ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

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Dear Professionals, **1st July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (99): NCLT directs RP to not reject a claim merely on the ground of being filed after prescribed period of 90 days as the CIRP is still under progress and no resolution plan approved by CoC.

In the insolvency proceedings initiated under s. 10, IBC (CP(IB) 737(PB)/2018) pertaining to *M/s Twenty First Century Wire Rods Ltd.* (Corporate Debtor), Hon'ble NCLT (Principal Bench, New Delhi), while disposing-off an application (CA 942(PB)/2019) filed by M/s Noble Resources Ltd. (applicant) seeking directions to RP to consider its claim which was filed with some delay, held that since the CIR process is still under progress and no resolution plan has been approved by the CoC, the RP cannot reject the claim on the ground of delay.

While considering the aforementioned application, Hon'ble NCLT also took into account the fact that it had earlier condoned delay while disposing-off a similar application (CA 727(PB)/2019) filed in the instant proceedings. Thus, while giving notice to the RP, Hon'ble NCLT observed that *"keeping in view nature of the controversy and the view already taken by us we do not feel that any reply would be necessary."*

In the aforementioned circumstances, Hon'ble NCLT held, *"We pass the same order in the instant matter and dispose of the application with a direction to the Resolution professional to take into consideration the claim made by the applicant on the basis of the award passed by the Arbitrator. The Resolution Professional shall not reject the claim on the ground of delay as the CIR Process is still under progress and no resolution plan has been approved by the CoC so far.*

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

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Dear Professionals, **2nd July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (100): NCLT holds that power under s. 19, IBC does not extend to seeking information from an unrelated third party.

In the proceedings pertaining to the Corporate Debtor, *M/s Educomp Infrastructure & School Management Limited* (CP (IB) No.10/Chd/Hry/2018) initiated under s.10, IBC, an application (CA No. 335/2018) was filed by the RP u/s 19(2) & 19(3) seeking full access and control rights to a software where the books of accounts of the CD were recorded, saved and managed. It is important to note that the said software is controlled by CD's parent company which itself is undergoing CIRP. Hon'ble NCLT, however, after going through the language of s. 19 came to a finding that *"86 The aforesaid provision makes it abundantly clear that besides the ex-management, the requirement is that the ex-directors, respondents No.1, 2, 3 and 5, all of them collectively or independently, must furnish information and complete assistance to the Resolution Professional as required by him to facilitate in managing the affairs of the Corporate Debtor, however, the unrelated parties are under no obligation to furnish information as far as the scope and ambit of s. 19 of The Code is concerned…"*

Hon'ble NCLT, *vide* its order dt. 14th June, 2019 also analysed scope of ss. 17 and 18 in the context of *"Duties of Resolution Professional"* and held that *"94 …To implement the intention of the Code up to this extent, it is obvious that the Suspended Directors and Managerial persons should extend full cooperation. Simultaneously also furnish all information about their accounts and financial facilities availed from various financial creditors."*

While holding Directors of CD (suspended Board) responsible for non-submission of the information as well as non-cooperation as prescribed under s. 19 IBC, the AA held that, in such cases, s. 70 gets attracted and concerned officer of CD shall be liable for penal consequences.

Thus, concluding, the AA partly allowed IRP's application holding that operation of s. 19, IBC shall remain confined to management of the CD and not third parties.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
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Dear Professionals, **3rd July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (101): NCLAT reiterates its holding that an order passed u/s 14, IBC imposing moratorium is not applicable to criminal proceedings initiated under PMLA, 2002.

In an appeal (CA (AT)(I)-140/2019) preferred by *M/s Rotomac Global Private Limited* (CD, through the Liquidator) against Hon'ble NCLT (Allahabad Bench) order dt. 10th January, 2019 (impugned order) passed in I.A. No. 150/2018 in CP No. (IB) 70/ALD/2017, Hon'ble NCLAT, *vide* its *order dt. 2nd July 2019*, reiterates its earlier view taken in the matter of *Varrsana Ispat Limited v. Deputy Director, Directorate of Enforcement'* holding that *"**Section 14 is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having essence of crime or crime proceeds.**"*

In *Varrsana (supra)*, after analyzing provisions of the Prevention of Money Laundering Act, 2002, Hon'ble NCLAT had concluded that since PMLA relates to 'proceeds of crime' and the offence relates to 'money-laundering' resulting in confiscation of property derived therefrom, or involved therein, section 14 of the 'I&B Code' shall not be applicable to such proceedings. It was further observed that offence under PMLA is punishable with imprisonment and has nothing to do with the CD, and rather, it shall be applicable to the Ex-directors and Shareholders of the CD, who cannot be given the protection of s.14. Thus, concluding, it was held:

"14. As the 'Prevention of Money Laundering Act, 2002' relates to different fields of penal action of 'proceeds of crime', it invokes simultaneously with the 'I&B Code', having no overriding effect of one Act over the other including the 'I&B Code'…"

Having taken the aforementioned view, the appeal was dismissed and the impugned order affirmed.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS

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Dear Professionals, **4th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (102): NCLT (Chennai) Bench allows RP's application for CD's Liquidation based on CoC's resolution.

In respect of the proceedings initiated against a CD (M/s Tanjara Trading (P) Ltd.) under section 7, IBC, an application was filed by the RP u/s 33(2), IBC, seeking orders for liquidation of the CD based on a resolution passed by the CoC with 100% voting share. It is interesting to note that the CoC which consisted of one member only, *i.e.*, Federal Bank Limited, had, after taking into account the fact that there are no other assets available with the CD except for some scrap (valuing a particular sum), straight away passed a resolution with 100% voting share suggesting for liquidation of the CD.

