ACUITY LAW

INSOLVENCY
LAW NEWSLETTER

JULY 2019

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ACUITY LAW

ABOUT ACUITY LAW

Acuity Law was founded in November 2011. Acuity Law comprises of a team of young and energetic lawyers led by Souvik Ganguly, Gautam Narayan and Shankar Iyer who have deep and diverse experiences in their chosen areas of practice. We advise Indian and multinational companies, funds, banks and financial institutions, founders of companies, management teams, international law firms, domestic and international investment banks, financial advisors and government agencies in various transactions in and outside India.

Acuity Law takes pride in rendering incisive legal advice taking into consideration commercial realities. Our areas of practice are divided into three departments.

The Corporate practice is led by Souvik Ganguly, the Tax practice is led by Shankar Iyer and the Disputes practice is led by Gautam Narayan.

As part of the Corporate practice, Acuity Law advises on:

- Mergers and acquisitions;
- Distressed mergers and acquisitions;
- Insolvency Law;
- Private Equity and Venture Funding;
- Employment and labour laws;
- Commercial and trading arrangements; and
- Corporate Advisory

As part of the Tax practice, Acuity Law under the leadership of Shankar Iyer advises on matters such as corporate tax and international tax relating to:

- Withholding taxation
- Double taxation avoidance agreements
- Jurisdiction analysis
- Strategies for acquisitions, mergers, divestitures, diversification or consolidation of businesses
- Inbound structuring
- Externalization structures
- Tax Due Diligences
- Group holding structures
- Distribution strategies
- Endowment planning / wealth planning strategies

As part of the Disputes practice, Acuity Law under the leadership of Gautam Narayan advises and represents clients on domestic and cross - border:

- Civil disputes;
- Criminal law matters; and
- Arbitration matters

Acuity Law actively follows legislative and policy developments in its chosen areas of practice and shares such developments with clients and friends on a regular basis.

If you want to know more about Acuity Law, please visit our website acuitylaw.co.in or write to us at al@acuitylaw.co.in.

INTRODUCTION

This newsletter covers key updates about developments in the Insolvency Law during the month of July 2019. We have summarized the key judgments passed by the National Company Law Appellate Tribunal (**NCLAT**) and various benches of the National Company Law Tribunals (**NCLT**). We have also covered some key amendments made to the IBBI (Insolvency Professionals) Regulations, 2016**,** IBBI (Insolvency Professional Agencies) Regulations, 2016, IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, IBBI (Liquidation Process) Regulations, 2016, IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and IBBI (Information Utilities) Regulations, 2017 during the month of July 2019. Please see below the summary of the relevant regulatory developments.

A FOREIGN DECREE PASSED EX-PARTE AT A NON-RECIPROCATING TERRITORY CANNOT BE THE BASIS FOR INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Matter: Peter Johnson John (Employee) vs. M/s. KEC International Limited

Order dated: 03 July 2019

Summary:

Appeal was preferred by Peter Johnson John **(Appellant)** before the National Company Law Appellate Tribunal (**NCLAT**) against the order of National Company Law Tribunal, Mumbai Bench (**NCLT**), whereby the NCLT rejected the application filed by the Appellant for initiating corporate insolvency resolution process (**CIRP**) against M/s. KEC International Limited (**Respondent**) on the ground that there existed a dispute between the parties.

The Appellant sought CIRP of the Respondent at the NCLT on the basis of a claim on account of salary dues adjudicated *ex-parte* by the Labour Court of Kinshasa, Congo and a pending civil suit before the Hon'ble Bombay High Court seeking declaration in regard to executability of the decree in India passed by the Labour Court of Kinshasa, Congo. The NCLT observed that since there was no reciprocating treaty with the Democratic Republic of Congo, a decree passed by Labour Court of Kinshasa, Congo could not be executed in India under Section 44A of the Code of Civil Procedure (**CPC**) whereunder a foreign decree could be directly executed in India. This decree was required to be adjudicated under Section 13 of the CPC. The NCLT held that since the application to initiate CIRP was filed by the Applicant during the pendency of the suit before the Bombay High Court and the claim was based on the foreign decree it constituted an existing dispute between the parties. Accordingly, the NCLT held that the application initiating CIRP was not maintainable.

