



THE INSTITUTE OF
Company Secretaries of India

भारतीय कम्पनी सचिव संस्थान

IN PURSUIT OF PROFESSIONAL EXCELLENCE

Statutory body under an Act of Parliament

(Under the jurisdiction of Ministry of Corporate Affairs)

SUPPLEMENT EXECUTIVE PROGRAMME (NEW SYLLABUS)

for

June, 2022 Examination

SETTING UP OF BUSINESS ENTITIES & CLOSURE

MODULE 1

PAPER 3

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Part A

Lesson 3

Alteration of Charter Document

1. Companies (Incorporation) Fifth Amendment Rules, 2021

Ministry of Corporate Affairs vide Notification dated 22nd July, 2021 amended the Companies (Incorporation) Rules, 2014 and incorporated a new Rule 33A. Rule 33A deals with allotment of a new name to the existing company under section 16(3) of the Act. Rule 33A(1) states that In case a company fails to change its name or new name, as the case may be, in accordance with the direction issued under sub-section (1) of section 16 of the Act within a period of three months from the date of issue of such direction, the letters “ORDNC” (which is an abbreviation of the words “Order of Regional Director Not Complied”), the year of passing of the direction, the serial number and the existing Corporate Identity Number (CIN) of the company shall become the new name of the company without any further act or deed by the company, and the Registrar shall accordingly make entry of the new name in the register of companies and issue a fresh certificate of incorporation in Form No.INC-11C: Provided that nothing contained in sub-rule (1) shall apply in case e-form INC-24 filed by the company is pending for disposal at the expiry of three months from the date of issue of direction by Regional Director, unless the said e-form is subsequently rejected.

A company whose name has been changed under sub-rule (1) above shall at once make necessary compliance with the provisions of section 12 of the Act and the statement, “Order of Regional Director Not Complied (under section 16 of the Companies Act, 2013)” shall be mentioned in brackets below the name of company, wherever its name is printed, affixed or engraved: Provided that no such statement shall be required to be mentioned in case the company subsequently changes its name in accordance with the provisions of section 13 of the Act.

2. Rectification of Name of Company

Section 16(1) of the Companies Act, 2013 (as amended in Companies (Amendment) Act, 2020) provides that if, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which,—

(a) in the opinion of the Central Government, is identical with or too nearly resembles the name by which a company in existence had been previously registered, whether under this Act or any previous company law, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of three months from the issue of such direction, after adopting an ordinary resolution for the purpose;

(b) on an application by a registered proprietor of a trade mark that the name is identical with or too nearly resembles to a registered trade mark of such proprietor under the Trade Marks Act, 1999, made to the Central Government within three years of incorporation or registration or change of name of the company, whether under this Act or any previous company law, in the opinion of the Central Government, is identical with or too nearly resembles to an existing trade mark, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of three months from the issue of such direction, after adopting an ordinary resolution for the purpose.

Where a company changes its name or obtains a new name under sub-section (1), it shall within a period of fifteen days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

If a company makes default in complying with any direction given under sub-section (1), the company shall be punishable with fine of one thousand rupees for every day during which the default continues and every officer who is in default shall be punishable with fine which shall not be less than five thousand rupees but which may extend to one lakh rupees. Provided that nothing in this sub-section shall prevent a company from subsequently changing its name in accordance with the provisions of section 13.

3. Exemptions under Chapter XXII- Companies Incorporated Outside India

Section 393A empowers the Central Government may, by notification, exempt any class of-

(a) foreign companies;

(b) companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India, as may be specified in the notification, from any of the provisions of this Chapter and a copy of every such notification shall, as soon as may be after it is made, be laid before both Houses of Parliament.

Further, Ministry Of Corporate Affairs vide Notification dated 5th August, 2021 in exercise of the powers conferred by section 393A of the Companies Act, 2013, the Central Government hereby exempts, from the provisions of sections 387 to 392 (both inclusive), the following:-

(a) foreign companies;

(b) companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India,

insofar as they relate to the offering for subscription in the securities, requirements related to the prospectus, and all matters incidental thereto in the International Financial Services Centres set up under section 18 of the Special Economic Zones Act, 2005.

