provides that the assets owned by a third party which are in possession of the Corporate Debtor are excluded from the liquidation estate. In the case of PF, employee contributes some portion from his salary towards PF balance and the matching contribution should come from Employer. Hence the amount deducted from the salaries of the employees will lie with the employer; therefore, these are the assets of the workmen and which are in the possession of the employer. Therefore, the balances of PF and allied dues are excluded from the liquidation estate.

In the case of Karpagam Spinners, the Regional Provident Fund Commissioner, Tirunelveli filed an appeal to direct the resolution Professional to drop the categorisation of the Provident fund dues under Section 53 (1)(f) of the code. Hon'ble NCLT Chennai bench dismissed it and stating

that the liquidator has correctly recorded the verification and admission of the claim of the applicant. This is against the provisions of the code.

3. <u>If the Employer is not contributing his share towards the PF what would be the position?</u>

The Corporate Debtor is supposed to contribute these statutory dues in time. It is a statutory obligation on the part of the corporate debtor. If the Corporate debtor is not remitting his share of the contribution, then in such case these assets are lying with the corporate debtor in the form of Current Assets. So, these assets are though lying with corporate debtor but corporate debtor is not the owner of the assets. These assets are belonging to the workers. So assets belonging to the third party lying in the hands of the corporate debtor are to be excluded from the liquidation asset. Immediately on the commencement of CIRP, the powers of the Board of Directors will be suspended and it will be lying in the hands of IRP /RP as the case may be. As per Section 17(2) (e) provides that the IRP will be responsible to comply all the statutory obligations while managing the operations of the Corporate debtor. So if the IRP has taken over the corporate debtor as a going concern, then IRP has the responsibility to remit PF and allied dues within the timeline

<u>What is the position if the corporate debtor has not provided or deficiency in the fund?</u>

In the case of M/s Alchemist Asset Reconstruction Co Ltd Vs. Moser Baer (India) ltd it was held that even if there is any deficiency to the Provident fund, Pension fund, and Gratuity fund than the liquidator shall ensure that the fund is made available in the aforesaid accounts, even if the employer has not diverted the requisite amount

The Hon'ble National Law Appellate Tribunal, New Delhi in a case of the liquidator of Lanco Infratech ltd Vs Apalla Siva Kumar held that where no fund is created by a company, in violation of the statutory provision of the payment of Gratuity Act 1972, then the liquidator cannot be directed to make payment of gratuity to the employees. It is opined that Liquidator has no domain to deal with the properties of the corporate debtor which are not part of the liquidation estate .This sort of ruling run against the provisions of the Code.

<u>Do these funds will have priority?</u>

The Code deliberately and expressly provide that the Provident fund and allied dues arrears Away from the liquidation estate .These dues are well protected under Section 36 of the Code. The Resolution Professional can take control and custody of these assets under the Provisions of the EPF & MP Act 1952. In other words, these dues should be paid on priority

Well before the commencement of the liquidation process itself. Every amount owed by an Employer in respect of the employee's contribution is considered to be the first charge on The assets of the entity and is payable in preference to all other debts. As per section 11(2) of the employees provident fund and Miscellaneous provisions Act contains a non-obstante clause laying down that if an amount is due from an employer whether in respect of the employees contribution deducted from the wages of the employees or the employers contribution, the same shall be deemed to be the first charge on the assets of the establishment and shall not withstanding anything contained in any other law for the time being in force, be paid in priority to all other debts

Pension and allied dues come within the liquidation estate?

The matter of whether these funds come within the meaning of liquidation estate or not was decided in the case of State bank of India Vs Moser Baer Karamchari Union. In this case the liquidator instead of paying these funds in preference but included in the liquidation estate and decided to make payments under the waterfall mechanism under section 53 of the code. But the workers union pleaded for direction to exclude the amount due to them towards Provident fund and pension fund from the purview of the liquidation estate. NCLT New Delhi bench has decided the matter in favour of the workers union. SBI has preferred an appeal against the decision of Hon'ble NCLT New Delhi. The Appellate Tribunal has confirmed the decision of lower court and held that these funds are outside the purview of the liquidation estate

In case corporate debtor is not contributing towards PF and if there are no funds, what is the duty of the liquidator?

It is the statutory obligation cast upon the Corporate Debtor to contribute the amount towards PF and allied dues. But the Corporate debtor has failed in his statutory Obligation, in such case the liquidator has taken the possession of the liquidation estate which does not include the PF and allied dues which are assets of the workmen and linked with right to life because the workmen has contributed his share from their life savings out of hard earnings with expectation that the amount can be obtained after their retirement. If this amount is included in the liquidation estate is nothing but diluting most valuable and inalienable right of a person right to life. So the dues of the workmen cannot be treated at par with Creditors of the corporate debtor. Hence these funds are not included in the liquidation estate. These funds are superior to the liquidation estate. These funds payable by the corporate debtor are first liquidated before any amount pay to other creditors as per section 53 of the code. In such case the duty of liquidator to honour the statutory obligation of making payment towards PF and other allied dues is very difficult when the assets are less than the liabilities.

To mitigate this problem, section 2 A was introduced. This section must read with synchronisation with regulation 39 B of CIRP regulations. As per regulation 39 B while approving a resolution plan or deciding to liquidate the corporate debtor, the committee of Creditors (COC)

may make a best estimate of the amount required to meet liquidation costs in consultation with the resolution professional in the event a liquidation order is passed by the adjudicating authority. Along with the estimated costs, the COC shall also make a best estimate of value of the liquid assets available to meet the estimated costs. In case estimated costs are in excess of the available liquid assets, the COC shall approve a plan providing for contribution for meeting the difference between the two. Such plan is to be submitted by a resolution Professional to the adjudicating authority along with the submission of resolution plan or decision of COC to liquidate the corporate debtor. Once the plan is approved by Adjudicating authority it will be binding on all stake holders who are involved in the resolution plan. The Section particularly speaks about the liquidation costs hence PF and allied dues are not covered here.

Hence if there is no money is available for making contribution to PF and other allied dues, the liquidator can ask for contribution from the secured financial creditors. Secured Creditors can make contribution on only one reason that these payments rank high in order of priority to all other debts. There is no obligation on the part of Secured Creditors to contribute. In case they are not contributing, then the liquidator can make this contribution from liquidation estate in priority to payment to liquidation costs or the liquidator can look to regulator for providing sufficient resources for meeting this statutory obligation under Section 224 of the Code.

What is Section 224 of the IBC?

Under the Section 224, a fund was formed under the name Insolvency and Bankruptcy Fund for the purpose of insolvency resolution, liquidation and bankruptcy of persons under the Code

Is damages and interest components are included in dues?

This was decided in the case of Tourism Finance Corporation of India ltd Vs Rain bow Papers ltd and others and held that dues includes the damages and interest component also by the NCLAT New Delhi as per Section 7 Q and Section 14-B of the Employees Provident funds and Miscellaneous Provisions Act 1952 in view of the reason that these are workmen assets and out of purview of the liquidation estate. Since outside scope of liquidation estate, IBC is not applicable and accordingly Section 238 of the code is not applicable.

The Section 238 of the Code is applicable on only two conditions

1. The Provisions of the Code should apply to the matter in question first
2. There should be a inconsistence between the two acts

Here IBC does not apply to the dues of the workmen in respect of PF and allied dues which are outside the scope of the liquidation estate and hence overriding effect of Section 238 does not applicable to the assets of the workmen

Is Section 14 is applicable for the prior attachments made by EPF authorities?

The Section 14 (1) (a) bar against the institution or continuation of suits or any legal proceedings against a corporate debtor on declaration of moratorium by the Adjudicating Authority. The bar provided under this section is against all types of proceedings or limited to certain proceedings only. The term was interpreted by Delhi High court in Power Grid Corporation of India ltd Vs. Jota Structures ltd it was held that proceedings does not mean all proceedings. The Proceedings against the recovery of dues from the Corporate debtor only included and other proceedings are not included .The Apex court held in the matter of Rabindra Chamrior Vs Registrar of Companies the directors of the company are responsible for the acts of violations of the provisions of EPF & Miscellaneous Act.

In the case of Assistant Provident Fund Commissioner & Recovery Officer, EPFO Vs Florind Shoes Private limited and another it was held by NCLT Chennai Bench that liquidator can sell the assets of the Corporate debtor and pay off the dues payable to the EPF depart before distributing the assets as stated under section 53 of the Code

Similarly in the matter of M/s Sholingur Textiles ltd, the NCLT New Delhi held that the attachment of assets of the Corporate debtor made by the statutory authorities under their laws, before the Commencement of moratorium is legally valid . On appeal also NCLAT has reiterated that mere registering of encumbrance on a property already under attachment will not tantamount to violation of the moratorium

Disclaimer: The entire contents of this article have been prepared based on relevant provisions and as per the information existing at the time of the preparation. Although care has been taken to ensure the accuracy, completeness, and reliability of the information provided, I assume no responsibility, therefore. Users of this information are expected to refer to the relevant existing provisions of applicable Laws. The user of the information agrees that the information is not professional advice and is subject to change without notice. We assume no responsibility for the consequences of use of such information. This is only a knowledge sharing initiative and the author does not intend to solicit any business or profession.

CAN A SUCCESSFUL RESOLUTION APPLICANT TAKE A "U TURN" FRUSTRATING CORPORATE INSOLVENCY RESOLUTION PROCESS??

Puneet Dhawan
Insolvency Professional

National Company Law Appellate Tribunal ("**NCLAT**") while super- scribing the decision of National Company Law Tribunal, New Delhi Bench in **"Kundan Care Products Ltd. v. Amit Gupta"**[1], observed that a successful resolution applicant whose Resolution Plan stands approved by Committee of Creditors cannot be permitted to withdraw its resolution plan thereby altering its position to the detriment of various stake holders.

Facts of the case:

During the CIRP of the Corporate Debtor, the resolution plan submitted by Kundan Care Products Ltd./ successful resolution applicant, ("**Appellant**") was approved by the CoC of the Corporate Debtor and accordingly an application under Section 30(6) of the IBC read with 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") was filed by the RP before the NCLT, seeking approval of Appellant's resolution plan.

In the meanwhile, due to pending proceedings before the Supreme Court of India, there was delay in hearing the resolution plan approval application filed by the RP by the NCLT. Resutantly, the Appellant filed an application before the NCLT seeking withdrawal of its resolution plan on the basis that the resolution plan has become commercially unviable and unfit for implementation.

NCLT's order in withdrawal application:

The NCLT vide order dated July 3, 2020 rejected the request of the Appellant to withdraw its resolution plan holding that it lacks the jurisdiction to permit withdrawal of the resolution plan once approved by the CoC of the Corporate Debtor. The NCLT further observed that since a

[1] Kundan Care Products Ltd. v. Mr. Amit Gupta & Ors. [Company Appeal (AT) (Insolvency) No. 653 of 2020 decided on September 30, 2020]

matter on similar ground is pending before the Supreme Court, it shall not be appropriate for the NCLT to deal with the said issue.

Appellant assailed the impugned order rejecting the prayer of withdrawal application of its resolution plan and refund of the Performance Bank Guarantee before the NCLAT.

