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Insolvency Round-Up

Vol. I, Issue V

PREFACE

Manoj K. Singh
Founding Partner

It gives us immense pleasure to bring out to you this fifth issue of *Insolvency Round-Up* encompassing articles on interesting topics such as recent amendment ordinance, discretionary or obligatory responsibility of committee of creditors qua choosing a resolution plan, effect of moratorium on arbitration under section 14 of the Code, application of law of limitation on the code, case notes etc.

We begin with a write up on the intricacies involved in selection of the resolution plan by CoC. As it is, the resolution professional has to ensure that only those plans which meet the essential criteria stated above are presented before the CoC, however there are no criteria or guidelines provided in the Code or the Rules on which the CoC should evaluate a plan. The Code gives complete discretion to the CoC to approve any plan before it with any modifications as it may deem fit. So what are the aspects the CoC is expected to keep in mind for choosing the best possible resolution plan, let's ponder over!

Next, we discuss the effects of moratorium initiated under section 14 of the Code on ongoing arbitration proceedings in view of recent pronouncement by Hon'ble Supreme Court holding that the arbitration, which had been instituted after the commencement of moratorium under the Code, is non-est in law thereby upholding section 14.

Further, recently notified the Insolvency and Bankruptcy (Amendment) Ordinance, 2017 is analyzed vis-à-vis its underlying objective to fine-tune the Code i.e. insolvency resolution of corporate persons in a time bound manner for maximization of assets of such persons, the Ordinance brought major amendment to the criteria for who can be the resolution application. Notable, the Ordinance intends to checkmate unscrupulous promoters who are trying to buy back their assets paying a fraction of what they originally owned lenders.

Furthermore, under a case study we examine Hon'ble National Company Law Tribunal, Principal Bench, New Delhi's decision in the matter titled *Axis Bank Limited and Another v. Edu Smart Services Private Limited* holding invocation of corporate guarantee against the corporate debtor would result in enforcing of 'security interest' and it would amount to violation of the moratorium imposed under Section 14(1)(c) of the Code.

The Limitation Act, 1963 was binding upon erstwhile laws on debt recovery laws; however how does it apply (*or doesn't*) in view of various judgments of adjudicating authorities has also been included in this issue.

The creditor should not be placed in a situation which is worse than the situation at the time of liquidation of the assets of the corporate debtor – this principle as enshrined under Regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as "liquidation value" has been deliberated upon under a write up.

So, what is the position of insolvency laws for corporate persons i.e. position under Companies Act vis-à-vis the Code? Let's find out in the last article of this issue wherein we compare the provisions of both statutes to understand the issue better.

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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.

Thank you.

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SELECTING A RESOLUTION PLAN – DISCRETIONARY OR OBLIGATORY FOR COMMITTEE OF CREDITORS?

The Insolvency and Bankruptcy Code ("the Code") envisages that upon the Corporate Insolvency Resolution Process (CIRP) being triggered a moratorium is applicable on all proceedings against the Corporate Debtor till the expiry of 180 days (extendable to 270) or earlier till a resolution plan is approved by the adjudicating authority. The Resolution Professional (RP) appointed by the Committee of Creditors (CoC), in its first meeting, is required to prepare an Information Memorandum (IM) and invite Resolution Applicants (RAs) to present a resolution plan for the revival of the Corporate Debtor. In case if a resolution plan is not received or is not approved by the CoC or the Adjudicating Authority, the resolution process fails and a liquidation order is passed under the provision of Section 33 of the Code.

WHO CAN PRESENT A RESOLUTION PLAN

According to Section 25 (h) of the Code, the RP is required to invite prospective lenders, investors and 'any other persons' to submit Resolution Plans for the revival of the Corporate Debtor. In effect, any financial institution, private investors, competitors and even the ex management of the Corporate Debtor can obtain the IM from the RP and submit a plan. While till recently the Code was silent on placing any additional restrictions or qualifying criteria on the RAs it was observed that the RP's were inviting prospective applicant who meet a certain criteria. In the case of M/s Tirupati Infrproject Pvt Ltd[1] the RAs were required to deposit 20 cr with the RP and also in case of Jaypee Infratech[2] only those firms having a net-worth in excess of 1000 crore were invited to submit a plan. Though initially these additional criteria were a *bonafide* effort to filter out non serious applicant and miscreants it was not sure if they would be able to stand the scrutiny of law. However, with the recent amendments been made to the Code vide ordinance dated 23rd November, now the RP has been empowered by law[3] to impose a qualifying criteria for the RAs.

CONTENTS OF A RESOLUTION PLAN

Section 30 of the Code lays down the mandatory requirement which a resolution plan should fulfil for it to be presented to the CoC. It includes providing insolvency resolution process costs, liquidation value to operational creditors and dissenting financial creditors, its supervision and implementation schedule, and the management and control of the corporate debtor during its term. A reading of Section 30 along with Rule 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016, makes it clear that the RP has to present all the plans to the CoC which meet the criteria laid down in the aforementioned section and rules. Before the promulgation of the ordinance dated 23rd November while the RP had no discretion in rejecting any plan received, now with the amended section 25(h) any plan by a person not meeting the specified criteria is liable to be rejected by the RP and will not be presented before the CoC.

APPROVAL PROCESS AND THE DISCRETION OF THE COMMITTEE OF CREDITORS

The CoC may approve any plan by a vote of not less than 75% of voting share of financial creditors. While the RP has to ensure that only those plans which meet the essential criteria stated above are presented before the CoC, there are no criteria or guidelines provided in the Code or the Rules on which the CoC should evaluate a plan. The Code gives complete discretion to the CoC to approve any plan before it with any modifications as it may deem fit.

