KNOWLEDGE REPONERE

(A Weekly Bulletin)

(December 18, 2017 – January 7, 2018)

INSOLVENCY PROFESSIONALS AGENCY

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(30th Bulletin: December 18, 2017 – January 7, 2018)

Dear Professional Members,

At the outset, team ICSI IPA wishes its readers a very Happy and Prosperous New Year! As we usher into this new year, it is time to replenish the reservoir of curiosity ahead of what promises to be a fascinating 2018. ICSI IPA shall continue to keep a tab on the most evolving jurisprudence of the recent times and update its reader's about the headway taking place continually in the Insolvency and Bankruptcy Code, 2016 **("Code").**

On this note, we take pride in sharing with our readers, the 30th bulletin on the Code.

A. Amendment in (i) the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, and (ii) the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017.

The amendments have done away with the requirement of disclosing the "liquidation value" in the Information Memorandum of an asset undergoing resolution. In other words, the liquidation value to be paid to dissenting creditors will have to be kept confidential. This amendment aims to fetch a higher price for the stressed assets under liquidation. . Further, a Resolution Applicant shall submit the resolution plan(s) to the Resolution Professional (**"RP"**) within the time given in the invitation for the resolution plan(s) in accordance with the provisions of the Code which would help Committee of Creditors (**"CoC"**) to close the resolution process at the earliest.

More details about the amendment are available at:
http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/press%20release%2001012018_2018-01-01%2022:19:50.pdf

B. On January 2, 2018, Rajya Sabha passed the Insolvency and Bankruptcy (Amendment) Bill, 2017. The Bill had already been passed by the Lok Sabha and is awaiting the President's assent.

The Bill, *inter alia*, prohibits certain persons from submitting a resolution plan in case of defaults. These include: (i) wilful defaulters, (ii) promoters or management of the company if it has an outstanding non-performing debt for over a year, and (iii) disqualified directors, among others. These persons, however, can become "eligible to submit a resolution plan" if they clear all the overdue amounts with interest and other charges relating to their NPA accounts. Further, it bars the sale of property of a defaulter to such persons during liquidation.

C. On January 3, 2018, IBBI, in exercise of its powers under section 196 read with section 208 of the Code, issued 3 circulars.

i) The *first* circular mandates Insolvency Professionals ("IPs") to prominently state (i) his name, address and email, as registered with the IBBI, (ii) his Registration Number as an IP granted by the IBBI, and (iii) the capacity in which he is communicating i.e. whether as an Insolvency Resolution Professional ("IRP") or as an RP.
More details about the circular are available at:
http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/CIRP%20l_2018-01-03%2018:41:16.pdf

ii) The *second* circular clarifies that a corporate person undergoing insolvency resolution process, fast track insolvency resolution process, liquidation process or voluntary liquidation process under the Code needs to comply with provisions of the applicable laws during such process. It directs that while acting as an IRP, RP or a Liquidator, an IP shall exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person undergoing any process under the Code complies with the applicable laws.
Further, the circular clarifies that if a corporate person during any of the aforesaid processes under the Code suffers any loss, including penalty, if any, on account of non-compliance of any provision of the applicable laws, such loss shall not form part of insolvency resolution process cost or liquidation process cost under the Code and states that in such a scenario, the IP will be responsible for the non-compliance of the provisions of the applicable laws if it is on account of his conduct.

More details about the circular are available at:
http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/CIRP%202_2018-01-03%2018:41:44.pdf

iii) The *third* circular directs that an IRP shall not outsource any of his duties and responsibilities under the Code and that he shall not require any certificate from another person certifying eligibility of a resolution applicant. The circular also clarifies that no certificate is required from another person certifying eligibility of a resolution applicant.

More details about the circular are available at: http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/CIRP%203_2018-01-03%2018:42:53.pdf

D. As you are aware, the Government of India had constituted the Insolvency Law Committee ("Committee") vide order dated 16.11.2017, to identify the issues that may impact the efficiency of the Corporate Insolvency Resolution and the Liquidation Framework prescribed under the Code, and make suitable recommendations to address such issues, enhance efficiency of the processes prescribed and the effective implementation of the Code.

The Committee in its first meeting held on 8th December, 2017 requested members of the Committee to hold discussions with their stakeholders in order to address the issues related to Code and to suggest necessary recommendations to the Committee.

In this regard, ICSI IPA conducted meeting(s) at New Delhi on 23rd December 2017 and at Mumbai on 02nd January 2018, comprising of Insolvency Professionals and other stakeholders. In the said meetings, suggestions regarding the amendments required in the Code/Regulations/Rules were discussed in order to present the same before the Committee.

We request members to send their suggestions along with reasons regarding the amendments required in the Code/Regulations/Rules at mehreen.rahman@icsi.edu so as to ensure us to consolidate the suggestions and send the same to the Committee.

