

KNOWLEDGE REPONERE

**(A WEEKLY BULLETIN)
(OCTOBER 23- OCTOBER 27,
2017 AND OCTOBER 30-
NOVEMBER 03, 2017)**

©  **INSOLVENCY PROFESSIONALS AGENCY**

All rights reserved. No part of this Publication may be translated or copied in any form or by any means without the prior written permission of The ICSI Insolvency Professionals Agency.

Disclaimer

Although due care and diligence has been taken in the production of this Knowledge Reponere (A Weekly Bulletin), the ICSI Insolvency Professionals Agency shall not be responsible for any loss or damage, resulting from any action taken on the basis of the contents of this Knowledge Reponere (A Weekly Bulletin). Anyone wishing to act on the basis of the material contained herein should do so after cross checking with the original source.

Published by:

 **INSOLVENCY PROFESSIONALS AGENCY**

1st Floor, ICSI House, 22, Institutional Area, Lodi Road
New Delhi-110003

Phones: 011-4534 1099/33

Email: info@icsiipa.com

INSOLVENCY PROFESSIONALS AGENCY

KNOWLEDGE REPONERE

(A Weekly Bulletin: October 23- October 27, 2017 and October 30- November 03, 2017)

*“Knowledge is power. Information is liberating.
Education is the premise of progress, in every society, in every family”*

– Kofi Annan

Dear Professional Members,

Greetings!

I am pleased to share with you our next issue of weekly bulletin on the Insolvency and Bankruptcy Code, 2016 (“**Code**”).

As you are aware, the World Bank, in its “**Doing Business Report, 2018**”, India now ranks 100 among 190 countries. Report has also acknowledged India as a top improver, with an improvement of 30 ranks compared to last year’s report, the highest jump in rank of any country in the Doing Business Report, 2018. As per report, India is the only country in South Asia and BRICS economies to feature among most improved economies this year. One of the important highlights of India’s performance in Doing Business Report 2018 related to “**Resolving Insolvency**” wherein India’s rank improved from 136 to 103; Strength of insolvency framework index increased from 6 to 8.5 amongst others.

New Syllabus for Limited Insolvency Examination with effect from January 01, 2018.

On November 02, 2017, Insolvency and Bankruptcy Board of India (“**IBBI**”) has come out with a Press Release detailing the syllabus, format and frequency of the “Limited Insolvency Examination” (Examination) with effect from 1st January, 2018. The detailed press release is available at the following link:
<http://ibbi.gov.in/PressReleaseSyllabus2Nov17.pdf>

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.	Nitin Gupta V/s. M/s. Applied Electro Magnetic Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	46.77 Lakhs
2.	M/s. Regal Metals and Ferro Alloys V/s. M/s. SPM Auto Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	5.55 Crores
3.	JBB Enterprises V/s. YMS Mobitech Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Allahabad	1.88 Crores
4.	Lakshmi Vilas Bank Limited V/s. Orchid Pharma Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	Amount not mentioned in the order
5.	M/s. Surya Balaji Steels Pvt. Ltd. V/s.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	Amount not mentioned in the order

2) BRIEF OF SOME OF THE DECIDED CASES

Supreme Court of India

Alchemist Asset Reconstruction Company Ltd.Peitioner
V/s.
M/S. Hotel Gaudavan Pvt. Ltd. & Ors
....Respondent

Date of judgment: 23rd October 2017

Brief facts:

- Petition for initiating corporate insolvency resolution process was filed under the Code was admitted on 31.03.2017 by the National Company Law Tribunal (“NCLT”), Principal Bench, New Delhi. As a result, the moratorium imposed by Section 14 of the Code came into effect. Despite the moratorium, arbitration clause between the parties was invoked and Sole Arbitrator was appointed.
- In an another order dated 31.05.2017, the NCLT, Principal Bench, New Delhi referred to Section 14 (1)(a) of the Code and stated that given the moratorium that is imposed, no arbitration proceedings could go on.
- A First Appeal was filed before the District Judge, Jaisalmer, Rajasthan under Section 37 of the Arbitration and Conciliation Act, 1996 and by the impugned order dated 06.07.2017, the appeal was asked to be registered and notice was issued awaiting a reply.

