



DEVELOPMENTS IN INSOLVENCY LAWS

IN AUGUST 2018

Acuity Law was founded in November 2011. Acuity Law comprises of a team of young and energetic lawyers led by Souvik Ganguly and Gautam Narayan, who have deep and diverse experiences in their chosen areas of practice. We have advised 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 astute legal advice informed by commercial realities. Our areas of practice are divided into two departments.

The Corporate practice is led by Souvik Ganguly 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 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
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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 www.acuitylaw.co.in or write to us at al@acuitylaw.co.in.

INTRODUCTION

This newsletter covers developments with respect to the Insolvency and Bankruptcy Code, 2016 during the month of August 2018. We have covered orders passed by the Hon'ble Supreme Court of India, National Company Law Appellate Tribunal, various benches of the National Company Law Tribunal and the Disciplinary Committee of the Insolvency and Bankruptcy Board of India. We have also covered a circular issued by the Insolvency and Bankruptcy Board of India on 10 August 2018, with respect to 'notice for the meetings of the Committee of Creditors'. Please see below the summary of the relevant orders and the circular.

ABBREVIATIONS

Adjudicating Authority	AA
Arbitration and Conciliation Act, 1996	Arbitration Act
Committee of Creditors	CoC
Corporate Insolvency Resolution Process	CIRP
Disciplinary Committee	DC
Hon'ble Supreme Court of India	Supreme Court
Insolvency and Bankruptcy Code, 2016	Code
Insolvency and Bankruptcy Board of India	IBBI
Interim Resolution Professional	IRP
National Company Law Tribunal	NCLT
National Company Law Appellate Tribunal	NCLAT
Resolution Professional	RP

1. ADMISSION OF RESOLUTION PLAN DESPITE DEFAULT BY ITS SUBSIDIARY COMPANIES

Matter: Corporation Bank vs. Amtek Auto Limited

Order Date: 25 July 2018

Summary: In this case, 3 applications were taken up together by the NCLT, Chandigarh Bench as all 3 applications were related to approval or rejection of resolution plan. One of the application was filed by the RP for approval of the resolution plan submitted by Liberty House Group PTE Limited (Liberty House Group). Later, from a report published in the newspaper with respect to CIRP of another company i.e. ABG Shipyard, it was noted by the RP that Liberty House Group was ineligible for submitting a resolution plan, as the accounts of 3 subsidiary companies of Liberty House Group were declared non-performing for a period of more than 1 year on account of non-payment of interest by the 3 subsidiary companies to the tune of INR 18,000,000 (Indian Rupees Eighteen Million). However, it is to be noted that there was no outstanding principal amount. This ineligibility of Liberty House Group was brought to the attention of the NCLT vide another application by the RP.

In the meantime, the outstanding dues along with the interest and other charges were fully repaid by the 3 subsidiary companies and there were no outstanding dues payable.

In view of the above, the NCLT keeping in mind a) the substantial amount of the total debt of the corporate debtor b) the successful resolution plan and c) the large number of the related and connected entities of the Liberty House Group held that non-disclosure by Liberty House Group of 3 of its associate companies which defaulted in non-payment of interest, amounting to a fraction of the total debt is not fatal to the validity of the resolution plan, especially when it has been repaid. Accordingly, the NCLT approved the resolution plan.

2. JURISDICTION OF AA ON ELIGIBILITY CRITERIA

Matter: Kannan Tiruvengandam vs. M. K. Shah Exports Limited & Others

Order dated: 26 July 2018

Summary: An appeal was filed by Kannan Tiruvengandam, being the RP of Assam Company India Limited (Corporate Debtor) before the NCLAT against the order dated 26 April 2018 of the NCLT Guwahati Bench. Under the said order, the NCLT had directed the RP and the members of the CoC to reconsider the eligibility criteria for submitting the resolution plan from prospective applicants on the basis that the RP had left room for modification of the terms and conditions, with respect to the said eligibility criteria. It is pertinent to note that, the said directions were sought by M. K. Shah Exports Limited (one of the resolution applicant).

In view of the above, the NCLAT held that the AA has no jurisdiction to sit in appeal over the decision of expert bodies (like the CoC) relating to eligibility criteria till it is not shown that the same is perverse or against any of the provisions of the Code or existing law.