1) CASE UPDATES

Cases under the Code are being filed expeditiously across the various benches of NCLT. It is therefore imperative for our readers to be cognizant of the developments taking place. 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.	Bank of Baroda V/s. Varia Engineering Work Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Ahmedabad	86.57 Crores
2.	Bank of Baroda V/s. Vimal Oil and Foods Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Ahmedabad	157.95 Crores
3.	Punjab National Bank V/s. Conros Steels Pvt. Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Mumbai	60.59 Crores
4.	Tata Power Company Limited V/s. Meenakshi Energy Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Hyderabad	22.05 Crores
5.	Kolinal Steels and Alloys Private Limited V/s. Master Shipyard Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	23.34 Lakhs

6.	Neelam Vishal Matadar V/s. Anil Tradecom Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Ahmedabad	21.3 Lakhs
7.	Manek Enterprise V/s. Anil Mines & Minerals Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Ahmedabad	1.79 Crores
8.	Sunil Sunderlal Luhar V/s. Indian Bank	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	Ahmedabad	10.36 Crores

2) BRIEF NOTE

NCLAT JUDGMENT

Dr. B.V.S. Lakshmi ...Appellant/Financial Creditor

Versus

Geometrix Laser Solutions Private Limited ...Respondent/Corporate Debtor

Date of Judgment: 22.12.2017

- The appeal was filed by Dr. B. V. S. Lakshmi (**"Dr. Lakshmi"**), claiming to be a Financial Creditor of Geometrix Laser Solutions Private Limited (**"Geometrix"**) against the judgment passed by NCLT, Hyderabad Bench, Hyderabad (**"NCLT"**) whereby the application filed by Dr. Lakshmi was dismissed on the ground that Dr. Lakshmi is not a Financial Creditor of Geometrix.
- Dr. Lakshmi contended that she was the shareholder of Geometrix and advanced a loan of Rs. 91,47,864/- to Geometrix between the year 2013 to 2015 to prevent it from going bankrupt.

- According to Dr. Lakshmi, the loan was advanced for the purpose of (a) repaying interest/installment on bank loans taken by Geometrix so that loans are not defaulted upon or rendered NPA; and (b) ensuring payment of salaries and money due to suppliers/vendors, so that business continues unabated.
- Dr. Lakshmi further contended that though the terms of loan were not recorded in writing, but, it was agreed that money advanced would carry interest and she relied upon email from the Managing Director of Geometrix and Auditor's Report of Geometrix for the same.
- Thus, Dr. Lakshmi contended that the loans were repayable on demand and Geometrix had admitted its liability in its books of accounts.
- It was submitted by Dr. Lakshmi that she had been wrongly held as not a Financial Creditor by NCLT as the debt owed by Geometrix was a 'Financial Debt' having commercial effect of borrowing and had been given against time value of money.
- It was further submitted that the definition of 'Financial Debt', uses the words "means and includes", is inclusive and the loan advanced by Dr. Lakshmi would nevertheless fall within the ambit of 'Financial Debt', even if it does not specifically fall within any of the clauses of 'Financial Debt' defined in section 5(8) of the Code.
- Geometrix relied upon the judgment of **Nikhil Mehta and sons (HUF) vs. AMR Infrastructure Ltd. [Company Appeal (AT) (Insolvency) No. 7 of 2017]** to contend that the essential criteria to be fulfilled for a creditor to come within the meaning of the term 'Financial Creditor' is not fulfilled.
- The term 'creditor' has been defined in section 3(10) of the Code wherein a 'Financial Creditor' as well as an 'unsecured creditor' have been independently mentioned. However, the proceedings under the Code can be triggered only by a Financial Creditor or an Operational Creditor. According to Geometrix, Dr. Lakshmi can at best claim to be an 'unsecured creditor' of Geometrix, however, no proceedings could be triggered by an 'unsecured creditor' who fails to meet the criteria of section 7 or 9 of the Code.
- As per Geometrix, the loans were not disbursed against consideration of time value and money. The amounts reflected in earlier Balance Sheet merely described certain 'unsecured loan' being payable to Dr. Lakshmi as on March 31, 2014. The Auditor Certificate placed on record by Geometrix categorically stated that no amount was due and payable to Dr. Lakshmi and further the Audited Balance Sheet as on March 31, 2017 also nowhere reflects any amount being due and payable to Dr. Lakshmi.
- There is no mention of the date and time when the debt became due and payable and thus, there was no 'default'.

