INSTITUTE OF INSOLVENCY PROFESSIONALS
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Dear Professionals, **1st August, 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 (122): NCLAT held that insolvency plea filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 cannot be rejected over claims disputed after demand notice.

An appeal (*Ahluwalia Contracts (India) Limited v. Raheja Developers Limited.*, Company Appeal (AT) (Insolvency) No. 703 of 2018) was filed before Hon'ble NCLAT impugning order dated 19th September, 2018 passed by Hon'ble NCLT (New Delhi Bench), whereby the Adjudicating Authority had rejected appellant's application filed under Section 9, IBC, 2016 against *M/s Raheja Developers Limited* (CD) after coming to a finding that the claim of the Appellant falls within the ambit of *'disputed claim'*.

The brief facts of the case were that demand notice under Section 8(1) was issued on 28th April, 2018 and at that time no arbitration proceedings were pending The notice invoking arbitration was sent by the Respondent to the Appellant on 24th May, 2018. Thus, clearly the arbitration proceedings were initiated by the Respondent- 'Corporate Debtor' only after receipt of the demand notice under Section 8(1) of the 'I&B Code'.

While considering the rival contentions raised by the parties, Hon'ble NCLAT referred to and placed its reliance on the Hon'ble Supreme Court judgement delivered in the matter of *"Mobilox Innovations Pvt. Ltd. v. Kirusa Software (P) Limited"*, wherein the Hon'ble Supreme Court held that for application of section 9 (5) (ii) (d), 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, as the case may be.

After examining the facts of the case and the case law on the subject, Hon'ble NCLAT observed and held as follows:

> *"18. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs. 1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid 'operational debt', the application under Section 9 cannot be rejected and is required to be admitted."*

In the result, Hon'ble NCLAT *vide* its order dated 23.07.2019 set aside the impugned judgment dated 19th September, 2018 and remitted the case back to the Adjudicating Authority for admitting the application under Section 9.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
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Dear Professionals, **2nd August, 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 (123): NCLT granted waiver from Appointment of Valuers *vide* its order dated 03rd June, 2019.

An application u/s 7 of Insolvency and Bankruptcy Code, 2016 was filed by Evershine Advisory Services pvt. Ltd (Financial Creditor) initiating the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor namely Optic Advisory pvt. Ltd. Hon'ble NCT *via* order dated 16.10.2018 admitted the application for initiation of CIRP against the Corporate Debtor.

It is pertinent to mention that Appointment of Valuer is mandatory under Regulation 27, Chapter VIII of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which provides as follow:

> "*27. Appointment of registered valuers.*
>
> *The resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date], appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35:..."*

However, the CoC in its 4th CoC meeting sought waiver from appointment of Valuers, since as per Balance sheet for 2017-2018, the assets of the company were of negligible value i.e. fixed assets worth Rs.1725/- and cash worth Rs. 90,306/- and the same was placed before the Tribunal for its approval.

On perusal of the aforementioned facts, the Hon'ble NCLT, Mumbai Bench granted waiver from valuation *vide* its order dated 03.06.2019.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
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Dear Professionals, **05th August, 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 (124): NCLAT held that the resolution applicant is required to provide the same treatment to all the Operational Creditors, who are equally situated.

An appeal (*Mr. Jagmeet Singh Sabharwal & Ors. (Successful Resolution Applicant) v. Rubber Products Ltd. & Ors.*, Company Appeal (AT)(Ins) No. 405 of 2019) was filed before Hon'ble NCLAT impugning order dated 19th February, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench whereby the 'resolution plan' submitted by the Appellant was approved.

NCLAT while directing the 'Resolution Applicant' to prepare a chart of redistribution amount to all the stakeholders including the debt payable to the Central Government, State Government or local authorities, observed as follows:

> *"7. From the definition of the 'Operational Debt' it is clear that there are 3 types of 'Operational Creditors', namely:-*
> *(i) Those who supplied goods and/or rendering services to the 'Corporate Debtor';*
> *(ii) Employees of the 'Corporate Debtor'; and*
> *(iii) The debt payable under the existing law to the Central Government or State Government or local authority.*
> *The 'Operational Creditors' who were supplying goods or rendered services including employees are investing money for keeping the company operational. Employees are also working to keep the company operational, therefore, they are class in themselves.*
>
> *"8. ...Therefore, classification is made between – (i) those 'Operational Creditors' who were employees; (ii) those who were suppliers of goods or rendering services by investing money and (iii) the Central Government or State Government or local authority, who only claim the statutory debt. Resolution plan cannot be arbitrary or discriminatory amongst class of such 'Operational Creditors'. Only the same treatment is to be made."*

In view of the aforesaid position of law, the 'resolution applicant' filed the 'Revised Redistribution Chart', Hon'ble NCLAT was of the view that based on the 'Revised Redistribution Chart' classification between the 'employees', 'Operational Creditors' who have supplied goods or rendered services and the 'Operational Creditors' like Government dues i.e. debt payable to the Central Government or State Government etc. is rational and correct. Further held that *'Resolution Applicant'* is required to provide the same treatment to *all the 'Operational Creditors'*, who are equally situated.

