

KNOWLEDGE REPONERE

**(A WEEKLY BULLETIN)
(06 TO 10, 13 TO 17 AND 20 TO
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"The only source of knowledge is experience."

-Albert Einstein

Dear Professional Members,

Greetings!

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

As you are aware, Moody's Investors Service ("**Moody's**"), a leading provider of credit ratings, research, and risk analysis in its Report has upgraded India's sovereign rating from the lowest investment grade of Baa3 to Baa2, and changed the outlook from stable to positive. Moody's Report has recognised proactive steps towards a resolution of non-performing loans through use of Code as a beginning to address key weakness in India's sovereign credit profile.

On 23rd November 2017, Hon'ble President of India has promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance 2017 ("**Ordinance**") to amend the Code. The Ordinance has been passed to further strengthen the insolvency resolution process. Broadly speaking, the Ordinance provides for prohibition of certain persons from submitting a resolution plan who, on account of their antecedents may adversely impact the credibility of the processes under the Code. Further, the Ordinance makes provisions to specify certain additional requirements for submission and consideration of resolution plan before its approval by Committee of Creditors. The detailed Ordinance is available at <http://ibbi.gov.in/180404.pdf>

Insolvency and Bankruptcy Board of India ("**IBBI**") has also recently amended (i) the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, and the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017. The detailed amendments are available at the following links:

- The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017 issued by IBBI is available at <http://www.ibbi.gov.in/cirpregulation19.pdf>
- The Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017 issued by IBBI is available at <http://www.ibbi.gov.in/fasttrack20.pdf>.

In another development, Ministry of Corporate Affairs (“MCA”) *vide* order dated 16th November 2017 has constituted an Insolvency Law Committee with a view to examine the suggestions received from various stakeholders for further improvement in the processes prescribed in the Code and related matters. The detailed MCA order is available at <http://www.ibbi.gov.in/2017-11-16%2019.37.pdf>

On 13th November 2017, **Hon’ble Supreme Court of India in *Uttara Foods and Feeds Private Limited Vs Mona Pharmachem (Civil Appeal No. 18520 of 2017)***, observed that the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, be amended by the competent authority so as to include inherent powers of National Company Law Appellate Tribunal as recognised by Rule 11 of the National Law Appellate Tribunal Rules, 2016 to allow a compromise to take effect after admission of the insolvency petition.

On 22nd November 2017, **Hon’ble Supreme Court of India in *Chitra Sharma & Ors. vs Union of India & Ors. (Writ Petition(s)(Civil) No(s). 744/2017)*** in furtherance to its earlier orders directed deposit of Demand Draft of Rs.275 crores by Jaiprakash Associates Limited (“JAL”) before Registry of Supreme Court on concerns raised by the home buyers about the realization of the amount. Hon’ble Supreme Court further directed a sum of Rs.150 crores to be deposited by 13.12.2017 and a further sum of Rs.125 crores be deposited by 31.12.2017. Hon’ble Supreme Court also directed JAL that neither the independent directors nor the promoter directors shall alienate their personal properties or assets in any manner, and if they do so, they will not only be liable for criminal prosecution but contempt of the Court. Hon’ble Supreme Court further directed that the properties and assets of their immediate and dependent family members should also not be transferred in any manner, whatsoever.

As per news reports, Securities and Exchange Board of India (SEBI) is jointly working with IBBI on the guidelines for insolvency resolution professionals under the capital market norms for better implementation of the Code. It is expected that the new guidelines will be issued very soon. Further, the Reserve Bank of India (RBI) is likely to release another list of about 50 loan accounts that are either stressed or on the verge of becoming non-performing assets (NPA).

1) CASE UPDATES

The speedy filing of the cases under the Code at various NCLT Benches is taking a new turn every day. The newly admitted cases with regard to Corporate Insolvency Resolution Process (CIRP) under the Code are as below:

S. No.	Case Title	Relevant SECTION	NCLT Bench	Amount default mentioned application (in Rupees)	in as in
1	M/s Anant Agro Industries V/s. Vijai Mahalaxmi Spinning Mills India Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai Bench	8.45 Lakhs	
2	C.M. Industries V/s. V.G. Textiles Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai Bench	6.56 Lakhs	
3.	Central Bank of India V/s. NCML Industries Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench	23.55 Crores	
4.	Ajay Kumar Gupta & Anr. v/s. IERO Fiveriver Pvt. Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	New Delhi Bench III	1.16 Crores	
5.	Central Bank of India v/s. Moser Baer Solar Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench	982.50 Crores	

6.	Alchemist Assets Reconstruction Company Ltd. V/s. Moser Baer India Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench	185.37 Crores
7.	VRV Asia pacific Pvt. Ltd. V/s. Cryogaas India Pvt. Ltd	Section 7 of the Code dealing with initiation of CIRP by operational creditor.	Ahmadabad	41.59 Lakhs
8.	Bank of Baroda vs. Varia Aluminium Pvt. Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Ahmadabad	127.92 Crores
9.	Engineering Labour Union V/s. U.B. Engineering Pvt. Ltd.	Section 10 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	20 Crores

2) BRIEF OF SOME OF THE DECIDED CASES

National Company Law Appellate Tribunal ("NCLAT") Judgments

M/s. Ksheeraabd Constructions Pvt. Ltd.Appellant- Corporate Debtor

Vs.