Part B

Lesson 13: Various Initial Registrations and Licenses

MICRO, SMALL AND MEDIUM ENTERPRISES

Revision of MSME Definition

In line with Government of India's top focus on energizing MSMEs in the country, Government of India approved the upward revision of MSME definition on 1st June 2020 under the Aatmanirbhar Bharat Package. The Government revised the MSME classification by inserting composite criteria of both investment and annual turnover. An enterprise shall be classified as a micro, small or medium enterprise on the basis of the following criteria, namely: --

(i) a micro enterprise, where the investment in plant and machinery or equipment does not exceed one crore rupees and turnover does not exceed five crore rupees;

(ii) a small enterprise, where the investment in plant and machinery or equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees; and

(iii) a medium enterprise, where the investment in plant and machinery or equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees.

Udyam Registration

Udyam is an online and simplified procedure of filing of registration which enables MSMEs to obtain registration without any documentation and fees. It is a globally benchmarked process and a revolutionary step towards Ease of Doing Business. Ministry of MSME has also commenced API integration of Udyam Registration portal with GeM so that MSEs can participate in Government procurement easily.

(1) Any person who intends to establish a micro, small or medium enterprise may file Udyam Registration online in the Udyam Registration portal, based on self-declaration with no requirement to upload documents, papers, certificates or proof.

(2) On registration, an enterprise (referred to as “Udyam” in the Udyam Registration portal) will be assigned a permanent identity number to be known as “Udyam Registration Number”.

(3) An e-certificate, namely, “Udyam Registration Certificate” shall be issued on completion of the registration process.

Registration Process

(1) The form for registration shall be as provided in the Udyam Registration portal.

(2) There will be no fee for filing Udyam Registration.

(3) Aadhaar number shall be required for Udyam Registration.

(4) The Aadhaar number shall be of the proprietor in the case of a proprietorship firm, of the managing partner in the case of a partnership firm and of a karta in the case of a Hindu Undivided Family (HUF).

(5) In case of a Company or a Limited Liability Partnership or a Cooperative Society or a Society or a Trust, the organisation or its authorised signatory shall provide its GSTIN and PAN along with its Aadhaar number.

(6) In case an enterprise is duly registered as an Udyam with PAN, any deficiency of information for previous years when it did not have PAN shall be filled up on self-declaration basis.

(7) No enterprise shall file more than one Udyam Registration:

Provided that any number of activities including manufacturing or service or both may be specified or added in one Udyam Registration.

(8) Whoever intentionally misrepresents or attempts to suppress the self-declared facts and figures appearing in the Udyam Registration or updation process shall be liable to such penalty as specified under section 27 of the Act.

Lesson 16

Intellectual Property Laws (Provisions Applicable for Setting up of Business)

Patents (Amendment) Rules, 2021

To encourage greater participation of the educational institutions, who play a pivotal role in country's innovation, official fees payable by them in respect of various acts under the Patents Rules, 2003, have been reduced by way of the Patents (Amendment) Rules, 2021, which came into effect on 21st September, 2021.

According to the amendment Rules "educational institution" means a university established or incorporated by or under Central Act, a Provincial Act, or a State Act, and includes any other educational institution as recognised by an authority designated by the Central Government or the State Government or the Union territories in this regard.

In the case of a small entity, or start up, or educational institution, every document for which a fee has been specified shall be accompanied by Form-28.

In case an application processed by a natural person, start up, small entity or educational institution is fully or partly transferred to a person other than a natural person, start up, small entity or educational institution, the difference, if any, in the scale of fees between the fees charged from the natural person, start up, small entity or educational institution and the fees chargeable from the person other than a natural person, start up, small entity or educational institution, shall be paid by the new applicant along with the request for transfer..

In a yet another significant push towards Mission Aatmanirbhar Bharat, benefits related to 80 Percent reduced fee for patent filing & prosecution have been extended to Educational institutions as well. Centre has notified the amendments to the Patents Rules in this regard.

