

Liquidation Process

A Handbook for the Guidance of Insolvency Professionals



Committee on Insolvency & Bankruptcy Code
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Foreword

The Insolvency and Bankruptcy Code, 2016 (IBC or the Code) has laid a strong foundation for sustainable development and economic growth in the nation. The Code was enacted to streamline the existing legal framework for insolvency resolution ensuring that the resolution takes place in a time bound manner to maximise value of assets, promote entrepreneurship, facilitate availability of credit and safeguard interests of all stakeholders.

The main objective of IBC was to revive the business of the corporate debtor. However, when the insolvency resolution does not seem to be feasible, the Code also provides for an orderly exit by laying down a comprehensive framework for liquidation process, prescribing various functions therein, the timelines for every part in the process, the reporting requirements etc.

I am happy to note that the Committee on Insolvency & Bankruptcy Code of ICAI has brought out the publication- ***“Liquidation Process - A Handbook for the Guidance of Insolvency Professionals”*** to help professionals appreciate the practical aspects and understand clearly the provisions related to orderly conduct of Liquidation Process under IBC, which is crucial in performing the task of liquidation effectively and efficiently as mandated under the Code.

I sincerely appreciate the efforts put in by CA. Gyan Chandra Misra, Chairman, CA. Rajendra Kumar P., Vice-Chairman and all other members of the Committee on Insolvency & Bankruptcy Code to bring out this useful publication.

I am sure that this publication would be of great help to the members, especially to insolvency professionals and other stakeholders.

1st February, 2024

CA. Aniket Sunil Talati
President, ICAI

Preface

A healthy credit flow and generation of new capital become indispensable for the growth of the economy, especially when it is envisioned that India would be emerged as a developed economy by 2047. In this direction, the enactment of The Insolvency and Bankruptcy Code, 2016 (IBC or the Code) has taken place in the country. The outcomes of the IBC during these years have been truly encouraging and it has established a strong and contemporary insolvency resolution framework. Also, the Code is continuously evolving to take care of changing market dynamics and emerging developments.

The main purpose of the Code is maintaining the going concern status through revival and resolution. Sometimes when the scope for rescue becomes not viable, proceeding for liquidation becomes imminent. The Liquidation Process as provided under IBC is conducted by a Liquidator, who is entrusted with several duties and responsibilities to carry the entire process within the prescribed timelines and also complying with various reporting requirements.

The Committee on Insolvency & Bankruptcy Code of ICAI as part of its initiative in bringing out pertinent publications on important processes under IBC has brought out this publication – **Liquidation Process – A Handbook for the Guidance of Insolvency Professionals** to facilitate professionals in understanding the various functions and responsibilities while performing his duties as a Liquidator in conducting the Liquidation Process of the Corporate Debtor.

We take this opportunity in thanking the President of ICAI, CA. Aniket Sunil Talati and Vice President of ICAI, CA. Ranjeet Kumar Agarwal for their support and encouragement in bringing out the publication.

We would like to thank all the Committee Members for their guidance and contribution in bringing out this publication.

We would like to sincerely appreciate and thank CA. Kamal Garg, who prepared the Draft of the publication and would also like to thank CA. Reshma Mittal and CA. Rakesh Jindal for reviewing the Draft publication.

We appreciate the efforts put in by Ms. S. Rita, Secretary, Committee on Insolvency & Bankruptcy Code, ICAI, CA. Sarika Singhal, Deputy Secretary, ICAI and the Committee Secretariat comprising of Ms. Sarita Aggarwal,

CA. Yash Agarwal and Ms. Nancy Mohini for providing their technical and administrative support in bringing out this publication.

We are confident that the members of the profession, especially insolvency professionals and other stakeholders will find the publication very helpful.

CA. Gyan Chandra Misra
Chairman
Committee on Insolvency &
Bankruptcy Code, ICAI

CA. Rajendra Kumar P
Vice- Chairman
Committee on Insolvency &
Bankruptcy Code, ICAI

Date: 1st February, 2024

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Introduction

The Insolvency and Bankruptcy Code, 2016 (IBC or the Code) is a comprehensive legislation that envisages and regulates the process of insolvency and bankruptcy of persons including corporates, partnerships, LLPs and individuals. The Code provides mechanism for insolvency resolution in a time bound manner to enable maximization of the value of assets, promote entrepreneurship, enhance availability of credit and balance the interest of all the stakeholders. The central objective of IBC is to revive and resolve the insolvency of Corporate Debtor and prevent it from going into liquidation. However, at times due to certain situations the liquidation process cannot be averted. In such cases, the IBC has laid an extensive framework for Liquidation Process and elaborate Regulations thereunder.

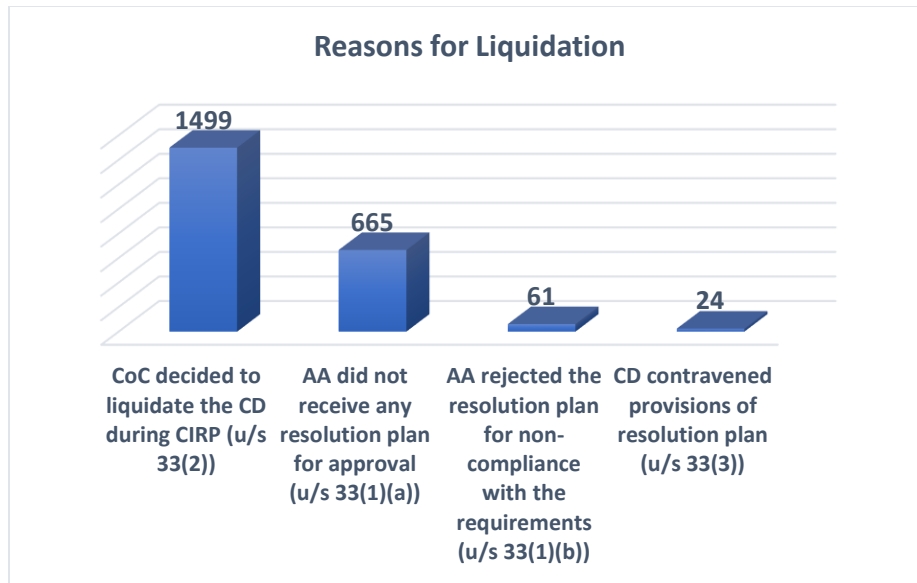
Liquidation Process of the corporate debtor is initiated under following circumstances:

- No resolution plan is received by the Adjudicating Authority before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process
- The resolution plan received is rejected by the Adjudicating Authority for non-compliance of the requirements specified
- The Committee of Creditors (COC) with not less than 66% of the voting share, at any time during the Corporate Insolvency Resolution Process (CIRP) but before confirmation of a resolution plan, including at any time before the preparation of information memorandum, decides to liquidate the corporate debtor
- The resolution plan approved by the Adjudicating Authority is contravened by the corporate debtor and any person other than the corporate debtor whose interests are prejudicially affected by such contravention, makes an application to the Adjudicating Authority for a liquidation

The Adjudicating Authority orders for liquidation of the corporate debtor in the aforesaid situations.

As per IBBI Newsletter- July-September 2023, as on September 2023, 2249 orders for commencement of liquidation have been passed. The details of liquidation in these circumstances are presented in the figure below:

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Further, as on September 30, 2023, there are 1652 ongoing liquidation processes out of total 2249 liquidation orders. The details of the mode of closure of liquidation process are presented in Table given below:

Status of Liquidation	Number
Initiated	2249
Final Report submitted	597
Closed by Dissolution	343
Closed by Going Concern Sale	32
Closed by Compromise / Arrangement	8
Ongoing Processes	1652

(Source: IBBI Newsletter -July -September 2023)

1. Initiation of Liquidation

Section 33 of the Insolvency and Bankruptcy Code, 2016 (IBC or the Code) provides as under:

(1) Situations where Adjudicating Authority shall order requiring the corporate debtor to be liquidated: Where the Adjudicating Authority,—

- (a) before the expiry of:
- the insolvency resolution process period or
 - the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or
 - the fast-track corporate insolvency resolution process under section 56,
- as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or
- (b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein,

it shall—

- (i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down;
- (ii) issue a public announcement stating that the corporate debtor is in liquidation; and
- (iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Adjudicating Authority shall pass a liquidation order on decision of the Committee of Creditors by at least 66% majority to liquidate the corporate debtor: Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the Committee of Creditors *approved by not less than sixty-six per cent of the voting share* to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

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For the purposes of section 33(2) of the Code, it is hereby declared that the Committee of Creditors (CoC) may take the decision to liquidate the corporate debtor, any time after its constitution under section 21(1) and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum - Explanation to section 33(2) of the Code inserted vide Insolvency and Bankruptcy Code (Amendment) Act, 2019 w.e.f. 16.8.2019.

Thus, with this amendment what follows is that the CoC have vast powers in respect of Corporate Debtor. CoC can decide any time (before confirmation of resolution plan by NCLT) that the corporate debtor cannot be continued as a going concern and should be liquidated. This essentially signifies that the CoC has the flexibility to leverage its commercial acumen in pursuing a comprehensive and timely resolution for distressed assets, aligning with one of the key objectives outlined in the Code.

(3) Resolution plan contravened by the concerned corporate debtor - person thus prejudicially affected may make an application to the Adjudicating Authority for a liquidation order: Where the resolution plan approved by the Adjudicating Authority [*under section 31 or under sub-section (1) of section 54L,*¹] is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) Passing of liquidation order: On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) No suit or other legal proceeding shall be instituted by or against the corporate debtor: Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor. [Section 52 of Code makes provisions relating to rights of secured creditor in liquidation proceedings.]

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

¹ Inserted by Insolvency and Bankruptcy Code (Amendment) Act, 2021 w.e.f. 4-4-2021

(6) Certain legal proceedings may be notified by the Central Government: The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) Notice of discharge: The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

Commercial wisdom of the CoC has been given paramount status without any judicial intervention: There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. Where the Resolution Plan is rejected, the NCLT would not have any option; but is obligated to initiate liquidation process under Section 33 – *K Sashidhar vs. Indian Overseas Bank & Ors. (SC) w.r.t. the liquidation order for Kamineni Steel & Power India Ltd.*

1.1 Compromise or arrangement

Regulation 2B of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 provides that:

(1) Where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013, it shall be completed within ninety days of the order of liquidation under section 33.

[Provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement]¹

[Provided further that where the recommendation to explore proposal of compromise or arrangement has been made by the committee under regulation 39BA of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall file the proposal within thirty days of the order of liquidation]²

(2) The time taken on compromise or arrangement, not exceeding ninety days, shall not be included in the liquidation period.

¹ Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020, **w.e.f. 6-1-2020**

² Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, **w.e.f. 16-9-2022**

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It is to be noted that the liquidator needs to make an application to the Adjudicating Authority to take approval for exclusion of such period from liquidation period which was taken in compromise or arrangement.

(3) Any cost incurred by the liquidator in relation to compromise or arrangement shall be borne by the corporate debtor, where such compromise or arrangement is sanctioned by the Tribunal under sub-section (6) of section 230:

Provided that such cost shall be borne by the parties who proposed compromise or arrangement, where such compromise or arrangement is not sanctioned by the Tribunal under sub-section (6) of section 230.

The Companies Act, 2013 ("the Act") envisages compromise or arrangements. Section 230 thereof, as amended by the Code, enables compromise or arrangement on the application by a liquidator appointed under the Code, as under:

"230. Power to compromise or make arrangements with creditors and members. —

(1) Where a compromise or arrangement is proposed—

*(a) between a company and its creditors or any class of them;
or*

(b) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs...."

As per above mentioned section, application u/s 230 of Companies Act can be submitted by the Liquidator.

As per Rule 3(3) of The Companies (Compromise, Arrangements and Amalgamations) Rules 2016 "**Where the company is not the applicant**, a copy of the notice of admission and of the affidavit shall be served on the company, or, where the company is being wound up, **on its liquidator**, not less than **fourteen days** before the date fixed for the hearing of the notice of admission.

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Further, as per Section 230(2) of The Companies Act 2013, the company or **any other person**, by whom an application is made under sub-section (1), shall disclose to the Tribunal by **affidavit**—

- (a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;
- (b) reduction of share capital of the company, if any, included in the compromise or arrangement;
- (c) any scheme of corporate debt restructuring consented to **by not less than seventy-five per cent** of the secured creditors in value, including—
 - (i) a creditor's responsibility statement in the prescribed form;
 - (ii) safeguards for the protection of other secured and unsecured creditors;
 - (iii) **report by the auditor** that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;
 - (iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and
 - (v) a **valuation report** in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

1.2 Liquidation Process envisages sale as a going concern:

Regulation 32 of the IBBI (Liquidation Process) Regulations, 2016 (Regulations) envisage sale as a going concern. It reads as under:

"32. Sale of Assets, etc.

The liquidator may sell-

- (a) *an asset on a standalone basis;*
- (b) ***the assets in a slump sale;***

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- (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."

Various judgments advocating the revival of Corporate Debtor are as follows:

While relying on regulation 32(e) of the Regulations, the Hon'ble Supreme Court in the matter of *Arcelor Mittal India Private Limited v. Satish Kumar Gupta & Ors.*¹ observed:

"The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation. We must not forget that the corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the corporate insolvency resolution process. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible."

While relying on regulation 32(e) of the Regulations, the Hon'ble Supreme Court in the matter of *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*², observed:

"What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern...."

It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation."

¹ Civil Appeal Nos. 9402-9405 of 2018

² Writ Petition (Civil) No. 99 of 2018

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The Hon'ble NCLAT, in the matter of S. C. Sekaran v. Amit Gupta & Ors., directed as under:

*" .. we direct the 'Liquidator' to proceed in accordance with law. He will verify claims of all the creditors; take into custody and control of all the assets, property, effects and actionable claims of the 'corporate debtor', **carry on the business of the 'corporate debtor' for its beneficial liquidation** etc. as prescribed under Section 35 of the I&B Code.... **Before taking steps to sell the assets of the 'corporate debtor(s)' (companies herein), the Liquidator will take steps in terms of Section 230 of the Companies Act, 2013.** The Adjudicating Authority, if so required, will pass appropriate order. Only on failure of revival, the Adjudicating Authority and the Liquidator will first proceed with the sale of company's assets wholly and thereafter, if not possible to sell the company in part and in accordance with law.*

.. The 'Liquidator' if initiates, will complete the process under Section 230 of the Companies Act within 90 days...".

Other important judgments in relation to Compromise or Arrangement:

The Hon'ble NCLAT, in the matter of Y. Shivram Prasad v. S. Dhanapal & Ors, observed as under:

".. we hold that the liquidator is required to act in terms of the aforesaid directions of the Appellate Tribunal and take steps under Section 230 of the Companies Act. If the members or the 'Corporate Debtor' or the 'creditors' or a class of creditors like 'Financial Creditor' or 'Operational Creditor' approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the Liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the Adjudicating Authority i.e. National Company Law Tribunal, Chennai Bench, in terms of the observations as made in above. On failure, as observed above, steps should be taken for outright sale of the 'Corporate Debtor' so as to enable the employees to continue."

In the matter of *Rasiklal S. Mardia v. Amar Dye Chem Limited & Ors.*, a shareholder filed a petition seeking revival of the company in liquidation through a compromise with creditors. The National Company Law Tribunal held that it is the liquidator alone who is authorised to file the company petition either for compromise or arrangement in respect of

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the company in liquidation. The Hon'ble NCLAT, while setting aside the impugned order of NCLT, observed:

"The Judgment in the matter of "National Steel & General Mills Versus Official Liquidator" makes it quite clear that Liquidator is only an additional person and not exclusive person who can move application under Section 391 of the old Act when the company is in liquidation. Looking to these Judgements, we are unable to support the view taken by NCLT that the Appellant could not have filed the Petition under Section 391 of the old Act."

In several matters it has been held that creditors and members of a CD in liquidation had a right to file application for compromise or arrangement under section 391 of the erstwhile Companies Act, 1956, which is similar to section 230 of Companies Act, 2013:

- (a) *Meghal Homes (P) Ltd. v. Shree Niwas Girni K.K. Samiti & Ors.*: The Hon'ble Supreme Court held:

".. It also does not appear to be necessary to restrict the scope of that provision considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Moreover, Section 391(1)(b) gives a right to the liquidator in the case of a company which is being wound up, to propose a compromise or arrangement with creditors and members indicating that the provision would apply even in a case where an order of winding up has been made and a liquidator had been appointed. Equally, it does not appear to be necessary to go elaborately into the question whether in the case of a company in liquidation, only the Official Liquidator could propose a compromise or arrangement with the creditors and members as contemplated by Section 391 of the Act or any of the contributories or creditors also can come forward with such an application."

- (b) *National Steel & General Mills v. Official Liquidator*: The Hon'ble High Court held:

".. In case of liquidation of the Company, in case the liquidator exclusively is interpreted to mean to have a right to move under Section 391 of the Act, and that Company is not to have such a right, there would be direct conflict between Sections 391 (1) and 446 (2)(c) of the Act which would not be in consonance of the principle of harmonious

interpretation of statutes. Therefore, the only rational interpretation, which can be put is that in case the company is wound up, liquidator is the additional person who can move the application under Section 391 of the Act apart from members, creditors and the Company."

- (c) *Rajendra Prosad Agarwalla & Ors v. Official Liquidator*: The Hon'ble High Court held:

"A plain reading of the section clearly indicates that the legislature intended that if any compromise or arrangement is proposed, the company or any creditor or any member of the company will be entitled to make the necessary application and in case where the company is being wound up, as the board has ceased to function and is no longer there and the company is represented by the liquidator, the liquidator will also be entitled to make the necessary application. The right which is conferred on the contributories or the creditors is not intended to be taken away when the company has gone into liquidation and in such a case an additional right is also conferred on the liquidator."

1.3. Person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor:

It should be noted that proviso to section 35(1)(f) of the Code mandates that the Liquidator shall not sell the immovable and movable property or actionable claims of the CD in liquidation to any person who is not eligible to be a resolution applicant. This prohibits Going Concern Sale (GCS) to persons ineligible under section 29A. However, the law did not prohibit such ineligible persons to participate in compromise or arrangement under section 230 of the Act until first proviso was inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020, w.e.f. 6-1-2020 to Regulation 2B which provides that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.

Prior to insertion of the above proviso there used to be a debate that it may be necessary to harmonise the provisions in the Code and the Act to provide level playing field. Some stakeholders felt that the ineligibility norms under section 29A of the Code may also apply to compromise or arrangement under section 230 of the Act. Other stakeholders felt that unlike liquidation under the Code, which is mostly Liquidator driven, the compromise or arrangement under the Act is mostly driven by the Tribunal. Further, section 29A of the Code has

several exceptions, while section 230 of the Act deals with all kinds of companies in all situations. It was felt there could be practical difficulties in implementation of ineligibility for the purposes of section 230 of the Act.

Now, pursuant to first proviso (*supra*), the debate is put to rest as now it is explicitly provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.

1.4. Mandatory assessment of Compromise or Arrangement while deciding to liquidate the corporate debtor:

Section 230 of the Companies Act, 2013 provides for a compromise and arrangement between a company and its creditors. A liquidator appointed under the Code can file an application before the NCLT, seeking a meeting of creditors under Section 230 of the Companies Act, 2013, for a compromise or arrangement. The 'IBBI Discussion Paper on Streamlining the Liquidation Process'¹ dated 14th June 2022 stated that all liquidation processes closed in the aforesaid manner took an average 466 days for completion.

Accordingly, Regulation 39BA as inserted by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2022, w.e.f. 16-9-2022, provides that:

(1) While deciding to liquidate the corporate debtor under section 33, the committee **shall** examine whether to explore compromise or arrangement as referred to under sub-regulation (1) of regulation 2B of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 and the resolution professional **shall** submit the committee's recommendation to the Adjudicating Authority while filing application under section 33.

(2) Where a recommendation has been made under sub-regulation (1), the resolution professional and the committee **shall** keep exploring the possibility of compromise or arrangement during the period the application to liquidate the corporate debtor is pending before the Adjudicating Authority.

Accordingly, in pursuance of above, second proviso to Regulation 2B as inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022, provides that where the recommendation to explore proposal of compromise or

¹ Visit <https://ibbi.gov.in/uploads/whatsnew/b3a47a6df67ffb00832dc7baec47123c.pdf>

arrangement has been made by the committee under regulation 39BA of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall file the proposal within thirty days of the order of liquidation.

2. Eligibility for appointment as liquidator

Regulation 3 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 provides as follows:

(1) An insolvency professional shall be eligible to be appointed as a liquidator if he, and every partner or director of the insolvency professional entity of which he is a partner or director, is independent of the corporate debtor.

Explanation— A person shall be considered independent of the corporate debtor, if he—

- (a) is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013 (18 of 2013), where the corporate debtor is a company;
- (b) is not a related party of the corporate debtor; or
- (c) has not been an employee or proprietor or a partner:
 - (i) of a firm of auditors or secretarial auditors or cost auditors of the corporate debtor; or
 - (ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor contributing ten per cent or more of the gross turnover of such firm,

in the last three financial years.

(2) A liquidator shall disclose the existence of any pecuniary or personal relationship with the concerned corporate debtor or any of its stakeholders as soon as he becomes aware of it, to the Board and the Adjudicating Authority.

(3) An insolvency professional shall not continue as a liquidator if the insolvency professional entity of which he is a director or partner, or any other partner or director of such insolvency professional entity represents any other stakeholder in the same liquidation process.

3. Appointment of Liquidator and fee to be paid

Section 34 provides as follows:

(1) Resolution professional appointed for the corporate insolvency resolution process under Chapter II shall act as the liquidator: Where the Adjudicating Authority passes an order for liquidation of the corporate debtor under section 33, the resolution professional appointed for the corporate insolvency resolution process under ¹*Chapter II* ²*[or for the pre-packaged insolvency resolution process under Chapter III-A]* shall, subject to submission of a written consent by the resolution professional to the Adjudicating Authority in specified form], act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority under sub-section (4).

(2) Powers of governing body to vest in the liquidator: On the appointment of a liquidator under this section, all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.

(3) Personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator: The personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor and provisions of section 19 shall apply in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.

(4) Replacement of resolution professional by the Adjudicating Authority: The Adjudicating Authority shall by order replace the resolution professional, if—

- (a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or
- (b) the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing; or

¹ Substituted for "Chapter II shall" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, **w.e.f. 6-6-2018**

² Inserted by Insolvency and Bankruptcy Code (Amendment) Act, 2021 **w.e.f. 4-4-2021**

- (c) *the resolution professional fails to submit written consent under sub-section (1) – Clause (c) inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.e.f. 6-6-2018*

(5) Adjudicating Authority may direct the Board to propose the name of another insolvency professional: For the purposes of clause (a) and (c) of sub-section (4), the Adjudicating Authority may direct the Board to propose the name of another insolvency professional to be appointed as a liquidator.

(6) Board shall propose the name of another insolvency professional within ten days: The Board shall propose the name of another insolvency professional *along with written consent from the insolvency professional in the specified form*, within ten days of the direction issued by the Adjudicating Authority under sub-section (5) as amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.e.f. 6-6-2018.