The AA, upon perusing the averments made in the application coupled with the resolution passed by the CoC, arrived to a considered view that the CoC has rightly decided suggesting for liquidation of the company since no asset worth enough to propose for resolution are there with the CD.

Keeping the above in view, the AA, *vide* its order dt. 25th June 2019, directed for issuance of public notice stating that CD is in liquidation with a direction to the liquidator to send a copy of the order to concerned RoC. Further, RP was appointed as Liquidator with directions to the personnel of CD to extend all co-operation to the liquidator. Also, directions were issued that no suit or other legal proceedings shall be instituted by or against the CD without prior approval of the AA (save as provided in sub-section (6) of s. 33, IBC).

Thus, the application (M.A./519/2019 in CA/126/IB/2018 in TCP/46/IB/CB/2017) was allowed.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

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Dear Professionals, **5th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (103): Once a debt payable by CD stands cleared on account of approval of plan by payment in favour of lenders, the effect of Deed of Guarantee comes to an end, holds the NCLAT.

The NCLT (Ahmedabad Bench) order dated 8th March 2019 (impugned order) approving the resolution plan filed by M/s ArcellorMittal India (P) Ltd. (successful resolution applicant) in respect of the Corporate Debtor, M/s Essar Steel India Limited, was sought to be challenged by different parties by filing their respective Appeals against the common impugned order. Since the appeals were filed against a common order, they were all heard together and also disposed by *vide* Hon'ble NCLAT's order dt. 4th July 2019.

In one of the appeals titled as *Prashant Ruia v. State Bank of India & Ors.* (CA (AT) (Ins.) No. 257 of 2019), the grounds of challenge made thereof were that the appellant being a Guarantor *wrt* CD's loans, its right of subrogation u/s 140 and its right to be indemnified u/s 145 (Indian Contract Act, 1872) stands extinguished on account of approval of the Resolution Plan submitted by M/s ArcellorMittal India (P) Ltd. While dismissing such contentions as devoid of merit, Hon'ble NCLAT, held as follows:

"31. The Appellant – Mr. Prashant Ruia has executed a 'Deed of Guarantee' between the lenders and the 'Corporate Debtor'. Such guarantee is with regard to clearance of debt. Once the debt payable by the 'Corporate Debtor' stands cleared in view of the approval of the plan by making payment in favour of the lenders ('Financial Creditors'), the effect of 'Deed of Guarantee' comes to an end as the debt stands paid. The guarantee having become ineffective in view of payment of debt by way of resolution to the original lenders ('Financial Creditors'), the question of right of subrogation of the Appellant's right under Section 140 of the Contract Act and the right to be indemnified under Section 145 of the Contract Act does not arise."

Finding no merit in the Appeal, the same was dismissed by Hon'ble NCLAT.

Regards,
CS Alka Kapoor
Chief Executive Officer

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Dear Professionals, **8th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (104): 'Committee of Creditors' cannot delegate its power to a 'Sub Committee' or 'Core Committee' for negotiating with the 'Resolution Applicant(s)'. – Holds the NCLAT.

In the insolvency proceedings initiated in respect of *M/s Essar Steel India Ltd.* (CD), while hearing a bunch of appeals filed by different parties against the common order dt. 8th March, 2019 passed by Hon'ble NCLT (Ahmedabad Bench), Hon'ble NCLAT, in CA(AT)(Ins) 242/2019, was informed by one of the Appellants, Standard Chartered Bank (SCB), that despite its opposition, CoC constituted a Core Committee/Sub-Committee to negotiate with the H1 Resolution Applicant (M/s ArcellorMittal India (P) Ltd.). Regarding the arrangement as inconsistent with the Code, SCB argued that negotiation with an RA on a Resolution Plan is a substantive function of the CoC, and due to constitution of such a sub-committee, SCB has been denied its right to participate in the decision making process.

SCB also informed that it was deliberately excluded from the sub-committee and from participating in the purported negotiations so that the true purpose of such secret negotiations, (which was to deny the rights of the SCB) does not get revealed. Raising a grievance that consequent to the secret negotiations (by the Sub-Committee), the upfront amount offered by Successful Resolution Applicant (ArcelorMittal India Pvt. Ltd.) got reduced from Rs. 42,000 Crores to Rs. 39,500 Crores, it was contended that the same has clearly prejudiced SCB's right to be paid its 100% principal outstanding.

Taking into account the aforementioned contentions, Hon'ble NCLAT, in its order dt. 4th July, 2019, framed an issue (for its decision) as to *whether the 'Committee of Creditors' can delegate its power to a 'Sub Committee' or 'Core Committee' for negotiation with the 'Resolution Applicant' for revision of plan*', and after hearing the parties and taking into account the law on the subject, Hon'ble NCLAT concluded:

"130. A 'Sub-Committee or 'Core Committee' is unknown and against the provisions of the 'I&B Code'. There is no provision under 'I&B Code' which permits constitution of a 'Core Committee' or 'Sub-Committee' nor the 'I&B Code' or Regulations empowers the 'Committee of Creditors' to delegate the duties of the 'Committee of Creditors' to such 'Core Committee'/ 'Sub Committee'."

Regards,
CS Alka Kapoor
Chief Executive Officer

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Dear Professionals, **9th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (105): Hon'ble NCLAT dismisses an appeal being barred by limitation and clarifies that Section 61(2) confers powers on NCLAT to condone a delay of maximum 15 days, if sufficient cause is shown.

In the insolvency proceedings (CP(IB)1138(MB)/2017) initiated in respect of *M/s Dunar Foods Ltd.* (CD), the AA, while dismissing an application (MA 603/2018) filed by National Spot Exchange Ltd. (NSEL) u/s 60(5), IBC, seeking directions to RP to admit its claim, Hon'ble NCLT (Mumbai Bench) *vide* its order dt. 6th March, 2019 had upheld RP's decision of rejecting the claim on the ground that the claimant had failed to prove that there was an existence of debt to it by the CD.