Over the past few weeks there have been comments and concerns from senior bankers about the ex-management submitting resolution plans for the revival of the corporate debtor. Though the bankers were generally not in favour of putting the reins of the

1 *As per the publication made in the newspaper, inviting resolution plans*

2 *As per the publication made in the newspaper, inviting resolution plans*

3 *Section 25(h)*

troubled enterprise back into the hands of management who was at the helm through its downfall, they were feeling constrained by the lack of any specific provision in the Code relating to this. In effect, while the CoC could have, in its discretion, rejected any plan if it was not convinced about it meeting the requirement, their hands were tied in a situation where the ex management proposed the best plan (at least on paper). Despite their reluctance in entertaining the plans from ex-management, in absence of any statutory backing, the CoC were constrained to treat all the plans received at par and select the one appearing to be the best lest they wanted to expose themselves to criminal prosecution for malafide action.

Amidst these talks of reluctant bankers, a circular dated 07.11.2017, was rolled out by the IBBI wherein an additional requirement was added vide amendment to Rule 38 of the above referred regulations. The amendment required the RAs to disclose among other things any criminal proceedings or disqualifications that they suffer and prescribed that the information may be used by the CoC to assess the credibility of the RA while deciding upon the plans received by them. Though it seemed that the amendment was been brought to address the concerns of the bankers, in reality it was no different from the existing discretion conferred upon the CoC as it stopped short of making the additional criteria a ground for disqualification.
However, things have changed with the promulgation of the ordinance dated 23rd November as it has practically placed statutory disqualifications on the plans received from ex-management/ promoters of the Corporate Debtor.

Without doubt the ex-management of the corporate debtor are best placed in reviving the Corporate Debtor, given their knowledge of the business, experience and most importantly the personal interest in the firm which they have built from scratch. Also, in certain instances the ill financial health of the Corporate Debtor may purely be due to extraneous circumstances and business cycles and not directly attributable to the management. While the ordinance dated 23rd November may have provided some respite to the banking community, whether these disqualifications would be these would be beneficial or detrimental to the overall business climate, or will survive at the altar of justice is yet to be seem.

EFFECT OF MORATORIUM ON ARBITRATION UNDER SECTION 14 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The Insolvency and Bankruptcy Code, 2016 (hereinafter to be referred as the "**Code**") is a beneficial legislation which has been enacted with the aim of having a well structured and a time bound process for the initiation of the Corporate Insolvency Resolution Process, and in the event of the failure of the CIRP, for liquidation. Part II of the Code contains the detailed procedure for initiation of CIRP against the Corporate Debtor, and in the situation, the Adjudicating Authority (hereinafter referred to as NCLT) admits an insolvency resolution application under Section 7,9 or 10 of the Code, it declares a moratorium under Section 14 which continues until the approval/rejection of the resolution plan. During the moratorium period, "*the initiation of suits or the continuation or pending suits and proceedings including the execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or any authority is prohibited.*"

Moratorium has been defined in the Black's Law dictionary as, *"Delay in performing an obligation or taking an action legally authorized or simply agreed to be temporary"*. The intent and the rationale behind having a moratorium is to protect the troubled corporate debtor and provide him with a breathing space so that the Corporate Debtor can focus all his attention towards the revival of his core business instead of worrying about the various proceedings and suits instituted against him. The Hon'ble Supreme Court in the case of *Innoventive Industries Ltd v. ICICI Bank Ltd* elucidated this by stating that the intent was, "*to provide the debtors a breathing spell in which he is to seek to reorganize his business.*"

Recently the Hon'ble Supreme Court in its recent judgment passed by a division bench in the case *Alchemeist Asset Reconstruction Company Ltd v. M/s. Hotel Gaudavan Pvt. Ltd. & Ors.*[4] **[1]** held that a proceeding under Arbitration and Conciliation Act 1996 (hereinafter referred to as "Arbitration Act") instituted after declaring moratorium under "Code") is non-est in law i.e. does not exist at all.

It was reiterated that the mandate under Section 14 is very clear and that it expressly states that the moment, the moratorium comes into effect under section 14(1) (a) it expressly prohibits institution or continuation of pending suits or proceedings against corporate debtor.

While setting aside the order of District Judge, Supreme Court expressed its dismay for entertaining the said appeal under section 37 of the Arbitration Act while the moratorium was in force. The Supreme Court held that the arbitration, which had been instituted after the commencement of moratorium under the Code, is non-est in law. This strict interpretation of the Hon'ble Supreme Court in upholding the provision of Section 14 of the Code holds the Code in good stead and provides a conducive environment for the fulfillment of the objectives that the Code aims to fulfill.

4 *Civil Appeal No.16929 of 2017*

THE INSOLVENCY AND BANKRUPTCY (AMENDMENT) ORDINANCE, 2017

On 23th November 2017, the President of India has promulgated the Insolvency and Bankruptcy (Amendment) Ordinance, 2017 (**"the Ordinance"**). In order to achieve the underlying objective of the Code i.e. insolvency resolution of corporate persons in a time bound manner for maximization of assets of such persons, the Ordinance brought major amendment to the criteria for who can be the resolution application. The Ordinance intends to checkmate unscrupulous promoters who are trying to buy back their assets paying a fraction of what they originally owned lenders.