(7) Order appointing such insolvency professional as the liquidator: The Adjudicating Authority shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator.

(8) Fee for the conduct of the liquidation proceedings shall form part of the liquidation cost: An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.

Section 5(16) of the Code read with Regulation 2(ea) of the Liquidation Regulations provide that the liquidation cost includes fee payable to the liquidator under regulation 4.

Regulation 39D as inserted by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019, w.e.f. 25-7-2019 provides that while approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may, in consultation with the resolution professional, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33, for –

- (a) the period, if any, used for compromise or arrangement under section 230 of the Companies Act, 2013;

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- (b) the period, if any, used for sale under clauses (e) and (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016; and
- (c) the balance period of liquidation

Regulation 4 as substituted by Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f. 25-7-2019 provides as follows:

- (1) The fee payable to the liquidator shall be in accordance with the decision taken by the Committee of Creditors under regulation 39D of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

¹[(1A) *Where no fee has been fixed under sub-regulation (1), the consultation committee may fix the fee of the liquidator in its first meeting.*]

- (2) In cases other than those covered under sub-regulation (1) and (1A), the liquidator shall be entitled to a fee-
 - (a) at the same rate as the resolution professional was entitled to during the corporate insolvency resolution process, for the period of compromise or arrangement under section 230 of the Companies Act, 2013; and
 - (b) as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation, as under:

Amount of Realisation/ Distribution (In rupees)	Percentage of fee on the amount realised/ distributed		
	in the first six months	in the next six months	thereafter
Amount of Realisation (exclusive of liquidation costs)			
On the first 1 crore	5.00	3.75	1.88
On the next 9 crore	3.75	2.80	1.41
On the next 40 crore	2.50	1.88	0.94

¹ Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022

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On the next 50 crore	1.25	0.94	0.51
On further sums realized	0.25	0.19	0.10
Amount Distributed to Stakeholders			
On the first 1 crore	2.50	1.88	0.94
On the next 9 crore	1.88	1.40	0.71
On the next 40 crore	1.25	0.94	0.47
On the next 50 crore	0.63	0.48	0.25
On further sums distributed	0.13	0.10	0.05

Clarification: For the purposes of clause (b), it is hereby clarified that where a liquidator realises any amount, but does not distribute the same, he shall be entitled to a fee corresponding to the amount realised by him. Where a liquidator distributes any amount, which is not realised by him, he shall be entitled to a fee corresponding to the amount distributed by him.

- (3) Where the fee is payable under clause (b) of sub-regulation (2), the liquidator shall be entitled to receive half of the fee payable on realisation only after such realised amount is distributed.

Clarification: Regulation 4 of these regulations, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said amendment Regulations.

- (9) Fees to be paid to the liquidator from the proceeds of the liquidation estate:** The fees for the conduct of the liquidation proceedings under sub-section (8) shall be paid to the liquidator from the proceeds of the liquidation estate under section 53.

CLARIFICATION W.R.T. LIQUIDATORS' FEE UNDER CLAUSE (b) OF SUB-REGULATION (2) OF REGULATION 4 OF IBBI (LIQUIDATION PROCESS) REGULATIONS, 2016 - CIRCULAR NO. IBBI/LIQ/61/2023, DATED 28-9-2023

Regulation 4 of the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Regulations) provides for Liquidator's fee. Sub-regulations (1)

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and (1A) provide that the fee payable to the liquidator be decided by the Committee of Creditors (CoC) or Stakeholders' Consultation Committee (SCC), as the case may be. If liquidators' fee is not fixed under sub-regulations (1) and (1A), clause (b) of sub-regulation (2) of Regulation 4 provides that the liquidator shall be entitled to a fee as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation, as under:

Amount of Realisation / Distribution (In rupees)	Percentage of fee on the amount realised / distributed		
	in the first six months	in the next six months	Thereafter
Amount of Realisation (exclusive of liquidation costs)			
On the first 1 crore	5.00	3.75	1.88
On the next....
Amount Distributed to Stakeholders			
On the first 1 crore	2.5	1.88	0.94
On the next

2. Based on records examined during the inspections and investigations and interaction with stakeholders, it has been observed that different interpretations of terms highlighted above are being made by the liquidator which are being clarified below: —

2.1 Amount realised: Regulation 4(2)(b) provides that the fee shall be "as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation...."

"Amount realised" means an amount that is being realised from the sale of an asset where the asset changes form. Where the asset is already liquid such as cash and bank balance including term deposits, mutual funds, and quoted shares, there is no 'realisation', and funds are readily available for distribution. The amount realised, thus, implies the proceeds from the sale/realization from the liquidation of assets which are not liquid. Therefore, the liquidator is not entitled to a fee on realisation for these liquid assets and is entitled to a fee only on distribution.

Clarification: "Amount realised" shall mean amount realised from assets other than liquid assets such as cash and bank balance including term

deposit, mutual fund, quoted share available on start of the process after exploring compromise and arrangement, if any.

2.2 Other liquidation costs:

The term "Amount of Realisation (exclusive of liquidation costs)" given in the table in Regulation 4(2)(b) mandates that all liquidation costs are to be deducted from the realisation amount. However, as per regulation 4(2)(b), "other liquidation cost" is to be deducted from realisation. There is a gap in understanding in the market about what components of the liquidation cost are to be excluded from the liquidation cost to derive "other liquidation cost".

The component that can be excluded is only that part of the liquidation cost which is itself dependent for its calculation on other liquidation costs *i.e.*, liquidator's fee. Including the same in "other liquidation cost" would entail a circular reference to the liquidator fee for the calculation of liquidator fee making the calculation very tedious and impractical. Hence, all other components of liquidation cost apart from liquidator's fee shall be part of the "other liquidation cost".

In few cases, liquidators are only considering process cost as "other liquidation cost" and thereby, exclude the cost incurred in preserving and protecting the assets of the CD, and running the CD as a going concern to calculate "other liquidation cost". Before amendment dated 25th July, 2019 to the Liquidation Regulations, the liquidation cost under Regulation 2(1)(ea) had four components. To clarify the liquidation cost, through aforesaid amendment four new components of liquidation cost were added. In some cases, it is being wrongly interpreted that these newly added four components, inter-alia, such as going concern costs etc., are to not be considered as the liquidation cost in respect of all those cases where the liquidation process commenced before the aforesaid amendment. Since these four components are paid in priority to payment to stakeholders as per section 53 of the Code by virtue of it being liquidation cost under section 53(1)(a), these newly added components were always part of the liquidation cost irrespective of the date of commencement of liquidation process. Any other interpretation would create uncertainty about the priority of payment of these components of liquidation cost over payment to stakeholders.

Furthermore, the term "other liquidation cost" existed right from the inception of liquidation regulations and thus could not have meant to exclude certain components of liquidation costs from "liquidation costs" which were added by a subsequent amendment in 2019.

Clarification: The "other liquidation cost" in regulation 4(2)(b) shall mean liquidation cost paid in priority under section 53(1)(a), after excluding the liquidator's fee.

2.3 Amount distributed to stakeholders:

Section 53 provides for order of priority for making distribution out of proceeds from sale of assets. Further, Regulation 42 provides that:

Distribution.

- (1)
- (2) The liquidator shall distribute the proceeds from realization within ninety days from the receipt of the amount to the stakeholders.
- (3) The insolvency resolution process costs, if any, and the liquidation costs shall be deducted before such distribution is made.

Furthermore, the table in Regulation 4(2)(b) provides for liquidator's fees to be calculated as a percentage of the 'Amount Distributed to Stakeholders'. However, in few cases, it has been observed that the liquidators are erroneously calculating fees even on distribution of the CIRP cost and liquidation cost, including expenses incurred in running the business of the CD during the liquidation process. The conjoint reading of Regulation 42(2) and 42(3) read with Regulation 4(2)(b) mandates the liquidator to distribute the proceeds from realization after deducting the payment of CIRP cost and liquidation costs as these costs do not represent distribution of proceeds to stakeholders/ claimants.

Clarification: "Amount distributed to stakeholders" shall mean distributions made to the stakeholders, after deducting CIRP and liquidation cost.

2.4 Amount of Realisation /Distribution:

It is observed that different interpretations are being made for the words "Amount of Realisation /Distribution" used in table in the Regulation 4(2)(b). Though, most of them are interpreting it correctly to mean the cumulative value of assets realised till date, few are interpreting it to mean the value of assets realised during the first six months and then next six months and so on. The words "Amount of Realisation /Distribution" are mentioned in column 1 only. Other columns are for percentage of fees on such realisation/ distribution. Thus, the cumulative value of amount realised/ distributed is to be bifurcated in various slabs as per column 1. Only after that, liquidator has to divide the amount realised in a particular slab based on the tenure in

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which it was realised such as in first six months, next six months or thereafter. Out of the total amount pertaining to that slab, for the amount realised in first six months, % of fees will be as per column 2; for the amount realised in next six months, % of fees will be as per column 3; and for the amount realised thereafter, % of fees will be as per column 4.

Illustration: Assume the liquidation commencement date is 01.11.2021. Further, the liquidation cost and period spent on compromise or arrangement are nil. The liquidator has realised Rs.10 crore on 01.01.2022 and another Rs.1 crore on 01.10.2023.

Liquidator's fee – erroneously computed:

Liquidator fee while interpreting "Amount of Realisation /Distribution" to mean value of assets realised during the first six months and then next six months period and so on, without considering the slab value of assets, computed as under:

Particulars	in first six months	Fee	in next six months	Fee
On the first 1 crore	5.00%	5,00,000	3.75%	3,75,000
On the next 9 crore	3.75%	33,75,000		
Total		38,75,000		3,75,000
Total fee				42,50,000

In the same illustration, if we consider that entire Rs. 11 crores was realised within 6 months, the calculation of the liquidator fee is as under:

Particulars	in the first six months	Fee
On the first 1 crore	5.00%	5,00,000
On the next 9 crore	3.75%	33,75,000
On the next 40 crore	2.80%	2,80,000
Total fee		41,55,000

In the above illustrations, the liquidator is getting more fee if he realises the assets within 12 months in comparison to realisation of the assets within 6 months which is against the spirit of the regulation. Thus, it is clear that the cumulative value of amount realised/ distributed is to be bifurcated in

various slabs as per column 1. Only after that, the liquidator has to divide the amount realised in a particular slab based on the tenure in which it was realised such as in first six months, next six months or thereafter. Thereafter, fee rate for various amounts realised in various periods are to be taken as per columns 2, 3 and 4.

Clarification: "Amount of Realisation /Distribution" shall mean cumulative value of amount realised/ distributed which is to be bifurcated in various slabs as per column 1 and thereafter the same is to be bifurcated into realisation/ distribution in various periods of time and then corresponding fee rate from the table is to be taken.

2.5 Period for calculation of fee: It has been observed that the liquidators are suo-moto excluding various time periods such as stay by court on sale of a particular asset, delay in relinquishment by secured creditor, for the purpose of calculating the fee. However, since the liquidator works under the overall guidance of the Adjudicating Authority, any such exclusion should have stamp of judicial authority and should be only for the asset for which such exclusion has been granted.

Clarification: Exclusion for purpose of fee calculation is to be allowed only when the same has been explicitly provided by the Hon'ble NCLT/ NCLAT or any other court of law and will operate only for the asset which could not have been realised during the excluded period.

3. The IPs who are currently handling or have handled in the past any liquidation assignment shall ensure that the fee charged by them under Regulation 4(2)(b) is in accordance with above clarifications and inform the same to the Board electronically on the website of IBBI. In cases, where excess liquidator's fee is returned and distributed on or before 31st October, 2023 no disciplinary proceedings will be initiated on the ground that the excess fee was charged and has now been returned.

4. This Circular is being issued in exercise of the powers conferred under the provisions of section 196 of the Insolvency and Bankruptcy Code, 2016.

4. Powers and duties of Liquidator

Section 35 provides as follows:

(1) Liquidator's powers are subject to the directions of the Adjudicating Authority: Subject to the directions of the Adjudicating

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Authority, the liquidator shall have the following powers and duties, namely: —

- (a) to verify claims of all the creditors;
- (b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;
- (c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report;
- (d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;
- (e) to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary;
- (f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant - Inserted by the Insolvency and Bankruptcy Code (Amendment) Act, 2018, w.e.f. 23-11-2017;

- (g) to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;
- (h) to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;

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- (i) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;
- (j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;
- (k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor;
- (l) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;
- (m) to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;
- (n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and
- (o) to perform such other functions as may be specified by the Board.

As per Section 34(2), on the appointment of a liquidator under this section, all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.

As per Section 34 (3), the personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor and provisions of section 19 shall apply in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.

Section 19 provides as under:

- (1) The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor.

(2) Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions.

(3) The Adjudicating Authority, on receiving an application under subsection (2), shall by an order, direct such personnel or other person to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the corporate debtor.

Considering the words contained in section 34(3) that is “provisions of section 19 shall apply in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional”, it is to be noted that in a voluntary winding up, the liquidator will have the same rights as are there with interim resolution professional during the interim period of corporate insolvency resolution process.

The official liquidator has a duty coupled with the power to institute or defend any suit, prosecution or other legal proceedings both civil and criminal in the name and on behalf of the company. Such power includes the power to carry on business of the company so far as may be necessary for the benefit of the company in liquidation. He has also the power to sell immovable and movable property and actionable claims of the company by public auction or private contract. Once the winding of the company is ordered, the official liquidator shall take the custody of all the properties, effects and actionable claims to which the company is or appears to be entitled. The position of a liquidator is essentially that of an agent employed for the purpose of winding up the company [V. K. Seshasayee v. Official Liquidator [2005] 127 Comp. Cas. 156 (Mad.)].

The expression “custody or control” should be considered carefully by the liquidator. It is so because the words “custody” and “control” have a distinguished footing. While the word “custody” signifies physical or constructive possession and the action or fact of owning, maintaining, or protecting something; the word “control” on the other hand, signifies a means of limiting or regulating something. For instance, while stock in hand at the godown of the entity can be taken under the custody by the liquidator but whether to sell or transfer such a stock or not is dependent upon the permission or so called control of the liquidator.

Actionable claim means a claim to any debt other than a secured debt or a beneficial interest in movable property not in possession of the claimant.

Actionable claim includes claims recognised by the court as affording grounds for relief either as to unsecured debts or as to any interest in movable property. It is not necessary that the property is in the possession of the person concerned, whether present or future, conditional or contingent [Canara Bank v. Tecon Engineers [1994] 80 Comp. Cas. 325 (Ker.)]

4.1. Prohibition to sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant:

The Insolvency and Bankruptcy Code (Amendment) Act, 2018, w.e.f. 23-11-2017 has inserted proviso to clause (f) of section 35(1) of the Code to provide that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.

As per Section 5(25) of the Code "Resolution applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25 ¹[or pursuant to section 54K, as the case may be].

Under section 25(2)(h) of the Code it is provided that it shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor and for this purpose he shall invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of Committee of Creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.

Section 54K deals with consideration and approval of resolution plan in context of pre-packaged insolvency resolution process.

In this regard, section 29A as inserted by the Insolvency and Bankruptcy Code (Amendment) Act, 2018, w.r.e.f. 23-11-2017, provides that 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,—

- (a) is an undischarged insolvent;

¹ Inserted by Insolvency and Bankruptcy Code (Amendment) Act, 2021, **w.r.e.f. 4-4-2021**

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- (b) is a wilful defaulter in accordance with the guidelines¹ of the Reserve Bank of India issued under the Banking Regulation Act, 1949;
- (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 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, or completion of such transactions as may be prescribed 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;

¹ See Master Circular on Wilful Defaulters issued by RBI at https://www.rbi.org.in/SCRIPTS/BS_ViewMasCirculardetails.aspx?id=9044#21

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- (d) has been convicted for any offence punishable with imprisonment—
- (i) for two years or more under any Act specified under the Twelfth Schedule; or
 - (ii) for seven years or more under any other law for the time being in force:
- Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:
- Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;
- (e) is disqualified to act as a director under the Companies Act, 2013:
- Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;
- (f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;
- (g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:
- Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;
- (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;
- (i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or
- (j) has a connected person not eligible under clauses (a) to (i).

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Explanation I.—For the purposes of this clause, the expression "connected person" means—

- (i) any person who is the promoter or in the management or control of the resolution applicant; or
- (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
- (iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that 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, or completion of such transactions as may be prescribed prior to the insolvency commencement date;

Explanation II.—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:—

- (a) a scheduled bank;
- (b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;
- (c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside

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- India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999;
- (d) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - (e) an Alternate Investment Fund registered with the Securities and Exchange Board of India;
 - (f) such categories of persons as may be notified by the Central Government.

In the case of Arun Kumar Jagatramka Vs. Jindal Steel and Power Ltd. & Anr. SC order dt. 15.03.2021 the supreme court held that Upholding the constitutional validity of regulation 2B of the Liquidation Process Regulations, the SC held that prohibition in section 29A and section 35(1)(f) of the Code must also attach to a scheme of compromise or arrangement under section 230 of the Companies Act, 2013 (scheme), where a company is undergoing liquidation under the Code. Even in the absence of said regulation, a person ineligible under section 29A read with section 35(1)(f) is not permitted to propose a scheme for revival of a company undergoing liquidation under the Code. In case of a company undergoing liquidation pursuant to the provisions of Chapter III of the Code, a scheme is a facet of the liquidation process. It would lead to a manifest absurdity if the very persons who are ineligible for submitting a resolution plan, participating in the sale of assets of the company in liquidation or participating in the sale of the corporate debtor as a 'going concern', are somehow permitted to propose a scheme. The same rationale which permeates the resolution process under Chapter II (by virtue of the provisions of section 29A) permeates the liquidation process under Chapter III (by virtue of the provisions of section 35(1)(f)).

(2) Liquidator can consult any of the stakeholders entitled to distribution of proceeds: As per section 35(2), the liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53.

Section 53 provides that the proceeds from the sale of the liquidation assets shall be distributed in the prescribed order of priority and within such period and in such manner as may be specified.

Provided that any such consultation shall not be binding on the liquidator:

As per Proviso of Regulation 31A (10), where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing and submit the records relating to the said decision, to the Adjudicating Authority and to the Board within five days of the said decision; and include it in the next progress report.

[Explanation- It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019.]

Provided further that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified¹ by the Board.

5. Public announcement by liquidator for submission of claims

Once Liquidator is appointed, he shall make public announcement in form B of Schedule II of IBBI (Liquidation Process) Regulations, 2016, within five days of his appointment. The public announcement shall be in newspaper, website of corporate debtor and website of IBBI. The public announcement shall call upon stakeholders to submit their claims within 30 days from liquidation commencement date - Regulation 12 of IBBI (Liquidation Process) Regulations, 2016.

With effect from 25-7-2019, Regulation 12(2) as substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 provides that the public announcement shall-

- (a) call upon stakeholders to submit their claims or *update their claims submitted during the corporate insolvency resolution process*, as on the liquidation commencement date; and
- (b) provide the last date for submission or updation of claims, which shall be thirty days from the liquidation commencement date.

¹ Regulation 8 of the IBBI (Liquidation Process) Regulations, 2016 – given later in this publication

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- ¹(c) *provide that where a stakeholder does not submit its claims during the liquidation process, the claims submitted by such a stakeholder, and duly collated by the interim resolution professional or resolution professional, as the case may be, during the corporate insolvency resolution process under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, shall be deemed to be submitted under section 38.*

Section 38 of the Code deals with consolidation of the claims whereby the liquidator shall receive or collect the claims of creditors within a period of thirty days from the date of the commencement of the liquidation process.

Further, as per Regulation 12(3) the announcement shall be published—

- (a) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the liquidator, the corporate debtor conducts material business operations;
- (b) on the website, if any, of the corporate debtor; and
- (c) on the website, if any, designated by the Board for this purpose.

5.1. Process email ID:

The liquidator shall operate the process email account handed over to him by the resolution professional in accordance with regulation 4C² of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and in the event of his replacement, the credentials of such email ID shall be handed over to the new liquidator – Regulation 12A as inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022

¹ Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, **w.e.f. 16-9-2022**

² It provides that the interim resolution professional shall open an email account and use it for all correspondences with stakeholders and in the event of his replacement by a resolution professional, shall handover the credentials of the email to him. The resolution professional shall, in case of his replacement with another resolution professional or a liquidator, hand over the credentials of the email to the other resolution professional or the liquidator, as the case may be.

5.2. IBBI'S Electronic Platform for Hosting Public Notices of Auctions:

A liquidator is required to issue public notice of auctions on the website designated by IBBI, in addition to other specified modes of publication, under sub-regulation (3) of regulation 12 of the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Process Regulations) read with clause (5) of paragraph 1 of its Schedule I.

Considering the above, the Board has provided¹ an electronic platform on its website: www.ibbi.gov.in for hosting public notices of auctions of liquidation assets. The Board has designated this platform for the purposes of clause (5) of paragraph 1 of Schedule I of the Liquidation Process Regulations. Liquidators are, therefore, directed to upload the public notice of every auction of any liquidation asset, with effect from 1st October, 2021, at www.ibbi.gov.in on the day of its publication in newspapers, through their designated login page.

Liquidators were earlier auctioning liquidation assets on various auction platforms. The information regarding such auctions was not available at a centralised place. A centralised platform for hosting all public notices of auctions of liquidation assets of ongoing liquidation processes has improved the visibility for the liquidation assets being sold, and has helped in expediting the processes and led to better realisation.

6. Reporting by Liquidator

The liquidator shall prepare and submit:

- (a) a preliminary report;
- (b) an asset memorandum;
- (c) progress report(s);
- (d) sale report(s);
- (e) minutes of consultation with stakeholders; and
- (f) the final report prior to dissolution

to the Adjudicating Authority in the manner specified under these Regulations - Regulation 5(1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

¹ Circular No. IBBI/LIQ/44/2021, Dated 30-9-2021

6.1. Preservation of records

The liquidator shall preserve a physical as well as an electronic copy of the reports and minutes referred to in sub-regulation (1) for eight years after the dissolution of the corporate debtor - Regulation 5(2)

6.2. Liquidator shall make the reports and minutes available to a stakeholder in either electronic or physical form

Subject to other provisions of these Regulations, the liquidator shall make the reports and minutes referred to sub-regulation (1) available to a stakeholder in either electronic or physical form, on receipt of

- (a) an application in writing;
- (b) costs of making such reports and minutes available to it; and
- (c) an undertaking from the stakeholder that it shall maintain confidentiality of such reports and minutes and shall not use these to cause an undue gain or undue loss to itself or any other person - Regulation 5(3).

The word “undertaking” signifies an affirmation and declaration in the case of a person by law allowed to affirm or declare instead of swearing. Generally, such an undertaking is taken through an affidavit.