An appeal was preferred against the aforementioned order dt. 6th March, 2019 before Hon'ble NCLAT. The Appellate Authority, while taking account of the fact that the claim was rejected on the ground that the same relates to CD's sister concern *i.e., PD Agro Processors Pvt. Ltd., vide* its *order dt. 5th July 2019*, also held that under section 61(2), IBC, *maximum period which can be condoned by the Appellate Authority is 15 days only*. It was further held that the condonation of delay can be granted only upon the Appellant showing sufficient cause for the same.

Taking account of the fact that the Appeal was preferred after a long delay of 44 days (beyond the 45 days), the same was dismissed by the Appellate Authority as barred by law of limitation.

Regards,
CS Alka Kapoor
Chief Executive Officer

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Dear Professionals, **10th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (106): In case of an MSME, in exceptional cases, the Promoter may not compete with other Resolution Applicants to regain control of CD – Holds Hon'ble NCLAT.

In an appeal (CA (AT) (Ins.) No. 203 of 2019) filed against Hon'ble NCLT (Chennai Bench) order dt. 1st February, 2019 passed in insolvency proceedings initiated (u/s 9, IBC) in respect of *M/s Bafna Pharmaceuticals Ltd.* (CD), Hon'ble NCLAT, *vide* its order dt. 4th July 2019, while dismissing the said appeal, affirmed the legal position adopted by Hon'ble NCLT, holding that it is open to the CoC to defer the process of issuance of IM if promoter of the MSME offers a viable and feasible plan in compliance with the Code. It also held that *in such a case the RA is not required to follow all the procedures as the case for accepting the proposal u/s 12A, IBC.*

The appeal was preferred by *M/s Saravana Global Holdings Ltd.* and *Mrs. P. Shobha*, contending to be interested in submitting resolution plan for the CD, and that they were prevented from doing so on account of the impugned order wherein the Resolution Plan submitted by CD's promoter has been approved by overlooking compliance with mandatory provisions of IBC. It was contended, in specific, that while u/s 25(2)(h), it is the RP's duty to invite prospective RAs who fulfil the criteria to submit their plans, and once the EoI has been published (Reg. 36A) and prospective RAs have been invited, the IM prepared u/s 29 is to be shared with them. In the present case, it was averred that while the IM was prepared but was not circulated. Dealing with these contentions of the Appellant, RP informed that it is on CoC's instructions that publication of EoI was deferred since CoC was actively considering CD's resolution plan furnished by the RA.

After perusing facts of the case and the contentions of the parties, Hon'ble NCLAT, while adverting to *Statement of Objects and Reasons* of the Code, as also Hon'ble SC's ruling in the matter of *Swiss Ribbons (P) Ltd. & Anr. v. UOI & Ors.*, held that *"it is clear that the I&B Code envisages maximization of value of the assets of the CD* and that *the company being MSME, it is not necessary for the 'Committee of Creditors' to follow all the procedures under the 'Corporate Insolvency Resolution Process'. For example, if case is settled before the constitution of the 'Committee of Creditors' or in terms of Section 12A on the basis of offer given by Promoter, in such case, all other procedure for calling of application of 'Resolution Applicant' etc. are not followed. If the Promoter satisfy all the creditors and is in a position to keep the 'Corporate Debtor' as a going concern, it is always open to 'Committee of Creditors' to accept the terms of settlement and approve it by 90% of the voting shares. The same principle can be followed in the case of MSME."*

The appeal was accordingly dismissed as devoid of any merit.

Regards,
CS Alka Kapoor
Chief Executive Officer

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Dear Professionals, **11th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (107): The definition of "*Financial Services*" under s. 3(16), IBC is not an exhaustive one. It may include activities other than those listed in the section – Holds Hon'ble NCLAT.

In a matter before it, recently, Hon'ble NCLAT had the opportunity to express its view on the subject relating to width of definition of the term *"financial services"* under IBC. In short, *whether the definition of "financial services" is confined to the nine activities enumerated under s. 3(16)*. This essentially means, if a Respondent is not engaged in any of the aforementioned activities, can it still claim an exception and seek refuge/protection from an action initiated against it by a Creditor (FC/OC) under IBC.

The appeal was preferred against Hon'ble NCLT (Delhi Bench) order dt. 6th February 2018 wherein, the AA, while dismissing an application filed by *Housing Development Finance Corporation Ltd.* (HDFC) u/s 7, IBC (CP (IC) – 738(PB)/2018) against *M/s RHC Holding (P) Ltd.*, (Respondent) it was held that the Respondent being an NBFC rendering *"Financial Services"* is out of the purview of IBC. Challenging the impugned order, the Appellant claimed that in Respondent's reply, it admitted that it is not a Financial Service Provider, and that, for the purposes of exclusion from IBC action, the activities enumerated in s. 3(16) have to be referred to. In other words, the exclusion cannot be beyond what has been contemplated and expressly provided for by the Code.

Upon perusing facts brought on record and the legal contentions raised by parties including some pertinent definition(s) like that of *Corporate Debtor*, *Corporate Person*, *Financial Service Provider*, *Financial Service*, *Financial Institutions*, Hon'ble NCLAT concluded that *the definition of 'financial services' u/s 3(16), IBC is not limited to the 9 activities shown in clauses (a) to (i). The definition being an inclusive one, there can be other services as well which can fall into the definition.*

Further, though, an unrelated contention was raised by the appellant alleging that the respondent is taking deposits from others in violation of conditions imposed by RBI, the Appellate Tribunal, considering the nature of dispute raised, held that such an issue cannot be decided by the NCLT while considering an application u/s 7 or 9, and thus, directed the Appellant to address its concern with the appropriate forum for a redressal.