The Ordinance inserted section 29A in the Code, which provide the criteria for persons not eligible to be resolution applicant. The said provision bar promoters of defaulting companies from submitting a resolution plan in front of Committee of Creditor and Insolvency professional. Besides promoters, the provision creates a list of persons who are ineligible to present resolution plan, which includes persons who are undischarged insolvents, those who are wilful defaulters (as stipulated by the Reserve Bank of India), disqualified directors under Companies Act, 2013, persons convicted for offences punishable with imprisonment of at least two years, persons prohibited by the Securities and Exchange Board of India from trading in securities or accessing the capital markets and certain other categories as mentioned in the Ordinance. Consequently, the Ordinance bars not only the willful defaulters, but also several other categories such as guarantors to the debtor.

The Ordinance prohibits the Committee of Creditors from approving a resolution plan submitted before the promulgation of this Ordinance, where the plan has already been submitted by a person ineligible to be a resolution applicant. In such cases, the Committee of Creditors has to call for Fresh Resolution Plan. The Ordinance has also put regulation on the person who can buy the moveable or immovable property of the debtor in the liquidation. The Ordinance inserted a proviso under section 35 of the Code that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.

The Ordinance clarifies the position of personal guarantor of the corporate debtor also. The Ordinance amends section 2 of the Code which deals with the applicability of the Code. The Ordinance inserted "personal guarantors to corporate debtor" in section 2 clause (e), meaning by the Code is now applicable to the personal guarantor of the corporate debtor. In consequence, it can be interpreted that now during the insolvency process, the moratorium under section14 of the Code will be applicable to the properties of the personal guarantor of the corporate guarantor also.

It would be important to mention that prior to the Ordinance, the Insolvency and Bankruptcy Board of India had vide its notification dated 7th November 2017 inserting new regulation after sub-regulation (2) under Regulation 38 in Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulation, 2017. Under the New Regulation, the Board has made mandatory that the resolution plan should contain details of the resolution applicant and other connected persons. The 'details' includes identity, conviction of any offence, if any, during the preceding five years, identification as willful defaulter, if any, by any bank or financial institution or consortium, etc.

Now, after the present amendment in the Code by way of the Ordinance both the Code and Regulations are harmonious. The outcome of this will be that the probability of successful resolution of the corporate debtor will be on higher side as the corporate debtor will be handed to person/entity with clean background.

CASE NOTE: MORATORIUM PROHIBITS INVOCATION OF CORPORATE GUARANTEE AGAINST CORPORATE DEBTOR

The Hon'ble Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi) in the case of *Axis Bank Limited and Another v. Edu Smart Services Private Limited* (decided on 27.10.2017) held that invocation of corporate guarantee against the corporate debtor would result in enforcing of 'security interest' and it would amount to violation of the moratorium imposed under Section 14(1)(c) of the Insolvency and Bankruptcy Code, 2016.

BACKGROUND FACTS

Edu Smart Services Private Limited (hereinafter *"Corporate Debtor"*) is the guarantor, by way of an irrevocable and unconditional corporate guarantee dated 03.06.2015, for Educom Solutions Ltd., which had entered into a Master Restructuring Agreement with Axis Bank Ltd. (hereinafter *"Applicant"*) for restructuring and reconstitution of existing loans and working capital facilities granted by consortium of lenders.

Meanwhile, DBS Bank Limited filed an application for insolvency of the Corporate Debtor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter *"the Code"*). In the said proceedings, the corporate insolvency resolution process (hereinafter *"CIRP"*) commenced on 27.06.2017 and moratorium was imposed under Section 14 of the Code. Thereafter, the Applicant made a claim based on the corporate guarantee, against the Corporate Debtor before the Insolvency Resolution Professional (hereinafter *"IRP"*) on 11.07.2017 without invoking or making any demand on the Corporate Debtor- corporate guarantor. A communication was sent by the IRP to the Applicant on 20.07.2017 intimating that the claim cannot be verified as the corporate guarantee has not been invoked. The Applicant subsequently invoked the corporate guarantee against the Corporate Debtor on 21.07.2017, which was brought to notice of the IRP who responded by stating that the liability under the corporate guarantee was contingent as on the date of commencement of CIRP on 27.06.2017 and therefore the claim of the Applicant was not verifiable. The Applicant filed an application under Section 60(5) of the Code challenging the decision of the IRP dated 20.07.2017 whereby the claim of the Applicant was rejected.

SUBMISSIONS BY THE INSOLVENCY RESOLUTION PROFESSIONAL

- A preliminary objection was raised by IRP stating that the Applicant has already claimed the amount of debt in the CIRP of the principal borrower- Educomp Solutions Ltd. and the said fact was deliberately suppressed by the Applicant. Further, it was contended that if such claim is accepted under two different CIRPs, then the same would amount to unjust enrichment to such creditor and would lead to anomalous situation.

- It was submitted that only a mature claim can be accepted by IRP at the time of the commencement of the insolvency process and that as per Section 3(11) of the Code, liability or obligation has to be due from any person in respect of a claim for it be accepted. Further, reliance was also placed on Regulation 13 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (hereinafter *"IBBI Regulations"*) to contend that the IRP has to verify only those claims which are existing as on the insolvency commencement date. Hence, it was argued that as the corporate guarantee was invoked after the commencement of CIRP, the same cannot be termed as a mature claim.

- It was also contended that the invocation of corporate guarantee against the Corporate Debtor was in violation of moratorium imposed under Section 14 of the Code as the liability under the corporate guarantee was contingent on the date of commencement of CIRP on 27.06.2017, resultantly making the claim non verifiable. Further, the Applicant did

not submit fresh claim form subsequent to the invocation of the corporate guarantee, and hence the claim could not be accepted and verified.

