SINGH & ASSOCIATES
Founder - Manoj K. Singh
ADVOCATES & SOLICITORS

# Insolvency Round-Up

Vol. I, Issue III

# PREFACE

***Manoj K. Singh***
***Founding Partner***

This third-issue of Insolvency Round-Up is packed with yet another fleet of articles on topics ranging from validity of demand notice served through an advocate, comparison between the powers of the resolution professional vis-à-vis those of the liquidator, applicability of moratorium on debtor's properties, lacuna faced by home-buyers, etc.

An analysis was recently drawn between I&B Code and the Arbitration Act in a case by the NCLAT holding mere clause of arbitration in an agreement cannot be termed to be an existence of dispute under I&B Code. The article provides scrutiny of the order of the appellate tribunal and the basis on which this ratio was arrived at.

It has been much talked about that foreign operational creditors are in a state of quandary whilst arranging a certificate from financial institution. So, what are the different issues involved and how to eradicate such bottle-necks has been included in this issue.

Recently, many home-buyers were left high & dry when the 'renowned' developer shattered their hopes of getting homes and issued publication to approach adjudicating authority in order claim their respective monies under I&B Code. Read for an article herein to understand the peculiar course of action this matter entails.

In a series of cases, the adjudicating authority and appellate authority has clarified that the moratorium applicable only to properties owned by the corporate debtor and not of a personal guarantor under I&B Code. Such orders have been collated and analyzed in an article in this issue.

Also, we have included a write-up on applicability of limitation act to proceedings under I&B Code along with a case note on interpretation of section 7(5)(a) of I&B Code.

We sincerely hope that you find the articles of this *Insolvency Round-Up* issue interesting & enriching as well and throw more light on the various aspects of the Code.

Please feel free to send your valuable inputs / comments at newsletter@singhassociates.in.

***Contributors to the current issue***:
Mr. Manoj K. Singh
Ms. Daizy Chawla
Mr. Harsimran Singh
Mr. Himanshu Chawla
Mr. Adhip Kumar Ray
Mr. Ankur Upadhyay
Ms. Vaishali Goyal
Mr. Vineet Arora
Ms. Monalisa Kosaria
Mr. Palash Jain

Thank you.

## All ©Copyrights owned by Singh & Associates



# INSOLVENCY ROUND-UP®

Volume I, Issue III

**SINGH & ASSOCIATES**
**ADVOCATES & SOLICITORS**

**NEW DELHI (HEAD OFFICE)**
E-337, East of Kailash, New Delhi - 110065
Email: newdelhi@singhassociates.in

**GURUGRAM**
Unit no. 701-704, 7th Floor, ABW Tower
IFFCO Chowk, Gurugram,
Haryana-122001

**MUMBAI**
# 48 & 49, 4th Floor, Bajaj Bhavan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai, Maharashtra - 400021, INDIA
Email: mumbai@singhassociates.in

**BANGALORE**
N-304, North Block, Manipal Centre47,
Dickenson Road, Bangalore - 560042, INDIA
Email: bangalore@singhassociates.in

Ph : +91-11-46667000
Fax : +91-11-46667001

**www.singhassociates.in**

Singh & Associates
Founder - Manoj K. Singh
Advocates & Solicitors

*Managing Editor*
***Manoj K. Singh***

*Published by*
***Singh & Associates***
***Advocates and Solicitors***

# Contents

1. ANALYSIS OF FIRST RESOLUTION PLAN APPROVED BY NCLT AND THE OBJECTION RAISED BY CREDITOR 04

2. A WORD OF CAUTION FOR ALL OPERATIONAL CREDITORS - DEMAND NOTICE SERVED THROUGH AN ADVOCATE CANNOT BE TREATED AS NOTICE UNDER SECTION 8 OF INSOLVENCY AND BANKRUPTCY CODE, 2016 07

3. ARRANGING A CERTIFICATE FROM FINANCIAL INSTITUTION IS DILEMMA FOR FOREIGN OPERATIONAL CREDITOR 09

4. MORATORIUM APPLICABLE ONLY TO PROPERTIES OWNED BY THE CORPORATE DEBTOR AND NOT OF A PERSONAL GUARANTOR 11

5. A COMPARISON BETWEEN THE POWERS OF THE RESOLUTION PROFESSIONAL VIS-A-VIS THOSE OF THE LIQUIDATOR UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 14

6. HOMEBODIES UNDER THE INSOLVENCY & BANKRUPTCY CODE, 2016 – A VISIBLE LACUNA 16

7. APPLICABILITY OF LIMITATION ACT TO PROCEEDINGS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 18

8. MORATORIUM 20

9. CASE NOTE: INTERPRETATION OF SECTION 7(5)(A) OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 22

10. CASE NOTE ON: ACHENBACH BUSCHHUTTEN CMBH & CO V. ARCOTECH LTD ANALYZING BETWIXT THE INSOLVENCY CODE AND ARBITRATION ACT 24

# ANALYSIS OF FIRST RESOLUTION PLAN APPROVED BY NCLT AND THE OBJECTION RAISED BY CREDITOR

The National Company Law Tribunal, Hyderabad (hereinafter referred as "Adjudicating Authority"), after hearing to all the concerned parties on 23.01.2017[1] admitted the application filed by Synergies-Dooray Automative Limited (hereinafter referred as "Corporate Debtor") under section 10 of the Insolvency and Bankruptcy Code (hereinafter referred as "the Code") and had appointed Ms. Mamta Binani as an Interim Resolution Professional (hereinafter referred as "IRP"). Pursuant to the order of the Adjudicating Authority, the IRP issued the public announcement and invited claims from the creditors in order to constitute the Committee of Creditors. After collation of the claims, the first meeting of Committee of Creditor was called on 22.02.2017 in which the IRP was appointed as Resolution Professional (hereinafter referred as "RP"). Thereafter, list of the creditors was forwarded to the Adjudicating Authority reflecting the percentage of exposure and voting rights (as provided in the table below)

| Financial creditor | Percentage share in CoC | Percentage share in Voting |
|---|---|---|
| Alchemist Asset Reconstruction Company Ltd. ("AARC") | 12.56% | 13.83% |
| Edelweiss Asset Reconstruction Company Ltd. ("EARC") | 8.94% | 9.84% |
| Millennium Finance Ltd. ("MFL") | 69.32% | 76.33% |
| Synergies Castings Ltd. ("SCL") | 9.18% | 0 |

As per the requirement of section 25(2)(h) of the Code, the RP had initiated the process of inviting prospective Resolution Applicants for submission of Resolution Plans for the resolution of the Corporate Debtor. In the response, 4 participants applied for the offer document, out of which, only 3 entities sent the Resolution Plan namely, 1) SMB Ashes Industries; 2) Synergies Casting Limited (SCL); 3) Suiyas Industries Private Industries. The resolution plan of SCL was selected by a vote of 90.16% (majority) during the second meeting of Committee of Creditor. Thereinafter, the RP had submitted the Resolution Plan approved by Committee of Creditors for seeking approval from the Adjudicating Authority under section 30(6) of the Code.