7. Submission of Preliminary Report by Liquidator

Regulation 13 provides that the liquidator shall submit a Preliminary Report to the Adjudicating Authority within seventy-five days from the liquidation commencement date, detailing—

- (a) the capital structure of the corporate debtor;
- (b) the estimates of its assets and liabilities as on the liquidation commencement date based on the books of the corporate debtor:

Provided that if the liquidator has reasons to believe, to be recorded in writing, that the books of the corporate debtor are not reliable, he shall also provide such estimates based on reliable records and data otherwise available to him;

- (c) whether he intends to make any further inquiry in to any matter relating to the promotion, formation or failure of the corporate debtor or the conduct of the business thereof; and
- (d) the proposed plan of action for carrying out the liquidation, including the timeline within which he proposes to carry it out and the estimated liquidation costs.

Further in terms of Regulation 34(4) the liquidator shall file the asset memorandum along with the preliminary report to the Adjudicating Authority.

8. Early dissolution if property insufficient to meet cost of liquidation

Any time after the preparation of the Preliminary Report, if it appears to the liquidator that—

- (a) the realizable properties of the corporate debtor are insufficient to cover the cost of the liquidation process; and
- (b) the affairs of the corporate debtor do not require any further investigation;

he may apply to the Adjudicating Authority for early dissolution of the corporate debtor and for necessary directions in respect of such dissolution - Regulation 14 of IBBI (Liquidation Process) Regulations, 2016.

9. Progress Reports by Liquidator

Regulation 15 of IBBI (Liquidation Process) Regulations, 2016 provides as follows:

(1) First progress report and subsequent progress report: The liquidator shall submit ¹*[Progress Reports, in the format stipulated by the Board, to the Adjudicating Authority and the Board]* as under—

- (a) the first Progress Report within fifteen days after the end of the quarter in which he is appointed;
- (b) subsequent Progress Report(s) within fifteen days after the end of every quarter during which he acts as liquidator; and

¹ Substituted for "Progress Reports to the Adjudicating Authority" by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, **w.e.f. 16-9-2022**

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Provided that if an insolvency professional ceases to act as a liquidator during the liquidation process, he shall file a Progress Report for the quarter up to the date of his so ceasing to act, within fifteen days of such cessation.

(2) Specified information that needs to be contained in the progress report: A Progress Report shall provide all information relevant to liquidation for the quarter, including—

- (a) appointment, tenure of appointment and cessation of appointment of professionals;
- (b) a statement indicating progress in liquidation, including—
 - (i) settlement of list of stakeholders,
 - (ii) details of any property that remain to be sold and realized,
 - (iii) distribution made to the stakeholders, and
 - (iv) distribution of unsold property made to the stakeholders;
- (c) details of fee or remuneration, including—
 - (i) the fee due to and received by the liquidator together with a description of the activities carried out by him,
 - (ii) the remuneration or fee paid to professionals appointed by the liquidator together with a description of activities carried out by them,
 - (iii) other expenses incurred by the liquidator, whether paid or not;
- (d) developments in any material litigation, by or against the corporate debtor;
- (e) filing of, and developments in applications for avoidance of transactions [under Part II] of the Code; and
- (f) changes, if any, in estimated liquidation costs.

(3) Statement of liquidator's account to be enclosed with the progress report: A Progress Report shall enclose an account maintained by the liquidator showing—

- (a) his receipts and payments during the quarter; and
- (b) the cumulative amount of his receipts and payments since the liquidation commencement date.

(4) Statement indicating any material change in expected realization of any property proposed to be sold: A Progress Report shall enclose a

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statement indicating any material change in expected realization of any property proposed to be sold, along with the basis for such change:

The following proviso has been **omitted** by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022.

“Provided that this statement shall not be accessible to any person during the course of liquidation, unless permitted by the Adjudicating Authority.”

A progress report indicates progress in the liquidation process, including the status of sale of assets, distribution to stakeholders, expenses incurred by the liquidator, developments in litigation, etc.

As per discussion paper brought by IBBI dt. 20.10.2023 on strengthening the Liquidation Process, it is proposed that Regulation 15 may be amended to provide that the progress reports shall also be shared with the SCC.

(5) Audited accounts of the liquidator's receipts and payments: The Progress Report for the fourth quarter of the financial year shall enclose audited accounts of the liquidator's receipts and payments for the financial year:

Provided that in case an insolvency professional ceases to act as liquidator, the audited accounts of his receipts and payments for that part of the financial year during which he has acted as liquidator, shall be enclosed with the Progress Report to be filed after cessation of his appointment.

Illustration: An insolvency professional becomes a liquidator on 13th February, 2017, and ceases to act as liquidator on 12th February, 2019. He shall submit Progress Reports as under:

Report No.	Period covered in the Quarter	Last Date of Submission of Report
1	13th February - 31st March, 2017	15th April, 2017
2	April - June, 2017	15th July, 2017
3	July - September, 2017	15th October, 2017
4	October - December, 2017	15th January, 2018
5	January - March, 2018	15th April, 2018
6	April - June, 2018	15th July, 2018
7	July - September, 2018	15th October, 2018
8	October - December, 2018	15th January, 2019
9	January - 12th February, 2019	27th February, 2019

He shall submit the audited accounts of his receipts and payments as under:

Audited Account No.	Period covered in the Year	Last Date of Submission
1	13th February - 31st March, 2017	15th April, 2017
2	April - March, 2018	15th April, 2018
3	April - 12th February, 2019	27th February, 2019

10. Registers and books of account to be maintained by liquidator

The Liquidator shall maintain account books, asset registers and other registers and records as specified in Regulation 6 of IBBI (Liquidation Process) Regulations, 2016. These should be maintained in forms indicated in Schedule III of IBBI (Liquidation Process) Regulations, 2016.

(1) Liquidator to get completed and updated the incomplete books of account: Where the books of account of the corporate debtor are incomplete on the liquidation commencement date, the liquidator shall have them completed and brought up-to-date, with all convenient speed, as soon as the order for liquidation is passed.

(2) Prescribed books and registers to be preserved at least for 8 years: The liquidator shall maintain the following registers and books, as may be applicable, in relation to the liquidation of the corporate debtor, and shall preserve them for a period of eight years after the dissolution of the corporate debtor—

- (a) Cash Book;
- (b) Ledger;
- (c) Bank Ledger;
- (d) Register of Fixed Assets and Inventories;
- (e) Securities and Investment Register;
- (f) Register of Book Debts and Outstanding Debts;
- (g) Tenants Ledger;
- (h) Suits Register;

- (i) Decree Register;
- (j) Register of Claims and Dividends;
- (k) Contributories Ledger;
- (l) Distributions Register;
- (m) Fee Register;
- (n) Suspense Register;
- (o) Documents Register;
- (p) Books Register;
- (q) Register of unclaimed dividends and undistributed properties; and
- (r) such other books or registers as may be necessary to account for transactions entered into by him in relation to the corporate debtor.

(3) Books and registers may be modified in form to fit the facts and circumstances: The registers and books under sub-regulation (2) may be maintained in the forms indicated in Schedule III, with such modifications as the liquidator may deem fit in the facts and circumstances of the liquidation process.

(4) Receipts of all payments and expenses: The liquidator shall keep receipts for all payments made or expenses incurred by him.

11. Appointment of professional by liquidator to assist him

Regulation 7 provides that:

(1) Professional's remuneration shall form part of the liquidation cost: A liquidator may appoint professionals to assist him in the discharge of his duties, obligations and functions for a reasonable remuneration and such remuneration shall form part of the liquidation cost.

(2) Related party cannot be appointed as assisting professional: The liquidator shall not appoint a professional under sub-regulation (1) who is his relative, is a related party of the corporate debtor or has served as an auditor to the corporate debtor in the five years preceding the liquidation commencement date.

(3) Assisting professional to disclose pecuniary or personal relationship, if any: A professional appointed or proposed to be appointed

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under sub-regulation (1) shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders, or the concerned corporate debtor as soon as he becomes aware of it, to the liquidator.

CLARIFICATION ON COMPLIANCE REGARDING BILLING / INVOICING FOR SERVICES AVAILED BY IP FROM PROFESSIONALS – CIRCULAR NO. IBBI/IP/65/2024, DATED 01-02-2024

- Clause 25C of Code of Conduct specified in First Schedule to IP Regulations stipulates that an IP shall ensure that the IPE or the professional engaged by it raises bills or invoices in their own name towards their fees, and such fees shall be paid to them through banking channel.
- It is pertinent to note that as per the terms of engagement or the market practice, the bill or invoice may also be raised in the name of the firm in which the individual professional appointed by IP is a partner. Thus, it is considered prudent to clarify that the bill or invoice raised in the name of the firm would be an adequate compliance of the regulation by the IP.
- Clarification: It is hereby clarified that for the purposes of clause 25C of Code of Conduct specified in First Schedule to IP Regulations, the bill or invoice may be raised in the name of the IPE or the professional or the firm in which such professional is a partner.

12. Consultation with stakeholders

As per Section 35(2), the liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53 of Insolvency Code, 2016. However, such consultation shall not be binding on the liquidator. The records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board (IBBI).

As per Regulation 8 of IBBI (Liquidation Process) Regulations, 2016, the stakeholders consulted under section 35(2) of Insolvency Code shall extend all assistance and cooperation to the liquidator to complete the liquidation of the corporate debtor. The liquidator shall maintain the particulars of any consultation with the stakeholders made under this Regulation, as specified in Form A of Schedule II of IBBI (Liquidation Process) Regulations, 2016.

As per Proviso of Regulation 31A(10), where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing and submit the records relating to the said decision, to the Adjudicating Authority and to the Board within five days of the said decision; and include it in the next progress report.

Explanation- It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019.

13. Duty of personnel to extend cooperation to Liquidator

Regulation 9 provides that:

(1) The liquidator may make an application to the Adjudicating Authority for a direction that a person who—

- (a) is or has been an officer, auditor, employee, promoter or partner of the corporate debtor;
- (b) was the interim resolution professional, resolution professional or the previous liquidator of the corporate debtor; or
- (c) has possession of any of the properties of the corporate debtor;

shall cooperate with him in the collection of information necessary for the conduct of the liquidation.

(2) An application may be made under this Regulation only after the liquidator has made reasonable efforts to obtain the information from such person and failed to obtain it.

14. Disclaimer of onerous property or contract

Regulation 10 provides as under:

(1) *Types of onerous properties that can be disclaimed after obtaining approval from Adjudicating Authority the application whereof to the Adjudicating Authority shall be made within six months from the liquidation commencement date:* Where any part of the property of a corporate debtor consists of—

- (a) land of any tenure, burdened with onerous covenants;

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- (b) shares or stocks in companies;
- (c) any other property which is not saleable or is not readily saleable by reason of the possessor thereof being bound either to the performance of any onerous act or to the payment of any sum of money; or
- (d) unprofitable contracts;

the liquidator may, notwithstanding that he has endeavored to sell or has taken possession of the property or exercised any act of ownership in relation thereto or done anything in pursuance of the contract, make an application to the Adjudicating Authority within six months from the liquidation commencement date, or such extended period as may be allowed by the Adjudicating Authority, to disclaim the property or contract.

(2) Application cannot be made if person interested in the property or contract inquired in writing: The liquidator shall not make an application under sub-regulation (1) if a person interested in the property or contract inquired in writing whether he will make an application to have such property disclaimed, and he did not communicate his intention to do so within one month from receipt of such inquiry.

(3) Seven days notice to be served to the persons interested in the onerous property or contract: The liquidator shall serve a notice to persons interested in the onerous property or contract at least seven days before making an application for disclaimer to the Adjudicating Authority:

Explanation: A person is interested in the onerous property or contract if he—

- (a) is entitled to the benefit or subject to the burden of the contract ; or
- (b) claims an interest in a disclaimed property or is under a liability not discharged in respect of a disclaimed property.

(4) Disclaimer shall operate to determine, from the date of disclaimer, the rights, interest and liabilities of the corporate debtor: Subject to the order of the Adjudicating Authority approving such disclaimer, the disclaimer shall operate to determine, from the date of disclaimer, the rights, interest and liabilities of the corporate debtor in or in respect of the property or contract disclaimed, but shall not, except so far as is necessary for the purpose of releasing the corporate debtor and the property of the corporate from liability, affect the rights, interest or liabilities of any other person.

(5) Person affected by the disclaimer shall be deemed to be a creditor of the corporate debtor: A person affected by the disclaimer under this

Regulation shall be deemed to be a creditor of the corporate debtor for the amount of the compensation or damages payable in respect of such effect, and may accordingly be payable as a debt in liquidation under section 53(1)(f), i.e., ranking priority for any remaining debts and dues.

In *Axis Bank Ltd. v. Lanco Kondapalli Power Ltd. - CP (IB) NO.678/7/HDB/2018*, NCLT-Hyd. observed that Corporate debtor had set-up gas based power plants and entered into an agreement for maintenance services of said plant with respondents. On account of lack of gas supply and lack of power purchase agreements for said plants, corporate debtor went into financial stress, ultimately got admitted into CIRP and later into liquidation. A liquidator was appointed who filed instant application seeking disclaimer of said maintenance agreements because of depleting financial health of corporate debtor as maintenance of plants agreements became onerous. It was noted that in absence of disclaimer, corporate debtor would have become liable to pay fixed sum to respondents even for non-utilization of any services which would become burdensome for it. Accordingly, NCLT allowed the instant application because in instant case, liquidator was to take steps to reduce burden on corporate debtor so as to benefit creditors and said agreements became onerous on corporate debtor.

15. Recovery of monies due by Liquidator

The liquidator shall endeavor to recover and realize all assets of and dues to the corporate debtor in a time-bound manner for maximization of value for the stakeholders - Regulation 39 of IBBI (Liquidation Process) Regulations, 2016.

16. Liquidation Estate

Section 36(1) provides that for the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate *in relation* to the corporate debtor. Further as per section 36(2) the liquidator shall hold the liquidation estate as a *fiduciary* for the benefit of all the creditors.

The term "fiduciary" is derived from the Roman Law and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect of the trust or the confidence involved in it and the scrupulous good faith and candor which it requires. As an adjective it means the nature of trust; analogous to trust; related to or founded upon trust or confidence. For example, executor of estate, receiver in bankruptcy; trustee.

A trustee for example, possesses a fiduciary responsibility to the beneficiaries of the trust to follow the terms of the trust and requirements of applicable State law [Black's Law Dictionary quoted in V.M. Francis v. Central Bank of India [1992] 74 Comp. Cas. 765 (Ker.)].

16.1. Composition of liquidation estate

Section 36(3) provides that subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following:—

- (a) any assets over which the corporate debtor has *ownership rights*, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor.
- (b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets.
- (c) tangible assets, whether movable or immovable.
- (d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights.
- (e) assets subject to the determination of ownership by the court or authority.
- (f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter.
- (g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest.
- (h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and
- (i) all proceeds of liquidation as and when they are realised.

Ownership denotes the relation between a person and an object forming the subject-matter of his ownership. It consists of a complex of rights, all of which are rights in rem, being good against all the world and not merely against specific persons (Swadesh Ranjan Sinha v. Haradeb Banerjee AIR 1992 SC 1590). There are various rights or incidents of ownership all of which need not necessarily be present in every case. They may include a right to possess, use

and enjoy the thing owned; and a right to consume, destroy or alienate it. Such a right may be indeterminate in duration and residuary in character. A person has a right to possess the thing which he owns, even when he is not in possession, but only retains a reversionary interest, i.e., a right to re-possess the thing on the termination of a certain period or on the happening of certain event. The rights of an owner are seldom absolute, and often are in many respects controlled and regulated by statutes (Sukumari Debi v. Ramdas Ganguli AIR 1994 Cal. 85).

The word 'encumbrance' means interests in or burden or charge upon property. The estate (encumbrances) which may be carved out of ownership, may be classified as (1) securities; (2) leases; (3) servitude; and (4) trusts. All such cases may be called encumbrances. The encumbrance in a given case may include in its fold claim by adverse possession which again creates interests in property. Thus, it would be clear that the word 'encumbrances' can only mean interest in the property or land [Jethamal Mohanlal Khivansara v. Union of India [2004] 137 Taxman 545 (Bom.)]

Section 3(27) of the Code states that "property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property.

Rights are interests protected and recognized by law (*Krishna Kishore Firm v. Government of AP AIR 1990 SC 2202*)

Rights are vested when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded or anticipated continuance of existing laws, does not constitute vested rights [Mosammat Bibi Sayeeda v. State of Bihar JT 1996 (4) 637]

Interest is a species of right. It is that right which is in the nature of ownership but does not necessarily connote title. An interest is a right in rem in respect of the property or a right which is enforceable against a person, for example, by virtue of an agreement in personam with a corresponding obligation or duty on such person, vis-à-vis the person in whom the right is vested. The obligation on the part of this person relates to some property or thing. Breach of the obligation may be enforced with respect to such property or thing. The nature of right is recognised in section 40 of the Transfer of Property Act, 1882 [Multi Rise Towers v. Appropriate Authority[1995] 211 ITR 102 (Cal.)]

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Interest in property means one or more of those rights which go to make up ownership. It includes, for example, mortgage, lease, charge, easement and the like (see Collector of Bomaby v. Nusservanji Rattanji Mistri AIR 1955 SC 298).

The possession of the property can be presumed from such an act and action of the parties as the nature of the property admits. The real test of possession is an intention of possession together with that amount of occupation or control of the entire subject-matter of which it is practically capable and which is sufficient for practical purposes to exclude the stranger from interfering [Electro Zavod (India) (P.) Ltd. v. CIT [2005] 149 Taxman 658 (Cal.). The Supreme Court in B. Gangadhar v. B. R. Rajalingam [1995] 5 SCC 238 observed:

“ . . Halsbury’s Laws of England, IVth edition, Vol. 35, in para 1214 at page 735, the word ‘possession’ is used in various contexts and phrases, for example, in the phrase ‘actual possession’ or ‘to take possession’ or ‘interest in possession’ or ‘estate in possession’ or ‘entitled in possession’. In para 1211 at page 732, legal possession has been stated that possession may mean that possession which is recognized and protected as such by law. Legal possession is ordinarily associated with de facto possession; but legal possession may exist without de facto possession and de facto possession is not always regarded as possession in law. A person who, although having no de facto possession, is deemed to have possession in law, is sometimes said to have constructive possession”

The terms “possession” and “occupy” are in common parlance used interchangeably. However in law, possession over a property may amount to holding it as an owner but to occupy is to keep possession by being present in it (Ram Dass v. Davinder (2004) 3 SCC 684/AIR 2004 SC 2162). The Supreme Court in Puran Singh v. State of Punjab (1975) 4 SCC 518 observed, “the occupation of property by a person as agent or servant at the instance of the owner will not amount to physical possession.”

16.1.1. Attachment/freeze orders over the assets of the corporate person:

In a judgment dated 26 July 2018 passed by Division Bench of the Hyderabad High Court in case of WP bearing no. 8560 of 2018, filed by Leo Edibles & Fats Limited against the Tax Recovery Officer (Central), Income Tax

Department, Hyderabad, with regard to the action of the Sub-Registrar, refusing to register its purchase of immovable property due to the attachment, in the liquidation proceedings relating to VNR Infrastructures Limited.

The Court held that:

"Tax Recovery Officer cannot claim any priority merely because of the fact that the order of attachment was issued by him was long prior to the initiation of liquidation proceedings under the Code against VNR Infrastructures Limited, Hyderabad. It may be noted that Section 36(3)(b) of the Code indicates in no uncertain terms that the liquidation estate assets may or may not be in possession of the corporate debtor, including but not limited to encumbered assets. Therefore, even if the order of attachment constitutes an encumbrance on the property, it still does not have the effect of taking it out of the purview of Section 36(3)(b) of the Code. The said order of attachment therefore cannot be taken to be a bar for completion of the sale and the Tax Officer to submit claim before Liquidator as and when the distribution of the assets, in terms of Section 53(1) of the Code, is taken up..."

In Ananta Mills Ltd. (In Liquidation) v. City Deputy Collector, Ahmedabad, [(1972) 42 Com. case 476] the Gujarat High Court observed that the purpose of attachment appeared to be to prevent private alienations of the property but the attaching-creditor does not acquire, by merely levying attachment, any interest in the property.

In Prem Lal Dhar v. Official Assignee [(1897) ILR 25 Cal. 179 (P.C.)], the Hon'ble Court considered the effect of attachment prior to the commencement of winding-up proceedings and whether such attachment could continue on the property even in the hands of the purchaser, who bought the property through the official liquidator free of all encumbrances. The court in the said matter held that such attachment of the properties of a company, which was subsequently ordered to be wound up, without any further action being taken would be of no consequence or effect against the official liquidator and the property could be disposed of by the official liquidator, since such attachment merely prohibits private alienation by the person whose property is attached but creates no interest in such property.

In Kerala State Financial Enterprises Ltd. v. Official Liquidator [2006] 72 SCL 130 (SC), the Supreme Court observed that the expression 'attachment' has no definite connotation. An order of attachment is passed for achieving a limited purpose. It is subject to further orders as also provisions of other

statute. The words 'attachment would mean taking into the custody of the law' the person or property of one already before the court, or of one whom it is sought to bring before it. It is used for two purposes: (i) to compel the appearance of a defendant; and (ii) to seize and hold his property for the payment of the debt. It may mean prohibition to transfer, conversion, disposition or movement of property by an order issued by the court. The Supreme Court held (para 9) that an attachment itself does not create any charge in property. By reason of attachment, no decree is passed.