Decision of Hon’ble Supreme Court of India:

- Supreme Court taking note of the mandate of the Code observed that the moment an insolvency petition is admitted, the moratorium that comes into effect under Section 14(1)(a) of the Code expressly interdicts institution or continuation of pending suits or proceedings against Corporate Debtors.
- Supreme Court stated that “*we are surprised that an arbitration proceeding has been purported to be started after the imposition of the said moratorium*”

and appeals under Section 37 of the Arbitration Act are being entertained. Therefore, we set aside the order of the District Judge dated 06.07.2017 and further state that the effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium is non est in law”.

- Apart from setting aside the order of the District Judge in relation to arbitration proceedings instituted after imposition of the moratorium under the Code, Hon’ble Supreme Court of India quashed the criminal proceeding (i.e. F.I.R.) against Interim Resolution Professional (“**IRP**”) and observed that F.I.R. has been taken in a desperate attempt to see that the IRP does not continue with the proceedings under the Insolvency Code which are strictly time bound.
- Supreme Court has also given directions that the steps that have to be taken under the Insolvency Code will continue unimpeded by any order of any other Court.

National Company Law Appellate Tribunal (“NCLAT”) Judgments

Shriram EPC Limited

....Appellant – Corporate Debtor

V/s.

Rio Glass Solar SA

....Respondent – Operational Creditor

Date of judgment: 2nd November, 2017

Brief facts:

- An Appeal was filed by Shriram EPC Limited, Corporate Debtor (“**Shriram EPC**”), challenging the order of NCLT, Division Bench, Chennai admitting the application for initiation of corporate insolvency resolution process under section 9 of the Code filed by Rio Glass Solar SA, (“**Rio Glass**”), Operational Creditor.
- Shriram EPC alleged that the demand notice under section 8 (1) of the Code was not given by Rio Glass, but through an Advocate/Law Firm.
- It was also alleged that the application under section 9 of the Code was not signed by Rio Glass but, by the Power of Attorney holder.

- Shriram EPC also alleged that the copy of certificate from financial institution maintaining accounts of the Operational Creditor confirming that there is no payment of an unpaid operational debt by Corporate Debtor within the meaning of section 9(3)(c) of Code was not filed.
- On the aforesaid grounds the order of NCLT was challenged by Shriram EPC.

Decision of NCLAT and reasons thereof

- NCLAT observed that application under section 9 of the Code preferred by Rio Glass was not maintainable as the notice for the purposes of Section 8 (1) of the Code has been issued and signed by a law firm and there is nothing on record to suggest that the person/law Firm was authorized by the operational creditor or the Law firm is holding any position within the office of the Operational Creditor. NCLAT relied on its earlier decision *Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr.*, wherein it was held that demand notice cannot be issued by an Advocate/law Firm and the same has to be issued by the operational creditor or any person authorized who holds a position with or in relation to operation creditor.
- NCLAT observed that application under section 9 of the Code by Rio Glass was not maintainable since application has been signed and filed by Power of Attorney holders. NCLAT relied on its earlier decision *Palogix Infrastructure Limited vs. ICICI Bank Limited*, wherein it was held that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial creditor or 'operational creditor' or 'corporate applicant'.
- NCLAT observed that order of NCLT admitting the application under section 9 of the Code cannot be upheld as in the present case, one "CaxiaBank", Madrid has given a chart which has been filed by Rio Glass but it is not recognized as financial institution of India under the Code and any other record of default has not been enclosed by Rio Glass. NCLAT relied on its earlier decision *Smart Timing Steel Ltd. Vs. National Steel and Agro Industries Ltd.*, wherein it was held that filing of certificate from a 'financial institution' is mandatory,
- Allowing the appeal, the NCLAT set aside the order of NCLT and dismissed the application preferred by Rio Glass under section 9 of the Code.

Transport Technologies Pvt. Ltd.Appellant – Corporate Debtor

V/s.