3. CONSIDERATION OF RESOLUTION PLAN SUBMITTED POST THE LAST DATE OF SUBMISSION OF PLANS

Matter: M/s. Sarda Energy and Minerals Limited in the matter of State Bank of India vs. Impex Metal & Ferro Alloys Limited

Order dated: 26 July 2018

Summary: The application is filed by M/s. Sarda Energy and Minerals Limited (Proposed Resolution Applicant) as the RP had not considered its expression of interest and resolution plan as they were submitted post their last day of submission. The question before the NCLT, Kolkata Bench was whether it had the jurisdiction to direct the RP to consider the resolution plan submitted by the Proposed Resolution Applicant.

The NCLT keeping in mind the objects of the Code and in order to maximize the value of the assets of the corporate debtor, directed the RP to consider the resolution plan submitted by the Proposed Resolution Applicant.

4. AA DO NOT HAVE THE JURISDICTION TO DETERMINE WHETHER A PERSON IS AN EMPLOYEE OF THE CORPORATE DEBTOR

Matter: Yogesh Kumar & Others vs. Shantanu T. Ray, RP of M/s. AML Steel and Power Limited & Others.

Order dated: 30 July 2018

Summary: Yogesh Kumar & Others (Appellants) filed an appeal to the NCLAT against the decision of the RP of the corporate debtor i.e. M/s. AML Steel and Power Limited, wherein the said RP had ousted the Appellants on classifying them as ex-employees of the corporate debtor.

The NCLAT held that, neither the NCLT Chennai Bench nor this appellate tribunal (i.e. NCLAT) have the jurisdiction to adjudicate the issue on whether the Appellants are employees or ex-employees of the corporate debtor. In view of the above, the NCLAT directed the RP to determine whether the Appellants were to be treated as current employees of the corporate debtor on the basis of evidences, such as pay roll and attendance sheet and decide who shall be retained for ensuring the corporate debtor to continue as a 'going concern'.

5. RESULT OF SUBROGATION OF RIGHTS OF HOMEBUYER

Matter: Ajay Walia vs. M/s. Sunworld Residency Private Limited

Order dated: 30 July 2018

Summary: Mr. Ajay Walia (Petitioner), a homebuyer had booked an apartment for INR 13,676,375 (Indian Rupees Thirteen Million Six Hundred Seventy Six Thousand Three Hundred Seventy Five) by obtaining a loan from HDFC Bank. As per the supplementary agreement entered into between the Petitioner and Sunworld Residency Private Limited i.e. the corporate debtor, the Petitioner had the option to cancel the purchase of the apartment on completion of 24 months from the date of loan disbursement.

Further, as per another clause in the supplementary agreement, the Petitioner was not liable to pay pre-EMI interest on the bank loan amount, but it was the liability of the corporate debtor to pay the interest on the loan for these 24 months and; upon cancellation, the corporate debtor was to refund the booking amount to the homebuyer. Subsequently a tripartite agreement was entered into between the Petitioner, HDFC Bank and the corporate debtor whereby the Petitioner unconditionally and irrevocable subrogated its right to receive any amount payable by the corporate debtor to the Petitioner in the event of cancellation, in favour of HDFC Bank.

The question before the NCLT, Allahabad Bench was whether the Petitioner could be considered as a financial creditor. The said NCLT held that as the Petitioner had subrogated all its rights in favour of HDFC Bank, he cannot be treated as a financial creditor.

6. LOCUS STANDI OF IBBI TO FILE AN APPEAL

Matter: IBBI vs. Wig Associates Private Limited & Others.

Order dated: 01 August 2018

Summary: IBBI had filed an application with the NCLAT as it noticed that the interpretation given by the NCLT, Mumbai Bench of Section 29A was incorrect which resulted in selection of an ineligible resolution applicant further leading to approval of an ineligible resolution plan.

The NCLAT held that though the observation made by the said NCLT in relation to the interpretation of Section 29A may not be proper, the IBBI has no *locus standi* to challenge the same and accordingly the application was disposed.

7. SUSPENDED DIRECTOR(S) OF THE CORPORATE DEBTOR IS / ARE NOT ENTITLED TO RECEIVE CONFIDENTIAL INFORMATION UNDER THE CODE

Matter: Standard Chartered Bank & DBS Bank vs. Ruchi Soya Industries Limited

Order dated: 03 August 2018

Summary: In this matter, an application was filed by one of suspended directors of the corporate debtor (Applicant) at the NCLT, Mumbai Bench as it was aggrieved by one of the decisions passed by the CoC of the corporate debtor, wherein the said CoC refused to grant permission to the Applicant to participate in the CoC meetings, due to fear of leaking confidential information, which comprised of 'Fair Value' and 'Liquidation Value'.

