KNOWLEDGE REPONERE

(A Weekly Bulletin)

(24-28 JULY, 2017 and 31 July-4th August, 2017)

INSOLVENCY PROFESSIONALS AGENCY

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"The quality of a leader is reflected in the standard they set for themselves." – Ray Croc

Dear Professional Members,

In the recent past, it is seen that after the admission of application for initiation of corporate insolvency either under section 7 or section 9, the corporate debtor, in most cases, approaches the NCLAT (Appellate Authority), for withdrawl of application. When there is a settlement reached between the parties wherein, the debtor repays its dues to the financial/operational creditor, as the case may be.

In one of the cases titled ***Lokhandwala Kataria Construction Private Limited vs. Nisus Finance & Investment Manager LLP***, the corporate debtor (Lokhandwala Kataria Construction Private Limited) urged the Appellate Authority to exercise its inherent powers as the matter had been settled between the corporate debtor and creditor.

The Appellate Authority refused to exercise such power in withdrawl of application stating that Rule 11 of the NCLAT Rules, 2016 (which contains provision of inherent power) has not been adopted for the purpose of Insolvency and Bankruptcy Code, 2016 ("IBC") and only Rule 20 to 26 of NCLT Rules, 2016 have been adopted.

When both the parties approached before the Hon'ble Supreme Court, the Hon'ble Supreme Court exercised its inherent powers under Article 142 of the Constitution of India and put a 'quietus to the matter', and took the consent terms of parties on record.

It is feared that this trend, even though exercisable in facts of each case and does not act as a precedent, yet, would lead to more parties coming to the doors of Hon'ble Supreme Court and getting out of the rigours of Insolvency Bankruptcy Code, 2016. It is also an apprehension amongst the Insolvency Professionals (IPs) that debtors with deep pockets like to take their changes before the Apex Court to continue remaining out of the clutches of law.

1) CASE UPDATES

The speedy filing of the cases under the Code at various NCLT Benches is taking a new turn every day. The newly admitted cases with regard to Corporate Insolvency Resolution Process (CIRP) under the Code are as below:

S. No.	Case Title	Relevant Section	NCLT Bench	Amount in default as mentioned in application (in Rupees)
1.	State Bank of India V/s. M/s. Alok Industries Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Ahmedabad	2,218.56 Crores
2.	State Bank of India Vs Bhushan Steel Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench	9,227 Crores
3.	Punjab National Bank Vs Bhushan Power and Steel Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench	9,306 Crores
4.	Bank of Baroda V/s. Binani Cements	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Kolkata	3,042 Crores
5.	State Bank of India V/s. Amtek Auto	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Chandigarh	8,066 Crores
6.	M/s. The Mauritius Commercial Bank V/s. M/s. Varun Corporation Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Mumbai	USD 17,122,179
7.	M/s. SREI Infrastructure Finance Ltd. V/s. M/s. K. S Oils Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Ahmedabad	99.73 Crores
8.	M/s. Canara Bank V/s. M/s. Deccan Chronicle Holdings Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Hyderabad	Amount not mentioned in order
9.	M/s. Daxen Agritech India Pvt. Limited V/s.	Section 9 of the Code dealing with	Chandigarh	Amount not mentioned in order

	M/s. Daehsan Trading (India) Private Limited	initiation of CIRP by operational creditor.		
10.	M/s. Portrait Advertising & Marketing Pvt. Ltd. V/s. M/s. Mothers Pride Dairy India Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Principal Bench	64.49 Lakhs
11.	M/s. Gurinandan Fashion Pvt. Ltd. V/s. M/s. Pooja Tex-Prints Private LImited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Ahmedabad	Order not available
12.	M/s. Vertex Chemicals V/s. M/s. Mahaan Proteins LImited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Principal Bench	14.68 Lakhs
13.	Aggarwal Elastics V/s. Anu Elastics Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	1.25 Lakhs
14.	Mr. Nitin Khandelwal V/s. M/s. Maini Construction Equipments Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	Order not available
15.	M/s. Globe Express Services (Overseas Group) Limited & Anr Vs MM Cargo Container Line Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	23.94 Lakhs
16.	M/s Aggarwal Elastics through Vs Ms Anu Elastics Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	Amount not mentioned in the order
17.	M/s Aggarwal Elastics through Vs Ms Anu Elastics Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP	New Delhi	