Arguments on behalf of Appellant:

1. Appellant submitted that there is no basis or justification for the finding that the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 has no power or jurisdiction to allow withdrawal of a Resolution Plan post approval from the Committee of Creditors (for short 'CoC').

2. Appellant further contended that the Code does not contain any provision to compel the specific performance of a Resolution Plan by an unwilling Resolution Applicant and a plea for withdrawal of a plan will have to be accepted, if the plan is found to be unviable, unfit for implementation or is either lacking provisions for its successful implementation or is based on incorrect assumptions.

3. Lastly it was argued that that in the instant case, the approved Resolution Plan has been rendered commercially unviable on account of delay in conclusion of CIRP and the Appellant could not be prevented from withdrawing the same.

Argument on behalf of Respondent No.1 ('Resolution Professional'):

1. It was put forth by the Resolution Professional that the Appeal is not maintainable in view of the same being squarely covered by the judgment of Appellate Tribunal rendered in

"Committee of Creditors of Educomp Solutions Ltd. vs. Ebix Singapore Pte. Ltd. & Anr.[2]" wherein it was held that after approval of the Resolution Plan by the Committee of Creditors the Adjudicating Authority has no jurisdiction to entertain or permit the withdrawal application filed by the Resolution Applicant and that Adjudicating Authority cannot enter into the arena of the majority decision of the Committee of Creditors.

2. Another point raised was that there is no provision in the Code which allows withdrawal of an approved Resolution Plan and provisions in the Regulations for submission of Performance Bank Guarantee by a Resolution Applicant while submitting its Resolution Plan is a provision to discourage the Resolution Applicant from withdrawing its Resolution Plan.

[2] Company Appeal (AT) (Insolvency) No. 203 of 2020

3. It lastly submitted that the Resolution Plan of Appellant was approved in preference to two other Resolution Applicants for maximizing the value of Corporate Debtor and the Appellant cannot be permitted now to scuttle the Corporate Insolvency Resolution Process of the Corporate Debtor by walking away from its Resolution Plan which will have the effect of pushing the Corporate Debtor into liquidation.

Argument on behalf of Respondent No. 2 (Committee of Creditors)

The Respondent No.2 (Committee of Creditors) re-iterated the arguments of the Resolution Professional that the I&B Code does not prescribe any provision for withdrawal of Resolution Plan by the Resolution Applicant and the Adjudicating Authority is not bestowed with any power to allow withdrawal of the Resolution Plan.

Analysis & Decision:

The NCLAT while referring to the decision of the Supreme Court of India **in "*K. Shashidhar v. Indian Overseas Bank & Ors.*"** [3] held that an adjudicating authority does not have the requisite jurisdiction to permit a withdrawal of a resolution plan and that the intervention of an adjudicating authority to the decision of the COC in approving the Appellant's resolution plan is only limited to ensuring compliance of the resolution plan to that of Section 30(2) of the IBC.

The argument advanced on behalf of the Appellant that there is no provision in the I&B Code compelling specific performance of Resolution Plan by the Successful Resolution Applicant WAS repelled on four major grounds:

i. There is no provision in the I&B Code entitling the Successful Resolution Applicant to seek withdrawal after its Resolution Plan stands approved by the Committee of Creditors with requisite majority;
ii. The successful Resolution Plan incorporates contractual terms binding the Resolution Applicant, but it is not a contract of personal service which may be legally unenforceable;
iii. The Resolution Applicant in such case is estopped from wriggling out of the liabilities incurred under the approved Resolution Plan and the principle of estoppel by conduct would apply to it;
iv. The value of the assets of the Corporate Debtor is bound to have depleted because of passage of time consumed in Corporate Insolvency Resolution Process and in the event of Successful Resolution Applicant being permitted to walk out with impunity, the Corporate Debtor's depleting value would leave all stake holders in a state of devastation.

[3] (2019) SccOnline SC 257

The NCLAT further negated the reliance placed by the Appellant on the judgment passed in the matter ***Committee of Creditors of Metalyst Forging Ltd. v. Deccan Value Investors LP & Ors.***[4]**,** and observed that in the said case, the unwilling resolution applicant was not compelled to specific performance of the resolution plan, as the resolution plan approved by the COC was held to be in violation of Section 30(2)(e) of the IBC. However, in the present case, since the Appellant's resolution plan is pending approval of the adjudicating authority, the reliance placed by the Appellant on the *Deccan Value* judgment was held by the NCLAT to hold no value in the circumstances of the present case.

In view of the above, the NCLAT opined the appeal devoid of any merits and dismissed the same.

Views:

The decision rendered by the Appellate Authority is in consonance with the judgment passed by the NCLAT in the matter of *Educomp Solutions*[5], and reaffirms the stand while upholding the sanctity of the IBC Code and its evolution. The NCLAT has made it clear that a successful Resolution Applicant cannot be allowed to take a U Turn once the Resolution Plan stands approved by Committee of Creditors as the same would lead to disastrous consequences for the Corporate Debtor which may be pushed into liquidation as the CIRP period may by then be over thereby setting at naught all possibilities of insolvency resolution and protection of a Corporate Debtor, more so when it is a going concern.

4 Company Appeal (AT) (Insolvency) 1276 of 2019

5 Supra 2

MICRO, SMALL AND MEDIUM ENTERPRISES

Gopinath Jaichandran
Insolvency Professional

The spread of novel COVID-19 pandemic has left an adverse impact on economies around the world. India being one of the most promising nations in terms of economic development and growth has seen a loss greater than ever. Micro Small and Medium enterprises in particular have been the worst casualty of Covid-19 induced lockdown. Considering the halt in economic activity over the past few months, it is incomprehensible that a vast number of MSMEs will be crushed, perhaps to the point of permanent closure. As a counter measure, the government has taken steps not only to facilitate supply of sufficient credit but also the revival of the stressed enterprises through an effective insolvency framework. Hon'ble Finance Minister in her announcements under the "Atma Nirbhar Abhiyaan" announced the suspension of initiation of fresh Insolvencies for Bharat all defaults arising post 25th March, 2020 for succeeding 6 months or such further period not exceeding one year from such date and a special Insolvency Resolution framework for MSME under Section 240A of the IBC

10A. Suspension of initiation of corporate insolvency resolution process.

Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf. Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period. Explanation - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March 2020

Definition of Micro, Medium and Small Enterprises.

MSME(s) are governed and regulated by The Micro, Small and Medium Enterprises Development Act, 2006. The said act has been enacted to provide for the facilitation, promotion, development and enhancement of the competitiveness of MSME(s). The MSMED Act categorized MSME(s) into two classes

1. **Manufacturing Enterprises:** These MSME(s) are engaged in the production or manufacturing of goods in any industry.

2. **Service Enterprises:** These MSME(s) are engaged in providing services.

The definition and criteria of MSME(s) is provided under the MSMED Act. Earlier the criteria for classification of MSME was provided as under:

Old MSME Classification in terms of MSMED Act 2006			
Criteria: Investment in Plant & Machinery or Equipment (Section 7 of MSMED Act 2006)			
Classification	**Micro**	**Small**	**Medium**
Manufacturing Enterprises	Investment<Rs.25 Lakhs	Investment<Rs.5 Crores	Investment<Rs.10 Crores
Services Enterprises	Investment<Rs.10 Lakhs	Investment<Rs.2 Crores	Investment<Rs.5 Crores

Revised MSME Classification as per Gazette Notification dated 26.06.2020			
Criteria: Investment and Annual Turnover			
Classification	**Micro**	**Small**	**Medium**
Investment	Investment<Rs.1 Crore	Investment<Rs.10 Crores	Investment<Rs.50 Crores
Turnover	Turnover<Rs.5 Crores	Turnover<Rs.50 Crores	Turnover<Rs.250 Crores

The Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 is a comprehensive legislation providing a framework for resolution of insolvency and bankruptcy of corporate persons, LLP, individuals, partnerships and sole proprietorship firms however, rules are only notified for corporates and personal guarantors to Corporate Debtors. As most of the MSMEs are partnership or proprietorship firms. They have to resort to the standard Corporate Insolvency Resolution

Process. However, these enterprises have been excluded from the implication imposed by section 29 A of the code. Meaning thereby, the promoters of the defaulting MSME aren't barred under section 29A to bid for the enterprise.

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018

MSMEs occupy a very significant and important position in the Indian economy and therefore, due preservation and creation of more MSMEs are to be encouraged. Incentives should be granted to these business units as they are the bedrock of our economy. In consideration of all views the best approach to encourage MSMEs and provide them relief is to exempt or relax applicability of certain provisions under the regular insolvency process.

The due protection and preservation of rights in case of MSMEs will encourage entrepreneurs to enter and continue with their business by eliminating their fear of being targeted by fraudulent people, thereby benefiting the economy. The introduction of Section 29A has not only brought a change in the corporate insolvency resolution process but, it also brought within its wake various aspects having economic effect. In the present economic scenario the limited relief granted to the MSME under IBC regime is in line with our economic policy of protecting, preserving and promoting entrepreneurship in India."

240A. Application of this Code to micro, small and medium enterprises. –

(1) Notwithstanding anything to the contrary contained in this Code, the provisions of **clauses (c) and (h) of section 29A shall not apply to the resolution applicant** in respect of corporate insolvency resolution process of any micro, small and medium enterprises.

(2) Subject to sub-section (1), the Central Government may, in the public interest, by notification, 1 Ins. by Act No. 26 of 2018, sec. 37 (w.e.f. 6-6-2018). direct that any of the provisions of this Code shall— (a) not apply to micro, small and medium enterprises; or (b) apply to micro, small and medium enterprises, with such modifications as may be specified in the notification.

Ineligibility norms under section 29A of the IBC: -

The extract of Section 29A of provisions clause (c) and (h) of the IBC is reproduced herein below:

Persons not eligible to be resolution applicant A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

(C) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor: Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non- performing asset accounts before submission of resolution plan: Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor. Explanation I- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date. Explanation II.— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code.

(h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

MSMEs as Corporate Debtors and Operational creditors

The IBC, it is well recognised that MSMEs can either be part of the group of creditors or fall in the group of debtors. In both capacities, they will come within the ambit of IBC. The other advantages would be reduction in cost of credit for MSMEs and preservation of jobs of MSMEs employees. MSMEs in India are mostly financed as a mixture of personal debt and corporate

debt, in case the enterprise goes into the state of bankruptcy, it's more likely that the proprietor in his personal capacity has also lost the capabilities to pay back the debts. Moreover, most of these entities operate as Sole proprietorship and aren't registered MSMEs have recourse under both The MSMED Act 2006 and The IBC Act, 2016. So far as MSMED Act is concerned, it facilitates recovery of dues to MSME whereas; IBC is anything but a recovery mechanism. Therefore, the question still persists as to how to structure the legitimate interest of creditors and maximize a reasonable rehabilitation of MSMSEs and the owners of such enterprises and the society that benefit from its renewed efforts. An added layer of complexity to this matter is distinguishing between personal and business debt of a natural person given the fungible nature of money and credit. Post Insolvency financing is also a major concern for MSMEs. As an operational creditor, it has been found that many large corporates deal with MSMEs in India only on a credit basis and MSMEs hesitate to complain against non-payment for fear of loss of business. Often delayed payments and negligible pay outs to MSMEs by the corporates, in case the latter ends up in bankruptcy tribunal, it leads to stress among MSMEs. The increased threshold under the code may be a boom for MSMEs that are corporate debtors and have credit outstanding up to INR 1 crore but what about the operational creditors which are MSMEs, such an action may boost MSMEs departure from taking recourse to a standard Corporate Insolvency Process. By the virtue of its requirements, the standard CIRP Process may not benefit MSMEs, reason being the CIRP process tends to be cumbersome for MSMEs and therefore time and again the Adjudicating Authority has reiterated that in case of MSME resolution, the company is not bound to follow all the procedures under the 'Corporate Insolvency Process'.

