DEVELOPMENTS IN INSOLVENCY LAWS

IN OCTOBER 2018

ACUITY LAW

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 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 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 October 2018. We have covered (i) orders passed by the Hon'ble Supreme Court, the National Company Law Appellate Tribunal, the National Company Law Tribunal and the Insolvency and Bankruptcy Board of India; (ii) amendments with respect to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2018 dated 05 October 2018 and the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2018 dated 22 October 2018.; and (iii) the report issued by the Insolvency Law Committee on 'Cross Border Insolvency' has also been covered by us. Please see below the summary of the relevant orders, amendments and the report issued by the Insolvency Law Committee on 'Cross Border Insolvency'.

ABBREVIATIONS

Adjudicating Authority	AA
Committee of Creditors	CoC
Corporate Insolvency Resolution Process	CIRP
Insolvency and Bankruptcy Code, 2016	Code
Insolvency and Bankruptcy Board of India	IBBI
Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016	IP Regulations
Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016	CIRP Regulations
Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017	Fast Track CIRP Regulations
Insolvency Law Committee	ILC
Interim Resolution Professional	IRP
National Company Law Tribunal	NCLT
National Company Law Appellate Tribunal	NCLAT
Resolution Professional	RP
Supreme Court of India	SC

1. THE VOTING SHARE THRESHOLD OF THE COC COMPRISING ENTIRELY OF REAL-ESTATE BUYER, SHOULD BE TREATED AS 'DIRECTORY' AND NOT MANDATORY

Matter: Nikhil Mehta & sons (HUF) & Others vs. M/s. AMR Infrastructure Limited

Order dated: 28 September 2018

Summary:

An application was filed by the IRP before the NCLT, Allahabad Bench ("**NCLT**") with respect to issues arising out of a deadlock created by low percentage of votes cast by members of the CoC, who entirely comprised of real estate buyers (for commercial as well as residential properties).

In this matter, only 52.78% of the financial creditors (i.e. real estate buyers), participated in the CoC meetings and casted their votes. Various crucial decisions, which required a minimum of 66% of votes for its approval, could not be finalized as the total voting rights arising out of the participating members itself was below the said requirement. Due to the afore-mentioned issues in relation to CIRP of the corporate debtor, the IRP approached NCLT.

In view of the above, the NCLT inter alia held that, courts should lean against an interpretation which makes a statue unconstitutional and unworkable and adopt such an interpretation which makes it constitutional, workable and help in achieving its object. Further, the object of the Code is to promote resolution and to discourage liquidation. Hence, in case of a deadlock, preference should be given to decisions undertaken by the highest percentage in the CoC and not by the minimum statutory requirement (i.e. 66% of votes). In view of the same, the statutory requirement of obtaining a minimum of 66% of votes should be treated as directory in nature in case of CoC comprising of 100% class of real estate buyers, including commercial and residential.

2. LIMITATINO ACT, 1963 IS RETROSPECTIVELY APPLICABLE TO APPLICATIONS FILED BEFORE ITS DATE OF INTRODUCTION UNDER THE CODE

Matter: B.K. Educational Services Private Limited vs. Parag Gupta And Associates

Order date: 11 October 2018

Summary: In this matter, the question before the SC was whether the Limitation Act, 1963 would be made applicable to applications made by financial creditors and operational creditors under the Code made on and from the commencement of the Code i.e. from 01 December 2016. The NCLAT had held that Limitation Act does not apply to applications made by financial creditors and operational creditors under the Code on and from the commencement of the Code since the Code was introduced only on 01 December 2016 and three years had not lapsed from the date the right to apply had accrued. The Code was later amended on 06 June 2018 to include section 238A which reads as follows:

"238-A. Limitation: The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Appellate Tribunal, as the case may be."

The SC made the following observations *inter alia* being (i) an application filed after enforcement of the Code cannot revive a time barred debt as it is no longer due; (ii) the insertion of section 238A would not serve its object unless it is construed as being retrospective

Accordingly, the SC while making the above observations held that if default has occurred 3 years prior to filing an application by financial creditors or operational creditors under the Code the application would be barred by the Limitation Act, 1963.