With the aforementioned observations, the appeal was dismissed being devoid of merit *vide* Hon'ble NCLAT's order dt. 10th July 2019.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

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Dear Professionals, **12th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (108): If the circumstances justify and in unforeseen circumstances, NCLT (or NCLAT) may exclude certain period for counting CIRP period – Clarifies Hon'ble NCLAT.

While section 238A, IBC clearly lays down regarding applicability of Limitation Act, 1963 to proceedings before Hon'ble NCLT and Hon'ble NCLAT, the Hon'ble Authorities have, time and again, been called upon to express its opinion on different aspects of the subject to *iron out the creases* and giving a fine shape to the law.

Applicability of *Principle of Exclusion* which forms a part of the law of limitation (Limitation Act, 1963) was the subject matter for consideration, recently, before Hon'ble NCLAT in the matter of *Vandana Garg v. Reliance Capital Ltd. & Ors.* (C.A. (AT) (Ins.) No. 603 of 2019). The appeal was preferred by the RP of *M/s GVR Infra Projects Limited* (CD) challenging Hon'ble NCLT's (Division Bench, Chennai) order dt. 30th April, 2019 (impugned order) whereby the relief sought for exclusion of 35 days on the ground of *delay in appointment of RP* (in place of the IRP) was rejected. A further grievance was also raised by the appellant claiming that delay in appointment of RP resulted in delay in calling of applications from RAs, contending that, if such period is not excluded, in the absence of any viable or feasible plan, the AA may have to pass order for liquidation of CD.

Hon'ble NCLAT being seized of the issue, referred to its own judgment dt. 8th May, 2018 passed in the matter of *Quinn Logistics India Pvt. Ltd. v. Mack Soft Tech Pvt. Ltd. & Ors.* wherein the same issue fell for its consideration, and wherein Hon'ble NCLAT held as follows:

"9. …if an application is filed by the 'Resolution Professional' or the 'Committee of Creditors' or 'any aggrieved person' for justified reasons, it is always open to the Adjudicating Authority/Appellate Authority to 'exclude certain period' for the purpose of counting the total period of 270 days, if the facts and circumstances justify exclusion, in unforeseen circumstances."

In *Quinn Logistics* (*supra*), Hon'ble NCLAT had further provided certain circumstances (as illustrations) which shall form a good ground for grant of exclusion. The circumstances laid down were: (*a*) CIRP stayed by a Court of Law/ NCLT/NCLAT/SC; (*b*) No RP functioning during CIRP; (*c*) Interregnum period between date of CIRP admission order and date of RP taking charge; (*d*) Interregnum period between order reserved by AA/NCLAT/SC and passing of order; (*e*) CIRP set aside by NCLAT and restored by Hon'ble SC; (*f*) Any other circumstance which justify exclusion of certain period.

With the aforementioned observations, the appeal was allowed and prayer for exclusion of 35 days (as also a period of 18 days during which the application remained pending before the AA) from CIRP period was allowed *vide* Hon'ble NCLAT's order dt. 2nd July 2019.

Regards,
CS Alka Kapoor
Chief Executive Officer

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Dear Professionals, **15th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (109): NCLAT rejects a legal contention that admission of application u/s 7, IBC is not contemplated in all cases wherein there is a 'default'.

The language of s. 7(5)(a), IBC makes it abundantly clear as to the requirements for admission of an application by a Financial Creditor. The requirements are: (a) occurrence of default; (b) complete application filed; and (c) no disciplinary proceedings pending against proposed RP.

In an appeal (*Mr. Nakul Bharana v. ICICI Bank Ltd.*, CA (AT) (Ins.) No. 701 of 2019) filed before Hon'ble NCLAT, an order dt. 29th May, 2019 (impugned order) passed by Hon'ble NCLT (Principal Bench) in the proceedings initiated by ICICI Bank (FC) against *M/s Gwalior Bypass Project Limited* (CD) was sought to be challenged claiming that the impugned order has been passed in complete disregard to the provisions of Section 7(5)(a) of the Code, as per which the admission of application under Section 7 is not contemplated in all cases wherein default has occurred. A suggestion was made by the Appellant claiming that, even if the default has occurred, the Code confers some discretion in the NCLT to either admit or reject the application, keeping in mind the object of the Code.

Dismissing the aforementioned legal contention raised by the Appellant, Hon'ble NCLAT made a reference to Hon'ble SC's ruling in *Innoventive Industries Limited v. ICICI Bank and Anr.* wherein the following was held:

"28. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due… The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority."

In the result, the appeal was dismissed and the impugned order upheld *vide* Hon'ble NCLAT order dt. 10th July 2019.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

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Dear Professionals, **16th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (110): *Regulation 30A, IBBI (CIRP) Regulations, 2016 is directory in nature* – Holds Hon'ble NCLAT.

Regulation 30A (CIRP Regulations, 2016) which speaks of *Withdrawal of application* requires the applicant to submit its Withdrawal Application (u/s 12A, IBC) with the IRP/RP *before issue of invitation for Expression of Interest.* Recently, the said Regulation was the subject matter for discussion before Hon'ble NCLAT in the matter of *Navin Heavy Lifter & Anr. v. Canbuild Precast Solutions Pvt. Ltd.* (CA (AT) (Ins.) No. 649 of 2019). In the said appeal, Hon'ble NCLT's order dt. 9th May 2019, *vide* which a section 12A application was dismissed, was sought to be challenged. Hon'ble NCLT had dismissed the application on the ground that the CIRP was initiated prior to insertion of Section 12A.