- It was contended that Dr. Lakshmi had filed the application before NCLT with unclean hands as she filed fabricated Memorandum and Articles of Association. Further, it was contended that Dr. Lakshmi was guilty of siphoning funds. A criminal complaint and FIR was lodged against Dr. Lakshmi in August, 2016 and therefore, according to Geometrix, the application before NCLT was filed by Dr. Lakshmi merely to arm-twist the former.
- NCLAT, after quoting the definition of 'Financial Debt', 'Debt' and 'Default', observed that, for coming within the definition of 'Financial Debt' as defined under section 5(8) of the Code, a claimant is required to show that (a) there is a debt along with interest, if any and (b) such disbursement has been made against 'consideration for the time value of money'. To show that there is a debt due which was disbursed against the 'consideration for the time value of money', it is not necessary to show that an amount has been disbursed to 'Corporate Debtor'. A person can show that the disbursement has been made against the 'consideration for the time value of money' through an instrument.
- NCLAT noted that, in the present case, Dr. Lakshmi had failed to bring on record any evidence to suggest that she disbursed the money against 'consideration for the time value of money'. There was nothing on record to suggest that Geometrix borrowed the money. Further, NCLAT observed that Dr. Lakshmi failed to show that the amount has been raised by Geometrix under any other transactions, such as sale or purchase agreement, having commercial effect of borrowing. In absence of any such evidence, Dr. Lakshmi could not claim that loan amount, came within the meaning of 'Financial Debt'.
- NCLAT, accordingly, upheld the judgment passed by NCLT and dismissed the appeal filed by Dr. Lakshmi.

NCLT JUDGEMENT

ICICI Bank Ltd. ...Applicant/Financial Creditor

Versus

Innoventive Industries Ltd. ...Respondent/Corporate Debtor

Date of judgment: 08.12.2017

- In this judgment, four (4) applications were disposed of by NCLT, Mumbai Bench, Mumbai (**"NCLT"**).
- Earlier, an application under section 7 of the Code was filed by ICICI Bank, Financial Creditor (**"ICICI Bank"**) which came to be admitted by NCLT.

- During the Corporate Insolvency Resolution Process of Innoventive Industries Ltd., Corporate Debtor (**"Innoventive"**), Suyash Outsourcing Pvt. Ltd., resolution applicant (**"Suyash Outsourcing"**) submitted a resolution plan which was not approved by CoC with 75% vote sharing.
- **MA No. 557 of 2017** – this application was filed by Suyash Outsourcing, with a prayer, *inter alia*, to allow it to submit revised resolution plan which had not been approved with 75% vote sharing of CoC but only 66.57% of the CoC voted in favour of the resolution plan.
- Suyash Outsourcing contended that the requirement of 75% vote in favor of a resolution plan is directory and not mandatory. It further contended that rejection of the proposed plan would result in loss-loss situation for all stakeholders of Innoventive including the workmen and employees of the company and dissenting financial creditors had not given any reasons for rejection of the proposed resolution plan.
- As the Code is meant for maximization of value of assets and to balance the interest of all stakeholders, it was contended that the value of the resolution plan being more than double the net liquidation value of Rs. 135.40 crores, it is the only viable alternative for liquation.
- NCLT noted that the moot point to be adjudicated is as to *"whether it had jurisdiction to exercise over a decision taken by CoC as contemplated in the Code."*
- NCLT took note of the provisions of section 12, 21, 22, 27, 28 and 30 of the Code where provisions with regard to 75% voting share has been mentioned. It noted section 21(8) of the Code which mandates that all decisions of CoC shall be taken by a vote of not less than 75% of voting shares of the Financial Creditors.
- NCLT also examined the statement and objects of the Code and observed that the only object in leaving everything to the domain of creditors is, because their stake is stuck in the company and in order to avoid abrasion of the rights of creditors to minimum, it has been mandated that all decisions shall be taken with super majority. Further, it noted that Part-II of the Code which deals with 'insolvency resolution of corporate persons' includes liquidation process as well and thus, it is inconceivable to understand that the Code has come into existence for restricting of companies alone and not for liquidation.
- Thus, NCLT held that the mandate of statute and the statements and objects of the enactment as well as the report of the Committee who drafted the legislation have not minced words in saying that the pre-requisite for approval

of the resolution by CoC is 75% majority of the vote shares of the CoC. NCLT also observed that even the provisions of section 60(5) of the Code, which start with a non-obstante clause, would not be of any assistance as the same is an overriding provision in respect of other laws abut not to the provisions of this Code, therefore, if any law is laid down in this Code to do a particular thing in a particular manner, NCLT cannot exercise this jurisdiction given under section 60(5) of the Code to override a specification already given in the Code.