[https://dpiit.gov.in/sites/default/files/Patents Amendment Rules 22September2021.pdf](https://dpiit.gov.in/sites/default/files/Patents%20Amendment%20Rules%2022September2021.pdf)

Part-C

Lesson 21

Corporate Insolvency Resolution Process, Liquidation and Winding Up: An Overview

1. Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2021

According to the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2021 the liquidator has been empowered with greater autonomy during liquidation process, comparable to the resolution professional during CIRP. The participation of stakeholders is not much elaborated in the Code. The liquidation regulations provide for a consultation committee known as stakeholders' consultation committee (SCC), which has representation from secured financial creditors, unsecured financial creditors, workmen and employees, government, other operational creditors, and shareholder/partners to advise the liquidator on matters relating to sale. Though the advice of this committee is not binding on the liquidator, consultation process on important issues, addresses the issue related to information asymmetry and therefore ensures an effective participation of stakeholders. The amendment expands the scope of consultation to cover all aspects related to sale of assets and appointment of professionals. The amendment regulations also provide for manner of selection of representatives of stakeholders in SCC.

The participation of large number of buyers in the process is key to better realization of value for the stakeholders. Keeping this in view the amendment regulations provide that Liquidator shall not require payment of any non-refundable deposit or fee for participation in an auction. It also provides that the earnest money deposit shall not exceed ten percent of the reserve price in an auction. Also, with a view to improve visibility for the liquidation assets, the Board has made available an electronic platform at www.ibbi.gov.in for hosting public notices of auctions of liquidation assets of ongoing liquidation processes.

Further, to enhance the transparency and accountability, the amendment regulations provide for the Liquidator to intimate the reasons for rejection of the highest bid to the highest bidder and report the same in the next progress report.

For Details : <https://ibbi.gov.in/uploads/press/7d2e741e1de66880b3b9fbbbed3c94410.pdf>

2. Pre-Packaged Insolvency Resolution Process (PPIRP)

Micro, small, and medium enterprises (MSMEs) are critical for India's economy. They contribute significantly to gross domestic product and provide employment to a sizeable population. The COVID- 19 pandemic has impacted their business operations and exposed many of them to financial stress. Resolution of their stress requires different treatment, due to the unique nature of their businesses and simpler corporate structures. Therefore, it was considered expedient to provide an efficient alternative insolvency resolution process under the Code for corporate MSMEs, that ensures quicker, cost-effective and value maximising outcomes for all the stakeholders, in a manner which is least disruptive to the continuity of their businesses, and which preserves jobs.

PPIRP is available for resolution of stress of corporate MSMEs. It is available as an alternate option, should the stakeholders like to use it. PPIRP has the features, which make a CIRP sacrosanct, and has the rigour and discipline of the Corporate Insolvency Resolution Process (CIRP). It is informal up to a point and formal thereafter. It blends debtor-in-possession with creditor in control. It is neither a fully private nor a fully public process - it allows the company, if eligible under section 29A, to submit the Base Resolution Plan (BRP) which is exposed to challenge for value maximisation. It safeguards the rights of stakeholders as much as in CIRP and has adequate checks and balances to prevent any potential misuse. It entails a limited role of the courts and IPs. Unlike CIRP, it does not yield liquidation if there is no resolution plan. Though PPIRP and CIRP are alternate options, some stakeholders may prefer one over the other in certain circumstances.

PPIRP is introduced in IBC, 2016 by way of CHAPTER III-A consisting of section 54A to 54 P. This is a new opportunity for MSME's to come out of Covid Pandemic and resolve their insolvency as "One time settlement with creditors" with the approval of Adjudicating Authority while corporate debtor (CD) is run by existing promoters.

The provisions governing PPIRP are available in:

- Insolvency and Bankruptcy Code, 2016, as amended by the Insolvency and Bankruptcy (Amendment) Ordinance, 2021(Chapter III-A contains Section 54A to 54 P);

- Insolvency and Bankruptcy (Pre-packaged Insolvency Resolution Process) Rules, 2021; and
- Insolvency and Bankruptcy Board of India (Pre Packaged Insolvency Resolution Process) Regulations, 2021.

Eligibility for PPIRP

When a corporate debtor classified as a micro, small or medium enterprise under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006, commits minimum default of Rs 10 lakhs, it can opt for PPIRP. The Central Government can increase minimum default limit to Rs 1 crore.

Which MSME can't opt for PPIRP?

