

ACUITY **LAW**

**INSOLVENCY
LAW NEWSLETTER**

November 2021

acuitylaw.co.in

ABOUT ACUITY LAW

Acuity Law was founded in November 2011. Acuity Law comprises of a team of young and energetic lawyers/ professionals led by Souvik Ganguly, Gautam Narayan, Deni Shah and Renjith Nair 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 three departments. The Corporate practice is led by Souvik Ganguly, the Global Trade and Tax practice is led by Deni Shah and the Disputes practice is led by Gautam Narayan with assistance from Renjith Nair.

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 Global Trade and Tax practice, Acuity Law advises on:

- Cross-border tax planning and jurisdiction analysis
- Strategies for acquisitions, mergers, divestitures, diversification or consolidation of businesses
- Inbound and outbound investment structuring
- Endowment planning / wealth management strategies
- Global Trade & Customs laws, including foreign trade policy
- International supply chain optimization
- Goods & Services Tax and other Indirect taxes

As part of the Disputes practice, Acuity Law 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.

The information contained in this document is not legal advice or legal opinion. The contents recorded in the said document are for informational purposes only and should not be used for commercial purposes. Acuity Law LLP disclaims all liability to any person for any loss or damage caused by errors or omissions, whether arising from negligence, accident or any other cause.

INTRODUCTION

This newsletter covers key updates about developments in the insolvency law during the month of November 2021.

We have summarized the key judgments passed by the High Courts (**HC**), National Company Law Appellate Tribunal (**NCLAT**), the National Company Law Tribunals (**NCLT**) and the proposed amendments in the Insolvency and Bankruptcy Code, 2016 (**Code**) by the Ministry of Corporate Affairs, Government of India (**Government**). Please see below the summary of the relevant regulatory developments.

1) A DEL CREDERE AGENT IS NOT AN OPERATIONAL CREDITOR UNDER THE CODE

Matter: Alturas Trading Corp. v. VRMX Concrete India Pvt. Ltd.

Order dated: 04 October 2021

Summary:

In the present case, Alturas Trading Corp (**Alturas**), a del credere agent, filed an application to initiate corporate insolvency resolution process (**CIRP**) of VRMX Concrete India Pvt. Ltd. (**VRMX**). An agreement was entered into between Alturas and Bharat Cement Corporation Pvt. Ltd. (**Principal**) appointing Alturas as a del credere agent. In commercial parlance, a del credere agent is a person who is engaged by the principal to assist in supply of goods or services by contacting potential buyers on behalf of the principal. The difference between an agent and a del credere agent is that a del credere agent guarantees to make payment to the principal if the buyer fails to make payment before the due date, while an ordinary agent does not guarantee recovery of dues. In the present case, Alturas would be entitled to certain commission only upon realization of the sale proceeds from VRMX to Principal. As VRMX had defaulted in payment to Principal, Alturas had to compensate the Principal. It was on the basis of such compensation amount that Alturas sought to initiate CIRP of VRMX.

NCLT noted from the agreement between Alturas and the Principal that there was no nexus between VRMX and Alturas. Though goods were supplied, invoices were raised by the Principal and not by Alturas itself, which was merely a del credere agent, NCLT opined that there was no operational debt which was due and payable by VRMX to Alturas. Accordingly, NCLT held that the application by Alturas was not maintainable and dismissed the same.

2) CIRP IS MAINTAINABLE AGAINST CORPORATE DEBTOR WHICH IS A GOVERNMENT COMPANY

Matter: ATE Projects Pvt. Ltd. v. Rajasthan Drugs and Pharmaceuticals Ltd. and Ors.

