

# **KNOWLEDGE REPONERE**

**(A WEEKLY BULLETIN)**  
**(17-21 APRIL, 2017)**



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# **INSOLVENCY PROFESSIONALS AGENCY**

(Section 8 Company registered under the Companies Act, 2013)

## **KNOWLEDGE REPONERE** (A Weekly Bulletin: 17-21 April, 2017)

*“The capacity to learn is a gift, the ability to learn is a skill and the willingness to learn is a choice.” – Brian Herbert*

**Dear Professional Members,**

The Insolvency and Bankruptcy Code, 2016 (“Code”) has started taking its shape with more than 300 cases being filed at different National Company Law Tribunal Benches (NCLT), more than 40 cases being admitted, 15 cases in respect of which appeal has been preferred at National Company Law Tribunal (NCLAT) and 1 case being filed under Voluntary Liquidation Process. The orders of NCLT and NCLAT provides for the interpretation of the Code.

As on date as per the petitions filed before NCLT, debt amount worth Rs. 13,000 Crores has been recognized as amount in default as on date. This issue attempts to analyse the various provisions of the Code and the landmark judgements passed by NCLT.

### **1. M/S UTTAM GALVA STEEL LTD.**

<b>Name of the Corporate Debtor</b>	M/s Uttam Galva Steel Ltd.
<b>Name of Operational Creditor/Applicants</b>	M/s DF Deutsche Forfait AG and Misr Bank Europe GmbH
<b>Company Petition No.</b>	45/I&BP/NCLT/MAH/2017
<b>Bench</b>	NCLT, MUMBAI BENCH, MUMBAI
<b>Date of Order</b>	10.04.2017
<b>Section involved</b>	Section 9 of IBC, 2016 r/w Rule 6 of IBC (Application to Adjudicating Authority) Rules, 2016
<b>Amount Involved</b>	Rs. 110,40,30,876/-
<b>Status of Application</b>	Admitted

#### **I. Background**

1. The present petition is filed under section 9 of the Code by Operational Creditors (collectively referred to as “OCs”) viz. M/s DF Deutsche Forfait AG (“Deutsche”) and Misr Bank Europe GmbH (“Misr Bank”) against Uttam Galva Steels Limited (“Uttam”) stating that Uttam defaulted in making payment of USD 16,542,886.33 (inclusive of interest till 28.02.2017)

equivalent to Rs. 110,40,30,876/- towards 20,000 tons of prime steel billets supplied by German Company named AIC Handels GmbH (“AIC”).

2. This debt was initially by assigned by AIC to Deutsche by entering into a discount agreement, thereafter Deutsche, in turn, subsequently assigned a part of this debt to Misr Bank.

## II. Brief Facts

1. Uttam is engaged in manufacturing steel rolls and also dealing with import and export business in relation to steel.
2. On 16.08.2013, Uttam entered into a Sales Contract with AIC for purchase of 20,000 MT of Prime Steel Billets (hereinafter “goods”) at the rate of \$540 per MT agreeing that the shipment of goods would be made in September, 2013 and agreed money would be payable in 180 days from the Bill of Lading.
3. Accordingly, on 16.09.2013, AIC shipped 19,976 MT of goods and bill of Lading dated 16.09.2013 came to be issued. On 18.09.2013, AIC issued invoice for a sum of USD 10,787,040 for the goods supplied.
4. Uttam had to make the payment by 15.03.2014 (maturity date after 180 days).
5. Uttam also sent confirmation that the goods had been duly received along with documents thereby accepting faultless performance of AIC. Thus, Uttam irrevocably and unconditionally had undertaken to pay AIC as per the invoice waiving all rights of objection and defence.
6. On 07.10.2013, AIC issued letter of notification to Uttam informing that AIC had entered into *forfeiting* agreement [*an agreement where the exporter uses financial assistance of an entity to enable it to receive cash immediately by selling its (exporters’) receivables i.e. the amount which importer owes to exporter) at a discount and eliminates the risk by making sale without recourse.*] with Deutsche whereby it assigned its entire debt with present and future rights, claims and Uttam duly acknowledged and confirmed the same.
7. On 27.12.2013, Deutsche sent a notification to Uttam that part of receivables due to it, which were to mature on 15.03.2014, had been unconditionally assigned to Misr Bank. This assignment was acknowledged by Uttam.
8. On default of Uttam to make payment, Deutsche and Misr Bank issued notice dated 08.12.2016 u/s 433 and 434 Companies Act, 1956 which was replied by Uttam raising allegations like, goods delivered to third party i.e. Aartee Commodities Ltd. (“Aartee”), subsequent assignment to Misr Bank not valid. However, no suit was filed by Uttam.
9. After coming into force of the Code, statutory notice under section 8 of the Code was issued to Uttam on 28.02.2017 calling Uttam to pay USD 16,542,886.33 i.e. a principal sum of USD 10,787,040 and interest of USD 5,755,846.33 (totalling to USD 16,542,886.33 equivalent to Rs. 110,40,30,876/-).
10. On 03.03.2017, Uttam’s advocates replied by denying all claims with a caveat that they were in process of obtaining detailed instructions from Uttam and would reply in due course.
11. On 11.03.2017, Uttam again replied stating that its obligations under the Sales Contract were dependent on payment of Aartee and Uttam has already filed a civil suit in respect of his claims against the creditors on 10.03.2017 before the Hon’ble High Court of Bombay.
12. Thereafter, Deutsche and Misr Bank filed the present petition on the ground that no suit or arbitration proceedings were pending before issuance of notice under section 8 of the Code.