Regarding the issue as no more a *res integra*, Hon'ble NCLAT, *vide* its order dt. 12th July 2019, referred to Hon'ble Supreme Court's order dt. 14th December 2018 (*Brilliant Alloys Private Limited v. Mr. S. Rajagopal & Ors. – Special Leave Petition (Civil) No.31557/2018***)** wherein it was held that Regulation 30A has to be read with s. 12A, IBC which does not contain any stipulation that a withdrawal application cannot be permitted after invitation for Expression of Interest, and thus, the said stipulation in Reg. 30 was held to be only directory in nature.

Basing its legal finding on the aforementioned Apex Court judgment, Hon'ble NCLAT allowed the application filed u/s 12A which had approval of 100% voting share of the CoC and set aside the impugned order. Consequently, Hon'ble NCLT's order appointing an *'Interim Resolution Professional'*, declaring moratorium and all other order(s) passed by the Adjudicating Authority pursuant to the impugned order and action taken by the 'Resolution Professional' were also set aside.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
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17th July, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals presents:

Learning Curve (111): NCLAT held that the Adjudicating Authority cannot quash the disciplinary proceeding initiated by IBBI, even if proceeding is initiated at the instance and recommendation made by the Adjudicating Authority.

In the matter of *Insolvency and Bankruptcy Board of India v. Shri Rishi Prakash Vats* an appeal was filed by IBBI (*Insolvency and Bankruptcy Board of India*) against an order issued by Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) to quash the disciplinary proceedings initiated by IBBI against Rishi Prakash Vats (who was appointed as the RP) during the CIRP of *Rana Global Limited*.

In the aforementioned matter, CIRP was delayed for certain reasons and the AA passed an *order dated 26th April, 2018* against RP for lack in taking any action in the CIRP proceedings because of a typographical error in his name. Pursuant to this order, IBBI initiated disciplinary proceedings against the RP. Subsequently, RP filed certain explanation before the Adjudicating Authority, showing the reasons for delay for execution of the CIRP. Since, the proper explanation was given by the RP, the Adjudicating Authority expunged the earlier order made on 26th April, 2018 and IBBI was informed.

NCLAT concluded that, *"once a disciplinary proceeding is initiated by the IBBI on the basis of evidence on record, it is for the Disciplinary Authority, i.e., IBBI to close the proceeding or pass appropriate orders in accordance with law. Such power having been vested with IBBI and in absence of any power with the Adjudicating Authority/ (National Company Law Tribunal), the Adjudicating Authority cannot quash the proceeding, even if proceeding is initiated at the instance and recommendation made by the Adjudicating Authority/ National Company Law Tribunal."*

The appeal was disposed off and the matter was remitted to the IBBI to pass appropriate order taking into consideration the orders passed by the AA.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
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Dear Professionals, **18th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (112): Unless the "Debt" is crystallised and payable in law, the issue of "Default" does not arise – Holds Hon'ble NCLAT.

Hon'ble NCLAT, recently, in *Peter Johnson John v. M/s KEC International Ltd.* (CA(AT)(Ins.) 188/2019) was called upon to adjudicate *"whether in the absence of an adjudication (by a Competent Court in India) of a foreign Decree, passed ex-parte, by a Court in a non-reciprocating territory, the Decree Holder thereof can seek initiation of CIRP against the Judgment Debtor u/s 9, IBC."*

The factual matrix of the case was that, the Appellant, who was employed by CD in the Democratic Republic of Congo ('*DR of Congo*') was not paid any salary. Aggrieved by the said conduct of CD, appellant had approached the concerned Labour Court and also secured a Decree against the CD. CD, however, failed to pay the decretal amount and wound up its business from *DR of Congo*. This compelled the Appellant to approach Hon'ble Bombay High Court under s. 13 CPC, 1908 seeking enforcement of the decree. The Appellant, thereafter, also initiated the present proceedings under s. 9, IBC against the CD.

It is important to note that s. 13 (*supra*) requires a Foreign Judgment to *inter alia* have been passed on '*merits*' in order to be '*conclusive'*. Furthermore, s. 44A, CPC (*supra*) speaks of *"Execution of Decrees passed by Courts in reciprocating territory."* Admittedly, in the present case, neither was the decree passed on merits of the case, nor is there any reciprocation arrangement with the *DR of Congo wrt recognition of foreign decrees*.

Vide the impugned order dt. 20th December 2018, Hon'ble NCLT (Mumbai Bench), while dismissing the application filed u/s 9, IBC, had held that since s. 9 application was filed by Appellant during pendency of the aforesaid suit and the Appellant's claim was based on the foreign decree, it constituted an existing dispute between the parties on the date of filing of application under s. 9, IBC.

Upholding the impugned order, Hon'ble NCLAT, *vide* its order dt. 03.07.2019, held that adjudication initiated by Appellant before Bombay High Court in regard to foreign decree (obtained *ex parte)* falls within the purview of a pre-existing dispute placing an embargo on the powers of the Adjudicating Authority to initiate CIRP and until such adjudication fructifies into a decree favouring the Appellant, claim of the Appellant cannot be held to have crystallised into a *"Debt payable in law"*.

With the aforementioned observations, the appeal was dismissed as devoid of merits.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

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Dear Professionals, **19th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (113): Finding that CD's Ex-Directors have failed to co-operate with the Liquidator (as well as Adjudicating Authority) and Contempt Proceedings already initiated against them, Hon'ble NCLAT directs them/appellants to appear and raise their grievances (against Liquidator) before the AA itself.