Where properties of corporate debtor under liquidation were attached under PMLA, question as to whether properties attached were not proceeds of crime or lenders were bona fide lenders, was to be decided by authorities under PMLA; for withdrawal of attachment, liquidator appointed under IBC has to approach authorities under PMLA - Anil Goel, Liquidator, Rotomac Global (P.) Ltd. vs. Directorate of Enforcement (NCLAT)

16.2. Assets which will not form part of liquidation assets

As per section 36(4), the following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—

- (a) assets owned by a third party which are in possession of the corporate debtor, including—
 - (i) assets held in trust for any third party;
 - (ii) bailment contracts;
 - (iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund. "Workman" shall have the same meaning as assigned to it in section 2(s) of the Industrial Disputes Act, 1947 - section 3(36);
 - (iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
 - (v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;
- (b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions – [for example, participants may deposit collaterals (Ref. Circular No: NSE Clearing/ SLBS/2008/ 005) in the form of cash equivalents i.e. cash, fixed deposit receipts and bank guarantee. The collateral deposited by the participant are utilized towards margin

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requirement of the participant. In case of failure of the participant to meet its obligation, the collaterals provided by the participants may be liquidated by NSE Clearing to meet the obligation of the participant];

- (c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;
- (d) assets of any Indian or foreign subsidiary of the corporate debtor; or
- (e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

Usually under a lease arrangement, the ownership of the asset vests in the lessor and only the right to use the asset is transferred to the lessee. A lease transaction usually does not by itself result into a transfer of title. However, in certain cases of financial leases, the lease contract may provide for an option to buy the asset with the lessee. Any financial lease transaction shall result into an automatic transfer of asset after a period of time to the lessee, if it has been pre-decided at the time of the execution of the lease agreement itself that title of ownership is sure to change hands at the end of the lease term. In such a situation, where the lessee is given an option to buy the asset at the end of the lease tenure at a nominal price at which there is reasonable certainty that the lessee will exercise the option to purchase asset, it would be regarded as an automatic transfer of the property. In a hire purchase transaction, the entire cost of asset along with the expected rate of return of the financier is collected from the customer and an option is given to the customer to buy the asset at a nominal price, normally, as low as Rs. 1 or such. In such cases of hire purchase, since the entire amount is recovered from the customer during the tenure of the transaction, the option to buy at a nominal price is not a real option, as the probability of the customer not exercising the option is nil. Therefore, in a hire purchase transaction, there is a certainty that the title of the goods will pass on to the customer at the end of the tenure. The option to purchase at the end of the lease term must be real and the lessee must not be compelled to exercise the option. For instance, in case the option price is very nominal, like hire-purchase transactions, it will be irrational to assume that the lessee will not exercise the option. The option in such a case remains just a formality since the lessee shall otherwise lose the entire rentals paid if the option is not exercised, therefore, the principles of common wisdom indicate that exercising such an option is certain. Further, to determine the nominality

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of the option price, one should compare it with the expected market value or residual value of the asset at the end of the lease term. The determination of nominality is a case specific matter that is ascertained based on prudence and applicable market practice. One of the factors influencing the thin line of difference between a lease and hire purchase transaction is the certainty of exercising the option. Given that the option price is very nominal, it will be irrational to assume that after paying all the rentals the lessee will not exercise the option to purchase at a nominal price. However, if the option is not nominal but a bargain price, the uncertainty still remains. Here the option at a bargain price or a nominal price must not be regarded as the same, since in case of the former, it will be at the sole discretion of the lessee to either exercise the option, however, for the latter it becomes certain. Accordingly, a lease transaction with an option to purchase at a bargain price shall not be regarded as a hire purchase transaction provided that the price is not nominal and the uncertainty remains. Thus, for an asset to be excluded from the liquidation estate, the option to purchase the asset at the end of the lease term must be such that it defies common wisdom that the transfer will be effectuated that is to say it should not result in automatic transfer. Hence, such leased assets which do not stipulate automatic transfer of title but only right to use is transferred, shall be excluded from the liquidation estate of the lessee. The asset taken on hire purchase and those taken on lease with reasonable certainty that the ownership shall be transferred after the expiry of the lease term, shall accordingly be included in the calculation of liquidation estate of the lessee.

Section 148 of the Indian Contract Act, 1872 states that a "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee". Under section 164 the bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions, respecting them. Section 170 further states that where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a *right to retain* such goods until he receives due remuneration for the services he has rendered in respect of them.

Related Case Law:

In the matter of Jet Aircraft Maintenance Engineers Welfare Association Vs Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Ltd. & Ors., the NCLAT held that the workman and employees are entitled to receive the amount of Provident fund and gratuity in full since they are not part of liquidation estate under Section 36(4)(b)(iii).

17. Asset memorandum

Regulation 34 provides as follows:

(1) Prepare an asset memorandum in accordance with this Regulation within thirty days or seventy-five days from the liquidation commencement date: For cases under sub-regulation (1) of regulation 35, the liquidator shall, within thirty days from the liquidation commencement date, prepare an asset memorandum in accordance with this regulation based on the information memorandum prepared under section 29, with suitable modifications - Substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022.

Regulation 35(1) provides that where the valuation has been conducted under regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 or regulation 34 of the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017, as the case may be, the liquidator shall consider the average of the estimates of the values arrived under those provisions for the purposes of valuations under these regulations.

Sub-regulation (1A) as inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022 further provides that for cases covered under sub-regulation (2) of regulation 35, the liquidator shall prepare an asset memorandum in accordance with this Regulation within seventy-five days from the liquidation commencement date.

Regulation 35(2) provides that in cases not covered under sub-regulation (1) or where the liquidator is of the opinion that fresh valuation is required under the circumstances, he shall within seven days of the liquidation commencement date, appoint two registered valuers to determine the

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realisable value of the assets or businesses under clauses (a) to (f) of regulation 32 of the corporate debtor.

(2) Contents of asset memorandum: The asset memorandum shall provide the following details in respect of the assets which are intended to be realized by way of sale—

- (a) value of the asset, valued in accordance with Regulation 35;
- (b) value of the assets or business(s) under clauses (b) to (f) of regulation 32, valued in accordance with regulation 35, if intended to be sold under those clauses - Clause (b) substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2018, w.e.f. 22-10-2018;

Regulation 32(b) to (f) (*supra*) mentions following assets or business(s):

(b)	<i>the assets in a slump sale;</i>
(c)	<i>a set of assets collectively;</i>
(d)	<i>the assets in parcels;</i>
(e)	<i>the corporate debtor as a going concern; or</i>
(f)	<i>the business(s) of the corporate debtor as a going concern”</i>

- (c) intended manner of sale in accordance with Regulation 32, and reasons for the same;
- (d) the intended mode of sale and reasons for the same in accordance with Regulation 33;
- (e) expected amount of realization from sale; and
- (f) any other information that may be relevant for the sale of the asset.

For the purpose of this chapter (Realisation of Assets) and Schedule I, 'assets' include an asset, all assets, a set of assets or parcel of assets (,business), as the case may be, which are being sold - *Explanation* to Chapter VI (below Regulation 40) of IBBI (Liquidation Process) Regulations, 2016.

(3) Details in respect of each of the assets: The asset memorandum shall provide the following details in respect of each of the assets other than those referred to in sub-regulation (2)—

- (a) value of the asset;

- (b) intended manner and mode of realization, and reasons for the same;
- (c) expected amount of realization; and
- (d) any other information that may be relevant for the realization of the asset.

(4) Filing of asset memorandum along with preliminary report: The liquidator shall file the asset memorandum along with the preliminary report to the Adjudicating Authority.

(5) Accessibility to asset memorandum no longer is restricted: The liquidator shall share the asset memorandum with the Board and members of the consultation committee having voting rights after receiving an undertaking from each member that such member shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person - Substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022.

18. Valuation of assets or business intended to be sold

Regulation 35 has been substituted with new provisions by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2018, w.e.f. 22-10-2018. New Regulation 35 provides as follows:

(1) Liquidator shall consider the average of the estimates of the values as determined under CIRP or fast track CIRP: Where the valuation has been conducted under regulation 35¹ of the Insolvency and Bankruptcy Board of

¹ Regulation 27 of CIRP Regulation in context of Regulation 35 for determining fair value and liquidation value provides as follows:

(1) The resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35.

(2) The interim resolution professional or the resolution professional, as the case may be, may appoint any professional, in addition to registered valuers under sub-regulation (1), to assist him in discharge of his duties in conduct of the corporate insolvency resolution process, if he is of the opinion that the services of such professional are required and such services are not available with the corporate debtor.

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India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 or regulation 34¹ of the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017, as the case may be, the liquidator shall consider the average of the estimates of the values arrived under those provisions for the purposes of valuations under these regulations.

(2) Liquidator shall within 7 days of the liquidation commencement date appoint two registered valuers in other cases: In cases not covered under sub-regulation (1), or where the liquidator is of the opinion that fresh valuation is required under the circumstances, he shall within seven days of the liquidation commencement date, appoint two registered valuers to determine the realisable value of the assets or businesses under clauses (a) to (f) of regulation 32 of the corporate debtor.

(3) The interim resolution professional or the resolution professional, as the case may be, shall appoint a professional under this regulation on an arm's length basis following an objective and transparent process:

Provided that the following persons shall not be appointed, namely: -

- (a) a relative of the resolution professional;
- (b) a related party of the corporate debtor;
- (c) an auditor of the corporate debtor at any time during the period of five years preceding the insolvency commencement date;
- (d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.

(4) The invoice for fee and other expenses incurred by a professional appointed under this regulation shall be raised in the name of the professional and be paid directly into the bank account of such professional.

¹ Regulation 26 of Fast Track CIRP Regulation in context of Regulation 34 for determining fair value and liquidation value provides as follows:

The resolution professional shall within seven days of his appointment, appoint one registered valuer to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 34:

Provided that the following persons shall not be appointed as registered valuers, namely:

- (a) a relative of the resolution professional;
- (b) a related party of the corporate debtor;
- (c) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or
- (d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.

(2.1.) Ineligibility to be appointed as registered valuers: Provided that the following persons shall not be appointed as registered valuers, namely:-

- (a) a relative of the liquidator;
- (b) a related party of the corporate debtor;
- (c) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or
- (d) a partner or director of the insolvency professional entity of which the liquidator is a partner or director.

(3) Registered valuers shall independently submit their report to the liquidator: The Registered Valuers appointed under sub-regulation (2) shall independently submit to the liquidator the estimates of realisable value of the assets or businesses, as the case may be, computed in accordance with the Companies (Registered Valuers and Valuation) Rules, 2017, *after physical verification of the assets of the corporate debtor.*

(4) Average of two estimates shall be taken as value of assets or businesses: The average of two estimates received under sub-regulation (3) shall be taken as the value of the assets or businesses.

19. Asset Sale Report

Asset Sale Report shall be prepared as specified in Regulation 36 of IBBI (Liquidation Process) Regulations, 2016 which provides as follows:

On sale of **an** asset, the liquidator shall prepare an asset sale report in respect of said asset, to be enclosed with the Progress Reports, containing—

- (a) the realized value;
- (b) cost of realization, if any;
- (c) the manner and mode of sale;
- (d) if the value realized is less than the value in the asset memorandum, the reasons for the same;
- (e) the person to whom the sale is made; and
- (f) any other details of the sale.

The word 'an' signifies separability of each part of an item of property, plant and equipment with a cost that is significant in relation to the total cost of the item. This aspect is reinforced by Para 44 of Ind AS 16 which states that an entity allocates the amount initially recognised in respect of an item of property,

plant and equipment to its significant parts and depreciates separately each such part. For example, it may be appropriate to depreciate separately the airframe and engines of an aircraft. Similarly, if an entity acquires property, plant and equipment subject to an operating lease in which it is the lessor, it may be appropriate to depreciate separately amounts reflected in the cost of that item that are attributable to favourable or unfavourable lease terms relative to market terms.

20. Realization of security interest by secured creditor

Regulation 37 provides as follows:

(1) Secured creditor to intimate proposed price to Liquidator: A secured creditor who seeks to realize its security interest under section 52 of the Code shall intimate the liquidator of the price at which he proposes to realize its secured asset.

(2) Liquidator to inform secured creditor if he can get better price: The liquidator shall inform the secured creditor within twenty-one days of receipt of the intimation, if a person is willing to buy the secured asset before the expiry of thirty days from the date of intimation by secured creditor, at a price higher than the price intimated by the secured creditor.

Where the liquidator informs the secured creditor of a person willing to buy the secured asset higher than price informed by the secured creditor, the secured creditor shall sell the asset to such person at that high price.

Where the secured asset is realized at higher price intimated by Liquidator, the secured creditor shall bear the cost of identification of the buyer incurred by Liquidator.

(3) If Liquidator does not inform value or asset not sold at that value: If the liquidator does not inform the secured creditor about a person willing to buy the secured assets at a higher price, or the person does not buy the secured asset at the higher price, the secured creditor may realize the secured asset in the manner it deems fit. However, at least at the price intimated by the secured creditor earlier.

Where the secured asset is realized as per above value i.e. value brought by secured creditor, the liquidator shall bear the cost incurred to identify the buyer incurred by him.

(4) Provision not applicable if sale under SARFAESI Act or RDB Act:

The provisions of this Regulation shall not apply if the secured creditor enforces his security interest under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 or the Recovery of Debts and Bankruptcy Act, 1993. - Regulation 37(7) of IBBI (Liquidation Process) Regulations, 2016.

(5) Ineligible buyers: A secured creditor shall not sell or transfer an asset, which is subject to security interest, to any person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor – Regulation 37(8) as inserted by Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020, w.e.f. 6-1-2020.

20.1. Assignment of not readily realisable assets including assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions

Regulation 37A(1) as inserted by the Insolvency and Bankruptcy Board of India(Liquidation Process) (Fourth Amendment) Regulations, 2020, w.e.f. 13-11-2020 provides that a liquidator may assign or transfer a not readily realisable asset through a transparent process, in consultation with the stakeholders' consultation committee in accordance with regulation 31A, for a consideration to any person, who is eligible to submit a resolution plan for insolvency resolution of the corporate debtor.

Explanation.- For the purposes of this sub-regulation, "not readily realisable asset" means any asset included in the liquidation estate which could not be sold through available options and includes contingent or disputed assets and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions referred to in sections 43 to 51 and section 66 of the Code.

In the matter of Ritu Tandon vs. M/s Rain Automotive India Private Limited NCLT held that as per the present scheme of Sections 43, 45, 50, and 66 of IBC 2016, Avoidance/PUFE applications can only be filed and pursued by a Resolution Professional (RP) or a Liquidator, as the case may be. There is no explicit provision under Sections 43, 45, 47, 50, and 66 of IBC 2016, by which an Application under these Sections could be filed or pursued by an Assignee/ or a Third Party on behalf of the RP or Liquidator. An RP or a Liquidator cannot assign debt/NRRAs under Sections 43, 45, 50, and 66 of IBC 2016 before the

adjudication of Avoidance/PUFE proceedings i.e., before the Debt/Demand is determined or crystallized by the Adjudicating Authority.

In terms of Section 60(5) of IBC 2016, this Adjudicating Authority has no jurisdiction to adjudicate an Avoidance/PUFE application pursued by a Third Party or an Assignee i.e., a dispute between two third parties (i.e., the Assignee and Respondents of the Avoidance Applications, neither of whom represents the Corporate Debtor) which will be dehors the insolvency proceedings of the Corporate Debtor. However, this does not mean that the debt can never be assigned. Once the demand is crystallised or determined, in other words, when the avoidance/PUFE proceedings are concluded, the debt can be assigned by following the due procedure prescribed under the law. In other words, the cause to pursue avoidance applications cannot be transferred or assigned by the Liquidator. Only the assets crystallised in terms of the order passed in avoidance/PUFE applications can be assigned or transferred to a third party.

21. Distribution of unsold assets

The liquidator may, with the permission of the Adjudicating Authority, distribute amongst the stakeholders, **an** asset that¹*[could not be sold, assigned or transferred]* due to its peculiar nature or other special circumstances - Regulation 38(1) of IBBI (Liquidation Process) Regulations, 2016.

Sub-regulation (2) provides that the application seeking permission of the Adjudicating Authority under sub-regulation (1) shall—

- (a) identify the asset;
- (b) provide a value of the asset;
- (c) detail the efforts made to sell the asset, if any; and
- (d) provide reasons for such distribution.

22. Liquidator to realize uncalled capital or unpaid capital contribution

Regulation 40 provides as under:

(1) *Realize any amount due from any contributory to the corporate*

¹ Substituted for "cannot be readily or advantageously sold" by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020, **w.e.f. 13-11-2020**.

debtor: The liquidator shall realize any amount due from any contributory to the corporate debtor.

Regulation 2(1)(c) states that "Contributory" means a member of the company, a partner of the limited liability partnership, and any other person liable to contribute towards the assets of the corporate debtor in the event of its liquidation.

(2) Liquidator shall be entitled to call and realize the uncalled capital of the corporate debtor and to collect the arrears: Notwithstanding any charge or encumbrance on the uncalled capital of the corporate debtor, the liquidator shall be entitled to call and realize the uncalled capital of the corporate debtor and to collect the arrears, if any, due on calls made prior to the liquidation, by providing a notice to the contributory to make the payments within fifteen days from the receipt of the notice, but shall hold all moneys so realized subject to the rights, if any, of the holder of any such charge or encumbrance.

(3) Distribution to contributory subject to his contribution to the uncalled or unpaid calls: No distribution shall be made to a contributory, unless he makes his contribution to the uncalled or unpaid capital as required in the constitutional documents of the corporate debtor.

Explanation: For the purpose of this chapter and Schedule I, 'assets' include an asset, all assets, a set of assets or parcel of assets, [business]¹, as the case may be, which are being sold.

23. Powers of Liquidator to access information

Section 37(1) of the Code (Note that these powers are overriding powers, irrespective of provisions in any other law): -

Notwithstanding anything contained in any other law for the time being in force, the liquidator shall have the power to access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor from the following specified sources -

- (a) an information utility.

¹ Inserted by Notification No. IBBI/2018-19/GN/REG037, dated 22nd October, 2018 (w.e.f. 22-10-2018).

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- (b) credit information systems regulated under any law for the time being in force.
- (c) any agency of the Central, State or Local Government including any registration authorities.
- (d) information systems for financial and non-financial liabilities regulated under any law for the time being in force.
- (e) information systems for securities and assets posted as security interest regulated under any law for the time being in force.
- (f) any database maintained by the Board, and
- (g) any other source as may be specified by the Board.

¹National E-Governance Services Limited (NeSL) is India's first Information Utility and is registered with the Insolvency and Bankruptcy Board of India (IBBI) under the aegis of the Insolvency and Bankruptcy Code, 2016 (IBC). The company has been set up by leading banks and public institutions. The primary role of NeSL is to serve as a repository of legal evidence holding the information pertaining to any debt/claim, as submitted by the financial or operational creditor and verified and authenticated by the parties to the debt.

NeSL works towards

- Time-bound resolution by providing verified information to creditors and to Adjudicating Authorities that do not require further authentication.
- Default intimation to Creditors linked to a debtor when any creditor files a default against a debtor
- Mitigation of information asymmetry between parties to a debt
- Superior credit monitoring by creditors
- An agreed statement of outstanding balance between parties to a debt
- Facilitate all stakeholders of the IBC ecosystem by leveraging Information Technology to achieve objective of code.

23.1. Creditors can ask for information from liquidator

The creditors may require the liquidator to provide them any financial information relating to the corporate debtor in specified manner - section 37(2) of the Code. The liquidator shall provide information to such creditors within a

1 Source: <https://nesl.co.in/welcome-to-nesl/>

period of seven days or provide reasons for not providing such information - section 37(3).

24. Consolidation of claims

(1) Receive or collect the claims of creditors within a period of thirty days: The liquidator shall receive or collect the claims of creditors within a period of thirty days from the date of the commencement of the liquidation process - section 38(1).

(2) Submission of claim by the financial creditor: A financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility. However, where the information relating to the claim is not recorded in the information utility, the financial creditor may submit claim with supporting documents to prove the claim in the same manner as provided for the submission of claims for the operational creditor under sub-section (3) – section 38(2).

(3) Submission of claim by an operation creditor: An operational creditor may submit a claim to the liquidator in manner, along with supporting documents required to prove the claim as may be specified by the Board – section 38(3).

(4) Submission of claim by financial cum operational creditor: A creditor who is partly a financial creditor and partly an operational creditor shall submit claims to the liquidator to the extent of his financial debt in the manner provided in section 38(2) and to the extent of his operational debt under section 38(3) – section 38(4).

(5) Withdrawal or variation of claim within 14 days: A creditor may withdraw or vary his claim under this section within fourteen days of its submission – section 38(5).

“withdrawing” is an act of repudiation or renouncing, “vary” signifies changes or modifications in size, amount, degree, or nature.

25. Submission of proof of claims to Liquidator

Regulation 16 as substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f. 25-7-2019 provides that:

(1) A person who claims to be a stakeholder, shall submit its claim, or update its claim submitted during the corporate insolvency resolution process,

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including interest, if any, on or before the last date mentioned in the public announcement.

(2) A person shall prove its claim for debt or dues to him, including interest, if any, as on the liquidation commencement date.

Further, the proof of claims shall be submitted to Liquidator as follows —

- (a) *Operational Creditor* - Operational Creditor (other than a workman or employee) shall submit proof of claims in person, by post or electronically in Form C of Schedule II as contained in IBBI (Liquidation Process) Regulations, 2016, with details specified in Regulation 17.
- (b) *Financial Creditor* - Financial Creditor shall submit proof of claims electronically in Form D of Schedule II as contained in IBBI (Liquidation Process) Regulations, 2016, with details specified in Regulation 18.
- (c) *Workmen and employees* - Workmen and employees shall submit proof of claims in person, by post or electronically in Form E of Schedule II as contained in IBBI (Liquidation Process) Regulations, 2016, with details specified in Regulation 19.
- (d) *Other stakeholders* - Other stakeholders shall submit claims in person, by post or electronically in Form G of Schedule II of IBBI (Liquidation Process) Regulations, 2016, with details specified in Regulation 20.

The requirements for the above are tabulated as below:

Operational Creditor	Financial Creditor	Workmen and employees	Other stakeholders
(1) A person claiming to be an operational creditor of the corporate debtor, other than a workman or employee, shall submit proof of claim to the liquidator in	(1) A person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the liquidator in electronic means in Form D of Schedule II.	(1) A person claiming to be a workman or an employee of the corporate debtor shall submit proof of claim to the liquidator in person, by post or by electronic means in Form E	(1) A person, claiming to be a stakeholder other than those under Regulations 17(1), 18(1), or 19(1), shall submit proof of claim to the liquidator in

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<p>person, by post or by electronic means in Form C of Schedule II.</p> <p>(2) The existence of debt due to an operational creditor under this Regulation may be proved on the basis of—</p> <p>(a) the records available with an information utility, if any; or</p> <p>(b) other relevant documents which adequately establish the debt, including any or all of the following—</p> <p>(i) a contract for the supply of goods and services with corporate debtor;</p> <p>(ii) an invoice demanding payment for the goods and services supplied to the corporate</p>	<p>(2) The existence of debt due to the financial creditor may be proved on the basis of—</p> <p>(a) the records available in an information utility, if any; or</p> <p>(b) other relevant documents which adequately establish the debt, including any or all of the following—</p> <p>(i) a financial contract supported by financial statements as evidence of the debt;</p> <p>(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;</p> <p>(iii) financial</p>	<p>of Schedule II.</p> <p>(2) Where there are dues to numerous workmen or employees of the corporate debtor, an authorized representative may submit one proof of claim for all such dues on their behalf in Form F of Schedule II.</p> <p>(3) The existence of dues to workmen or employees may be proved by them, individually or collectively, on the basis of—</p> <p>(a) records available in an information utility, if any; or</p> <p>(b) other relevant documents which adequately establish the dues, including any or all of the following—</p> <p>(i) a proof of</p>	<p>person, by post or by electronic means in Form G of Schedule II.</p> <p>(2) The existence of the claim of the stakeholder may be proved on the basis of —</p> <p>(a) the records available in an information utility, if any, or</p> <p>(b) other relevant documents which adequately establish the claim, including any or all of the following-</p> <p>(i) documentary evidence of notice demanding payment of unpaid amount or bank statements of the claimant showing that the claim has not been paid and an affidavit that the documentary evidence and bank statements</p>
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<p>debtor; <i>(iii)</i> an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; and <i>(iv)</i> financial accounts.</p>	<p>statements showing that the debt has not been repaid; and <i>(iv)</i> an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.</p>	<p>employment such as contract of employment for the period for which such workman or employee is claiming dues; <i>(ii)</i> evidence of notice demanding payment of unpaid amount and any documentary or other proof that payment has not been made; and <i>(iii)</i> an order of a court or tribunal that has adjudicated upon the non-payment of dues, if any. (4) The liquidator may admit the claims of a workman or an employee on the basis of the books of account of the corporate debtor if such workman or employee has not made a claim.</p>	<p>are true, valid and genuine; <i>(ii)</i> documentary or electronic evidence of his shareholding; and <i>(iii)</i> an order of a court, tribunal or other authority that has adjudicated upon the non-payment of a claim, if any.</p>
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26. Substantiation of claims, etc.