In view of the above, the said NCLT first clarified that, under the Code and allied regulations, the suspended directors of the corporate debtor and other persons (other than the CoC) shall come under the definition of 'participant' and not 'members' of the CoC. In view of the same, the NCLT held that though a participant has a right to attend the meetings of the CoC and obtain relevant information, the participant cannot have access to confidential information and the access to such confidential information is only limited to the members of the CoC.

8. APPLICATION FILED AFTER DISSOLUTION OF PARTNERSHIP FIRM

Matter: Ramesh Kumar Suneja vs. Brij Mohan Sahni

Order dated: 07 August 2018

Summary: Ramesh Kumar Suneja (Appellant) has claimed that the application filed by Brij Mohan Sahni (Financial Creditor) which got duly admitted by the NCLT, New Delhi Bench is barred by the principles of res-judicata as an earlier application filed by M/s. Gay Printers was already dismissed. M/s. Gay Printers was a partnership firm between Late Mr. Surinder Mohan Sahni and the Financial Creditor and post the death of Mr. Surinder Mohan Sahni the partnership between Mr. Surinder Mohan Sahni and the Financial Creditor came to an end. Accordingly, the firm, M/s. Gay Printers stood dissolved. Subsequently, Mr. Rasik Sahni entered into partnership with the Financial Creditor and the new partnership firm took all the assets and liabilities of M/s Gay Printers.

M/s. Gay Printers had granted a loan of INR 10,000,000 (Indian Rupees Ten Million) to the corporate debtor and therefore an application before the NCLT was made by M/s. Gay Printers. However, the NCLT dismissed this application as it was filed post the dissolution of M/s. Gay Printers. Subsequently, an application was filed by the Financial Creditor against the corporate debtor which was admitted by the NCLT. Aggrieved by the decision of the NCLT the promoter of the corporate debtor (i.e. the Appellant) moved the NCLAT.

The NCLAT set aside the order of the NCLT, for the reasons that, firstly, there was nothing on record to show that the loan amount of INR 10,000,000 (Indian Rupees Ten Million) was advanced by the Financial Creditor and secondly, the said amount was advanced by M/s. Gay Printers, which stood dissolved and not by the Applicant.

9. SUPREME COURT REVIVES PERIOD OF 180 DAYS FOR JAYPEE INFRATECH LIMITED

Matter: Chitra Sharma and Others vs. Union of India and Others

Order dated: 09 August 2018

Summary: A Special Leave Petition (SLP) was initially filed by the home buyers who had invested in the projects of Jaypee Infratech Limited after the commencement of CIRP against Jaypee Infratech Limited under the Code. The said SLP was filed, as admission of Jaypee Infratech Limited for CIRP would have undermined the delivery of the residential apartments to the said homebuyers.

In relation to the said SLP, the Supreme Court though did not stay the CIRP proceedings against Jaypee Infratech Limited, but ordered that the representatives of the home buyers should be made part of the CoC for safekeeping the interest of the homebuyers.

Subsequently, as no resolution plan was finalized by the CoC, Jaypee Infratech Limited would have been admitted for liquidation. The homebuyers, in order to protect their interest, once again moved the Supreme Court.

In light of the amendments made to the Code, which permit homebuyers to be a part of the CIRP, the Supreme Court disposed of all pending petitions and applications before it in this matter and revived the CIRP period by another 180 days, thus ordering a fresh round of bidding for Jaypee Infratech Limited. However, the Supreme Court barred Jaiprakash Associates Limited and/or its promoters from participating in the CIRP of Jaypee Infratech Limited, as they are ineligible under section 29A of the Code.

10. PROVISIONS OF THE CODE WILL PREVAIL OVER THE INCOME TAX ACT, 1961

Matter: PR. Commissioner of Income Tax vs. Monnet Ispat and Energy Limited

Order dated: 10 August 2018

Summary: In this matter, the Supreme Court upheld the decision of the Delhi High Court and held that, in view of the non-obstante clause under the Code, the provisions of the Code will prevail over the provisions of the Income Tax Act 1961, on existence of any inconsistency between the said statutes.

Further, the Supreme Court also clarified that, dues towards secured creditors will take precedence over income tax dues.