Order dated: 11 November 2021

Summary:

Between 2015 to 2017, ATE Projects Pvt. Ltd. (**ATE Projects**) had provided services to Rajasthan Drugs and Pharmaceuticals Ltd. (**RDPL**), a Government of India enterprise, payments for which were outstanding. In 2017, the Government of India ordered the shutting down of RDPL and consequently, ATE Projects was directed to stop the work at site and informed that the outstanding liabilities shall be cleared in accordance with the concerned authority's decision. As payments were still outstanding, ATE Projects filed a petition before NCLT, Jaipur Bench in 2019 seeking CIRP of RDPL.

The issues before the NCLT, Jaipur bench were:

- Whether an application to initiate CIRP is maintainable against a Government Company; and
- Whether existence of an arbitration clause in the agreement executed between the parties bars initiation of CIRP.

NCLT observed that a "Government Company" is covered under the definition of a "Company" under Companies Act, 2013 (**Act**). Since RDPL has not been performing any governmental functions or the functions of state, it cannot be immune to insolvency proceedings merely on the ground of being a Government Company.

The NCLT also held that the Code has overriding effect over the Arbitration and Conciliation Act, 1996 and therefore, the objection taken by RDPL that ATE Projects' application is not maintainable in view of the arbitration clause in the agreements between the parties was without any merit. Accordingly, CIRP was initiated against RDPL.

3) ONCE A RESOLUTION PLAN IS APPROVED BY NCLT, THE CORPORATE DEBTOR CANNOT BE PROSECUTED FOR PRIOR OFFENCES EVEN IF AN APPEAL AGAINST THE ORDER OF NCLT IS PENDING BEFORE NCLAT.

Matter: Dewan Housing Finance Corporation Ltd. v. Union of India

Order dated: 16 November 2021

Summary:

In the present case, Dewan Housing Finance Corporation Ltd. (**DHFL**), the corporate debtor, was a co-accused, along with its erstwhile directors and promoters, in certain criminal proceedings. Concurrently, CIRP proceedings were going on against DHFL before NCLT and the resolution plan submitted by Piramal Capital and Housing Finance Limited (**Successful Resolution Applicant**) was approved by the NCLT. This order was challenged before the NCLAT, which refused to grant an interim stay against the NCLT order during the pendency of the appeal.

The Code provides that a corporate debtor ought not to be prosecuted for an offence committed prior to commencement of CIRP once a resolution plan, which results in change in management of the corporate debtor, has been approved by the NCLT. Therefore, DHFL made an application before the court seeking its discharge from the criminal proceedings which were on alleged acts committed by DHFL prior to initiation of CIRP. The order of the court rejecting this application was challenged before the Bombay HC.

The main issue under consideration of the Bombay HC was whether, DHFL would be absolved of all criminal offences committed prior to commencement of CIRP, from the date of approval of the resolution plan by NCLT, although an appeal against NCLT's order was pending before the NCLAT. The Bombay HC noted that the resolution plan has been approved by the NCLT and such a resolution plan has resulted in change in management of DHFL in favour of persons who were not related to the erstwhile management of DHFL. Therefore, immunities under the Code cannot be denied to DHFL. The Bombay HC also opined that mere filing of an appeal by itself does not operate as a stay, unless a specific prayer is made in this regard and orders are passed. Therefore, the Bombay HC set aside the order of the court and discharged all criminal proceedings against DHFL.

4) FOREIGN AWARD IS NOT SUFFICIENT TO INITIATE CIRP AGAINST A CORPORATE DEBTOR

Matter: Jaldhi Overseas Pte. Ltd v. Steer overseas Private Ltd.

Order dated: 17 November 2021

Summary:

Jaldhi Overseas Pte. Ltd. (**Jaldhi Overseas**), a company incorporated in Singapore sought to initiate CIRP against Steer Overseas Pvt. Ltd. (**Steer Overseas**), an Indian company. Dispute arose between the parties and the matter was referred to arbitration in Singapore. The arbitral tribunal passed a partial foreign award in favour of Jaldhi Overseas, who was also granted leave by the High Court of the Republic of Singapore to enforce the arbitral award. Since Steer Overseas refused to make payments, Jaldhi Overseas filed a petition before NCLT seeking initiation of CIRP against Steer Overseas.

