September 2023

Insolvency Newsletter - (May – June 2023)

This edition of the Insolvency Newsletter covers key updates on judicial pronouncements under IBC during May – June 2023 by the Supreme Court of India, National Company Law Appellate Tribunal, and some of the National Company Law Tribunals.

Impacting initiation of CIRP by financial creditors

Vidarbha differentiated: Once payment default is established, application filed under Section 7 of IBC must be admitted

In the case of ***M. Suresh Kumar Reddy v. Canara Bank & Ors***[1], an application was filed for initiation of CIRP against Kranthi Edifice Private Limited ("**Kranthi Edifice**") by Canara Bank. The application was admitted by NCLT, Hyderabad. M. Suresh Kumar Reddy (a suspended director of Kranthi Edifice) appealed the admission order before the NCLAT, and subsequently before the Supreme Court.

The Supreme Court, following its decisions in *Innoventive Industries Limited v. ICICI Bank*[2] ("**Innoventive Industries Judgment**") and *E.S. Krishnamurthy v. Bharath Hi-Tech Builders Private Limited*[3] ("**E.S. Krishnamurthy Judgment**"), held that once the NCLT is satisfied that a payment default has occurred, there is *hardly any* discretion left with it to refuse the initiation of CIRP against the CD. It is only where the NCLT finds that a debt has not yet become due and payable, that it may reject the application filed for initiation of CIRP against a CD.

The Supreme Court further clarified that its decision in *Vidarbha Industries Power Limited v. Axis Bank Limited*[4] cannot be construed as taking a view contrary to the Innoventive Industries Judgment and E.S. Krishnamurthy Judgment.

Petition for initiation of CIRP which is disposed of basis consent terms can be revived without consent of NCLT

In the case of ***IDBI Trusteeship Services Limited vs. Nirmal Lifestyle Limited***[5], an application was filed by IDBI Trusteeship Services Limited ("**IDBI Trusteeship**") seeking initiation of CIRP against Nirmal Lifestyle Limited ("**Nirmal Lifestyle**"). The application was admitted by NCLT, Mumbai. Post admission of the application, Nirmal Lifestyle and IDBI Trusteeship entered into settlement ("**NL Settlement Terms**"). In view of the NL Settlement Terms,

[1] May, 2023, Supreme Court [Civil Appeal No. 7121 of 2022]
[2] August, 2017, Supreme Court [Civil Appeal Nos. 8337-8338 of 2017]
[3] December, 2021 Supreme Court [Civil Appeal No. 3325 of 2020]
[4] July, 2022, Supreme Court [Civil Appeal No. 4633 of 2021]
[5] May 2023, NCLAT New Delhi, [Company Appeal (AT) (Insolvency) No. 117 of 2023]

the RP of Nirmal Lifestyle filed an application under Section 12A of IBC for withdrawal of the application filed for initiation of CIRP of Nirmal Lifestyle. NCLT allowed the withdrawal and took the NL Settlement Terms on record.

Thereafter, Nirmal Lifestyle failed to comply with the NL Settlement Terms. Accordingly, IDBI Trusteeship filed an application before NCLT, Mumbai for revival of the CIRP against Nirmal Lifestyle. However, NCLT, Mumbai dismissed the application observing that IBC does not provide for reopening/revival of applications. The decision of NCLT, Mumbai was challenged before NCLAT.

The NCLAT relied on the judgment in *SRLK Enterprises LLP v. JALAN Transolutions (India) Ltd*[6], and noted that the application for initiating CIRP against Nirmal Lifestyle was withdrawn by placing on record the NL Settlement Terms. The NCLAT held that in such cases the petition ought to be revived if the consent terms provide for revival of the petition upon default of the consent terms.

Even if the governing law of the term loan agreement is English law, a creditor can file an application for initiation of CIRP in the jurisdiction of the registered office of the corporate debtor

In the case of ***Rajesh Kumar Modi v. Punjab National Bank (International) Limited & Ors.***[7], a shareholder of La Trendz Fabrica Private Limited ("**La Trendz**") filed an appeal before NCLAT, New Delhi challenging an order of NCLT, Mumbai admitting La Trendz into CIRP. La Trendz was admitted into CIRP upon an application filed by Punjab National Bank (International) Limited as the La Trendz had failed to meet its payment obligations under the loan agreements which were governed under English law. The NCLAT held that the financial creditor can file an application for initiating CIRP against the CD in the jurisdiction of the registered office of the CD, even if the governing law of the term loan agreement is English law.

Absence of components of interest and fixed repayment period does not disqualify a debt from being a 'financial debt' under IBC

In the case of ***Shivam Agrioils Private Limited v. Shree Krishna Vanaspati Industries Private Limited***[8], the NCLAT held that the liability to pay interest on a loan is not the only criterion for determining the *time value of money* of financial debt under IBC. It further held that that a debt is not disqualified as being financial debt merely because it carried no interest or did not have a fixed repayment term.