With the aforementioned observations, the Appeal was allowed *vide* Hon'ble NCLAT order dt. 11th June, 2019.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
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Dear Professionals, **06th August, 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 (125): NCLAT held that the shareholders and promoters who are ineligible to file the 'resolution plan' under Section 29A have no right to raise their grievance with regard to the 'expression of interest'.

An appeal (*JM Financial Asset Reconstruction Company Ltd.& ors v. Sevenhills Healthcare Pvt. Ltd.*, Company Appeal (AT) (Insolvency) No. 134, 136 & 165 of 2019) was filed before Hon'ble NCLAT dated 23rd January, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, whereby the Adjudicating Authority disposed of all the applications, and instead of approving the 'resolution plan' already approved by the 'Committee of Creditors' and passing the order under Section 31 of the Insolvency and Bankruptcy Code, 2016, remitted the matter with direction which amounted to initiation of resolution process *de novo* from the stage of calling of 'Expression of Interest'.

Hon'ble NCLAT on the issue that whether the shareholders and promoters who are ineligible to file the 'resolution plan' under Section 29A, have the right to raise their grievance with Company regard to Expression of Interest observed as follows:

> *"20. The shareholders and promoters being ineligible to file the 'resolution plan' under Section 29A, they have no right to raise their grievance with* regard to the 'expression of interest' published on 14th May, 2018 fixing 'earnest money deposit' of Rs.100 Crores.
>
> *21. In this background, it was not open for the Adjudicating Authority to entertain Interlocutory Application Nos. 409/2018 and Interlocutory Application Nos. 450/2018, which were filed by the 'shareholders' and 'promoters', who were ineligible to submit the 'resolution plan' and that too after approval of the 'resolution plan' by the 'Committee of Creditors'."*

With the aforementioned observations, the Appeal was allowed *vide* Hon'ble NCLAT order dt. 08th April, 2019.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
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Dear Professionals, **7th August, 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 (126): If, under a Contract of Supply *inter se* the parties, the existence of a dispute as regards quality of goods supplied is established, no application filed u/s 9, IBC, seeking initiating of CIRP against the CD, is maintainable – reiterates Hon'ble NCLAT.

Though the language of section 9(5)(ii)(d), IBC makes it abundantly clear that the AA shall reject an application filed u/s 9, IBC by an OC, where, the facts disclose that in response to a notice issued u/s 8, IBC by such OC to the CD, a "*notice of dispute*" has been received by the OC from CD, applications have been filed before Hon'ble NCLTs and even appeals preferred before Hon'ble NCLATs contending non-existence or existence of a dispute, as the case may be, based on the facts and circumstances of the case.

In an appeal matter (*R.S. Cottonmark (I) (P) Ltd. v. Rajvir Industries Ltd.* (CA (AT) (Ins) No. 653 of 2018), recently decided by Hon'ble NCLAT *vide* its **order dt. 5th August, 2019**, the Appellate Tribunal was called upon by an OC (Appellant) to decide legality of an order dt. 6th September, 2018 passed by Hon'ble NCLT (Hyderabad Bench), wherein, based on its findings as regards facts of the case, the AA had rejected OC's petitions on the ground of "*existence of dispute*".

The relevant and pertinent facts of the case, in brief, are, pursuant to a contract *inter se* the parties, the Appellant had made certain supplies of goods to the Respondent (CD). The Respondent, however, after conducting a quality test on the goods supplied had found them not upto the mark, as per CD's requirements. Furthermore, an intimation in this regard was sent to the OC, as also to the Market Intermediary (as per the practice in place). Upon perusing the facts of the case as also hearing the rival contentions of the parties, Hon'ble Appellate Tribunal held, *"11. We are of the considered view that there is an existence of dispute as on the date of issue of Demand Notice by the Appellants to the Respondent. Apart from the above, the Respondents also raised the issue with regard to quality of the bales supplied by the Appellants to the Respondent… 12… From the perusal of the dates of the said letters, it is apparent that the letters have been issued much prior to issuance of Demand Notice… by the Appellants to the Respondent"*

The NCLAT also quoted relevant paras from Hon'ble SC judgment delivered in the matter of *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd*. wherein the whole scheme of sections 8 and 9, IBC was discussed, especially as regards *"existence of a dispute and/or suit or arbitration proceedings which must exist before the receipt of the demand notice or invoice, as the case may be"*