		by operational creditor.		
18.	M/s. Brasher Boot Company Ltd. V/s. M/s. Forward Shoes (India) Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	Order not available
19.	M/s. Shiv Pooja Traders V/s. M/s. Jammu Paper Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chandigarh	Amount not mentioned in order
20.	Mr. Rashid Ismail Tharadra V/s. M/s. Raj Oil Mills Limited	Section 10 of the Code dealing with initiation of CIRP by Corporate Debtor.	Mumbai	125.45 Crores
21.	M/s. Haldia Coke and Chemicals Pvt. Ltd.	Section 10 of the Code dealing with initiation of CIRP by Corporate Debtor.	Chennai	Order not available

2) NCLAT CASE BRIEFS

Case Title	M/s. Inox Wind Limited V/s. Jeena & Company
Appellant	M/s. Inox Wind Limited (Corporate Debtor)
Respondent	Jeena & Company (Financial Creditor)
Relevant Section under which case was filed before NCLT	Section 9 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Operational Creditor.

The appeal was preferred by the Corporate Debtor - Inox Wind Limited ("Appellant") against orders dated July 05, 2017 and July 11, 2017 passed by NCLT, Chandigarh Bench ("Adjudicating Authority") whereby the application filed by operational creditor - Jeena & Co. ("Respondent") under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") was admitted and the 'Interim Resolution Professional' was also appointed.

Appellant's Submissions

I. The Appellant contended that the impugned order was passed by the Adjudicating Authority in contravention of principle of natural justice i.e. without giving any notice to the Appellant prior to the admission of the application.

II. For this contention, reliance was placed on the decision of the Appellate Tribunal in **"Innoventive Industries Limited Vs ICICI Bank and Another" wherein it was held that since the amended Section 424 of Companies Act, 2013** is applicable to the proceedings under the Code, it is mandatory for the Adjudicating Authority to follow the Principles of Rules of Natural Justice while passing an order under the Code.

III. It was further contended that the appellant is a solvent company and is in a position to pay the dues. It was also submitted that the amount due to the Respondent has also been paid.

Respondent's Submission

I. The respondents admitted that no notice was issued by the Adjudicating Authority before admitting the application under Section 9 of the Code and that the amount due to the respondent was also paid by the appellant.

Relevant Facts

I. While the hearing was going on, an ex-employee of the Appellant Mr. Shailendra Puri who worked as AVP (Marketing) w.e.f. 4th June, 2013 to 21st April, 2016 submitted that the appellant company had not paid his salary. Such statement was made only orally.

II. On the next date, he appeared in person; signed one synopsis dated July 25, 2017 and informed that the appellant had resolved the grievance by paying the claimed amount and that no more claim is subsisting.

Decision of the Appellate Authority

I. The Appellate Authority found that the impugned order was passed by the Adjudicating Authority in complete violation of the principles of natural justice and against their decision as was held in **"Innoventive Industries Limited"**.

II. In such situation, the Appellate Authority noted that it was left with no other option but to set aside the impugned orders.

III. Hence the impugned orders were set aside.

IV. Consequently, the appointment of Interim resolution Professional, order declaring moratorium, freezing of account and all other orders passed pursuant to the impugned

order and actions taken by the Interim Resolution Professional including the advertisement published in the newspaper were declared as illegal.

V. The Appellate Authority also allowed the appellant to function independently through its Board of Directors with immediate effect.