On the aspect of interest, the NCLAT relied upon the decision of *Orator Marketing (P) Ltd. v. Samtex Desinz (P) Ltd.*[9] ("**Orator Judgment**") where the Supreme Court has already settled that the component of interest is not an essential condition for bringing a debt within the fold of 'financial debt'. In the Orator Judgment, the Supreme Court had observed that "financial debt" has been defined to mean debt along with interest *if any* and that the words "if any" could not have been intended to be otiose. Therefore, if there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt.

[6] April, 2021, NCLAT New Delhi, [Company Appeal (AT) (Insolvency) No. 294 of 2021]
[7] May 2023, NCLAT, New Delhi [Company Appeal (AT) (Insolvency) No. 53 of 2023]
[8] May 2023, NCLAT, New Delhi [Company Appeal (AT)(Insolvency) No. 982 of 2022]
[9] (2023) 3 SCC 753

Impacting initiation of CIRP by Operational Creditor

A partnership firm which is an 'operational creditor' need not be registered for filing an application for initiating CIRP

In the case of ***Haren Sanghvi & Associates vs CDigital Arts & Crafts Private Limited***[10] an application was filed by Haren Sanghvi & Associates ("**Haren Associates**") for initiating CIRP against CDigital Arts & Crafts Private Limited ("**CDigital**"). CDigital contended that Haren Associates is not a registered partnership and hence has no locus to file the application for initiating CIRP against CDigital.

The NCLT held that it is well settled law that there is no requirement or a pre-condition that a partnership firm which is an operational creditor must be a registered partnership firm to be able to file an application for initiating CIRP against a CD.

Inadequacy of stamp duty paid on an agreement cannot disqualify operational claims

In the case of ***Smartworks Coworking Spaces Private Limited v. Turbot HQ India Private Limited***[11], Smartworks Coworking Spaces Private Limited ("**Smartworks**") was entitled to receive lease rentals from Turbot HQ India Private Limited ("**Turbot**") for leasing the coworking office space throughout the lock-in period, as per the terms of the lease agreement. During the lock-in period, Turbot was not allowed to terminate the lease agreement. However, Turbot terminated the lease agreement much before the expiry of the lock-in period. This termination constituted a breach of contract and gave rise to an operational claim. Basis this, Smartworks filed an application for initiation of CIRP against Turbot. This was challenged by Turbot on the ground that the lease agreement, being the basis of the claim of Smartworks, was insufficiently stamped.

The NCLAT held that Turbot had acted upon the lease agreement by taking possession of the premises and paying monthly rentals, etc., despite the lease agreement being insufficiently stamped. Accordingly, having acted upon the lease agreement, Turbot is obligated to pay the dues as agreed therein, which can form the basis of initiation of CIRP. Insufficiency of stamp duty would not bar such claims.

Maintainability of an application under Section 9 of IBC for implementation of an Arbitral Award

In the case of ***M/s. KK Ropeways Ltd. Vs. M/s. Billion Smiles Hospitality Pvt. Ltd.***[12], M/s. KK Ropeways Ltd., ("**KK Ropeways**") obtained an ex-parte arbitral award of INR 26,33,022 (Indian Rupees twenty six lakh thirty three thousand twenty two only) (along with interest) ("**Arbitral Award**") against Billion Smiles Hospitality ("**Billion Smiles**") of recovery of lease rentals, under a lease/ rent agreement. Billion Smiles preferred an appeal under Section 34 of the Arbitration Act, before the Delhi High Court, assailing the Arbitral Award. Pending the appeal, KK Ropeways filed an application for initiation of CIRP against Billion Smiles before NCLT, Bengaluru for default on account of non-payment under the Arbitral Award. NCLT, Bengaluru dismissed KK Ropeways' application on the ground that, *inter alia*, since Billion Smiles had filed an appeal against the award shows that the operational debt claimed by the creditor is 'under dispute'.

In appeal, the NCLAT upheld the position that as Billion Smiles had challenged the Arbitral Award under the Arbitration Act, the `operational debt' is under 'dispute' and accordingly petition by KK Ropeways under Section 9 of IBC is not maintainable.

For a detailed analysis, please refer to the JSA Prism of July 31, 2023.