- Regarding the contention of the applicant that workmen would suffer and that the resolution plan value is double to the net liquidation value given by valuers, NCLT observed that to bring in this Code, exercise has been done by studying the Indian law and various foreign law and after thorough discussion, the bill came to be approved by Parliament. The provisions of legislation cannot be changed by NCLT in its own wisdom by ignoring the exercise done by undertaken.
- **MA No. 530 of 2017** – this application was filed by promoter of Innoventive reiterating what was stated in the MA No. 557 of 2017 filed by Suyash Outsourcing. Since MA No. 557 of 2017 was dismissed by NCLT, this application was also dismissed.
- **MA No. 529 of 2017** – this application was filed by the workmen of Innoventive that if the latter is liquidated, the workmen will suffer as Innoventive had been providing livelihood to more than 2000 families. NCLT observed that the jurisdiction of NCLT lies to exercise its power under section 31 of the Code only when a plan is approved by CoC. When no decision has been taken by CoC, no jurisdiction will lie to NCLT as jurisdiction given under section 30 is only limited to approve or reject the resolution plan approved by CoC with super majority. Thus, the application was dismissed.
- **MA No. 590 of 2017** – this application was filed by Workmen's Union of Innoventive praying that the company shall not be liquidated. It was contended, inter alia, that the workmen have a right to work which has been given to them under Article 41 of the Constitution read with Article 14 of the Constitution. NCLT observed that on reading of the application, it appears that the Workmen's Union is seeking an order under Article 14 of the Constitution which is not within the reach of NCLT, lest any other court except constitutional courts i.e. Hon'ble High Court and Hon'ble Supreme Court.

- **IA No. 72 of 2017** – this application was filed by the RP praying for liquidation of Innoventive. NCLT observed that the since the resolution plan has not been approved by CoC and the insolvency resolution process of 270 days was already over by October 14, 2017, NCLT, ordered liquidation of Innoventive.
- Accordingly, the four (4) applications were dismissed and order for liquidation of Innoventive was passed.

REJECTED ORDER

Tayo Rolls Limited	**…Corporate Debtor**
And	
Mr. Suresh Padmanabhan	**…Corporate Applicant**

Date of Judgment: 22.12.2017

- Based on the Board Resolution dated July 3, 2017, Shri Suresh Padmanabhan, Corporate Applicant (**"Shri Suresh"**) filed the present application under section 10 of the Code on behalf of Tayo Rolls Limited, Corporate Debtor (**"Tayo Rolls"**).
- The application stated that the Corporate Debtor had raised financial debts from various non-related party Financial Creditors as well as from its holding company i.e. Tata Steels Ltd. The application further stated that the Corporate Debtor owed an amount of Rs. 7043.29 lakhs to its holding company. Further, the Corporate Debtor had been unable to pay wages and related dues to its workmen since October, 2016. Corporate Applicant annexed all documents relating to financial debts and also recommended the name of IRP.
- In the written submissions filed by Corporate Debtor, it was stated as to how, considering the negative network, continued cash losses, inability to meet future financial obligations and other related factors, the Corporate Debtor had come to the present financial position, thereby rendering it unable to pay its debts.
- Corporate Applicant relied upon the judgment of **Leo Duct Engineering & Consultants Ltd. vs. Canara Bank [Company Appeal No. 100/2017]** to contend that any fact unrelated or beyond the requirement under the Code or forms prescribed are not to be stated or pleaded and the non-disclosure of any facts, unrelated to section 10 cannot be termed as suppression of facts.

- NCLT, on perusal of the written submissions filed by Corporate Debtor observed that, in the Board meeting of Corporate Debtor dated February 12, 2016, it was decided to refer the Corporate Debtor to Board for Industrial and Financial Reconstruction (**"BIFR"**) under the provisions of Sick Industrial Companies (Special Provisions) act, 1985 (**"SICA"**). Such reference was made on February 29, 2016, which was registered on March 23, 2016 and was last heard on November 24, 2016. However, SICA came to be repealed with effect from December 1, 2016 vide Government Notification dated November 28, 2016 and all references and enquiries pending before BIFR abated.
- As per section 4 sub-clause (b) of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (**"SICA Repeal Act"**), a company, in respect of which an appeal or reference or enquiry stands abated may make a reference to NCLT under the Code within 180 days (one hundred and eighty days) from the date of commencement of the Code.
- NCLT noted that the present application under section 10 of the Code was filed on July 13, 2017 and the provisions of section 4 sub-clause (b) of SICA Repeal Act would be applicable in the present case. It was admitted in the written submissions by Corporate Applicant that his reference was pending before BIFR and on account of provisions of SICA Repeal Act, reference got abated. Thus, the abatement is on account of government notification.
- The Corporate Debtor was entitled to file an application within 180 days from the date of commencement of the Code. The Code came into effect on December 1, 2016. Thus, the time limit of 180 days expired in May, 2017, however, the application has been filed on July 13, 2017 i.e. after the expiry of statutory time limit. NCLT observed that the Corporate Debtor did not mention anything about the abatement of reference pending before BIFR and the said fact was disclosed only when an intervention application was filed by the workers of Corporate Debtor before NCLT.
- Since the application under section 10 of the Code was, in fact, a reference, which was earlier pending before BIFR and was not filed within the stipulated time, NCLT rejected the application.

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