The main features of the Resolution Plan which was submitted with the Adjudicating Authority were (i) the total recovery of INR 5,408.21 lakh by the Creditors and same be paid by way of long term funds and accruals (sum of investments or interests) of SCL over a time span of five years; (ii) A merger to take place between SDAL and SCL; (iii) the state government to exempt the stamp duty as applicable on the proposed merger; (iv) all the existing tax dues of Corporate Debtor were to be paid from the end of fifth year in which the payment of Creditors will be over and the said payment of existing dues will also be made in a time span of five years without any interest; and (v) The Resolution Applicant

*1 C.A. No. 123/2017 in CP(IB) No.01/HDB/2017*

to finance any shortfalls in making timely payments to the tax authorities or any other debtors and to induce funds for all other obligations under the Resolution Plan.

## OBJECTION BY EDELWISE:

EARC, one of the financial creditors holding 9.84% in voting share, had filed objection with respect to the incorrect admission of claims and constitution of invalid Committee of Creditor by IRP under section 60(5)(c) of the Code read with Rule 14 and 34 of the NCLT Rules 2016[2]. The sub-section (5)(c) of Section 60 of the Code provides that the NCLT has jurisdiction to entertain or dispose of any application wherein "*any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the code*". EARCL has made the following objections before the Adjudicating Authority:

(a) IRP has failed to consider that an Assignment Agreement which was entered into on 24 Nov. 2016 by which the existing debt of the Corporate Debtor has suspiciously changed hands from a related party of the Corporate Debtor being SCL to a third-party MFL and the same is invalid as it was entered into with the mala fide ulterior motive of reducing the voting rights of the Applicant in the meeting of the Committee of Creditor;

(b) EARC stated that under the Code a related party of a corporate debtor is not entitled to any participation or voting rights in meeting of the Committee of Creditors of a Corporate Debtor. SCL being a group company of the Corporate Debtor is a related party and therefore, cannot in any manner whatsoever be part of the Committee of Creditor of the Corporate Debtor;

(c) Further the debt assigned by SCL to MFL by the Assignment Agreement would also not be considered for the voting in the committee of Creditors.

## ADJUDICATING AUTHORITY OBSERVATIONS:

The Adjudicating Authority looked into the objections raised by EARC and given the following observations with respect to it.

(a) The Adjudicating Authority said that by reading the provision of section 60(5)(c) of the Code, it is established beyond doubt that the said Section empowers this NCLT to determine question of priorities or question of law or facts arising out of or in relation to the insolvency resolution of the Corporate Debtor;

(b) The Adjudicating Authority observed that question of priorities or question of law or facts as amenable to the jurisdiction of this Tribunal can only be in terms of the existing debts or liabilities of the Corporate Debtor. The aspect of inter-se transfer between the Financial Creditors of the Corporate Debtor cannot fall within the purview of the jurisdiction of the Tribunal. Therefore, the Tribunal cannot adjudicate on the aspect of validity of the Assignment Agreement between SCL and MFL;

(c) The Tribunal also observed that by reading section 5(24) of the Code, MFL does not fall into any of the conditions which makes an entity a related party of the Corporate Debtor and trigger the applicability of the said section. Further, it is evident that SCL as a part of its commercial decision assigned its dues to MFL and MFL also as a part of its business decision as a Non Banking Financing Company acquired the debts from SCL. Therefore there is no relation between SCL and MFL;

(d) The Tribunal, in the passing reference also said that with regard to the intention of the Corporate Debtor and SCL, the proceeding before the Tribunal under the Code is summary proceedings and therefore, *mens rea* cannot be raised before the Tribunal.

## CONCLUSION:

The Adjudicating Authority approved the resolution plan under section 31(1) after scrutinizing the said resolution under the requirement mentioned under section 30(2) of the Code. It is to be noted that Section 30(2) of the Code makes it obligatory on the part of the Resolution Professional that the Resolution plan confirm the various requisites as provided under various sub-clauses of Section 30(2) of the Code.

Though the Resolution Plan is approved, it is pertinent to mention that the amount proposed to be recovered through the resolution plan is only 54.04 cr. (w.r.t Creditors) whereas the total debt shown in the

*2 CA No. 43 of 2017 in CP No. 01/IBC/HDB/2017*

application which was presented by the Corporate Debtor before the Adjudicating Authority under Section 10 of the Code was to the tune of INR 971.25 cr (which includes interest also). The Adjudicating Authority has approved approximate haircut of 94%, which might set the bar of recovery too low.

Here, it would be worth mentioning that the main reason for the approval of the Resolution Plan by the Committee of Creditors at first instance was the voting right of MFL as financial creditor in the Committee of Creditors. MFL was holding 76.33% share in the voting and the as the Hon'ble Adjudicating Authority rightly observed while deciding CA. No. 57 of 2017 IN CP (IB) No. 01/HDB/2017 that the assignment of debt by SCL to MFL just before the enactment of Code is similar to "Tax Planning" as because of this assignment deed, the share of all the financial creditors were reduced and the resolution plan was approved smoothly.

# A WORD OF CAUTION FOR ALL OPERATIONAL CREDITORS - DEMAND NOTICE SERVED THROUGH AN ADVOCATE CANNOT BE TREATED AS NOTICE UNDER SECTION 8 OF INSOLVENCY AND BANKRUPTCY CODE, 2016

How easy it was to hire an advocate, who used to draft a simple reminder known as Legal Notice/Demand Notice in a legal language and the same was served on the Debtor. Is it so easy under Insolvency and Bankruptcy Code 2016 (*I&B Code 2016*)? The answer is a big NO. Recently, the Hon'ble National Company Law Appellate Tribunal (*NCLAT*) while affirming the order of Hon'ble Adjudicating Authority (*National Company Law Tribunal/NCLT*) Chandigarh in *Macquarie Bank Limited V/s Uttam Galva Metallics Limited*[3] has held that the demand notice issued through an Advocate/lawyer by the Appellant cannot be treated as notice under Section 8 of the I&B Code 2016.

The Hon'ble NCLAT, while deciding an appeal under Section 61 of I&B Code 2016, wherein the Appellant have challenged the impugned order of Hon'ble NCLAT, Chandigarh has held that the Adjudicating Authority, Chandigarh was correct in holding that the Application under Section 9 filed by the Operational Creditor/Appellant is not maintainable as the demand notice attached to said the Section 9 of I&B Code 2016 Application of the Operational Creditor/Appellant was not in accordance with the Law and accordingly the Application of the Operational Creditor was defective.

It is to be noted that whenever there is a default in payment of any dues on the part of the Corporate Debtor, an Operational Creditor may serve a Demand Notice under Section 8 of I&B Code 2016 in the mode and manner prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (*Adjudicating Authority Rules, 2016*). The said Demand Notice is served under Form 3 of the Adjudicating Authority Rules 2016. The Operational Creditor can also serve the invoice due under Form 4 of the Adjudicating Authority Rules 2016. The Corporate Debtor need to within 10 days of such receipt of the notice in Form 3 or the invoice in Form 4 as the case may be either inform the Operational Creditor that there exists a dispute before the receipt of such notice/ invoice or repay the amount due. In case the Corporate Debtor fails to respond to such notice served upon it within the prescribed period of 10 days then Operational Creditor can proceed with filing an application under Section 9 in the mode and manner prescribed under the Adjudicating Authority Rules 2016 along with such supporting documents as provided therein to initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. In the present case, the Operational Creditor/Appellant had served the notice under Section 8 of I&B Code 2016 however, the same was served through a lawyer of Singapore.