- Moreover, it was submitted that the total claim of the secured creditors is about Rs. 112 crores, whereas the corporate guarantee furnished by the Corporate Debtor is of Rs. 2048 crores. Further, the liquidation valuation of the assets of the Corporate Debtor is about Rs. 25 crores only and therefore, it was submitted that the claim made by the Applicant on the basis of the corporate guarantee is a *mala fide* attempt to create hurdle in the CIRP of the Corporate Debtor.

SUBMISSIONS BY THE APPLICANT

- It was argued that the liability of the principal debtor and the corporate guarantor is co-extensive as provided under Section 128 of the Indian Contract Act, 1872; and therefore there is no bar in filing claims against the Corporate Debtor- corporate guarantor. Further, it was submitted that it was not necessary to make disclosure relating to claim made against the principal borrower i.e. Educomp Solutions Ltd.

- Additionally, it was stated that the definition of "financial creditor" as provided under Section 5(7) of the Code includes "any person to whom financial debt is owed and also includes the person to whom the said debt has been legally assigned or transferred." Hence, it was submitted that the Applicant being a financial creditor has rightfully forwarded its claims before the IRP.

ISSUE

Whether the Applicant is entitled to make a claim by invoking the corporate guarantee after the date of commencement of the corporate insolvency resolution process of the Corporate Debtor- corporate guarantor?

DECISION

In the present case, the CIRP commenced on 27.06.2017 and the corporate guarantee was invoked on 21.07.2017, which is much after the insolvency commencement date. In such situation, the IRP would not be in a position to verify the claim as it will not be reflected in the Books of Accounts which are supposed to be updated as on 27.06.2017. In absence of any record to verify the claim, it will be impossible for the IRP to accept any such claim which has become a debt after 27.06.2017.

The term 'debt' has been defined under Section 3(11) of the Code as "a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt". On the basis of this definition, the debt in this case has not become due from the Corporate Debtor on the insolvency commencement date and it became due only when the corporate guarantee was invoked by the Applicant which was later in time. Thus, it was held that in order to qualify as 'debt' firstly provisions of the corporate guarantee must be satisfied by raising a demand which is expressed by invoking the corporate guarantee and the date of its invocation has to be earlier than the insolvency commencement date

It was also observed that a careful consideration of Regulations 12 and 13 of IBBI Regulations show that the IRP has to verify every claim as on the insolvency commencement date and maintain a list of creditors containing names of all such creditors along with the amount claimed. Therefore the Applicant in the present case would not qualify for the consideration of its claim as it has become due and payable after the commencement date of CIRP.

Finally, the Hon'ble Adjudicating Authority held that a perusal of Section 14 of the Code makes it absolutely clear that the moratorium prohibits any action to foreclose, recover or enforce any security interest created by a corporate debtor in respect of its property; and that invocation of corporate guarantee against the Corporate Debtor would result in enforcing of security interest and it would amount to violation of moratorium under Section 14(1)(c) of the Code.

APPLICABILITY OF LIMITATION TO THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The Law of Limitation has been on the talks in context to whether it shall be applicable to the Insolvency and Bankruptcy Code, 2016 ("**IBC, 2016**") since its very beginning. Though the previous debt recovery laws such as the Recovery of Debt and Bankruptcy Act, 1993 and the SARFEASI Act, 2002 were bound by the provisions of the Limitation Act, 1963. The Hon'ble National Company La**w** Appellate Tribunal ("**NCLAT**") has pronounced various judgments discussing the applicability of the Limitation Act, 1963 to the IBC, 2016.

The issue of applicability of the Limitation Act, 1963 to the IBC, 2016 was considered by the National Company Appellate Tribunal (NCLAT) in the first matter of **Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd.**, *[Company Appeal (AT) (Insolvency) No.44 of 2017]*. In the aforesaid case, the NCLAT explicitly held that the provisions of the Limitation Act, 1963 would not apply to the IBC, 2016. The relevant extracts of the judgment are reiterated below:

"The next ground taken on behalf of the appellant is that the claim of the respondent is barred by limitation, as the Debentures were matured between the year 2011 – 2013 is not based on Law. There is nothing on the record that Limitation Act, 2013 is applicable to I&B Code. Learned Counsel for the appellant also failed to lay hand on any of the provision of I&B Code to suggest that the Law of Limitation Act, 1963 is applicable. 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."

However, subsequently the aforementioned matter went in appeal to the Hon'ble Supreme Court in **Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd.**, *[Civil Appeal No.10711 of 2017]*, wherein the question of the applicability of the Limitation Act, 1963 to the IBC, 2016 was kept open, while the appeal was dismissed.

Thereafter consequently, the NCLAT considered the question of applicability of the Limitation Act, 1963 in the judgment in **Black Pearl Hotels Pvt. Ltd. vs. Planet M Retail Ltd.**, *[Company Appeal (AT) (Insolvency) No.91 of 2017]*, decided on 17th October, 2017. The aforesaid appeal arises from the decision of the National Company Law Tribunal, Mumbai, rejecting an application for initiation of insolvency proceedings by an operational creditor on the ground that the debt was barred by limitation.

The NCLAT did not explicitly deal with the issue of whether the Limitation Act, 1963 does or does not apply to the IBC, 2016. However, the NCLAT opined that even if it is assumed that the Limitation Act, 1963 does apply to the IBC, 2016, then the period of limitation would only start running from 1st December, 2016, the date when the IBC, 2016 came into effect. The relevant extracts of the judgment are reiterated below:

"Insolvency and Bankruptcy Code, 2016 has come into force with effect from 1st December, 2016. Therefore, the right to apply under I&B Code accrues only on or after 1st December, 2016 and not before the said date (1st December, 2016). As the right to apply under section 9 of I&B Code accrued to appellant since 1st December, 2016, the application filed much prior to three years, the said application cannot be held to be barred by limitation."