INFERENCE

The Micro, Small and Medium Enterprises **(MSME(s))** have unquestionably been an integral part of the Indian Economy for decades now. When it comes to understanding the contribution of the MSME sector to the Indian economy, one finds that it contributes over 28 per cent of the GDP, 45 per cent to the manufacturing output and more than 40 per cent of exports. The MSME(s) were the largest provider of employment after agriculture in the nation. This is an extremely important indicator of the integral position that MSME(s) hold in the Indian Economy. Thus, it is no surprise that the Government has been making robust changes in the framework pertaining to MSME, to further boost the economy and GDP. Consequently, India's ranking in the 'world bank ease of doing business' has taken a hit from 77th to 63rd rank among 190 nations .Federation of Indian Micro Small Medium Enterprise represented to government and, it had requested to create a separate sub-category of MSMEs within the operational creditors and accord the MSMEs with special rights of recovering full payment due against the corporate debtor facing corporate insolvency resolution process (CIRP) or liquidation. Other such practical concern is the finalization of a feasible resolution plan for an MSME (being a corporate debtor

under CIRP), which plan may reasonably be forthcoming and viable in case the promoters of MSMEs are given a fair opportunity for participating in the resolution plan. The main concept of the IBC is not a recovery law, and saving the lives of the companies is important than recovery of loans. An important aspect of ease of doing business enshrines not just 'easy entry' into business but also 'easy formulation of exit', and Therefore, insolvency framework for MSMEs shouldn't only focus on reorganization/restructuring, but also expeditious liquidation mechanism because this will encourage the entrepreneurs to re-establish themselves with a better reallocation of resources, generating firm creation and economic growth Accordingly, with the insertion of Section 240A utilizing this weapon, and expedite identifying relevant areas, and issuing specific directions as regard the applicability of relevant provisions to IBC to MSMEs.

THE ADJUDICATING OFFICER OF SEBI IS NOT HAVING POWER TO PROCEED WHEN THERE IS A MORATORIUM UNDER 'CORPORATE INSOLVENCY RESOLUTION PROCESS'

Dr. M. Govindarajan
Insolvency Professional

Introduction

The Insolvency and Bankruptcy Code, 2016 ('Code' for short) provides for the initiation of corporate insolvency resolution process ('CIRP' for short) by a financial creditor or an operational creditor or by the corporate applicant itself. An application is to be filed before the Adjudicating Authority with the relevant documents required and pay the requisite fee. The Adjudicating Authority will consider the application and admit the application it the Adjudicating Authority is satisfied that the application is complied with all requirement of the provisions of the Code. The Adjudicating Authority appoints interim resolution professional and also declared a moratorium under section 14 of the Code.

Moratorium

Section 14(1) of the Code provides that on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following-

- the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- the recovery of any property by an owner or less or where such property is occupied by or in the possession of the corporate debtor.

CIRP by financial providers

The Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 provides for the initiation of CIRP by the financial providers. The provisions of the Code relating to the Corporate Insolvency Resolution Process of the corporate debtor shall, *mutatis mutandis* apply, to the insolvency resolution process of a financial service provider subject to the following modifications-

Initiation of CIRP-

- no corporate insolvency resolution process shall be initiated against a financial service provider which has committed a default under section 4, except upon an application made by the appropriate regulator in accordance with rule 6;
- the application shall be dealt with in the same manner as an application by a financial creditor under section 7, subject to-
- on the admission of the application, the Adjudicating Authority shall appoint the individual proposed by the appropriate regulator in the application filed under sub-clause (i) of clause (a) of rule 5, as the Administrator.

Moratorium-

- an interim moratorium shall commence on and from the date of filing of the application under clause (a) till its admission or rejection; and
- the license or registration which authorises the financial service provider to engage in the business of providing financial services shall not be suspended or cancelled during the interim-moratorium and the corporate insolvency resolution process.

Effect of moratorium – some case laws

- ***Rajendra K. Bhuta v. Maharashtra Housing and Area Development Authority' – (2020) SCC Online 292***, the Supreme Court, while considering Section 14 (1)(d) of the Code, held that when it comes to any clash between the MHADA Act and the Insolvency Code, on the plain terms of Section 238 of the Insolvency Code, the Code must prevail. This is for the very good reason that when a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced under Section 14 the moment a petition is admitted under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14.

- **Innovative Industries Limited v. ICICI Bank Limited' - (2018) 1 SCC 407**, the Supreme Court held that any proceedings under any law against a corporate debtor cannot be proceeded once moratorium is in effect.
- **Alchemist Asset Reconstruction Company Limited v. Hotel Gaudavam Private Limited and others' – (2018) 16 SCC 94,** despite a moratorium issued under Section 14(1) of the Code an arbitrator was appointed who issued notices to the parties. The Supreme Court held that the mandate of the new Insolvency Code is that the moment an insolvency petition is admitted, the moratorium that comes into effect Under Section 14(1)(a) expressly interdicts institution or continuation of pending suits or proceedings against corporate debtors. The Supreme Court was surprised that an arbitration proceeding has been purported to be started after the imposition of the said moratorium and appeals under Section 37 of the Arbitration Act are being entertained. Therefore, the Supreme Court set aside the order of the District Judge dated 6.7.2017 and further state that the effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium is *non est* in law.

Power of Adjudicating Officer of SEBI

SEBI is a regulator constituted under SEBI Act. However, the Officers appointed under the Act and the Rules made there under are not having powers to initiate any proceedings against an entity against which CIRP is initiated and moratorium is declared. There is no exception to the regulators like SEBI. The same has been upheld by the Securities Appellate Tribunal in **'Dewan Housing Finance Corporation Limited v. Securities and Exchange Board of India' – Appeal No. 206/2020 – SAT, Mumbai – delivered on 09.10.2020,** the Adjudicating Officer, vide his order dated 29.05.2020, imposed a penalty of Rs.20 lakhs under Section 15A(b) and section 15HB of Securities Exchange and Board of India Act, 1992 ('Act' for short) on Dewan Housing Finance Corporation Limited ('Appellant') and directed to pay the said amount within 45 days from the date of receipt of order failing which recovery proceedings will be initiated against the appellant under section 28A of the Act.

The appellant filed appeal before the Securities Appellate Tribunal ('SAT') against the order passed by the Adjudicating Officer on 29.05.2020.

The facts of the case run as below-

The Reserve Bank of India (RBI) suspended the Board of Directors of the appellant vide their order dated 20.11.2019 under section 45-IE (2) of the Reserve Bank of India Act, 1994. The RBI also appointed an administrator to manage the affairs of the company. RBI, on 29.11.2019

filed an application before the Adjudicating Authority under Rule 5(1)(a) of Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Provider and application to Adjudicating Authority) Rules, 2019 to initiate corporate insolvency resolution process under the Code. The Adjudicating Authority admitted the petition filed by RBI on 03.12.2019 and declared moratorium. The Adjudicating Authority also appointed the Administrator as resolution professional.

The Adjudicating Officer of SEBI, on 24.12.2019 issued a show cause notice to the appellant under Rule 4 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 to show cause as to penalty should not be imposed on the appellant for non-compliance of Regulation 16(1) of SEBI (Issue of Listing of Debenture Securities) Regulations, 2008 ('Regulation') read with Rule 18 (7)(b)(ii) and 18(7)(c) of Companies (Share Capital and Debentures) Rules, 2014 read with Regulation 52(1) and 52(4) of SEBI (LODR) Regulations, 2015.

The allegation in the show cause notice issued by the Adjudicating Officer is that the appellant failed-

- to create the requisite debenture redemption reserve;
- to invest 15% of the amount of non-convertible debentures maturing as on 31.03.2020; and
- to fail to submit the audited financial result and line items as prescribed under LODR regulations.

The appellant submitted a reply dated 09.01.2020 that in view of section 14 of the Code no proceedings could not be initiated or continued during the currency of moratorium period. The Adjudicating Officer imposed the said penalty holding that Section 14 of the Code would not prevent the power of the Adjudicating Officer from determining the liability of the corporate debtor and hence the same can be continued.

The appellant submitted the following before the Appellate Tribunal-

- The impugned order passed by the Adjudicating Officer is not only illegal perverse and against the judgments of Supreme Court in some cases.
- The adjudicating officer has patently ignored the decision of the Supreme Court in spite of it being cited and has ventured into giving a finding that he has the power to proceed which is directly against the decision of the Supreme Court.

- The provisions of section 14 are patently clear and explicit and are not vague which requires use of an external aid.
- When the provision is clear and there is a direct decision of the Supreme Court it was not open to the adjudicating officer to use external aid in interpreting the provisions of section 14 of the Code.
- The use of external aid by the adjudicating officer while relying upon the Insolvency Law Committee's Report dated March, 2018 was wholly erroneous and amounts to contempt of the decision of the Supreme Court.

The respondent submitted the following before the Appellate Tribunal-

- The respondent will not seek to recover the amount during the moratorium period.
- The ambit of word 'proceedings' under section 14(1)(a) of the Code needs to be given a wider meaning.
- If one considers the Insolvency Law Committee Report one would find that the Code and the moratorium prescribed under section 14 was basically for creditors and not applicable to the regulators/statutory authority like the respondent.
- The proceedings of the assessing liability are different from proceedings initiated to determine the assessed liability.
- The moratorium declared under the Code does not prevent the Adjudicating Officer from determining the liability of the corporate debtor.
- The moratorium declared under the Code will only be applicable to the enforcement/recovery of the determined liability.
- The Adjudicating Officer has full powers to proceed against the appellant for the purpose of determining the liability of the alleged non compliance of the ILDS Regulations and LODR Regulations.

The Appellate Tribunal considered the arguments put forth by both the parties. The Appellate Tribunal analyzed the provisions relating to moratorium. The Appellate Tribunal observed that Section 14 of the Code provides that the Adjudicating Authority, by order, declare the moratorium for prohibiting the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment or order in any court of law, tribunal, arbitration panel or any authority. Section 14 is very clear and there is no need of further elaboration.

The Appellate Tribunal further observed that where moratorium has been declared under section 14 of the Code by the Adjudicating Authority, the Authority in the Adjudicating Officer under SEBI will have no jurisdiction to institute any proceedings. If any proceeding has been initiated and continues during the declaration of moratorium then the Authority is prohibited in continuing the said proceedings.