The issue before the NCLT was whether a foreign award is sufficient to initiate insolvency proceedings under the Code. The NCLT held that a foreign award is not a decree and mere production of a foreign award does not give an effect to it. The NCLT further clarified the position and explained that under the Arbitration and Conciliation Act, 1996, HC's alone have exclusive jurisdiction to deal and enforce with foreign awards.

Accordingly, the petition filed by Jaldhi Overseas was rejected and it was held that a foreign award is not sufficient to initiate a CIRP. Further, it was clarified that the NCLT does not have powers of a civil court and cannot execute of a foreign award.

5) **ASSETS WHICH ARE SUBJECT TO DETERMINATION OF OWNERSHIP BY COURT OF AUTHORITY WOULD FORM PART OF THE LIQUIDATION ASSET**

Matter: IDBI Bank Limited and Ors v. V. Venkata Sivakumar and Ors.

Order dated: 17 November 2021

Summary:

Application was preferred by IDBI Bank Ltd. and Ors., being secured creditors (**Applicants**) in relation to Jeypore Sugar Company Ltd. (**Jeypore Sugar**), the corporate debtor seeking relief before NCLT. The Applicants averred that the liquidator of the corporate debtor obtained valuation of assets in an irregular manner and excluded certain assets, thereby failing to maximize the value of assets of the corporate debtor.

Applicants had a claim of INR 567 crores against the corporate debtor and were members of the committee of creditors holding a total voting share of 98.68% (ninety eight point six eight percent). Pursuant to the liquidation of the corporate debtor, the liquidator of the corporate debtor sought an invitation for proposing a scheme for compromise or arrangement under the Act to submit resolution plans. A fresh valuation report was submitted demonstrating a drastic reduction in liquidation value from INR 332 crores to INR 223 crores. The fresh report failed to explain the reason for the drastic reduction while a prime asset/property was accepted at zero valuation since it was a part of a pending litigation.

The NCLT held that assets which are subject to the determination of ownership by the court or authority would form part of the liquidation estate. The liquidator was directed to conduct fresh valuation of the assets of the corporate debtor including the prime asset and to invite schemes from prospective scheme proponents.

6) **JOINT CIRP CAN BE INITIATED AGAINST A CORPORATE DEBTOR AND THE LANDOWNING ENTITY IF THERE IS AN INTRICATE FINANCIAL RELATIONSHIP BETWEEN THESE COMPANIES WHICH ARE UNDER THE SAME CONTROL AND THEIR BUSINESSES ARE INTER-RELATED, INTERTWINED AND INTERWOVEN**

Matter: Jitender Arora (Resolution Professional of Premia Projects Ltd.) v. Tek Chand and Anr.

Order dated: 18 November 2021

Summary:

In the present case, Solitaire Infomedia Pvt. Ltd. (**Solitaire**), the land owning entity was under the ownership and control of Premia Projects Ltd. (**Premia**), the corporate debtor. These two entities had entered into a collaboration agreement whereby Premia was to develop homes on the land belonging to Solitaire and sell them to homebuyers. However, it was alleged that the money advanced by the homebuyers was siphoned by the director of Premia to his other companies, and eventually CIRP was initiated against Premia and a Resolution Professional (**RP**) was appointed. As there were no other asset of Premia, the RP made an application before NCLT praying:

- He should be allowed to take charge of assets of Solitaire; or
- He should be allowed to initiate joint CIRP of both the holding company and its subsidiary i.e., Premia and Solitaire.