Recently, the NCLAT has given a detailed judgment on the applicability of the Law of Limitation to the IBC, 2016 in its recent judgment in ***Speculum Plast Pvt. Ltd. vs. PTC Techno Pvt. Ltd.***, *[Company Appeal (AT) (Insolvency) No. 47 of 2017]*. In the above mentioned case, the NCLAT held that the Limitation Act, 1963 is not applicable for initiation of Corporate Insolvency Resolution Process, though the doctrine of Limitation and Prescription is necessary to be looked into for determining the question that whether an application under section 7 or section 9 can be entertained after a long delay, amounting to laches.

Further, the NCLAT was of the opinion that if such an application (as mentioned above) is filed before the Adjudicating Authority after a long delay of more than three years, the Adjudicating Authority may give an

opportunity to the applicant to explain the delay within a reasonable period and on the failure to explain the delay the application shall normally not be entertained. The relevant extracts of the judgment are reiterated below:

"In view of the settled principle, while we hold that the Limitation Act, 1963 is not applicable for initiation of 'Corporate Insolvency Resolution Process', we further hold that the Doctrine of Limitation and Prescription is necessary to be looked into for determining the question whether the application under Section 7 or Section 9 can be entertained after long delay, amounting to laches and thereby the person forfeited his claim.

If there is a delay of more than three years from the date of cause of action and no laches on the part of the Applicant, the Applicant can explain the delay. Where there is a continuing cause of action, the question of rejecting any application on the ground of delay does not arise.

Therefore, if it comes to the notice of the Adjudicating Authority that the application for initiation of 'Corporate Insolvency Resolution Process' under section 7 or Section 9 has been filed after long delay, the Adjudicating Authority may give opportunity to the Applicant to explain the delay within a reasonable period to find out whether there are any laches on the part of the Applicant. The stale claim of dues without explaining delay, normally should not be entertained for triggering 'Corporate Insolvency Resolution Process' under Section 7 and 9 of the 'I&B Code'."

Apart from the above, the NCLAT also mentioned explicitly that the aforementioned principles for determining the Limitation cannot be made applicable to an application under section 10 of the IBC, 2016 as the Corporate Applicant does not claim money but prays for initiation of the Corporate Insolvency Resolution Process against itself.

The NCLAT also addressed the issue in relation to applicability of the above mentioned principles for Limitation on filing of claims before the Insolvency Resolution Professional. The NCLAT opined that in case of a stale claim, after a long delay and in absence of any continuous cause of action, it shall be open for the Insolvency Resolution Professional to decide whether to accept or reject the claim. Though, later on the creditor aggrieved from the decision of the Insolvency Resolution Professional can file objections before the Adjudicating Authority for necessary actions.

The aforesaid pronouncement implies that the debt which is time barred can be accepted for an application under the IBC, 2016 amounting to laches, if a reasonable explanation is provided to the Adjudicating Authority for such delay. Though it shall be interesting to see further the interpretation and application of the aforementioned observations of the NCLAT by the various benches of the National Company Law Tribunals while entertaining applications under the IBC, 2016.

LIQUIDATION VALUE OF THE ASSET IN THE RESOLUTION PLAN

The term "Liquidation value" has been defined in the Regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 **(CIRP Regulations**). The Regulation defines the "liquidation value" as the estimated realizable value of the assets of the corporate debtor if the corporate debtor were to be liquidated on the insolvency commencement date. The cursory reading of the regulation shows that estimated value of the assets of the corporate debtor at the time of the liquidation on the commencement date of the insolvency will be considered as the liquidation value for the purpose of the Insolvency process and such value will be used in the Information Memorandum under Regulation 36 of the CIRP Regulations. This estimated value is based on the principle of vertical comparison as used under the United States Bankruptcy Code. According to this principle, the creditor should not be placed in a situation which is worse than the situation at the time of liquidation of the assets of the corporate debtor.

The Insolvency and Bankruptcy Code, 2016 ("**the Code**") does not provide the meaning of "*estimated realizable value*" as mentioned in the Regulation 35 of the CIRP Regulation. However, the regulation does provide the manner in which the Liquidation value can be determined. The Regulation explains that two registered valuers appointed under Regulation 27 of the CIRP Regulations shall provide the value of the assets computed in accordance with internationally accepted valuation standards. If the Resolution Professional thinks that the values are significantly different, he may appoint another registered valuer who shall submit an estimate computed in the same manner. After the submission of the valuers reports, the average of the two closest estimates shall be considered the liquidation value.

Pursuant to section 30(2) of the Code, the Board has specified Regulation 38 of the CIRP Regulations, 2016 which states that:

"(1) A resolution plan shall identify specific sources of funds that will be used to pay the-

(a) insolvency resolution process costs and provide that the insolvency resolution process costs will be paid in priority to any other creditor;

(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favor of the resolution plan."

The liquidation value of the assets of the corporate debtor is calculated in its entirety. The total liabilities payable to the creditor firstly will be paid through the assets of the entity and after the exhaustion of the assets value, if the debt still remains to be paid, for such debt the management of the corporate debtor will be held liable for payment.