- (a) MSME which has completed PPIRP or completed CIRP, as the case may be, during the period of three years preceding the initiation date;
- (b) MSME which is undergoing a CIRP;
- (c) MSME which is undergoing a liquidation u/s 33.
- (d) MSME not eligible to submit a resolution plan under section 29A.

Proposal of name of Resolution Professional

The financial creditors of the corporate debtor, not being its related parties, representing such number and such manner as may be specified, have proposed the name of the insolvency professional to be appointed as resolution professional for conducting the PPIRP of the corporate debtor,

Approval of the name of Resolution Professional

The financial creditors of the corporate debtor, not being its related parties, representing not less than sixty-six per cent. in value of the financial debt due to such creditors, have approved the name of RP proposed.

Declaration by the majority of the directors or partners of the corporate debtor

The majority of the partners or directors of the CD shall make a declaration stating:

- (i) an application for initiating PPIRP shall be filed within a definite time period not exceeding ninety days.
- (ii) PPIRP is not being initiated to defraud any person; and
- (iii) the name of the insolvency professional proposed and approved to be appointed as resolution professional by unrelated Financial Creditors.

Special Resolution by CD

The resolution approving the filing of application for initiating PPIRP shall be passed by a special resolution, or at least three-fourth of the total number of partners, as the case may be, of the corporate debtor.

Approval of the Financial Creditors

The corporate debtor shall obtain an approval from its financial creditors, not being its related parties, representing not less than sixty-six per cent. in value of the financial debt due to such creditors, for the filing of an application for initiating PPIRP. Prior to seeking approval from financial creditors, the corporate debtor shall provide such financial creditors with —

- (a) the declaration as referred above
- (b) the special resolution or resolution by majority of partners;
- (c) a base resolution plan which conforms to the requirements referred to in section 54K and
- (d) such other information and documents as may be specified.

Application to initiate pre-packaged insolvency resolution process

Alongwith filing an application with the Adjudicating Authority for initiating PPIRP, the corporate debtor shall furnish the following:

- (a) the declaration, special resolution or resolution, as the case may be, and the approval of financial creditors for initiating PPIRP
- (b) the name and written consent of the insolvency professional proposed to be appointed as resolution professional and his report about eligibility of CD for initiating PPIRP and base resolution plan
- (c) a declaration regarding the existence of any transactions of the corporate debtor that may be within the scope of provisions in respect of avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI.
- (d) information relating to books of account of the corporate debtor and such other documents relating to such period as may be specified.

Order by the Adjudicating Authority

The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order,—

- (a) admit the application, if it is complete; or
- (b) reject the application, if it is incomplete:

The Adjudicating Authority shall, before rejecting an application, give notice to the applicant to rectify the defect in the application within seven days from the date of receipt of such notice from the Adjudicating Authority.

Commencement of PPIRP

PPIRP shall commence from the date of admission of the application by the Adjudicating Authority.

Time-limit for completion of PPIRP

- PPIRP shall be completed within 120 (one hundred and twenty) days from the pre-packaged insolvency commencement date (PPICD).
- RP shall submit approved resolution plan within 90 days of PPICD.
- If CoC doesn't approve resolution plan within 90 days, RP shall submit an application for termination of PPIRP.

Declaration of moratorium and public announcement during PPIRP

The Adjudicating Authority shall, on the PPICD, along with the order of admission:

- (a) declare a moratorium applying section 14(1) & 14 (3) mutatis mutandis
- (b) appoint RP named in the application
- (c) cause a Public Announcement of the initiation of PPIRP to be made by resolution professional, immediately after his appointment

Moratorium shall continue till PPIRP ends.

List of claims and preliminary information memorandum

The corporate debtor shall, within two days of the PPICD, submit to the resolution professional the following information, namely:— (a) a list of claims, along with details of the respective creditors, their security interests and guarantees, if any; and (b) a preliminary information memorandum containing information relevant for formulating a resolution plan

Management of affairs of corporate debtor

During the PPIRP period, the management of the affairs of the corporate debtor shall

continue to vest in the Board of Directors or the partners, as the case may be, of the corporate debtor who shall make every endeavour to protect and preserve the value of the property of the corporate debtor, and manage its operations as a going concern.

Committee of Creditors

The resolution professional shall, within seven days of the PPICD, constitute a committee of creditors, based on the list of claims confirmed and update it regularly. The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors following the provisions of section 21 except sec 21(1).