The liquidator may call for such other evidence or clarification as he deems fit from a claimant for substantiating the whole or part of its claim – Regulation 23.

(1) Proving security interest: Regulation 21 provides that the existence of a security interest may be proved by a secured creditor on the basis of—

- (a) the records available in an information utility, if any;
- (b) certificate of registration of charge issued by the Registrar of Companies; or
- (c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India.

(1.1) Presumption of security interest: Regulation 21A as inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f. 25-7-2019 provides as follows:

(1) Information to liquidator about the decision to relinquish within 30 days of liquidation commencement date: A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:

Provided that, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall be presumed to be part of the liquidation estate.

(2) Payment of excess of the realised value of the asset: Sub-regulation (2) substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020, w.e.f. 6-1-2020 provides that where a secured creditor proceeds to realise its security interest, it shall pay -

- (a) as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date; and
- (b) the excess of the realised value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date:

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Provided that where the amount payable under this sub-regulation is not certain by the date the amount is payable under this sub-regulation, the secured creditor shall pay the amount, as estimated by the liquidator:

Provided further that any difference between the amount payable under this sub-regulation and the amount paid under the first proviso shall be made good by the secured creditor or the liquidator, as the case may be, as soon as the amount payable under this sub-regulation is certain and so informed by the liquidator.

(3) Failure on part of secured creditor to pay excess realisation shall lead to asset becoming part of liquidation estate: Where a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.

Explanation.- It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 – Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2022, w.e.f. 28-4-2022.

In terms of section 36 (3)(g) of the Code, the liquidation estate comprises all liquidation estate assets which include any asset of the corporate debtor (“the CD”) in respect of which a secured creditor has relinquished security interest. The Code enables a secured creditor in the liquidation proceedings to (a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or (b) realise its security interest in the manner specified in section 52 of the Code. Regulation 32 of the Regulations prohibits the Liquidator to sell an asset which is subject to security interest, unless the security interest therein has been relinquished to the liquidation estate. The Code, however, did not provide any timelines for opting to relinquish or exercise security interest.

As there were no timeline provided for a secured creditor to convey its decision to relinquish its security interest or enforce security outside of the liquidation process, it created uncertainty particularly in considering a Going Concern Sale. It was reported that often secured creditors are neither confirming their relinquishment nor proceeding to sell the asset outside liquidation. Until the secured lenders intimate their decision to the liquidator, i.e., whether they wish to relinquish their security interest to the liquidation estate or not, it is difficult for the Liquidator to prepare the Asset Memorandum. Therefore, Regulation 21A *supra* provides that a secured creditor should intimate its decision within

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thirty days from the liquidation commencement date. Non-communication of such decision would imply that they have relinquished their security interest.

Further the Financial Creditor while submitting its claim in Form D of Schedule II is required to specify "Whether security interest relinquished". Accordingly, the timeline for submission of claim may also be construed as the timeline for opting to relinquish or exercise security interest.

Where the secured creditors decide to realize their security interest, the workmen would recover lesser amount or nothing depending upon the realisation during the liquidation process. The stakeholders felt that there is a need to make necessary changes in section 52 of the Code on the lines of section 529(1) of the Companies Act, 1956 or in the Regulations to protect the dues of workmen. The said section entitled the Liquidator to recover the cost of preservation of security if the secured lenders sell assets independently. The secured creditor was liable to pay his portion of the expenses incurred by the Liquidator for the preservation of the security before its realisation by the secured creditor. Regulation 21A thus now provide that if a secured creditor, instead of relinquishing his security and proving for his debt, proceeds to realise his security, he shall be liable to pay his share of the expenses incurred by the Liquidator for the preservation of the security before its realisation by the secured creditor.

(2) Production of bills of exchange and promissory notes: Regulation 22 provides that where a person seeks to prove a debt in respect of a bill of exchange, promissory note or other negotiable instrument or security of a like nature for which the corporate debtor is liable, such bill of exchange, note, instrument or security, as the case may be, shall be produced before the liquidator before the claim is admitted.

The effect of endorsement of a bill of exchange is that the property in the promissory note is transferred to the endorsee with the right to further negotiation. The original debt in respect of which the promissory note was passed is not assigned to the endorsee. The endorsee has no title to the debt. No privity is established with regard to the debt between the endorsee and the maker of the promissory note. All that the endorsee gets, by the endorsement is the right to sue on the promissory note and to recover the amount due under it. It, therefore, follows from this is that an endorsee of the promissory note can only sue on the promissory note itself. He cannot sue on the debt as he is not entitled to that debt (Narayan Rajaram v. Prabhakar Keshav AIR 1951 Bom. 345).

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If a debt is not assigned in favour of the person in whom the bill of exchange is endorsed then the right to sue on the original debt or original cause of action still subsists and survives in favour of the endorser who has endorsed the bill of exchange in favour of the third party [Clicquot Asia Ltd. v. Red Robin International Ltd. [2005] 126 Comp. Cas. 51 (Bom.)]

The essential of a promissory note are:

- (1) An unconditional undertaking to pay;*
- (2) The sum of money should be a sum of money and should be certain;*
- (3) The payment should be to the order of a person who is certain, or to the bearer of the instrument; and*
- (4) The maker should sign it.*

If these four conditions exist, the instrument is a promissory note [Sant Singh v. Madandas Panika 1976 JLJ 235(MP)(FB)].

The features which distinguish a promissory note from a bond are :

- i. If money payable under an instrument is not certain, it cannot be a promissory note, although it can be a bond.*
- ii. If the instrument is not attested by a witness, it cannot be bond, although it may be a promissory note.*
- iii. If the instrument is payable to order or bearer, it cannot be a bond, but it can be a promissory note [Sant Singh v. Madandas Panika 1976 JLJ 235 (MP)(FB)].*

In Indus Airways (P.) Ltd. v. Magnum Aviation (P.) Ltd. [2014] 12 SCC 539 the Supreme Court noted that the question therein was whether post dated cheque issued by way of advance payment for a purchase order could be considered for discharge of legally enforceable debt. The cheque was issued by way of advance payment for the purchase order but the purchase order was cancelled and payment of the cheque was stopped. Accordingly, this Court held that while the purchaser may be liable for breach of the contract, when a contract provides that the purchaser has to pay in advance and cheque towards advance payment is dishonoured, it will not give rise to criminal liability under Section 138. Thus, it was summarised that the issuance of cheque towards advance payment could not be considered as discharge of any subsisting liability.

That dishonour of cheque issued for discharge of later liability is clearly covered by the Statute. It is to be noted that whether a post-dated cheque is

for "discharge of debt or liability" depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, then the Section under 138 of the Negotiable Instruments Act is attracted and not otherwise. If a drawer of a cheque issues a cheque for consideration and if it is dishonoured then he is liable under Section 138 of the Negotiable Instruments Act. In other words, the drawer of the cheque is liable for debt or other liability which is legally enforceable debt or other liability and not for dishonour of cheque given for security of the total loan. Usually, the cheque for repayment of the loan will be given as a post dated cheque as "security". This means that the drawer of the cheque is liable even for dishonour of the cheque given for security if on the date of the cheque, liability or debt exists or the amount has become legally recoverable. This highlights the fact that the Supreme Court in the case of *Sampelly Satyanarayan Rao v. Indian Renewable Energy Development Agency Ltd*, [2016] 74 taxmann.com 68/138 SCL 73 has given the judgment that dishonour of post dated cheques issued for discharge of existing liability shall be covered by the Negotiable Instruments Act.

(3) Cost of proof: Regulation 24 provides that a claimant shall bear the cost of proving its claim. Costs incurred by the liquidator for verification and determination of a claim shall form part of liquidation cost.

Provided that if a claim or part of the claim is found to be false, the liquidator shall endeavor to recover the costs incurred for verification and determination of claim from such claimant, and shall provide the details of the claimant to the Board.

(4) Determination of quantum of claim: Where the amount claimed by a claimant is not precise due to any contingency or any other reason, the liquidator shall make the best estimate of the amount of the claim based on the information available with him – Regulation 25. Quantification of claims shall be done on following basis –

- **Contingent claims:** Contingent claims shall be made based on best estimates – Regulation 25 of IBBI (Liquidation Process) Regulations, 2016.
- **Periodical payments:** In the case of rent, interest and such other payments of a periodical nature, a person may claim only for any amounts due and unpaid up to the liquidation commencement date – Regulation 27 of IBBI (Liquidation Process) Regulations, 2016.

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- **Debt payable at future time:** A person may prove for a claim whose payment was not yet due on the liquidation commencement date and is entitled to distribution in the same manner as any other stakeholder. Subject to any contract to the contrary, its present value will be calculated on basis of formula $X / (1+r)^n$ as specified in Regulation 28 of IBBI (Liquidation Process) Regulations, 2016.

where,

(a)	"X" is the value of the admitted claim;
(b)	"r" is the closing yield rate (%) of government securities of the maturity of "n" on the date of distribution as published by the Reserve Bank of India; and
(c)	"n" is the period beginning with the date of distribution and ending with the date on which the payment of the debt would otherwise be due, expressed in years and months in a decimalized form.

- **Mutual credits and set-off:** Where there are mutual dealings between the corporate debtor and another party, the sums due from one party shall be set off against the sums due from the other to arrive at the net amount payable to the corporate debtor or to the other party.

Illustration: X owes Rs. 100 to the corporate debtor. The corporate debtor owes Rs. 70 to X. After set off, Rs. 30 is payable by X to the corporate debtor - Regulation 29 of IBBI (Liquidation Process) Regulations, 2016.

- (5) **Debt in foreign currency:** Regulation 26 provides that the claims denominated in foreign currency shall be valued in Indian currency at the official exchange rate as on the liquidation commencement date.

Explanation— "The official exchange rate" is the reference rate published by the Reserve Bank of India or derived from such reference rates.

27. Verification of claims by liquidator and display of claims

The liquidator shall verify the claims submitted under section 38 within such time as specified by the Board – Section 39(1).

The liquidator may require any creditor or the corporate debtor or any other person to produce any other document or evidence which he thinks necessary for the purpose of verifying the whole or any part of the claim – Section 39(2).

The claims shall be verified by liquidator within 30 days from last date for receipt of claims. He may admit or reject whole or part of claim - Regulation 30 of IBBI (Liquidation Process) Regulations, 2016.

¹[Provided that the liquidator shall also verify the claims collated during the corporate insolvency resolution process but not submitted during the liquidation process, within thirty days from the last date for receipt of claims during liquidation process and may either admit or reject the claim, in whole or in part.]

27.1. Transfer of debt due to creditors

Regulation 30A as inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020, w.e.f. 13-11-2020 provides that:

- (1) A creditor may assign or transfer the debt due to him or it to any other person during the liquidation process in accordance with the laws for the time being in force dealing with such assignment or transfer.
- (2) Where any creditor assigns or transfers the debt due to him or it to any other person under sub-regulation (1), both parties shall provide to the liquidator the terms of such assignment or transfer and the identity of the assignee or transferee.
- (3) The liquidator shall modify the list of stakeholders in accordance with the provisions of regulation 31.

27.2. List of stakeholders

Regulation 2(1)(k) of the Liquidation Regulations, 2016 state that "stakeholders" means the stakeholders entitled to distribution of proceeds under section 53.

(1) Liquidator to prepare a list of stakeholders: Regulation 31(1) of IBBI (Liquidation Process) Regulations, 2016 provides that the liquidator shall prepare a list of stakeholders, category-wise, on the basis of proofs of claims submitted and accepted under these Regulations, with—

¹ Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022.

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- (a) the amounts of claim admitted, if applicable,
- (b) the extent to which the debts or dues are secured or unsecured, if applicable,
- (c) the details of the stakeholders, and
- (d) the proofs admitted or rejected in part, and the proofs wholly rejected.

It should be noted that in terms of section 40 of the Code the liquidator may, after verification of claims under section 39, either admit or reject the claim, in whole or in part, as the case may be, but where the liquidator rejects a claim, he shall record in writing the reasons for such rejection.

As noted earlier, the liquidator shall verify the claims submitted under section 38 within the time as specified by the Board. The liquidator may require any creditor or the corporate debtor or any other person to produce any other document or evidence which he thinks necessary for the purpose of verifying the whole or any part of the claim - section 39 of the Code.

(2) Liquidator to file list of stakeholders with NCLT: The liquidator shall file the list of stakeholders with the Adjudicating Authority within forty-five days from the last date for receipt of the claims – Regulation 31(2)

(3) Application to the Adjudicating Authority to modify an entry in the list of stakeholders: The liquidator may apply to the Adjudicating Authority to modify an entry in the list of stakeholders filed with the Adjudicating Authority, when he comes across additional information warranting such modification, and shall modify the entry in the manner directed by the Adjudicating Authority – Regulation 31(3)

The liquidator shall modify an entry in the list of stakeholders filed with the Adjudicating Authority, in the manner directed by the Adjudicating Authority while disposing off an appeal preferred under section 42 – Regulation 31(4)

(4) Inspection of list of stakeholders: Regulation 31(5) provides that the list of stakeholders, as modified from time to time, shall be—

- (a) available for inspection by the persons who submitted proofs of claim;
- (b) available for inspection by members, partners, directors and guarantors of the corporate debtor;
- (c) displayed on the website, if any, of the corporate debtor;

- ¹(d) filed on the electronic platform of the Board for dissemination on its website [Provided that this clause shall apply to every liquidation process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021]

Vide Circular No. IBBI/LIQ/40/2021, Dated 4-3-2021 read with Circular No. IBBI/LIQ/46/2021, Dated 24-11-2021, the Board has made available an electronic platform at www.ibbi.gov.in for filing of list of stakeholders as well as updating it thereof. The platform permits multiple filings by the liquidator as and when the list of stakeholders is updated by him.

The insolvency professionals are directed to file the list of stakeholders of the respective corporate debtor under liquidation and modification thereof, in the aforesaid format, within three days of the preparation of the list or modification thereof, as the case may be.

The filings due as on the date of circular shall be filed within 15 days of this circular.

The insolvency professionals are further advised to use the aforesaid format for filing the list of stakeholders with the Adjudicating Authority under sub-regulation (2) of regulation 31 of the Liquidation Process Regulations.

28. Stakeholders' consultation committee (SCC):

(1) Constitution of SCC for specified matters to be advised to the liquidator: Regulation 31A(1) as substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022 provides that the liquidator shall constitute a consultation committee, comprising of all creditors of the corporate debtor, within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on matters relating to-

¹ Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021, **w.e.f. 4-3-2021**.

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(a)	remuneration of professionals appointed under regulation 7;
(b)	sale under regulation 32, including manner of sale, pre-bid qualifications, reserve price, marketing strategy and auction process.;
(c)	fees of the liquidator;
(d)	valuation under sub- regulation (2) of regulation 35;
(e)	the manner in which proceedings in respect of preferential transactions, undervalued transaction, extortionate credit transaction or fraudulent or wrongful trading, if any, shall be pursued after closure of liquidation proceedings and the manner in which the proceeds, if any, from these proceedings shall be distributed.

(2) Transitional provision for SCC: Sub-regulation (1A) provides that the Committee of Creditors under section 21 shall function as the consultation committee with same voting rights till constitution of the consultation committee under sub-regulation (1)

(3) Voting share and composition of SCC: Sub-regulation (2) as substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022 provides that the voting share of a member of the consultation committee shall be in proportion to his admitted claim in the total admitted claim:

Provided a secured creditor who has not relinquished his security interest under section 52 shall not be part of the consultation committee:

Provided that the promoters, directors, partners or their representatives may attend the meeting of the consultation committee, but shall not have any right to vote:

Provided further that a financial creditor or his representative, if he is a related party of the corporate debtor, shall not have right to vote.

(4) Facilitation by liquidator for nominating representatives: Sub-regulation (3) as substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022 provides that the liquidator may facilitate the stakeholders of each class namely financial creditors in a class, workmen, employees, government departments, other operational creditors, shareholders, partners, to nominate their representative for participation in the consultation committee.

(5) Failure to nominate will result in selection of representatives on the basis of voting share: If the stakeholders of any class fail to nominate their representatives, under sub-regulation (3), such representatives shall be selected by a majority of voting share of the class, present and voting.

Sub-regulation (4A) as inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022 provides that the representative under sub-regulation (3) or (4) shall vote in proportion to the voting share of the stakeholders it represents.

(6) Access to all relevant records and information: Subject to the provisions of the Code and these regulations, representatives in the consultation committee shall have access to all relevant records and information as may be required to provide advice to the liquidator under sub-regulation (1).

(7) First meeting and other meetings of SCC: The liquidator shall convene the first meeting of the consultation committee within seven days of the liquidation commencement date and may convene other meetings, if he considers necessary, on a request received from one or more members of the consultation committee. Provided that when a request is received by the liquidator from members, individually or collectively, having at least thirty three percent of the total voting rights, the liquidator shall mandatorily convene the meeting- Substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022.

(8) Liquidator shall chair the meeting: The liquidator shall chair the meetings of consultation committee and record deliberations of the meeting.

(9) Liquidator to place recommendations of CoC before the SCC: The liquidator shall place the recommendation of Committee of Creditors made under sub-regulation (1) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, before the consultation committee for its information. [Regulation 39C as aforesaid is w.r.t. assessment of sale as a going concern].

(10) SCC to advise the liquidator by at least 66% voting: The consultation committee shall advise the liquidator, by a vote of not less than sixty-six percent of the representatives of the consultation committee, **voting**. The word "voting" here is substituted for "present and voting" by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022.

(11) Advice to be non-binding: The advice of the consultation committee shall not be binding on the liquidator:

Provided that where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing ¹[and ²submit the records relating to the said decision, to the Adjudicating Authority and to the Board within five days of the said decision; and include it in the next progress report.].

³[Explanation.— It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019.]

⁴[(12) **SCC may by vote of not less than 66% propose to replace the liquidator:** The consultation committee, after recording the reasons, may by a majority vote of not less than sixty-six per cent., propose to replace the liquidator and shall file an application, after obtaining the written consent of the proposed liquidator in Form AA of the Schedule II, before the Adjudicating Authority for replacement of the liquidator:

Provided that where a liquidator is proposed to be replaced, he shall-

- (a) continue to work till his replacement; and
- (b) be suitably remunerated for work performed till his replacement:

(12.1.) Reconstitution of SCC which was constituted before 16-9-2022:

Provided that where a consultation committee under regulation 31A has been constituted before the commencement of Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022 (i.e., before 16-9-2022), the liquidator within thirty days of the commencement of the said Regulations, shall reconstitute the consultation committee as required under the said Regulations and provisions provided under amended Regulation 31A shall come into effect only after such constitution.]

¹ Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2021, **w.e.f. 30-9-2021**

² Substituted for "mention it in the progress report" by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, **w.e.f. 16-9-2022**

³ Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2022, **w.e.f. 28-4-2022**

⁴ Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, **w.e.f. 16-9-2022**

The role of SCC may be limited to advising the Liquidator. The Liquidator has three broad responsibilities, namely, claim adjudication, sale of assets/business and distribution of liquidation proceeds. The SCC may have access to relevant records and information as may be required for effective deliberation. It may advise only through deliberations in a meeting chaired by the Liquidator. The Liquidator shall record a summary of discussion in the meeting of the SCC. This is in consonance with the provisions in section 292(1) of the Companies Act, 2013 which provides that the Liquidator shall, in the administration of the assets of the company and the distribution thereof among its creditors, have regard to any directions which may be given by the resolution of the creditors or contributories at any general meeting or by the advisory committee.

28.1. Proforma for Reporting Liquidator's Decision(s) different from the Advice of Stakeholders' Consultation Committee

Sub-regulation (1) of regulation 31A of the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Regulations) provides that the liquidator shall constitute a SCC to advise him on matters relating to remuneration of professionals, sale under regulation 32, fees of liquidator, valuation, etc. Sub-regulation (10) of regulation 31A as amended vide notification, dated 16.09.2022, provides that the '... advice of the consultation committee shall not be binding on the liquidator'. The proviso to sub-regulation (10) provides that 'where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing and submit the records relating to the said decision, to the Adjudicating Authority and to the Board within five days of the said decision; and include it in the next progress report.'

In pursuance of the above vide Circular No. IBBI/LIQ/57/2022 Dated 21-12-2022, the Board has made available an electronic platform at www.ibbi.gov.in, for reporting the liquidator's decisions different from the advice given by the SCC. The proforma for such reporting is as follows:

Proforma for Reporting Liquidator's Decision(s) different from the Advice of Stakeholders' Consultation Committee

(Under proviso to Regulation 31A (10) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016)

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Date of meeting of consultation committee	
Agenda(s) on which decision of liquidator is different from the advice given by consultation committee	
Summary of advice provided by consultation committee	
Justification for taking the decision different from the advice by consultation committee	
Voting results	
• Assent (%)	
• Dissent (%)	
• Did not vote (%)	
Minutes of the consultation committee	

29. Admission or rejection of claims by liquidator

The liquidator may, after verification of claims, either admit or reject the claim, in whole or in part. If the liquidator rejects a claim, he shall record in writing the reasons for such rejection - section 40(1) of the Code.

The liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within seven days of such admission or rejection of claims - section 40(2) of the Code.

30. Determination of valuation of claims

The liquidator shall determine the value of claims admitted under section 40 of the Code, in such manner as may be specified by the Board - section 41 of the Code.

31. Appeal against the decision of Liquidator

A creditor may appeal to the Adjudicating Authority against the decision of the liquidator *accepting or* rejecting the claims within fourteen days of the receipt of such decision - section 42 of the Code. It should be noted that the words "*accepting or*" have been inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.e.f. 6-6-2018.

32. Preferential transactions and relevant time

Section 43 provides as follows:

(1) Application to Adjudicating Authority for avoidance of preferential transactions: Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) Deemed to have given preference - various cases: A corporate debtor shall be deemed to have given a preference, if—

- (a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of:
 - a creditor or
 - a surety or
 - a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; **and**
- (b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

(3) Certain transfers not considered as preferential transfers: For the purposes of sub-section (2), a preference shall not include the following transfers—

- (a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;
- (b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that —
 - (i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and
 - (ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

(3.1.) Transfers made in pursuance of Court's order not excluded from preferential transactions: Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

(3.2.) Meaning of "new value" secured by security interest: Explanation.— For the purpose of sub-section (3) of this section, "new value" means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) Specified persons who have been given preferential treatment and relevant time thereof: A preference shall be deemed to be given at a relevant time, if—

- (a) It is given to a **related party** (other than by reason only of being an employee), during the period of **two years preceding the insolvency commencement date**; or
- (b) a preference is given to a person **other than a related party** during the period of **one year preceding the insolvency commencement date**.