Multi Trade

....Respondent – Operational Creditor

Date of Judgment: 25th October, 2017

Brief facts:

- An Appeal was filed by Transport Technologies Pvt. Ltd., Corporate Debtor (“**Transport Technologies**”) challenging the order of NCLT, Mumbai Bench admitting the application for initiation of corporate insolvency resolution process under section 9 of the Code filed by Multi Trade.
- As a brief background, it may be noted that Multi Trade filed a petition under Sections 433 and 434 of the Companies Act, 1956 for winding up of Transport Technologies before the High Court of Bombay. However, during the pendency of the said case and in view of introduction of the Code and pursuant of the Companies (Transfer of pending proceedings) Rules, 2016 (“**Transfer of pending proceedings Rules**”) issued by Central Government and notified on 7th December, 2016, the matter was transferred from High Court of Bombay to the NCLT, Mumbai Bench. On hearing Multi trade, the NCLT treated the application under Section 9 of the Code and admitted the case.
- In view of the Rule 5 of Transfer of pending proceedings Rules, the application filed under Sections 433 and 434 of the Companies Act, 1956 was transferred from High Court to the NCLT who treated the application under Section 9 of the Code and admitted the case.
- It was alleged by Transport Technologies that no notice under Section 8 (1) of the Code was issued and the copy of Form 5(i.e application for initiation of corporate insolvency resolution process by Operational Creditor) as required under Section 6(2) of the Code was also not served on the Transport Technologies. It was also alleged that no application under Section 9 or Form 5 was filed before the NCLT. It was also alleged that the NCLT has passed the order only after consideration of the reply filed by the Transport Technologies pursuant to notice under Section 434 of the Companies Act, 1956 which

cannot be taken into consideration for admitting the application under section 9 of the Code.

Decision of the NCLAT and reasons thereof:

- NCLAT observed that there is nothing on record to suggest that any notice under Section 8 (1) of the Code was issued and served or the application under Form 5 was filed.
- Allowing the appeal, the NCLAT held that in terms of Rule 5 of Transfer of pending proceedings Rules and in absence of non-supply of requisite informations, the application cannot be treated as an application under Section 9 for initiation of Corporate Insolvency Resolution Process of the Transparent Technologies.

Sandeep Reddy & Anr. ...Appellants – Corporate Debtor
vs.
Jaycon Infrastructure Ltd. ...Respondent – Operational Creditor

Date of Judgment: 26th October, 2017

Brief facts:

- An appeal was filed by Sandeep Reddy & Anr, the Corporate Debtor (“**Sandeep Reddy**”) challenging the order of NCLT, Hyderabad Bench, Hyderabad, admitting the application for initiation of corporate insolvency resolution process under section 9 of the Code filed by Jaycon Infrastructure Ltd., the Operational Creditor (“**Jaycon**”).
- It was alleged by Sandeep Reddy that there is a dispute in existence prior to issuance of notice of demand under sub-section (1) of Section 8 of the Code.
- It was further contended that the name of the Interim Resolution Professional was not recommended by the Operational Creditor and the NCLT without calling for name of any IRP from the IBBI appointed IRP, on its own.
- Jaycon admitted that IRP was appointed without any suggestion made by it and submitted that parties have reached the settlement in writing which is binding on the parties.

Decision of the NCLAT and reasons thereof:

- NCLAT held that the application under Section 9 of the Code was not maintainable since it is not disputed by Jaycon that there was a dispute in existence prior to issuance of demand notice under sub-section (1) of Section 8 of the Code and that parties have already reached the settlement
- NCLAT *prima facie* was of the opinion that the Code do not empower the NCLT to suggest any name or appoint any IRP/ Resolution Professional of its own choice. However, NCLAT observed that since the parties have settled the dispute and initiation of resolution process under section 9 of the Code was not maintainable, in view of existence of dispute, we leave the question open as to whether the NCLT has power to appoint any person of its own choice or not which will be decided in an appropriate case.