Logically, the liquidation value of the operational or financial creditor as mentioned in the above said regulation might be the minimum value payable to operational creditor or a financial creditor in a hypothetical liquidation as on the insolvency commencement date. As per the author's view, for determining the liquidation value due to creditor (operational or financial) one has to first arrange them in stacking order (i.e. the order of their priority in liquidation), and then start distributing the estimated realizable value of assets (i.e. Liquidation value) down the ladder. The liquidation value assigned at each stage of stacking order will be the liquidation value due to the persons at that stage of the staking order.
Therefore, liquidation value will be different from the amount of debts due to creditors. The amount of debts due to the creditors (operational or financial creditor) will be static (as "proved' by such creditor to the Resolution professional) and remain unaffected from the claims of other creditors. On the other hand, while determining the liquidation value due to creditors, due

regard should be given to the priority of other debts in a liquidation scenario, as such the liquidation value due to a particular creditor may be much lesser than the actual amount of debts proved by and payable to such creditor.

It is also pertinent to mention that though the regulations require that the resolution plan must ensure the payment of liquidation value to operational creditors, the same shall be paid in priority to any financial creditor. Similarly, the liquidation value due to the dissenting financial creditor must be paid in priority to any consenting financial creditors. One of the inferences from the above regulation can be drawn that the regulation does not alter the priority of distribution of the liquidation value. However, it merely specifies the point of time at which payments shall be made, if any, to the operational creditors and dissenting financial creditors

CONCLUSION:

Valuation of assets is one of the core features of the corporate insolvency resolution process under the Code. However, there are various clarifications that are yet to be provided by the Insolvency and Bankruptcy Board of India in relation to the provisions pertaining to valuation of assets as provided under the Code. One of the prominent controversies in relation to valuation of assets is the stacking priority of the creditors during the drafting of the resolution plan. The CIRP Regulations 2016 does not clearly provide the priority list on the basis of which the distribution of the liquidation value of the assets could be done. However, inference can be drawn from the CIRP Regulations that the liquidation value of the assets could be distributed on the basis of the priority list provided for the liquidation process.

INSOLVENCY LAWS FOR CORPORATE PERSONS: POSITION UNDER COMPANIES ACT, 2013 VIS-À-VIS INSOLVENCY & BANKRUPTCY CODE, 2016

Section 255 of the Insolvency and Bankruptcy Code, 2016 (hereinafter "the Code") has been notified with effect from November 15, 2016 and by virtue of Section 255 of the Code, the Companies Act, 2013 (herein after referred to as "2013 Act") stands amended in accordance with Schedule XI of the Code. The aforesaid Schedule XI now defines the term "winding up" by introducing a new Section 2(94A) to the 2013 Act as "winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016." Thus, certain winding up proceedings will now be governed by the provisions of 2013 Act and certain under the Code. The other significant changes introduced by the Code include removal of provisions of 'voluntary winding up' and winding up on the ground of 'inability to pay debts' from the 2013 Act as these proceedings are now to dealt with under the Code.

Subsequent to the notification of Section 255 of the Code, the Ministry of Corporate Affairs (hereinafter "MCA"), through its Notification dated December 07, 2016, has notified the provisions of Chapter XX of the 2013 Act with effect from December 15, 2016. These provisions address winding up of companies on any ground 'other than inability to pay debts', enlisted under Section 271(a) to (e) of the 2013 Act.

CORPORATE INSOLVENCY PROCEDURE: POSITION PRIOR TO AND AFTER NOVEMBER 15, 2016

The provisions for winding up in the 2013 Act were provided for in Chapter XX, engineering two modes of winding up of a company. Part I dealt with winding up by the National Company Law Tribunal and part II contained provisions for voluntary winding up; with detailed provisions in part III applicable to both modes of winding up. Under the erstwhile regime, winding up applications could be made on account of "inability to pay debts", i.e. when the existing assets of the company became insufficient to repay liabilities.

As mentioned above, Section 255 of the Code has effectively omitted the application of the insolvency procedure under the 2013 Act and replaced it with Sections 7 to 9 of the Code, being initiation of Corporate Insolvency Resolution Process by financial and operational creditors. An application to the Adjudication Authority for initiation of Corporate Insolvency Resolution Process can be made only when there is an occurrence of "default" in payment of debt by a corporate debtor. The Code creates a deeming fiction such that a corporate debtor which defaults in payment shall be considered insolvent for the purpose of the Code. The legal effect of such deeming provision is that the treatment of 'inability to pay' and 'failure to pay' is alike. This a hallmark difference from the erstwhile regime wherein 'inability to pay debts' stood for commercial insolvency.

Once the application is accepted by the adjudicating authority, an insolvency professional is appointed for conducting the 'insolvency resolution process'. The resolution process will have to be completed within a maximum period of 180 days from the date of registration of the case. This period may be extended by 90 days if 75% of the financial creditors agree. The process will involve negotiations between the debtor and creditors to draft a resolution plan which finally needs an accord from Adjudicating Authority. In the event that such corporate insolvency plan is not executed within the aforesaid timeline, the adjudicating authority may pass an order for liquidation of the corporate person in relation to whom the application was made.

The Code also bears a contrast from the 2013 Act by allowing all creditors, whether secured or unsecured, to initiate the process. Although, financial creditors may assumes a dominant role later on, being on the committee of creditors.