Aggrieved by the order of the NCLT, the Appellant moved the NCLAT. The NCLAT after taking note of the facts held that unless the decretal amount is adjudicated upon by the Hon'ble Bombay High Court as a legally payable claim, the same cannot be construed as a "Debt" and unless the debt is crystallized and payable in law, the issue of default would not be attracted. The NCLAT, accordingly upheld the order of the NCLT.

LENDERS INVOLVED IN 'EXTORTIONATE CREDIT TRANSACTIONS' CANNOT BE CONSIDERED AS FINANCIAL CREDITORS

Matter: Shinhan Bank vs. Sugnil India Private Limited & others

Order dated: 09 July 2019

Summary:

Sugnil India Private Limited (**Corporate Debtor**) was admitted for corporate insolvency resolution process under the Insolvency and Bankruptcy, Code, 2016 (**Code**) by the National Company Law Tribunal, New Delhi Bench (**NCLT**). The Committee of Creditors (**CoC**) was constituted. One of the members of the CoC i.e. Shinhan Bank (**Applicant**), filed an application before the NCLT challenging the status of the other CoC members (**Respondents**), who were individuals. The Applicant filed the Application contending that the Respondents were not Financial Creditors.

The issue before the NCLT was whether the Respondents are Financial Creditors as defined under the Code taking into consideration the money advanced by them and / or, whether there is a Financial Debt.

The NCLT observed that the money advanced by the Respondents to the Corporate Debtor was not in pursuance to any loan agreement / document but merely a letter by the lender for advance to the Corporate Debtor. The NCLT was therefore of the view that it is first important to consider whether the advance made by the Respondent would fall under the category of deposit / loan. For this purpose, the NCLT considered the Companies Act, 2013 read with Companies (Acceptance of Deposit) Rules and after analysing the transactions between the Corporate Debtor and the Respondents stated that the said advance of money was accepted by Corporate Debtor as loan. Further, reliance was placed on the order passed the NCLAT in the matter of *Sanjay Kewalramani vs. Sunil Parmanand Kewalramani and others* wherein it was held that the mere fact of interest payment by the Corporate Debtor does not constitute 'debt' as 'financial debt'.

The NCLT, however, further observed that the rate of interest charged was 65% which is higher than the maximum interest rate usually charged for private loans i.e. 24%. The NCLT was thus of the view that carrying the rate of interest which is exorbitant and nowhere near business standards prevailing in the market would attract provisions of the Code dealing with 'Extortionate Credit Transactions'. The resolution professional (**RP**) has to consider the same and avoid such transaction. However, such exercise was neither discussed nor considered by the RP.

In view of the above the NCLT admitted the Application and held that the Respondents do not fall under the category of financial creditors but may consider themselves as unsecured creditors who may avail other remedies to recover their debt. The NCLT further ordered the CoC meetings already held as non-est and also nullified the resolutions passed in such meetings. The NCLT also directed the RP to reconstitute the CoC.

NATIONAL COMPANY LAW TRIBUNAL HAS NO POWER TO QUASH DISCIPLINARY PROCEEDINGS INITIATED BY THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Matter: Insolvency and Bankruptcy Board of India vs. Shri Rishi Prakash Vats and others.

Order dated: 11 July 2019

Summary:

Appeal was preferred by the Insolvency and Bankruptcy Board of India (**IBBI**) before the National Company Law Appellate Tribunal (**NCLAT**) against the order of National Company Law Tribunal, New Delhi Bench (**NCLT**) whereby the NCLT quashed the disciplinary proceeding initiated by the IBBI.

The issue before the NCLAT was whether the NCLT has jurisdiction to quash the disciplinary proceedings once initiated by the IBBI.

The NCLAT held that once a disciplinary proceeding is initiated by the IBBI on the basis of evidence on record, it is for the IBBI to close the proceeding or pass appropriate orders in accordance with law. Further, the NCLT is not vested with the power to quash the proceeding, even if proceeding is initiated at the instance and recommendation made by the NCLT.