The Hon'ble NCLAT, while interpreting the clause (a) & (b) of sub-Rule (1) of Rule 5 of the Adjudicating Authority Rules 2016 observed that the Rules mandate an Operational Creditor to deliver the Corporate Debtor either the Demand Notice in Form-3 or a copy of an invoice attached with a notice in Form-4. If the Rule 5 of Adjudicating Authority Rules 2016 is read with the Form 3 or Form 4, it is clear that the persons who are authorized to give notice is an Operational Creditor or through a person authorized to act on behalf of the Operational Creditor who hold some position with or in relation to the Operational Creditor.

The Hon'ble Tribunal further observed "*that it is only when the Operational Creditor serves the notice in Form 3 or Form 4 to the Corporate Debtor, it will understand the serious consequences of non-payment of "Operational Debt", otherwise like any normal pleader notice/Advocate notice or like notice under Section 80 of C.P.C or notice for initiation of proceeding under Section 433 of the Companies Act, 1956, the "Corporate Debtor" may decide to contest the suit/case if filed, as distinct Corporate*

3 *Company Appeals (AT) (Insol) No. 96 of 2017*

*Insolvency Resolution Process where such claim otherwise cannot be contested, except where there is an existence of dispute, prior of issuance of notice under Section 8".* Accordingly, an advocate/lawyer or Chartered Accountant or a Company Secretary or any other person in absence of any authority by the Operational Creditor and if such person do not hold any position with or in relation to the Operational Creditor cannot issue notice under Section 8 of I&B Code 2016.

In other word only the in-house Counsel, Chartered Accountant or a Company Secretary who holds a position with Operational Creditor and have been duly authorized by the Operational Creditor can serve a demand notice under Section 8 of the I&B Code 2016.

# ARRANGING A CERTIFICATE FROM FINANCIAL INSTITUTION IS DILEMMA FOR FOREIGN OPERATIONAL CREDITOR

Though, initially it was thought that Insolvency and Bankruptcy Code 2016 (I&B Code 2016) came as boon for all those Creditors who otherwise have to wait for years to settle their dues. It is true that Insolvency and Bankruptcy Code 2016 is not a recovery code wherein the debt can be recovered but is a mechanism to revive the Corporate Debtor by resorting to Corporate Insolvency Resolution Process (CIRP) but still the maximum time to wait by any Creditor to know when and how they will get their dues was 180 days or wherever there was an extension 270 days. But, as the filing are been done under the I&B Code 2016 before the Hon'ble Adjudicating Authorities across the country the interpretation of the various provisions of the Code 2016 makes it clear that it is not easy for Creditor to initiate the CIRP.

Recently, the Hon'ble National Company law Appellate Tribunal (NCLAT/Appellate Tribunal) in ***Macquaire Bank Limited V/s Uttam Galva Metallics Limited***[4], while rejecting the appeal filed by the Appellant under Section 61 of I&B Code 2016 against the order of Hon'ble Adjudicating Authority, National Company Law Tribunal (NCLT), Chandigarh, have upheld the order of the Hon'ble NCLT Chandigarh wherein the Hon'ble Tribunal had held that the "*Certificate from a foreign Bank cannot be considered as Certificate from financial institution as contemplated under Section 9 (3) (c) of the I&B Code 2016.*"

In the case in hand the Appellant was a Foreign Company but not constituted under the relevant provisions of Companies Act, 1956/Companies Act, 2013. The Appellant was not having any office in India or any account with any of the Bank or 'Financial Institution' in India. The Appellant had enclosed along with the Application filed under Section 9 of the I&B Code 2016 in Form 5 as provided under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (Adjudicating Authority Rules, 2016), a certificate from Macquaire Bank, Australia as proof of non-receipt of payment from the Corporate Debtor and accordingly default of debt.

It is to be noted that as per Section 3(14) of I&B Code 2016, a financial institution means a scheduled bank, financial institution as defined in section 45 (I) of the Reserve Bank of India Act, 1934, public financial institution as defined in clause (72) of Section 2 of the Companies Act, 2013 and such other institution as the Central Government may by notification specify as financial institution.

It was the observation of the Hon'ble Appellate Tribunal, that the Macquaire Bank i.e. the Bank whose certificate was attached by the Operational Creditor does not fall under any of the category of the financial institution as provided under Section 3(14) of I&B Code 2016 including that there is no notification from the Central Government specifying "Macquaire Bank" for the purpose of sub-section (14) of Section 3 read with Section 9 of I&B Code 2016, accordingly the Application filed by the Appellant before the Hon'ble Adjudicating Authority was rightly rejected.

Among various contentions of the Appellant, one of the contention of the Appellant was that enclosing the Certificate from Financial Institution is not mandatory and is only directory for the reason that if one refer to Form 5, it enlist in Part V of the said Form-5, the particulars of Operational Debt (documents, records and evidence of default) and in the said list there is no reference to the Certificate of Financial Institution.

The Hon'ble Appellant Tribunal, while rejecting the above contention of the Appellant have explained that Certificate of Financial Institution is mandatory is nature has already been decided in the matter of ***Smart timing Steel Limited Vs National Steel and Agro Industries Limited*** [5]. Further, the extended contention of the Appellant that in the Form 5 (format of Application to be filed before the Hon'ble Adjudicating

4 *Company Appeals (AT) (Insol) No. 96 of 2017*

5 *Company Appeal (AT) (Insol) No. 28 of 2017*

Authority) there is no reference to Certificate of Financial Institution is also not acceptable for the reason that "*Form 5 cannot override the substantive provision of clause (c) of sub-section (3) of Section 9 of I&B Code 2016 which mandates enclosure of Certificate from Financial Institution maintaining accounts of operational creditor confirming that there is no payment of unpaid operational debt by the Corporate Debtor*".

This order will cause great difficulty for the Creditors who fall under the category of Operational Creditor but is not maintaining any account in any category of financial institution defined under Section 3(14) of I&B Code 2016. We need to wait till there is either an amendment in the category of financial institution as defined under I&B Code 2016 or a notification is issued by the Central Government in this regard. Till that time the foreign operational creditor cannot resort to Section 9 of I&B Code 2016 with respect to their debt.

# MORATORIUM APPLICABLE ONLY TO PROPERTIES OWNED BY THE CORPORATE DEBTOR AND NOT OF A PERSONAL GUARANTOR

Before we dwell further on the topic of this article, it is imperative to take note of the relevant provisions of the Insolvency and Bankruptcy Code, 2016 (the "Code") that remain bone of contention. Also, the recent Order dated 09.08.17 by the Hon'ble National Company Law Appellate Tribunal (NCLAT) in Company Appeal (AT) (Insolvency) No. 129 of 2017 titled "*Schweitzer Systemtek India Pvt. Ltd. Vs. Phoenix ARC Pvt. Ltd. & Ors.*" (the "Case") has been analyzed herein under to throw some more light on the article-topic vis-à-vis relevant provisions of the Code.