The circumstances under which a company can be wound up by Tribunal, other than inability to pay debts,

have been enlisted under Section 271 as follows : (a) passing of special resolution to that effect; (b) acting against the sovereignty and integrity of India, security of state, friendly relations with foreign states, public order, decency or morality; (c) conducting affairs in a fraudulent manner; (d) default in filing of financial statements or annual returns with the Registrar for immediately preceding five financial years; and (e) on just and equitable grounds in the opinion of Tribunal. These provisions were notified with effect from December 15, 2016, therefore the winding up applications on any of the aforementioned grounds will be made to the Tribunal in accordance with the provisions of 2013 Act.

VOLUNTARY WINDING UP

As per Section 59 of the Code read with the Regulations, any corporate entity may initiate a voluntary liquidation proceeding if it satisfies the following conditions:

- it has not committed any default;
- if majority of the directors or designated partners of the corporate person make a declaration verified by an affidavit to the effect that (i) the corporate person has no debt or it will be able to pay its debts in full out of the sale proceeds of its assets under the proposed liquidation; and (ii) liquidation is not initiated to defraud any person;
- such declaration is accompanied by the audited financial statements and valuation report of the corporate person;
- within 4 (four) weeks of such declaration, a special resolution is passed by the contributories requiring the corporate person to be liquidated and appointing an insolvency professional as a liquidator (Contributories' Resolution); and
- creditor(s) representing two-thirds in value of the total debt owed by the corporate person, approve the Contributories' Resolution within 7 days of its passage

The provisions under the 2013 Act were not notified before the commencement of the Code, thereby meaning that voluntary winding up continued to be governed by the 1956 Act before the notification on Section 59 of the Code on 30 March, 2017. The Insolvency and Bankruptcy Board of India has also, vide its notification dated 31 March 2017, notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 (Regulations) with effect from 1 April 2017. This has set out the process for the voluntary liquidation of a corporate person under the Code, which includes companies, limited liability partnerships and any other persons incorporated with limited liability.

TRANSFER OF WINDING UP PROCEEDINGS FROM HIGH COURT TO TRIBUNAL:

Proceedings pending before the High Courts on December 15, 2016, and the notice of which have not been served on the respondent, for both winding up on inability to pay debts and winding up on grounds other than inability to pay debts will be transferred to Tribunal. Although the former category will be governed by the provisions of the Code, the latter category will be governed by the provisions of 2013 Act. The proceedings shall be transferred to the respective Bench of the Tribunal exercising territorial jurisdiction over the concerned State and shall be dealt in accordance with the provisions of the Code. Along with the Notification dated December 07, 2016, MCA on the same date issued the Companies (Transfer of Pending Proceedings) Rules, 2016 ("Rules") for clarifying the ambiguities relating to transfer of pending proceedings from a High Court to the Tribunal.

RECENT AMENDMENTS W.R.T INSOLVENCY AND BANKRUPTCY CODE 2016

a. Insertion of new sub-regulation (3) after regulation (2) in regulation 38, of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2017

A new sub-regulation (3) has been inserted after regulation (2) in regulation 38 with the objective to seek the details of the resolution applicant submitting the resolution plan with Insolvency Resolution Professional. Regulation 38 provides for mandatory contents of the resolution plan. The newly inserted sub-regulation (3) provides that a resolution plan shall contain details of the resolution applicant and other connected persons to enable the committee to assess the credibility of such applicant and other connected persons to take a prudent decision while considering the resolution plan for approval. The term "details" include the following in respect to the resolution applicant and other connected person namely:

- Identity;
- Conviction for any offence, if any, during the preceding five years;
- Criminal proceedings pending, if any;
- Disqualification, if any, under Companies Act, 2013, to act as director;
- Identification as a willful defaulter, if any, by any bank or financial institution or consortium thereof in accordance with the guidelines of the Reserve Bank of India ;
- Debarment, if any, from accessing to, or trading in, securities markets under any order or directions of the Securities and Exchange Board of India; and
- Transactions, if any, with the corporate debtor in the preceding two years;

The expression "connected persons" means-

- Persons who are promoters or in the management or control of the resolution applicant;
- Persons who will be promoters or in management or control of the business of corporate debtor during the implementation of the resolution plan;
- Holding company, subsidiary company, associate company and related party or the persons referred above.

b. Substitution of sub-regulation (2) in regulation 39 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2017

The sub regulation (2) in regulation 39 has been replaced with a new regulation. As per the substituted regulation, the resolution professional will submit to the committee of the creditors all resolutions plans which comply with the requirements of the Code and regulations made thereunder along with the details of any preferential transaction under Section 43, undervalued transactions under section 45, extortionate credit transactions under section 50 and fraudulent transaction under section 66 of the Insolvency and Bankruptcy Code, 2016 if any observed, found or determined by the resolution professional. Additionally, it also provides that if any order of Ajdudicating Authority has been received regarding the transaction mentioned such orders will also be required to be submitted with the committee of Creditors.

c. Amendments in Insolvency and Bankruptcy Code 2016

The Government of India with the help of an Ordinance which was given assent by President on 23.11.2017 amended the Insolvency and Bankruptcy Code, 2016 by inserting/substituting certain sections, sub-sections, clauses under the Code. These amendments can be summarized as follows:

Substitution of Clause (e) in Clause (2) of Section 2 by expanding the scope of applicability of the code to personal guarantors of corporate debtors, partnership firms and properitorship firms, and individuals other than persons referred to in clause (e);

Substitution of clause 25 in Section (5) by giving clarity to the definition of resolution applicant. As per the amendment the Resolution Applicant will mean a person, who individually or jointly with any other

person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25;

Substitution of word "any person" with the word "resolution applicant" in clause 26 of Section 5. Clause 26 provides for the definition of Resolution plan;
Insertion of clause (h) under sub-section (2) of Section 25. Section 25 defines the duties of resolution professional. By newly inserted clause (h), the Resolution professional is duty bound to invite prospective resolution applicants, who fulfill such criteria as may be laid down with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Baord, to submit a resolution plan or plans.
Insertion of new section 29 A. The new section inserted provides the persons not eligible to be a resolution applicant.