3. AN IRP / RP SHOULD STRIVE TOWARDS RESOLUTION RATHER THAN LIQUIDATION

Matter: Mr. Sandeep Kumar Gupta

Order dated: 15 October 2018

Summary:

In this matter, the IBBI took on record the order dated 26 October 2017, passed by the AA, in the matter of Stewards and Lloyds of India Limited and order dated 28 February 2018, passed by the NCLAT, in the matter of Mr. Sandeep Kumar Gupta vs. Stewards and Lloyds of India Limited and another, wherein certain adverse observations were made against Mr. Sandeep Kumar Gupta ("**Mr. Gupta**") with respect to his conduct and performance as the IRP / RP in the CIRP of Stewards and Lloyds of India Limited ("**Corporate Debtor**").

After seeking the response from Mr. Gupta, the IBBI formed a prima facie opinion that Mr. Gupta had contravened provisions of the IP Regulations. Accordingly, the IBBI issued a show cause notice dated 18 May 2018 to Mr. Gupta.

On further adjudication, the IBBI *inter alia* observed that Mr. Gupta failed to act in the best interest of the Corporate Debtor as it did not consider it necessary to have even one CoC meeting (during its tenure as a RP), especially when no resolution plan was received by Mr. Gupta. Further, Mr. Gupta did not even feel the need to take the view of the CoC on whether an extension of 180 days period was required or not. In addition to the above, the IBBI also observed that Mr. Gupta was working towards the liquidation of the Corporate Debtor rather than the resolution of the Corporate Debtor. Hence, Mr. Gupta deprived the CoC of its rights to decide the fate of the Corporate Debtor and thereby pushed the Corporate Debtor into liquidation.

In view of the above, the IBBI imposed a monetary penalty on Mr. Gupta which amounted to 100% of the total fee payable to him as IRP and as RP in the CIRP of the Corporate Debtor. Further, the IBBI also issued direction to Mr. Gupta to undergo the pre-registration educational course specified under the IP Regulations from his Insolvency Professional Agency to improve his understanding of the Code and the regulations made thereunder, before accepting any assignment under the Code.

4. DECISION MADE BY AN ERSTWHILE RP CANNOT BE REVIEWED BY A SUBSEQUENT RP

Matter: Canara Bank vs. RP of Allied Strips Limited

Order dated: 26 October 2018

Summary:

In this matter, M/s. Power2SME Private Limited ("**Claimant**") made an application before the erstwhile RP of Allied Strips Limited ("**Corporate Debtor**") wherein the Claimant sought reliefs *inter alia* being (i) discharge of material which it claimed ownership of; and (ii) to permit possession of the same. Post detailed deliberation, the erstwhile RP granted the Claimant the reliefs sought for vide order dated 20 August 2018. It is pertinent to note herein that Canara Bank was the consortium leader and had extended working capital facilities to the Corporate Debtor. Being aggrieved by the order of the erstwhile RP, Canara Bank filed a mere objection before the AA, wherein it prayed for directions to be given to the subsequent RP (of the Corporate Debtor) for review of the order dated 20 August 2018 passed by the erstwhile RP.

The AA vide order dated 11 October 2018 held that the Code and its allied regulations have no provision for reviewing the decision of the erstwhile RP by a subsequent RP and thereby dismissed the application of Canara Bank.

Subsequently, Canara Bank filed an appeal at the NCLAT, wherein the NCLAT rejected the said appeal, as not only did Canara Bank fail to challenge the order of the erstwhile RP dated 20 August 2018 before the NCLAT but also because the said order had attained finality.