❖ Section 10(3) of the Code reads as under:

*"(1) …*

*(2) …*

*(3) The corporate applicant shall, along with the application furnish the information relating to--*

*(a)* ***its books of account*** *and such other documents relating to such period as may be specified; and*

*(b) ….*

*(4) …*

*(5)…"*

❖ Section 14 (Moratorium) of the Code provides as under:

*(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:--*

*(a) …;*

*(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of* ***its assets*** *or any legal right or beneficial interest therein;*

*(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of* ***its property*** *including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*

*(d) …*

*(2) …*

*(3) ...*

*(4) …"*

❖ Section 60 of the Code is reproduced herein below:

*"60.* ***Adjudicating Authority for corporate persons-*** *(1) …*

*(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal,* ***an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal****.*

*(3) ...*

*(4) ...*

*(5) ... –*

*(6) ...".*

In the Case, the Appellant-Corporate Applicant challenged the order passed by Ld. Adjudicating Authority (National Company Law Tribunal or NCLT) Mumbai Bench, whereby and where-under the application preferred by appellant under section 10 of the Code was admitted, an order of Moratorium passed and Insolvency Resolution Professional (IRP) was ordered to be appointed. The grievance of the appellant before NCLAT was that the movable and immovable property of the guarantor (promoter) got attached pursuant to Corporate Insolvency Resolution Process (CIRP) initiated under section 10 against the Appellant-Corporate Applicant. However, such statement was disputed by the Financial Creditor (being the first respondent in the Case).

The NCLAT took note of the observations of the Adjudicating Authority in the order under challenge wherein the provision relating to moratorium under section 14 was discussed and clarified as to which property is to be attached while passing order for initiation of moratorium. The relevant portion of the Order of the Adjudicating Authority is reproduced hereunder:

> *"8.1. On careful reading I have noticed that the term* ***"its"*** *is significant. The plain language of the Section is that on the commencement of the Insolvency process the 'Moratorium' shall be declared for* ***prohibiting any action to recover or enforce any security interest created by the Corporate Debtor in respect of "its" property.*** *Relevant section which needs in-depth examination is Section 14 (1) (c) of The Code. There are recognized canons of interpretation. Language of the Statute should be read as it existed. This is a trite law that no word can be added or substituted or deleted from the enacted Code duly legislated. Every word is to be read and interpreted as it exists in the statute with the natural meaning attached to the word.* ***Rather in this Section the language is so simple that there is no scope even to supply casus omissus I hasten to add that the doctrine of Noscitur a Sociis' is somewhat applicable that the associated words take their meaning from one another so that common sense meaning coupled together in their cognate sense be interpreted.*** *As a result, "its" denotes the property owned by the Corporate Debtor.* ***The property not owned by the Corporate Debtor do not fall within the ambits of the Moratorium.*** *Even Section 10 is confined to the Book of the Accounts of the Corporate Debtor, due to the reason that Section 10(3) has specified that the Corporate Applicant shall furnish "its" Books of Accounts. This Bench has no legislative authority to expand the meaning of the term "its" even under the umbrella of* ***'ejusdem generis'.***
>
> *8.2 The outcome of this discussion is that the Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. The Moratorium has no application on the properties beyond the ownership of the Corporate Debtor. As a result, the Order of the Hon'ble Court directing the Court Commissioner to take over the possession shall not fall within the clutches of Moratorium. Even otherwise, the provisions of The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (the SARFAESI Act) may be having different criteria for enforcement of recovery of outstanding debt, which is not the subject matter of this Bench.* ***Before I part with it is necessary to clarify my humble view that the SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned by a Corporate Debtor, otherwise not.***
>
> *9. To conclude the Application under Section 10 of The Code is hereby "Admitted" subject to the exception as carved out supra. The consequential directions shall be that the provisions of Section 14 of The Code i.e. "Moratorium" shall come into operation. Next, the proposed name of Interim Resolution Professional i.e. (Page 4 name) is hereby approved. The IRP shall take appropriate action such as Public Announcement etc. so that*

*the Insolvency Resolution Process shall be initiated expeditiously. He is directed to submit a Progress Report within one month's time from the commencement of Insolvency Resolution Process."*

Hon'ble NCLAT observed earlier order in matter titled ***"Alpha & Omega Diagnostics (India) Ltd. V. Asset Reconstruction Company of India Ltd. & Ors."*** being Company Appeal (AT) (Insol.) No. 116 of 2017. The NCLAT vide its judgment dated 31st July, 2017, made following observations: -

*"4. Ld. Counsel appearing on behalf of the Appellant submitted that the appellant has grievance only relating to qualifying part of the impugned order as quoted above. According to the appellant, the Moratorium should take into its recourse on the subject matters and assets relating to its matters pending before the Debt Recovery Tribunal (DRT) and under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI).*

*5. However, we are not inclined to accept such submissions as Appellant-Corporate Applicant has sought for* ***"its"*** *own insolvency resolution process that will include only the assets of the Corporate Debtor and not any assets, movable or immovable of a third party, like any director or other. In so far as 'guarantor' is concerned, we are not expressing any opinion, as they come within the meaning of 'Corporate Debtor individually', as distinct from principal debtor who has taken a loan.*

*6. In the aforesaid background, if Ld. Adjudicating Authority, on careful reading of the provisions has come to the definite conclusion that on commencement of the insolvency process the "Moratorium" shall be declared for prohibiting any action to recover or enforce any security interest created by the 'Corporate Debtor' in respect of* ***"its"*** *property, no ground is made out to interfere with the said order."*

Hon'ble NCLAT, while dismissing the appeal of the corporate debtor in the Case, clarified that section 60(2) of the Code, if CIRP or liquidation proceeding of a corporate debtor is pending before the Adjudicating Authority, an application relating to the insolvency resolution or bankruptcy of a personal guarantor required to be filed before the same Bench of Adjudicating Authority. In other words, separate application for initiation of resolution process require to be filed against the guarantor before the same very Bench of the Adjudicating Authority who is hearing the corporate resolution process or liquidation proceeding against principal corporate debtor.

The point-wise outcome of the above analysis of the Case and provisions of the Code is:

1) The term "its" (mentioned in section 10(3) and section 14) denotes the property owned by the Corporate Debtor alone;

2) The property not owned by the Corporate Debtor do not fall within the ambits of the Moratorium;

3) NCLAT has no legislative authority to expand the meaning of the term "its" even under the umbrella of *'ejusdem generis'*;

4) Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor alone;

5) The Moratorium has no application on the properties beyond the ownership of the Corporate Debtor;

6) SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned by a Corporate Debtor, otherwise not;

7) Separate application for initiation of resolution process required to be filed against the guarantor before the same very Bench of the Adjudicating Authority who is hearing the CIRP or liquidation proceeding against principal corporate debtor.

# A COMPARISON BETWEEN THE POWERS OF THE RESOLUTION PROFESSIONAL *VIS-A-VIS* THOSE OF THE LIQUIDATOR UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Under section 433(e) of the Companies Act, 1956 and under Section 271(1)(a) of the unamended Companies Act, 2013 a company could be wound up if it was "unable to pay its debts". The effect of an order for winding up under both these acts would result in liquidation of the company. With the enactment of the Insolvency and Bankruptcy Code, 2016 (hereafter, "IBC") and through the action of section 255, inability to pay debts has been removed as a ground for winding up under section 271(1)(a). Now, under the IBC, the course of law now mandates that if a Corporate Debtor[6] (including a company) is not able to pay its debts then an effort must be made to revive it through the Corporate Insolvency Resolution Process(hereafter, "CIRP") and, if that fails, the company must be liquidated under the provisions of the IBC.