Substitution of sub-section (4) in Section 30. As per the substituted sub section, resolution plan been submitted by any resolution applicant who is ineligible due to section 29A will not be considered.

Insertion of new proviso to sub-section (1) in clause (f) of Section 35 (powers and duties of liquidator). As per the new proviso, a liquidator will not sell the immovable and movable property or actionable claims of the Corporate Debtor in liquidation to any person who is not eligible to be a resolution applicant.

d. Exemption to open offer obligations under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011

Securities board of India ("the Board) in the meeting dated June 21,2017 have exempted the entities to make an open offer w.r.t acquisitions been made pursuant to approved resolution plans of the Adjudicating Authority under Section 31 of Insolvency and Bankruptcy Code 2016. It would be worth mentioning that as per the provisions of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 any entity acquiring stake of more than 25% to make an open offer to acquire the stake further unless exempted by the Board. Prior to this the board earlier have given relaxation to lenders from preferential issue requirements under SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 and from open offer obligations under SBEI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 w.r.t undertaking restructuring of listed companies in distress through Strategic Debt Restructuring (SDR) scheme in terms of the guidelines of RBI.

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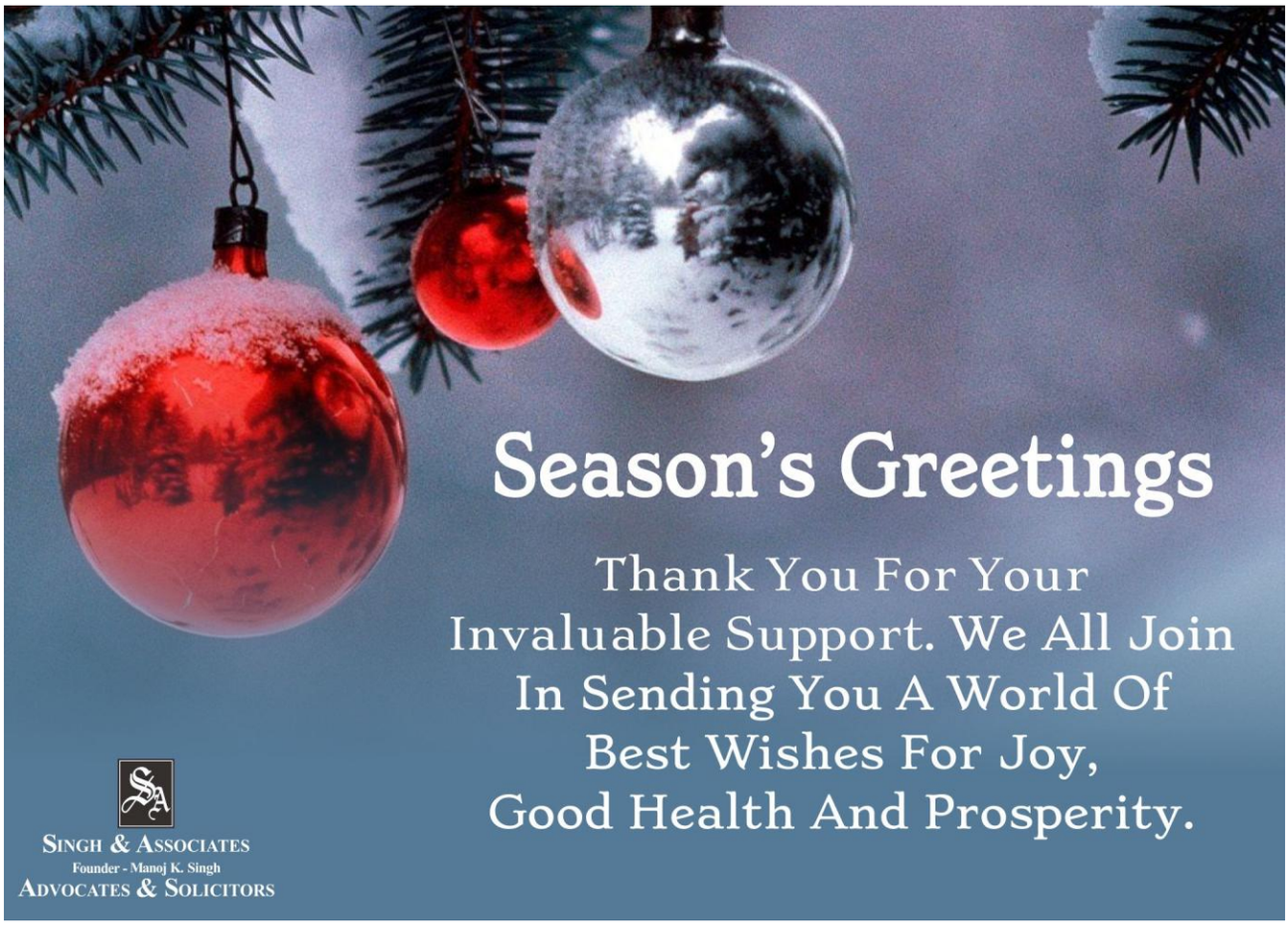
Season's Greetings
Thank You For Your
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Best Wishes For Joy,
Good Health And Prosperity.
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Founder - Manoj K. Singh
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