11. THE CODE CANNOT BE INVOKED IN RESPECT OF AN OPERATIONAL DEBT WHERE AN ARBITRAL AWARD (NOT BEEN ADJUDICATED UPON) HAS BEEN PASSED AGAINST THE DEBTOR

Matter: K. Kishan vs. M/s. Vijay Nirman Company Private Limited

Order dated: 14 August 2018

Summary: In this matter, an appeal was made to the Supreme Court challenging the decision of the NCLAT and the NCLT, Hyderabad Bench. The NCLT admitted the application, as not only did the alleged corporate debtor admit the claim (operational debt) under the pending arbitration proceeding against it, but had also not stayed the arbitration award (which was passed in favour of the operational creditor). The NCLAT, in addition to the above, observed that, due to the non-obstante clause under the Code, the provisions of the Code will prevail over the provisions of the Arbitration Act and thereby dismissed the appeal.

The Supreme Court held that, in the present matter, the operational debt happens to be a disputed one and thereby allowed the appeal by rejecting the judicial pronouncements of the aforementioned AA's for the following reasons:

- a) Once legal proceedings have been initiated under the Arbitration Act (for challenging the award), the debt would automatically be classified as a 'disputed debt'. The exception being that, only when such arbitration proceedings gets barred by the laws of limitation, will it then be eligible for the CIRP under the Code.
- b) The NCLAT was erroneous in applying the provisions of the non-obstante clause of the Code, as the award passed under the Arbitration Act together with the steps taken for its challenge would only make it clear that the operational debt in the present case is a disputed one.

12. MATURITY OF CLAIM OR DEFAULT OF CLAIM HAS NO NEXUS WITH FILING OF CLAIM

Matter: i. Export Import Bank of India vs. RP of JEKPL Private Limited
ii. Axis Bank Limited vs. Edu Smart Services Private Limited and DBS Bank Limited

Order dated: 14 August 2018

Summary: The NCLAT dealt with two appeals simultaneously, one filed by Export Import Bank of India (EXIM Bank) with respect to the CIRP initiated against JEKPL Private Limited (JEKPL) and (ii) Axis Bank Limited (Axis Bank) with respect to CIRP against Edu Smart Services Private Limited as the question of law was common.

In this matter, EXIM Bank had advanced a loan to Jubilant Energy N.V. (JENV) being the principal borrower, for which a corporate guarantee was executed by Jubilant Enpro Private Limited (JEPL / Corporate Guarantor). The contractual obligation of the Corporate Guarantor was further secured by a counter corporate guarantee by JEKPL in favour of EXIM Bank.

On 17 March 2017, JEKPL got admitted under the Code for CIRP. Subsequently, EXIM Bank invoked the corporate guarantee as well as the counter corporate guarantee against JEPL and JEKPL. On such invocation EXIM Bank filed a claim before the RP (of JEKPL) as a financial creditor. However, the RP did not treat EXIM Bank as a financial creditor, as EXIM Bank invoked the said guarantees post the CIRP date. Since, the NCLT, Allahabad Bench affirmed the decision of the RP and rejected the application filed by EXIM Bank, EXIM Bank filed an appeal before the NCLAT.

The NCLAT observed that a 'corporate counter guarantee' is essentially a 'supplementary / additional guarantee' and that 'counter-indemnity obligation' with respect to counter guarantee was provided by JEKPL as EXIM Bank disbursed debt against the consideration for time value of money in principal borrower's favour. In view of the above, the NCLAT held EXIM Bank to come well within the definition of financial creditor, as provided under the Code.

In the case of Axis Bank, the NCLT, Principal Bench rejected the claim of Axis Bank on the ground that, 'corporate guarantee' cannot be invoked during ongoing CIRP due to the moratorium, and that, only claims which are due and payable before commencement of CIRP can only be taken into consideration. The NCLAT however held that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim pursuant to public announcement or for collating the claim or for updating claim.

Hence, the NCLAT while holding EXIM Bank and Axis Bank to be a 'financial creditor' directed the respective NCLT's to treat them as a member of their respective CoC while reconsidering / considering resolution plan(s).

13. MORATORIUM SHALL NOT BE APPLICABLE TO PERSONAL GUARANTORS OF THE CORPORATE DEBTOR

Matter: State Bank of India vs. Ramakrishnan V. and Another

Order dated: 14 August 2018

Summary: In the present matter, State Bank of India filed an appeal to the Supreme Court against the order of the NCLAT, dated 28 February 2018. The NCLAT under the said order upheld the decision of the NCLT, Chennai Bench by stating that proceedings under the Code can be initiated against a personal guarantor. The NCLAT had further held that, a resolution plan being binding on a personal guarantor, makes a personal guarantor a part of the CIRP. In view of the above, moratorium imposed under the Code should be made applicable to personal guarantors.

