

KNOWLEDGE REPONERE

(A WEEKLY BULLETIN)

(8-12 MAY, 2017 AND 15-19 MAY, 2017)

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“The success of young entrepreneur will be the key to India’s transformation in the new millennium.” – Dhirubhai Ambani

Dear Professional Members,

The legislations which act complementary to Insolvency and Bankruptcy Code, 2016 (“Code”) have been amended in the recent past to achieve the objectives of the Code which inter-alia include time bound insolvency resolution. The promulgation of **Banking Regulation (Amendment) Ordinance 2017** is one of the major such amendment authorising Reserve Bank of India (RBI) to direct banking companies to resolve specific stressed assets by initiating insolvency resolution process under the Code where required, by inserting Section 35AA and Section 35 BB of Banking Regulations Act, 1949.

This action of the Union Government will have an immediate impact on the effective resolution of stressed assets (principally in consortium or multiple banking arrangements). The Ordinance proposes the following 3 measures:

- ✓ The government may authorise the Reserve Bank of India (RBI) to issue directions to banks to initiate insolvency proceedings against the defaulters under the Insolvency and Bankruptcy Code (“Code”).
- ✓ RBI on its own accord can issue directions to banks for resolution of stressed assets.
- ✓ RBI may form committees of expert members to deal with resolution of stressed assets.

The cases filed before National Company Law Tribunal (NCLT) under the Code are increasing throwing newer challenges such as appointment of same Interim Resolution Professional (IRP) in group companies, certificate from foreign bankers in respect of foreign bank accounts whether mandatory, non cooperation of debtor claiming that public announcement in respect of corporate insolvency resolution process is defamatory etc.

In this knowledge bulletin, we provide updates with regard to the recent filed and admitted cases, cases rejected and reasons thereof for rejection as well as the recent initiatives of ICSI IPA.

1) Case Updates

The speedy filing of the cases under the Code at various NCLT Benches is taking a new turn every day. Over 1000 cases have been filed so far, out of the filed cases 90 cases have been admitted. In our previous weekly updates we provided the details of the 70 cases which were admitted. The details of 20 cases admitted subsequently are tabulated below:

S. No.	Case Title	Relevant Section	NCLT Bench	Amount in default as mentioned in application (in Rupees)
1.	M/s. Bank of India V/s. M/s. HDO Technologies Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Mumbai	162 Crores
2.	Mrs. Tripat Kaur V/s. M/s. Kaliber Associates Pvt. Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Delhi	1 Crore
3.	Punjab National Bank V/s. M/s. DLS Industries Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Mumbai	4.41 Crores
4.	Punjab National Bank, V/s. M/s. James Hotels Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Chandigarh	52.57 Crores
5.	Mr. Dilip M. Rathore Proprietor of Bright Steel Processors V/s. M/s. Loha Ispat Ltd.	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	Mumbai	6.78 Crores
6.	M/s. Sanjay Ruia & Associates V/s. M/s. Magna Opus Hospitality Private Limited	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	Mumbai	2.29 Lakhs
7.	M/s. Anant Overseas Private Limited V/s. M/s. Global Houseware limited	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	Principal Bench	2.80 Crores
8.	M/s. Bharat Trading Corporation V/s. M/s. Wind-Ways Packaging Pvt. Ltd. (Formerly known as Aar Aar Arts Pvt. Ltd.)	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	Mumbai	Amount not mentioned in order.
9.	M/s. Eknath K. Aher, V/s. M/s. Royal Twinkle	Section 8 & 9 of the Code dealing with	Mumbai	Order not available.

	Star Club Limited	initiation of CIRP by operational creditor.		
10.	M/s. Sayali S. Rane V/s. M/s. Citrus Check Inns Limited	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	Mumbai	Order not available.
11.	M/s. Naresh Kumar & Cements Limited V/s. M/s. Kalyanpur Cements Limited	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	Kolkata	Order not available.
12.	M/s. Aggarwal Marketing and Services(Energy) Limited V/s. M/s. Maxtech Oil & Gas Services Limited	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	97 Lakhs
13.	Mr. Dilip M. Rathore Proprietor of Bright Steel Processors V/s. M/s. Loha Ispat Ltd.	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	Mumbai	6.78 Crores
14.	M/s. Radico Khaitan Ltd. V/s. M/s. Ajudhia Distributors Pvt. Ltd.	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	Kolkata	47 Lakhs
15.	M/s. Eknath K. Aher, V/s. M/s. Royal Twinkle Star Club Limited	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	Mumbai	1.09 Lakhs
16.	M/s. Sayali S. Rane V/s. M/s. Citrus Check Inns Limited	Section 8 & 9 of the Code dealing with initiation of CIRP by operational creditor.	Mumbai	1.12 Lakhs
17.	M/s. Swift Shipping & Freight Logistics Private Ltd.	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	Mumbai	6.3 Crores
18.	M/s. Suvarna Karnataka Cements Private Ltd.	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	Bengaluru	41.22 Crores
19.	Dunn Foods Limited	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	Chandigarh	82.47 Crores