3) REJECTED CASES

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

Case Title	Brief Facts and Reasons for rejection
M/s Value Line Interiors Pvt. Ltd. <i>[Operational Creditor]</i> vs. M/s Rattan India Power Ltd. <i>[Corporate Debtor]</i> Date of Judgment: 23.10.2017 (NCLT, New Delhi Bench)	<u>Brief facts:</u> <ul style="list-style-type: none">• The application was filed by M/s Value Line Interiors Pvt. Ltd., Operational Creditor (“ Value Line”) against M/s Rattan India Power Ltd., Corporate Debtor (“ Rattan India”) under section 9 of the Code for initiating the corporate insolvency resolution process in relation to non-payment of its dues for jobs done and completed in relation to interior fit outs, firefighting and plumbing work.• Rattan India alleged that Value Line has suppressed various existing disputes in respect of the work executed which has caused Rattan India untold harassment and extra expenses arising out not only in respect of dissatisfactory work done, but also on account of delay in execution within the time

	<p>agreed upon under the contract and relied upon previous correspondences corroborating the facts.</p> <ul style="list-style-type: none"> • Rattan India alleged that the agreement executed between the parties specifically provided for damages on account of delay in completion of work and therefore Rattan India seek to recover the same from Value Line. <p><u>Decision of NCLT and reasons thereof:</u></p> <ul style="list-style-type: none"> • NCLT observed that the liability to pay Value Line for the service rendered has been in dispute even prior to filing of the present petition under section 9 of the Code. • NCLT observed that disputes with respect to the quality of service rendered is evident from various communications on record. Further, the liability on account of delay in executing the job work arising out of the work order is also sought to be invoked. • NCLT rejecting the petition observed that while it is beyond the scope of NCLT to adjudicate the evidentiary value of the dispute, its existence is sufficient ground for rejecting the present petition.
<p>Axis Bank <i>[Applicant]</i></p> <p>DBS Bank <i>[Financial Creditor]</i></p> <p>vs.</p> <p>Edu Smart Services Pvt. Ltd. <i>[Corporate Debtor]</i></p>	<p><u>Brief facts:</u></p> <ul style="list-style-type: none"> • The application was filed by Axis Bank Limited (“Axis Bank”) under section 60(5) of the Code for setting aside the decision of Resolution Professional (“RP”) where RP had rejected the claim filed by Axis Bank in regard to Corporate Insolvency Resolution Process (“CIRP”) of Edu Smart Services Pvt. Ltd., Corporate Debtor (“Edu Smart”). • Briefly stated, an application under section 7 of the Code was filed by DBS Bank Limited, Financial Creditor (“DBS”) and the said application was

Date of Judgment :
27th October, 2017

(NCLT, New Delhi
Principal Bench)

admitted on 27th June, 2017 i.e., the insolvency commencement date.

- Axis Bank filed a claim of around Rs. 396 crores before RP on the basis of a corporate guarantee given by Edu Smart.
- RP communicated to Axis Bank intimating that the claim cannot be verified as corporate guarantee had not been invoked.
- Subsequently, Axis Bank invoked corporate guarantee vide letter dated 21st July, 2017 and informed the Resolution Professional (“RP”) to process the claim.
- The claim was rejected by RP on the ground that the liability under corporate guarantee was contingent as on date of commencement of insolvency process on 27th June, 2017, and thus, not verifiable.

Decision of NCLT and reasons thereof:

- NCLT held that as per Regulation 13(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“CIRP Regulations”), RP shall verify claims, as on the insolvency commencement date. Since the claim of Axis Bank arose on the basis of invocation of guarantee on 21st July, 2017, i.e. after the insolvency commencement date, the claim was correctly not verified by RP.
- The NCLT also observed that invocation of corporate guarantee against Edu Smart would result in enforcing of security interest and it would thus, be in violation of moratorium provisions of section 14(1)(c) of the Code.

- | | |
|--|------------------------------------------------------------------------------------------------------------|
| | <ul style="list-style-type: none">• Accordingly, the application by Axis Bank was dismissed. |
|--|------------------------------------------------------------------------------------------------------------|

I trust you will find this issue of our weekly bulletin useful and informative.

Wish you good luck in all your endeavors!!

CS ALKA KAPOOR
CHIEF EXECUTIVE OFFICER
(Designate)
011-45341099

CS/PA