Thus, finding no legal infirmity in the impugned order, Hon'ble NCLAT dismissed the Appeal reiterating that IBC is not meant to be a legal instrument for recovery of money, and left it open to the Appellant to pursue any alternative remedy available to it in law with regard to its claims against the Respondent/CD.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
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Dear Professionals, **8th August, 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 (127): NCLAT turns down an RP's contention that *"Promoters are not permitted to file application for withdrawal u/s 12A, IBC".*

In an appeal (*Sukhbeer Singh v. Dinesh Chandra Agarwal, (Resolution Professional), Maple Realcon (P) Ltd.*, CA (AT) (Ins.) No. 259 of 2019) pending before Hon'ble NCLAT, while hearing a plea raised for exclusion of a certain period for acceptance of a resolution plan, the Appellate Authority, after taking into account facts and circumstances of the case, had, *vide* its order dt. 16th July, 2019, *inter alia* directed the RP to place Appellant's/Promoter's proposal u/s 12A before the CoC for its consideration. *Vide* the said order, it was further directed, that, in case the proposal gets approved by 90% voting share of the CoC, the Appellate Authority may decide on allowing the withdrawal application, and, in case there is a failure of the proposal, the NCLAT shall decide on the Resolution Plans.

Pursuant to the aforementioned orders, though, the RP was required to place Appellant's proposal before the CoC, there was a failure to do so. The reason put forth by the RP (before the NCLAT) for such a failure was based on a technical understanding of the provision, which is, that the *Promoters are not permitted to file an application u/s 12A, IBC*. Rejecting such a contention, Hon'ble NCLAT held that, *"2. … It is the Promoters, who can settle the matter with all the 'Financial Creditors', 'Operational Creditors' including the Allottees and for that they may give their proposal, and the "Resolution Professional" is bound to place it before the 'Committee of Creditors', which is supposed to consider such application in the light of Section 12-A…"*

Thus, **Hon'ble NCLAT, *vide* its order dt. 7th August, 2019,** while upholding Promoter's right to file an application u/s 12A, directed the RP to place Appellant's/Promoter's proposal before the CoC with a further directions/caveat to include the Home Buyers (who are also members of the CoC) for casting their vote on Appellant's proposal for settlement.

During the proceedings, Hon'ble NCLAT also clarified, that, in case the CoC approves Appellant's proposal (with 90% voting share), directions may further be issued to the Promoters to furnish Bank Guarantee against the payment of settlement amount, failing which, the OC may not make a prayer for withdrawal of its application (filed u/s 9, IBC).

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
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Dear Professionals, **9th August, 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 (128): A mere dispute raised by a CD subsequent to service of Demand Notice u/s 8(1) by the OC does not fulfil the requirements of the term *"existence of dispute"* employed u/s 8(2)(a), IBC.

An appeal, tiled as *M/s. Next Education India Pvt. Ltd. v. M/s. K12 Techno Services Pvt. Ltd.* (Company Appeal (AT) (Insolvency) No. 98 of 2019) was filed before Hon'ble NCLAT impugning an order dt. 20th December, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench whereby the AA had rejected an application filed by the Appellant u/s 9, IBC on the ground of '*existence of dispute*'.

In its appeal, the Appellant challenged AA's aforestated conclusion and also brought on record Form 5 of 'debt' and 'default', as also the Demand Notice issued by it to the CD u/s 8(1) of the 'I&B Code'. It was further brought to Hon'ble NCLAT's notice by the Appellant that its application (u/s 9, IBC) was rejected merely on the ground that the Respondent in its reply to the Demand Notice had raised several disputes regarding existence of debt payable by the CD to the OC.

Hon'ble NCLAT, however, considering the fact that a dispute was raised by the CD only while replying to the Demand Notice, inquired from the CD if there is any correspondence evidencing existence of such a dispute prior to issuance of the Demand Notice u/s 8(1), and the CD utterly failed to bring any such correspondence before the Hon'ble NCLAT. Taking cognizance of such facts, the Appellate Authority clarified the position of law in the following words:

"It is a settled law that if any dispute is raised prior to the issuance of the invoices or Demand Notice u/s 8(1) of the I&B Code with regard to quality of service or goods or pendency of the suit or arbitration, in such case one may take the plea that there is an 'existence of dispute' but if any dispute is raised after issuance of Demand Notice u/s 8(1) that cannot be termed to be a 'preexisting dispute'."

Thus, concluding, the Appellate Authority while setting aside the impugned order, remitted the matter back to the Adjudicating Authority, (National Company Law Tribunal), Bengaluru Bench, for admitting the application u/s 9, IBC, after notice to the CD, and further allowed the CD to settle the claim before its admission, if it so chooses.

Regards,
CS Alka Kapoor
Chief Executive Officer

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Dear Professionals, **13th August, 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 (129): NCLAT allows exclusion of period during which the decision posed regarding voting share of allottees remained pending before NCLT.