ADJUDICATING AUTHORITY HAS POWERS TO PASS INTERIM ORDERS BEFORE ADMISSION OF THE APPLICATION

Matter: NUI Pulp and Paper Industries Private Limited vs. Roxcel Trading GMBH

Order dated: 17 July 2019

Summary:

Roxcel Trading GMBH (**Respondent**) had filed an application (**Application**) as an operational creditor for initiation of corporate insolvency proceedings against NUI Pulp and Paper Industries Private Limited (**Appellant**) before the National Company Law Tribunal, Chennai Bench (**NCLT**). The Respondent submitted to the NCLT that there was a dispute in existence between the Appellant

and the Respondent and accordingly sought time from the NCLT to file its reply. Considering the apprehension of the Respondent that the Appellant and its Directors would sell the assets of the Appellant to defeat the purpose of the Insolvency and Bankruptcy Code, 2016, the NCLT while granting time, passed an interim order under the NCLT Rules, 2016 (**Rules**). The interim order prohibited the Respondent from alienating or creating any encumbrances on the assets of the Respondent.

The Appellant aggrieved by the interim order passed by the NCLT filed an appeal before the National Company Law Appellate Tribunal (**NCLAT**). The Appellant contended that the NCLT did not have the jurisdiction to pass interim orders before the admission of the Application. The NCLAT held that the NCLT can pass orders to meet the ends of justice under the Rules.

SUBSIDIES TO BE PAID TO THE CORPORATE DEBTOR UNINFLUENCED BY THE ORDER OF LIQUIDATION AS CORPORATE DEBTOR TO CONTINUE AS A GOING CONCERN DURING THE LIQUIDATION PROCESS

Matter: Mr. Arvind Garg, Liquidator of Moser Baer Solar Limited vs. Committee of Creditors Moser Baer Solar Limited through Punjab National Bank

Order dated: 23 July 2019

Summary:

Appeal was preferred by the liquidator (**Appellant**) of Moser Bear Solar Limited (**Corporate Debtor**) before the National Company Law Appellate Tribunal (**NCLAT**) against the order of National Company Law Tribunal, Principal Bench, New Delhi (**NCLT**) whereby the NCLT passed an order of liquidation against the Corporate Debtor.

The Appellant contented that order of liquidation passed by the NCLT against the Corporate Debtor may affect the realisation of subsidies from the Central Government, Ministry of Electronics and Information Technology granted as per the decision of the order passed by the Hon'ble High Court of Delhi, if the Central Government comes to know that the Corporate Debtor has gone for liquidation.

The NCLAT placed reliance on its decision in the matter of *Y. Shivram Prasad vs. S. Dhanapal & Others* and stated that the Appellant is required to follow the procedure for liquidation and ensure that the Corporate Debtor remains a going concern even during the period of liquidation. Accordingly, the NCLAT held that it is still open to Ministry of Electronics and Information Technology to release subsidies despite the order of liquidation as the Corporate Debtor will continue as a going concern to ensure revival and resolution even during the period of liquidation.

AFTER APPROVAL OF RESOLUTION PLAN WHEREIN CLAIMS OF ELECTRICITY BOARD WERE ALREADY GIVEN TREATMENT IT WAS NOT OPEN TO THE NCLT TO PASS AN ORDER TO RELEASE THE AMOUNT IN FAVOUR OF THE ELECTRICITY BOARD

Matter: Asset Reconstruction Company (India) Limited vs. R. Venkatakrishnan and another

Order dated: 23 July 2019

Summary:

In this case, corporate insolvency resolution processes (**CIRP**) were initiated against two corporate debtors namely Paragon Steels (P) Ltd. and another against SMM Steel Re-rolling Mills Private Limited; and a common resolution professional (**RP**) was appointed (**Corporate Debtors**). Kerala State Electricity Board (**KSEB**) which was supplying electricity to units of the Corporate Debtors disconnected the same on account of non-payment of dues during CIRP process and continuation of moratorium. The supply was only restored pursuant to the National Company Law Tribunal, Chennai Bench's (**NCLT**) order whereby the NCLT directed the RP of the Corporate Debtors to deposit an amount of Rs. 3,25,00,000 in an escrow account as security.