INHERENT POWERS OF NCLT IN WITHDRAWL OF APPLICATION

Case Title	Lokhanwala Kataria Constructions Private Limited V/s. Nisus Finance & Investment Manager LLP
Appellant	Lokhanwala Kataria Constructions Private Limited (Financial Creditor)
Respondent	Nisus Finance & Investment Manager LLP (Corporate Debtor)
Relevant Section under which case was filed before NCLT	Section 7 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Financial Creditor.

The present appeal was preferred by the Corporate Debtor ("Appellant") against order dated June 15, 2017 passed by NCLT, Mumbai Bench ("Adjudicating Authority") whereby the application filed by financial creditor ("Respondent") under Section 7 of the Code was admitted.

Respondent's Submissions

I. At the time of the hearing, the respondent stated that the dispute between the parties has been settled and part amount has also been paid.

Appellant's Submission

I. The fact of settlement having been made was highlighted by the appellant.

II. A request was made to NCLAT to exercise inherent power under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 ("NCLAT Rules") which empowers the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.

Decision of NCLAT

I. The Appellate Authority noted the provisions of Rule 8 of IBBI (Application to Adjudicating Authority) Rules, 2016 ("Adjudicating Authority Rules") which

empowers the Adjudicating Authority to permit withdrawal of the application on a request of the applicant before its admission.

II. Thus, it was held that an application made under Section 7 can be withdrawn only before its admission by the Adjudicating Authority but once the application is admitted, it cannot be withdrawn and the procedures laid down under Sections 13 to 17 of the Code need to be followed.

III. The Appellate Authority further held that even a financial creditor is not allowed to withdraw the application once admitted till the claims of all the creditors are satisfied by a Corporate Debtor. It was further held that the settlement between the parties could not be a ground to interfere with the impugned order in absence of any other infirmity.

IV. On the issue of exercising inherent powers, the Appellate Authority noted that Rule 11 of the NCLAT Rules, which talk of inherent powers of NCLAT, have not been adopted for the purposes of Insolvency and Bankruptcy Code and only Rule 20 to 26 of the National Company Law Tribunal Rules, 2016 have been adopted. In absence of any specific inherent power and where the is not merit the question of exercising inherent power does not arise.

Subsequent Development

The appellant filed statutory appeal before the Hon'ble Supreme Court of India vide Civil Appeal No. 9279/2017 wherein, the Hon'ble Supreme Court, even though observed that prima facie it seems that NCLAT does not have inherent powers (while exercising powers under the Code), however, since both the parties were before the Hon'ble Supreme Court, the Apex Court, exercising its power to do complete justice under Article 142 of the Constitution of India, recorded the consent terms and put a quietus to the matter.

BUYERS CAN APPROACH NCLT IN CASE OF DEFAULT IN "ASSURED RETURNS"

Case Title	Nikhil Mehta and Sons V/s. AMR Infrastructure Ltd.
Appellant	Nikhil Mehta and Sons (Financial Creditor)
Respondent	AMR Infrastructure Ltd. (Corporate Debtor)
Relevant Section under which case was filed before NCLT	Section 7 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Financial Creditor.

The present appeal was filed by the Financial Creditors against the order dated 23rd January, 2017 passed by NCLT , Principal Bench New Delhi("Adjudicating Authority") whereby the

Adjudicating Authority held that the appellants are not Financial Creditors as defined under Section 5(7) of Insolvency and Bankruptcy Code, 2016 ("Code").

Brief Facts

I. The appellants entered into different agreements/Memorandum of Understandings with Respondent/Corporate Debtor for purchase of 3 units in a project developed by Respondent.

II. One of the unit was purchased by the appellant under the "Committed Return Plan" as per which if the appellant pays a substantial portion of the total sale consideration upfront at the time of execution of the MOU. The Respondent would pay a particular amount to the appellant each month as committed return/assured return each month from the date of execution of MOU till the time of handing over the physical possession of the unit.

III. The Respondent started paying the committed returns to the Appellant as per the MOU for some time, but stopped thereafter.