The Supreme Court overruled the decision of the NCLAT and held that the provisions of moratorium as stipulated under the Code should not be made applicable to personal guarantors of the corporate debtor, on the following basis:

- a) Personal guarantors will continue to be proceeded against under the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 as neither Part III of the Code (which deals with CIRP and bankruptcy for individuals and partnerships firms) nor the repealing provisions i.e. section 243 of the Code, which repeals the aforementioned 2 legislation, has been brought into force; and
- b) The Code's objective is not to allow personal guarantors (wherein majority of cases, personal guarantees are given by directors who are in management of the companies, as clarified by the Supreme Court) to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why moratorium provision is not applicable to them.

14. AN IRP / RP CANNOT AUTHORISE A FIRM / COMPANY (IN WHICH HE IS A PARTNER / DIRECTOR) TO RAISE INVOICES FOR HIS PROFESSIONAL FEE ON HIS BEHALF

Matter: Mr. Dinkar T. Venkatasubramanian

Order dated: 23 August 2018

Summary: In this matter, Mr. Dinkar T. Venkatasubramanian (Defendant) was appointed as the IRP vide order dated 17 March 2017, for undertaking the CIRP of JEKPL Private Limited (Corporate Debtor). Subsequently, the Defendant was replaced by Mr. Mukesh Mohan (Complainant) by getting appointed as the RP of the Corporate Debtor. Immediately, on being appointed as the RP, the Complainant made a complaint against the Defendant to the IBBI, by stating that the Defendant in order to escape his personal liability of paying income tax directed the payment of his professional fees to M/s. E&Y LLP (E&Y). It is pertinent to note that, the Defendant is a partner at E&Y.

The DC, IBBI after some deliberation held that the Defendant acted in contravention to the provisions of the Code and its allied regulations as the Defendant had permitted E&Y to raise an invoice on his behalf for his professional fee, thereby treating the profession of 'Insolvency Professionals' as an employment.

The DC further, observed that, an insolvency professional must maintain complete independence in his professional relationships and while conducting the CIRP.

15. CODE OF CONDUCT TO BE FOLLOWED BY THE RP

Matter: Mr. Mukesh Mohan

Order dated: 23 August 2018

Summary: In this matter, Mr. Mohan was appointed as IRP / RP for the CIRP of 4 corporate debtors, namely, JEKPL Private Limited, Carnation Auto India Private Limited, Athena Demwe Power Limited, and Tirupati Inks Limited. However, Mr. Mohan had contravened several provisions of in these CIRP's. From the order passed on account of the contraventions made by Mr. Mohan, the following is inferred:

- a) RP must not enter into a private communication with a creditor, irrespective of the creditors voting power.
- b) RP must seek approval of the CoC before specifying the eligibility criteria in the expression of interest and this cannot be considered as a post facto approval.
- c) RP is the sole authority for taking a view on irregular transactions and filing applications before the AA seeking appropriate relief. The CoC has no authority to decide the merits of such transactions and whether to file and when to file the application before the AA. It can, however, raise a concern if the RP does not discharge his duties, including his duties in respect of irregular transactions, in accordance with Code.
- d) RP must ensure that the professionals including forensic auditor and registered valuers engaged by him to assist him in CIRP must not have any conflict of interest as they have a substantial bearing on the outcome of a CIRP, particularly on maximization of value of the assets of the corporate debtor.
- e) RP must not usurp other role and must not allow others to usurp his role. He must perform his defined role under the Code.

16. IBBI ISSUES CIRCULAR REGARDING NOTICE FOR THE MEETINGS OF THE COC

The IBBI has issued a circular dated 10 August 2018, bearing no. IBBI/CIRP/016/2018, with respect to the 'notice for the meetings of the CoC'.

Under this circular, directions have been issued to the IRP / RP, wherein every notice of meeting of the CoC and any other communication addressed to the financial creditors (other than class creditors), needs to specify that the financial creditors must be represented in the CoC or in any meeting of the CoC by such persons who are competent and are authorised to take decisions on the spot and without deferring decisions for want of any internal approval.