The order of the NCLT was challenged by the Corporate Debtor before the National Company Appellate Law Tribunal (**NCLAT**).The RP's contention before the NCLAT was that KSEB was an operational creditor of the Corporate Debtor, its claims were already given

treatment in the resolution plan by adjusting arrear payments made towards preadmission bills against the bills raised during CIRP. The NCLAT while setting aside the order of the NCLT held that it wasn't open to NCLT to pass an order to release the said amount in favour of KSEB after approval of the resolution plan.

THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY PROFESSIONALS) (AMENDMENT) REGULATIONS, 2019

The Insolvency and Bankruptcy Board of India (**IBBI**) notified Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2019 (**Amendment Regulations**) on 23 July 2019 to amend the IBBI (Insolvency Professionals) Regulations, 2016

Following are some important amendments introduced through the Amendment Regulations:

a) An insolvency professional (**IP**) is not permitted to accept or undertake an assignment as interim resolution professional, resolution professional, liquidator, bankruptcy trustee, authorised representative or in any other role under the Insolvency and Bankruptcy Code, 2016 (**Code**) after 31 December 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment. The authorisation for assignment is issued to the IP's by the IP agency;
b) An IP, holding an authorisation for assignment' or when he undertakes an assignment, shall not engage in any employment;
c) Where an IP has conducted a corporate insolvency resolution process (**CIRP**), such IP and his relatives shall not accept any employment, other than an employment secured through open competitive recruitment, with, or render services, other than services under services under the Code to a creditor having more than ten per cent voting power, the successful resolution applicant, the corporate debtor or any of their related party, until a period of 1 year has passed from the date of his cessation from the CIRP;
d) An IP shall not appoint or engage any of his relatives or related parties for any work relating to any of his assignment; and
e) The IP agency shall inform the IBBI when it issues or renews an authorisation for assignment, suspends or cancels an authorisation for assignment', revokes the suspension of an authorisation for assignment' or accepts the surrender of an authorisation for assignment, within one working day of taking such action.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY PROFESSIONAL AGENCIES) (AMENDMENT) REGULATIONS, 2019

The Insolvency and Bankruptcy Board of India (**IBBI**) notified Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) (Amendment) Regulations, 2019 (**Amendment Regulations**) on 23 July 2019 to amend the IBBI (Insolvency Professional Agencies) Regulations, 2016

Following amendment is introduced:

Insolvency professional agency (**IPA**) shall pay a fee of five lakh rupees to IBBI, within fifteen days from the date of commencement of the financial year. However, annual fee shall not be payable in the financial year in which an IPA is granted registration or renewal. Further, any delay in payment of fee by an IPA shall attract simple interest at the rate of twelve percent per annum until paid.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (MODEL BYE-LAWS AND GOVERNING BOARD OF INSOLVENCY PROFESSIONAL AGENCIES) (AMENDMENT) REGULATIONS, 2019

The Insolvency and Bankruptcy Board of India (**IBBI**) notified Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2019 (**Amendment Regulations**) on 23 July 2019 to amend the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016

Following are some important amendments introduced through the Amendment Regulations:

a) Subject to meeting other requirements, an individual can serve as an independent director of the governing board up to the age of 75 years or maximum of two terms of three years each, whichever is earlier;
b) Changes have been made to the Model Byelaws under which insolvency professional agency shall issue / renew an authorisation of assignment to the insolvency professionals (**IP**);
c) Subject to meeting other requirements, an IP shall be eligible to obtain an authorisation of assignment if he has not attained the age of 70 years; and
d) A new Form B with respect to authorisation for assignment has been introduced.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) (AMENDMENT) REGULATIONS, 2019

The Insolvency and Bankruptcy Board of India (**IBBI**) notified Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 (**Amendment Regulations**) on 25 July 2019 to amend the IBBI (Liquidation Process) Regulations, 2016