The expression "transfer of property" connotes the passing of rights in property from one person to another. In one case, there may be a passing of the entire bundle of rights from the transferor to the transferee. In another case, the transfer may consist of one of the estates only out of all the estates comprising the totality of rights in the property. In a third case, there may be reduction of the exclusive interest in the totality of rights of the original owner into a joint or shared interest with other persons. An exclusive interest in property is a larger interest than a share in that interest. To the extent to which the exclusive interest is reduced to a shared interest, it would seem that there is a transfer of interest – Sunil Sidharthbhai v. CIT [1985] 156 ITR 509 (SC)

"Transfer" is generally regarded as comprehending within its scope both voluntary and involuntary - Mangalore Electric Supply Co. Ltd. v. CIT [1978] 113 ITR 655 (SC)

Interest in property means one or more of those rights which go to make up ownership. It includes, for example, mortgage, lease, charge, easement and the like - Collector of Bomaby v. Nusservanji Rattanji Mistri AIR 1955 SC 298.

33. Order in case of preferential transactions

On an application made by the resolution professional or liquidator under section 43(1) of the Code, Adjudicating Authority can pass any of following orders [section 44(1) of the Code]:

- (a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor.
- (b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred.
- (c) release or discharge (in whole or in part) of any security interest created by the corporate debtor.
- (d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct.
- (e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate.
- (f) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference, and
- (g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference.

33.1. Order cannot be passed if interest in property was acquired in good faith

As per Proviso of Section 44(1)(g) of the Code, the Adjudicating Authority

cannot pass order in respect of preferential transaction, if the third party had acquired interest or benefit in property from a person other than the corporate debtor in good faith.

33.2. Presumption that interest was not acquired in good faith

If a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference:

- (i) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor
- (ii) is a related party, it shall be presumed that the interest was acquired or the benefit was received otherwise than in good faith unless the contrary is shown.

A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the corporate insolvency resolution process has been made under section 13 of the Code - Explanation II to section 44(1) of the Code.

In such case, it shall be presumed that the person had not acquired interest in property in good faith and burden is on that person to prove that he had acquired interest in property in good faith- Explanation I to section 44(1) of the Code.

The applicant, an educational society, had entered into a lease agreement with company-in-liquidation under which a land was leased to applicant on a monthly rent for a period of 28 years after which, applicant was to become an absolute owner. Liquidation proceedings in respect of company-in-liquidation had been commenced on 14-3-2000, which was followed by an order of winding up. Official Liquidator was appointed as liquidator of company-in-liquidation and he took possession of its properties. For financing its expansion programme, applicant approached a bank which in turn demanded security over leasehold land and sought specific orders from Court approving creation of charge on leasehold land in favour of bank, and for keeping said land outside purview of liquidation proceedings till time loan amount was repaid. Applicant, therefore, filed instant application under rules 6 and 9 seeking permission from Court to create charge over leasehold land in favour of bank – It was found that value of leasehold property of 6 acres was more than Rs. 1 crore per acre but same was leased out to applicant society for a meager amount of Rs. 2.84

lakhs for 28 years with absolute ownership thereafter. It was held that the property was transferred to applicant-society not for valuable consideration and thus the transaction entered into between company-in-liquidation and applicant-society was not in ordinary course of business and encumbrance was not in good faith – *Kirloskar Institute of Advanced Management Studies v. Official Liquidator of Mysore Kirloskar Ltd. (In Liquidation)* [2011] 108 SCL 720 (Karnataka)

34. Avoidance of undervalued transactions

If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in subsection (2) [words "of section 43" omitted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018] determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter - section 45(1) of the Code.

Cases when transaction shall be considered as undervalued: A transaction shall be considered undervalued where the corporate debtor —

- (a) makes a gift to a person; or
- (b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,

and such transaction has not taken place in the ordinary course of business of the corporate debtor - section 45(2).

34.1. Relevant period for avoidable transactions

Insolvency commencement date is the cut off date: Section 46(1) provides that in an application for avoiding a transaction at undervalue, the liquidator or the resolution professional, as the case may be, shall demonstrate that—

- (i) such transaction was made with any person within the period of one year preceding the insolvency commencement date; or
- (ii) such transaction was made with a related party within the period of two years preceding the insolvency commencement date.

34.2. Independent expert to assess evidence relating to the value of the transactions

Section 46(2) provides that the Adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions mentioned in this section.

Where appellant purchased plants and machinery of corporate debtor for only Approx. Rs. 21 lakhs, however, book value of said property was of Rs. 1.56 crore, such transaction was clearly an undervalued transaction and no independent expert was needed to be appointed under section 46(2) to assess value of transaction ~ *Radico Trading Ltd. v. Tarun Batra* [NCLAT Delhi. Comp. App. (At) (Insolvency) no. 139 of 2022 March 22, 2022]

34.3. Application by creditor in cases of undervalued transactions

Section 47 provides as follows:

(1) Creditor, member or a partner of a corporate debtor may apply to Adjudicating Authority where an undervalued transaction has taken place: Where an undervalued transaction has taken place and the liquidator or the resolution professional as the case may be, has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor, as the case may be, may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect in accordance with this Chapter.

(2) Adjudicating Authority to pass restoration order and/ or disciplinary order after examining veracity of the application: Where the Adjudicating Authority, after examination of the application made under sub-section (1), is satisfied that—

- (a) undervalued transactions had occurred; and
- (b) liquidator or the resolution professional, as the case may be, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the Adjudicating Authority,

it shall pass an order—

- (a) restoring the position as it existed before such transactions and reversing the effects thereof in the manner as laid down in section 45 and section 48;

- (b) requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.

34.4. Order by Adjudicating Authority in cases of undervalued transactions

If Adjudicating Authority finds undervaluation, it can pass any of following orders—

- (a) require any property transferred as part of the transaction, to be vested in the corporate debtor.
- (b) release or discharge (in whole or in part) any security interest granted by the corporate debtor.
- (c) require any person to pay such sums, in respect of benefits received by such person, to the liquidator or the resolution professional as the case may be, as the Adjudicating Authority may direct or
- (d) require the payment of such consideration for the transaction as may be determined by an independent expert - section 48.

35. Transactions defrauding creditors - action if corporate debtor had defrauded creditors

If Adjudicating Authority is satisfied that undervalued transaction i.e. undervalued transaction as referred in sub-section (2) of Section 45 was deliberately entered into by corporate debtor—

- (a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor, or
- (b) in order to adversely affect the interests of such a person in relation to the claim, the Adjudicating Authority can pass any of following orders -
 - (i) restoring the position as it existed before such transaction as if the transaction had not been entered into and
 - (ii) protecting the interests of persons who are victims of such transactions - section 49(1) of the Code.

Fraudulent preference means giving an improper benefit to a few creditors leading to inequity between them and the generality of creditors. In order to establish that fraudulent preference was shown to a particular creditor it must also be shown that it was done with a view to giving him favoured treatment.

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The dominant motive attending the transaction has to be ascertained and if it is tainted with dishonesty, questions of fraud arise. A probe into the debtor's mind and an assessment of the various motives that animate human conduct is thus involved. Since the inference relates to dishonesty or something approaching dishonesty, there must be solid ground for drawing it. If the circumstances proved are equally consistent with guilt or innocence, the benefit of doubt goes to the accused. Suspicion, however strong, will not be sufficient; if there is a room for more explanations than one for the debtor's conduct, an intent for to prefer cannot be inferred in the absence of direct evidence. There is no fraudulent preference if the payment or transfer is not voluntary. The payment of debts by a company under threat of legal proceedings or under reasonable apprehension of such proceedings does not amount to showing of preference. However, a payment made or benefit given to a creditor is not considered to be involuntary merely because the company had previously promised to make or give it at a time when it was solvent - Official Liquidator v. Victory Hire Purchase Co. (P.) Ltd.[1982] 52 Comp. Cas. 88 (Ker.)

Mortgages made by Corporate Debtor in ordinary course of business were not 'preferential transaction' or 'undervalued transaction' and were not made to defraud creditors of corporate debtor or for any fraudulent purpose –

Where mortgage(s) were made in favour of 'banks and financial institutions' by 'corporate debtor' i.e., 'Jaypee Infratech Ltd.' in ordinary course of business of 'corporate debtor' as appellant-banks and financial institutions had given loans to holding company namely 'Jaiprakash Associates Ltd.' and 'corporate debtor' being one of group company, like a guarantor, executed mortgage deed(s) in favour of appellants-banks and financial institutions, it was held that transactions were not 'preferential transaction' or 'undervalued transaction' and were not made to defraud creditors of corporate debtor or for any fraudulent purpose and, therefore, mortgage deeds, in question, could not be said to be made by way of transactions which came within meaning of 'fraudulent trading' or 'wrongful trading' under section 66 and appellant banks were entitled to exercise their rights under 'I&B Code' - *Axis Bank Ltd. v. Anuj Jain (NCLAT - CA(AT) 243 to 245 and 249 of 2019, Dated 1.8.2019)*

35.1. No order against person who had acquired interest in property in good faith

Proviso to section 49(1) provides that an order under this section—

- (a) shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest; and
- (b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

36. Extortionate credit transactions

Section 50 of the Code provides as follows:

(1) Application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments:

If the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor - section 50(1).

(2) Board may specify the circumstances: The Board may specify the circumstances in which a transaction which shall be covered under section 50(1).

(2.1) Debt extended by any person providing financial services which is in compliance with any law: Any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall not be considered as an extortionate credit transaction - *Explanation* to section 50(1).

The provisions of sections 35 to 53 of Chapter III and Chapter VII shall also apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary – Section 59(6) of the Code. Section 5(12) provides that "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be.

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Considering the mutatis mutandis application of Section 50(1) read with Section 5(12) in light of directive given by section 59(6), the words “insolvency commencement date” used in section 50(1) shall mean “liquidation commencement date” for the purpose of voluntary liquidation of corporate persons. Under Regulation 3(3) of voluntary liquidation process regulation the liquidation proceedings in respect of a corporate person shall be deemed to have commenced from the date of passing of the resolution under sub-clause (c) of sub-regulation (1).

36.1 When a transaction shall be considered an extortionate credit transaction:

Regulation 11 provides that a transaction shall be considered an extortionate credit transaction under section 50(2) where the terms—

- (a) require the corporate debtor to make exorbitant payments in respect of the credit provided; or
- (b) are unconscionable under the principles of law relating to contracts.

The rate of interest charged is not in itself always sufficient to persuade the court that it is grossly exorbitant. The rate charged must be considered alongside other factors, such as:

- *Security* – generally, interest should be charged at a lower rate where security is given.
- *Risk* – The higher the level of risk to which the lender is exposed, the higher the rate of interest to be expected. A poor credit rating normally equals a greater risk.
- *Urgency* – Where the borrower(s) require(s) the money urgently and, perhaps, leave the lender insufficient time to do the normal credit checks, the rate of interest charged might be expected to be higher.

There is no prescriptive list of the types of matters that would constitute a credit transaction contravening the ordinary principles of fair dealing. Some examples follow:

- An agreement signed without the borrower having proper opportunity to read the terms and conditions.
- An agreement entered into in threatening or intimidating circumstances.
- Where the borrower was induced to enter into the agreement by false or misleading statements.

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- Where important details have been hidden in the small print.
- Where interest is charged on monies not lent (such as a first payment deducted from the amount advanced).

Section 3 and 4 of Usurious Loans Act, 1918 requires a special mention here. Section 4 of this Act states that on any application relating to the admission or amount of a proof of a loan in any insolvency proceedings, the Court may exercise the like powers as may be exercised under section 3 by a Court in a suit to which this Act applies. Section 3(1) of this Act where, in any suit to which this Act applies, whether heard *ex parte* or otherwise, the Court has reason to believe,—

- (a) that the interest is excessive; and
- (b) that the transaction was, as between the parties thereto, substantially unfair

the Court may exercise all or any of the following powers, namely, may,—

- (i) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest;
- (ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, re-open any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;
- (iii) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just

Section 3(2) provides that in this section "excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan. In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid, whether in money or in kind, for expenses, inquiries, fines, bonuses, premia, renewals or any other charges, and if compound interest is charged, the periods at which it is calculated, and the total advantage which may reasonably be taken to have been expected from the transaction. In considering the question of risk, the Court shall take into account the presence or absence of security and the value

thereof, the financial condition of the debtor and the result of any previous transactions of the debtor, by way of loan, so far as the same were known, or must be taken to have been known, to the creditor. In considering whether a transaction was substantially unfair, the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor.

Section 2(3) of the Usurious Loans Act, 1918 states that "Suit to which this Act applies" means any suit—

- (a) for the recovery of a loan made after the commencement of this Act; or
- (b) for the enforcement of any security taken or any agreement, whether by way of settlement of account or otherwise, made, after the commencement of this Act, in respect of any loan made either before or after the commencement of this Act; or
- (c) for the redemption of any security given after the commencement of this Act in respect of any loan made either before or after the commencement of this Act.

37. Order of Adjudicating Authority in respect of extortionate credit transactions

Section 51 provides that where the Adjudicating Authority is satisfied that the terms of a credit transaction required exorbitant payments to be made by the corporate debtor, it shall, by an order—

- (a) restore the position as it existed prior to such transaction,
- (b) set aside the whole or part of the debt created on account of the extortionate credit transaction,
- (c) modify the terms of the transaction,
- (d) require any person who is, or was, a party to the transaction to repay any amount received by such person, or
- (e) require any security interest that was created as part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be.

38. Secured creditor in liquidation proceedings

"Secured creditor" means a creditor in favour of whom security interest is created - section 3(30).

A secured creditor in the liquidation proceedings may—

- (a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or
- (b) realise its security interest in the manner specified in this section - section 52(1).

A relinquishment takes place when the owner withdraws himself from the property and abandons his rights thereto. It presumes that the property continues to exist after the relinquishment. [CIT v. Rasiklal Maneklal (HUF) [1989] 177 ITR 198 (SC)]

If the secured creditor intends to realise security interest under section 52(1)(b) of the Code, he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

38.1. Verification by liquidator before secured creditor realises his security interest

Before any security interest is realised by the secured creditor under section 52(1)(b) of the Code, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest.

The existence of security interest may be proved either—

- (a) by the records of such security interest maintained by an information utility or
- (b) by such other means as may be specified by the Board - section 52(3).

The existence of a security interest may be proved by a secured creditor on the basis of—

- (a) the records available in an information utility;
- (b) certificate of registration of charge issued by the Registrar of Companies;
- (c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India - Regulation 21 of

Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

38.2. Enforcement of security interest by secured creditor

A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it - section 52(4).

If the secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force - section 52(5).

The Adjudicating Authority may pass such order as may be necessary to permit a secured creditor to realise security interest - section 52(6).

38.3. Yield of an amount by way of proceeds which is in excess of the debts due to the secured creditor

Section 52(7) provides that where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—

- (a) account to the liquidator for such surplus; and
- (b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

38.3.1. Insolvency resolution process costs due from secured creditors to be deducted from the proceeds of any realisation:

The amount of insolvency resolution process costs, due from secured creditors who realise their security interests shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate - section 52(8).

38.3.2. Unpaid debts of such secured creditor:

Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in section 53(1)(e) - section 52(9).

39. Sale as a going concern

It should be noted that Regulation 32 has been substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2018, w.e.f. 22-10-2018 and the substituted Regulation states that 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.

Regulation 32A as inserted by Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f. 25-7-2019 provides that:

- (1) Where the Committee of Creditors has recommended sale under clause (e) or (f) of regulation 32 or where the liquidator is of the opinion that sale under clause (e) or (f) of regulation 32 shall maximise the value of the corporate debtor, he shall endeavour to first sell under the said clauses.
- (2) For the purpose of sale under sub-regulation (1), the group of assets and liabilities of the corporate debtor, as identified by the Committee of Creditors under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall be sold as a going concern.
- (3) Where the Committee of Creditors has not identified the assets and liabilities under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.
- (4) The liquidator may sell the assets of the corporate debtor under clause (e) of regulation 32 exclusively only at the first auction. Sub-regulation (4) has

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been substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022 w.e.f. 16-9-2022.

Should 'Going Concern Sale' be defined¹: Para 4 of the Discussion Paper on Corporate Liquidation Process reads as follows:

The framework for Going Concern Sale (GCS) may need to provide for the following:

“4.1 Who may exercise the option for GCS?”

The stakeholders as well as the Liquidator may exercise the option as under:

4.1.1 The CoC may be enabled to recommend, in case it deems fit, GCS, including the type of GCS- sale of the CD as a going concern or sale of the business of the CD as going concern- and the timeline for its completion, while passing a resolution for liquidation during the corporate insolvency resolution process (CIRP). If the CoC recommends GCS, the Liquidator shall proceed with the other options for sale, on failure of GCS or expiry of timeline for GCS given by the CoC. This means GCS and other options for sale will be sequential.

4.1.2 If there is no recommendation from the CoC, the Liquidator shall explore all options of sale simultaneously keeping in view market practice in the line of business of the CD. He shall offer for sale a package of assets, a business comprising select assets and/or liabilities, or CD comprising select assets and/or liabilities, to the extent possible, simultaneously.

4.2 Should 'Going Concern Sale' be defined?

4.2.1 The term is well-understood in legal parlance. The jurisprudence in this regard is fairly well-developed out of the erstwhile liquidation regime under the Companies Act, 1956. The Code recognises 'going concern' and envisages resolution as a 'going concern' but does not define it. It has been in vogue for more than two years and has not caused any difficulty. The Insolvency Law Committee in its report dated 26th March, 2016 noted that the phrase "as a going concern" implies that the CD would be functional as it would have been prior to initiation of CIRP, other than the restrictions put by the Code. It may not, therefore, be defined. However, it may be explained that going concern means all such assets and the liabilities, which constitute

¹ Extracts from the discussion paper on Corporate Liquidation Process along with draft regulations - IBBI Press Release, Dated 27-4-2019

an integral business or the CD, that must be transferred together, and the consideration must be for the business or the CD. The buyer of the assets and liabilities should be able to run business without any disruption. The business or the CD must be a running one, and it must be transferred along with its employees. In case of sale of the CD as going concern, the equity shareholding of the CD must be transferred, and the buyer must take over the CD, its business, affairs and operations, including its licenses, assets, entitlements, beneficial interests, trademarks, brand, government approvals, etc.

4.2.2 It may not be possible to offer a complete business or the CD for GCS, as certain assets may not be surrendered by secured creditors to the liquidation estate, certain assets may be subject to protracted litigations, etc. It is also possible that in the facts and circumstances of a CD, a GCS may not be possible. It should, therefore, be left to the CoC or the Liquidator to find creative, innovative cost-effective structures to minimise and mitigate legal and commercial risks associated with GCS. In fact, the Supreme Court in the matter of *Industrial Finance Corporation v. Official Liquidator, High Court, Calcutta*, held that there is no standard or uniform pattern to be followed for disposing the assets of the company and should be examined on a case to case basis. In case, the GCS is undertaken at the choice of the CoC, the CoC, including secured financial creditors, shall indicate composition of assets and/liabilities to be sold as going concern. In any other case, the Liquidator may have flexibility to package the assets and liabilities as per market practice and offer every option under regulation 32 of the Regulations simultaneously. He will compute value of each option and each combination of options and sell the asset, business or the CD in the manner which gives the highest value. For example, a CD has three assets A, B, and C, and three liabilities X, Y and Z. He may offer for sale, (a) A only, (b) B only, (c) C only, (d) A and B, (e) B and C, (f) A and C, (g) A, B and C, (h) A and X, (i) A and Y, (j) A and Z, (k) A, B and X, and so on. After receipt of bids for each package, he may find that sale of one business comprising A, B and Y, and sale of one asset (C) give the highest value. He may sell these and discharge the liabilities X and Z from the sale proceeds as per section 53 of the Code.”

40. Mode of sale

The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I of IBBI (Liquidation Process)

Regulations, 2016. Regulation 33 of IBBI (Liquidation Process) Regulations, 2016 in this regard are as follows:

40.1. Private sale in certain cases

The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when:

- (a) the asset is perishable
- (b) the asset is likely to deteriorate in value significantly if not sold immediately
- (c) the asset is sold at a price higher than the reserve price of a failed auction; or
- (d) the prior permission of the Adjudicating Authority has been obtained for such sale:

The liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to:

- (a) a related party of the corporate debtor
- (b) his related party; or
- (c) any professional appointed by him.

40.2. No sale in case of collusion between buyers

The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties.

40.3. Mode of sale as prescribed under Schedule I:

The modes are enumerated as below:

1. Auction

- (1) Where an asset is to be sold through auction, a liquidator shall do so the in the manner specified herein.
- (1A) Subject to provisions of regulation 2B, the liquidator shall issue a public notice of an auction for sale under regulation 32 within forty-five days from the liquidation commencement date unless the

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consultation committee advises to extend the timeline - Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022

- (1B) The liquidator shall issue public notice for the next auction, in case of failure of the auction, within fifteen days from the last failed auction unless the consultation committee advises to deviate from the specified time period - Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022
- (1C) Notwithstanding anything contained in this Schedule, the liquidator shall complete an auction process within thirty-five days from the issue of public notice for auction - Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022
- (1D) The liquidator shall provide at least fourteen days from issue of public notice for submission of eligibility documents by prospective bidder – Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022
- (1E) The liquidator shall provide to qualified bidder at least seven days, for inspection or due diligence of assets under auction, from the date of declaration of qualified bidder - Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022
- (1F) A prospective bidder in an auction process shall deposit earnest money deposit at least up to two days before the date of auction - Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022
- (2) The liquidator shall prepare a marketing strategy, with the help of marketing professionals, if required, for sale of the asset. The strategy may include—
 - (a) releasing advertisements;
 - (b) preparing information sheets for the asset;
 - (c) preparing a notice of sale; and
 - (d) liaising with agents.

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- (3) The liquidator shall prepare terms and conditions of sale, including reserve price, earnest money deposit as well as pre-bid qualifications, if any.
- Provided that the liquidator shall not require payment of any non-refundable deposit or fee for participation in an auction under the liquidation process: Provided further that the earnest money deposit shall not exceed ten percent. of the reserve price - Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2021, w.e.f. 30-9-2021
- (4) The reserve price shall be the value of the asset arrived at in accordance with regulation 35.
- It is a prudent practice to fix the Reserve Price under consultation with the SCC and to take their approval on Reserve Price.
- (4A) Where an auction fails at the reserve price, the liquidator may reduce the reserve price by up to twenty-five percent of such value to conduct subsequent auction.
- It is a prudent practice to fix the Reserve Price under consultation with the SCC and to take their approval on Reserve Price.
- (4B) Where an auction fails at reduced price under clause (4A), the reserve price in subsequent auctions may be further reduced by not more than ten percent at a time.
- (5) The liquidator shall [*issue a public notice*]¹ of an auction in the manner specified in Regulation 12(3);
- Provided that the liquidator may apply to Adjudicating Authority to dispense with the requirement of Regulation 12(3)(a)² keeping in view the value of the asset intended to be sold by auction.
- (6) The liquidator shall provide all assistance necessary for the conduct of due diligence by interested buyers.
- (7) From a date to be notified through circular by the Board, the liquidator shall sell the assets only through an electronic auction platform

¹ Substituted for "make a public announcement" by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2021, w.e.f. 30-9-2021

² Public announcement to be published in in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the liquidator, the corporate debtor conducts material business operations

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empaneled by the Board – Substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022. Prior to its substitution, clause (7) read as under:

“The liquidator shall sell the assets through an electronic auction on an online portal, if any, designated by the Board, where the interested buyers can register, bid and receive confirmation of the acceptance of their bid online.”