IV. In view of the above, the appellants filed application under Section 7 of the Code before the Adjudicating Authority which was dismissed vide the impugned order.

Appellants' Submissions

I. The transaction between the appellants and respondent was not a simple real estate transaction. In this regard, appellants relied upon an order passed by SEBI holding that transactions whereby the developer offers to pay assured returns to the buyer are not pure real estate transactions; rather they satisfy the ingredients of a collective investment scheme as defined under section 11AA of the SEBI Act.

II. Since the provisions of winding up under the Companies Act, 2013 stand substituted by the Code, the appellants should be entitled to relief under the Code.

III. The balance sheet of the respondent shows the amount to be paid to appellants as "commitment charges" under the head of "Financial Costs".

IV. The respondent was deducting TDS on the amount paid as committed returns/assured returns under Section 194(A) of Income Tax Act, 1961, which is applicable to deduction of TDS on the amount which is paid to some as "interest, other than Interest on Securities". Thus, the payment made by respondent to appellants is payment of "interest" thereby making the amount payment made by appellants to respondent as "Loan" for constructing the project.

Respondent's stand

I. Respondent appeared but did not file any affidavit denying the averments made by appellants.

Decision of Appellant Authority and reasons thereof

I. The Appellate Authority noted that following **two questions** arose before it for consideration

i. Whether the appellants who reached with agreements/ Memorandum of Understandings with respondent for the purchase of three units being a residential flat, shop and office space in the projects developed, promoted and marketed by the respondent come within the meaning of 'Financial Creditor' as defined under the provisions of sub-section (5) of Section 7 of the Code? and

ii. Whether an application for triggering insolvency process under Section 7 of the Code is maintainable where winding up petitions have been initiated and pending before the Hon'ble High Court against the 'Corporate Debtor?

II. As regards the **first question**, the Appellate Authority quoted the provisions of section 5(7), section 5(8) and section 7 of the Code as well as the extracts of the judgment passed by the Learned Adjudicating Authority with regard to the appellants being Financial Creditors. Thereafter, the Appellate Authority noted the relevant clause of one of the MoU dated 12th April, 2008 executed between appellants and respondent.

III. After scrutinizing the above provisions, the Appellate Authority held that the appellants are "investors" and had chosen the "committed return plan". The respondent in their turn agreed upon to pay monthly committed return to the investors. Thus, the amount due to the appellants came within the meaning of "debt" defined under section 3(11) of the Code. Furthermore, the Appellate Authority noted from the Annual Return and Form 16-A of the respondent that the respondent had treated the appellants as "investors" and borrowed amount pursuant to sale purchase agreement for their commercial purpose treating at par with loan in their return. Thus, the Appellate Authority held that the amount invested by appellants came within the meaning of 'Financial Debt' as defined under section 5(8)(f) of the Code, subject to satisfaction of as to whether such disbursement against consideration is for "time value of money".

IV. For determining "time value of money", the Appellate Authority perused the MoU between the parties providing for "monthly committed returns" to be paid to the appellants. The Appellate Authority held that it was clear from the MoU that the amount

disbursed by appellant was "against consideration of time value of money" and respondent raised the amount by way of sale-purchase agreement, having commercial effect of borrowing". This was clear from the annual returns of respondent wherein the amount so raised/borrowed was shown as "commitment charges" under the head "financial cost". Thus, the appellants were "Financial Creditors" under section 5(7) of the Code.

V. Accordingly, the Appellate Authority allowed the appeal and remitted the matter to the Adjudicating Authority to admit the application subject to the condition that other conditions of section 7 of the Code are satisfied by the appellants.

VI. From a reading of the judgement, it is clear that the Appellate Authority did not deliberate upon the second question raised in the appeal.

NOTICE UNDER SECTION 8 OF IBC TO BE GIVEN BY OPERATIONAL CREDITOR ITSELF, NOT BY ADVOCATE/CA/CS

Case Title	Uttam Glava Steels Limited V/s DF Deutsche Forfait AG & Anr.
Appellant	Uttam Galva Steels Limited (Corporate Debtor)
Respondent	DF Deutsche Forfait AG & Anr. (Operational Creditor)
Relevant Section under which case was filed before NCLT	Section 10 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Corporate Debtor.

