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ASC

INSOLVENCY TIMES

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Editorial

LEARNING WITH TIME- MAKING CIRP FASTER

5 years is a sufficient time to find out ways how our existing practises can be sharpened to cut deiays and find resolutions in much quicker ways. Peeping through the shortcomings or the bottienecks, iBBI is now proposing some smart ways to handle CIRPs.

Some of the smart measures suggested by the iBBi are:

1. Earlier invitation of expression of interest from prospective resoiution appiicant;
2. information Memorandum can be prepared a iittie iater, not required so early;
3. Shortening timeiines for filing avoidance appiication;
4. Marketing of assets by resoiution professional;
5. Decide eariy on iiquidation if corporate debtor is defunct;
6. Utiiise time between filing of iiquidation application and the consequential NCLT order for expioring compromise arrangement;
7. Vaiuers making presentation before CoC n their assumptions and methods;
8. Not repeating stale valuation reports in longer CiRP.

The proposed changes iook progressive and meaningful as CiRPS have to be quicker to protect the vaiuations. Lets wait for the amendments of CIRP regulations.

Expect more vibrancy from Insolvency Resoiution Process

Stay Aiert!

Anju Agarwal
Partner
ASC Insolvency Services LLP

Unpaid License Fee is an Operational Debt under insolvency and Bankruptcy Code: Holds Five-Member Bencb of NCLAT

The Appellate Bench interpreted the word "Service" used in Sectlon 5(21) of the Code to hold the clalm of the Llcensor as Operational Debt

The Nationai Company Law Appeliate Tribunal (NCLAT) has held that a ciaim for payment of license fee for use and occupation of immovabie premises for commercial purposes is an operationai debt within the meaning Section 5(21) of the Insoivency & Bankruptcy Code (IBC). A five-member Bench headed by the Hon'ble Chairperson was formed to decide the issue. It also reviewed the application of the word 'service,' which is not defined under the IBC, and overruled two eariier judgments while stating that they *did not dwell upon the correct meaning of expression 'service' used In Sectlon 5(21) of the Code.*

In the instant case, the Operational Creditor had entered into a license agreement with the Corporate Debtor for running an educationai estabiishment for a iicense fee payabie monthiy. Due to default in payment, the Operational Creditor fiied an application under Section 9 of the Code for initiation of the corporate insoivency resolution process (CIRP) in respect of the Corporate Debtor. The Application was disallowed by the Adjudicating Authority on the ground that the due license fee was not an operational debt under the Code.

The Counsei for the Corporate Debtor submitted before the Hon'bie NCLAT that the appeai was not maintainabie as the aileged dues of rent is the subject matter of a civil suit between the parties and the same cannot be treated as operational debt as held by the Adjudicating Authority.

"In the present case, debt pertainlng to unpaid license fee was fully covered within the meaning of 'operatlonal debt' under Section 5(21) of the Code and the Adjudicating Authority committed error in holding that the debt claimed by the Operational Creditor is not an operational debt", the Hon'bie Appeilate Adjudicating Authority observed.

Registration of Insolvency Professional suspended for removing certain CoC members from tbe iist of CoC and revise their voting share

The Insolvency Professional had aiso stated before the CoC that no approval was required from the CoC for the golng concern expenses

The Insolvency and Bankruptcy Board of India (IBBI) has suspended the registration of an Insolvency Professional for a period of three years after he removed certain COC members from the list of CoC of the Corporate Debtor for not contributing to the corporate insolvency resoiution process (CiRP) costs. The move was made by the IBBI in exercise of the powers conferred under Section 220(2) of the Insoivency and Bankruptcy Code, 2016 (IBC) read with Regulation 11 of the IBBI (Insolvency Professionals) Reguiations, 2016 and Reguiation 13 of the iBBi (Inspection and Investigation) Regulations, 2017.

The Board noticed that the Insolvency Professionai had vioiated the provisions of the Code and regulations by deciding to remove the CoC members from the iist of CoC and revise their voting share on the basis that some CoC members have not contributed to the CiRP cost, and stating before the CoC that no approvai is required from the CoC for the going concern expenses.

IBBI made it clear in its order of suspension that the Code does not envisage the removal of any CoC member on non-payment of CIRP cost, stating the same to be a blatant violation of the provisions of the Code and Regulations made thereunder. The Board observed that if such kind of action is permitted, then Resolution Professionals would abuse their powers by removing CoC members.

Further, the Board observed that if the contention that the Resolution Professional need not take approvai of the CoC for going concern expenses is to be accepted, it would iead to Resoiution Professionals spending arbitrary amounts in the name of going concern expenses which is not only against Regulation 34 of the CIRP Reguiations but also against the spirit of the Code.