Under the Code, Chapter II of Part II in sections 6 to 32 deals with CIRP whereas, sections 33 through 54 in Chapter III of Part II deals with the Liquidation Process. For the purpose of the CIRP, under the IBC, an Interim Resolution Professional (hereafter, "IRP") is appointed, who can then be confirmed as the Resolution Professional (hereafter, "RP") or a different RP can be selected in his place. The IRP/RP's main role is to aid in the revival of the company and in this regard, he has been given wide and varied powers and duties under the Code. The primary tasks of the IRP include assuming control and running the affairs and management and assets of the corporate debtor as a going concern, collecting information on the finances of the Corporate Debtor, collecting and collating claims and constituting the committed of creditors. The committee of creditors then appoints a resolution professional. The resolution professional then takes over the CIRP. The RP has the same power and the duties to conduct the CIRP as the IRP.[7] In addition, the RP has the important duty of preparing the information memorandum under section 29 of the Code, receiving the resolution plan and checking whether the plan conforms to the requirements under section 30(2), presenting resolution plans at the meeting of the committee of creditors and submitting the resolution plan accepted by the committee of creditors to the Adjudicating Authority for approval.

In cases where no resolution plan is submitted to the Adjudicating Authority, or the resolution plan is rejected, or when the committee of creditors decide to go into liquidation[8] or the resolution plan is contravened, then the Adjudicating Authority may pass an order for liquidation. This liquidation order therefore marks the end of the Corporate Insolvency Resolution Process and the beginning of the Liquidation Process. Under the Act, the resolution professional appointed for the CIRP takes over as liquidator[9] unless replaced by the Adjudicating Authority. Subsequently, the powers of the board would vest in the liquidator and management of the corporate debtor would move into the hands of the liquidator to enable him to carry out the liquidation process. In order for the liquidator to carry out its job, he has been given powers under section 35 of the IBC. These powers are similar to the ones given to the IRP under the provisions dealing with CIRP, with the only difference being the end result in this process is liquidation of the company. Further, under the code, both the resolution professional and the liquidator have powers to apply for the avoidance

6 *Insolvency and Bankruptcy Code 2016, s 3(8): "corporate debtor" means a corporate person who owes a debt to any person; s. 3(7): (7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;*

7 *Ibid, s 23(2)*

8 *Ibid, s 33(2)*

9 *Ibid, s 34*

of preferential transactions[10], undervalued transactions[11] and extortionate credit transaction[12].

For the purpose of liquidation however, the liquidator has some special powers that are different from those of the resolution professional. Under section 36 the liquidator forms a liquidation estate where liquidator holds all the properties of corporate debtor as a fiduciary, for the benefit of the creditors. Another major function of the liquidator is the consolidation and verification of the claims submitted to him, determination of their value. While the resolution professional also has the power to call for and collate the claims, there are a few differences in procedure collation of claims in CIRP and the liquidation. In the liquidation process, the liquidator has the power to reject claims raised[13] and if a claim is rejected, a creditor can appeal against this decision to the Adjudicating Authority.[14] Additionally, claims once made can be withdrawn.[15] The liquidation assets are then sold and the proceeds are distributed according to the order of priority given under section 53. Following this, the liquidator makes an application to the Adjudicating Authority for dissolution of the Corporate Debtor.

Thus we see that there are a number of similarities as well as differences between the roles of the resolution professional and that of the liquidator. It is pertinent to keep in mind however, that there is no overlap between the two. The resolution professional works towards reviving and restructuring the corporate debtor, after a failure of the same, the liquidator sells the liquidation assets, distributes the proceeds and makes an application for dissolution of the company.

*10 Ibid, s 43*
*11 Ibid, s 45*
*12 Ibid, s 50*
*13* Ibid, s 40
*14* Ibid, s 54
*15* Ibid, s 38

# HOMEBUYERS UNDER THE INSOLVENCY & BANKRUPTCY CODE, 2016 – A VISIBLE LACUNA

The Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as **"The Code"**) was ushered in with much fervor and enthusiasm as an elixir possessing a cure to all infirmities plaguing the erstwhile insolvency and bankruptcy regime in India. The lack of a single and unified law dealing with insolvency and bankruptcy was, *inter alia,* an area which required radical reform to revamp the then existing structure and for alleviating the distressed credit market. The reform was expected to benefit stakeholders across a wide spectrum given the scheme of The Code. However, there exists a lacuna with respect to purchasers of residential property and their categorization under the Code which needs immediate redressal to subvert injustice that may be meted out to them.

The objective of The Code is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an insolvency & bankruptcy fund, and matters connected therewith and incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve the ease of doing business, and facilitate more investments leading to higher economic growth and development.[16] In the light of the underlying object behind the enactment of The Code, 2016, it would be prudent to speak of the kind of creditors who can, under The Code, initiate insolvency resolution process against the corporate debtor. According to Sections 7, 9 & 10 the financial creditor, the operational creditor and the corporate debtor may initiate corporate insolvency resolution process against the corporate debtor in the form and manner as specified in the aforesaid provisions. The different classes of creditors are classified into their respective heads in accordance with the nomenclature of debt owed to them by the corporate debtor which is seen in juxtaposition to the definitions provided in the statute. Section 5(8) lays down the definition of financial debt while Section 5(21) lays down the meaning of an operational debt.

Under Chapter II of The Code, 2016 only the financial creditor, the operational creditor and the corporate debtor can initiate corporate insolvency resolution process. It remains unclear under the statute as also in the light of various judicial pronouncements whether the homebuyers would come under any of the above categories. The first case in line which pronounced on the aforesaid question was the case of **Nikhil Mehta vs. AMR Infrastructures**[17] then due in the NCLT principal bench in New Delhi where the applicants approached the NCLT under Section 7 of The Code, claiming themselves to be financial creditors. The corporate debtor undertook to pay a particular amount to the buyer each month, as Committed Returns/ Assured Returns from the date of execution of the MOU till the time of handing over the actual physical possession to the buyer. In the present case, after the execution of various Memorandum of Understandings, the Respondent started paying the monthly "Assured Returns" to the applicants although erratically. It is alleged that the cheques issued by the respondent was dishonored for the reasons, inter alia, of insufficient funds. It was alleged that many other like the applicants have been duped to invest their hard-earned money in many projects belonging to the respondent. The court held that the "Assured returns" associated to the delivery of possession had nothing to do with the requirement of sub-section (8) of Section 5 as it was the time value of money which was missing from the transaction at hand and as such the applicants did not satisfy the definition of "financial creditors" within the meaning of The Code.

In an appeal preferred against the aforesaid order, the NCLAT by **order dated 21.07.2017 in Company**

*16 Statement of objects and reasons, The Insolvency and Bankruptcy Code, 2016.*

*17 CP No.(ISB)-03/(PB)/2017*

**Appeal (AT) (Insolvency) No. 07 of 2017**, after due perusal of the Memorandum of Understanding, the annual returns and the subsequent TDS deduction under Form 16A, arrived at the conclusion that the 'Corporate Debtor' treated the appellants as 'investors' and borrowed the amount pursuant to sale purchase agreement for their commercial purpose treating at par with 'loan' in their return. Thereby, the amount invested by appellants came within the meaning of 'Financial Debt', as defined in Section 5(8) (f) of The Code. **The instant pronouncement by the NCLAT was specifically applicable to the "Committed assured return plans" and as such the position of the homebuyers without an assured return plan was condemned to oblivion.**

At this juncture, it would be opportune to mention another case **Pawan Dubey & Ors. Vs. J.B.K. Developers[18],** the principal bench of NCLT at New Delhi considered the question whether the applicants could be treated as operational creditors within the meaning of Section 9 of The Code. The NCLT, placing reliance on the decision rendered in the case of Col. Vinod Awasthy vs. A.M.R. Infrastructures Ltd.[19] where it was held that given the time line in The Code it is not possible to construe section 9 read with section 5(20) & (21) of The Code so widely to include within its scope even the cases where dues are on account of advance made to purchase the flat or a commercial site from a construction company like the Respondent in the present case especially when the Petitioner has remedy available under the Consumer Protection Act and the general law of the land, declined to admit the petition. In an appeal preferred against the earlier order in the matter of Pawan Dubey[20] the NCLAT held that the appellants were merely allottees of the flats and thus did not come within the meaning of operational creditors within the meaning of The Code.