The present appeal was filed by the Corporate Debtor ("Appellant") against the impugned order dated 10th April, 2017 passed by NCLT, Mumbai Bench ("Adjudicating Authority") whereby the Adjudicating Authority admitted the application filed by two Operational Creditors ("Respondents") and directed to refer the matter to IBBI to recommend name of Interim Resolution Professional ("IRP") for his appointment.

- **Appellant/Corporate Debtor's Submissions**

I. There is a pre-existing bonafide dispute between the parties. To support this submission, appellant contended that:

a. Respondents violated the contractual terms
b. There is a dispute about quantum of default
c. There is a dispute as to who is the defaulter (whether Uttam or 3rd party)
d. Dispute as to whether respondents are operational creditors of appellant or not
e. Respondents had issued a winding up notice on 8th December, 2016 much prior to the issuance of notice under section 8 of the Insolvency and

Bankruptcy Code ("IBC"). This winding up notice was replied in detail by appellant vide reply dated 3rd January, 2017.

II. Respondents relied upon a document dated 27th December, 2013 to fix liability of appellant which has not been signed by appellant. This fact was brought to notice of respondents in the year 2013 itself.

III. The notice under section 8 of IBC dated 28.02.2017 is issued jointly by the respondents through their counsel and not by the respondents themselves.

IV. Section 9 of IBC does not contemplate filing of joint application by two or more operational creditors, as is done in the present case by respondents.

V. Demand notice under section 8 of IBC was not issued by 'authorized persons' in accordance with law.

VI. Certificate of 'financial institution' as prescribed and mandatory under clause (c) of sub-section (3) of section 9 of IBC was not filed by respondents.

VII. The certificate produced on record by respondents was defective on multiple counts as it was not issued by a notified 'financial institution' but by Misr Bank which is not recognized as 'financial institution' in India as per section 3(14) read with clause (c) of sub-section (3) of section 9 of IBC.

VIII. The affidavit in support of the application should have been filed, as prescribed in Form 5 of the IBBI (Application to Adjudicating Authority) Rules, 2016 ("Adjudicating Authority Rules")

- **<u>Respondents'/Operational Creditors' submissions</u>**

I. A joint petition is maintainable which *per se* indicates/suggests joinder of more than one cause of action to enable parties to institute a proceeding jointly in court of law.

II. The transaction between the appellant and supplier of goods was single and the same has not been split into two cause of actions. It is only the right to receive payment under the Bills of Exchange that has now been vested in two entities. Therefore, in effect, there is no joinder of cause action but only right to receive payment under Bills of Exchange.

III. Vide Notification dated 20.12.2016, NCLT Rules, 2016 was amended and Rule 23A was inserted. In view of Rule 23A, it was contended that joint petition is maintainable.

IV. Appellant himself admitted to filing of suit before the Hon'ble High Court of Bombay but therein the Appellant has not disputed the transactions of sale/purchase in terms of quality/quantity of goods supplied nor disputed the existence of debt. Only

contention raised in that suit was that goods were meant for consumption of another end user and that person has not paid any amount to the appellant

V. Procedures are hand maiden of justice which cannot defeat the substantive rights of parties. Therefore, format of demand notice cannot be stated to be mandatory.

VI. The requirement of certificate by a financial institution, which has been held to be mandatory in *Smart Timing Steel Limited vs. National Steel and Agro Industries Limited*, is only for the purpose of confirming or ascertaining through a trustworthy source like any financial intuition to find out, whether any payment has been received in response to the demand notice or not. In the present case, a certificate of bank albeit incorporated under the law of Germany has been produced to affirm that no payment has been received.