The Appellate Tribunal also analyzed the judgments of Supreme Court relied on by the appellant in the following cases-

- Alchemist Asset Reconstruction Company Limited v. Hotel Gaudavan Private Limited and Others
- Rajendra K. Bhuta v. Maharashtra Housing and Area Development
- Innovative Industries Limited v. ICICI Bank Limited (***supra***).

The Appellate Tribunal held that the contention of the respondent that the word 'proceedings' depicted in section 14(1) of the Code has to be given an expansive meaning cannot be considered by the Adjudicating Officer as it would amount to contempt of court. In the present case the Adjudicating Authority admitted the application of the initiation of corporate insolvency against the corporate debtor on 03.12.2019 whereas the Adjudicating Officer issued show cause notice to the appellant on 24.12.2019. Thus, the proceedings were initiated by the Adjudicating Officer after the moratorium has been declared.

The Appellate Tribunal was of the opinion that the external aid can be considered only when there is ambiguity in the provision. Section 14 of the Code is very clear and there is no room for any ambiguity. The Appellate Tribunal allowed the appeal filed by the appellant. The Appellant Tribunal quashed the impugned order imposing a penalty and to recover under section 28A of the Act upon failure to pay. The Appellate Tribunal also quashed the show cause notice and the entire proceedings.

SALE AS A GOING CONCERN IN LIQUIDATION

Dr. S K Gupta
CEO(IPA-ICAI)

Sarthak Ohri
Student – Graduate Insolvency Program

1. Introduction

Insolvency laws around the globe are focused on Re-organization of the debtor's business and provide a well-laid mechanism for doing so. However, there exists another phase of insolvency which is a step beyond resolution and is termed as 'Liquidation/ Bankruptcy'. While the most common form of the process is usually either of the two, there exists another approach which lies between a resolution and liquidation. An attempt to preserve the value, rescue the business yet resulting in the assets changing hands.

Sale as a going concern during liquidation is the hybrid approach which strikes a balance between liquidation and re-organization which has been discussed in the UNCITRAL Legislative Guide on Insolvency Law[6]. It related this concept to the economic theory of preserving the value by keeping the essential components of a business together instead of breaking them into fragments[7]. The mention of liquidation as going concern as the third possibility, in case a firm default, can be found in The Report of the Bankruptcy Law Reform Committee, Volume I: Rationale and Design under the head titled as 'The key economic question in the bankruptcy process'; suggests that liquidation as going concern is not a new concept[8].

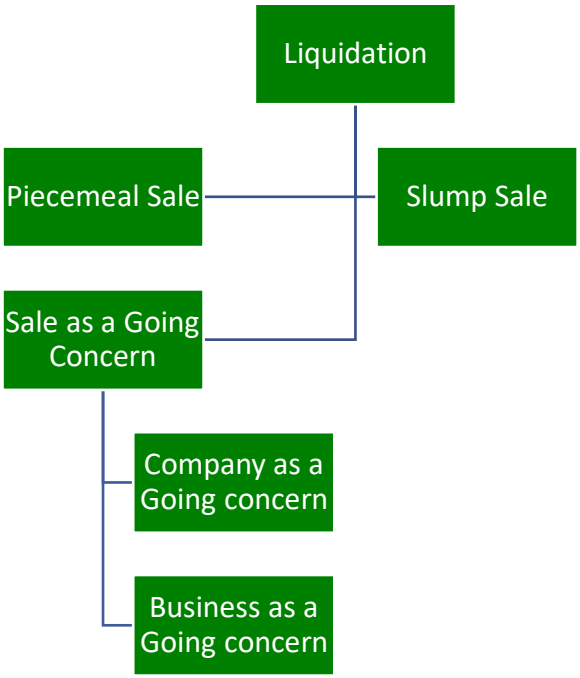
A Going Concern approach entails the sale of business of the company including all its assets and properties on as is where is basis. When the company goes into liquidation, prior to the amendment in IBC the liquidator had limited options and he could either sell the assets as piecemeal or slump sale but after incorporation of Section 32(c) in the Code the liquidator also hasthe option to sell the company with all its assets i.e selling the business as a whole without bifurcating its properties and liabilities. Thus, one of the essential objectives of Insolvency and Bankruptcy Code,2016 was to ensure speedy completion of the process but in numerous cases it is seen that due to delay in liquidation process there was a loss to the

[6] UNCITRAL Legislative Guide on Insolvency law, (https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf).
[7] UNCITRAL Legislative Guide on Insolvency Law, Page-11.
[8] Ashmika Agrawal, *Liquidation As Going Concern Under Insolvency And Bankruptcy Law,* 3, (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3527389).

company, its employees, workers. Now the company can be sold as a going concern which has the potential to ensure better utilization of resources of the company.

This concept note strives to discuss the perspectives of debtors and creditors during a going concern sale, challenges that could occur and various theories/ approached that emerged within this concept by drawing inferences from various judicial and legal provisions of India as well as other counterparts across the globe.

1. **Liquidation Strategies Adopted Worldwide**



1. **Piecemeal Sale:** There can be various classes of assets which may be related or unrelated. Under this strategy, the liquidator tries to sell the assets separately (piece-by-piece) by way of separate transactions. This strategy is best suited for assets that are impaired assets or assets unrelated to the business activity and yet may be in possession of the debtor.

2. **Slump Sale:** It is a mode of sale where a group of assets or even a division is sold for a lump-sum consideration. There can be a division or a business line with the debtor which no one is willing to buy and operate as a going concern as part of the complete business buy-out, while it may also not be feasible to sell its assets under a piecemeal strategy. Then the slump sale of that division/ undertaking can be a beneficial strategy.

3. **Sale as a going concern:** By a literal reading of this term, it appears that the business comprising of all the assets, liabilities and rights stands transferred to a person who seeks to run the organization as a going concern (normal operating scenario). However, the laws are evolving and this concept is further being bifurcated into-

a. Sale of a Company as a going concern
b. Sale of business as a going concern

3. How it all started - The Going Concern Assumption.

The term 'Going Concern' has been interpreted by various judgements, professional guidance and standards, academicians etc.

Accounting Standard -1 describes going concern as- *"When it is assumed that the enterprise has neither the intention nor the need to liquidate or curtail materially the scale of its operations"*[9]

The Insolvency Law Committee in its report of March 2018 describes the term as –

"The phrase "as a going concern" implies that the corporate debtor would be functional as it would have been prior to initiation of CIRP, other than the restrictions put by the code."[10]

In a round table of Insolvency and Bankruptcy Board of India ("IBBI") held on 21st May 2018, several issues were bought up and the term 'Going Concern' was discussed at length and described as-

"Going Concern means all the assets, tangibles or intangibles and resources needed to continue to operate independently a business activity which may be whole or a part of the business of the corporate debtor without values being assigned to the individual asset or resource."[11]

There have also been various judicial interpretations of the term 'Going Concern'. In *re Indo Rama Textile Limited,*[12] the Delhi High Court held that a company is said to be transferred as a going concern when the assets and liabilities being transferred constitute a business activity capable of being run independently for a foreseeable future.

The term going concern was examined in the case of *Rajashri Foods Pvt Ltd*[13], where it was observed that:

"A going concern is a concept of accounting and applies to the business of the company as a whole. Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business. Such transfer of business as a whole will comprise comprehensive transfer of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc."

[9] AS-1 - Framework for the Preparation and Presentation of Financial Statements, (https://resource.cdn.icai.org/56169asb45450.pdf).
[10] Report of the Insolvency Law Committee, March 2018, Page-37, (http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf).
[11] IBBI Agenda, (https://ibbi.gov.in/Agenda_03_26062018.pdf).
[12] re IndorRama Textile Limited, 4 CompLJ 141 (2013) (Del).
[13] Advance Ruling No. KAR ADRG 06 / 2018.

4. Difference between the two – Huge or Small?

"If the business is owned by a company there is a choice of buying the assets from the company, or buying the whole company itself by acquiring its shares from its shareholders."[14]

1. Sale of the debtor (company) as a going concern-

It is normally understood in the context of ownership of the debtor. The equity shareholding of the debtor gets transferred, and the purchaser takes over the undertaking along with all the assets, including all contracts, licenses, concessions, agreements, benefits, privileges, rights or interests which were registered in the name of the debtor[15]. The prime difference being the survival of the debtor's legal entity which gets transferred to the acquirer. Hence, unlike a liquidation or winding up, there is no estate formed, assets are realised and paid to the creditors as per the priority rule set out in law and finally, the company is dissolved.

In a going concern sale, the company as a legal entity will itself form a part of the liquidation estate on an "as is where is" basis. In this case, the liabilities would not be transferred as liquidation sale is a special situation, unlike ordinary business sale. In liquidation, the liabilities as on the Liquidation Commencement Date have to be settled in the priority order listed in the law (Section 53 in case of IBC). The proceeds from the sale of the company and its assets are realised and further distributed[16].

The Corporate Debtor will also issue shares to the acquirer and the existing shares may not get transferred and shall stand extinguished. Another important aspect of this mode of sale is that the, the acquirer is expected to carry on the business of the corporate debtor after the acquisition.

2. Sale of the Debtors' business as a going concern-

[14] Steeles Law Solicitors, *A Guide to Buying or Selling a Business*, 5 (https://www.steeleslaw.co.uk/wp-content/uploads/2017/07/A-guide-to-buying-or-selling-a-business-print-1.pdf).
[15] Dr. Binoy J. Kattadiyil and CS Nitika Manchanda, *Liquidation As A Going Concern: Ivrcl Ltd - A Case Study Analysis*, (September 25, 5:15 PM), (https://icsiiip.com/Portals/0/LIQUIDATION%20AS%20A%20GOING%20CONCERN%2C%20IVRCL%20LTD%20-%20A%20CASE%20STUDY%20volume9-issue5%284%29-2020.pdf)
[16] Resolution Services Team, Vinod Kothari & Company, *Enabling Going Concern Sale In Liquidation*,11 (http://vinodkothari.com/wp-content/uploads/2019/06/Enabling-Going-Concern-Sale-in-Liquidation.pdf).

This is in the nature of "second-best option" where the going concern sale of the company itself is not possible[17]. There may be scenarios when the acquirer is not interested in the corporate entity of the debtor but only its business.

A debtor may have a different line of businesses and each business may have the potential to be sold separately as a going concern. There may also be some assets which are not related to the business and these can be sold using other liquidation strategies like piecemeal.

For liabilities and its settlement, the same process is followed as mentioned above and these are settled according to the realisations from the Liquidation estate.

Buyers and Sellers Perspective in determining either of the two strategies

A buyer may have a different set of needs while a seller may have different interests in selling the business. It is then that both the parties discuss their commercial judgement on a table and a transaction happens.

So whether to sell the debtors legal entity or only business as a going concern will, in most cases depend on the positions and interests of both the parties.

What does a buyer want?

The general rule of thumb for a company sale is that a buyer will normally prefer to buy the assets of a business and the seller will prefer to sell the shares[18]. When the business is sold as a going concern the seller is a company but when the entity is sold as a going concern the sellers are none other than the owners which are shareholders (Priority will be given to creditors during insolvency).