M/s. Vijay Nirman Company Pvt. Ltd.Respondent- Operational Creditor

Date of Judgment: 20th November, 2017

Brief facts:

- An application was filed by M/s Vijay Nirman Company Pvt. Ltd., Operational Creditor ("**Vijay Nirman**") against M/s Ksheeraabd Construction Pvt. Ltd., Corporate Debtor ("**Ksheeraabd Construction**") before the National Company Law Tribunal ("NCLT"), Hyderabad Bench under section 9 of the Code for initiating the corporate insolvency resolution process. The said application was

admitted by NCLT *vide* order dated 29th August, 2017 which was challenged by Ksheeraabd Construction before NCLAT.

- The main plea of Ksheeraabd Construction before NCLAT was that there was 'existence of a dispute' and therefore, application under section 9 of the Code was not maintainable.
- Ksheeraabd Construction alleged that after the Arbitral Award was passed by Arbitral Tribunal on 21st January, 2017, an application under section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") was preferred and the same amounts of pendency of a case and thus, 'existence of dispute'. This fact was brought to notice of NCLT yet the application was admitted.
- Ksheeraabd Construction also alleged that NCLT failed to appreciate that Ksheeraabd Construction had raised a counter claim before the Arbitral Tribunal. The fact that counter claim was raised itself indicates that there was 'existence of dispute'.
- Ksheeraabd Construction further submitted the Arbitral Award dated 21st January, 2017 cannot be termed as a 'decree', till it is enforceable and cannot be regarded as a 'debt' before it is final. Since the arbitral award was challenged in this case, the arbitral award could not be said to be enforceable under section 36 of the Arbitration Act.
- Vijay Nirman alleged that once the arbitral award was passed, the dispute stands decided and the award amount is a debt payable to it.
- Vijay Nirman also submitted that Ksheeraabd Construction never raised any dispute prior to notice under section 8(1) of the Code, therefore, it cannot be termed as dispute in existence.

Decision of NCLAT and reasons thereof:

- NCLAT observed that the question which arises for consideration is whether pendency of a case before a court under section 34 of the Arbitration Act can be termed to be 'dispute in existence' of the purposes of section 5(6) of the Code.

- NCLT observed that under section 36 of the Arbitration Act, an arbitral award is executable as a decree, however, it can be enforced only after the time for filing the application under section 34 of the Arbitration Act has expired and/or if no application is made or such application having been made has been rejected. Therefore, for the purposes of Arbitration Act, an arbitral award reaches finality after expiry of enforcement time or if the application under section 34 is filed and rejected.
- NCLT noted that for the purposes of the Code, no reliance can be placed on section 34 of the Arbitration Act. The Code being a complete code in itself, will prevail all over other Acts including Arbitration Act as mentioned in section 238 of the Code. Thus, the provisions of the Code, with regard to finality of an Arbitral Award for initiation of CIRP will prevail over the Arbitration Act.
- NCLAT further took note of Form-5 under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which mentions an order passed by Arbitral panel/Arbitral Tribunal to be one of the documents/records and evidence of default.
- NCLAT held that while pendency of suit or arbitral proceedings has been termed to be an 'existence of dispute', an order of a court, Tribunal or Arbitral Panel adjudicating on the default (commonly known as award), has been treated to be a 'record of operational debt'.
- In view of the above, NCLAT dismissed the appeal filed by Ksheeraabd Construction.

M/s. Speculum Plast Pvt. Ltd.

....Appellant

Vs.

PTC Techno Pvt. Ltd.

....Respondent

WITH

Parag Gupta & Associates

....Appellant

Vs.

B.K. Educational Services Pvt. Ltd.Respondent

WITH

Ashlay Infrastructure Pvt. Ltd.Appellant

Vs.

LDS Engineers Pvt. Ltd.Respondent

Date of Judgment: 7th November, 2017

Brief facts:

- In all these appeals as common question of law was involved, and hence were heard together and were disposed of by NCLAT through common judgment.
- The question that arose for determination in these appeals was whether Limitation Act, 1963 is applicable for triggering 'Corporate Insolvency Resolution Process' under the Code?