NCLT denied the prayers holding that there was no provision in the Code to allow joint CIRP. In appeal, NCLAT opined that the definitions of 'property', 'transaction', 'transfer' along with the provisions regarding information memorandum under the Code makes it clear that those assets, which are transferred to or from a corporate debtor, and which are material to the insolvency resolution of the corporate debtor, are part of the assets of the corporate debtor even if held by another company. Therefore, such assets should be included in the information memorandum. This is so that the creditors of the corporate debtor can get their rightful dues as is required and provided under the Code. Noting that Solitaire was under the complete ownership and control of Premia and emphasizing the importance of land to the entire process of CIRP of Premia, the NCLAT opined that consolidation of individual CIRPs of Premia (which is the land developer) and Solitaire (which is the landowner), should be done to yield maximum benefits to stakeholders. However, as order of initiation of CIRP has been passed only against Premia and there was neither any application nor order for initiation of CIRP against Solitaire, NCLAT directed NCLT to first consider an application seeking CIRP against

Solitaire and then allow consolidation of CIRPs of Solitaire and Premia to provide fair, just and proper relief to the creditors of the Premia.

7) 'CONTEMPT PROCEEDINGS' CAN BE EXERCISED BY NCLT

Matter: Shailendra Singh v. Nisha Malpani (Resolution Professional) and Anr.

Order dated: 22 November 2021

Summary:

The appellant, an advocate appointed for the corporate debtor filed an application before the NCLT to recover his legal fees from the respondent being the resolution professional. The NCLT directed the respondent to pay the arrears of fees which the respondent failed to do so. Thus, a contempt application under the Act was filed initiating contempt proceedings against the respondent for wilful disobedience and for issuance of appropriate directions to clear the bills. The NCLT, in the contempt application held that the Act does not extend the contempt jurisdiction to the Code and dismissed the contempt application. The said order of the NCLT was appealed before the NCLAT.

The NCLAT after making observations was of the view that 'Contempt Proceedings' can be exercised by NCLT being the 'Adjudicating Authority'. A conjoined reading of Section 408 and 425 of the Act points out that the power to punish for 'Contempt' is vested with the 'Tribunal' adjudicating on any matter not only confined to the Act but also to matters relating to the Code. Further, the NCLAT was of the view that the 'Tribunal' has the power to regulate its own procedure in accordance with the rules of natural justice and equity, for the purpose of discharging its functions under the Act. A reasonable opportunity to represent his/her case before the bench or any other officer authorised in this behalf before passing an order or direction imposing penalty is to be given.

The NCLAT held in its order that the conclusions arrived at by the NCLT in the impugned order stating that the Code is devoid of contempt jurisdiction is clearly unsustainable. Thus, the NCLAT directed the NCLT to restore the contempt application to its file within 2 (two) weeks from the date of the receipt of the copy of the judgment and dispose of the same on merits.

8) GOVERNMENT PROPOSES FRAMEWORK FOR CROSS-BORDER INSOLVENCY

Notification dated: 24 November 2021

Summary:

A situation concerning cross-border insolvency arises when the debtor has assets or creditors in different jurisdictions or when different insolvency proceedings have been filed in multiple jurisdictions. The Code, at present, does not have provisions for cross-border insolvency. In order to address the growing need of cross-border insolvency, the government constituted an insolvency law committee, which had proposed a framework for cross-border insolvency. The government has now amended the cross-border insolvency framework and has sought comments from the public.

The amendments to the cross-border insolvency framework are:

- Cross-border insolvency will now be applicable to corporate debtors as well as personal guarantors;
- The adjudicating authority for personal guarantors would be the Debt Recovery Tribunals (DRT), while for corporate debtors would be the NCLT. However, where insolvency proceeding of a corporate debtor is adjudicated before NCLT, then cross-border application for personal guarantors of such a corporate debtor should also be filed before the NCLT and not the DRT;
- Centre of main interest for personal guarantors would be their habitual place of residence; and
- Provisions of cross-border insolvency will not be applicable on pre-packaged insolvency resolution process and financial service providers.

Our co-ordinates:

Mumbai

506 Marathon Icon
Off Ganpatrao Kadam Marg
Lower Parel, Mumbai – 400013

Email: al@acuitylaw.co.in