In an appeal, titled as *Mahesh Kumar Panwar v. M/s Mega Soft Infrastructure (P) Ltd. & Anr.*, CA (AT) (Ins.) No. 617 of 2019, Hon'ble NCLT's (Delhi Bench) order dt. 22nd April, 2019 (impugned order) was sought to be challenged. *Vide* the impugned order, Hon'ble NCLT, upon noticing the conduct and continued absence from Court as also the reluctant attitude of CD's Ex-Directors in assisting the proceedings, had dismissed their application seeking recall of non-bailable warrants issued against them in the contempt proceedings.

The aforementioned Contempt proceedings were initiated against CD's Ex-Directors at the instance of Liquidator who had made a grievance that the Appellant/Ex-Directors were not co-operating with him and that despite AA's directions, issued from time to time, the Ex-Directors were wilfully disobeying to co-operate. Accordingly, the provisions of s. 425, Companies Act (r/w ss. 70 and 72, IBC) were sought to be invoked by the Liquidator. The Liquidator had also brought it to Hon'ble Tribunal's notice that the Ex-Directors had filed a collusive petition seeking mandatory injunction with an illegal design to somehow procure a Court order for injunction over the property in order to keep it out of the arena of liquidation Proceedings against the CD.

The Appellant/Ex-Director had filed another application before Hon'ble NCLT questioning the working of Liquidator seeking orders for removal of the Liquidator. The said application was dismissed by Hon'ble NCLT on the ground that the Ex-Directors have no *locus standi* to file an application on behalf of others.

Considering the aforementioned circumstances, Hon'ble NCLAT disposed-off the appeals with the following orders:

"7. In the present case, as we find that the Appellant has not co-operated with the 'Resolution Professional'/ 'Liquidator' and is still not co-operating and the Adjudicating Authority has already initiated the contempt proceedings under Section 425 of the companies Act and intends to order for penal action under Section 70 and 72 of the I&B Code, we allow the Appellant to raise all the issues before the Adjudicating Authority…"

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

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Dear Professionals, **22nd July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (114): In an application made by *Workmen* and *Employees*, a claim over their *Gratuity* and *Provident Fund* cannot be made subject to determination by RP/Liquidator as the same are not the Assets of the Corporate Debtor.

In an appeal, titled as *Sunil Kumar Jain v. Mr. Sundaresh Bhatt & Ors.*, CA (AT) (Ins.) No. 605 of 2019, CD's Workmen had challenged the validity of Hon'ble NCLT's (Ahmedabad Bench) order dt. 25th April, 2019 (impugned order) wherein Hon'ble Adjudicating Authority had declined to grant any relief to the Appellants claiming their salary for the CIRP period and the prior period.

During the course of the hearing, submissions were made by the Appellants claiming that Hon'ble AA *vide* its order dt. 25th April, 2019 had directed the RP to deposit a sum of Rs. 2.75 Crores (out of approximately Rs. 9.55 Crores) with the Registrar by way of fixed deposit and it was contended that Appellants' claim should be settled out of the said amount.

Hon'ble NCLAT, however, observed that an order of liquidation has already been passed in the matter and that a disputed question of fact as to whether the Appellants actually worked during the CIRP or the period earlier to that, cannot be dealt with by the AA till such information could be obtained from the RP or the claim is decided by the Liquidator.

In the aforementioned circumstances, Hon'ble NCLAT, while declining to interfere with the impugned order, allowed the Appellants (272 workmen and employees) to file their individual claims before the Liquidator for determination of their claims.

As regards Appellant's claim over *Gratuity* and *Provident Fund*, Hon'ble Appellate Tribunal held that such funds cannot be treated as asset of the CD, and thus, they are to be disbursed amongst the employees/workmen as per their entitlement.

The Appeal was accordingly dismissed with the aforesaid observations.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
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Dear Professionals, **22nd July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (115): It is not open to an appellant to challenge an order admitting its own application.

Curiously, in an appeal, titled as *Mr. Suresh Narayan Singh v. Tayo Rolls Ltd.*, CA (AT) (Ins.) No. 561 of 2019, the Appellant, who represented 284 workers of the CD (M/s Tayo Rolls Ltd.), had sought to challenge Hon'ble NCLT (Kolkata Bench) order dt. 5th April, 2019 whereunder the Appellant application filed u/s 9, IBC was admitted. The impugned orders were passed by the AA in terms of Hon'ble NCLAT's directions passed in its judgment dt. 26th September, 2018 (in Appeal (CA (AT) (Ins.) No. 112 of 2018) wherein the Appellant had challenged AA's order dt. 3rd January, 2019 rejecting Appellant's application (filed u/s 9, IBC) on the ground that application u/s 9 has to be filed by the OC individually and not jointly.

Hon'ble NCLAT also recorded the fact that while an application u/s 10, IBC, was also preferred (by the CD), the same was rejected by AA, and subsequently, while hearing an appeal against the rejection order, the Appellate Authority, though set aside the impugned order, but did not remit the matter back to AA since CIRP was already initiated against the CD in the application filed u/s 9, IBC.

Expressing its view on the matter, Hon'ble NCLAT held, *13. The Appellant- Mr. Suresh Narayan Singh having filed application under Section 9 and being successful, on the basis of direction of this Appellate Tribunal his application under Section 9 was admitted. Now, it is not open to the Appellant to challenge the order of admission of application filed by him."*

The Appellate Authority further held that the appeal is not maintainable also in view of s. 61, IBC, since the appellant is not an aggrieved person since the application preferred by him u/s 9, IBC has already been admitted.

The Appeal was accordingly dismissed *vide* Hon'ble NCLAT order dt. 18th July 2019.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
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Dear Professionals, **24th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (116): Proceedings before NCLT, either under section 7 or section 9 or section 10, are neither in the nature of a litigation, nor a money suit, or a money claim – Holds Hon'ble NCLAT.

