

ACUITY LAW

**INSOLVENCY
LAW NEWSLETTER**

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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 and Gautam Narayan, 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 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
- 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 May 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 (i) a circular dated 02 May 2019 issued by Insolvency and Bankruptcy Board of India (**IBBI**) titled 'Temporary Surrender and Revival of Professional Membership of an Insolvency Professional'; and (ii) the 'Insolvency Professionals to act as Interim Resolution Professionals and Liquidators (Recommendation) Guidelines, 2019' dated 14 May 2019. Please see below the summary of the relevant regulatory developments and reports.

AMENDED PROVISIONS ONLY HAVE PROSPECTIVE EFFECT AND NOT RETROSPECTIVE EFFECT, UNLESS SPECIFIED OR UNLESS THE PROVISION IS BENEFICIAL IN NATURE AND DOES NOT IMPOSE ADDITIONAL OBLIGATIONS ON ANY PARTY.

Matter: Arcelor Mittal India Private Limited vs. Abhijit Guhathakurta

Order dated: 15 April 2019

Summary:

The NCLT, Mumbai Bench (**NCLT**) had earlier allowed the application for initiation of Corporate Insolvency Resolution Process (**CIRP**) against EPC Constructions India Limited (**Corporate Debtor**). In the present matter an application was made by Arcelor Mittal India Private Limited, an unsuccessful resolution applicant (**Applicant**) against the approval of the resolution plan submitted by Royale Partners Investment Fund Limited (**Successful Resolution Applicant**) as being invalid for not obtaining relevant approval by the Competition Commission of India (**CCI**) before presenting the resolution plan to the Committee of Creditors (**CoC**).

It is to be noted that, the amendment notifying the requirement of CCI approval of a resolution plan containing a provision for combination prior to it being placed before the CoC came into force on 17 August 2018. The CIRP proceedings against the Corporate Debtor had initiated on 20 April 2018.

The question for consideration before the NCLT was whether the newly introduced proviso requiring CCI approval of a resolution plan, containing a provision for combination prior to it being placed before the CoC would be applicable in the present case.

The NCLT observed that the provisions that exist at the time of admission of the CIRP application would be applicable at the stage of submission of resolution plan. It also observed that the amended provisions only had prospective effect and not retrospective effect, unless the provision is beneficial in nature and does not impose additional obligations on any party.

Accordingly, in the present case it was held that since the approval of the plan by the CCI was an additional obligation on a resolution applicant, such provision would not have retrospective effect and only the provisions at the time of admission of application would apply. Thus, the resolution plan without the approval of the CCI was held to be valid and the present application filed by the Applicant was dismissed.

NCLT DIRECTS THE MATTER TO THE MINISTRY OF CORPORATE AFFAIRS AND IBBI TO RESOLVE DEADLOCK.

Matter: IDBI Bank Limited vs. Jaypee Infratech Limited

Order dated: 15 April 2019

Summary:

Two applications were filed before the NCLT, Allahabad Bench, one by nine home buyers association and the other by eight financial creditors all of them being members of the Committee of Creditors (**CoC**). Due to difference of opinion expressed by the members of NCLT, Allahabad Bench on the point pertaining to procedure for determining voting share for passing resolutions in the CoC that comprise multiple class of financial creditors such as home buyers, lenders and fixed depositors during Corporate

Insolvency Resolution Process (**CIRP**), the matter was referred to the Hon'ble President of the NCLT. The Hon'ble President of the NCLT in turn referred the matter before NCLT, New Delhi Bench (**NCLT**).

The main application before the NCLT, Allahabad Bench for initiation of Corporate Insolvency Resolution Process (**CIRP**) against Jaypee Infratech Limited (**Corporate Debtor**) was filed by IDBI Bank Limited (**Financial Creditor**).

The question for consideration before the NCLT was whether the various voting share thresholds fixed for the decision of the CoC, prescribed under Insolvency and Bankruptcy Code, 2016 (**Code**) were to be followed mandatorily or they were only directory.

The question for consideration arose for the reason being that, in this case although the lenders, fixed depositors and home buyers had a total voting percentage of 41.8%, 0.01% and 58.1% respectively, only a small number of home buyers cast their votes even with regard to appointment of authorized representative. Since a large number of home buyers failed to exercise their vote, it was not possible to obtain the requisite vote required under the Code and therefore items tabled before the CoC were not being passed. The main petition showed that nine out of ten resolution plans were rejected due to poor response in voting by home buyers as compared to the full participation by the lenders. The contention of the home buyers is that they should be considered as a separate class of creditors as they have the same goal and similar agenda, therefore the rule of majority in cases of voting by creditors in class should be made applicable for the purpose of the CIRP of the Corporate Debtor.