However, the NCLAT in the matter of **Rubina Chadha vs A.M.R. Infrastructures**[21] Ltd. though it shied away from deciding the question of law pertaining to the *locus standi* of the homebuyers, it referred the matter back to the NCLT with the following finding. "The appellants herein, whether they are 'Financial Creditor' or 'Operational Creditor' or 'Secured Creditor' or 'Unsecured Creditor', as claim to be creditors are now entitled to file their respective claims before the 'Interim Resolution Professional and their claims are to be considered in accordance with the provisions of The Code."

The Insolvency & Bankruptcy Board of India by notification dated 16.08.2017 brought forth an amendment to the regulations by bringing in FORM F for submission claims by creditors other than financial creditors and operational creditors. The aforesaid amendment was brought forth at a time when approximately 32000 home buyers remained bemused about their locus with respect to their pending claims against the infrastructure giant, giving them a ray of hope. However, subsequently the Interim Resolution Professional granting respite to the homebuyers of the housing projects by Jaypee Infratech decided to accept whichever forms their claims were filed in. Despite this act of the interim resolution professional, the problems of the homebuyers remained far from being over, as during liquidation, the homebuyers would only get what is left over after the secured and the operational creditors are repaid. In a bid to address the situation, **acting on a PIL, the Hon'ble Supreme Court, vide order dated 04.09.2017[22], stayed the insolvency proceedings initiated by the National Company Law Tribunal, Allahabad** on the plea of IDBI Bank against Jaypee Infratech. The aforesaid order of the apex court was to protect the interests of over 30,000 homebuyers who would otherwise be left in the lurch due to the insolvency proceedings.

The position of law relating to the position of the homebuyers continues to be fraught with uncertainty. The existing lacuna in The Code with respect to the *locus* of the homebuyers needs immediate legislative intervention as was evident during the Jaypee debacle.

*18 C.P. No. (IB)-19(PB)/2017 decided on 31.03.2017*
*19 C.P NO.(IB) -10(PB)/2017 decided on 20.02.2017*
*20 (supra)*
*21 Company Appeal (AT) (Insolvency) No. 8 of 2017*
*22 Writ Petition(s) (Civil) No. 744/2017.*

# APPLICABILITY OF LIMITATION ACT TO PROCEEDINGS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The much debated I&B Code, 2016 was enacted by the Government to correct the mounting burden of debts on business and corporate houses and to improve the NPA status of banks. It aimed towards a measure which provided the companies an option to revive and start afresh, simultaneously giving the creditors their due. The code has been used by several creditors to recover their dues or debts. In such a scenario one question arises that whether for a time-barred claim/debt an application under the I&B Code can be filed. The question has arisen in a no. of cases.

In *Deem Roll-Tech Limited v. M/S R.L. Steel & Energy Ltd.*,[23] the question pertaining to initiation of CIRP for a time-barred claim came before the Principal Bench of NCLT. The debt had arisen out of sale and the last payment by the debtor was made on 25.02.2014. Holding that the provisions of Limitation Act, 1963 are applicable to applications under I&B Code, it was observed by the bench as follows:

"Sec. 255 of IBC provides that the Companies Act 2013 shall be amended in the manner specified in the eleventh schedule to IBC and a perusal of the eleventh schedule of IBC discloses the amendments made to the Companies Act 2013 of several provisions though not section 433 of the Act wherein specifically the provisions of the Limitation Act 1963 (36 of 1963) is made applicable and that it shall, as far as may be apply to the proceedings or appeals before the Tribunal or Appellate tribunal as the case may be. Hence in the absence of any specific bar in the IBC to the application of the Limitation Act, 1963 coupled with the provisions of Sec. 433 of the Act as contained in the Companies Act 2013 which makes Limitation Act applicable to this Tribunal the debt as claimed by the petitioner is barred by limitation and hence cannot be the basis for invoking IBC before this Tribunal".

A similar question arose in *Sanjay Bagrodia v. Sathyam Green Power Pvt. Ltd.*[24] before the Principal Bench at New Delhi. To counter the plea that Limitation Act will be applicable to proceedings under I&B Code, the counsel for the operational creditor contended that tribunals are creatures of a statute and the Limitation Act, 1963 cannot be read into the Statutes creating the Tribunals unless it is expressly provided. He drew the attention of the Bench to Section 238 of I&B Code and argued that this is a non-obstante clause which provide that the IBC will have its effect notwithstanding anything inconsistent therewith contained in other laws for the time being in force.

The bench relied on its decision in *Deem Role* and held that limitation period is applicable and that the rule of prudence requires that public policy of law must be given effect which is widely followed. Law does not come to the rescue of those who sleep over their rights. It comes to the help of those who are vigilant. Explaining the non-obstante nature of section 238 of the Code, the bench observed as follows:

"The other argument based on Section 238 of IBC would also not advance the case of the applicant because Section 238 only postulates that if there is any conflict between the provisions of IBC and any other existing law then IBC would prevail. It is obviously a non-obstante clause. Nothing has been pointed out to us to highlight any conflict so as to attract the application under Section 238 of the IBC."

Hon'ble Justice MM Kumar in *Sanjay Bagrodia* also referred Section 60(6) of the Code and held that it provides for application of Limitation Act, 1963 to the I&B Code. The section provides as follows:

"(6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a

*23 Company Application No. (I.B.) 24/PB/2017.*

*24 C.P. No. (IB)108(PB)/2017, MANU/NC/0465/2017.*

corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded".

Interpreting the aforesaid provision Hon'ble J. MM Kumar observed as follows:

"The simple result flowing from the plain reading of Section 60(6) IBC is that the claim made before the NCLT must also be within the period of limitation as prescribed by the Limitation Act, 1963."

Thus, the petition of the operational creditor, being for a claim outside the net of limitation period was dismissed. Nevertheless, the position seems to have now been changed with the ruling given by Appellate Tribunal NCLAT in *Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Limited.*[25] The NCLAT held that there is nothing on the record that Limitation Act, 1963 is applicable to I&B Code. There is no provision of the I&B Code which suggest that the Law of Limitation is applicable. The bench observed as follows:

"The I & B Code, 2016 is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution Process. If there is a debt which includes interest and there is default of debt and having continuous course of action, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted.

