



ASC

INSOLVENCY TIMES



Volume 75, February 2023

Editorial



Amendments Sought In IBC For Equitable Distribution Among Creditors

Recently, the Insolvency and Bankruptcy Board of India (IBBI) has come out with proposals for change in the law to the effect that the creditors other than secured Financial Creditors should be subject of equitable distribution among the creditors of the Corporate Debtor. The said amendments seem to be getting light as the IBBI has been time and again prompted by the Appellate Adjudicating Authority and other judicial institutions in the field. The Supreme Court judgment in Rainbow Papers, which seeks to bring at par the secured government dues to those of financial debts, may also have contributed to the Board's decision of proposing such amendments.

Although the secured Financial Creditors would continue to have first claim as per the proposed changes, but only upto the Liquidation value of the Corporate Debtor. Moreover, any recovery beyond Liquidation value would be shared ratably among all creditors.

While the said amendments are apparent to be abridging the massive gaps between the status of financial and operational creditors, banks and financial institutions have been reported to say that the same would impact credit markets and security considerations significantly.

Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

Anju Agarwal

Partner

ASC Insolvency Services LLP

Business related discussion contact Deepak Maini (IP, Advocate) at +91 97111 91523



NCLAT stays Insolvency Process initiated against Zee Entertainment Enterprises Limited

The Merger between Zee and Sony Pictures Network India Private Limited had come to a standstill owing to the moratorium imposed by NCLT

The National Company Law Appellate Tribunal (NCLAT) has granted interim relief to Zee Entertainment Enterprises Limited (ZEEL), staying the corporate insolvency resolution process (CIRP) initiated by the Adjudicating Authority on instance of IndusInd Bank, a move that had threatened to disrupt Zee Entertainment's merger with Sony.

In August last year, Zee had approached the NCLT seeking approval for its merger with Sony. Its board of directors approved the scheme in December 2022, and 90% of the secured creditors had given the company a no-objection-certificate for the merger. Basis this, the tribunal had dispensed with the requirement of creditors' meet under company law. Zee currently owes 90% of its secured debt to two major secured creditors, HDFC Bank Ltd. and Kotak Mahindra Bank Ltd. However, the debt is minor, totaling less than Rs 33 crore as on Dec. 31, 2021. The merger application is currently in at the second stage before the NCLT.

In the second stage of mergers, the court decides the date for the final hearing and disseminates the information to all the stakeholders through a public notice. Objections against the merger have also been invited.

The Lenders of Reliance Capital tell NCLAT that they are open to negotiate for maximising asset value

Lenders of Anil Ambani-promoted Reliance Capital had moved the Appellate Tribunal challenging an NCLT order which restricted further auction of the Corporate Debtor.

Lenders of Reliance Capital have recently been reported to submit before the Hon'ble National Company Law Appellate Tribunal (NCLAT) that there are no fetters on the power of creditors for negotiating over resolution plans in pursuit of higher valuation of the stressed asset.

The Counsel arguing for the Appellant Lenders of Reliance Capital, in his concluding arguments, submitted before the Appellate Adjudicating Authority that the intent of Insolvency and Bankruptcy Code, 2016 (IBC) is to maximise the value of the assets and the Committee of Creditors are free to negotiate with the terms for that.

Lenders of Anil Ambani-promoted Reliance Capital had moved the NCLAT in Appeal challenging an order of the Mumbai Bench of the National Company Law Tribunal (NCLT) which restricted further auction of the Corporate Debtor undergoing corporate insolvency resolution process (CIRP). The NCLT Mumbai had said that the challenge mechanism for financial bids stood concluded as on December 21, 2022 with the bid of Torrent Investments at Rs. 8,650 crores being the highest.

The NCLAT was hearing the plea filed by Vistra ITCL (India), one of the lenders, and Hinduja group firm Indusind International Holdings Ltd (IIHL) against the order of the NCLT. Reliance Capital has a consolidated debt of about 40,000 crores.

NCLT admits Insolvency plea against Big FM Radio's Operator Reliance Broadcast Network

The Mumbai Bench of the NCLT has appointed Rohit Ramesh Mehra as an Insolvency Professional

The National Company Law Tribunal (NCLT) has admitted Reliance Broadcast Network Limited, the Big FM Radio network operator which runs the popular FM radio station Big FM under the corporate insolvency resolution process (CIRP). The Adjudicating Authority has appointed Shri Rohit Ramesh Mehra as an Interim Resolution Professional (IRP) and placed the Company into moratorium, thereby prohibiting any transactions or legal proceedings by or against the Company.