5. THE IBBI (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (FOURTH AMENDMENT) REGULATIONS, 2018 DATED 05 OCTOBER 2018

The following amendments are introduced:

a) The definition of 'dissenting financial creditor' has been omitted;

b) Votes of members of the CoC can be obtained without the presence of all members at such meetings of the CoC;

c) The RP shall now be under the obligation to circulate the minutes of the meeting to the authorised representatives of the members within 48 hours of the conclusion of the said meeting. Further, the authorised representative shall circulate the minutes of the meeting to creditors in a class and announce the voting window at least 24 hours before the window opens for voting instructions and keep the voting window open for at least 12 hours.

d) The resolution plan is not required to provide the source of funds for carrying out payment towards the CIRP cost, liquidation value to operational creditors and to dissenting financial creditors. Further, amount due to the operational creditors under the resolution plan shall now be required to be paid before the financial creditors;

e) The prospective resolution applicant is now not required to give an undertaking for providing additional funds with respect to payment towards the CIRP cost, liquidation value to operational creditors and to dissenting financial creditors; and

f) The IRP / RP is now required to preserve a physical as well as an electronic copy of the records relating to the CIRP of the corporate debtor, in accordance with the record retention schedule, which shall be communicated by the IBBI in consultation with Insolvency Professional Agencies.

6. THE IBBI (LIQUIDATION PROCESS) (SECOND AMENDMENT) REGULATIONS, 2018 DATED 22 OCTOBER 2018

The following amendments are introduced:

a) A liquidator can now additionally undertake 'the sale of the business(s) of the corporate debtor as a going concern';

b) If an asset is subject to security interest, it cannot be sold by the liquidator in any of the prescribed manner unless its security interest has been relinquished to the liquidation estate;

c) A new set of provisions has been introduced for the purpose of carrying out valuation of the assets during the liquidation process, in cases where valuation has not been carried out as per the CIRP Regulations or Fast Track CIRP Regulations. Accordingly, a liquidator has to appoint , 2 registered valuers within 7 days of the liquidation commencement date, in order to determine the realisable value of the assets or businesses intended to be sold of the corporate debtor. The valuers so appointed by the liquidator cannot be (i) a relative of the liquidator; (ii) a related party of the corporate debtor; (iii) an auditor of the corporate debtor at any time during the 5 years preceding the insolvency commencement date; or (iv) a partner or director of the insolvency professional entity of which the liquidator is a partner or director.

d) A new Form B with respect to 'Issue of public announcement' has been introduced.

7. REPORT BY THE ILC ON 'CROSS BORDER INSOLVENCY'

The ILC has published its report on 'Cross Border Insolvency' on 16 October 2018 ("**Report**"), wherein it has prepared a draft framework for adopting the UNCITRAL Model Law on Cross Border Insolvency, 1997 ("**Model Law**"). Further, the Model Law has been adopted globally by 44 countries, including the likes of the United States of America, the United Kingdom, Singapore, etc. Adopting the Model Law for cross-border insolvency will ensure cooperation between domestic and foreign courts, thereby helping India align with global practices.

In view of the above, the ILC intends to include the said framework as a part to the Code. Following are some of the key recommendations made by the ILC with respect to proposed draft cross-border insolvency legislation ("**Cross-Border Insolvency Law**") adopting the Model Law under the Code:

a) Initially, the Cross-Border Insolvency Law should be extended to corporate debtors and not individuals and partnership firms;

b) The Central Government should be empowered to notify the entities that may be excluded from the applicability of the Cross-Border Insolvency Law;

c) A conservative approach should be adopted in providing access to foreign representatives till the infrastructure of cross-border insolvency in India is developed;

d) A code of conduct should be made applicable to foreign representatives as may be specified by the IBBI along with set of penalty provisions, which also be made applicable to domestic insolvency professional's under the Code;

e) Foreign representatives (which means a person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the corporate debtor's assets or affairs or to act as a representative of the foreign proceeding and includes any person or a body appointed on an interim basis) should be required to register with the IBBI;

f) Foreign representatives may be allowed to participate in domestic proceedings;

g) No favorable treatment should be given to foreign creditors over domestic creditors under the Code; and

h) The provisions of 'moratorium' as stipulated under the Code, should be inserted in the Cross-Border Insolvency Law as well.

Please click here to view the Report.