### III. Objections of Uttam

Uttam objected to the admission of the application on the ground that –

1. The application is not maintainable since Uttam raised notice of dispute within 10 days after receipt of notice u/s 8.
2. Affidavit not filed by OCs under section 9(3)(b) stating that no notice has been given by Uttam relating to dispute of unpaid operational debt (however, when reply was given by Uttam, there was no need to affidavit that no reply has been given).
3. Deutsche and Misr Bank are not operational creditors.
4. The petition should be rejected u/s 9(5)(ii)(d) once notice of dispute has been received by OCs.
5. OCs never initiated any recovery proceedings though the alleged debt is of March, 2014 until present petition is filed.
6. Disputed questions of facts are involved requiring adjudication by Trial Court and the adjudication in summary manner cannot be done.
7. Sales Contract is governed by English Law thus, requiring consent of Uttam for any modification.
8. Interest on principal amount is highly arbitrary and not admitted by Uttam.
9. Power of Attorney (“POA”) given to file this case has not specifically authorized the persons to initiate proceedings under Code.

### IV. Grounds of Admission and details of order Discussion

#### A. Discussion of term ‘dispute’

- i. The Bench observed that the issue is whether the word ‘includes’ is extensive as understood or would it only mean “suit” or “arbitration proceedings”.
- ii. The contention of Uttam was that the word ‘dispute’ had to be understood as ‘mere denial to the claim’. According to Uttam, the definition of dispute is inclusive definition enlarging scope to the extent it can travel and that the word “and” in section 8(2)(a) is to be read as “or”.
- iii. The Bench took help of section 2 of the Code which stated that definition has to be taken in the way it is defined as long as the context otherwise does not require. Uttam’s contention was rejected on the ground that, *one*, defining section will not govern the substantive section, and, *two*, definition has to be construed in the context of substantive section, not otherwise.
- iv. The Bench observed that “if reply is given denying the claim despite default occurrence is clear, does it mean that no application can be filed by any operational creditor even though the operational creditor makes the case of default occurrence? If that is so, it will virtually ousting operation creditor filing any case under Section 9.
- v. The Bench relied upon *South Gujarat Roofing Tiles Manufacturers Association vs. State of Gujarat (1976) 4 SCC 601* to contend that even the word ‘includes’ can be used in the sense of ‘means’.
- vi. In the present case, Uttam’s figures had gone into minus, Profit and loss statement as on 31.03.2016 reflected profit after tax as -1551.51 crores. There was no indication that the company could pay its debts or could be revived.

## **B. “Existence of Dispute”**

- i. The Bench noted that existence of dispute would mean pendency of either suit or arbitration proceedings before receipt of section 8 notice from the operational creditor.

## **C. Power of Attorney not authorized to initiate proceedings under the Code**

- i. The counsel for Uttam had relied upon an order dated 30.03.2017 of the Special Bench NCLT at Guwahati which held that an attorney had exceeded his power by filing case under section 7 of the Code basing on POA given 2 years before.
- ii. However, the Bench noted that in the present case, two POAs were executed by OCs just 2 months before filing of the present application authorizing the attorney to demand outstanding amount from Uttam and also to initiate proceedings including winding up proceedings.
- iii. The winding up jurisdiction in respect to Section 433(e) of the Companies Act, 1956 were metamorphosed into insolvency proceedings under the Code and thus, the petition could not be rejected on this ground.