Look out Circuiar can be issued against a Personai Guarantor in the interest of Puhiic Money: Teiangana High Court

Writ Petitlon fiied by Personai Gaarantor to iift travel ban post Resolution Pian being passed dismissed as 226.02 crores was outstanding towards Public Sector Bank

The High Court of Telangana has recently disaliowed a Personai Guarantor to travei abroad rejecting his piea to lift travel ban. The Writ Petition was fiied by the Petitioner Personal Guarantor for the issue of a Writ of Mandamus declaring the action of respondents imposing travel ban on the Petitioner as illegal, arbitrary and in vioiation of Article 21 of the Constitution.

The Petitioner was the director/ personai guarantor of the Company which had avaiied a ioan from erstwhiie Vijaya Bank which has now merged with the Bank of Baroda. Proceedings were initiated against

the Company under the provisions of the Insoivency and Bankruptcy Code, 2016 (IBC). A Resolution Plan was approved by the Nationai Company Law Tribunai, Chennai (NCLT). Under the said Resolution Plan, the Resoiution Appiicant UV Asset Reconstruction Company Limited and WL Structures Private Limited Consortium had taken over the management of the Company.

The Petitioner was stopped at the airport and toid by the immigration authorities and was told that he could not travel as there was a ban on foreign travel imposed on him. Furthermore, the Petitioner submitted before the High Court, merely because the Petitioner stood as a personal guarantor to the Company, which loans were in fact covered under the Resoiution Plan approved by the NCLT. He submitted that the travei ban could not be imposed on the Petitioner without any material to show that he wouid abscond from the jurisdiction of the Court, more so when aii the coilaterai securities offered by the erstwhile Directors had been covered under the Resolution Plan.

However, the High Court heid that as the Respondent Bank had initiated recovery proceedings against the Petitioner, if lookout circular is lifted and if the Petitioner disappears, the recovery proceedings wouid be brought to a standstiii and recovery of crores of pubiic money wouid become impossibie. Hence, it was considered fit by the Court to dismiss the Petition.

NCLT has power to repiace Liquidator under the insoivency and Bankruptcy Code, 2016: Ruies NCLT Chennai

The Adjudicating Authority laid down that Monitoring Committee and Chairman thereof are appointed In accordance with the provisions of the Code

The Nationai Company Law Tribunai, Chennai Bench (NCLT) has recentiy held that the NCLT have the power to repiace the Liquidator during the liquidation process of the Corporate Debtor under the insolvency and Bankruptcy Code, 2016 (iBC).

The NCLT initiated the corporate insoivency resoiution process (CIRP) of Jeypore Sugar Company Limited and thereafter initiated the liquidation process of company and appointed Mr. Venkata Sivakumar as the Liquidator.
The Appiicant IDBI Bank fiied an appiication before the NCLT seeking removai of the Liquidator. It was contended by the bank that the Liquidator did not have the valid authorisation at the time of his appointment and by giving his written consent for appointment as Liquidator, he has suppressed the material fact before NCLT.

The Liquidator opposed the appiication on the ground that there is no provision under the IBC to change/ remove the Liquidator and aiso the Liquidator cannot be changed at the behest of the stakeholders by the NCLT during the Liquidation process.

NCLT negated the contention of Liquidator by relying upon Section 16 of the General Ciauses Act, 1897 which states that the power to appoint also inciudes power to suspend or dismiss aiso. NCLT heid that on

a conjoint reading of Section 33 of IBC and Section 16b of the General Clauses Act shows that the NCLT has the power to dismiss the Liquidator since NCLT has the powers under Section 33 and 34 of IBC to appoint a Liquidator.

Furthermore, the Adjudicating Authority went on to hold that though IBC does not provide for grounds on which the Liquidator can be removed, but recourse to Section 276 of the Companies Act, 2013 can be made which provides for grounds of removal of Liquidator such as misconduct, fraud, professional incompetence and others.

IBBI mandates Insolvency Professionals to raise bills only in tbeir names

The Board has also mandated RPs to disclose relationship with the Corporate Debtor, Financial Creditors and Resolution Applicants

The Insolvency and Bankruptcy Board of India (IBBi) has mandated that the Insolvency Professionals should henceforth raise bills in their own names towards their fees. Also, such fees would have to be paid through banking channels, the IBBi states in its notification. Further, the IBBI has amended its regulations to stipulate that the Resolution Professionals should disclose his/her relationship and the relationship of the professionals engaged by the IPs with the Corporate Debtor, Financial Creditors and the Resolution Applicant.

The Board by way of notification in the Official Gazette has brought in amendments to the IBBi (Insolvency Professionals) Regulations, 2016 whereby certain clauses have been inserted which requires every Insolvency Professional to make disclosures of the relationship of the Insolvency Professional Agency to which he is a member with the participating entities of corporate insolvency resolution process (CiRP). A specific time frame has also been specified by the Board for the IPs to make such disclosure.