In the CIRP proceedings (CP (IB) 77/ALD/2017) initiated by *IDBI* against *M/s Jaypee Infratech Ltd.*, order dt. 6th May, 2019 (impugned order) passed by NCLT, Allahabad Bench, in CA No. 115 of 2019, was sought to be challenged by *IDBI* before Hon'ble NCLAT (CA (AT) (Ins) 536 of 2019). *Vide* the impugned order, the AA, while dealing with RP's application seeking *exclusion of period of pendency of its application before AA, wherein, in view of the facts and circumstances of the case, clarity was sought on the method of counting total period of 270 days of CIRP*, had directed the other parties to file their respective replies to the application.

The issue posed before Hon'ble NCLAT (in the appeal) was to decide, whether, *in the facts and circumstances of the case*, as also taking into account the interest of all allotees:

- *Should the period during which the matter relating to decision on voting share of Allottees remained pending for consideration before the AA be excluded for the purposes of counting the CIRP period of 270 days, or else,*

- *Should the CD be allowed to go for liquidation on the ground that the period of 270 days has expired*.

In order to arrive at a decision, Hon'ble NCLAT *inter alia* referred to Hon'ble Apex Court decisions delivered in the matters of *Quinn Logistics India (P) Ltd. v. Mack Soft Tech (P) Ltd.*, *Arcellormittal India (P) Ltd. v. Satish Kumar Gupta & Ors.* and *Chitra Sharma v. Union of India*. Some pertinent extracts from Hon'ble NCLAT's order dt. 30th July 2019 are reproduced below:

20. Admittedly, no regulation was framed under the 'Insolvency and Bankruptcy Code' as to how the voting share of thousands of Allottees will be counted, all of whom come within the meaning of 'Financial Creditors' and thereby are members of the 'Committee of Creditors'. It was in this background the Allottees Association preferred the application before the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench … to decide the issue. The two Hon'ble Members of NCLT differed on the principle … and referred the matter to the Principle Bench for placing the matter before Third Hon'ble Member who has delivered its decision… In the meantime, 270 days lapsed…"

Taking into account the extra ordinary circumstances of the case, Hon'ble NCLAT took a considered view that the aforestated period can be excluded for counting the period of 270 days. However, considering long pendency of the matter, a period of 90 days only was allowed to be excluded to enable the RP to call for fresh 'resolution plans'. The appeals were disposed-off accordingly.

Note: In a challenge petition before Hon'ble SC, impugning aforementioned decision of Hon'ble NCLAT, the Apex Court, while taking into account the recent (2019) IBC amendment, has, *vide* its order dt. 2nd August, 2019, ordered for a two weeks' stay on Hon'ble NCLAT's order.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
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Dear Professionals, **14th August, 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 (130): "*Debt arising out of non-payment of lease rent*" cannot be the trigger for initiating action u/s 9, IBC – Holds NCLT (Guwahati Bench).

An application, titled as *M/s Aurora Accessories (P) Ltd. v. M/s Ace Acoustics & Audio Video Solutions (P) Ltd.*, CP (IB) 15/GB/2019), was recently taken up for disposal by Hon'ble NCLT (Guwahati Bench), wherein, on the basis of a claim for non-payment of lease rent by CD prayer for initiation of proceedings u/s 9, IBC was made.

Some pertinent facts related to the case are, that, *vide* a tenancy agreement executed *inter se* Petitioner and CD, Petitioner had agreed to lease its property to CD for a period of 3 years. Subsequently, defaults were committed by CD in payment of rent to the Petitioner thereby compelling Petitioner to serve a notice u/s 8, IBC, claiming payment of "Operational Debt" due by CD to Petitioner. However, since no payment was made pursuant to the said notice, proceedings were initiated before Hon'ble NCLT (Guwahati Bench) wherein the CD took several objections *inter alia* including non-satisfaction of the requirements of s. 3(6) (defining the term "claim), s. 3(11) (defining the term "debt"), and s. 5(21) defining the term "Operational Debt"). It was contended that *a transaction of "immovable property" cannot be considered as a transaction falling under the term "operation debt" unless such a transaction has a direct correlation of direct input to the output produced or supplied by the CD*.

Taking up the legal issue as regards standing of the Petitioner as "Operational Creditor", the AA, while referring to the definition of the term "Operational Debt" held that the definition has four components, *viz.*, (i) Goods, (ii) Services, (iii) Employment, and (iv) Government Dues, and after applying the test laid down in the provision, the Tribunal came to the following finding:

"6.1…On the facts of our case, we would be concerned with the first two, that is, provision of goods or services. We are of the view that supply of goods or services would mean such supply as is the input for either manufacturing or trading…"

"6.2… any debt arising without nexus to the direct input to the output produced or supplied cannot, in the context of the Code, be considered as an operational debt. Even though it can be a claim amounting to a debt, it cannot be categorised as an operational debt.