- (8) If the liquidator is of the opinion that a physical auction is likely to maximize the realization from the sale of assets and is in the best interests of the creditors, he may sell assets through a physical auction after obtaining the permission of the Adjudicating Authority. The liquidator may engage the services of qualified professional auctioneers specializing in auctioning such assets for this purpose.
- (9) An auction shall be transparent, and the highest bid at any given point shall be visible to the other bidders.
- (10) If the liquidator is of the opinion that an auction where bid amounts are not visible is likely to maximize realizations from the sale of assets and is in the best interests of the creditors, he may apply, in writing, to the Adjudicating Authority for its permission to conduct an auction in such manner.
- (11) If required, the liquidator may conduct multiple rounds of auctions to maximize the realization from the sale of the assets, and to promote the best interests of the creditors.
- (11A) Where the liquidator rejects the highest bid in an auction process, he shall intimate the reasons for such rejection to the highest bidder and mention it in the next progress report - Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2021, w.e.f. 30-9-2021.
- (12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety days of the date of such demand:

Provided that payments made after thirty days shall attract interest at the rate of 12%:

Provided further that the sale shall be cancelled if the payment is not received within ninety days.

- (13) On payment of the full amount, the sale shall stand completed, the liquidator shall execute certificate of sale or sale deed to transfer such assets and the assets shall be delivered to him in the manner specified in the terms of sale.

2. Private Sale

- (1) Where an asset is to be sold through private sale, a liquidator shall conduct the sale in the manner specified herein.
- (2) The liquidator shall prepare a strategy to approach interested buyers for assets to be sold by private sale.
- (3) Private sale may be conducted through directly liaising with potential buyers or their agents, through retail shops, or through any other means that is likely to maximize the realizations from the sale of assets.
- (4) The sale shall stand completed in accordance with the terms of sale.
- (5) Thereafter, the assets shall be delivered to the purchaser, on receipt of full consideration for the assets, in the manner specified in the terms of sale.

41. All money to be paid into bank account except petty cash

The liquidator shall open a bank account in the name of the corporate debtor followed by the words 'in liquidation', in a scheduled bank, for the receipt of all moneys due to the corporate debtor - Regulation 41(1)

The liquidator shall deposit in the bank account opened under sub-regulation (1) all moneys, including cheques and demand drafts received by him as the liquidator of the corporate debtor, and the realizations of each day shall be deposited into the bank account without any deduction not later than the next working day - Regulation 41(2).

41.1. Cash upto Rs. one lakh for petty expenses

The liquidator may maintain a cash of one lakh rupees or such higher amount as may be permitted by the Adjudicating Authority to meet liquidation costs - Regulation 41(3).

41.2. All payments by cheque or online

All payments out of the account by the liquidator above five thousand rupees shall be made by cheques drawn or online banking transactions against the bank account - Regulation 41(4).

42. Distribution of assets

Section 53(1) provides that notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely :—

- (a) the insolvency resolution process costs and the liquidation costs paid in full;
- (b) the following debts which shall rank equally between and among the following:—
 - (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
 - (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
- (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
- (d) financial debts owed to unsecured creditors;
- (e) the following dues shall rank equally between and among the following:—
 - (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
 - (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
- (f) any remaining debts and dues;

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- (g) preference shareholders, if any; and
- (h) equity shareholders or partners, as the case may be.

Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator - section 53(2)

Priority of tax dues: As per Section 178 of the Income Tax Act, 1961 the liquidator shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the Assessing Officer [AO] who is entitled to assess the income of the company and the AO shall, after making such inquiries or calling for such information as he may deem fit, notify to the liquidator within three months from the date on which he receives notice of the appointment of the liquidator the amount which, in his opinion, would be sufficient to provide for any tax which is then, or is likely thereafter to become, payable by the company. The liquidator shall on being so notified, shall set aside an amount, equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands. Section 178 of the Income Tax Act, 1961 as amended by section 247 of the Code provides that "*The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*"

Section 82 of the CGST Act, 2017 also provides that notwithstanding anything to the contrary contained in any law for the time being in force, save as otherwise provided in the *Insolvency and Bankruptcy Code, 2016*, any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person.

As noted earlier in the discussions made below section 36 of the Code, in a judgment dated 26 July 2018 passed by Division Bench of the Hyderabad High Court in case of WP bearing no. 8560 of 2018, filed by *Leo Edibles & Fats Limited against the Tax Recovery Officer (Central), Income Tax Department, Hyderabad*, with regard to the action of the Sub-Registrar, refusing to register its purchase of immovable property due to the attachment, in the liquidation proceedings relating to VNR Infrastructures Limited.

The Court held that:

"Tax Recovery Officer cannot claim any priority merely because of the fact that the order of attachment was issued by him was long prior to the

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initiation of liquidation proceedings under the Code against VNR Infrastructures Limited, Hyderabad. It may be noted that Section 36(3)(b) of the Code indicates in no uncertain terms that the liquidation estate assets may or may not be in possession of the corporate debtor, including but not limited to encumbered assets. Therefore, even if the order of attachment constitutes an encumbrance on the property, it still does not have the effect of taking it out of the purview of Section 36(3)(b) of the Code. The said order of attachment therefore cannot be taken to be a bar for completion of the sale and the Tax Officer to submit claim before Liquidator as and when the distribution of the assets, in terms of Section 53(1) of the Code, is taken up..."

Therefore, it is obvious that the provisions of Code overrides the provisions of the Income Tax Act and CGST Act. The Income-tax Department/ GST Department, are clearly not the secured creditors and the debt owed to the Department is in the nature of dues that clearly adds to the consolidated fund of the state and thus, should be settled as per the waterfall structure mentioned in Section 53(1)(e).

Various judgments in relation to Distribution of assets:

- ***Merely because a company is having Government participation does not make it a part of the Government:*** In *Paschimanchal Vidyut Vitran Nigam Ltd. v. Raman Ispat (P.) Ltd.* Civil Appeal No. 7976 of 2019, Hon'ble Supreme Court held that PVVNL undoubtedly has government participation. However, that does not render it a government or a part of the 'State Government'. Its functions can be replicated by other entities, both private and public. The supply of electricity, the generation, transmission, and distribution of electricity has been liberalized in terms of the 2003 Act barring certain segments. Private entities are entitled to hold licenses. In this context, it has to be emphasized that private participation as distribution licensees is fairly widespread. For these reasons, it is held that in the present case, dues or amounts payable to PVVNL do not fall within the description of section 53(1)(f) of the IBC.
- ***Lending money to third party and not to corporate debtor is not a financial debt but is a secured debt:*** The Hon'ble Supreme Court of India in *Vistra ITCL (India) Ltd. v. Dinkar Venkatasubramanian* Civil Appeal No. 3606 of 2020 held that where appellant lent money to third party and not to corporate debtor, creation of pledge of shares by corporate debtor would not bring it within meaning of financial debt but

it would be treated as secured creditor who would be entitled to retain security interest in pledged shares in terms of sections 52 and 53 of IBC.

- **Financial debts owed to unsecured creditors have to be distributed by the liquidator as per the preference set out under section 53(1) of Insolvency and Bankruptcy Code, 2016 i.e. after distributing the workmen dues, wages and unpaid dues to the employees and, therefore, monies lying to credit of arbitration application were permitted to be withdrawn by liquidator for distribution in accordance with section 53:** In *Cholamandalam Investment and Finance Co. Ltd. v. Navrang Roadlines (P.) Ltd.* [2023] 176 SCL 81 (Madras), High Court of Madras held that financial debts owed to unsecured creditors have to be distributed by liquidator as per preference set out under section 53(1) i.e. after distributing workmen dues, wages and unpaid dues to employees and, therefore, monies lying to credit of arbitration application were permitted to be withdrawn by liquidator for distribution in accordance with section 53.

In this case, the respondent entered into Trip Loan Agreement dated 17-4-2018 with the appellant/Non-Banking Finance Company for a permitted limit of Rs. 1.75 crores and availed Trip loan facility from the appellant. The respondent utilized the said loan facility during the term of Agreement. However, the respondent had committed default in repayment of the loan amount and the tenure for repayment had also expired and accordingly, the respondent was liable to pay a sum of Rs. 1.96 crores as on 15-5-2019 to the appellant. Therefore, the appellant invoked section 9 of the Arbitration and Conciliation Act, 1996 by filing Application No. 3703 of 2019 to prohibit the Garnishees to make payment to an extent of Rs. 1.96 crores or any amount to the respondent and also directing the Garnishees to deposit the sum of Rs. 1.96 crores or any amount to the credit of A. No. 3703 of 2019.

- **Settlement agreement between RP and workmen:** In IBBI Order No. IBBI/DC/86/2022, it was observed by the Disciplinary Committee that where settlement agreement between RP and workmen was entered into on advice of secured creditors of corporate debtors in good faith for early completion of liquidation process and RP did not distribute any amount of sale proceeds contrary to section 53, no act was done by RP in contravention of IBC.

42.1. Fees payable to liquidator to be deducted from distribution

The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction - section 53(3)

42.2. Distribution on proportionate basis if proceeds are insufficient

At each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full - *Explanation (i)* below section 53(3) of the Code.

42.3. Distribution of Proceed to stakeholders

Subject to the provisions of section 53 of the Code, the liquidator shall not commence distribution before the list of stakeholders and the asset memorandum has been filed with the Adjudicating Authority - Regulation 42(1) of IBBI (Liquidation Process) Regulations, 2016.

The liquidator shall distribute the proceeds from realization within *ninety days* from the receipt of the amount to the stakeholders - Regulation 42(2) of IBBI (Liquidation Process) Regulations, 2016. "Ninety days" have been substituted for "six months" by Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f. 25-7-2019.

The insolvency resolution process costs, if any, and the liquidation costs shall be deducted before such distribution is made - Regulation 42(3) of IBBI (Liquidation Process) Regulations, 2016.

42.4. Return of excess money received by stakeholder

A stakeholder shall forthwith return any monies received by him in distribution, which he was not entitled to at the time of distribution, or subsequently became not entitled to - Regulation 43 of IBBI (Liquidation Process) Regulations, 2016.

43. Insolvency resolution process costs

"Insolvency resolution process costs" means:

- (a) the amount of any interim finance and the costs incurred in raising such finance
- (b) the fees payable to any person acting as a resolution professional
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process, and
- (e) any other costs as may be specified by the Board - Section 5(13).

44. Liquidation cost

"Liquidation cost" means any cost incurred by the liquidator during the period of liquidation subject to such regulations, as may be specified by the Board - Section 5(16).

Regulation 2(1)(ea) as Substituted by Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f. 25-7-2019 states that "liquidation cost" under clause (16) of section 5 means-

- (i) fee payable to the liquidator under regulation 4;
- (ii) remuneration payable by the liquidator under sub-regulation (1) of regulation 7;
- (iii) costs incurred by the liquidator under sub-regulation (2) of regulation 24;
- (iv) costs incurred by the liquidator for preserving and protecting the assets, properties, effects and actionable claims, including secured assets, of the corporate debtor;
- (v) costs incurred by the liquidator in carrying on the business of the corporate debtor as a going concern;
- (vi) interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower;
- (vii) the amount repayable under sub-regulation (3) of regulation 2A;
- (viii) any other cost incurred by the liquidator which is essential for completing the liquidation process:

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Provided that the cost, if any, incurred by the liquidator in relation to compromise or arrangement under section 230 of the Companies Act, 2013, if any, shall not form part of liquidation cost.

"Liquidation commencement date" means the date on which proceedings for liquidation commence in accordance with section 33 or section 59 of the Code, as the case may be - Section 5(17).

44.1. Contributions to liquidation costs:

Regulation 2A as inserted by Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f. 25-7-2019 provides that:

(1) Where the Committee of Creditors did not approve a plan under sub-regulations (3) of regulation 39B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall call upon the financial creditors, being financial institutions, to contribute the excess of the liquidation costs over the liquid assets of the corporate debtor, as estimated by him, in proportion to the financial debts owed to them by the corporate debtor.

Illustration: Assume that the excess of liquidation costs over liquid assets is Rs.10, as estimated by the liquidator. Financial creditors will be called upon to contribute, as under:

Sl. No.	Financial creditors	Amount of debt due to financial creditors (Rs.)	Amount to be contributed towards liquidation cost (Rs.)
(1)	(2)	(3)	(4)
1	Financial institution A	40	04
2	Financial institution B	60	06
3	Non-financial institution A	50	00
4	Non-financial institution B	50	00
Total		200	10

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(2) The contributions made under the plan approved under sub-regulation(3) of regulation 39B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 or contributions made under sub-regulation (1), as the case may be, shall be deposited in a designated escrow account to be opened and maintained in a scheduled bank, within seven days of the passing of the liquidation order.

(3) The amount contributed under sub-regulation (2) shall be repayable with interest at bank rate referred to in section 49 of the Reserve Bank of India Act, 1934 as part of liquidation cost.

Explanation:- It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 - Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2022, w.e.f. 28-4-2022.

Financial support to liquidator by members of CoC¹: It is observed that in some cases, the Liquidator faces an acute shortage of liquid funds during the liquidation process. In some cases, the assets of the Corporate Debtor (CD) are not enough to cover even the liquidation cost. In some other cases, the Liquidator faces scarcity of funds to meet liquidation cost till the sale of the assets. There are many activities, such as public announcement, that must be performed in all cases, irrespective of the size of the assets or resources of the CD.

In the matter of *Hind Motors Limited [CP (IB) NO. 01/CHD/2017]*, the Adjudicating Authority noted that the CD has no liquid assets and hence it is difficult to meet the expenses of liquidation. Accordingly, it clarified that the expenses of the public announcement and for service of process etc. incurred by the liquidator shall be reimbursed by the Union Bank of India presently and the same shall be part of liquidation cost.

It had since been suggested by stakeholders that the cost of liquidation may be borne by the financial creditors upfront and the same may be recovered from sale of assets. This may, however, be burdensome for retail individual creditor. It is, therefore, proposed that secured institutional financial creditors

¹ Extracts from Discussion paper on corporate insolvency resolution process along with draft regulations - IBBI Press Release, Dated 8-5-2019

may be obliged to bring in interim finance to run the CD as a going concern or liquidate the CD, if there are no liquid assets available to defray these expenses.

It was, therefore, then proposed that the regulations may require the CoC to consider an agenda item, while rejecting a resolution plan or deciding to liquidate the CD, providing for liquidation expenses. It must consider the estimated amount of liquidated costs, the availability of liquid assets to meet liquidation costs, and balance amount required for meeting liquidation costs and require the secured institutional financial creditors to bring in upfront balance amount of liquidation cost, in an escrow account with a scheduled bank, within seven days of the liquidation order. The money brought in by the secured institutional financial creditors plus interest @ bank rate thereon shall be included in the liquidation cost. (Consequential amendments are also required in the Liquidation Regulations.)

45. Completion of liquidation within one year

Regulation 44(1) as substituted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f. 25-7-2019 provides that the liquidator shall liquidate the corporate debtor within a period of *one year* from the liquidation commencement date, notwithstanding pendency of any application for avoidance of transactions under Part II of the Code, before the Adjudicating Authority or any action thereof.

Further, if the liquidator fails to liquidate the corporate debtor within one year, he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation - Regulation 44(2) of IBBI (Liquidation Process) Regulations, 2016.

Explanation: - In relation to the liquidation processes commenced prior to the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, the requirements of this regulation as existing before such commencement, shall apply - Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2022, w.e.f. 28-4-2022.

It is noteworthy here that the following proviso to Regulation 44(1) has been omitted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022:

"Provided that where the sale is attempted under sub-regulation (1) of regulation 32A, the liquidation process may take an additional period up to ninety days."

46. Final report by Liquidator prior to dissolution, treatment of avoidance transactions and preservation of records

When the corporate debtor is liquidated, the liquidator shall make an account of the liquidation, showing how it has been conducted and how the corporate debtor's assets have been liquidated - Regulation 45(1) of IBBI (Liquidation Process) Regulations, 2016.

If the liquidation cost exceeds the estimated liquidation cost provided in the Preliminary Report, the liquidator shall explain the reasons for the same - Regulation 45(2) of IBBI (Liquidation Process) Regulations, 2016.

Regulation 45(3) as substituted by Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f. 25-7-2019 provides as follows:

46.1. Compliance Certificate to be submitted to NCLT along with the application for dissolution of corporate debtor and the final report

Sub-regulation (3) as substituted by Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f. 25-7-2019 provides that the liquidator shall submit an application along with the final report and the compliance certificate in Form H to the Adjudicating Authority for –

- (a) closure of the liquidation process of the corporate debtor where the corporate debtor is sold as a going concern; or
- (b) for the dissolution of the corporate debtor, in cases not covered under clause (a)

46.2. Treatment of avoidance of transaction

The liquidator shall, on the advice of the consultation committee, provide in the application along with the final report filed under regulation 45 for the manner in which proceedings in respect of avoidance transactions, if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II

of the Code, will be pursued after the dissolution or closure of liquidation process and the manner in which the proceeds, if any, from such proceedings shall be distributed - Inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022.

46.3. Preservation of Records

Regulation 45A as inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022, w.e.f. 16-9-2022 provides as follows:

(1) complete account of the liquidation process: The liquidator shall preserve copies of all such records which give a complete account of the liquidation process.

(2) specified records: Without prejudice to the generality of the provisions of sub-regulation (1), the liquidator shall preserve copies of records relating to or forming the basis of:-

- (a) his appointment as liquidator, including the terms of appointment;
- (b) handing over and taking over of the assignment;
- (c) admission of corporate debtor into liquidation;
- (d) public announcement;
- (e) the constitution of consultation committee and minutes of consultation committee meetings during liquidation process;
- (f) claims, verification of claims, and list of stakeholders;
- (g) details of relinquishment or otherwise by secured creditors in liquidation process;
- (h) engagement of professionals, registered valuers, etc. including work done, reports etc., submitted by them;
- (i) Invitation, consideration and approval of plans / proposals / scheme received, in case of going concern sale in liquidation process or compromise or arrangement under section 230 of the Companies Act, 2013;
- (j) all filings with the Adjudicating Authority, Appellate Authority, High Courts, Supreme Court, whichever applicable and their orders;
- (k) statutory filings with Board and insolvency professional agencies;

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- (l) correspondence during the liquidation process;
- (m) cost of liquidation process;
- (n) all reports, registers, documents such as preliminary report, asset memorandum, progress reports, asset sale report, annual status report, final report prior to dissolution, various registers and books, etc. mentioned in regulations 5 and 6 of these Regulations;
- (o) preferential, undervalued, extortionate credit transactions or fraudulent or wrongful trading;
- (p) any other records, which is required to give a complete account of the process.

(3) *period of preservation:* The liquidator shall preserve:

- a. electronic copy of all records (physical and electronic) for a minimum period of eight years; and
- b. a physical copy of records for a minimum period of three years;

from the date of dissolution of the corporate debtor or closure of the liquidation process or the conclusion of any proceeding relating to the liquidation process, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.

(4) *outgoing liquidator to handover the records to new liquidator:* In case of replacement of liquidator, the outgoing liquidator shall handover the records under sub-regulations (1) and (2) to the new liquidator and be responsible for preserving the records not handed over, for any reason, to the new liquidator.

(5) *records to be handed over to the buyer when sale on going concern took place:* Where the corporate debtor has been sold as a going concern under clause (e) of regulation 32, the general records of the corporate debtor shall be handed over to the successful buyer.

(6) *compliance with applicable laws:* The records of the corporate debtor shall be preserved by the liquidator as per the applicable laws.

(7) *records to be preserved at secure place:* The liquidator shall preserve the records at a secure place and shall be obliged to produce records as may be required under the Code and the Regulations made thereunder.

Explanation - The records referred to in this regulation include records pertaining to the period of a liquidation process during which the liquidator acted as such, irrespective of the fact that he did not take up the assignment from its commencement or continued the assignment till its conclusion.

47. Corporate Liquidation Account

The Board shall operate and maintain an Account to be called the Corporate Liquidation Account in the Public Accounts of India:

Provided that until the Corporate Liquidation Account is operated as part of the Public Accounts of India, the Board shall open a separate bank account with a scheduled bank for the purposes of this regulation - Regulation 46(1) of IBBI (Liquidation Process) Regulations, 2016.

Vide Circular No. IBBI/LIQ/027/2020, Dated 9-1-2020, in terms of proviso to sub-regulation (1) of regulation 46 of the Regulations, the IBBI has opened a separate bank account for deposit of unclaimed dividends and/or undistributed proceeds of liquidation processes. The particulars of this account are as under:

Name of the Account	: IBBI-Corporate Liquidation Account
Account Number	: 2254005800000015
Nature of Account	: Current
Name of the Bank	: Punjab National Bank
IFSC Code	: PUNB0225400
Name of the Branch	: Barakhamba Road Branch, New Delhi

The liquidators are, therefore, advised to deposit any unclaimed dividends and/or undistributed proceeds of liquidation processes into the aforesaid account in accordance with regulation 46 of the Regulations. They are further advised to provide the particulars of the amount deposited into the account as per Form-I of the Schedule II to the Regulations and send a scanned signed copy of the said Form-I electronically to liq.cirp@ibbi.gov.in.

47.1. Deposit the amounts of unclaimed dividends undistributed proceeds before submitting application for closure of liquidation process or dissolution of corporate debtor

A liquidator shall deposit the amount of unclaimed dividends, if any, and undistributed proceeds, if any, in a liquidation process along with any income earned thereon till the date of deposit into the Corporate Liquidation Account before he submits an application under sub-regulation (3) of regulation 45 – Regulation 46(2).

A liquidator, who holds any amounts of unclaimed dividends or undistributed proceeds in a liquidation process on the date of commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020 (i.e., 6-1-2020), shall deposit the same within fifteen days of the date of such commencement, along with any income earned thereon till the date of deposit – Regulation 46(3).

A liquidator, who fails to deposit any amount into the Corporate Liquidation Account under this regulation, shall deposit the same along with interest thereon at the rate of twelve percent per annum from the due date of deposit till the date of deposit - Regulation 46(4).