Vesting management of corporate debtor with resolution professional

- At any time during PPPIRP, CoC can decide by a vote of not less than sixty-six per cent. of the voting shares, resolves to vest the management of the corporate debtor with the resolution professional.
- The resolution professional shall make an application for this purpose to the Adjudicating Authority (AA).
- AA shall pass an order vesting the management of the corporate debtor with the resolution professional if it is of opinion that :
 - (a) the affairs of the corporate debtor have been conducted in a fraudulent manner; or
 - (b) there has been gross mismanagement of the affairs of the corporate debtor, From the date of order, the remaining provisions of CIRP will apply to PPIRP.

Consideration and approval of resolution plan

- The corporate debtor shall submit the base resolution plan to the resolution professional within two days of the PPICD, and the resolution professional shall present it to the CoC.
- The CoC may provide the corporate debtor an opportunity to revise the base resolution plan prior to its approval or invitation of prospective resolution applicants.
- The CoC may approve the base resolution plan for submission to the Adjudicating Authority if it does not impair any claims owed by the corporate debtor to the operational creditors.
- RP shall invite prospective resolution applicants to submit a resolution plan or plans, to compete with the base resolution plan if the CoC does not approve the base resolution plan or the base resolution plan impairs any claims owed by the corporate debtor to the operational creditors.

- The resolution applicants submitting resolution plans pursuant to invitation, shall fulfil such criteria as may be laid down by the resolution professional with the approval of the committee of creditors.
- The resolution professional shall provide to the resolution applicants the information memorandum and evaluation criterion.
- The resolution professional shall present to the committee of creditors, for its evaluation, resolution plans meeting requirement of sec 30(2).
- The CoC shall evaluate the plans so presented and select a resolution plan from amongst them.
- If the plan so selected is “significantly better” than the base resolution plan, such resolution plan may be selected for approval.
- Where the resolution plan selected is not considered for approval or is not significantly better than base resolution plan, it shall compete with the base resolution plan and one of them shall be selected for approval.
- If the plan finally selected is approved by CoC with 66% voting, RP shall submit the same to AA and if CoC doesn’t approve the same, then the resolution professional shall file an application to AA for termination of the PPIRP,

Approval of resolution plan

- AA shall approve the resolution plan within 30 days of its receipt if it is satisfied that the resolution plan as approved by the CoC meets the requirements of section 30 (2) and the resolution plan has provisions for its effective implementation.
- Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the above requirements, it may, within thirty days of the receipt of such resolution plan, by an order, reject the resolution plan and pass an order for termination of PPIRP.
- If AA has passed order for vesting of management of CD to RP and the resolution plan approved by the CoC does not result in the change in the management or control of the corporate debtor, the Adjudicating Authority shall pass an order —
 - (a) rejecting such resolution plan;
 - (b) terminating the PPIRP and passing a liquidation order in respect of the corporate debtor; and
 - (c) declaring that the PPIRP costs, if any, shall be included as part of the liquidation costs for the purposes of liquidation of the corporate debtor.

Termination of pre-packaged insolvency resolution process

The Adjudicating Authority shall, within thirty days of the date of application made by RP, by an order, terminate the PPIRP

- (i) If CoC does not approve any resolution plan in 90 days
- (ii) CoC neither approves selected resolution plan nor base resolution plan,
- (iii) CoC decides to terminate PPIRP by a vote of sixty-six per cent of the voting shares

If AA has passed an order for vesting of management in RP and PPIRP is required to be terminated in above circumstances, then AA shall pass an order of liquidation of corporate debtor.

Initiation of corporate insolvency resolution process

The CoC may resolve to initiate a corporate insolvency resolution process in respect of the corporate debtor, by a vote of sixty-six per cent. of the voting shares. The CoC can pass such resolution at any time after the PPICD but before the approving the resolution plan. The Adjudicating Authority shall, within thirty days of the date of such intimation, pass an order to:

(a) terminate the PPIRP and initiate corporate insolvency resolution process.

(b) appoint the resolution professional as the interim resolution professional

The order so passed by the AA shall be deemed to be an order of admission of an application under section 7 and shall have the same effect and CIRP shall commence from the date of such order.