The AA also referred to some precedents (by different NCLTs) concerning the aforementioned subject, *viz., Pramod Yadav & Ors. v. Divine Infracon (P) Ltd., Citicare Super Speciality Hospital v. Vighnaharta Health Visionaries (P) Ltd., Jindal Steel & Power Ltd. v. DCM International Ltd.*, as also Hon'ble NCLAT's judgment delivered in the appeal filed against AA's decision in Jindal Steel matter (*supra*), wherein it was concluded that, since, in the case there was no claim in respect of provision of goods or services and the debt in respect of payment of dues does not arise under any law for the time being in force payable to the Central or State Government, the same does not satisfy the requirements of s. 9, IBC.

Thus, concluding, Hon'ble NCLT, *vide* its ***order dt. 9th August, 2019***, held that the debt arising out of non-payment of lease rent does not fall within the definition of "operational debt", and accordingly dismissed the application/petition as not maintainable.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
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Dear Professionals, **16th August, 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 (131): AA cannot interfere with CoC's decision to remove the RP when such a decision is approved by 88% voting share, unless it is shown that such decision is perverse or without jurisdiction – Holds NCLAT.

In an appeal filed against an order dt. 27th June, 2019 passed by AA (NCLT, Ahmedabad Bench) in the CIRP proceedings initiated in respect of *M/s ORG Informatics Ltd.* (CD), Hon'ble NCLAT, held a view that the CoC is not required to record any reason or ground for replacing of the Resolution Professional. It further held that for the purposes of proceedings reported to the IBBI, the CoC cannot await the decision of the IBBI for the purposes of replacement.

In the present case, the CoC with a majority voting share of 88% had decided to replace the RP and had moved an application before the AA seeking its consent for replacing the RP. The AA, however, had, *vide* the impugned order *inter alia* held that since no ground is given showing the cause of replacement of the IRP coupled with the fact that the CoC has already passed a Resolution for Liquidation of the CD, there is no reason for it to pass orders for replacing the IRP/RP. Further, taking cognizance of RP's statement that he has not been paid his professional fee as also the expenditure incurred by him during the CIRP, the AA had directed the CoC to take necessary steps towards payment of RP's remuneration and the expenditure incurred by him.

After perusing facts and circumstances of the case as also the current position of law, Hon'ble NCLAT held as follows:

"For the aforesaid reason, it was not open to the Adjudicating Authority to direct the same very 'Resolution Professional' to file an application for 'Liquidation' particularly when the 'Committee of Creditors' in its meeting decided to request the Adjudicating Authority to extend certain period and if not allowed, then pass order of Liquidation"

With the aforementioned observations, the Appellate Tribunal, while allowing the appeal, had set aside the impugned order vide its order dt. 6th August, 2019.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
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Dear Professionals, **19th August, 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 (132): Consolidation of Videocon Group Firms proceedings will set a precedent for future group insolvency proceedings.

In past few months several petitions, one after another, have been filed by the creditors either demanding the consolidation or in some cases objecting the consolidation of insolvency process of the Videocon group Companies.

Hon'ble NCLT, Mumbai Bench based upon the principles laid down by judicial authorities, mostly by U.K./ U.S.A. courts observed that before arriving at any conclusion on ***'Consolidation'*** , the existence of certain ingredients are necessary to be examined, viz ; *(1) Common control, (2) Common directors, (3) Common assets, (4) Common liabilities, (5) Inter-dependence, (6) Inter-lacing of finance, (7) Pooling of resources, (8) Co-existence for survival , (9) intricate link of subsidiaries 10) inter-twined of accounts, 11) inter-looping of debts, 12) singleness of economics of units, 13) cross shareholding, 14) Inter dependence due to intertwined consolidated accounts, 15) Common pooling of resources, etc.*

Hon'ble NCLT, Mumbai Bench *vide* its order dated **08.08.2019** allowed consolidation of insolvency resolution process against 13 Videocon Group companies into a single process. The two companies left out of the consolidated proceedings are KAIL Ltd. and Trend Electronics. While doing so, the tribunal observed as follow:

- KAIL and Trend electronics have independent resources and liabilities and can survive independently.
- Independent process will help in proper segregation of assets and liabilities. An independent resolution process for these two entities will help in attracting better resolution plans.

Further, the tribunal held that the period of 180 day-time limit for completion of resolution process will be considered from the day of the order by the tribunal. Therefore, for the purpose of calculation of 180 days as prescribed u/s 12 of I&B Code the corporate insolvency resolution process should be completed within 180 days from the date of this order.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)

Dear Professionals, **20th August, 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 (133): Claim relating to *'mortgaged property'* is not barred by limitation under IBC as the period of limitation is 12 years with regard to mortgaged property under Limitation Act.