The amendment further mandates that no insolvency Professional shall include any amount towards any loss, including penalty, in the insolvency resolution process cos or liquidation cost, which is incurred on account of non-compliance of any provision of laws applicable on the Corporate Person while conducting the resolution process.

GMR's lenders agree to rework tbe Power Unit's loans wortb 2900 crores

The Power Unit has a totai debt of 2913 crores, of whlch 81% is deemed as a sustalnabie portlon

Lenders have agreed to restructure Rs 2,900 crore of loans to GMR's power-producing unit, GMR Warora Energy, in what would help the group remove the non-performing-account tag on it. According to experts, NPA tag makes it difficult for a company to raise fresh funds or make an acquisition under the Insolvency and Bankruptcy Code, 2016 (IBC). Also at times, it is difficult to win government contracts, experts say.

The power unit has total debt of Rs 2,913 crore, of which 81% is deemed as a sustainable portion. The balance loan is unsustainable, which will be substituted with low-coupon non-convertible debentures as per the deal with the lenders.

As per sources, the loan has been agreed to be guaranteed by GMR Energy, which would later be replaced by GMR Power & Urban Infrastructure Ltd. As per the agreement, the account would be upgraded as standard a year after the debt recast plan is implemented, provided the company makes timely payments.

in 2016, ICRA downgraded GMR Warora to 'D' after it defaulted on lenders' payments. The rating was upgraded to 'BB' the following year after the company regularised payments. Lenders have been made to see that major portion of the debt is sustainable and the primary barrier in the way to resolution if the company's NPA tag and its repute.

RECENT JUDGMENTS

Sanjeev Mabajan v. India Bank (Erstwblle Allababad Bank) & Anr

Direction cannot be given to the Financiai Creditor to grant OTS benefit to Borrower: NCLAT

The National Company Law Appellate Tribunal, New Delhi has recently observed that though a settlement has to be encouraged in applications filed by the Financial Creditors for initiation of corporate insolvency resolution process(CIRP) of Corporate Debtors under the Insolvency and Bankruptcy Code, 2016 (IBC), however, the Adjudicating Authority does not have the power or jurisdiction to direct the Lender/ Financial Creditor to offer the benefit of One Time Settlement (OTS) to the Borrower/ Corporate Debtor who has defaulted in repayment of the loan disbursed by the Lender to it.

in the instant case, the Corporate Debtor brought forward before the Appellate Adjudicating Authority its willingness to settle the matter on an earlier offer made by the Financial Creditor. However, the Financial Creditor submitted that it was not willing to settle the matter on the same terms as had been offered by it way back to the Corporate Debtor. It was further argued on behalf of the Lender that no borrower as a matter of right can pray for grant of benefit of OTS.

NCLAT held that since the Corporate Debtor has not denied its financial liabilities towards the Bank and an earlier compromise offered by the Bank has already failed, no direction can now be issued to the Financial Creditor to positively grant the benefit of OTS to a borrower. The debt and default being found, the Appellate Bench upheld admission of Section 7 Application filed by the Lender.

Teena Saraswat Pandey, RP of Rajpal Abbikaran Pvt Ltd

The suspended Management must be provided with the copy of the Resoiution Plan: NCLAT

The Nationai Company Law Tribunai (NCLT), Indore Bench has recently laid down that the suspended Management must be provided with a copy of the Resolution Plan prior to convening the meeting of the Committee of Creditors (CoC) for deliberating upon the Resolution Plan so that the suspended management can file their objections to the same before the CoC decides to either accept or reject the pian.

The Appellate Adjudicating Authority was apprised by the Resolution Professional about the apprehension of confidentiality breach by the suspended management, upon which the Bench held that the Resolution Professional may supply the copy of the plan on the prerequisite of the Management giving a confidentiality undertaking in respect of the plan.

The NCLAT ruled that the law has been well settled by the Hon'ble Supreme Court that every participant of the meeting of the CoC is entitled to receive the notice of the meeting along with agenda and every document relevant for matters to be discussed and the issues to be voted upon in the meeting. The erstwhile Board of Directors being participants are entitled to an advance copy of the plan, being the document which forms part of the matters to be discussed in the meeting.

Punjab National Bank & Ors v. Plyush Colonisers Ltd. Tbrougb RP

Replaced RP being a related party- not a ground for overturning commerciai decision of CoC to replace previous RP: ruies NCLAT

The National Company Law Appellate Tribunal (NCLAT), New Delhi has disallowed an appeal filed by a dissenting Financiai Creditor against repiacement of Resolution Professional alieging that the repiaced Resolution Professional was ineligible since he is a related party.