Therefore, as of now the law stands on the footing that for bringing application under I&B Code, 2016, adherence to Limitation Act, 1963 is not required. Even when a creditor comes up with a time-barred claim/ debt, the process of Corporate Insolvency Resolution Process can be initiated at his instance. The ruling of the NCLAT is in consonance with the propounded object of the Code i.e. it is not a forum or tool for debt recovery but a platform for reinstating and revival of business which cannot be denied merely because the claim has become time-barred and there can be no default in respect of the same.

25 *Company Appeal (AT) (Insolvency) No. 44 of 2017, MANU/ NL/0063/2017.*

# MORATORIUM

## DEFINITION

Black Law defines Moratorium as *"Delay in performing an obligation or taking an action legally authorized or simply agreed to be temporary"*.

As per definition provided in the Oxford dictionary Moratorium is *"A legal authorization to debtors to postpone payment."*

Merriam Webster dictionary provides a more inclusive definition of the term Moratorium and not just related to delay in payment when it says:

1. *A legally authorized period of delay in the performance of a legal obligation or the payment of a debt*
2. *A waiting period set by an authority*
3. *A suspension of activity*

## MORATORIUM IN INSOLVENCY PROCEEDINGS

The object of insolvency laws across the world is to protect to the troubled debtor from going into a tailspin and provide him some breathing space to revive his enterprise by protecting it from the claims of its creditors and other stakeholders. As soon as a Moratorium is placed, all proceedings against the Corporate Debtor for recovery of any debt or property come to a standstill for the duration of the moratorium. This provides the debtor the necessary protection from all claims, existing as well as future, for the duration of the moratorium and let the Corporate Debtor focus all his attention towards the revival of the core business. Any distraction in terms of claims and law suits and taken away for a limited period with the sole intent of helping the enterprise stand back on its feet which is not only in the interest of the creditors, promoters and employees but also for the well being of the entire economic system.

## WHEN DOES IT COME INTO EFFECT?

The Moratorium, as envisaged in the Insolvency and Bankruptcy Code ("the Code") comes into effect immediately after the application under section 7, 9 or 10 of the Code, as the case may be, is admitted by the adjudicating authority. The day the insolvency application is admitted and moratorium is applied is referred to as the 'Insolvency Commencement Date'. Though the moratorium starts from the Insolvency Commencement Date, the Interim Resolution Professional (IRP) maybe appointed at a later date vide a separate order.

## WHEN DOES IT COME TO END?

The Moratorium once applied remains in force till the completion of the Corporate Insolvency Resolution Process which has to complete in 180 days from Insolvency Commencement Date and can be extended to 270 days, with the leave of the adjudicating authority after showing sufficient cause. Once the resolution process comes to an end, either the resolution plan is approved by the adjudicating authority or a liquidation order is passed under section 33 and thereafter the moratorium applied ceases to have effect.

## EXTENT OF MORATORIUM

Moratorium extends to all suits and proceedings against the corporate debtor in any court of law and includes execution and arbitration proceedings. It also applies to any proceedings initiated by banks under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) as well as any action to evict the corporate debtor from a property. However, the Moratorium only extends to the assets of the Corporate Debtor against whom the insolvency proceedings are initiated and not to the proceedings against its directors and guarantors. While there was little confusion on this aspect, directors and guarantors of the troubled enterprise were trying to find succour in the moratorium to escape from recovery proceedings against them pending before other courts. To settle any confusion and prevent any possible misuse of the moratorium,

the NCLT bench at Mumbai, in *Schweitzer Systemtek vs. Phoenix ARC limited (T.C.P. No. 1059/I&BP/NCLT/MB/MAH/2017),* recently held that the Moratorium will have no application on the properties beyond the ownership of the Corporate Debtor and the same view was upheld by the Appellate Tribunal when deciding the appeal therein *(Company Appeal (AT) (Insolvency) No. 129 of 2017)*.

## POWER TO MODIFY THE TERMS OF THE MORATORIUM

Though section 14 of the Code is clear about the terms of the moratorium and so far all the benches of tribunals across the country have been using the standard language and terms of the moratorium as provided in the Code, recently in two instances the benches have taken the liberty to modify the moratorium by adding riders. In *Canara Bank vs. Deccan Chronicle (CP No. IB/41/7/HDB/2017)*, the Hyderabad bench excluded proceedings pending before the Hon'ble Apex court and Hon'ble High Courts. In *Amit Spinning Industries (IB-131(PB)/2017)* matter the Principal Bench at Delhi reduced the moratorium period to 100 days in view the previous moratorium already enjoyed by the Debtor under the erstwhile Sick Industrial Companies Act.

As we are witnessing with several other aspects, the Code being in its infancy, it is expected that varying interpretations regarding the extent and the manner of application of moratorium are bound to be taken by different benches. It is only over a period of time that the jurisprudence would crystallize and as officers of the court and followers of law the onus is on the legal practitioners to help the Tribunals in correctly interpreting the provisions of law.

# CASE NOTE: INTERPRETATION OF SECTION 7(5)(A) OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

In the case of *State Bank of India v. Essar Steel India Ltd., C.P (I.B) No. 40/7/NCLT/AHM/2017*, the National Company Law Tribunal, Ahmedabad Bench has interpreted Section 7(5)(a) of the Insolvency and Bankruptcy Code, 2016 ("*the* Code") to hold that the Adjudicating Authority has discretion to either reject or admit the application for initiating the Corporate Insolvency Resolution Process even if the application is complete in all aspects.

## BACKGROUND

Standard Chartered Bank (SCB) and State Bank of India (SBI) initiated Corporate Insolvency Resolution Process under Section 7 of the Code read with Rules 4 and 9(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against ESSAR Steel India Limited (ESSAR).

SCB and SBI had provided loan to Essar Steel Offshore Limited (ESOL), a wholly owned subsidiary of ESSAR. These loans were secured by the guarantee of ESSAR under the facility agreement. Subsequently, ESOL defaulted in payment of the loan amount due and as ESSAR was its guarantor, SCB issued demand notice to ESSAR after ESOL defaulted in repayment. ESSAR also failed to pay the amount due under the agreement. Meanwhile, ESSAR issued a letter to SCB suggesting a Debt Restructuring Proposal pursuant to which the outstanding amount would be paid over the period of 25 years along with interest. SCB rejected the said proposal. Thereafter, SCB filed an application for initiating Corporate Insolvency Resolution Process (CIRP) under Section 7 of the Code against ESSAR. SBI also filed a similar application against ESSAR on behalf of the Joint Lenders Forum (JLF).

It is should be noted here that financial creditors, that is, SCB and SBI have filed an application for initiating insolvency proceeding against the guarantor and not the principal debtor. The provision for the same is provided in the Code. Section 3(8) of the Code defines "corporate debtor" as "*a corporate person who owes a **debt** to any person*". "Debt" has been defined under Section 3(11) to include financial debt. Section 5(8) read with its sub-clause (i) defines "financial debt" as "*a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes - (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause.*" Thus, the Code specifically includes liability with respect to a guarantee under 'financial debt' and empowers a financial creditor to initiated Corporate Insolvency Resolution Process against the guarantor as well.

At the outset, ESSAR has contended that it is not a willful defaulter and that there is no diversion of funds, fraud or malfeasance on its part. ESSAR also argued that CIRP before the Adjudicating Authority poses risks- firstly, the process of formulation of Debt Resolution Process will have be reinitiated and further time will be lost due to a fresh start; and secondly, the functioning of ESSAR is complex and that it would be difficult for an individual interim resolution professional to oversee such complex operations.