The buyer is generally interested in the assets and goodwill of a company, and this enables him to pick those assets/ business which he wants to acquire. All other liabilities will be left with the seller. The cost of Due Diligence during the acquisition of a business would be much lower than the case when the entity is purchased. The buyer may be interested in purchasing the legal entity if the name of the entity carries a huge brand value.

What does a seller want?

If the legal entity along with a business is sold, then the shareholders go for a complete breakup of the company in terms of assets as well as liabilities and warranties. However, the buyer

[17] Umang Mehta and Rishab Murli, *Beneficial Liquidation: Sale as a Going Concern*, (Apr. 02, 2020, 10:24 PM) (https://tauruslegal.co.in/2019/11/13/beneficial-liquidation-sale-as-a-going-concern/articles/852/).

[18] Steeles Law Solicitors, A Guide to Buying or Selling a Business, 6 (https://www.steeleslaw.co.uk/wp-content/uploads/2017/07/A-guide-to-buying-or-selling-a-business-print-1.pdf).

would always insist on not taking some pecuniary liabilities and contractual indemnities of the company, which will continue to bind the shareholders even after the sale. (IBC has introduced section 32A, whereby the promoters remain responsible for the criminal liabilities even after the ownership of corporate debtor has been transferred).

Deal as viewed from the tax authorities perspective

The perspective of tax authorities becomes important to decide the right liquidation strategy to avoid a long-lasting battle in tax tribunals and courts and determining the right amount of tax liability.

The Gujarat High Court in the case of *ACIT v. Patel Specific Family Trust*[19] has held that where there is a sale of the entire business including all assets and liabilities, as a going concern and it is not possible to bifurcate the consideration received on account of transfer, the transfer does not give rise to Capital Gain.

However, a contrary view has been given by the Hon'ble Supreme Court of India. In the case of *CIT vs Equinox Solution Pvt. Ltd.*[20] the Apex court has analysed the taxability of sale of the business on a going concern basis and held that the sale is a slump sale and not the sale of depreciable assets covered under section 50(2) of the Income-tax Act, 1961. Similar view has also been held in the case of *CIT vs Artex Manufacturing Company*[21]. The Hon'ble Supreme Court of India has confirmed that sale of a business carried on for long-term, on a going concern basis is a slump sale, and thus, should be liable to be taxed as long-term capital gains.

When it comes to indirect taxes in India, In the Central Goods and Services Tax Act, 2017 there is a specific provision for transfer of a business as a going concern. Item 4 of Schedule II clearly states that if the transfer of goods happens as a part of a transfer of a business as a going concern, then there will be no levy of GST on such a transfer.

5. Transfer of Liability – Yes/ No?

The question of liabilities does not arise in cases when a going concern sale is made during liquidation. There are various factors attributed to this analogy.

1. Claims:

The primary reason being that the insolvency laws require various kinds of liabilities (existing or contingent) to convert into claims and on the basis of the list of claims, all the claimants are paid as per the priority rule established under the law. The liabilities which stand together on

[19] ACIT v. Patel Specific Family Trust, (Guj) [2011] 330 ITR 397.
[20] CIT vs Equinox Solution Pvt. Ltd., TS-149-SC-2017 (India).
[21] CIT vs Artex Manufacturing Company, [1997(6) SCC 437 CIT]/ [1997] 93 Taxman 357 (SC).

the balance sheet become strangers to each other because the liquidation laws usually discriminate them based on 'secured' and 'unsecured'.

The liabilities are also not allowed to be transferred because they may not be in line with the section governing distribution under the law (Section 53 for IBC). And even if a liability get transferred to the acquirer, where would the claimants go? Will they file a fresh claim with the new owner and if yes, under what law?

As has been rightly argued in the case of *Gupta Global Resources Pvt Ltd*, that if the liabilities are transferred to the buyer, then the various claimants who have a claim on the liquidation estate would have dual claims – a claim on the liquidation estate, as also a claim on the buyer of the going concern, which is not contemplated under IBC. However, the liquidator was directed to follow the procedures as laid down in Regulations prescribed under the Code.

2. Contradiction with existing laws of India:

The regulation 39C of IBBI(Insolvency Resolution Process For Corporate Persons) Regulations, 2016, provides that,

*"Where the committee recommends sale as a going concern, it shall identify and group the assets **and liabilities**, which according to its commercial considerations, ought to be sold as a going concern under clause (e) or clause (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016."*

Would this regulation make it mandatory for the liquidator to get the liabilities transferred? Making liability as part of the block will degrade them leading to degradation of marketability of assets which are already stressed.

3. Value:

Will the value of the assets transferred in going concern be enough to cover all the liabilities? If the sale could not fetch enough then the residual value would have to be part of the liquidation estate.

4. Creditors Rights:

In case of liquidation, the secured creditors have the right under Section 52 of the IBC to either enforce their security interest or to relinquish the same in favour of the liquidation estate. However, if the going concern strategy is adopted then they may have to necessarily relinquish their charge on the assets.

As has been held in the matter of *Edelweiss Asset Reconstruction Co. Ltd. Vs. Reid and Taylor India Limited*[22] where the applicant Financial Creditor claiming sole first charge over the fixed assets and first pari-passu charge over the current assets of the Corporate Debtor sought permission of the Adjudicating Authority to realise the security interest by selling the secured assets of the Corporate Debtor on "as is where is" basis as a going concern as per section 52 of the Code read with regulation 37 of the IBBI (Liquidation Process) Regulations, 2016. Another Financial Creditor had objected to this stating that section 52 of the Code does not empower a secured creditor to stand outside the liquidation process to enforce its security to the exclusion of other secured creditors having same ranking pari-passu charge over the same security interest, more particularly when the issue of priority of charges had not been adjudicated. The Adjudicating Authority held that only the first charge holder/ the secured creditor with first pari-passu charge can stay outside the liquidation process and realize his security interest and allowed the applicant being the first charge holder to realise security interest under section 52.

6. Some Judicial Precedents in India

1. One of the first cases to be attempted under sale as a going concern was in the matter of *Gujarat NRE Coke Limited*[23] where the Kolkata bench of NCLT observed that the liquidation has severe consequences on several of its stakeholders, especially the workmen. To protect the livelihood of the workmen of the debtor, the tribunal directed the liquidator to attempt the sale as a 'going concern' through a slump sale. It further observed that a slump sale is nothing more than the transfer of the whole or part of a business concern as a going concern.

2. Further, the transfer of sale is not a new concept in India. in the case of *M.C.T.M. Chidambaram Chettiar vs The Official Receiver, High Court*[24], the assets of the Madras Chemical Industries Limited, which was in the process of being wound up, was ordered to be sold as a going concern.

3. In the matter of *Edelweiss Asset Reconstruction Company Ltd. v Bharati Defence and Infrastructure Ltd.*[25] Hon'ble NCLT held that, considering the national importance attached to product line of the company, the customers explicitly Ministry of Defence, Indian Coastguard, Customs etc, order book size, advances paid by various Government

[22] Edelweiss Asset Reconstruction Co. Ltd. Vs. Reid and Taylor India Limited, MA-1392/2019 in CP No.382/IB/MB/MAH/2018
[23] Gujarat NRE Coke Limited, C.P No 182/2017
[24] M.C.T.M. Chidambaram Chettiar vs The Official Receiver, High Court, (1943) 1 MLJ 123
[25] Edelweiss Asset Reconstruction Company Ltd. v Bharati Defence and Infrastructure Ltd., MA 170/2018 in CP292/I&B/NCLT/MAH/2017

Departments, the work in progress stalled at various stages of production and huge number of workforce (around 850 employees) we direct that the Liquidator shall endeavour to sell the Corporate Debtor company as a going concern.

4. The Supreme Court in *Allahabad Bank v ARC Holding*[26] held that if the company is sold off as a going concern, then along with the assets of the company, if there are any liabilities relevant to the business or undertaking, the liabilities too would be transferred.

5. Recently in the matter of *Bharat Heavy Electricals Ltd. v Anil Goel, The Liquidator of Visa Power Ltd.*[27] Hon'ble NCLAT set a tone for the process to be followed for going concen sale. The court noted that the requirement of preparation of Information Memorandum and Evaluation Matrix as per section 25(2)(h) is not not applicable in the course of Liquidation process, unless corporate debtor or its business is being disposed of on going concern basis. The objective behind this statement of the Appellate Tribunal was to clarify that the disposal of assets cannot be done without having any intelligent criteria being applied for eligibility of bidders.

6. In *Jayaprakash Shyamsundar Mandare v. Laxminarayan Murlidhar*[28], it was held that a company can be sold off as a going concern only when the company is continuing its operations.

7. In the matter of *National Tannery Co Ltd,* a committee was formed to run the company until its sale on going concern basis and, eventually the Government of West Bengal offered to acquire the company on a going concern basis, pay consideration, and also agree to pay the wages of the workmen.

8. **IVRCL Limited:** IVRCL is widely reported as the first case under Liquidation to be successfully sold as a going concern. While reporting the quarterly financial results as of June 30, 2020 the company made disclosures to stock exchange that the Company on February 27, 2020, has received a bid under E-Auction process for the sale of the Company as going concern from Gabs Megacorp Limited at a price of INR 1654.77 Crore. The Bid is approved by the stakeholders of the company and the bidder has paid required Earnest Money Deposit (EMD) and the balance bid amount with interest thereon was to be payable

[26] Allahabad Bank v ARC Holding , AIR 2000 SC 3098
[27] Bharat Heavy Electricals Ltd. v Anil Goel, The Liquidator of Visa Power Ltd. and Agrawal Structure Mills Pvt. Ltd., Company Appeal (AT) (Ins) No.22 of 2020.
[28] Jayaprakash Shyamsundar Mandare v. Laxminarayan Murlidhar , AIR 1983 Bom 364

on or before 2nd September 2020. However, due to COVID-19 Pandemic situation, the successful bidder of the Corporate Debtor, has filed an application before the Hon'ble NCLT, Hyderabad on 18th day of August 2020, for seeking extension of three months w.e.f. from 03.09.2020 to pay the balance bid amount without any interest from 03.07.2020 to 31.12.2020 and the order is reserved.[29]

Meanwhile in same case of IVRCL, in the matter of *Siripuram Developers and others v Andhra Bank*[30] Hon'ble NCLT ordered Andhra Bank not to proceed and sale the properties of the Corporate Guarantor (also a subsidiary) of the Corporate Debtor mortgaged with the respondent till the completion of the Liquidation process as the enforcement of security by the bank would diminish the value of the Corporate Debtor which would further impact the sale as a going concern. This presents a case where the judiciary applied its wisdom and ruled in favour of rescuing a company rather than breaking it into fragments.