47.2. Submission of evidence of depositing the amount into corporate liquidation account

A liquidator shall submit to the authority with which the corporate debtor is registered and the Board, the evidence of deposit of the amount into the Corporate Liquidation Account under this regulation, and a statement in Form-I setting forth the nature of the amount deposited into the Corporate Liquidation Account, and the names and last known addresses of the stakeholders entitled to receive the unclaimed dividends or undistributed proceeds - Regulation 46(5).

The liquidator shall be entitled to a receipt from the Board for any amount deposited into the Corporate Liquidation Account under this regulation – Regulation 46(6)

47.3. Stakeholders' or other person's claim for any amount deposited into the Corporate Liquidation Account

A stakeholder, who claims to be entitled to any amount deposited into the Corporate Liquidation Account, may apply to the Board in Form J for an order for withdrawal of the amount:

Provided that if any other person other than the stakeholder claims to be entitled to any amount deposited into the Corporate Liquidation Account, he shall submit evidence to satisfy the Board that he is so entitled - Regulation 46(7).

The Board may, if satisfied that the stakeholder or any other person referred to under sub-regulation (7) is entitled to withdrawal of any amount from the

Corporate Liquidation Account, make an order for the same in favour of that stakeholder or that other person – Regulation 46(8).

47.4. Responsibilities of the Board

The Board shall maintain a corporate debtor-wise ledger of the amount deposited into and the amount withdrawn from the Corporate Liquidation Account under this regulation – Regulation 46(9).

The Board shall nominate an officer of the level of Executive Director of the Board as the custodian of the Corporate Liquidation Account and no proceeds shall be withdrawn without his approval – Regulation 46(10).

The Board shall maintain proper accounts of the Corporate Liquidation Account and get the same audited annually – Regulation 46(11).

The audit report along with the statement of accounts of the Corporate Liquidation Account referred to in sub-regulation (11) shall be placed before the Governing Board and shall be forwarded to the Central Government – Regulation 46(12).

47.5. Unclaimed or undistributed amounts to be transferred to Consolidated Fund of India

Any amount deposited into the Corporate Liquidation Account in pursuance of this regulation, which remains unclaimed or undistributed for a period of fifteen years from the date of order of dissolution of the corporate debtor and any amount of income or interest received or earned in the Corporate Liquidation Account shall be transferred to the Consolidated Fund of India - Regulation 46(13).

48. Dissolution of corporate debtor

Where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor - section 54(1).

The Adjudicating Authority shall on application filed by the liquidator under sub-section (1) order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly - section 54(2).

A copy of an order of Adjudicating Authority under section 54(2) shall within seven days from the date of such order, be forwarded to the authority with which the corporate debtor is registered - section 54(3).

49. Application of provisions of the Companies Act, 2013 to Liquidation proceedings under the Code

Section 2(94A) of the Companies Act, 2013 states that "winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable. This section was inserted by the Insolvency and Bankruptcy Code, 2016, w.e.f. 15-11-2016.

It should be noted that Part III of Chapter XX of the Companies Act, 2013 deals with the provisions applicable to every mode of winding up. On the other hand, section 238 of the Code states that the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. It, thus, follows that the provisions contained in Part III of Chapter XX of the Companies Act, 2013 shall be applicable even in case of winding up of a company undertaken under the provisions of the Code and such provisions shall be applicable to extent these are not inconsistent with the provisions contained in the Code.

49.1. Powers of Tribunal to declare dissolution of company void

Section 356 of the Companies Act, 2013 provides as under:

- (1) Where a company has been dissolved, whether in pursuance:
 - of this Chapter XX; or
 - of section 232 dealing with merger and amalgamation of companies; or
 - otherwise – this word 'otherwise' seems to cover in its sweep even dissolution under the Insolvency and Bankruptcy Code, 2016,

the Tribunal may at any time within two years of the date of the dissolution, on application by the Company Liquidator of the company or by any other person who appears to the Tribunal to be interested, make an order, upon such terms as the Tribunal thinks fit, declaring the dissolution to be void, and thereupon such proceedings may be taken as if the company had not been dissolved.

- (2) The Tribunal shall—
 - (a) forward a copy of the order, within thirty days from the date thereof, to the Registrar who shall record the same; and

- (b) direct the Company Liquidator or the person on whose application the order was made, to file a certified copy of the order, within thirty days from the date thereof or such further period as allowed by the Tribunal, with the Registrar who shall record the same.

50. Power to seek assistance of Chief Metropolitan Magistrate, etc. for taking into custody or under control all property, books of account or other documents

Section 429 of the Companies Act, 2013 provides as follows:

(1) The Tribunal may, in any proceedings for winding up of a company under this Act or in any proceedings under the Insolvency and Bankruptcy Code, 2016, in order to take into custody or under its control all property, books of account or other documents, request, in writing, the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector within whose jurisdiction any such property, books of account or other documents of such company under this Act or of corporate persons under the said Code, are situated or found, to take possession thereof, and the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector, as the case may be, shall, on such request being made to him,—

- (a) take possession of such property, books of account or other documents; and
- (b) cause the same to be entrusted to the Tribunal or other persons authorised by it.]

(2) For the purpose of securing compliance with the provisions of subsection (1), the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector may take or cause to be taken such steps and use or cause to be used such force as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector done in pursuance of this section shall be called in question in any court or before any authority on any ground whatsoever.

51. Model time-line for liquidation process

Regulation 47 as inserted by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, w.e.f. 25-7-2019, gives

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the following Table which presents a model timeline of liquidation process of a corporate debtor from the liquidation commencement date, assuming that the process does not include compromise or arrangement under section 230 of the Companies Act, 2013 or sale under Regulation 32A:

Model Timeline for Liquidation Process

Sl. No.	Section/ Regulation	Description of Task	Norm	Latest Timeline (Days)
(1)	(2)	(3)	(4)	(5)
1	Section 33 and 34	Commencement of liquidation and appointment of liquidator	LCD	$0 = T$
2	Section 33 (1) (b) (ii) / Reg. 12 (1, 2, 3)	Public announcement in Form B	Within 5 days of appointment of liquidator.	$T + 5$
3	Reg. 35 (2)	Appointment of registered valuers	Within 7 days of LCD	$T + 7$
3A.	Reg. 31A (6)	First meeting of SCC	Within 7 days of LCD	$T+7]$
4	Section 38 (1), Reg. 17, 18, 19, 20 and 21A	Submission of claims; Intimation of decision on relinquishment of security interest	Within 30 days of LCD	$T + 30$
5	Section 38 (5)	Withdrawal/ modification of claim	Within 14 days of submission of claim	$T + 44$
6	Reg. 30	Verification of claims received under regulation 12(2)(b)	Within 30 days from the last date for receipt of claims	$T + 60$

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7	Reg. 31A	Constitution of SCC	Within 60 days of LCD	T + 60
8	Section 40 (2)	Intimation about decision of acceptance/ rejection of claim	Within 7 days of admission or rejection of claim	T + 67
9	Reg. 31 (2)	Filing the list of stakeholders	Within 45 days from the last date of receipt of claims	T + 75
10	Section 42	Appeal by a creditor against the decision of the liquidator	Within 14 days of receipt of such decision	T + 81
11	Reg. 13	Preliminary report to the AA	Within 75 days of LCD	T + 75
12	Reg. 34	Asset memorandum	Within [30/75] days of LCD	T + [30/75]
13	Reg. 15 (1), (2), (3), (4) and (5), and 36	Submission of progress reports to AA; Asset Sale report to be enclosed with every Progress Report, if sales are made	First progress report	Q1 + 15
			Q-2	Q2 + 15
			Q-3	Q3 + 15
			Q-4	Q4 + 15
			FY: 1 Audited accounts of liquidator's receipt & payments for the financial year	15th April
14	Proviso to Reg. 15 (1)	Progress report in case of cessation of liquidator	Within 15 days of cessation as liquidator	Date of cessation + 15
15	Reg. 37 (2, 3)	Information to secured creditors	Within 21 days of receipt of intimation from secured creditor	Date of intimation + 21

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16	Reg. 42 (2)	Distribution of the proceeds to the stakeholders	Within 3 months from the receipt of amount	Date of Realisation + 90
17	Reg.10 (1)	Application to AA for Disclaimer of onerous property	Within 6 months from the LCD	T + 6 months
18	Reg.10 (3)	Notice to persons interested in the onerous property or contract	At least 7 days before making an application to AA for disclaimer.	
19	Reg. 44	Liquidation of corporate debtor.	Within one year	T + 365
20	Reg. 46	Deposit the amount of unclaimed dividends and undistributed proceeds	Before submission of application under sub-regulation (3) of regulation 45]	
21	Sch-1 Sl. No 12	Time period to H1 bidder to provide balance sale consideration	Within 90 days of the date of invitation to provide the balance amount.	

[AA: Adjudicating Authority, LCD: Liquidation Commencement Date, SCC: Stakeholders' Consultation Committee]

52. Liability for prior offences, etc. – whether accrues in case of liquidation

Section 32A as inserted by Insolvency and Bankruptcy Code (Amendment) Act, 2020, w.e.f. 28-12-2019 provides that:

(1) Offence committed prior to the commencement of the corporate insolvency resolution process shall cease: Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the

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date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-

- (a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor: No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, **or** sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—

- (i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had

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abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation.- For the purposes of this sub-section, it is hereby clarified that,-

- (i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;
- (ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Extension of assistance and co-operation to any authority investigating an offence: Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.

Insertion of section 32A in Code by section 10 of IBC (Amendment) Act, 2020 stipulating liability for prior offences of erstwhile management of corporate debtor apparently important to new management to make a clean break with past and start on a clean slate, is Constitutionally valid - *Manish Kumar v. Union of India* [2021] 123 taxmann.com 343 (SC).

In context of CIRP, In *Tata Steel BSL Limited & Anr. v. Union of India & Anr.* [WP(CRL) 3037/2019], the trial Court took cognizance of the offences punishable under the Companies Act, 2013 and the Indian Penal Code, 1860, based on a complaint filed by the Serious Fraud Investigation Office. The petitioner submitted that it took over the CD through a resolution plan and section 32A of the Code discharges it from the proceeding before the trial Court. The High Court held that the CD would not be liable for any offence committed prior to commencement of the CIRP. It also clarified that such an order will not affect the prosecution of the erstwhile promoters or any officers who may be responsible for committing the offences.

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In *JSW Steel Ltd. v. Mahender Kumar Khandelwal & Ors.* [CA(AT)(Ins)No. 957/2019 & Ors], the NCLAT observed that section 32A suggests that the ED/other investigating agencies do not have the powers to attach assets of the CD, once a resolution plan stands approved and the criminal investigations against the CD stand abated. It further observed that the intent and purpose of section 32A is to provide certainty to the resolution applicant that the assets of the CD, as represented to him, and for which he proposes to pay value/consideration in terms of the resolution plan, would be available to him in the same manner as at the time of submission of the resolution plan.

However, in context of liquidation, the question arises as to whether similar frame of reference is available or not. The protection under section 32A is also available to sale of liquidation assets. The Liquidator appointed in respect of *Varrsana Ispat Limited v. Deputy Director, Directorate of Enforcement, Delhi* and *SBER Bank v. Varrsana Ispat Limited* [IA (IB) No. /KB/2020 in CP (IB) No. 543/KB/2017], the liquidator sought permission to sell the assets of the CD which were attached by the ED, who objected on ground that an application under section 32A can be made only after the liquidation process is over and can be filed only by the successful resolution applicant and not the liquidator. The AA held that section 32A is applicable to the assets of the CD undergoing liquidation and a liquidator can file an application like the one in hand. It further held that a liquidator can proceed with the sale of the assets even if it is under attachment by the ED, to continue the time bound process of liquidation under the Code and upon completion of the sale proceedings, the buyer can take appropriate steps to release the attachment. In *Anil Goel, Liquidator v. Dy. Director, Directorate of Enforcement* in the matter of *REI Agro Limited* [CA (IB) No. 453/KB/2018 in CP (IB) No. 73/KB/2017], the liquidator sought orders against the ED to release the attachment of assets of the CD. The AA observed: "In any case, the Court established under PMLA Act being a criminal Court can only decide whether the properties attached during investigation from possession of the Corporate Debtor could be said to be the properties acquired by them using proceeds of the crime. It is for this Tribunal to decide as to how the properties and assets of the Corporate Debtor under liquidation can be appropriated. The Liquidator must get possession of those properties attached by the Enforcement Director, New Delhi."

Section 32A(2) of IBC only protects property of corporate debtor in liquidation from provisional attachment by ED under section 5 of PMLA in respect of money laundering offences committed prior to commencement of CIRP, it however, does not make liquidator of corporate debtor immune from answering to requests for information that may be directed towards him by investigating

authorities under PMLA - HC of Delhi in *Nitin Jain Liquidator PSI Ltd. v. Enforcement Directorate*, W.P.(C) 3261 of 2021

Where application was filed for release of properties of corporate debtor attached under PMLA on ground of introduction of section 32A, but corporate debtor and liquidator were not made party to proceedings, application was rejected on ground of non-joinder of necessary party - *JM Financial Asset Re-Construction Co. Ltd. v. Deputy Director, Directorate of Enforcement, Mumbai*, [2021] 125 taxmann.com 212 ((PMLA-AT), NEW DELHI)

53. Offences and Penalties

53.1. Special Courts under Companies Act to try offences under the Code

Offences under of this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013.

Court shall not take cognizance of any offence punishable under this Act, except on a complaint made by the Board (IBBI) or the Central Government or any person authorised by the Central Government in this behalf - section 236(2).

The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

In case of a complaint under section 236(2) of the Code the presence of the person authorised by the Central Government or the Board (IBBI) before the Court trying the offences shall not be necessary unless the Court requires his personal attendance at the trial - section 236(4).

Offences under Insolvency & Bankruptcy Code are triable by Special Court consist of Metropolitan Magistrate or Judicial Magistrate First Class and not by a Court consist of Judge holding office of a Sessions Judge or Additional Sessions Judge - Satyanarayan Bankatlal Malu v. Insolvency and Bankruptcy Board of India, Bombay HC in Writ Petition No. 2592 of 2021.

53.2. Fraudulent or malicious initiation of proceedings

Section 65 provides that:

(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

¹[(3) If, any person initiates the pre-packaged insolvency resolution process—

(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or

(b) with the intent to defraud any person,

the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.]

53.3. Punishment for concealment of property

If any officer of the corporate debtor has committed any of following offence, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both - section 68

53.3.1. Acts within the twelve months immediately preceding the insolvency commencement date [Clause (i)]

(a) wilfully concealed any property or part of such property of the corporate debtor or concealed any debt due to, or from, the corporate debtor, of the value of ten thousand rupees or more or

(b) fraudulently removed any part of the property of the corporate debtor of the value of ten thousand rupees or more or

¹ Inserted by the Insolvency and Bankruptcy Code (Amendment) Act, 2021, *w.r.e.f.* 4-4-2021

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- (c) wilfully concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the property of the corporate debtor or its affairs or
- (d) wilfully made any false entry in any book or paper affecting or relating to the property of the corporate debtor or its affairs or
- (e) fraudulently parted with, altered or made any omission in any document affecting or relating to the property of the corporate debtor or its affairs or
- (f) wilfully created any security interest over, transferred or disposed of any property of the corporate debtor which has been obtained on credit and has not been paid for unless such creation, transfer or disposal was in the ordinary course of the business of the corporate debtor or
- (g) wilfully concealed the knowledge of the doing by others of any of the acts mentioned in clauses (c), (d) or clause (e) or

53.3.2. Acts after insolvency commencement date [Clause (ii)]

At any time after the insolvency commencement date, committed any of the acts mentioned in sub-clauses (a) to (f) of clause (i) or has the knowledge of the doing by others of any of the things mentioned in sub-clauses (c) to (e) of clause (i) or

53.3.3. Receiving secured property after insolvency commenced [Clause (iii)]

At any time after the insolvency commencement date, taken in pawn or pledge, or otherwise received the property knowing it to be so secured, transferred or disposed.

53.3.4. Burden of proof of innocence is on accused officer

An officer shall not be liable to any punishment under this section if he proves that he had no intent to defraud or to conceal the state of affairs of the corporate debtor. Thus, burden of proof is on him to prove innocence - *proviso* to section 68.

"Officer" for the purposes of Chapter VI and Chapter VII of Part II of the Code (which relates to offences and penalties), means an officer who is in default, as defined in section 2(60) of the Companies Act, 2013 or a designated partner as defined in section 2(j) of the Limited Liability Partnership Act, 2008, as the case may be - Section 5(19)

53.4. Punishment for transactions defrauding creditors

If an officer of the corporate debtor or the corporate debtor commits any of following acts, such officer of the corporate debtor or the corporate debtor, as the case may be, shall be punishable with imprisonment for a term which shall not be less than one year, but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both - section 69:

- (a) made or caused to be made any gift or transfer of, or charge on, or has caused or connived in the execution of a decree or order against, the property of the corporate debtor.
- (b) concealed or removed any part of the property of the corporate debtor within two months before the date of any unsatisfied judgment, decree or order for payment of money obtained against the corporate debtor.

A person shall not be punishable under this section if the acts mentioned in clause (a) were committed more than five years before the insolvency commencement date or if he proves that, at the time of commission of those acts, he had no intent to defraud the creditors of the corporate debtor.

53.5. Punishment for misconduct in course of corporate insolvency resolution process

On or after the insolvency commencement date, where an officer of the corporate debtor does any of the following, he shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both - section 70(1):

- (a) does not disclose to the resolution professional all the details of property of the corporate debtor, and details of transactions thereof, or any such other information as the resolution professional may require or
- (b) does not deliver to the resolution professional all or part of the property of the corporate debtor in his control or custody and which he is required to deliver or
- (c) does not deliver to the resolution professional all books and papers in his control or custody belonging to the corporate debtor and which he is required to deliver or

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- (d) fails to inform there solution professional the information in his knowledge that a debt has been falsely proved by any person during the corporate insolvency resolution process or
- (e) prevents the production of any book or paper affecting or relating to the property or affairs of the corporate debtor or
- (f) accounts for any part of the property of the corporate debtor by fictitious losses or expenses, or if he has so attempted at any meeting of the creditors of the corporate debtor within the twelve months immediately preceding the insolvency commencement date.

An officer shall not be liable to any punishment under this section if he proves that he had no intent to defraud or to conceal the state of affairs of the corporate debtor. Thus, burden of proof is on him to prove innocence - *provisio* to section 70(1).

53.6. Offences by insolvency professional

If an insolvency professional deliberately contravenes the provisions of Part II of the Code, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which shall not be less than one lakh rupees, but may extend to five lakhs rupees, or with both - section 70(2).

53.7 Punishment for falsification of books of corporate debtor

On and after the insolvency commencement date, where any person destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is in the knowledge of making of any false or fraudulent entry in any register, books of account or document belonging to the corporate debtor with intent to defraud or deceive any person, he shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both - section 71.

53.8. Punishment for wilful and material omissions from statements relating to affairs of corporate debtor

Where an officer of the corporate debtor makes any material and wilful omission in any statement relating to the affairs of the corporate debtor, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years, or with fine which shall not be

less than one lakh rupees, but may extend to one crore rupees, or with both - section 72.

53.9. Punishment for false representations to creditors

Where any officer of the corporate debtor is involved in following acts, he shall be punishable with imprisonment for a term which shall not be less than three years, but may extend to five years or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both - section 73:

- (a) on or after the insolvency commencement date, makes a false representation or commits any fraud for the purpose of obtaining the consent of the creditors of the corporate debtor or any of them to an agreement with reference to the affairs of the corporate debtor, during the corporate insolvency resolution process, or the liquidation process
- (b) prior to the insolvency commencement date, has made any false representation, or committed any fraud, for that purpose.

53.10. Punishment for contravention of moratorium or the resolution plan

If the corporate debtor or any of its officer violates the provisions of section 14, any such officer who knowingly or wilfully committed or authorised or permitted such contravention shall be punishable with imprisonment for a term which shall not be less than three years, but may extend to five years or with fine which shall not be less than one lakh rupees, but may extend to three lakh rupees, or with both - section 74(1).

If any creditor violates the provisions of section 14, any person who knowingly and wilfully authorised or permitted such contravention by a creditor shall be punishable with imprisonment for a term which shall not be less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both - section 74(2).

If the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both - section 74(3) of the Code.

53.11. Punishment for false information furnished in application

If any person furnishes information in the application made under section 7, which is false in material particulars, knowing it to be false or omits any material fact, knowing it to be material, such person shall be punishable with fine which shall not be less than one lakh rupees, but may extend to one crore rupees - section 75.

53.12. Punishment for non-disclosure of dispute or payment of debt by operational creditor

- Where an operational creditor has wilfully or knowingly concealed in an application under section 9 the fact that the corporate debtor had notified him of a dispute in respect of the unpaid operational debt or the full and final payment of the unpaid operational debt; **or**
- Where any person has knowingly and wilfully authorised or permitted such concealment,

such operational creditor or person shall be punishable with imprisonment for a term which shall not be less than one year but may extend to five years or with fine which shall not be less than one lakh rupees but may extend to one crore rupees, or with both - section 76.

53.13. Punishment for providing false information in application made by corporate debtor

- Where a corporate debtor provides information in the application under section 10 which is false in material particulars, knowing it to be false and omits any material fact, knowing it to be material; or
- Where any person has knowingly and willfully authorized or permitted the furnishing of such information,

such corporate debtor or person, as the case may be, shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years or with fine which shall not be less than one lakh rupees, but which may extend to one crore rupees, or with both - section 77.

¹ Substituted for "repayment" by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.r.e.f. 6-6-2018

53.14. Punishment for offences related to pre-packaged insolvency resolution process

- (1) Where—
- (a) a corporate debtor provides any information in the application under section 54C which is false in material particulars, knowing it to be false or omits any material fact, knowing it to be material; or
 - (b) a corporate debtor provides any information in the list of claims or the preliminary information memorandum submitted under sub-section (1) of section 54G which is false in material particulars, knowing it to be false or omits any material fact, knowing it to be material; or
 - (c) any person who knowingly and wilfully authorised or permitted the furnishing of such information under sub-clauses (a) and (b),

such corporate debtor or person, as the case may be, shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years or with fine which shall not be less than one lakh rupees, but which may extend to one crore rupees, or with both.

- (2) If a director or partner of the corporate debtor, as the case may be, deliberately contravenes the provisions of Chapter III-A, such person shall be punishable with imprisonment for not less than three years, but which may extend to five years, or with fine which shall not be less than one lakh rupees, but which may extend to one crore rupees, or with both- Section 77A.

Explanation :— For the purposes of this section and sections 75, 76 and 77, an application shall be deemed to be false in material particulars in case the facts mentioned or omitted in the application, if true, or not omitted from the application as the case may be, would have been sufficient to determine the existence of a default under this Code.]

53.15. Protection of action taken in good faith

No suit, prosecution or other legal proceeding shall lie against the Government or any officer of the Government, or the Chairperson, Member, officer or other employee of the Board or an insolvency professional or liquidator for anything which is in done or intended to be done in good faith under this Code or the rules or regulations made thereunder – Section 233.

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