Decision of NCLAT and reasons thereof:

- NCLAT held that the Limitation Act, 1963 is not applicable for initiation of 'Corporate Insolvency Resolution Process';
- NCLAT also held that the Doctrine of Limitation and Prescription is necessary to be looked into for determining the question whether the application under Section 7 or Section 9 of the Code can be entertained after long delay, amounting to laches and thereby the person forfeited his claim.
- NCLAT noted that if there is a delay of more than three years from the date of cause of action and no laches on the part of the Applicant, the Applicant can explain the delay. NCLAT also noted that where there is a continuing cause of action, the question of rejecting any application on the ground of delay does not arise.
- In the aforesaid context, NCLAT observed that if it comes to the notice of the Adjudicating Authority that the application for initiation of 'Corporate Insolvency Resolution Process' under section 7 or Section 9 has been filed after long delay, the Adjudicating Authority may give opportunity to the Applicant to explain the delay within a reasonable period to find out whether there are any laches on the part of the Applicant.

- NCLAT observed that the stale claim of dues without explaining delay, normally should not be entertained for triggering 'Corporate Insolvency Resolution Process' under Section 7 and 9 of the Code.
- NCLAT also observed that the aforesaid principle for triggering an application under Section 10 of the Code cannot be made applicable as the 'Corporate Applicant' does not claim money but prays for initiation of 'Corporate Insolvency Resolution Process' against itself, having defaulted to pay the dues of creditors.

1) REJECTED CASES

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

Case Title	Brief Facts and Reasons for rejection
<p>M/s Caparo Procama Infrastructure Limited [Operational Creditor]</p> <p>vs.</p> <p>Technofab Engineering Limited [Corporate Debtor]</p> <p>Date of Judgment: 14.11.2017</p> <p>(NCLT, New Delhi Bench)</p>	<p>Brief facts:</p> <ul style="list-style-type: none"> • The application was filed by M/s Caparo Procama Infrastructure Limited, Operational Creditor (“Caparo”), against Technofab Engineering Limited, Corporate Debtor (“Technofab”) under section 9 of the Code for initiating the corporate insolvency resolution process in relation to non-payment of its dues for services rendered under Material Handling Services Agreement. Services were provided through deployment of manpower and usage of Procama Warehousing Solutions, a software developed and used for warehouse management which was installed on the computers kept at the warehouse of Technofab. • Caparo alleged that it has raised invoices from March 2016 to October 2016 for a total sum of Rs. 31,25,325/- and has been requesting Technofab to make payment towards the outstanding bills, however, the Technofab failed to make payment of the same. • Caparo in its application to the NCLT for initiating the corporate insolvency resolution process stated that Technofab had terminated Material Handling Services Agreement on 4th

October 2016 with effect from 31st October 2016 on allegation that Caparo mismanaged the warehouse and there was shortage of stock.

- Caparo also mentioned in its application that after serving termination notices, Technofab and Caparo had discussions wherein Technofab showed its financial difficulties to make the payment and as a result Caparo withdrew its manpower deployed at the warehouse.
- Technofab alleged that the services provided by Caparo were found deficient since inception of the Material Handling Services Agreement. Technofab also alleged that several irregularities were found in the services of Caparo and were duly pointed out. In support of the contentions Technofab placed various correspondences and minutes.
- Technofab also submitted that prior to the termination of the Agreement, a meeting was held between the parties and minutes of meeting dated 26.09.2016 were placed on record in which deficiencies were discussed between parties.
- Technofab alleged that it had issued 4 debit notes in respect of loss suffered by it due to deficient stock amongst other things.

Decision of NCLT and reasons thereof:

- NCLT noted that from the contention of the Caparo itself, it appears that there was a dispute between the parties much before issuance of demand notice under section 8 of the Code.
- NCLT further noted that perusal of records reveals that large number of communications made between the parties clearly shows that there

had been existence of dispute between the parties much before issuance of demand notice under section 8 of the Code.

- NCLT also noted counter claim raised by Technofab against the losses on account of mismanagement and deficiency of services rendered by Caparo.
- NCLT also noted that the Material Handling Services Agreement was terminated by Technofab on the count of material breach of agreement which supports the contention that there has been dispute in respect of services provided by Caparo during the contractual period.
- NCLT took note of the Supreme Court judgment in *Mobilox Innovative Pvt. Ltd. vs Kirusa Software Pvt. Ltd.* and observed that in the factual scenario there is no doubt that the Technofab has raised a genuine dispute with sufficient particulars and hence the amount of claim raised by Caparo falls within the ambit of disputed claim.
- On the basis of aforesaid, NCLT rejected the application of Caparo filed under section 9 of the Code stating that a dispute truly exists.

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

Wish you good luck in all your endeavors!!

Team ICSI IPA