REALISING VALUE FROM A NON REALISABLE ASSET UNDER THE IBC

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The Insolvency & Bankruptcy Code, 2016 (“**the Code**”) was introduced for reorganizing and restructuring entities on the verge of a collapse. While efforts are made to ensure the revival and continuation of a corporate entity through a resolution process, there are occasions when an entity could suffer corporate death by liquidation under Section 33 of the Code.

Upon commencement of liquidation, a liquidator is appointed who creates a liquidation estate held by him in a fiduciary capacity for the benefit of the stakeholders. This estate comprises of the following categories of assets:

- assets owned by the corporate debtor
- assets which may or may not be in the corporate debtor’s possession,
- tangible and intangible assets,
- assets where ownership is yet to be determined,
- assets underlying in avoidable transaction,
- asset relinquished by one or more secured creditor,
- proceeds of liquidation

Out of this pool of assets, some may be converted to cash quickly while for others realization may be a time taking process. Assets which are not easily convertible to cash and could take an indefinite waiting period for realisation are called ‘Not Readily Realisable Assets’ (“**NRRA**”). The explanation to Regulation 37A[1] of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (“**Liquidation Regulations**”) defines NRRA as those assets in the liquidation estate which could not be sold through available options and includes contingent or disputed assets and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions.

Significantly, under Regulation 44(1) of the Liquidation Regulations, a liquidator has one year from the date of commencement of liquidation to complete the liquidation process. The concern associated with NRRA is that its indefinite realisation timeline jeopardizes the objective of a time bound liquidation process, leaving the liquidator with one of two choices. First, to await the realisation of the

[1] 37A. Assignment of not readily realisable assets.
(1) A liquidator may assign or transfer a not readily realisable asset through a transparent process, in consultation with the stakeholders’ consultation committee in accordance with regulation 31A, for a consideration to any person, who is eligible to submit a resolution plan for insolvency resolution of the corporate debtor.
Explanation. — For the purposes of this sub-regulation, “not readily realisable asset” means any asset included in the liquidation estate which could not be sold through available options and includes contingent or disputed assets and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions referred to in sections 43 to 51 and section 66 of the Code.

NRRAs which means depreciation in asset value and second, to leave the asset unrealised out of the liquidation pool and pay the stakeholders with the proceeds available at the time without deriving the value from the NRRA. The effect of both is detrimental to the Code's objective of a time bound process for facilitation of maximisation of the value of the assets.

With this background, the Insolvency & Bankruptcy Board of India inserted Regulation 37A of the Liquidation Regulations. Under this Regulation, a liquidator can transfer or assign a NRRA through a transparent process to such persons who would otherwise have been eligible to submit a resolution plan during the insolvency resolution process, after deliberations with the Stakeholders' Consultation Committee[2] ("**SCC**"). Thus, any person who is ineligible to be a resolution applicant under Section 29A of the Code cannot be a buyer of a NRRA.

Unlike a resolution plan where a successful resolution applicant acquires the business of the corporate debtor as a going concern, acquiring an asset which

[2] Regulation 31A of the Liquidation Regulations

is not easily realisable in liquidation process permits the buyer to hand-pick the asset best suitable to their requirements through a confidential and transparent process. This is advantageous for the buyer as without having to assume control of the corporate debtor’s business operations, an asset that is conducive to the the growth and development of the buyer’s business is acquired at a price much cheaper than the market price.

Under the NRRA mechanism, the liquidator issues a process memorandum inviting prospective investors for assignment or transfer of NRRAs. Similar to an Expression of Interest[3] issued by a resolution professional requesting bids for resolution of the corporate debtor, this process memorandum is drafted to provide interested parties with information on the asset that may be useful to them in making an offer for purchasing an asset. After passing the eligibility assessment criteria set out in the process memorandum issued for handover of NRRA in terms of Regulation 37A, the potential investor is at complete liberty to verify the accuracy and reliability of the records of the corporate debtor and obtain independent advice on the same. The potential investors, then, make

[3] Regulation 36A of the the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

their bids for assignment/transfer of the NRRA and the most suitable bid is chosen by the liquidator in consultation with the SCC. However, in the event the route adopted for transfer/assignment of NRRA remains unsuccessful due to the peculiarity of the asset or circumstances associated with it, the liquidator, with permission of the Adjudicating Authority, may distribute such NRRAs among stakeholders[4]. For instance, in the liquidation of Shilpi Cable Technologies Limited[5] the liquidator issued a process memorandum inviting offers for its NRRAs worth INR 1,478 crore. The NRRAs included investments by the company in equity shares of its subsidiaries, loans and advances to related and other parties and assets underlying the proceedings for preferential and fraudulent transactions under the Code.

A transfer of NRRA is a win-win situation for all, i.e., the buyer, the liquidator and the stakeholders because the buyer obtains a viable asset for their business operations facilitating timely completion of the liquidation proceedings for the liquidator and allowing stakeholders to exit at an earlier stage from the liquidation process than having to wait out a long period for deriving any value

[4] Regulation 38, Liquidation Regulations, 2016

[5] C. P. No. (IB)/64/2017 before Hon'ble National Company Law Tribunal, Principal Bench, New Delhi

from the NRRA. Hence, the NRRA mechanism is a godsend for investors looking to get their hands on tangible assets at discounted price despite the risk of an indefinite timeline for realisation attached to it for the ultimate buyer. The buyer, however, shall have to carefully conduct their diligence to ensure that the net effect of purchasing an asset even at a reduced cost must outweigh the cost of recovery in order to get a beneficial outcome from the NRRA mechanism.

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