



**DEVELOPMENTS IN
INSOLVENCY LAW**

**IN JULY
2018**

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 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
- 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 www.acuitylaw.co.in or write to us at al@acuitylaw.co.in.

INTRODUCTION

This newsletter covers the developments with respect to the Insolvency and Bankruptcy Code, 2016 (“**Code**”) during the month of July 2018. We have covered orders passed by the National Company Law Appellate Tribunal (“**NCLAT**”) and various benches of the National Company Law Tribunal (“**NCLT**”), the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2018 and circular issued by the Insolvency and Bankruptcy Board of India (“**IBBI**”) on 13 July 2018, with respect to appointment of authorized representative for class of creditors. Please see below the summary of the relevant orders, the said amendment bill and circular.

1. PROCEDURE TO RESOLVE THE DEADLOCK FOR APPOINTING / REPLACING THE RESOLUTION PROFESSIONAL

Matter: ICICI Bank Limited vs. Oceanic Tropical Fruits Private Limited

Order dated: 04 July 2018

Summary: The issue dealt by the NCLAT was with respect to the steps required to be taken by the committee of creditors for appointment of interim resolution professional as resolution professional or to replace the resolution professional by another resolution professional, on failure to obtain a minimum of 75% votes from the members of the committee of creditors (“**CoC**”). In view of the above, the NCLAT *inter alia* held the following:

- a) The requirement of obtaining 75% votes from the members of the CoC for appointment of interim resolution professional as resolution professional and replacement of the resolution professional by another resolution professional is mandatory.
- b) Hence, in cases where the CoC fails to obtain 75% of votes for either of the abovementioned scenario, the matter would be then required to be referred to the respective adjudicating authority, who is then required to request the IBBI to name a resolution professional and in the meantime may allow the interim resolution professional / resolution professional (as the case may be) to continue its function.

Note: As per the amendments introduced through the the Insolvency and Bankruptcy Code (Amendment) Ordinance 2018 (“**Ordinance**”), the requirement of obtaining 75% of votes by the members of CoC, for appointment of interim resolution professional as resolution professional / replacement of the resolution professional by another resolution professional has been brought down to 66%.

2. EXISTENCE OF DISPUTE, ON ACCOUNT OF NOTICE ISSUED FOR COMMENCEMENT OF ARBITRATION PROCEEDING

Matter: Pramod Yadav & Another vs Divine Infracon Private Limited

Order dated: 04 July 2018

Summary: An application was filed by the operational creditors (who were the lessors) against the alleged corporate debtor (being the lessee). However, the NCLT, Delhi bench, vide order dated 28 September 2017, rejected the application on the ground of existence of dispute. Being aggrieved by the said order, the operational creditor filed an appeal before the NCLAT.

In view of the above, the NCLAT observed that, since the corporate debtor had issued a notice, dated 17 January 2017, for appointment of a sole arbitrator, the corporate debtor made it clear that it intended to make a request for appointment of arbitrator under the Arbitration and Conciliation Act, 1996 (i.e. prior to initiating the section 9 application by the operational creditors). Hence, the NCLAT *inter alia* held that, since the arbitral proceedings had already commenced, on account of the notice issued for appointment of arbitrator under the Arbitration and Conciliation Act, 1996, the NCLT was right in dismissing the same on the ground of existence of dispute.

3. POSITION OF DIRECTORS OF THE CORPORATE DEBTOR WHO ARE RE-APPOINTED VIDE THE RESOLUTION PLAN

Matter: Tomorrow Sales Agency Private Limited vs. Rajiv Khurana (Resolution Professional for Power Himalayas Limited & Others)

Order dated: 05 July 2018

Summary: An appeal was made by the successful resolution applicant against the order dated 20 April 2018 passed by the NCLT, Chandigarh Bench, wherein the said NCLT refused to grant approval of its resolution plan for various reasons.

In view of the same the NCLAT inter alia held that, merely retention of two directors of the corporate debtor would not violate any of the provisions laid down under section 29A of the Code. The NCLAT further stated that, if the directors of the corporate debtor are employees, it is always open for resolution applicants to allow them to continue as employees, who are otherwise operational creditors and the resolution applicant is bound to pay them.

4. 'FINANCIAL DEBT' INCLUDES ANY INDEMNITY OBLIGATION IN RESPECT OF A GUARANTEE

Matter: Andhra Bank vs. M/s. F.M. Hammerle Textile Limited

Order dated: 13 July 2018

Summary: An appeal was filed by Andhra Bank (“**Appellant**”) before the NCLAT against the order of the NCLT Chandigarh Bench. The said NCLT inter alia held that the Appellant could not be treated as a financial creditor, since Appellant had no right to make a claim for being the guarantor of the corporate debtor.

The NCLAT inter alia held that, though the Appellant is allowed to be a part of the committee of creditors as a 'member', it cannot raise its claim at this stage of the insolvency resolution process, as it continues to be the guarantor of the corporate debtor even after the successful resolution applicant takes over the management of the corporate debtor.