Following are some important amendments introduced through the Amendment Regulations:

a) **Stakeholders consultation committee** – A stakeholders' consultation committee (**Committee**) should be constituted within 60 days of the liquidation commencement date from the stakeholders list prepared by the liquidator. These stakeholders are divided into different classes and each class may elect its representative. The liquidator may also convene meetings of the Committee for deliberations. The Committee may also advise the liquidator, but it is not binding.
b) **Contribution** - The financial creditors being financial institutions shall contribute towards the excess liquidation costs in cases where the committee of creditors did not approve a plan to meet the liquidation costs as required and such contributions shall be maintained in an escrow account.
c) **Timelines** - The liquidation of the corporate debtor shall be completed within one year from the liquidation commencement date. And the liquidator should distribute the proceeds within 90 days. The final report which is to be submitted before dissolution should henceforth be accompanies with a compliance report in the prescribed form. Compromise or arrangement must be reached within 90 days of the initiation of liquidation due to expiry of resolution process period or where the resolution plan is contravened by the corporate debtor.
d) The secured creditors have the option to relinquish security interest in their claim. In case they realise the security, they shall pay towards the costs and workman dues for the preceding 24 months.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (SECOND AMENDMENT) REGULATIONS, 2019

The Insolvency and Bankruptcy Board of India (**IBBI**) notified the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019 (**Amendment Regulations**) on 25 July 2019 to amend the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Following are some important amendments introduced through the Amendment Regulations:

a) Applicant filling the application for withdrawal of corporate insolvency resolution process after the issuance of invitation for expression of interest shall provide the reasons justifying withdrawal after issue of such invitation;
b) The interim resolution professional shall submit the withdrawal application to the adjudicating authority on behalf of the applicant within 3 days of receipt of application if the withdrawal application is made before the constitution of committee of creditors (**CoC**);
c) CoC shall consider the withdrawal application within 7 days of its receipt if the withdrawal application is made after the constitution of CoC;

d) CoC shall record its deliberations on feasibility and viability of the resolution plans;
e) CoC, while approving a resolution plan or deciding to liquidate the corporate debtor, may make a best estimate of the amount required to meet liquidation costs, in consultation with the resolution professional, in the event an order of liquidation is passed;
f) CoC shall make a best estimate of the value of the liquid assets available to meet the liquidation cost;
g) If the estimated value of the liquid assets is less than the estimated liquidation cost, CoC shall approve a plan providing for contribution for meeting the difference between the two;
h) CoC while approving a resolution plan or deciding to liquidate the corporate debtor, may recommend that the liquidator may first explore sale of the corporate debtor as a going concern or sale of the business of the corporate debtor as a going concern, if an order for liquidation is passed; and
i) In a case where CoC recommends sale as a going concern, it shall identify and group the assets and liabilities, which according to its commercial considerations, ought to be sold as a going concern.

THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INFORMATION UTILITIES) (AMENDMENT) REGULATIONS, 2019

The Insolvency and Bankruptcy Board of India (**IBBI**) notified the IBBI (Information Utilities) (Amendment) Regulations, 2019 (**Amendment Regulations**) on 25 July 2019 to amend the IBBI (Information Utilities) Regulations, 2017

Following are some important amendments introduced through the Amendment Regulations:

a) Information utility shall pay annual fee of Rs. 5 million to IBBI within 15 days from the commencement of the financial year. However, no annual fee shall be payable in the financial year in which an information utility is granted registration or renewal. Further, any delay in payment of fee by an information utility shall attract simple interest at the rate of twelve percent per annum until paid.
b) Information utility shall expeditiously undertake the process of authentication and verification of information of default as soon as it is received.
c) Information utility shall deliver the information of default to the debtor seeking confirmation within the time specified in the technical standards;
d) Information utility shall remind the debtor at least three times for confirmation of information of default and in case the debtor does not respond, allow three days each time for the debtor to respond; and
e) Information utility shall deliver the information of default or the reminder to the debtor either by hand, post or electronic means at the postal or e-mail address of the debtor.

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2019

The Insolvency and Bankruptcy Code (Amendment) Act, 2019 (**Amendment Act**) has been notified in the Official Gazette on 6 August 2019. The Amendment Act was introduced to fill the gaps in the corporate insolvency resolution (**CIRP**) framework enshrined under the Insolvency and Bankruptcy Code, 2016 (**Code**).

