KNOWLEDGE REPONERE

(A Weekly Bulletin)

(11-15 December, 2017)

ICSI INSOLVENCY PROFESSIONALS AGENCY

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(A Weekly Bulletin: December 11, 2017- December 15, 2017)

"Education is the greatest gift of life, it should never stop" – Tony Clark

Dear Professional Members,

Greetings!

We are pleased to share with you our next issue of weekly bulletin on the Insolvency and Bankruptcy Code, 2016 ("**Code**").

Insolvency and Bankruptcy Board of India ("**IBBI**") has on 15th December 2017, issued the "Insolvency Professionals to act as Interim Resolution Professionals or Liquidators (Recommendation) Guidelines, 2017" ("**Guidelines**") replacing the Insolvency Professionals to act as Interim Resolution Professionals (Recommendation) Guidelines, 2017 issued earlier.

Under the Guidelines, IBBI will prepare a Panel of Insolvency Professionals ("**IP**") for appointment as Interim Resolution Professional ("**IRP**") or Liquidator and share the said Panel with the Adjudicating Authority. The Adjudicating Authority may pick up any name from the Panel for appointment of IRP or Liquidator for a corporate insolvency resolution process ("**CIRP**") or Liquidation, as the case may be. The Panel will have Bench wise list of IPs based on the registered office of the IP. It will have a validity of six months and a new Panel will replace the earlier Panel every six months.

It may be noted that aforesaid Guidelines will be reviewed by the IBBI from time to time. The detailed guidelines are available at following link: http://ibbi.gov.in/webadmin/pdf/whatsnew/2017/Dec/Insolvency%20Professionals%20to%20act%20as%20Interim%20Resolution%20Professionals%20or%20Liquidators%20(Recommendation)%20Guidelines,%202017_2017-12-16%2022:58:38.pdf

1) CASE UPDATES

The speedy filing of the cases under the Code at various National Company Law Tribunal ("**NCLT**") Benches is taking a new turn every day. The newly admitted cases with regard to 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.	Anubhuti Aggarwal V/s. DPL Builders Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	New Delhi	31 Lakhs
2.	Punjab National Bank V/s. M/s. Dinesh Polytubes Pvt. Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Chandigarh	4.07 Crores
3.	Bank of Baroda V/s. Vimal Oil & Foods Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Ahmedabad	171.99 Crores
4.	Standard Chartered Bank V/s. DBS Bank Ltd	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Mumbai	334.14 Crores
5.	APT Packaging Limited V/s. Sheon Skincare Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	10.78 Lakhs
6.	Maharashtra Tourism Development Corporation V/s. Luxury Train Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Principal Bench	20.07 Crores

7.	M/s. ELHPL Private Limited V/s. M/s. ICICI Bank Limited	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	Principal Bench	3 Crores

2) BRIEF OF SOME OF THE DECIDED CASES

Supreme Court Judgment

Macquarie Bank Limited …Appellant/Operational Creditor

Versus

Shilpi Cable Technologies Ltd. …Respondent/Corporate Debtor

With
Civil Appeal No. 15481 of 2017
Civil Appeal No. 15447 of 2017

Date of Judgment: 15.12.2017

Brief facts:

- The facts contained in three appeals were similar and hence Supreme Court disposed off all the appeals through a common judgment.

- In the present case, Macquarie Bank Limited, Operational Creditor ("**MBL**") supplied certain goods to Shilpi Cable Technologies Ltd., Corporate Debtor ("**Shilpi Cable**") for which invoices were raised. However, Shilpi Cable failed to repay the outstanding amounts despite several reminders. Thereafter, MBL filed statutory notice under section 433 and 434 of Companies Act, 1956 which was replied by Shilpi Cable contending that there was no outstanding.

- After enactment of the Code, MBL issued demand notice through advocate/lawyer under section 8 of the Code which was replied by Shilpi Cable denying the liability to pay the outstanding. Thereafter, MBL filed application under section 9 of the Code for initiating CIRP against Shilpi Cable. After hearing the parties, NCLT rejected the application of MBL and held that section 9(3) (c) of the Code which requires certificate from financial institution maintaining accounts of the operational creditor confirming that there is no payment of unpaid operational debt by the corporate debtor, was mandatory

and since there was non-compliance of the same, the application was dismissed.