In an appeal titled as *M/s Smartron Indian (P) Ltd. v. M/s ZTE Corporation* (CA (AT) (Ins.) No. 733 of 2019), wherein an order dt. 21st June, 2019 passed by Hon'ble NCLT (Hyderabad Bench) was sought to be challenged. *Vide* the impugned order, the AA had declined to grant its permission to the Corporate Debtor (*M/s Smartron India (P) Ltd.*) to file its sur-rejoinder/additional counter and additional documents in the proceedings initiated against it by *M/s ZTE Corporation* (Operational Creditor) u/s 9, IBC, and had directed the parties to argue on merit.

While considering merits of the plea taken by the appellant, Hon'ble NCLAT referred to its own judgment delivered in the case of *Binani Industries Ltd. v. Bank of Baroda & Anr., CA (AT) (Ins.) No. 82 of 2018* wherein it was held that an application u/s. 7 or s. 9 or s. 10 which relates to initiation of '*Corporate Insolvency Resolution Process*' is neither a litigation nor a money suit or a money claim, and held that, the question of sur-rejoinder/additional counter and additional documents does not arise.

The Appellate Tribunal also referred to the Apex Court dicta delivered in the landmark judgment of *Innoventive Industries Ltd. v. ICICI Bank & Ors.* (judgment dt. 31st August, 2017) wherein the subtle distinction between different sets of procedure/scheme to be followed in respect of a section 7 application and that of a section 9 application was clearly laid down. In light of such directions, Hon'ble NCLAT held as follows:

"5. One opportunity which was required to be given to the 'Corporate Debtor' has since been given and it has filed its reply affidavit. Now, it is on the basis of the record available and the stand so taken by the 'Corporate Debtor', the Adjudicating Authority is required to decide the matter…"

The Appeal was accordingly dismissed *vide* Hon'ble NCLAT order dt. 18th July 2019.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

A wholly owned subsidiary of ICSI and registered with IBBI
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25th July, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals presents:

Learning Curve (117): A "*dispute*" barring an Application under Section 9 must have existed prior to the issuance of demand notice u/s 8(1).

While disposing of an appeal (*Ahluwalia Contracts (India) Ltd. v. Raheja Developers Ltd.* Company Appeal (AT) (Insolvency) No. 703 of 2018), *vide* its judgment dt. 23rd July, 2019, the NCLAT set aside the impugned order of NCLT, New Delhi bench dated 19th September, 2018 in which the AA rejected the application filed u/s 9 on the ground that the claim of the Appellant falls within the ambit of 'disputed claim'.

After perusing the documents produced on record, NCLAT found that the date of issuance of demand notice u/s 8(1) was 28th April, 2018 while the arbitration proceeding which resulted into the dispute was initiated by the Respondent *vide* notice dated 24th May, 2018, i.e. **one month later than the date of issuance of demand notice.** Therefore, the Corporate Debtor cannot rely on arbitration proceeding to suggest a pre-existing dispute.

Further, the NCLAT also referred to the SC decision rendered in "***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited 2017"*** , where the Hon'ble Supreme Court held that the '*existence of the dispute*' and/or *the suit or arbitration proceeding* must be pre-existing – i.e. **it must exist before the receipt of the demand notice or invoice**.

The NCLAT thus remarked that the AA wrongly rejected the Appellant's claim on the ground that it fell within the ambit of a disputed claim as it was initiated a month after the date of issuance of demand notice as per Section 8(1) and hence was not a *'pre-existing dispute'*. Further NCLAT remitted the case to the Adjudicating Authority for admitting the application u/s 9 after notice to the CD to enable him to settle the matter prior to the admission.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
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26th July, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals presents:

Learning Curve (118): NCLAT held that NCLT is empowered to pass *ad-interim* orders, including an order restraining the Corporate Debtor from alienating its assets, before admitting any application under Sections 7 or 9 of the Code.

While dismissing an appeal in the matter of ***NUI Pulp and Paper Industries Pvt. Ltd. v. M/s. Roxcel Trading GMBH (*Company Appeal (AT) (Insolvency) No. 664 of 2019)** *vide* order dated 17.07.2019, NCLAT held that the National Company Law Tribunal (NCLT) is empowered to pass ad-interim orders, including an order restraining the Corporate Debtor from alienating its assets, before admitting an application under Sections 7 or 9 of the Code.

M/s Roxcel Trading GMBH (Respondent) filed an application under Section 9 of the Code against the Appellant. When the matter came up for hearing before NCLT, Chennai, the Corporate Debtor (Appellant) submitted that there was an existence of a dispute between the parties. NCLT adjourned the matter till Appellant had to file its reply.
NCLT invoked its inherent jurisdiction under Rule 11 of the *NCLT Rules, 2016* and restrained the Appellant and its Directors from alienating, encumbering or creating any third party interest on the assets of the Company except with respect to the withdrawal of the legitimate expenses required for carrying on the day-to-day expenses.

An appeal was filed against this order on the ground that before admission of an application under Sections 7 or 9, the NCLT has no jurisdiction to restrain a Corporate Debtor and its Directors from alienating, encumbering or creating any third party interest on the assets of the Corporate Debtor.

NCLAT dismissed the appeal and concluded that the Adjudicating Authority (NCLT) can make any such order as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

A wholly owned subsidiary of ICSI and registered with IBBI
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29th July, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavor to develop and educate Insolvency Professionals presents:

Learning Curve (119) – Hon'ble High Court of Delhi vide its order dated 18th July, 2019 held that moratorium under Section 14 of the Code will not bar trial of suit by the corporate debtor and a counter-claim in such suit if issues and facts in both are intertwined and interlinked.