Some of the key proposed amendments are discussed below:

a) **Definition of Resolution Plan**

The definition of the 'Resolution Plan' now includes the provisions for restructuring of the corporate debtor, including by way of merger, amalgamation and demerger. These reorganisation structures may provide for an efficient way of revival of the corporate debtor as a going concern and maximise the value of the corporate debtor.

b) **Timeline for Completion of CIRP**

The CIRP must be mandatorily completed within a period of 330 days from the insolvency commencement date. The 330 days' time period includes any extension given under Section 12 of the Code and time taken in legal proceedings in relation to the resolution process of the corporate debtor. Another change implemented under the Amendment Act is that where a resolution process of a corporate debtor is pending and has not been completed within the period of 330 days, such resolution process shall be completed within a period of 90 days from the date of commencement of the amendment. However, if the process, including time taken in legal proceedings, is not completed within the said period of 330 days, an order requiring the corporate debtor to be liquidated under clause (a) of sub-section (1) of Section 33 shall be passed.

Although the timeline provided under the Amendment Act seems to be a step in the right direction, the application of such strict timelines might face some hurdles considering the pendency of a large number of matters in the various benches of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT). Therefore, institutional capacity may be further required to be increased for effective implementation of this amendment. Further, the binding effect of this amendment will also be required to be considered keeping in view the time period required in cases where the resolution plan is challenged in the NCLAT or the Supreme Court of India.

c) **Delay in Admission of Application**

It has been clarified that the adjudicating authority shall provide reasons in writing for not admitting or rejecting the application within 14 days of receipt of the application. It is pertinent to note that such requirement is only mandatory for application made by the financial creditors.

This will prevent the unwanted delays in the admission of the application which may lead to further value deterioration and push for speedier disposal of application.

d) **Voting by Authorised Representative**

The authorised representative under sub-section(6A) of Section 21 shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent of the voting share of the class of financial creditors he / she represents, who have cast their vote. However, the vote to be cast in respect of withdrawal an application under Section 12A of the Code has to be as per the individual instructions of financial creditors which are represented by the authorised representatives.

This will ease the decision-making process in cases where debenture holders or homebuyers form the majority of the Committee of Creditors (**CoC**).

e) **Treatment under the Resolution Plan**

i. **Treatment of Operational Creditors**

A resolution plan must provide for payment to operational creditors of an amount which is higher than: (a) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under Section 53; or (b) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of Section 53.

ii. **Treatment to Dissenting Financial Creditors**

It has been clarified that the amount payable under a resolution plan to the dissenting financial creditors shall not be less than the liquidation value of their debt. It is pertinent to note that the this would re-align the Code with the Reserve Bank of

India's Circular on "Prudential Framework for Resolution of Stressed Assets" dated 7 June 2019 which also provides payment of at least liquidation value to dissenting creditors.

iii. Priority and Value of Security

It has been clarified that the manner of distribution of proceeds under the resolution plan can be decided by the CoC and it can also take into account the order of priority amongst creditors as laid down under Section 53, including the priority and value of the security interest of a secured creditor.

iv. Applicability to Pending Cases

The amendments relating to payment to creditors under a resolution plan shall also be applicable to cases: (i) where a resolution plan has not been approved or rejected by the Adjudicating Authority; (ii) where an appeal has been preferred under Section 61 or Section 62 or such an appeal is not time barred under any provision of law for the time being in force; or (iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan.

An explanation has been added to clarify that any distribution shall be fair and equitable to such creditors. Therefore, the explanation sought to clarify that the scheme of distribution must follow Supreme Court's decision in Swiss Ribbons v. Union of India. However, the term "fair and equitable" has not been defined under the Code.

The Amendment Act was necessary in light of recent ruling of the Hon'ble NCLAT in the Essar Steel dated 4 July 2019 which granted operational creditors near equal status as the financial creditors in the distribution of the bid amount of the resolution plan. Further, the Hon'ble NCLAT held that the manner of distribution as provided under the Section 53 is only applicable to distribution of proceeds from liquidation and not to resolution plans. Moreover, the Hon'ble NCLAT held that CoC would have no role in the manner of distribution under the resolution plan.

f) **Resolution Plan Binding on Governments**

It has been clarified that the resolution plan approved by the adjudicating authority is binding on the Central Government, State Government or any local authority to whom statutory dues are owed by the corporate debtor.

The recovery of statutory dues is now possible only in accordance with the resolution plan. The amendment will put an end to various proceeding especially the tax proceedings that are pending against the corporate debtor.

g) **Liquidation by the CoC**

The CoC may take the decision to liquidate the corporate debtor, any time after its constitution under Section 21 of the Code and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

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