The NCLT considering the larger public interest has directed this matter to the Ministry of Corporate Affairs and IBBI to resolve this deadlock.

POST COMPLETION OF 270 DAYS PERIOD IF NO RESOLUTION PLAN IS APPROVED THEN THE ONLY OPTION IS TO GO FOR LIQUIDATION.

Matter: Ramchandra D. Choudhary, Resolution Professional of Varia Aluminium Private Limited vs. Committee of Creditors of Varia Aluminium Private Limited

Order dated: 22 April 2019

Summary:

In this matter, an application has been filed by the resolution professional (**RP**) before NCLT, Ahmedabad Bench (**NCLT**) seeking an extension of 294 days and to exclude the period for which the process of Corporate Insolvency Resolution Process (**CIRP**) could not be carried out.

The NCLT observed that the RP had already been granted 90 days extension which expired on 20 August 2018. Therefore, enough time was given to the RP and the RP had failed to perform his duties.

The NCLT while partially allowing the application, *inter alia*, held the following:

- a. Time is of the essence of the Insolvency and Bankruptcy Code, 2016 (**Code**) and it has to be completed within 270 days itself.
- b. Prayer for 294 days extension is not justifiable and if no resolution plan is approved, then the only option is to go for liquidation.

The NCLT however granted 47 days extension i.e. the period taken to appointment the RP and also excluded the period for which the present application was pending.

PROPERTIES ATTACHED BY SEBI TO BE DE-ATTACHED AND HANDED OVER TO THE RP

Matter: Mr. Bhanu Ram and Others vs. M/s HBN Dairies and Allied Limited

Order dated: 30 April 2019

Summary:

In this matter, an application was filed by the Resolution Professional (**RP**) of M/s HBN Dairies and Allied Limited (**Corporate Debtor**) before the NCLT, Principal Bench (**NCLT**) seeking direction to be given to the Securities and Exchange Board of India (**SEBI**) to de-attach the properties of the Corporate Debtor that had been attached prior to the commencement of the Corporate Insolvency Resolution Process (**CIRP**).

The properties had been attached by SEBI pursuant to an order by the Securities Appellate Tribunal under the SEBI Act and hence SEBI refused to de-attach the properties.

The NCLT made a reference to the non-obstante clause under the Insolvency and Bankruptcy Code, 2016 (**Code**) which gives the Code an overriding effect over all other laws and the moratorium clause in the Code which stays proceedings under all other legislation. NCLT held that since the CIRP had already been initiated and a moratorium order had been passed, SEBI must de-attach the properties and hand over their possession to the RP so as to enable the RP to carry out the CIRP expeditiously.

NO BUSINESS WAS CARRIED OUT BY CORPORATE DEBTOR WITH THE INTENT TO DEFRAUD THE CREDITORS OR FOR ANY FRAUDULENT PURPOSE

Matter: Anup Kumar, Resolution Professional of M/s Shivakala Developers Private Limited vs. BDR Builder and Developers Private Limited

Order dated: 02 May 2019

Summary:

In this matter, three applications have been filed by Anup Kumar, the Resolution Professional (**RP**) before the NCLAT for setting aside the transaction entered into by M/s Shivakala Developers Private Limited (**Corporate Debtor**) on the ground of it being a preferential transaction to defraud the creditors.

The RP has alleged that the sale considerations given by the Corporate Debtor are undervalued and not done in the ordinary course of business.

Corporate Debtor was a real estate developer who, prior to initiation of CIRP, sold a commercial complex to BDR Builder & Developers Private Limited and others (**Respondents**).

NCLAT while dismissing the applications held the following:

- a. The Corporate Debtor was in the real estate business; therefore, the sale was in the ordinary course of business under the provision of the Insolvency and Bankruptcy Code, 2016 (**Code**);
- b. The Respondents are not related parties and the transactions were made about eight to nine years before the commencement of the insolvency proceedings. Therefore, the application for relevant period for avoidable transaction was uncalled for; and
- c. The alleged violation of provision of the Code for preferential transaction cannot be termed to be for fraudulent purpose. There was no intent to defraud the creditors by any business of the Corporate Debtor.