9. Despite the Hon'vle NCLT giving out directions to attempt the Corporate Debtors sale as a going concern under Liquidation in multiple cases, recently in the matter of *Invest Asset Securitisations & Reconstructions Pvt. Ltd. v Mohan Gems & Jewels Pvt. Ltd.*[31] the Adjudicating Authority turned down the sale of the Corporate Debtor as a Gping Concern. According to the tribunal the regulations permitting the Liquidator to attempt the sale of Corporate Debtor are inconsistent with the code and rules issued under section 239 of the code. The tribunal noted that after the Liquidation there is a requirement of dissolution of the Corporate Debtor which would not be complied with if the Corporate Debtor is sold at this stage.

Though such order is passed almost after two years since the regulations were amended to incorporate this as a mode of sale, this order may have far reaching consequences not only on the transaction concerned in the case but also the transactions that are in the stage of conclusion.

7. Changes Recommended by the report of the Insolvency Law Committee, 2020

Chapter 2 of the report of the Insolvency law Committee released in February, 2020 has recommended some important changes in matters of sale of business as going concern during liquidation.

[29] https://www.bseindia.com/xml-data/corpfiling/AttachHis/3e368ce2-8aa3-408f-bd09-73f252822dea.pdf
[30] Siripuram Developers and others v Andhra Bank. IA No. 355 of 2020 in CP(IB) No. 294/7HDB/2017
[31] Invest Asset Securitisations & Reconstructions Pvt. Ltd. v Mohan Gems & Jewels Pvt. Ltd., I.A No. 1490/2020 in CP.(IB)-590(PB)/2018.

Going concern sale should not be mandated

The committee observed that the liquidator has been mandated to attempt a going concern sale of the business prior to disposing the assets of the Corporate debtor in any other manner. As per committee, it may not be a feasible option for every corporate debtor, especially where the business in unviable. Therefore, the committee recommended that it is the liquidator who is best placed to assess the relevant factors and after consulting the stakeholder's consultation committee decide whether a going concern sale should be attempted or not. As per the committee the going concern sale should not be mandated during the liquidation.

Sale of Corporate Debtor as a going concern

The committee observed that the liquidation is envisaged as the state at the end of insolvency resolution period, where neither creditors nor debtors can find a commonly agreeable solution by which to keep the entity as a going concern. Therefore, the committee noted that it would be contrary to the scheme of the Code to allow a corporate debtor to be sold as a going concern after the conclusion of its liquidation process, which envisages a dissolution of the corporate entity. However, where the business of the corporate debtor can be sold as a going concern, the liquidator may attempt the same.

8. Indian and International Provisions

1. India

In India, the Insolvency and Bankruptcy Code, 2016 and the IBBI (Liquidation Process) Regulations, 2016, govern the process of liquidation of a company.

Regulation 32 of the regulations (Supra) specifies the manner of sale during liquidation. According to the regulation,

The liquidator may sell-

(a) an asset on a standalone basis;

(b) the assets in a slump sale;

(c) a set of assets collectively;

(d) the assets in parcels;

(e) the corporate debtor as a going concern; or

(f) the business(s) of the corporate debtor as a going concern"

[Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate.]

2. Italy

In the context of an insolvency procedure, the bankruptcy receiver has to comply with the main criterion of block selling the entire business, its branches, its assets or its legal relationships when it turns out that this option allows creditors a better satisfaction. Otherwise, the bankruptcy receiver must carry out the liquidation of individual assets. If the bankruptcy receiver considers the sale of the entire business to be more appropriate, he or she may alternatively evaluate, in the liquidation plan:

- the immediate sale of the business;
- or the continuation of the business and the subsequent sale of it (eg, if this option allows them to sell the business at a higher price).

If the bankruptcy receiver decides to carry out the liquidation of individual assets, there are different procedures for the sale of the debtor's immovable or movable assets: an auction sale of immovable assets to protect creditors' interests in bankruptcy proceedings and a private sale for movable assets and assignment of claims. The procedures are subject to the supervision of the court and in some cases to the (nonbinding) opinion of the creditors' committee[32].

The transfer of a business as a going concern (or a branch thereof) implies the transfer of all those assets that are organised to carry out that business or that branch of the business (including real property, plants and machinery, stocks, trade receivables goodwill and contracts (including employment contracts)).

If a transaction qualifies as a transfer of a business as a going concern, certain provisions of the law concerning contracts, employment, liabilities and receivables pertaining to the business become applicable. While the parties may agree to derogate from such laws in many respects they will be unable to derogate from the law in relation to certain rights of third parties (ie, employees and creditors).

The transferor remains liable to the creditors after the transfer of the business for the debts that exist at the time of the transfer unless the creditors have given their consent to the transfer. The transferee is jointly liable along with the transferor for the debts and liabilities of the business, if and to the extent such debts and liabilities are recorded in the accounts of the transferor. In general terms, this rule is aimed at protecting the creditors' interest, and cannot be derogated from the parties.

However, according to case law, the parties may contractually exclude the debts and liabilities from the transfer of the business, with the stipulation that such exclusion shall be effective only between the parties and not as regards the creditors.

The Insolvency Act and Law No. 270/1999 provide for specific rules on the matter, according to which:

[32] Raffaele Lener and Giovanna Rosato, *Restructuring & Insolvency 2019*, 264, 265, (https://gettingthedealthrough.com/area/35/restructuring-insolvency/).

- unless agreed otherwise, the transferee of a business as a going concern is not liable for the business debts arising before the transfer; and
- the bankruptcy receiver or the extraordinary commissioner may provide for the transfer of the business as a going concern or assets or receivables by way of contribution to one or more companies, with the exclusion of liability on the transferor for the liabilities arising from the carrying out of the business prior to the transfer.

According to Law No. 270/1999, the sale of a business as a going concern (or part thereof) or the sale of a group of assets of the insolvent company is made in accordance with specific provisions, pursuant to which, inter alia:

- the transferee must undertake to continue the same business activity for at least two years
- the transferee must maintain the employment level established at the time of the transfer for at least two years. Insofar as the employees are concerned in the framework of the trade unions' consultations applicable in the transfer of a business as a going concern (the consultations), the extraordinary commissioner, purchaser and employees' representatives may agree on certain exceptions to Italian law on the protection of employees transferred by way of a transfer of a business as a going concern (TUPE legislation);
- in the framework of the consultations, or after the unsuccessful conclusion of the consultation, the extraordinary commissioner and the transferee may agree to transfer only parts of the businesses as a going concern with the identification of the employees in those parts of the business to be transferred to the transferee;
- the extraordinary commissioner may also proceed with the disposal of assets and liabilities initiated by the insolvent company, with the exclusion of the transferor from the liabilities related to the exercise of the business prior to the disposal; and
- the existing liens and guarantees in favour of the transferor maintain their validity and rank in favour of the transferee

3. Peru

In August 2018, the Insolvency Law was amended by means of Law No. 30844. The amendments introduced by Law No. 30844 have been in force since 29 August 2018 and mainly refer to the term of liquidations as a going concern and the mechanisms for the sale of assets. In the case of liquidation proceedings, it is possible to sell specific assets or the entire business as a going concern. In both cases, the purchaser will acquire the assets 'free and clear' of liens as it is expressly stated in the Insolvency Law[33]. This shows that third world countries like Peru, that are developing are also making reforms to their insolvency laws

[33] Rafael Corzo de la Colina, Renzo Agurto Isla and Patricia Casaverde Rodríguez, *Restructuring & Insolvency 2019*, 365, (https://gettingthedealthrough.com/area/35/restructuring-insolvency/).

4. Malaysia

The Malaysian Guide on Transfer of Business as a Going Concern ("TOGC")[34] stipulates that transfer may involve the transfer of a whole or part of a business as a going concern from a taxable person to another taxable person and in the case where only part of the business is transferred, that part of the business must be able to operate on its own. For there to be a transfer capable of being treated as a TOGC it must include the transfer of business assets. For TOGC provisions to apply it is important that the assets, whatever they are and however many are to be transferred, put the purchaser in possession of a business, rather than simply assets.

9. What other modes of restructuring allow for sale as a going concern

1. Pre-packaged Sales:

A rising trend in major jurisdictions across the globe is to allow a "pre-packaged" sale, where a business is sold as a going concern to the directors or promoters. This route is adopted before the formal administration process begins. In a pre-pack, the deal is negotiated and the company is sold quickly and confidentially with the involvement of creditors.

2. Open market sale:

The company markets itself through a sale advisor to seek controlling investors or to sell out its divisions/ business. The process is executed by preparing a scheme and filing with the company tribunals.

The primary difference between all these methods and liquidation sale as a going concern lies in the fact that the entity is under a liquidation stage after having failed the administration process and this is seen as a last resort to rescue the business.

10. Issues that can be addressed by the legislature, regulator and judiciary:

Irrespective of how developed a legislation is, there are bound to be changes in the ecosystem which continuously require certain regulations to be amended to meet the changes with time. There are some issues that need an answer and prospective amendments in law because these may create a hindrance in execution of this mode of sale under Liquidation. Following is an illustrative list of such issues that may arise over time.

1. **Applicability of Section 29A:** While Liquidators as a matter of practise require the bidders to furnish an affidavit under section 29A of the code the same is not yet required by law for an asset sale under Liquidation. If the objective of section 29A is to be achieved

[34] Royal Malaysian Customs, *Guide On Transfer Of Business As A Going Concern,* (http://gst.customs.gov.my/en/rg/SiteAssets/specific_guides_pdf/TOGC_24052016v2.pdf).

in entirety then there is a need of amendment to the act restricting bidders in an e-auction to buy the assets of the company.

2. **CCI Approval:** While the objective of Anti-trust authority is to encourage a fair play in the market, the question arises if the Adjudicating Authotity will require approval of Competition Commission of India before approval of the sale. Another aspect is whether the Commission will apply failing firms defence to such transactions.

3. **Features of a resolution plan:** Regulation 37 of IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 allow the measures like curing or waiving of any breach of the terms of any debt due from the corporate debtor, reduction in the amount payable to the creditors, obtaining necessary approvals from authorities along with other measures to be incorporate in a resolution plan. The question to be looked into by the legislature, regulator and the judiciary would be whether such benefits would be available to the bidder of the Corporate Debtor who comes with an intent to revive the company under Liquidation.

11. Conclusion

The concept of going concern sale under Liquidation is still evolving in India as well as other jurisdictions. Though the intention is to rescue the failing companies, it completely depends upon the market how they perceive this method and weigh the business in terms of value that can further be distributed among the creditors. Though we have seen increasing trend across benches of the Adjudicating Authority encouraging the Liquidators to attempt a going concern sale, some issues may tend to arise which would need to be dealt proactively to make this rescue mechanism successful. In the end it is the Adjudicating Authority who will have to consider the viability of the transaction and approve it keeping the interests of all the stakeholders in mind.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 5(20) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL CREDITOR

- **M. Ravindranath Reddy v. G. Kishan - [2020] 113 taxmann.com 526 (NCL-AT)**

Where much prior to issuance of demand notice, there was a pre-existing dispute regarding enhancement of rent, landlord seeking recovery of enhanced lease rent cannot be treated as an operational creditor within meaning of section 5(20).

The owner of industrial premises in question admitted that prior to issuance of demand notice under section 8, notice to vacate leasehold premises and termination of lease was issued to the corporate debtor-lessee. The corporate debtor stated that there was a mutual understanding for not increasing rent for six years while the landlord sought to recover dues of enhanced rent.