20.	M/s. Suvarna Karnataka Cements Private Ltd.	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	Bengaluru	Order not available.
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2) Cases filed at NCLAT

A number of cases under the Code have been filed with the Appellate Tribunal i.e NCLAT in the month of May, 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.	M/S Vasan Health Care Pvt Ltd V/s. M/S Alcon Laboratories (India) Pvt Ltd & Anr.
2.	Palogix Infrastructure Pvt Ltd. V/s. ICICI
3.	Smart Timing Steel Ltd. V/s. National Steel & Agro Industries Ltd.
4.	Philips India Limited V/s Goodwill Hospital & Research Centre Ltd.
5.	M/s. Hind Motors Limited
6.	M/s. Surendra Trading Company V/s. Juggilal Kamapat Jute Mills Limited
7.	M/s. J.R. Agro Industries (P) Ltd. V/s. M/s. Swadisht Oil Pvt. Ltd.
8.	Neelkanth Township & Constructions Pvt Ltd V/s. Urban Infrastructure Trustees Ltd.
9.	M/s. Annapurna Infrastructure Pvt Ltd & Anr. V/s. M/S SORIL Infra Resources Ltd.
10.	Unimark Remedies Ltd. V/s. Ashok ALCO-Chem Ltd.
11.	M/s Hotel Gaudavan Pvt Ltd. V/s. M/s Alchemist Asset Reconstruction Co. Ltd.
12.	Dr. B.V.S Lakshmi V/s. M/s Geomatrix Laser Solutions Pvt Ltd.
13.	Uttam Galva Steels Ltd. V/s. DF Deutche Forfait AC & Anr.
14.	Steel Konnect (India) Pvt Ltd. v/s. Hero Fincorp Limited

3) Few NCLAT landmark orders

A. INNOVENTIVE INDUSTRIES LTD. V/S. ICICI

- Innoventive Industries (appellant/corporate debtor) challenged the order dated 17.01.2017 passed by NCLT, Mumbai Bench (Adjudicating Authority) whereby all the contentions raised by appellant were rejected and the applicant preferred by respondent/financial creditor – ICICI Bank was held to be complete under section 7(2) of the Insolvency and Bankruptcy Code, 2016 (“Code”).
- Following questions were involved in the present appeal:
 - i. Whether a notice is required to be give to the Corporate Debtor for initiation of Corporate Insolvency Resolution Process under the Code and if so, at what stage and for what purpose?
 - ii. Whether Maharashtra Relief Undertaking (Special Provisions) Act [“MRU Act”] shall prevail over the Code?
 - iii. Whether, the prior consent of Joint Lender Forum (JLF) is required by financial creditor in case of consortium lending before filing an application under section 7 of the Code?

➤ **Whether notice is required to be given to Corporate Debtor for initiation of corporate insolvency resolution process?**

- The NCLAT examined various decisions of Hon'ble Apex Court on question as to how far rule of natural justice is an essential element. It also took note of the recent judgment in Shree Metaliks passed by Hon'ble Calcutta High Court. However, the appellate authority was also mindful of the decisions of Hon'ble Apex Court observing that 'useless formality' being one of the exception to the rule of natural justice, the adherence to same in every situation is not warranted.
- The appellate authority, after observing the provisions of section 424 of Companies Act, 2013 and clause 3 of Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, held that "adjudicating authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by corporate debtor and to find out whether the application is complete or there is any other defect required to be removed. Adherence to principles of natural justice would not mean that in every situation the adjudicating authority is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order."
- In the present case, the appellate authority observed that even though no notice was given to the appellant before admission of the case, the fact that appellant intervened before admission of the case and all objections raised by appellant had been noticed, discussed and considered, there was no need to give any notice to the appellant.