According to the Application filed by IDBI Trusteeship Services on behalf of L&T Investment Management Limited for initiation of CIRP of the Company, Reliance Broadcast Network failed to clear financial debt of Rs 175 crore. L&T Investment Management Limited had subscribed to NCDs worth Rs 200 crore issued by the Anil Ambani group company in three tranches in 2015 and 2016.

IDBI Trustee Services acted as the trustee for L&T Investment Management Services, while Reliance

Capital acted as the guarantor for Reliance Broadcast Network. At the time of redemption of the NCDs in 2020, Reliance Broadcast failed to make the payments. Following which, the Financial Creditor on behalf of L&T Investment Management invoked the Guarantee and called upon Reliance Capital to make the payments.

The NCLT in its order has stated that the Petitioner (IDBI Trusteeship Services) has been able to establish the necessary ingredient of there being a financial debt and default thereupon having been committed by the Corporate Debtor (Reliance Broadcast Network).

Gujarat High Court allows Welspun to take over ABG Shipyard's assets

The 'Reason to believe' cannot arise from mere suspicion, gossip or rumour, the High Court noted while turning down ED's request

The Welspun Group's successful ₹790-crore bid to take over auctioned assets of ABG Shipyard was challenged by the Enforcement Directorate under the Prevention of Money Laundering Act (PMLA).

There has always been a tussle for supremacy between the PMLA and the Insolvency and Bankruptcy Code. In this case, it was well after Welspun paid the consideration that the ED acted, based on a complaint by State Bank of India. Welspun had bought the assets by means of a ₹400-crore loan from IndusInd Bank, with the assets as security.

The ED attached those very assets.

It is an established position that to attach assets under PMLA, the ED must have 'reason to believe' that the assets involved 'proceeds of crime'. The 'reason to believe' is a necessary condition but cannot be based on gossip or rumour, the High Court had noted.

Hearing a petition from Welspun Steel Resources Pvt Ltd, the High Court of Gujarat, Ahmedabad, observed: "*Sine qua non to arrive at a determination that the assets are proceeds of crime, the foremost requirement is that the author has to have 'reason to believe' on the basis of material in his possession. 'Reason to believe' cannot arise from mere suspicion, gossip or rumour. There must be some material to suggest such formation of opinion.*" In the present case, the Honorable Judge of the High Court was satisfied that there was no strong 'reason to believe' that the assets were acquired by ABG Shipyard using 'proceeds of crime'.

Farmers move NCLT over Bajaj Sugar Insolvency Process

The Application was made by UP Sugarcane Farmers Group demanding a say in the ongoing CIRP of Bajaj Sugar

A farmers' body comprised of sugarcane growers from Uttar Pradesh has approached the National Company Law Tribunal (NCLT) demanding a say in the ongoing litigation under the Insolvency and Bankruptcy Code, 2016 (IBC) between State Bank of India and Bajaj Hindusthan Sugar.

Kushagra Bajaj, the country's largest sugar manufacturer, is facing an insolvency lawsuit from the state-owned bank. The farmers want to be treated as financial creditors of the sugar manufacturer because they claim to have supplied sugarcane to the company and owe them money. According to sources, the application filed by the farmers' group Agragami Kissan Samiti UP does not specify the exact amount of money owed to them by the Sugar Manufacturer.

While operational creditors are entitled to a portion of the proceeds received by creditors after the Company is resolved under CIRP or when the same is wound up by Liquidation, they are prioritized below Financial Creditors such as banks, financial institutions, and bond holders. Sugarcane growers are demanding that they be treated as Financial Creditors because the raw material they provide is critical for sugar production.

The farmers have alleged that agriculturists should be treated as a distinct class of creditors, similar to how home buyers are treated. Under the country's Insolvency regime, homebuyers have been granted the status of a Financial Creditor. SBI had approached the NCLT in August last year, alleging that Bajaj Hindusthan Sugar was in breach of a Rs 5,000 crore loan restructuring agreement.