Held that questions as to whether rent enhancement was as per mutual understanding or not, could only be decided on basis of evidence by competent Court having jurisdiction. Since there was a pre-existing dispute regarding enhancement of rent much prior to issuance of demand notice, the landlord who filed application for recovery of alleged enhanced lease rent, could not be treated as an operational creditor within meaning of section 5(20).

Case Review : G. Kishan v. Walnut Packaging (P.) Ltd. [2020] 113 taxmann.com 525 (NCLT - Hyd.) Set aside.

SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - APPEALS AND APPELLATE AUTHORITY

- **Securities and Exchange Board of India v. Assam Company India Ltd. - [2020] 113 taxmann.com 542 /[2020] 160 SCL 59 (NCL-AT)**

Interim order passed by SEBI pursuant to letter issued by Ministry of Corporate affairs declaring corporate debtor as a shell company did not amount to any existing law to attract clause (e) of section 30(2); therefore ground shown in section 61(3)(i) for preferring an appeal against approved Resolution Plan was not attracted.

CIRP was initiated against the corporate debtor and resolution plan submitted by the resolution applicant was approved. The appellant - SEBI filed appeal and challenged approval of resolution plan contending that the Ministry of Corporate affairs issued letter forwarding a copy of letter of Serious Fraud Investigation Officer declaring the corporate debtor as a shell company. Investigations initiated by the appellant against the corporate debtor pursuant to letter issued by the Ministry of Corporate affairs were still pending. The appellant passed an interim order issuing directions regarding securities of the corporate debtor. According to the appellant, resolution plan involving delisting of equity shares ought not to be proceeded with without hearing the appellant inasmuch as delisting of equity shares of the corporate debtor would hamper further investigation by the appellant and would render action initiated by the appellant against the corporate debtor nugatory and ineffective.

Held that interim order passed by the SEBI/appellant did not amount to any existing law to attract clause (e) of section 30(2) and, therefore, ground shown in section 61(3)(i) for preferring an appeal against approved resolution plan was not attracted in instant case. Since there was no material irregularity in exercising powers by the Resolution Professional during course of CIRP, and there being no violation of provisions of the I&B Code or any existing law, instant appeal was to be rejected.

SECTION 30 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - SUBMISSION OF

- **DBS Bank Ltd. v. Shailendra Ajmera - [2020] 113 taxmann.com 552 (NCL-AT)**

No interference was called for against order approving resolution plan as same was approved by CoC with 96.95 per cent share of voting in its commercial wisdom, and a 'secured creditor' could not claim preference over other 'secured creditor' at stage of distribution on ground of dissenting or assenting secured financial creditor.

In CIRP against the corporate debtor, resolution plan submitted by PAL was approved. The appellant-financial creditor contended that resolution plan envisaged payment of Rs. 4134 crore to financial creditors including the appellant against admitted claim of Rs. 8398 crore. The appellant stated that financial debt extended by the appellant to the corporate debtor was secured as a sole first charge on fixed assets of the corporate debtor. Further, the appellant

had voted against resolution plan, thus, it was entitled to minimum amount as payable in event of liquidation as dissenting secured creditor, which had not been provided in resolution plan in terms of sub-section (2)(b)(ii) of section 30.

Held that a 'secured creditor' cannot claim preference over other 'secured creditor' at stage of distribution out of resolution plan on ground of dissenting or assenting secured financial creditor, otherwise distribution would become arbitrary and discriminatory. Since the appellant had not challenged approval of resolution plan but had challenged approval of distribution made therein, question of applicability of section 30(2) did not arise. Further, section 30(2)(b)(ii) cannot be interpreted in a manner to give advantage to a dissenting secured financial creditor, and also, resolution plan was approved by the CoC with 96.95 per cent share of voting in its commercial wisdom, therefore no interference was called for against order approving resolution plan, and instant appeal was to be dismissed.

Case Review **:** Standard Chartered Bank v. Ruchi Soya Industries Limited [2020] 113 taxmann.com 551 (NCLT - Mumbai), Affirmed.

SECTION 10 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INITIATION BY CORPORATE APPLICANT

- ***Amit Gupta v. Yogesh Gupta - [2020] 114 taxmann.com 50 (NCL-AT)***

Requirement introduced in section 10 on 6-6-2018, which required corporate debtor to obtain prior approval of shareholders before filing section 10 application is not retrospective in nature.

The corporate debtor filed an application under section 10 to initiate CIRP against itself. The Adjudicating Authority by impugned order admitted said application. The appellant-shareholder of the corporate debtor alleged that said application was filed without approval of shareholders and thus, same was not maintainable. It was noted that under statutory law, requirement to get a special resolution passed by AGM or EGM was provided on 6-6-2018 in section 10 vide Second Amendment Act, 2018. However, in instant case application to initiate CIRP was admitted on 26-4-2018 i.e. prior to said amendment. Further, the appellant himself was holding 93.30 per cent of shareholding of the corporate debtor and thus, appellant could not claim that decision of AGM/EGM was necessary.

Held that impugned order passed by the Adjudicating Authority admitting application under section 10 was justified.

Case Review **:** Amit Gupta v. Yogesh Gupta [2020] 114 taxmann.com 49 (NCLT - All.), Affirmed.

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

- **Shiv Kumar Eashwaran v. NTC Logistics India (P.) Ltd. - [2020] 114 taxmann.com 57/[2020] 158 SCL 422 (NCL-AT)**

Where pursuant to initiation of CIRP, corporate debtor settled claims and dues as per settlement had already been paid to operational creditor prior to constitution of CoC, CIRP application stood withdrawn.

CIRP application filed by the operational creditor against the corporate debtor was admitted. The appellant stated to have settled claim with the operational creditor. The operational creditor submitted that the appellant on behalf of the corporate debtor had settled claims and dues as per settlement had been paid prior to constitution of CoC. The Interim resolution professional however stated that he had not been paid fee and cost incurred by him.

Held that in view of fact that parties settled matter, CIRP order passed by the Adjudicating Authority was to be set aside and application filed by the operational creditor under section 9 was to be withdrawn. Further, If amount of fees and cost was not paid to the resolution professional within 15 days, instant order was to be recalled.

Case Review : NTC Logistics India (P) Ltd. v. Canadian Crystalline Water India Ltd. [2020] 114 taxmann.com 56 (NCLT - Chennai), Set aside

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SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

- **Vijay Kumar Ghai v. State Bank of India - [2020] 114 taxmann.com 59 (NCL-AT)/[2020] 158 SCL 108 (NCL-AT)**

Where pursuant to initiation of CIRP, appellant was ready to settle matter with financial creditor having 91 per cent voting share, appellant was to be allowed to file an application under section 12A before CoC.

Application filed by the financial creditor - State Bank of India (SBI) against the corporate debtor under section 7 for initiation of CIRP was admitted. It was informed that the appellant was ready to settle matter with SBI and the appellant moved before SBI for one time settlement which was rejected. The appellant further stated that SBI had 91 per cent voting share and therefore any settlement with them would have amounted to settlement under section 12A.

Held that in view of facts and circumstances, the appellant was to be allowed to file an application under section 12A before the Committee of Creditors. And the appellant could give revised offer within a week but it could not come in way of Interim Resolution Professional to proceed in accordance with law uninfluenced by orders passed by the Appellate Tribunal.

Case Review : State Bank of India v. Priknit Retails Ltd. [2020] 114 taxmann.com 58 (NCLT - Chd.), Affirmed.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL D

- **Rajeev Anand v. Srei Equipment Finance Ltd. - [2020] 114 taxmann.com 61 (NCL-AT)/[2020] 158 SCL 432 (NCL-AT)**

Where finding of NCLT that amount was disbursed to corporate debtor was not supported by any evidence, same was unsustainable and moratorium order passed against corporate debtor was to be set aside.

CIRP proceedings had been initiated against the appellant-corporate debtor on account of default in repayment of its dues under loan agreement. Instant appeal was filed by the

corporate debtor mainly on the ground that no amount had been disbursed to the appellant and the financial creditor had not filed any document to show disbursement. The appellant further contended that there was no debt payable in law and order initiating CIRP had been passed based on presumed debt and without providing opportunity to the corporate debtor to file an objection which was against the principle of natural justice. The corporate debtor filed affidavit along with letter issued by bank to substantiate that amount under loan agreement was credited in its account and the corporate debtor immediately paid back entire amount to the financial creditor and asserted that said amount had not been paid towards any previous outstanding.

Held that since finding of the Adjudicating Authority that amount was again disbursed to the corporate debtor was not supported by any evidence, same was unsustainable, therefore, orders passed by the Adjudicating Authority declaring moratorium was to be declared as illegal and same were to be set aside.

Case Review : Srei Equipment Finance Ltd. v. Wianxx Impex (P.) Ltd. [2020] 114 taxmann.com 60 (NCLT - New Delhi), Reversed.

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

- **Somesh Choudhary v. Syndicate Interglobe - [2020] 114 taxmann.com 63 (NCL-AT)**

Where parties reached settlement prior to constitution of Committee of Creditors, and payment had also been made as per agreed terms of settlement, order initiating insolvency process under section 9 against corporate debtor was to be set aside.

After admission of CIRP application against the corporate debtor under section 9, parties reached terms of settlement. The operational creditor also accepted that terms of settlement had been reached between parties. As per terms of settlement, part of payment had also been paid and part was payable.

Held that in view of fact that parties settled matter before constitution of Committee of Creditors, order initiating CIRP against the corporate debtor was to be set aside and the corporate debtor was to be directed to pay rest of amount to the operational creditor within time as agreed in terms of settlement.

Case Review : Syndicate Interglobe v. Global Fragrances (P.) Ltd. [2020] 114 taxmann.com 62 (NCLT - New Delhi), Reversed.

SECTION 21 - CORPORATE INSOLVENCY RESOLUTION PROCESS - COMMITTEE OF CREDITORS

- **Vinay Kumar Mittal v. Dewan Housing Finance Corporation Ltd. - [2020] 114 taxmann.com 64 (SC)**

Where appellant-depositors who had invested in fixed deposits of respondent company challenged orders of High Court restraining respondent from making any payment to depositors, moratorium was declared against respondent corporate debtor, and, therefore, claims made by depositors would be considered by Committee of Creditors and Administrator without being influenced by orders passed by High Court.

The appellant-depositors invested in fixed deposits with respondent Company. However, the respondent company was restrained from making any payment to depositors by the High Court. On an application filed by RBI, corporate insolvency resolution process was initiated against the respondent-corporate debtor and moratorium was declared. The appellants filed instant appeal against restraint order of the High Court.

Held that claims made by depositors would be considered by the Committee of Creditors and the Administrator without being influenced by orders passed by the High Court and appellants could raise all points and contentions before the Committee of Creditors, the Administrator and if necessary, NCLT.

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

- **Jai Kishan Gupta v. Green Edge Buildtech LLP - [2020] 114 taxmann.com 109 (NCL-AT)/[2020] 158 SCL 116 (NCL-AT)**

Where Adjudicating Authority referred withdrawal application before CoC in view of huge claims from other creditors, and CoC rejected same, since order of CoC had not been challenged before

Adjudicating Authority, no interference was called for in order of Adjudicating Authority referring matter to CoC.