## **D. Locus of OCs to file the application**

- i. The Bench noted that the OCs had locus to file the present application since the debt has been properly assigned to Deutsche and thereafter, Deutsche assigned part of debt to Misr Bank.
- ii. As to doctrine of privity of contract, there need not be any separate contract between petitioners and corporate debtors once debt is assigned and then, the third party will come into shoes of original operational creditor.

## **E. Sales Contract is governed by English Law**

- i. It was held it was for Uttam to show that the English Law was applicable and it has not been done so. Further, Uttam has not shown that confirmation of assignment is a requisite under the Indian Law.

## **F. Bills of Exchange along with interest would become “Financial Debt” not “Operational Debt”**

- i. Financial debt is money borrowed to repay on future date along with interest. The money is lent for value addition to the money as agreed between parties.
- ii. Operational debt is normally based on a agreement to pay to goods or services, it does not mean that interest cannot be claimed in the times to come.
- iii. The difference in these transactions is one given to get interest over the money, the second transaction happens in business operations, in both cases money is involved, as days go by after truncation ,the time value of money will be there.

## V. Final Order

The Bench admitted the application and initiated insolvency process against Uttam.

### 2. M/s GUJARAT NRE COKE LIMITED

<b>Name of the Company</b>	M/s Gujarat NRE Coke Limited
<b>Company Petition No.</b>	182/2017
<b>Bench</b>	NCLT, Kolkata Bench, Kolkata
<b>Date of Order</b>	07.04.2017
<b>Section involved</b>	Section 10 of IBC, 2016 r/w Rule 7 of IBC (Application to Bench) Rules, 2016
<b>Amount involved</b>	Rs. 3673.21 crores
<b>Status of Application</b>	Admitted

#### Brief facts of the case

1. M/s Gujarat NRE Coke Limited (“Corporate Debtor” or “CD”) filed the present petition to initiate Corporate Insolvency Resolution process under section 10 of IBC read with Rule 7 of IBC (Application to Bench) Rules, 2016.
2. The CD stated in the application that it had committed default in respect to the financial assistance from financial creditors and operational creditors.
3. The amount in default for financial/operational creditors is Rs. 808.65 crores. The CD had been making loss as could be seen from balance sheet for FY 2013-14 and 2014-15.
4. The CD also gave details of its assets and liabilities. While the total assets of the CD were shown as Rs. 3849.75 crores, the amount due to secured and unsecured creditors was shown as Rs. 3673.21 crores.

#### Grounds of Admission and Details of the order

- A. The Bench took note of the details of default given by the CD in its petition as also the names of financial creditors/operational creditors.
- B. The Bench admitted the application and passed the following order:
  - Appointed an Interim Resolution Professional
  - Declared a Moratorium as contemplated under section 14 of the Code
  - Directed causing necessary public announcement in terms of section 13 of the Code

#### 1) Case Updates

The cases filed under the Code at various National Company Law Tribunal (NCLT) Benches, have reached near around 300 out of which 43 cases have been admitted so far. In our previous weekly updates we have provided the details of 25 cases which were admitted. The details of 18 cases admitted subsequently are tabulated below:

S. No.	Case Title	Relevant Section	Amount in default as mentioned in application (in Rupees)
<b>Principal Bench, New Delhi</b>			
1.	M/s. Era Infra Engineering Limited V/s. M/s. Pradeep Commercial Projects Pvt. Ltd.	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	68.23 Lakhs
<b>Ahmedabad</b>			
1.	M/s. Gujarat Oleo Chem Ltd.	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	4879.63 Crores
<b>Kolkata</b>			
1.	MBL Infrastructures Ltd. V/s. RBL Bank Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	7.26 Crores
2.	M/s. Gujarat NRE Coke Limited	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	3,880 Crores
<b>Allahabad</b>			
1.	M/s. National Gas Agencies V/s. M/s. Janata Chemicals Pvt. Ltd.	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	23 Lakhs
<b>Mumbai</b>			
1.	Starlog Enterprises Limited	Section 7 of the Code dealing with initiation of CIRP by	27.78 Crores

		financial creditor.	
2.	M/s. Edelweiss Asset Reconstruction Co. Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	1365.40 Crores
3.	M/s. Global Marine Supply Co. V/s. M/s. Swiber Offshore (India) Pvt. Ltd.	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	48 Lakhs
4.	Shyam Indofab Private Limited V/s. Midas Touch Export Private Limited	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	15.40 Lakhs
5.	M/s. DF Deutsche Forfait AG and Anr. V/s. M/s. Uttam Galva Steel Ltd.	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	110 Crores
6.	Ultra Drytech Engineering Limited	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	18.36 Crores
7.	Facor Steel Limited	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	28.36 Crores
8.	Marmagao Steel Limited	Section 10 of the Code dealing with initiation of	80 Crores