VII. Further, since the appellant has himself contended that the end user has not made the payment, non-payment of invoice becomes an admitted fact and requires no further elaboration by way of independent certificate in the manner there is no requirement of

Questions for consideration before the Appellate Authority

I. Whether a joint application by two or more 'operational creditors' under Section 9 of the IBC is maintainable?

II. Whether it is mandatory to file ‘certificate of recognized financial institution’ along with an application under Section 9 of IBC?

III. Whether the demand notice with invoice under Section 8 of IBC can be issued by any lawyer on behalf of an Operational Creditor? and

IV. Whether there is an existence of dispute, if any, in the present case?

Decision of Appellant Authority and reasons thereof

I. First Question

a) The Appellate Authority quoted section 7, 8 and 9 of IBC and noted the difference between them. It stated that language of section 7 of IBC provides that application for initiation of insolvency resolution process may be filed by Financial Creditor either by itself or jointly with other Financial Creditors, whereas, such language is not used in section 9 of IBC. Otherwise also, it is not practical for more than one ‘operational creditor’ to file a joint petition. Individual ‘operational creditors’ will have to issue their individual claim notice under section 8. The claim will vary which will be different in each case. The notice under section 8 will have to be issued in format. Separate Form-3 or Form-4 will be filed.

b) The reliance of respondents on Rule 23A of NCLT Rules, 2016 is not correct since the said Rule has not been adopted by section 10 of IBC.

II. Second Question

a) The Appellate Authority, after quoting the extract of judgment passed in Smart Timing Steel Limited (supra), observed that the Certificate relied upon dated 6th March 2017 attached by Respondents has not been issued by any 'financial institution' as defined in sub-section (14) of Section 3 of IBC but has been issued by **Misr Bank** which is a foreign bank and is not recognised as a 'financial institution'. The said Certificate has been issued by 'collecting agency' as distinct from 'Financial Institution" and genuity of the same cannot be verified by the Adjudicating Authority.

b) The Appellate Authority also noted that the affidavit in support of insolvency application, as prescribed in Form-5 of the 'Adjudicating Authority Rules' has not been filed, which mandates that 'no notice of dispute received to be returned or it is returned when dispute was raised', has to be enclosed by the 'operational creditor.

c) In absence of such certificate from 'notified Financial Institution', and as Form- 5 is not complete, we hold that the application under Section 9 of IBC, was not maintainable.

III. Third Question

a) The Appellate Authority observed that from a plain reading of sub-section (1) of Section 8, it is clear that on occurrence of default, the Operational Creditor is required to deliver the demand notice of unpaid Operational Debt and copy of the invoice demanding payment of the amount involved in the default to the Corporate debtor in such form and manner as is prescribed.

b) Sub-Rule (1) of Rule 5 of Adjudicating Authority Rules mandates 'operational creditor' to deliver to the 'corporate debtor' the demand notice in Form-3 or invoice attached with notice in Form-4.

c) Rule 5(1)(a) & (b) lists out person (s) who are authorised to act on behalf of operational creditor. From bare perusal of Form-3 and Form-4, read with sub-rule (1) of Rule *5* and Section 8 of the I&B Code, it is clear that an Operational Creditor can apply himself or through a person authorised to act on behalf of Operational Creditor. **The person who is authorised to act on behalf of Operational Creditor is also required to state "his position with or in relation to the Operational Creditor", meaning thereby the person authorised by Operational Creditor must hold position with or in relation to the Operational Creditor and only such person can apply.**

d) In view of provisions of IBC, read with Rules, as referred to above, it was held that an 'Advocate/ Lawyer' or 'Chartered Accountant' or 'Company Secretary', in absence of any authority of Board of Directors and holding no position with or in relation to the Operational Creditor cannot issue any notice under Section 8 of IBC, which otherwise is a 'lawyer's notice' as distinct from notice to be given by operational creditor in terms of section 8 of the IBC.

e) In the present case, as an advocate/lawyer has given notice and there is nothing on record to suggest that the lawyer has been authorised by 'Board of Directors' of the Respondent - 'DF Deutsche Forfait AG' and there is nothing on record to suggest that the lawyer holds any position with or in relation with the Respondents, it was held that the notice issued by the lawyer on behalf of the Respondents cannot be treated as a notice under section 8 of IBC and for that, the petition under section 9 at the instance of the Respondents against the Appellant was not maintainable.