5. APPROPRIATION OF CIRP COSTS

Matter: State Bank of India vs. Adhunik Metaliks Limited

Order dated: 17 July 2018

Summary: The NCLT, Kolkata bench dealt with three applications relating to the approval of resolution plan for the CIRP of the corporate debtor. The first application was filed by the resolution professional for approval of the resolution plan submitted by Liberty House Group Private Limited, which had received the consent of 99.94% of the CoC. The remaining applications were filed by MSTC Limited (“**MSTC**”) and Adhunik Metaliks Karmachari Sangh (“**AMKS**”), who objected to the said resolution plan approved by the CoC. MSTC was a facilitator, from whom the corporate debtor obtains raw materials for its manufacturing process, whereas AMKS was a trade union consisting of workers of the corporate debtor, who demanded that their unpaid wages and increment must be disbursed before the approval of the resolution plan.

The NCLT Kolkata bench inter alia held the following:

- a) Provisions of the Indian Contract Act, 1872 do not apply to matters under the Code, since the Code overrides other laws.
- b) Further, the amount owed by the corporate debtor before the insolvency commencement date is operational debt, and the amount after the insolvency commencement date is to be treated as corporate insolvency resolution process (“**CIRP**”) cost. Since the resolution professional is responsible to determine the CIRP cost, the amount paid by the resolution professional will have to be appropriated towards the expenses incurred after the insolvency commencement date only. Also, the amount of operational debt admitted by the resolution professional would be settled after the approval of the resolution plan.
- c) The resolution professional was justified in not considering payment of arrears of wages and increment accruing during the CIRP period, since the corporate debtor does not have sufficient funds to make these payments. The payments will be made only once the resolution plan is approved by the CoC.

6. RESOLUTION APPLICANT HAVING COMMON PROMOTERS / DIRECTORS WITH THE CORPORATE DEBTOR, DOES NOT AUTOMATICALLY BECOME INELIGIBLE UNDER SECTION 29A OF THE CODE

Matter: Application filed by Resolution Professional of Swadisht Oils Private Limited, in the matter of J.R. Agro Industries Limited vs. Swadisht Oils Private Limited

Order dated: 24 July 2018

Summary: This application has been filed by the resolution professional of Swadisht Oils Private Limited (“**Corporate Debtor**”) for seeking approval from the NCLT, Allahabad Bench on the resolution plan, so approved by the CoC of the Corporate Debtor. In this matter, the NCLT primarily dealt with the eligibility of the resolution applicant (who has common promoters / directors with the Corporate Debtor) with respect to section 29A of the Code and whether priority should be given to a related unsecured financial creditor over and above the payment of other ordinary creditor (especially operational creditors). In view of the above, the NCLT *inter alia* held the following:

- a) There is no bar on common promoters / directors to present a resolution plan for the company (i.e. corporate debtor) undergoing CIRP. The related party is barred from participating and voting in the CoC meeting but they are not debarred from submitting a resolution plan.
- b) Clause (j) of section 29A of the Code, covers only those connected persons who are otherwise eligible to submit a resolution plan but becomes ineligible due to disqualification(s) suffered by it under clauses (a) to (j) of section 29A. Since the Corporate Debtor itself is ineligible to participate in its CIRP, the question of determining whether the resolution applicant, who is a connected person of the Corporate Debtor, is eligible or not does not arise.
- c) There is no bar on common promoters / directors to present a resolution plan for the company (i.e. corporate debtor) undergoing CIRP. The related party is barred from participating and voting in the CoC meeting but they are not debarred from submitting a resolution plan.

7. IBBI ISSUES CIRCULAR REGARDING APPOINTMENT OF AUTHORIZED REPRESENTATIVE FOR CLASS OF CREDITORS

IBBI vide circular no. IBBI/CIRP/015/2018 dated 13 July 2018 has clarified the responsibility of the resolution professional to appoint an authorized representative for the class of creditors. In an ongoing CIRP, where at least 15 days are left to the date of approval of the resolution plan, the resolution professional must appoint an authorized representative for any creditors in a class who are not otherwise represented in the CoC, irrespective of the stage at which the CIRP is at.

8. THE INSOLVENCY AND BANKRUPTCY CODE (SECOND AMENDMENT) BILL, 2018 (“AMENDMENT BILL”)

The Amendment Bill was passed by the Lok Sabha on 31 July 2018 and will now be placed before the Rajya Sabha for its approval. The Amendment Bill, upon becoming effective will replace the Ordinance. In addition to the amendments proposed in the Ordinance, the Amendment Bill *inter alia* has proposed the following amendments:

- a) Clarification on the insolvency commencement date:
In case the interim resolution professional is not appointed on the date of admission of the application for CIRP, the insolvency commencement date shall be the date on which such interim resolution professional is appointed.
- b) Cost of the authorised representative:
Under the Ordinance the cost of the 'authorised representative' was to be borne by the financial creditors jointly. However, under the Amendment Bill the cost of the 'authorized representative' will form a part of the CIRP cost.
- c) Pre-approval of Competition Commission of India (“**CCI**”)
When a resolution plan provides a provision for combination, the resolution applicant will be required to obtain approval of CCI prior to obtaining the approval of the CoC and Adjudicating Authority