SSMP Industries Ltd (Plaintiff) filed the suit seeking recovery of Rs.1,61,47,336.44 against Perkan Food Processors Pvt. Ltd (Defendant). The Defendant filed its counter claim in the suit entitled to recover a sum of Rs.59,51,548/-. In the meantime, the Plaintiff went into Insolvency.

The question arose as to whether the adjudication of the counter claim would be liable to be stayed in view of Section 14 of the Code.

Based on an earlier decision of Delhi HC in *Power Grid Corporation of India v. Jyoti Structures Ltd*, the Hon'ble High Court observed that until and unless the proceeding has the effect of endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor, adjudication of the counter claim would not be prohibited under Section 14(1)(a) of the Code. Further the Court also referred to *Jharkhand Bijli*, wherein NCLAT in similar circumstances held that until and unless the counter claim is itself determined, the claim and the counter claim deserve to be heard together and there is no bar on the same in the Code.

Hon'ble High Court of Delhi held that the nature of a counter claim is such that it requires proper pleadings to be filed, defences and stands of both parties to be considered, evidence to be recorded and then issues have to be adjudicated. Till the defence is adjudicated, there is no threat to the assets of the corporate debtor and the continuation of the counter claim would not adversely impact the assets of the corporate debtor. Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, Section 14 could be triggered.

Regards,

CS ALKA KAPOOR

Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

A wholly owned subsidiary of ICSI and registered with IBBI
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Dear Professionals, **30th July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (120): Proceedings under Section 7, IBC cannot be challenged merely on account of some criminal proceedings initiated by CD against FC's Employees relating to a charge of "*Misappropriation of Funds*".

In a curious set of facts, an appeal (*Neeraj Jain v. Yes Bank Ltd. & Anr.*, CA (AT) (Ins) No. 323 of 2019) was filed before Hon'ble NCLAT impugning orders dt. 25th March 2018 passed by Hon'ble NCLT (Principal Bench), New Delhi whereby an application filed u/s 7, IBC was admitted against *M/s Namo Alloys (P) Ltd.* (CD). Aggrieved by the aforementioned orders (passed by the NCLT), the Appellant approached Hon'ble Appellate Tribunal in the capacity as CD's shareholder alleging some fraud played upon the CD by officials of the Bank (Financial Creditor) in connivance with the Chief Financial Officer of the CD.

The Appellant further informed the Appellate Tribunal that pursuant to the fraud played upon the CD, an FIR has been lodged and a Charge sheet already filed in the Criminal Court. Based on these facts, Appellant claimed that if the amount illegally withdrawn from CD would have remained in the account of the CD, it would not have failed to pay FC's dues.

Upon hearing contentions of both the parties, Hon'ble NCLAT held as follows:

"7. …an application under Section 7 being an independent proceeding has nothing to do with the pendency of the Criminal Case relating to misappropriate of the funds by the Chief Financial Officer of the 'Corporate Debtor' and the employees of the Banks. The Bank which is the 'Financial Creditor' is a separate entity from the Chief Financial Officer of the Corporate Debtor or the individual employees of the Bank(s), if any, involved. The pendency of the investigation or trial cannot be a ground to refuse an application under Section 7 if the application is complete and there is a debt and default. The 'I&B Code' being a complete Code will prevail over the other Acts and no person can take advantage of the pendency of the case to stall Insolvency and Bankruptcy proceeding filed under Section 7."

With the aforementioned observations, the Appeal was accordingly dismissed *vide* Hon'ble NCLAT order dt. 10th April 2019.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
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Dear Professionals, **31st July, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (121): *''I&B Code' being a subsequent Act of parliament, the 'Electricity Act, 2003' cannot override any provisions of the 'I&B Code''* held NCLAT.

An appeal (*Paschimanchal Vidyut Vitran Nigam Ltd. v. Raman Ispat Private Limited & Ors.*, Company Appeal (AT) (Insolvency) No. 639 of 2018) was filed before Hon'ble NCLAT impugning order dated 21st August, 2018 passed by Hon'ble NCLT (Allahabad Bench) in the proceedings initiated u/s 10, IBC whereby the Adjudicating Authority had allowed Liquidator's application seeking orders directions to the District Collector and Tehsildar, Muzaffarnagar for immediate release of the attached property of Corporate Debtor in favour of the liquidator to enable him to carry out his functions as liquidator under the IBC and had further directed the Appellant to submit its claim to the liquidator.

The brief facts of the case are that in the proceedings initiated under IBC, Liquidation order (dated 31st Jan, 2018) was passed under Section 33 against the CD. After the liquidation order, the District Collector had issued a notice dated 5th March, 2018 pursuant to the proceedings initiated by the *Paschimanchal Vidyut Vitran Nigam Limited* for recovery of its outstanding dues of Rs. 2,50,14,080/- from the CD in respect of the supply of electrical energy to the CD.

The Appellant had raised a contention before the Hon'ble NCLAT that 'Electricity Act, 2003' being a Special Statute with a non-obstante clause shall have an overriding effect on the 'I&B Code' which is a general statute. Hon'ble NCLAT, however, held that *"In view of Section 238 of the 'I&B Code', the 'I&B Code' will have overriding effect* on *all laws which are for the time being in force, including the 'Electricity Act, 2003' and Rules and Regulations framed thereunder."*

Hon'ble NCLAT also held that *"26. The District Collector cannot initiate proceeding for any outstanding dues for supply of electrical energy nor can auction movable and immovable properties. Though it is open to the Electricity Authority of the Collector to file claim before the Liquidator."*

With the aforementioned observations, the Appeal was accordingly dismissed *vide* Hon'ble NCLAT order dt. 15th May 2019.

Regards,
CS Alka Kapoor
Chief Executive Officer