- Aggrieved by the order of NCLT, MBL filed appeal to National Company Law Appellate Tribunal ("**NCLAT**"). In appeal, NCLAT upheld the order of NCLT and held that certificate from financial institution maintaining accounts of the operational creditor confirming that there is no payment of unpaid operational debt by the corporate debtor, is mandatory requirement for initiating CIRP under section 9 of the Code. NCLAT further held that the notice issued by the advocate/lawyer on behalf of the MBL cannot be treated as notice under Section 8 of the Code.

- In the aforesaid circumstances, MBL challenged NCLAT judgment before Hon'ble Supreme Court.

Decision of Supreme Court and reasons thereof:

- Hon'ble Supreme Court noted that the appeal filed by MBL raised two important issues under the Code viz.

  a) whether, in relation to an operational debt, the provisions contained in section 9(3) (c) of the Code relating to certificate from financial institution maintaining accounts of the operational creditor confirming that there is no payment of unpaid operational debt by the corporate debtor, is mandatory?;

  b) whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor?

  Section 9 (3) (c) of the Code is directory in nature

- In relation to first issue i.e. whether the provisions contained in section 9(3) (c) of the Code are mandatory, Hon'ble Supreme Court observed that filing certificate from a financial institution maintaining accounts of the operational creditor confirming that there is no payment of unpaid operational debt by the corporate debtor, is directory in nature for filing application under section 9 of the Code. In this regard, Supreme Court noted following:
  - A certificate under 9 (3) (c) of the Code is certainly not a "condition precedent" and the expression "confirming" in section 9 (3) (c) makes it clear that it is only a piece of evidence, which "confirms" that there is no payment of an unpaid operational debt.

  - There may be situations where a foreign supplier or assignee of such supplier may have a foreign banker who is not financial institution

within section 3 (14) of the Code. The fact that such foreign supplier is an operational creditor is established from reading of definition of "person" contained in section 3(23), as including person resident outside India, together with definition of 'operational creditor' in section 5(20). In this context, Supreme Court observed that the Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under section 3(14) of the Code.

- Annexure III to Form 5 speaks of copies of relevant accounts kept by banks/ financial institutions maintaining accounts of operational creditor confirming that there is no payment of the relevant unpaid operational debt by the operational debtor, if available. The words "if available" shows that the requirement of filing certificate from financial institution is not a pre-condition.

- Hon'ble Supreme Court took note of the principle contained in *Taylor v. Taylor* (1875) 1 Ch. D. 426 (Taylor Case), namely that where a statute states that a particular act is to be done in a particular manner; it must be done in that manner or not at all. However, Supreme Court observed that the said principle as contained in Taylor case is not applicable to present case by relying on the Constitution Bench judgment of Supreme Court in *Ukha Kolhe v State of Maharashtra* wherein it was held that the principle contained in Taylor case would not apply when a proof of a specified fact could be obtained by means other than that statutorily specified. Supreme Court noted that the judgment in *Ukha Kolhe case* applies on all fours to the facts of the present case in as much as proof of the existence of a debt and a default in relation in relation to such debt can be proved by other documentary evidence, as is specifically contemplated by section 9 (3) (d) of the Code. Supreme Court also noted that section 8 of the Code does not prescribe any particular method of proof of occurrence of default and came to conclusion that principle contained in Taylor case does not apply in present case.

- Relying on its earlier decision in *Surendra Trading Company v Juggilal Kamlapat Jute Mills Company Limited and Others,* Hon'ble Supreme Court noted that it is well settled that procedure is handmaid of justice and procedural provision cannot be stretched and considered as mandatory, when it causes serious general inconvenience. In this regard, Supreme Court noted that the important condition precedent for initiating CIRP under section 9 of the Code is occurrence of default, which can be proved, by means of other documentary evidence. Thus, filing certificate from a financial institution was held to be directory.