An appeal (*Babulal Vardharji Gurjar V. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.*, Company Appeal (AT) (Insolvency) No. 549 of 2018) was filed before Hon'ble NCLAT against impugned order dated 9th August, 2018 passed by the National Company Law Tribunal, Mumbai Bench admitting an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 filed by JM Financial Asset Reconstruction Co. Ltd. (Financial Creditor) against 'Veer Gurjar Aluminium Industries Pvt. Ltd.' (Corporate Debtor).

Appellant being the suspended director of Corporate Debtor raised the question of limitation and submitted that the 'default' was committed on 8th July, 2011 whereas the petition under Section 7 of the I&B Code was filed in March, 2018, the application was not maintainable being barred by limitation.

Hon'ble NCLAT placing reliance on decision of Hon'ble Supreme Court in the matter of 'B.K. Educational Services Private Limited', Section 238A of Insolvency and Bankruptcy Code, 2016 and Part V (First Division) of Limitation Act relating to 'Suits relating to immovable property', held as follows:

> *"30. In view of the aforesaid position of law, the property having mortgaged, we also hold that the claim is not barred by limitation as the period of limitation is 12 years with regard to mortgaged property and in terms of Section 5 (7) read with Section 5(8) as the property is mortgaged, Respondent No. 2 also comes within the meaning of 'Financial Creditor'."*

In the result, Hon'ble NCLAT *vide* its order dated 14.05.2019 held that the application under Section 7 was not barred by limitation nor the claim of Financial Creditor was barred by limitation and dismissed the appeal.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)

Dear Professionals, **21st August, 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 (134): The true spirit of Section 240A is to protect the genuine MSME entrepreneurs which are MSME entrepreneurs *from the beginning*.

An application by Mr. Pankaj Jhunjhunwala, Managing Director, H.M Cements Pvt. Ltd. (Resolution Applicant) (*Bank of India v. Maxim Infrastructure and Real Estate Limited.*, I.A. No. 43/2019 in C.P.(IB).04/GB/2018) was filed before Hon'ble NCLT, Guwahati Bench for a declaration that the Resolution Plan submitted by the resolution applicant is eligible for consideration on commercial merits by the CoC and also other consequential reliefs including staying the discussion of eligible Resolution Plans/ Revised Resolution Plans by the CoC.

In the matter, the Resolution Applicant being the promoter of the Company had attracted ineligibility under Section 29A of the Code. The promoter received a certificate claiming to be a MSME to escape this ineligibility.

The question that arose is whether the resolution applicant will be considered a bona fide MSME unit for this purpose simple based on the acknowledgement of the Competent Authority.

Hon'ble NCLT, Guwahati Bench held that since the applicant only got acknowledgment from the concerned authorities, i.e., District Industries and Commerce Centre, Government of Assam and only got the acknowledgment for the project of Corporate Debtor in Guwahati, this must be a clear attempt to submit a resolution plan through back door entry which is not in the spirit of Section 240A of IBC. The true spirit of Section 240A is to protect the interest of MSME entrepreneurs who are MSMEs from the beginning.

Hon'ble NCLT *vide* its order dated 06.08.2019 rejected the application and the Resolution Applicant was not considered to be a MSME for claiming eligibility to submit a plan.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI

Dear Professionals, **22nd August, 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 (135): The provident fund, the pension fund and the gratuity fund do not come within the meaning of *'liquidation estate'* for the purpose of distribution of assets under Section 53 - held NCLAT.

An appeal (*State Bank of India Vs. Moser Baer Karamchari Union & Anr., Company Appeal (AT) (Insolvency) No. 396 of 2019*) was filed before Hon'ble NCLAT, impugning order dated 19th March, 2019 issued by Hon'ble NCLT Principal Bench, New Delhi, wherein AA held that the 'Provident Fund Dues', 'Pension Fund Dues' and 'Gratuity Fund Dues' cannot be part of Section 53 of the Code.

State Bank of India (Appellant) placed its reliance on the explanation to Section 53, that 'workmen's dues', which are mentioned under Section 53(1)(c), shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013 and would thus include Provident Fund. Appellant also relied on Section 327 of the Companies Act, 2013 which relates to 'Preferential Payments' and submitted that the sums due to the workman from the provident fund or any other fund for the welfare of the workmen, maintained by the Company, be treated as 'workmen dues'.

The question arose for consideration in the appeal was whether the provident fund, pension fund and gratuity fund come within the meaning of assets of the 'Corporate Debtor' for distribution under Section 53 of the Code

Hon'ble NCLAT held that since 'workmen's dues' is specifically mentioned in Section 53(1)(b)(i) as dues for the period of twenty-four months preceding the liquidation commencement date, its meaning could not be derived through Section 326 of the Companies Act, 2013

Hon'ble NCLAT *vide* its order dated 19.08.2019 dismissed the appeal with the finding that the provident fund, the pension fund, and the gratuity fund do not come within the meaning of '*liquidation estate'* for the purpose of distribution of assets under Section 53.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI

Dear Professionals, **23rd August, 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 (136): Hon'ble Supreme Court held that expenses fixed by the Adjudicating Authority will be borne by the creditor who moved the application.