SREI Insolvency: NCLT will consider NARCL's Resolution Plan only after hearing Authum's petition

NARCL had emerged as the Successful Resolution Applicant in the CIRP followed by Authum who ranked second

The National Company Law Tribunal, Kolkata Bench (NCLT) has recently indicated that the Resolution Plan submitted by the National Asset Reconstruction Company Limited (NARCL) for the Insolvent Srei Group companies – Srei Infrastructure Finance Ltd (SIFL) and Srei Equipment Finance Ltd (SEFL) – will only be considered by the NCLT following the presentation of arguments by Authum Investment and Infrastructure challenging the mechanism.

Following the challenge mechanism process, Authum's financial bid was adjudged as the second highest in net present value (NPV). A petition was recently filed by Authum before the NCLT Kolkata bench challenging the process by which NARCL emerged as the top bidder to acquire the two companies due to issues with the evaluation matrix adopted by the Committee of Creditors (CoC).

Following the completion of the challenge mechanism process, the Srei group entities received three bids. NARCL's offer was ₹5,555 crore in NPV terms including upfront cash of ₹3,180 crore; Authum's bid in NPV terms was for ₹5,526 crore and the consortium of Varde Partners and Arena Investors' financial bid in terms of NPV stood at around ₹4,680 crore, including ₹3,250 crore upfront cash.



RECENT JUDGMENTS

Rohit Motawat v. Madhu Sharma, Proprietor Hind Chem Corporation & Anr.

An Invoice signed by one party is not reliable so as to prove liability of interest on the recipient of goods/ services: NCLAT

The National Company Law Appellate Tribunal (NCLAT) has held that for initiation of corporate insolvency resolution process (CIRP) in respect of the Corporate Debtor, the reliance of the Appellant/ Operational Creditor upon invoices that are signed only by the Operational Creditor and not by the Corporate Debtor is not sustainable. The Appellate Adjudicating Authority observed that such invoices do not come within the ambit of an agreement binding on the parties with respect to liability of interest.

In the present case, the National Company Law Tribunal, Jaipur Bench (NCLT) had admitted an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) filed by Shri Madhu Sharma, Proprietor of Hind Chemical Corporation & Anr. against M/s Shubh Aluminium Private Limited (Corporate Debtor). The debt amount was Rs. 38,58,994/- (without interest) out of which Rs. 9,97,122/- was paid in due course of proceeding. The interest had been claimed by the Respondent on the basis of invoices in which it was mentioned that if the amount is not paid within the due date, then 21% interest shall be charged.

The Appellate Bench observed that invoice is a unilateral document unless signed by both parties and interest cannot be claimed until and unless it is signed by both the parties. The Appellate Adjudicating Authority further held that the Adjudicating Authority had erred in not looking into the facts that the principal amount has entirely been paid. It was further observed that it is only the interest that is pending for which the application under Section 9 of the Code is not maintainable as the spirit of the legislation of the Code is for 'resolution of debt and distresses assets' and not for recovery.

With such observations, the Appellate Bench concluded that invoice in the present case was a unilateral document and a Section 9 Application for initiation of CIRP could not be entertained on the basis of the said invoices for recovery of unpaid interest.

Noble Marine Metals Co WLL v. Kotak Mahindra Bank Ltd & Ors

Whether the Adjudicating Authority has the jurisdiction to send back the Resolution Plan for reconsideration at request of Financial Creditor ?

The National Company Law Appellate Tribunal, Principal Bench, New Delhi (NCLAT) was recently faced with the question as to whether the Adjudicating Authority has the competence and jurisdiction to send

back the Resolution Plan for reconsideration before the Committee of Creditors (CoC) at the request of Financial Creditor. Further, the Appellate Bench also asked to itself whether the approved Resolution Plan is binding on the CoC which can neither be withdrawn nor sent back for modification.

In the present case, the corporate insolvency resolution process (CIRP) against Twenty First Century Wire Rods Limited (Corporate Debtor) was initiated by order of the Adjudicating Authority and Resolution Plans were invited thereafter by the Resolution Plan. The Financial Creditor, IDBI Bank had solely approved the Resolution Plan of the Resolution Applicant by 87.22%.

However, another Financial Creditor Kotak Mahindra Bank objected to the Resolution Plan on the grounds of having mandatory clause of release of personal guarantee of the Promoters. In view of the said objections, the Adjudicating Authority remitted the plan back to the CoC for reconsideration in accordance with law.