COLLATERAL SECURITY GIVEN FOR THE LOAN OF A THIRD PARTY SHALL NOT FALL UNDER THE CATEGORY OF A 'FINANCIAL DEBT' AS DEFINED UNDER THE CODE**Matter:** ICICI Bank Limited vs. Varun Corporation Limited**Order dated:** 06 May 2019**Summary:**

The NCLT, Mumbai Bench (**NCLT**) had earlier allowed an application for initiation of Corporate Insolvency Resolution Process (**CIRP**) against Varun Corporation Limited (**Corporate Debtor**). As no resolution plan was approved in this case, a liquidation order was passed by the NCLT. The present application is filed by ICICI Bank (**Applicant**) against the liquidator of the Corporate Debtor (**Liquidator**) on the ground that the Liquidator rejected the claim put forth by the Applicant.

The claim of the Applicant is in respect of a security provided in favor of the Applicant by the Corporate Debtor with respect to a third-party loan agreement. The shares held by the Corporate Debtor in the third-party company had already been pledged to the security trustee as appointed by the Applicant and no separate corporate guarantee was given for the said loan.

It was observed by the NCLT that the Corporate Debtor had no nexus with the third-party loan agreement and the Corporate Debtor had already performed their duties with respect to the same. It was held that collateral security given for the loan of a third party shall not fall under the category of a 'financial debt' as defined under the Insolvency and Bankruptcy Code, 2016 (**Code**).

It was further observed that the Applicant's debt was not being denied, but only the Applicant's status as a Financial Creditor was denied. The Applicant, being a secured creditor could move against the Corporate Debtor under the Code as a secured creditor.

Accordingly, the application by the Applicant against the Liquidator was dismissed and the Liquidators decision with respect to the claim was upheld.

DURING MORATORIUM SEBI WOULD NOT BE ABLE TO RECOVER ANY AMOUNTS NOR SELL ANY ASSETS OF THE CORPORATE DEBTOR**Matter:** Mr. Bohar Singh Dhillon vs. Mr. Rohit Sehgal**Order dated:** 09 May 2019**Summary:**

In this matter, an appeal was made before the NCLAT by a shareholder (**Appellant**) of HBN Dairies and Allied Ltd (**Corporate Debtor**) against the order of the NCLT, Principal Bench (**NCLT**). The order of the NCLT, admitted the application filed jointly by a group of investors, as financial creditors against Corporate Debtor for initiation of Corporate Insolvency Resolution Process (**CIRP**) under the Insolvency and Bankruptcy Code, 2016.

It is the case of the Appellant, that the application for initiating CIRP was not maintainable as Securities and Exchange Board of India (**SEBI**) had already taken action against the Corporate Debtor by attaching its properties even before the application for initiation of CIRP had been approved by the NCLT.

The question for consideration before the NCLAT was whether on failure to perform the duties, if any, penal order is passed for penalty imposed on the 'Corporate Debtor' or any recovery can be made in terms of the SEBI Act, 1992.

NCLAT observed that since moratorium order had been passed by the NCLT, till the time the order continues to have effect, SEBI would not be able to recover any amounts nor sell any assets of the Corporate Debtor. NCLAT also observed that the CIRP application had only been made by the creditors after there had been an inordinate delay by the SEBI in resolving the matter.

Accordingly, the NCLAT upheld the order of the NCLT admitting the application for initiation of CIRP of the Corporate Debtor. However, the NCLAT made note of the fact that the resolution professional appointed to carry out the CIRP process was to comply with the requirements under the SEBI Act, 1992 and that SEBI was entitled to take separate action against the directors and shareholders of the Corporate Debtor.

SUPPLIES WILL AMOUNT TO ESSENTIAL SUPPLIES ONLY WHEN SUCH SUPPLY IS NOT USED AS A DIRECT INPUT TO THE OUTPUT PRODUCED BY THE CORPORATE DEBTOR

Matter: Mr. G. Ramachandran, Resolution Professional of Sai Regency Power Corporation Private Limited vs. M/s ONGC Limited and another

Order dated: 15 May 2019

Summary:

In this matter, an application was filed before the NCLT, Chennai Bench (**NCLT**) by the Resolution Professional (**RP**) to direct ONGC (**Respondent**) to reinstate the supply of natural gas that had been terminated.

Sai Regency Power Corporation Private Limited (**Corporate Debtor**) had an existing Gas Supply Arrangement with the Respondent which was terminated by the Respondent prior to the admission of the application for initiation of Corporate Insolvency Resolution Process (**CIRP**) on account of breach of material obligations by the Corporate Debtor. The Corporate Debtor was an ongoing concern during the CIRP process and thus the RP sought direction be given to the Respondent to restart the gas supply by placing reliance on the moratorium issued in the case, which prevented any interruption of supply of essential services.