The Appellant, who was a CoC member having minority voting share of 20% had come up with the Appeal before NCLAT chailenging the order of the Adjudicating Authority whereby the NCLT had appointed a new Resolution Professional. It was submitted by the Appellant that the RP was not eligible since he is a related party.

"We are of the view that CoC having passed resolution for replacement of the Resolution Professional with requisite majority as per Section 27 of the Code, the Adjudicating Authority did not commit any error in replacing the Resolution Professional. it is always open to the Appellant to take recourse of Section 27 and in the event that the CoC resolves that the newly appointed RP is not eligible, decision can be taken to replace the said RP with a new RP", the Appellate Adjudicating Authority held.

Indian Oil Corporation Limited v. Manjeet Cotton Pvt. Ltd.

Aii ciaims, liquidated damages, advances, interest up to the date of approved Resolution Plan stand extingaished and can't be agitated even if Corporate Debtor had a continuing iiabiiity against the Appellant – NCLAT, New Delhi

The National Company Law Appellate Tribunal, New Delhi (NCLAT) while dismissing an appeal filed by an Operational Creditor, has held that no exception can be taken to the ruling that all claims, liquidated damages, advances etc. and interest on advances up to the date of the Resolution Plan approved by the Adjudicating Authority stands extinguished and cannot be agitated by the Appellant in future.

The Operational Creditor had contended before the Appellate Adjudicating Authority that the Corporate Debtor was under a continuing liability under the contract to perform its obligations. The Appellant further argued that the order of the Adjudicating Authority cannot be read to mean that the Corporate Debtor, now the Successful Resolution Applicant is relieved from its obligation arising out of the Contract.

The Appellate Bench, after going through the submissions made by the parties to the Appeal, ruled that no exception can be taken to the direction of the NCLT because the claim was up to the date of the approval of the Resolution Plan. The NCLAT further observed that in the event any future obligation arises of the Corporate Debtor/ Successful Resolution Applicant, it is open for the parties to take recourse in accordance with the terms and conditions and the order impugned cannot govern any future events and consequences.

Avantba Holdings Limited & Anr v. Mr. Abbilasb Lal, RP & Ors

For the purpose of inellglbiiity under Section 29A, Date of NPA has to be counted from the date of deciaration of account as NPA and not from the date It Is made effective: NCLAT

The National Company Law Appeliate Tribunal (NCLAT), New Delhi has recently dismissed an appeai wherein the Appellant sought disqualification of the Successful Resolution Applicant under Section 29A of the insolvency and Bankruptcy Code, 2016 (iBC). The Appellate Adjudicating Authority held that the Successful Resolution Applicant was eligible at the time the plan was first submitted by him as the grace period of one year as stipulated under Section 29A(c) of the Code had not eiapsed.

The principal question of fact involved in this Appeal was whether the grace period shall be counted from the date the account of the Resolution Applicant was declared as NPA, or whether the date which the bank notified the NPA classification to be effective from. The NCLAT noted that if the interpretation that the date from which the NPA is notified to be effective is to be accepted, the purpose of statutory prescription under Section 29A can be defeated by the Financial institutions by declaring NPA on particular date and making it effective from back date, so that no Resolution Applicant can take the benefit of statutory provision as provided under Section 29A(c). The NCLAT concluded its ruling by holding that for the purpose of counting the grace period as prescribed under Section 29A(c) of the Code, the date of NPA classification by the bank has to be taken into consideration and not any other date/ back date from which the Bank notifies the NPA classification to be effective.

State Bank of Indla v. M/s Fedders Eiectric & Engineering Ltd

NCLT permits the continuation of avoidance applications by Lenders after approval of Resoiution Plan

The National Company Law Tribunal, Allahabad Bench has recently held that avoidance applications filed during the corporate insolvency resolution process (CiRP) of the Corporate Debtor may be pursued by the Lender even post the approval of Resolution Plan by the Adjudicating Authority. The Resolution Plan included within its ambit that the avoidance applications can be pursued by the lender after the approval.

The Adjudicating Authority allowed the substitution of the Resolution Professional with the Lender Bank i.e. State Bank of india in the pending avoidance applications. It was brought to the attention of NCLT that as per Regulation 38(3) of the CIRP Regulations, a resolution plan shall provide for the manner in which proceedings in respect of avoidance transactions, the manner in which the said proceedings shall be continued and the proceeds, if any shall be distributed.

With a direction to amend the memo of parties, so as to replace State Bank of india as the Appiicant in place of the Resolution Professional, the NCLT allowed the Application for substitution filed by the Lender.

For enquiries related to:

- Insolvency Process,
- Bankruptcy Process,
- Filing petition with NCLT/DRT,
- Appointment of Insolvency Professionals,
- [redacted]
- Hearing of Cases or any other enquiries

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