The Successful Resolution Applicant filed an Appeal before the NCLAT challenging such remitting back of the plan to the CoC for reconsideration. The NCLAT upheld the order of the Adjudicating Authority saying that Only in case of Section 30 (2) of the Code, can the Resolution Plan be sent back to the CoC for review of such plan after satisfying the parameters. It was further observed that the mandatory clause in Resolution Plan which violates the provision of Section 128 of Indian Contract Act 1872, has to be treated to be violation of Section 30(2)(e) of the Code.

The Appellate Adjudicating Authority further held that the present is a case where CoC is not asking to withdraw from the Plan or asking for reviewing the entire Resolution Plan rather CoC has asked for leave of the Court for deleting clause in the Plan which sought to release the promoters from personal guarantee given to the Financial Creditors.

Rourkela Steel Syndicate v. Metistech Fabricators Pvt. Ltd. & Ors.

Section 69(2) of the Partnership Act does not apply to Section 7 or 9 of the Code since the said proceedings do not fall within the ambit of a 'suit'

The National Company Law Appellate Tribunal (NCLAT) has recently held that the initiation of corporate insolvency resolution process (CIRP) by an unregistered partnership firm was not barred by Section 69(2) of the Partnership Act. Section 69(2) provides that no suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

The Appellate Adjudicating Authority was of the view that the presence of the term 'suit' in the provision of Section 69(2) would make it not applicable to proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC) as the said proceedings can never be termed and put under the definition of suit.

The Appellate Adjudicating Authority was thus of the view that Adjudicating Authority had committed an error in rejecting the Section 7 Application on the ground that it is barred by Section 69(2) of the Partnership Act. Accordingly, the Appellate Bench set aside the order of rejection by the National Company Law Tribunal (NCLT). Further, NCLAT issued direction to revive the Petition under Section 7 of the Code before the NCLT and the same be considered afresh keeping aside the submission of the Corporate Debtor about the bar under Section 69(2) of the Partnership Act.

BMW Financial Services Private Limited v. S.K. Wheels Private Limited

Whether NCLT can liquidate the Corporate Debtor under Section 33(3) of the IBC for non- implementation of the Resolution Plan without mandate of Implementation and Monitoring Committee ?

The National Company Law Tribunal, Mumbai Bench (NCLT) while adjudicating a petition has ordered liquidation of the Corporate Debtor as the Resolution Applicant willfully failed to implement the Resolution Plan. The order of liquidation has been made without the mandate of the Implementation and Monitoring Committee (IMC) and to secure the asset value of the Corporate Debtor. Further, action has been initiated under Section 74 of the Code to penalize the Resolution Applicant for willful non-implementation of the Plan.

The Resolution Applicant as per the Plan was obligated to make an upfront payment of Rs. 10.07 crores to the respective stakeholders within 60 days of the Plan approval. However, the Resolution Applicant failed to fulfill its obligations under the Resolution Plan on repeated occasions.

Subsequently, the Resolution Applicant filed an application before the Adjudicating Authority for extension of time for implementation of the Resolution Plan. The Adjudicating Authority dismissed the said Application holding that such extension would amount to modification of the Resolution Plan and is impermissible under IBC. The Bench further directed the Resolution Professional to convene a meeting of the Committee of Creditors (CoC) and file an application for liquidation with the mandate of the CoC.

C. G. Vijyalakshmi v. Shri Kumar Rajan & Ors.

Partial payment of PF and Gratuity dues violative of Section 30(2)(E) of IBC: NCLAT Chennai

The National Company Law Appellate Tribunal, Chennai Bench (NCLAT), while adjudicating an appeal, has held that Provident Fund and Gratuity Dues have to be paid in full to the workmen/ employees till the CIRP commencement date. The Appellate Adjudicating Authority further held that the approved Resolution Plan violated Section 30(2) of the Code by paying only 35.13% of the PF and Gratuity dues and thus treating the workmen/ employees as Secured Creditors.

Hindustan Newsprint Limited ("Corporate Debtor") is a wholly owned subsidiary of Hindustan Paper Corporation Limited (HPCL), which is a Public Sector Undertaking of Government of India. The Corporate Debtor was incorporated for establishment of Kerala News Print Project Limited. The

The Resolution Plan submitted by Kerala Industrial Infrastructure Development Corporation (“Successful Resolution Applicant/SRA”) was approved by the Committee of Creditors (“CoC”). The Resolution Plan proposed that the Secured Financial Creditors would be paid 45% of the total principal loan amount.