## ISSUES INVOLVED

1. Whether the Adjudicating Authority has discretion to admit or reject an application under Section 7 of the Code?

   SCB has argued that although Section 7(5)(a) uses the term "may" but in the context of initiating a CIRP, it should be read as "shall". SCB contended that in order to find out whether the words "may" or "shall" are used in a directory or mandatory sense, the intent of the legislature needs to be looked at in the given circumstance. ESSAR on the other hand, argued that the legislature deliberately used the term "may" in Section 7(5)(a) which is evident from the fact that the word "shall" is used in Sections 9(5) and 10(4) with respect to the admission of applications by operational creditors and corporate applicants.

2. Whether the Adjudicating Authority was bound

to take into consideration the Debt Restructuring Scheme submitted by ESSAR?

It was argued by ESSAR that insolvency resolution process should not be commenced when a Debt Restructuring Process is ongoing as it will affect the proper functioning of the company and that the suspension of the Board of Directors may cause prejudice to the interest of the company.

3. Whether the Adjudicating Authority can appoint an interim resolution professional on the date of admission of application under Section 7, 9 or 10 of the Code?

   ESSAR argued that there is no need to appoint an interim resolution professional on the same day on which admission order is passed and it can be passed within 14 days of the admission of application. It relied on Section 14 of the Code to state that it is only moratorium which has to be declared on the date of commencement of Insolvency Resolution Process but the appointment of interim resolution professional can be deferred.

4. In light of the fact that SCB filed the application for initiating CIRP prior in time than SBI, whose proposed name for appointment as interim resolution professional should be considered?

   SCB argued that Section 5(11) of the Code defines "initiation date" as "*the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process*" and that it had initiated the proceedings before SBI filed its application under Section 7; hence, its recommended name should be appointed as the interim resolution professional. SBI on the other hand contended that it has proposed a name for interim resolution professional after analysis of various profiles on the basis of experience and presentations by JLF. SBI also argued that the value of debt of JLF is more than that of SCB and therefore it is appropriate to appoint interim resolution professional as recommended by JLF.

## DECISION

1. The Adjudicating Authority held that in order to give appropriate meaning to the words "may" and "shall", the intention of the legislature behind a particular enactment along with the circumstances needs to be looked into. The order of admission of CIRP application is a judicial order which should be according to principles of natural justice, legal provisions and in light of the consequences it entails. Hence, it was held that the Adjudicating Authority has discretion under Section 7(5)(a) to either admit or reject an application and it need not be mechanically admitted.

2. The Debt Restructuring Process was in progress for two years and was not finalised. On these facts, the Adjudicating Authority held that Debt Restructuring Process cannot be a factor to not commence CIRP and that even in the CIRP, the Restructuring Plan can be taken into consideration by the Committee of Creditors. Further, it was held that suspension of Board of Directors does not suspend the entire machinery of the company; instead it will be under the control of the interim resolution professional. The Hon'ble Gujarat High Court in *Essar Steel India Ltd. v. Reserve Bank of India and Ors*., Special Civil Application No. 12434/2017 observed that the Adjudicating Authority shall consider factual circumstances including the process of Debt Restructuring Process. Hence, the Adjudicating Authority opined that the Debt Restructuring Process may be taken into consideration during CIRP.

3. The Adjudicating Authority held that there is no provision which bars the appointment of interim resolution professional on the same day as the admission order. It was observed that the Code enjoins upon the Adjudicating Authority to declare moratorium, to make public announcement of initiation of CIRP and to appoint interim resolution professional on the date of commencement of Insolvency Resolution Process, that is, the date of admission of the application for initiating CIRP.

4. It was held that the date of initiation of Insolvency Resolution Process cannot be taken as a yardstick or as a guideline for appointing interim resolution professional. The Adjudicating Authority observed that the debts of JLF were more in value than the debt due to SCB and hence, it was just to appoint the SBI's proposed name as interim resolution professional.

# CASE NOTE ON: ACHENBACH BUSCHHUTTEN CMBH & CO V. ARCOTECH LTD ANALYZING BETWIXT THE INSOLVENCY CODE AND ARBITRATION ACT

The Honorable National Company Law Appellate Tribunal on July 31, 2017[26] ruled that mere clause of arbitration in an agreement cannot be termed to be an existence of dispute, the dispute under Section 9(5) of the Insolvency and Bankruptcy Code, 2016 hereinafter referred as "code" can be acceded only when arbitration is pending before the Arbitral Tribunal.

## BACKGROUND

Achenbach Buschhutten GmbH & Co, the operational creditor hereinafter referred as "ABG" filed an application before Hon'ble NCLT, Chandigarh under Section 8 of the code against Arotectch Limited, the corporate debtor hereinafter referred as "AL" for a debt amounting to Rs. 31,41,13,436. It was noticed by Hon'ble NCLT that ABG filed statement validating debt from Landesbank Baden-Wurttemberg hereinafter refereed as "LBW", a German financial institution as the company was incorporated in Germany but no affidavit from the authorized petitioner of the representative was filed in support even after the 7 days rectification period provided under Section 9(5)(ii) of the code and further a notice invoking arbitration has been served by AL which substantiates dispute hence on the abovementioned grounds the application got rejected.

The NCLAT affirmed the order passed by NCLT, Chandigarh but on alternated grounds.

## ANALYSIS

The NCLAT after relying on judgment of Honorable Supreme Court[27] ruled that Section 9(3) of the Code is a mandatory provision and the same is not complied by ABG as-

- LBW, a foreign entity is neither a bank in accordance to Section 45-I of Reserve Bank of India Act, 1934 nor a financial institution in consonance to Section 2(72) of the Companies Act, 2013 and a record from either of them is de rigueur relying on Macquarie Bank Limited v. Uttam Galva Metallics Limited.[28]
- An arbitration agreement which can be invoked later cannot be taken up as an existence of dispute overruling the grounds taken up by NCLT, Chandigarh.

## CONCLUSION

The Honorable National Company Law Appellate Tribunal thereby has bought clarity in construing dispute when there is a pending Arbitration agreement thereby an Arbitration agreement won't come under dispute until it has commenced and further a foreign financial institution or foreign bank cannot verify debt claims under the code.

*26 Achenbach Buschhutten CmbH & Co V. Arcotech Ltd, Company Appeal (Insolvency), No 97 of 2017, July 31, 2017*

*27 State of Mysore v. V.K Kangan, (1976) 2 SCC 895, August 21, 1975*

*28 Company Appeal (Insolvency), No 96 of 2017, July 17, 2017*

# SINGH & ASSOCIATES

Founder - Manoj K. Singh

## ADVOCATES & SOLICITORS


**NEW DELHI [HEAD OFFICE]**
E-337, East of Kailash, New Delhi-110065
Phone : +91-11-46667000
Fax : +91-11-46667001
newdelhi@singhassociates.in

**MUMBAI**
# 48 & 49, 4th Floor, Bajaj Bhavan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai, Maharashtra-400021
mumbai@singhassociates.in

**BANGALORE**
N-304, North Block, Manipal Centre
47, Dickenson Road, Bangalore - 560042
Ph : +91-80-42765000
bangalore@singhassociates.in

**GURUGRAM**
Unit no. 701-704, 7th Floor, ABW Tower
IFFCO Chowk, Gurugram,
Haryana-122001

**www.singhassociates.in**