A civil appeal (*S3 Electricals and Electronics Private Limited Vs. Brian Lau & Anr., CIVIL APPEAL NO. 103 OF 2018*) was preferred before the Hon'ble Supreme Court of India, impugning order dated 02nd August, 2017 issued by Hon'ble NCLAT, wherein application admitted under Section 7 of the Code against *'S3 Electrical and Electronics Private Limited'* was dismissed and Adjudicating Authority (AA) was directed to fix the '*fee of Interim Resolution Professional'* and the fees fixed by the AA of the IRP for the period he has functioned will be borne by the *corporate debtor*.

Hon'ble Supreme Court observed from Regulation 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 that the ***applicant*** is to bear expenses incurred by the IRP, which shall then be reimbursed by the Committee of Creditors to the extent such expenses are ratified. In a case like this where a CoC was never appointed, as the interim resolution process did not reach that stage, the Hon'ble Supreme Court held that the Adjudicating Authority will fix the expense which will be borne by the creditor who moved the application.

In view of the aforesaid observation, Hon'ble Supreme Court of India *vide* its order dated 05.08. 2019 set aside the impugned judgment dated 02.08.2017 issued by Hon'ble NCLAT to the extent that the expenses as fixed by the AA are to be paid by the corporate debtor and allowed the appeal to this extent.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI

Dear Professionals, **26th August, 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 (137): Financial Creditor cannot challenge the order of admission of CIRP filed by another financial creditor merely on the ground that it has a superior claim over the claim of the other Financial Creditors.

An appeal (*In the matter of L&T Infrastructure Finance Company Ltd. Vs Gwalior Bypass Project Ltd., Company Appeal (AT) (Insolvency) No. 676 of 2019*) was preferred before the Hon'ble NCLAT, impugning order dated 29th May, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench, wherein Adjudicating Authority admitted the application under Section 7 preferred by the ICICI Bank Limited and initiated CIRP against *'Gwalior Bypass Project Limited' (Corporate Debtor).*

Hon'ble NCLAT held that L&T claiming to be one of the financial creditor and not being a Member/ Shareholder of the Corporate Debtor Gwalior Bypass has no right to intervene to oppose admission of the application under Section 7 preferred by the ICICI Bank against the Corporate Debtor.

In view of the aforesaid observation, NCLAT further held that if the Appellant claims to be one of the Financial Creditor, it can file claim before the Resolution Professional, but it cannot challenge the order of admission in absence of any challenge by the Corporate Debtor, on the ground that it has first charge on the asset of the Corporate Debtor or has superior claim over the claim of the other Financial Creditors.

Accordingly NCLAT *vide* its order dated 19.08.2019, dismissed the appeal.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI

Dear Professionals, **27th August, 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 (138): NCLAT held that NCLT is not barred to entertain IBC proceedings based on its exclusive jurisdiction.

An appeal (*Excel Metal Processors Limited Vs Benteler Trading International GMBH and Anr.*, *Company Appeal (AT) (Insolvency) No. 782 of 2019*) was preferred before the Hon'ble NCLAT, impugning order dated 25th June, 2019, passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, wherein Adjudicating Authority admitted the application under Section 9 initiating CIRP against *Excel Metal Processors Private Limited* (Corporate Debtor).

The Appellant raised the question of jurisdiction of the NCLT, Mumbai Bench in entertaining the application under Section 9 of the Code based on the Agreement reached between the parties, that as per the Agreement and as the Office of the Respondent – Benteler Trading International GMBH is in Germany, any suit or case is maintainable only in the Court at Germany.

Honb'le NCLAT relied on its judgement in the matter of ***Binani Industries Limited vs. Bank of Baroda and Anr. – Company Appeal (AT) (Insolvency) No.82 of 2018 etc. decided on 14th November, 2018*** wherein it was held that 'Corporate Insolvency Resolution Process'/ insolvency proceedings is not a 'suit' or a 'litigation' or a 'money claim' for any litigation; No one is selling or buying the 'Corporate Debtor' a 'Resolution Plan'; It is not an auction; it is not a recovery, which is an individual effort by the creditor to recover the dues through a process that had debtor and creditor on opposite sides; and it is not liquidation. The object is mere to get resolution brought about, so that the Company do not default on dues.

Hon'ble NCLAT held that since the office of the corporate debtor was in Mumbai, NCLT, Mumbai Bench had the jurisdiction to entertain an application under Section 9 and the Appellant could not derive advantage of the terms of the agreement reached between the parties.

In view of the aforesaid observation, NCLAT *vide* its order dated 21.08.2019, dismissed the appeal.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

A wholly owned subsidiary of ICSI and registered with IBBI

Dear Professionals, **28th August, 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 (139): On completion of 270 days of CIRP period, if the RP has not been discharged, CoC cannot be treated to be a *functus officio* until a liquidation order is passed.