The PF Dues and Gratuity Claims of all employees were also paid at 35.13% of the admitted dues at par with secured Financial Creditors and workman. The Adjudicating Authority approved the Resolution Plan. However, the NCLAT in appeal held that since the Resolution Plan has been approved, the Corporate Debtor is statutorily obliged to deposit the PF of the workmen/employees with the Employees Provident Fund Organization (EPFO) in accordance with law. As such,, the NCLAT directed the Resolution Applicant to make payment of the unpaid Provident Fund, Gratuity Fund and pending dues to the workmen/ employees after deducting amount already paid.

Oswal Pumps Limited v Bhopal Tractors Private Limited

Requesting Ledger/ Statement from Operational Creditor is not admission of Claim does not renew Limitation: NCLT Indore

The National Company Law Tribunal, Chennai Bench (NCLT), while adjudicating an application filed in a case, has held if a Corporate Debtor merely requests statements or ledger from the Operational Creditor for verification, then such act would not amount to an admission of claim and would not renew the limitation period.

In the present case the Corporate Debtor had defaulted on a Cleaning and Forwarding Agreement for smooth and fluent operations. The Corporate Debtor failed to make payment against certain invoices raised by the Operational Creditor. Operational Creditor issued a Demand Notice under Section 8 of the Insolvency & Bankruptcy Code, 2016 (“IBC”) to the Corporate Debtor, the latter raised a dispute in view of the claim.

The Operational Creditor filed an application under Section 9 of IBC, seeking initiation of Corporate Insolvency Resolution Process (“CIRP”) against the Corporate Debtor over a default of Rs. 39,89,321/- inclusive of interest. The Bench observed that mere act of requesting statements from the Operational Creditor by the Corporate Debtor, does not amount to an admission of claims. Consequently, the limitation period does not get renewed. The application was dismissed for being barred by limitation.

For enquiries related to:

- **Insolvency Process,**
- **Bankruptcy Process,**
- **Filing petition with NCLT/DRT,**
- **Appointment of Insolvency Professionals,**
- **Assets Management of the Company,**
- **Hearing of Cases or any other enquiries**



Delhi Head Office

73, National Park, Lajpat Nagar IV,
New Delhi - 110024 (India)
Phone: +91-11-41729056-57, 41601289
www.ascgroup.in, info@ascgroup.in

Noida Corporate Office

C-100, Sector-2, Noida- 201301
Uttar Pradesh (India)
Phone No: +91-120-4729400

Gurgaon Office

605, Suncity Business Tower
Golf Course Road, Sector-54,
Gurugram - 122002, Haryana (India)
Phone No.: +91-124-4245110/116

Mumbai Office

MBAI SAGAR TECH PLAZA, A WING, OFFICE NO.
315-316, ANDHERI KURLA ROAD, SAKINAKA,
ANDHERI (E), MUMBAI - 400037, INDIA.
022-67413369/70/7171

Bengaluru Office

0420, Second Floor,
20th Main, 6th Block, Koramangala,
Bangalore - 560095, Karnataka (India)
Phone No.: 80-42139271

Chennai Office

Level2 – 78/132,
Dr RK Salai Mylapore
Chennai - 600004, Tamil Nadu (India)
Mobile No: +91-8860774980

Pune Office

UNE OFFICE NO. 4, 1ST FLOOR SILVER OAK,
SN NAGAR ROAD, WADGAON SHERI,
PUNE- MH – 411014
LANDMARK: NEAR INORBIT MALL

Singapore Office

11 Woodlands Close, #04-36 H,
Woodlands 11, Singapore - 737853
Mobile No: +65-31632191
www.ascgroup.sg,
info@ascgroup.sg

Canada Office

885 Progress Ave Toronto
Ontario M1H 3G3 Canada

Business related discussion contact Deepak Maini (IP, Advocate) at +91 97111 91523

Please write us at: anju@insolvencyservices.in, mahima@insolvencyservices.in

© ASC Group 2015. All rights reserved.

Disclaimer:

This e-bulletin is for private circulation only. Views expressed herein are of the editorial team. ASC or any of its employees do not accept any liability whatsoever direct or indirect that may arise from the use of the information contained herein. No matter contained herein may be reproduced without prior consent of ASC. While this e-bulletin has been prepared on the basis of published/other publicly available information considered reliable, we do not accept any liability for the accuracy of its contents.