The NCLT observed that under the moratorium clause in the Insolvency and Bankruptcy Code, 2016; the supply of electricity, water, telecommunication services and information technology services will amount to essential supplies only when such supply is not used as a direct input to the output produced by the Corporate Debtor. In view of the above the NCLT held that the supply of natural gas in the present case would not fall within the category of essential services and dismissed the application.

CIRCULAR DATED 02 MAY 2109 ON TEMPORARY SURRENDER AND REVIVAL OF PROFESSIONAL MEMBERSHIP OF AN INSOLVENCY PROFESSIONAL

Circular: Temporary Surrender and Revival of Professional Membership of an Insolvency Professional.

Order dated: 02 May 2019

Summary:

IBBI on the 02 May 2019 issued a circular titled 'Temporary Surrender and Revival of Professional Membership of an Insolvency Professional' (**Circular**) advising the Insolvency Professional Agency to not ordinarily accept surrender of professional membership of an Insolvency Professional (**IP**) as such surrender would create inconveniences in a number of circumstances. The circular lists out all such circumstances and also particular forms which may be used to process the acceptance of temporary surrender and revival of Professional membership of the IP.

The key provisions of the Circular are as follows:

Temporary surrender of professional membership shall not ordinarily be accepted under the below cases:

- a. where the IP is conducting a resolution process under the Insolvency and Bankruptcy Code, 2016;
- b. where the IP is acting as an authorised representative of a class of financial creditors; and

- c. where the IP is included in the panel of IPs under any guidelines made in that behalf.

The circular also lays down various forms for the purposes of acceptance of temporary surrender and revival of professional membership of an IP.

GUIDELINES DATED 14 MAY 2019 ON INSOLVENCY PROFESSIONALS TO ACT AS INTERIM RESOLUTION PROFESSIONALS AND LIQUIDATORS (RECOMMENDATION) GUIDELINES, 2019

Guidelines: Insolvency Professionals to act as Interim Resolution Professionals and Liquidators (Recommendation) Guidelines, 2019

Date: 14 May 2019

Summary:

IBBI on the 14 May 2019 notified the guidelines titled 'Insolvency Professionals to act as Interim Resolution Professionals and Liquidators (Recommendation) Guidelines, 2019' which lays down new norms for creation and maintenance of a Panel of Insolvency Professionals for the purpose of recommending such professionals to carry out Corporate Insolvency Resolution Process (**CIRP**) or Liquidation Proceedings.

Section 16 (3) (a) of the Insolvency and Bankruptcy Code, 2016 (**Code**) requires IBBI to recommend an Insolvency Professional (**IP**) on the making of a reference by the Adjudicating Authority (**AA**) for such an IP to act as an Interim Resolution Professional (**IRP**) in any matter. Section 34(4) of the Code also provides for the replacement of such IP under specific circumstances. However, as the IBBI does not have any information as to the volume, nature or complexity of the CIRP, it does not add much value to the process of appointment of the IP.

Also, the process of recommendation and final appointment of the IP usually takes more than a period of three weeks and thus the need for a new system of such appointment was felt.

For the new system, the IBBI laid down the following guidelines:

1. Creation of a Panel of IPs which shall be shared with the AA from where they may select any IP for the CIRP or Liquidation Process;
2. Validity of the Panel so formed shall be a period of 6 months and a new Panel shall replace the earlier Panel at the expiry of such period;
3. Eligibility of an IP to be a part of the Panel:
 - a. no disciplinary proceedings shall be pending against him initiated either by the IBBI or the Insolvency Professional Agency
 - b. no conviction in the last three years by a court of competent jurisdiction
 - c. must have expressed his interest to be included in the Panel
 - d. must undertake to discharge his responsibility as IRP or Liquidator
4. IPs shall be included in the Panel against the Bench under whose jurisdiction the registered office i.e. the address of the IP as registered with the Board, is located;
5. IBBI shall invite an expression of interest (**EoI**) from IPs to serve on such Panel and submission of such EoI by the IP shall be considered to be the IPs unconditional consent to act as an IP as per the directions of the AA;
6. Any IP included in the Panel shall not withdraw his interest to act as IRP or Liquidator, or decline to act as one or surrender his resignation during the validity of the Panel; and
7. Inclusion of IPs in the Panel shall be in the order of the volume of ongoing processes that the IPs have in hand. Depending on the volume of ongoing processes that the IPs have in hand, the IPs will get a score between 0 to 100; 0 being the score for an IP having highest volume of ongoing processes and 100 for an IP having no ongoing process. In case of similar number of ongoing processes, the IP registered earlier would be placed above the IP registered later.

This guideline replaced the Insolvency Professionals to act as Interim Resolution Professionals or Liquidators (Recommendations) (Second) Guidelines, 2018.

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