➤ **Whether MRU Act overrides Code?**

- The MRU Act operates in a different field from the Code. While MRU Act is an act to make temporary provisions for industrial relations and other matters to enable the State Government to conduct or to provide a loan or financial assistance, 'as a measure of preventing unemployment'; the Code is an act enacted to, inter alia, consolidate and amend laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner.
- There is no repugnancy between the Code and the MRU Act as they both operate in two different fields. The Parliament has expressly stated that the provisions of the Code shall have effect notwithstanding the provisions of any other law for the time being in force.

➤ **Whether prior consent of Joint Lenders Forum is required in case of consortium lending?**

- For initiation of corporate resolution process by financial creditor, the adjudicating authority is required to ascertain existence of default, whether application is complete and whether any disciplinary proceedings is pending against the proposed Insolvency Resolution Professional.
- Once the adjudicating authority is satisfied that the case is required to be admitted but the application is incomplete, the financial creditor is to be granted seven days time to complete the application. However, if there is no default or defects cannot be cured, the application is to be rejected.
- Beyond this, the adjudicating authority is not required to look into any other factor, including the question whether permission or consent has been obtained from one or

other authority, including JLF. Thus, appellant's contention regarding obtaining permission or consent of JLF was rejected.

B. SMART TIMING STEEL LTD. V/S. NATIONAL STEEL & AGRO INDUSTRIES LTD.

➤ **Whether a copy of the certificate from the financial institutions along with application by the operational creditor is directory or mandatory?**

- Section 9 (3)(c) of the code requires that the operational creditor shall along with the application for initiating Corporate Insolvency Resolution Process, furnish, along with other documents specified, a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor.
- In case of National Steel Agro Industries Ltd (Corporate Debtor), the NCLT, Mumbai Bench, rejected the application filed by Smart Timings Steel Ltd, an operational debtor, vide its order dated January 31, 2017, stating that the operational creditor had failed to file a copy of certificate from financial institution as sought in Section 9(3)(c).
- The operational Creditor filed an appeal under Section 61 of the Code, against the said order.
- The question for determination in this appeal is whether filing of "a copy of certificate from the "Financial Institution" maintaining accounts of the Operational Creditor confirming that there is no payment of unpaid operational debt by the 'Corporate Debtor' as prescribed under clause (c) of sub-section 3 of Section 9 of the Code is mandatory or directory.
- The appellant who claimed to be 'Operational Creditor' filed an application under Section 9 of the Code for initiation of Corporate Insolvency Resolution Process, enclosing some of the relevant documents. However, no copy of "the certificate from the Financial Institution maintaining account of the 'Operational Creditor" as prescribed under clause(c) of subsection (3) of Section 9 was enclosed.
- For the said reason the adjudicating authority rejected the application.

Points of Analysis

A. What is financial institution?

Sub-section (14) of Section 3 defines 'Financial Institution' means-- (a) a scheduled bank; (b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934); and (c) Public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013 (18 of 2013); and (d) such other institution as the Central Government may by notification specify as a financial institution.

B. Whether certificate from foreign banks required?

Appellant's Contention

The appellant is a foreign company of Hong-Kong having no office or bank account in India. As the appellant has no account in any scheduled bank or 'Financial Institution' as defined in Section 45-I of the RBI Act 1934 nor having such account with "Public 'Financial Institution'" as defined in clause (72) of Section 2 of the Companies Act 2013 or with any other institution notified by Central Government as 'Financial Institution', it failed to enclose any certificate from 'Financial Institution' maintaining account of the 'Operational Creditor'.

Learned counsel appearing on behalf of the appellant submitted that the foreign companies and multi-national companies having no office or having no account in India with any of the 'Financial Institution' will suffer to recover the debt as due from 'Corporate Debtors' of India. The appellant being a foreign based 'Operational Creditor', the 'Adjudicating Authority' was required to interpret the provisions of 'I & B Code' in such a manner that Section 9 would have taken in its fold all the 'Operational Creditors' who are entitled to recover the debt defaulted by 'Corporate Creditors' of India. Learned counsel for the appellant further submitted that the word 'shall' used in sub-section (3) of Section 9 for furnishing documents etc. should be read as 'may', and hold that sub-section (3) of Section 9 is directory.

C. Grounds of dismissal of appeal

On perusal of entire Section (3) along with sub-sections and clauses, inclusive of proviso, it would be crystal clear that, the entire provision of sub-clause (3) of Section 9 required to be mandatorily followed and it is not empty statutory formality.

In determining the question whether a provision is mandatory or directory, one must look into the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law-maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other. Therefore, it is clear that the word 'shall' used in sub-section (3) of Section 9 of the Code is mandatory, including clause 3 therein. The argument that the foreign companies having no office in India or no account in India with any "Financial Institution" will suffer in recovering the debt from Corporate Debtor cannot be accepted as apart from the Code, there are other provisions of recovery like suit which can be preferred by any person.