Notice under section 8 of the Code can be sent by a lawyer on behalf of operational creditor

- In relation to second issue i.e. whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor, Hon'ble Supreme Court observed that a conjoint reading of section 30 of the Advocates Act, 1961 ("**Advocates Act**") and sections 8 and 9 of the Code together with the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 *("***Adjudicatory Authority Rules**") and Forms there under would yield the result that a notice can be sent by a lawyer on behalf of operational creditor. In this regard, Supreme Court noted following:
    - Section 8 of the Code speaks of an operational creditor "delivering" the demand notice and not "issuing" it. Delivery, therefore, would postulate that such notice could be made by an authorized agent.
    - Form 3 and Form 5 of Adjudicating Authority Rules, require the person serving demand notice to "*state position with or in relation to the operational creditor*". In this context, Hon'ble Supreme Court observed that in "relation to" is a very wide expression which specifically includes a position which is outside or indirectly related to the operational creditor, including a lawyer.
    - Rejecting the contention that lawyers are excluded when it comes to issuing notices under section 8 of the Code, Supreme Court noted that reading the Code and on harmonious construction of section 30 of the Advocates Act along with judgment of *Byram Pestonji Gariwala v. Union Bank of India*, expression "an operational creditor may on the occurrence of a default deliver a demand notice…" under section 8 of the Code must be read as including an operational creditor's authorized agent and lawyer, as has been stated in Forms 3 and 5 appended to the Adjudicatory Authority rules.
    - Word "practice" in Section 30 of the Advocates Act is an expression of extremely wide import that would include all preparatory steps leading to the filing of an application before a Tribunal, including NCLT and NCLAT.
    - Supreme Court also noted that the *non-obstant*e provision in Section 238 of the Code will not override the Advocates Act since there is no inconsistency between the section 9 of the Code read with Adjudicating Authority Rules and Advocates Act.

NCLAT Judgment

Leo Duct Engineers & Consultants Limited ...Corporate Applicant (Debtor)

Versus

Canara Bank

Standard Chartered Bank ...Respondents/Financial Creditors

Date of judgment: 13.12.2017

Brief facts:

- An application was filed by Leo Duct Engineers & Consultants Limited ("**Leo Duct**") before NCLT under section 10 of the Code for initiating the CIRP. The said application was rejected by NCLT on the ground that the petition would have serious impact on the financial creditors who have already set the wheel in motion to Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**").

- In its decision, NCLT observed that it is not sufficient just to meet the requirements under section 10 of the Code which would automatically entitle the Corporate Debtor to initiate such proceedings. In its decision, NCLT observed that the Adjudicating Authority has to consider the merits of each case and see beyond what meets the eye, and only after due application of mind, consider the case on its merits.

- NCLT while rejecting the application under section 10 of the Code observed that this Bench does not deem it just, fit and proper to admit the petition as initiation of the proceedings by the Corporate Debtor shall cause irreparable loss and injury to the Banks, and an uncalled for protection to the borrowers and various guarantors.

- It was alleged by Leo Duct before NCLT that initiation of proceedings under the SARFAESI Act cannot be a ground to reject an application under Section 10, if otherwise it is complete in terms of the Code and Adjudicating Authority Rules

Decision of NCLAT and reasons thereof:

- NCLAT took note of its earlier judgment in *M/s. Unigreen Global Private Limited vs. Punjab National Bank and others* and observed that NCLT was not correct in rejecting the application of Leo Duct on the ground of suppression of relevant facts.

- NCLAT observed that the case of the Leo Duct was covered by the aforesaid decision in "M/s. Unigreen Global Private Limited" wherein it was held that *"Section 10 of the Code does not empower the Adjudicating Authority to go beyond the records as prescribed under Section 10 and the informations as required to be submitted in Form 6 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 subject to ineligibility prescribed under Section 11."*

- In the present case, NCLAT noted that it has not been pleaded that the Leo Duct is ineligible in terms of Section 11 of the Code. Further, NCLAT noted that the NCLT in its decision has noticed unrelated facts which are not required to be disclosed in terms of Section 10 or Form 6.

- In the aforesaid context, NCLAT observed that since the application under Section 10 of the Code was complete and in absence of any ineligibility of Leo Duct, it was incumbent on the part of the NCLT to admit the application, having no jurisdiction to notice unrelated facts beyond the requirement under the Code and the Forms prescribed under the Adjudicating Authority Rules.