CIRP application filed by the operational creditor against the corporate debtor was admitted. According to the appellant, a director of suspended board of the corporate debtor, the operational creditor and the corporate debtor entered into a settlement. An application for withdrawal of insolvency proceedings was moved by the operational creditor and committee of creditors was yet not constituted. The Adjudicating Authority found it appropriate to note that the financial creditors of the corporate debtor had already filed claims of huge amount and wanted to hear financial creditor, thus, referred matter to CoC with regard to settlement. The appellant contended that the Adjudicating Authority was required to exercise its discretion to allow withdrawal and could not have asked for opinion of financial creditor and further that CoC should not have been allowed to be constituted. Undesirable conduct of director of the corporate debtor was noted and affidavit was filed by the RP with regard to huge cash withdrawals and diversion of property by suspended board of directors.

Held that the Adjudicating Authority had discretion to allow or disallow withdrawal application. Since the Adjudicating Authority did not accept or reject withdrawal application and referred it to CoC, and decision taken by CoC in rejecting request for withdrawal had not been challenged before Adjudicating Authority, no interference was called for in decision of Adjudicating Authority.

Case Review : Green Edge Buildtech LLP v. Aadhaar Shri Infratech (P.) Ltd. [2020] 114 taxmann.com 107 (NCLT - New Delhi), Affirmed.

SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - APPEALS AND APPELLATE AUTHORITY

- **Kotak Investment Advisors Ltd. v. Krishna Chamadia - [2020] 114 taxmann.com 113 (Bombay)**

Where there were serious disputed questions of fact and petitioners had alternate and equally efficacious remedy of filing an appeal to NCLAT and in that appeal it could raise all grounds, writ petition filed by petitioner challenging order of NCLT in accepting resolution plan of respondent No. 2 was to be dismissed.

The petitioner participated in Corporate Insolvency Resolution Process of the Respondent No. 1 and submitted its Resolution Plan/Bid. However, the Respondent No. 1 accepted bid of Respondent No. 2 after last date of submission. The petitioner filed miscellaneous application before NCLT challenging adoption of bid of Respondent No. 2. The NCLT by impugned order sanctioned resolution plan and rejected petitioner's application. The petitioner filed writ petition challenging order of NCLT.

Held that since there were serious disputed questions of fact and petitioners had alternate and equally efficacious remedy of filing an appeal to NCLAT and in that appeal it could raise all grounds, writ petition filed by petitioner was to be dismissed.

SECTION 5(21) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL DEBT

- **Good Morning Fin-Advisory (P.) Ltd. v. PC Jain Textile (P.) Ltd. - [2020] 114 taxmann.com 137/[2020] 158 SCL 428 (NCL-AT)**

Where there was no evidence to prove that operational creditor raised loan for corporate debtor from bank, CIRP against corporate debtor on allegation of non-payment of service charge to operational creditor was to be dismissed.

The operational creditor was in business of raising finances for companies. It claimed that on request of the corporate debtor, it arranged loans of Rs. 25 crore for the corporate debtor but the corporate debtor did not make payment of service charge of 1 per cent of loan amount. The corporate debtor's case was that no service of the operational creditor was availed by the corporate debtor; neither any request was made by them to the operational creditor to procure loans. NCLT rejected the operational creditor's CIRP application on ground that the operational creditor had not filed any evidence in form of letter of engagement and assignment to the operational creditor for work of liaisoning with bank for raising loan.

Held that it could not be said that any amount was due and payable; hence, instant CIR petition was to be rejected .

Case Review : Good Morning Fin-Advisory (P.) Ltd. v. P.C. Jain Textiles (P.) Ltd. [2020] 114 taxmann.com 136 (NCLT - New Delhi), Affirmed.

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

- **SEITZ GmbH v. Simran Technologies (P.) Ltd. - [2020] 114 taxmann.com 199 (NCL-AT)**

Where a civil suit was filed by corporate debtor against operational creditor before issuance of demand notice, there was a pre-existing dispute between parties, therefore, CIRP petition filed by operational creditor was not maintainable.

The operational creditor stated that the corporate debtor had been regularly placing orders for surface acting detergents and the operational creditor supplied same. The corporate debtor failed to make payment towards invoices even after issuance of demand notice. The corporate debtor on other hand stated that the operational creditor and the corporate debtor entered into a confidentiality agreement which was in consideration of a relationship between the corporate debtor and the operational creditor. The corporate debtor contended that the operational creditor should first pay towards repayment of loan as consideration for transfer of all its customers and sale of business from the corporate debtor to the operational creditor. Further it was noted that the corporate debtor had also filed a civil suit in that connection.

Held that since there was a pre-existing dispute between the operational creditor and the corporate debtor before issuance of demand notice, CIRP petition filed by the operational creditor was not maintainable.

Case Review: SEITZ GmbH v. Simran Technologies (P.) Ltd. [2020] 114 taxmann.com 198 (NCLT - New Delhi), Affirmed.

LIE SYLLABUS

The Insolvency and Bankruptcy Board of India hereby publishes the syllabus and details of the Limited Insolvency Examination (Examination) under regulation 3 (3) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 for the examination to be conducted from 1st January 2021.

- **I. Syllabus for Examination**

The syllabus for the Examination is as under:

Sl. No	SUBJECT/ TOPICS	Weight (%)
1.	The Insolvency and Bankruptcy Code, 2016 (Code)	10
2.	Rules and Regulations under the Code (All Rules, Regulations and Circulars notified under the Code till 31st December 2020)	15
3.	(i) The Companies Act, 2013 Chapter III – Prospectus and Allotment of Securities Chapter IV – Share Capital and Debentures Chapter V – Acceptance of Deposits by Companies Chapter VI – Registration of Charges Chapter VII – Management and Administration	04

	Chapter IX – Accounts of Companies Chapter XV – Compromises, Arrangements and Amalgamations Chapter XVII – Registered Valuers Chapter XVIII – Removal of names of the companies from the register of companies Chapter XX – Winding-up of the companies Chapter XXVII – NCLT and NCLAT Chapter XXVIII Special Courts Chapter XXIX – Punishments (ii) The Partnership Act, 1932 (iii) The Limited Liability Partnership Act, 2008	
4.	(i) The Indian Contract Act, 1872 (Of contracts, Voidable Contracts and Void Agreement (Sections 10-30); Contingent Contracts (Sections 31-36); Performance of Contract (Sections 37-61); Novation, Rescission and Alteration of Contracts (Sections 62-67); Consequences of Breach of Contract (Sections 73-75); Contracts of Indemnity and Guarantee and Surety's Rights (Sections 124-127); Bailment and Pledge (Sections 148-181); Agency (Sections 182-238) (ii) The Negotiable Instruments Act, 1881 (iii) The Transfer of Property Act, 1882 and the Sale of Goods Act, 1930 (iv) The Code of Civil Procedure, 1908 (Sections 9, 10, 11, 26-32, 38-45,60-64, 73, 75-78, 89 and Order 21) and the Limitation Act, 1963 (v) The Prevention of Corruption Act, 1988 (Definition of public servant, Section 7-16 read with Section 29A of the Code) and the Prevention of Money Laundering Act, 2002 (Sections: 2-8, 48, 63, 67, 71, 72) (vi) The Recovery of Debts and Bankruptcy Act, 1993 (vii) The Arbitration and Conciliation Act, 1996	11

	(viii) The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (ix)The Micro, Small and Medium Enterprises Development Act, 2006: (Classification of enterprises, Advisory committee, Memorandum of micro, small and medium enterprises, Delayed payments to micro and small enterprises) (x) Real Estate (Regulation and Development) Act, 2016 (Sections: 2, 4, 5, 11, 17, 18, 20, 23, 31, 34, 36, 37, 38, 40, 41, 42, 58, 59, 69, 70, 71, 79, 80, 85, 86, 88, 89, 90) (xi) Securities Contracts Regulation Act, 1956 (Contracts and options in securities, listing of securities, Offences, penalties, and adjudication) and the following SEBI Regulations: - - Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 - Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 - Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 - Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015	
5.	Finance and Accounts (Corporate Finance; Financial Analysis; Liquidity Management; Tax Planning and GST)	05
6.	General Awareness: (i) Constitution of India: Right to Constitutional Remedies; provisions of Union Judiciary; provisions of High Courts in the States; (ii) Rights of Workmen under Labour Laws; (iii) Economy;	05

	(iv) Financial Markets; (v) Basic concepts of Valuation; and (vi) Forensic Audit	
7.	Case Laws- Important decisions of Supreme Court and High Courts, Decisions of NCLAT and NCLT relating to Corporate Insolvency Resolution, Corporate Liquidation, Voluntary Liquidation and Fast Track Resolution Process. There will be five questions carrying two marks each. **(CLICK HERE FOR LIST OF CASES)**	10
8.	Case Study on Corporate Insolvency Resolution and Liquidation. There will be one comprehension narrating a case and there will be ten questions based on the case carrying two marks each.	20
9.	Case Study on Individual Insolvency Resolution and Bankruptcy. There will be one comprehension narrating a case and there will be four questions based on the case carrying two marks each.	08
10.	Case Study on Companies/Partnership firms/ Limited Liability Partnerships. There will be one comprehension narrating a case and there will be three questions based on the case carrying two marks each.	06

11.	Case Study on Business and Professional Ethics. There will be one comprehension narrating a case and there will be three questions based on the case carrying two marks each.	06
Total		**100**

Note: Wherever any law, an Act of Parliament or any Rule is referred to in the syllabus, the same shall be taken as in force as on 31st December 2020. This means that any amendment in such laws, Acts or Rules effected after 31st December 2020 shall be ignored.

II. Format of Examination

The format of Examination is as under:

- The examination is conducted online (computer-based in a proctored environment) with objective multiple-choice questions.
- The examination centres are available at various locations across the country.
- The examination is available on every working day.
- A candidate may choose the time, the date, and the Examination Centre of his choice for taking the Examination. For this purpose, he needs to enroll and register at https://ibbiliexam.onlineregistrationform.org/IBBI.
- A fee of Rs.1500 (One thousand five hundred rupees) is currently applicable on every enrolment.
- The duration of the examination is 2 hours.
- A candidate is required to answer all questions.
- A wrong answer attracts a negative mark of 25% of the marks assigned for the question.
- A candidate needs to secure 60% of marks for passing.
- A successful candidate is awarded a certificate by IBBI.
- A candidate is issued a temporary mark sheet on submission of answer paper.
- No workbook or study material is allowed or provided.
- No electronic devices including mobile phones and smart watches are allowed.

Further changes, if any, in the above details of the Examination will be provided subsequently.

***Disclaimer**: The information contained in this document is intended for informational purposes only and does not constitute legal opinion, advice or any advertisement. This document is not intended to address the circumstances of any particular individual or corporate body. Readers should not act on the information provided herein without appropriate professional advice after a thorough examination of the facts and circumstances of a particular situation. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.*

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.