Accordingly NCLAT dismissed the appeal stating that the provisions of Section 9(3)(c) is mandatory.

4) 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.	Acme Specialties V/s. Entire Ceramics Ltd.	<ul style="list-style-type: none">• The matter was filed before the NCLT, Ahmedabad Bench, under Section 9 of the Code dealing with the initiation of corporate insolvency process by Operational Creditor.• The application was dismissed by NCLT on the grounds that no one was present from Corporate Debtor side at the time of hearing.
2.	SIDBI V/s. Nexgen Laminators Pvt. Ltd.	<ul style="list-style-type: none">• The matter was filed before the NCLT, Chandigarh Bench under Section 7 of the Code dealing with the initiation of corporate insolvency process by Financial Creditor.• The petition was dismissed because the petition was withdrawn by the Petitioner with liberty to pursue the petition for winding up of the company which was pending in High Court of Punjab and Haryana.
3.	M/s. Hada Textiles Industries Limited	<ul style="list-style-type: none">• The matter was filed before the NCLT, Kolkata Bench under Section 10 of the Code dealing with the initiation of corporate insolvency process by Corporate Debtor.• The petition was dismissed because the Tribunal does not have power to amend the order of BIFR or to extend the scheme period sanctioned by BIFR under the Code as requested by the Applicant under the petition.

5) Interface with Insolvency Professionals

In light of the issues and challenges being faced by the Interim Resolution Professionals while dealing under the Code, ICSI IPA organized an **Interactive Session on Insolvency and Bankruptcy Code, 2016 - Issues, Challenges and Case Analysis** on May 18, 2017 at Scope Complex, New Delhi with **Honourable Justice Shri S J Mukhopadhaya, Chairperson of NCLAT** and **Mrs. Suman Saxena, Whole Time Member of Insolvency and Bankruptcy Board of India.**

Mr. Amarjit Singh Chandhiok, President INSOL India and Senior Advocate, also shared his views at the Interactive Session. About 100 IPs participated and discussed their concerns and issues with the eminent guests at the Session, which was coordinated by CS Satwinder Singh, Central Council Member of ICSI and CS Alka Kapoor, Chief Executive Officer (Designate), ICSI Insolvency Professionals Agency.

6) New Publication- IBC CASE LAW COMPENDIUM (WITH CASE BRIEFS)

ICSI IPA is pleased to inform that, in its endeavour to keep its members updated, it released a publication titled **“IBC: A Case Law Compendium (With Case Briefs)”** on 18th May, 2017 at an **Interactive Session** with **Hon'ble Justice S. J. Mukhopadhaya, Chairperson, NCLAT** and **Mrs. Suman Saxena, Whole Time Member, IBBI.**

The book enjoys the privilege of being first of its kind compiling all orders issued by various benches of NCLT upto 30th April 2017, consisting:

- a. Table of orders accepting/rejecting an application (consolidated and Bench wise).
- b. Bench-wise orders of NCLT admitting an application along with case briefs.
- c. Table of rejected applications by various benches of NCLT with reasons for rejection.
- d. Bench-wise orders rejecting an application.
- e. Orders passed by NCLAT.

The Foreword to this publication has been written by **Shri Arun Jaitley, Hon'ble Minister of Finance and Corporate Affairs** and also by **Dr. M. S. Sahoo, Chairperson, IBBI.**

We are confident that this book will prove to be extremely handy and useful in understanding and interpreting the law in harmony with the adjudicators.

The cost per book is Rs. 800/-, however, the same is available at a discount of 20% i.e Rs. 640/- per book.

The book can be purchased through the following modes:

- a) From ICSI Headquarters
- b) Through post by sending a requisition mentioning your name and complete postal address along with a demand draft of Rs. 700/- per book (postage included) for the requisite amount in favour of the “ICSI Insolvency Professionals Agency” at the following address:

**Rita Aswani,
Deputy Director, Stores Department
The Institute of Company Secretaries of India,
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We shall appreciate your valuable suggestions to improve the publication.

We request all the Insolvency Professionals to intimate us the challenges and issues that they are facing under the Code. We will consider the same and take them further to the Insolvency and Bankruptcy Board of India (IBBI) for consideration. Professional Members are requested to mail their issues, concerns and challenges under the Code at lakshmi.arun@icsi.edu.

Wish you good luck in all your endeavors!!

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