- In the aforesaid context, setting aside the order, NCLAT remitted the case back to the NCLT, Mumbai Bench to admit the application under Section 10 of the Code after notice to the parties if there is no defect. NCLAT observed that in case of any defect, Leo Duct be allowed time to remove the defects.

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
Usha Holding LL.C. & Anr *[*Applicant/Operational Creditors*]* **vs.**	**Brief facts:** • Application under section 9 of the Code was filed by Usha Holding LL.C. ("**Usha Holding**"), a foreign business corporation authorized to conduct business in State of

Francorp Advisors Pvt. Ltd. *[*Respondent/Corporate Debtor *]* Date of Judgment: 11.12.2017 (NCLT, New Delhi Principal Bench)	New York and Mr. Atul Bhatara, a citizen of US domiciled in New York (collectively referred to as "**applicants**"), claiming themselves to be operational creditors, for initiating CIRP against Francorp Advisors Pvt. Ltd., Corporate Debtor ("**FAPL**"), a joint venture entity between the applicants, Franchise India Holdings Ltd. and Mr. Gaurav Marya, Director of Francorp Advisors Pvt. Ltd. • The applicants claimed a sum of USD 1,661,743.04 (excluding interest) as unpaid operational debt. The basis of unpaid operational debt was based on judgment dated 05.10.2015 delivered by District Court, Eastern District of New York-USA. • Usha Holding issued demand notice dated 12.04.2017 under section 8 of the Code to FAPL and on failure to repay the unpaid operational debt in full within 10 days of receipt of demand notice, application under section 9 of the Code for initiating CIRP was filed before NCLT. • Applicants relied upon the demand notice dated 12.04.2017, judgment and decree dated 05.10.2015, licence agreement between the applicants and FAPL and an MoU between Atul Bhatara and Gaurav Marya. • Upon issue of notice, FAPL appeared and made following submissions: ▪ Application was not maintainable as applicants are not 'operational creditors'; ▪ Judgment and decree dated 05.10.2015 was not a decree within the meaning of laws prevailing in India as it has not been passed by a reciprocating country and thus, not enforceable and

	not binding; ▪ Applicants have failed to comply with mandatory requirements of section 13 and section 44A of the Code of Civil Procedure, 1908 ("**CPC**") **Decision of NCLT and reasons thereof:** • After hearing both the parties, NCLT noted that section 234 of the Code, relating to cross border insolvency, has to be read with section 44A of CPC, which provides for execution of decrees passed by courts in reciprocating territory. • NCLT noted that section 44A of CPC provides that a certified copy of the decree of any superior court of any reciprocating territory is required to be filed in a District Court for execution in India along with a certificate from such superior court of Foreign county stating the extent, to which the decree has been satisfied or adjusted. NCLT also noted that as per section 44A(3) of CPC, a District Court in India can refuse execution if such decree falls within any of the exceptions specified in clause (a) to (f) of section 13. • NCLT noted that under section 13 of CPC, a foreign judgment is not conclusive as to any matter directly adjudicated upon between the same parties where it has, *inter alia*, not been pronounced by a court of competent jurisdiction, or where it has not been given on merits of the case. Under section 14 of CPC there is a presumption, upon production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction.

	• NCLT observed that the decree dated 05.10.2015 placed on record was not a certified copy of the decree or order. It was further observed that the applicants failed to show any notification of reciprocation between USA and India in terms of section 44A of CPC. • NCLT further observed that the decree dated 05.10.2015 is in violation of the law prevailing in India in as much as the agreement between the parties contained an arbitration clause. In case of any conflict, the matter ought to have been referred to arbitration by the courts in USA and the courts, ought not to have, adjudicated upon the same. This is in violation of the law prevailing in India as section 8 of the Arbitration and Conciliation Act, 1996 had not been followed and thus, the decree dated 05.10.2015 is hit by section 13(f) of CPC i.e. the foreign judgment has sustained a claim founded on a breach of any law in force in India. • Accordingly, the NCLT dismissed the application for initiation of CIRP.

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

Wish you good luck in all your endeavors!!

Team ICSI IPA