IV. Fourth Question

a) The Appellate Authority noted that from bare perusal of record, it is clear that Respondents issued winding up notice on 8th December, 2016 i.e., much prior to issuance of lawyer's notice purported to be under Section 8 of IBC. On receipt of such notice, appellant disputed the claim by detailed reply dated 3rd January, 2017. Apeart from that, respondents were relying on document dated 27th December 2013 to fix liability on the Appellant, which according to Appellant was not signed by the Appellant and such fact was brought to the notice of the Respondents as back as in the year 2013.

b) In *"Kirusa Software Private Ltd. Vs Mobilox Innovations Private Ltd.",* the Appellate Authority decided the issue of 'dispute' .

c) In view of the decision of *"Kirusa Software Put. Ltd. v. Mobilox Innovations Put. Ltd",* as a notice of winding up dated 8th December, 2016 was issued by Respondents, and claim was disputed by Appellant, by detailed reply dated 3rd January 2017 i.e., much prior to purported notice under Section 8, issued by Lawyer and a suit between the parties is pending, the Appellate Authority held that there is an existence of 'dispute', within the meaning of Section 8 read with sub-section (5) of Section 5 of IBC and, therefore, the petition under Section 9 preferred by Respondents against the Appellant was not maintainable.

d) In view of the detailed reasons and finding recorded above, it was held by Appellate Authority that the impugned order was illegal and set aside the same.

3) REJECTED CASES

Recently few cases have been rejected by NCLT on specific grounds while majority have been rejected on routine grounds such as non presence of parties at the time of hearing, mutual consent between the parties to withdrew the case, inadequate documents etc.

S. No	Case Title	Reasons for rejection
1.	M/s. ACE Build Pvt. Ltd. V/s. The A 2 Z Powercom Limited	• The matter was filed before the NCLT, Chandigarh Bench u/s 9 of the Code. • This matter was initially filed before Hon'ble Punjab and Haryana High Court on 09.09.2016 u/s 433(e) of the Companies Act, 1956.But since the Respondent was not served while the matter was pending before High Court, it got transferred to NCLT in terms of Companies (Transfer of Pending Proceedings) Rules, 2016. • As per the facts of the case, Petitioner and Respondent entered into a construction agreement and the total value of purchase order was Rs. 4.91 Crores as on 20.07.2012. • The amount in default in the said case is Rs. 49,31,452 along with the interest. • Petitioner sent several reminders for the outstanding amount and the Managing Director of Respondent Company assured the release of outstanding amount. • After making several request for payment, Petitioner served demand notice to the Respondent dated 07.06.2017 for the outstanding amount. • As per the order, the matter is not maintainable under the Code on the grounds that the debt has become time barred. • Subject to Section 3(11) of the Code, debt means a liability or application in respect of claim which is due from any person and includes a financial debt and operation debt. • In the said case, Respondent has provided a reconciled ledger statement to the Petitioner thereby acknowledging the debt of Rs. 49,31,452. • As per the counsel of Petitioner, Respondent has been assuring orally to make the payment but at same time not acknowledging the debt in writing. • As per the provisions of Section 18(1) of the Limitation Act, 1963, " ***where, before the expiration of the prescribed period for a suit***

		or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by any person through whom he drives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed." • Hence, the petition has been dismissed by NCLT on grounds of being time barred and consequently corporate insolvency resolution can't be invoked.

We hope these updates add value to your knowledge. Wish you good luck in all your endeavors!!

CS ALKA KAPOOR
CHIEF EXECUTIVE OFFICER
(Designate)