An application (*In the matter of Rana Saria Poly Pack Pvt Ltd Vs Uniword sugars Pvt. Ltd. CA No. 146-2019 in CP No. (IB) 120-ALD/2017*) was moved by Resolution Professional before the Hon'ble National Company Law Tribunal (NCLT), Allahabad Bench to seek urgent directions from the Court by way of permitting the CoC to conduct further meetings to discuss and decide the urgent Agenda, although the period of 270 days was over and the application filed for liquidation of the Company was under consideration of the AA.

Considering the peculiar circumstances, Hon'ble NCLT was of the view that since the RP was not discharged, hence, CoC cannot be treated to be a *functus officio* until a formal order of liquidation is passed.

In view of the aforesaid observation, NCLT *vide* its order dated 04.06.2019, directed that RP and CoC to continue with the CIRP with a view to safeguard the paramount interest of the company.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI

Dear Professionals, **29th August, 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 (140): To initiate CIRP, three years period of limitation should be counted from the date of cause of action and not from the date of filing of application under Section 9.

An appeal (*Synergy Property Development Service Pvt Ltd. Vs. Bellona Estate Developers Ltd. Company Appeal (AT) (Insolvency) No. 371 of 2019*) was moved by 'Synergy Property Development Services Pvt. Ltd.'- (Operational Creditor) before the Hon'ble National Company Law Appellate Tribunal (NCLAT), impugning order dated 22nd January, 2019 issued Hon'ble NCLT, Mumbai Bench (AA) wherein the claim filed by the Operational Creditor was rejected on the ground that the claim was barred by limitation.

The AA held that the invoices were issued in the year 2014 and the petition was filed on 22nd March, 2018 and, therefore, the claim was time barred. The Demand Notice under Section 8(1) was issued on 24th May, 2017 to which the 'Corporate Debtor' replied on 5th June, 2017 disputing the debt.

Hon'ble NCLAT held that:

> *'6. The Demand Notice under Section 8(1) having been issued by the Appellant on 24th May, 2017, we hold that the claim was not barred by limitation. The Adjudicating Authority failed to calculate the period of three years which was to be calculated for ascertaining the date of cause of action i.e. the last date of Demand Notice dated 1st September, 2014. The Demand Notice was issued on 24th May, 2017 to which denial was made by the 'Corporate Debtor' on 5th June, 2017. It was wrongly calculated on the basis of date of filing of application under Section 9.'*

In view of the aforesaid observation, NCLAT *vide* its order dated 28.08.2019, had set aside the impugned order dated 22nd January, 2019 and remitted the case to the Adjudicating Authority, Mumbai Bench to admit the application under Section 9.

Regards,
CS Alka Kapoor
Chief Executive Officer

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI

Dear Professionals, **30th August, 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 (141): Application filed by Homebuyers u/s 7 against the Builder for default, admitted by NCLT.

An application (*Rachna Singh & Anr. Vs. M/s Umang Realtech Pvt Ltd., CP No. IB-1564 (PB)/2018*) was moved by Ms. Rachna Singh and Mr. Ajay Singh (Petitioners) before the Hon'ble National Company Law Tribunal, New Delhi Bench, with the prayer of initiation of CIRP against M/s Umang Realtech Pvt Ltd (Corporate Debtor).

In the present application filed, the petitioners had booked an apartment in Umang Realtech's residential project in Gurgaon in year 2012 and made payments of Rs 1,01,25,734 on various dates. The corporate debtor had undertaken to apply for completion certificate by December 31, 2015. However even after expiry of sufficient time, possession of the said apartment was not handed over to the petitioner.

While deciding the application, the bench looked into the buyer's agreement wherein it was mentioned that if the Corporate Debtor defaulted in compliance will have to pay a compensation for delay at Rs 5 per square foot per month of the super area. The Corporate Debtor failed to comply, nor the possession was handed over nor the compensation was paid.

In view of aforesaid the Hon'ble NCLT held as follow:

"19. It is true that proceedings under the Code are not in the nature of recovery. In the present application, the financial creditor is seeking initiation of corporate insolvency resolution process by making prayer that all financial creditors, operational creditors and others may raise their claims and if corporate financial restructuring is possible then within the stipulated period it may be explored failing which the due process of law is to take its course. Therefore, by initiation of corporate insolvency resolution process, the financial creditor is only highlighting the default committed by the corporate debtor with respect to its inability to pay. The same is required to be remedied. Therefore, it cannot be concluded that the filing of the petition would amount to recovery of the debts by the financial creditor".

Hon'ble NCLT, New Delhi Bench *vide* its order dated 20.08.2019, admitted the application under Section 7.

Regards,
CS Alka Kapoor
Chief Executive Officer