		CIRP by corporate debtor.	
9.	Gupta Corporation Pvt. Ltd.	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	313 Crores
<b>Chandigarh</b>			
1.	M/s. Surbhi Body Products Pvt. Ltd.	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	2.13 Lakhs
2.	Sky Blue Papers Pvt. Ltd.	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	18.29 Crores
3.	Super Multicolor Printers Pvt. Ltd.	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	215.06 Crores
4.	SRS Modern Sales Limited	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	141ores

## 2) Cases filed at NCLAT

As on date around 15 cases under the Code have been filed at NCLAT in respect of which appeal has been preferred against the orders passed by different NCLT Benches. A list of such cases is summarized below:

S. No.	Case Title
1.	ICICI Bank Limited V/s. Innoventive Industries Limited
2.	Astra Offshore Sdn Bhd V/s. Swiber Offshore (India) Pvt. Ltd.
3.	Philips India Limited V/s Goodwill Hospital and Research Centre Limited
4.	Philips India Limited V/s Karina Healthcare Private Limited
5.	M/s. Hind Motors Limited
6.	M/s. Surendra Trading Company V/s. Juggilal Kamlapat Jute Mills Limited
7.	Kirusa Software Private Limited V/s Mobilox Innovation private Limited
8.	KKV Naga Prasad & Lanco Infratech limited
9.	Nikhil Mehta & Sons (HUF ) & Ors V/s. Ms. AMR Infrastructures Private Limited
10.	International Road Dynamics South Asia Pvt. Ltd. V/s. PS Toll Road Pvt. Ltd.
11.	ICICI Bank Limited V/s. Palogix Infrastructure PVT. Ltd.
12.	Rubina Chadha & ANR V/s. Ms. AMR Infrastructures Private Limited
13.	ICICI Bank V/s. Starlog Enterprises Limited
14.	M/s. Swadisht Oil Pvt. Ltd.
15.	M/s. Tomorrow Sales Agency Pvt Ltd V/s. M/s. Raipur Power and Steel Ltd. & Ors.

## 3) Rejected Cases

Out of the cases filed with different NCLT Benches, various cases have been rejected and dismissed by the Tribunal. A brief summary of the rejected and dismissed cases is compiled below:

S. No	Case Title	Reason for rejection
1.	M/s. Deem Roll- Tech Limited V/s. M/s. R. L. Steel & Energy Limited	<ul style="list-style-type: none"><li>• The matter was filed before the NCLT, Principal Bench, New Delhi under Section 9 of the Code dealing with the initiation of corporate insolvency process by Operational Creditor.</li><li>• The application was dismissed by NCLT on the grounds that:<ul style="list-style-type: none"><li>➤ Petitioner did not annex any proof of service of demand notice to the Respondent in the petition filed before NCLT.</li><li>➤ Respondent did not appear at the Tribunal on the date of hearing of petition.</li><li>➤ Since there is no specific bar under the</li></ul></li></ul>

		<p>Code with regard to the application of the provisions of the Limitation Act, 1963, application of the provisions of the Limitation Act, 1963 in this case make the debt raised by the Petitioner time barred.</p> <p>➤ Petitioner was seeking multiple remedies on same course of action in different legal forums.</p>
2.	Mukesh Kumar & Anr. V/s. AMR Infrastructure Limited	<ul style="list-style-type: none"> <li>• The matter was filed before the NCLT, Principal Bench under Section 9 of the Code dealing with the initiation of corporate insolvency process by Operational Creditor.</li> <li>• The application was dismissed by NCLT on the ground that the petitioner claiming to be the operational creditor was not covered under the definition of “Operational Creditor” as provided under Section 5(20) of the Code. <i>As per the NCLT order, an Operational Creditor means any person to whom a corporate debt is owed and whose liability from the entity comes from a transaction or operation.</i> Under the said case the Operational Creditor had neither supplied any goods nor rendered any services to acquire the status of an Operational Creditor.</li> <li>• Further the assured returns which were claimed to be the debt by the petitioner were not covered under the definition of “Operational Debt” under Section 5(21) of the Code. <i>As per NCLT order, operational debt means a debt arising out from the provisions of goods or services, employment or government dues.</i> Under the said case, the debt had not arisen from any of the aforementioned actions.</li> </ul>

Wish you good luck in all your endeavor!!

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