[10] May, 2023, NCLT Mumbai, [C.P. 4427/IB/MB/2019]
[11] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Insolvency) No. 772 of 2022]
[12] June, 2023, NCLAT, Chennai [Comp. App (AT) (CH) (INS.) No. 246 / 2021 (NCLAT Chennai]

An unsigned document attached to an email from the corporate debtor cannot be treated as an acknowledgement of debt

In the case of ***G.L. Shoes v. Action Udhyog Private Limited***[13]**,** Action Udhyog Private Limited ("**Action Udhyog**") had attached an unsigned statement of account to an email message with no other explanatory contents. This was argued to constitute an acknowledgement of debt for the purposes of Section 18 of the Limitation Act, 1963 ("**Limitation Act**"). NCLT, New Delhi rejected this argument on the ground that the statement of account was contained in an 'external file attachment' to the main body of the email and that the statement was neither duly authenticated with the signature of an authorized person of Action Udhyog, nor did it bear its company seal. Accordingly, NCLT held that requirements of Section 18 of the Limitation Act were not getting fulfilled and the petition was therefore barred by limitation. On appeal, the NCLAT confirmed the NCLT's decision and observed that for the purposes of Section 18 of the Limitation Act, an acknowledgment must be clear and unambiguous, and needs to be in writing and signed by the party against whom such right is claimed. The NCLAT reiterated that these requirements must be mandatorily satisfied irrespective of whether the acknowledgement is in electronic or in physical form and these cannot be exempted merely because a document is sent *via* e-mail.

Interest crystalized post filing of an application cannot be claimed

In the case of ***Hindustan Zinc Limited v. Mahindra Susten Private Limited***[14], the NCLAT held that once the CD has paid the crystalised amount claimed by an operational creditor under an application filed under Section 9 of IBC, the operational creditor cannot maintain a claim for interest for the period *after* the filing of such application under the Section 9 application. The NCLAT held further that such a claim would not be maintainable even if the operational creditor has reserved its right (in the application) to claim further interest.

The NCLAT, however, clarified that the dismissal of such an application does not preclude the operational creditor from pursuing other legal proceeding against the CD to recover such further interest in event the liability in respect of further interest is not discharged by the CD.

Impacting initiation of CIRP by Corporate Applicant

No mandatory requirement to issue notice to the creditor(s) at pre-admission stage

In the case of ***SMBC Aviation Capital Ltd. vs Interim Resolution Professional of Go Airlines (India) Ltd.***[15]**,** while deciding an operational creditor's objection in respect of initiation of CIRP by the Corporate Applicant under Section 10 of IBC, the NCLAT held that there is *no mandatory requirement to issue notice to the creditor(s) of the* Corporate Applicant *at the pre-admission stage, while deciding an application under Section 10 of IBC*.

In this regard, the NCLAT made reference to Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which only requires the Corporate Applicant to serve a copy of the application for initiating the CIRP to IBBI prior to filing the same before the NCLT.

The NCLAT, however, recognised that the NCLT may exercise *discretion* on a case to case basis, to require issuance of notice to the creditor(s) of the Corporate Applicant.

[13] May, 2023, NCLAT, New Delhi [Company Appeal (AT)(Insolvency) No. 846 of 2022]
[14] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Insolvency) No. 34 of 2023]
[15] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Insol.) No. 593 of 2023]

Jurisdictional issues of NCLT/NCLAT

NCLAT does not have the power to review its own judgement, but has the power to recall its judgement on specified grounds

In the case of ***Union Bank of India v. Dinkar T Venkatasubramanian & Ors.***[16] a 5 (five) member bench of the NCLAT, New Delhi put to rest the long-standing conundrum on the NCLAT's power to recall its orders[17]. The NCLAT held that it possesses the inherent powers to recall its judgment.

While recognizing the distinction between powers to review and recall, the NCLAT held that the power to review its judgment is not conferred upon NCLAT but power to recall its judgment is inherent to the NCLAT's powers under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016. The NCLAT, however, clarified that the power of recall cannot be used to re-hear a case and such power may only be exercised in the cases of procedural errors, or fraud.

Computation of limitation period for filing appeal ought to exclude time taken for obtaining certified copy of order

In the case of ***Sanket Kumar Agarwal & Anr v APG Logistics Private Limited***[18], Sanket Kumar Agarwal ("**Sanket**") had filed an application to initiate CIRP against APG Logistics Private Limited and the same was dismissed by the NCLT, Chennai *vide* order dated August 26, 2022. On September 2, 2022, Sanket filed an application for obtaining a certified copy of the NCLT dismissal order. On September 15, 2022, the order was uploaded on the website of the NCLT and a certified copy was provided to Sanket on the same day. Sanket lodged an appeal before the NCLAT on October 10, 2022 in the e-filing mode along with an Interlocutory Application seeking condonation of delay of 5 (five) days. The physical copy of the appeal was filed on October 31, 2022.

On January 9, 2023, NCLAT dismissed the appeal for being barred by limitation. NCLAT observed that the appeal was lodged through the e-portal on October 10, 2022, which was 46 (forty six) days after the NCLT order. It observed that while Section 61(2) of IBC provides a 30 (thirty) day deadline for preferring an appeal against an order of the NCLT, the NCLAT can condone a delay of upto 15 (fifteen) days if sufficient cause is shown. NCLAT also held that the ingredients of Section 61 of IBC do not stipulate that an aggrieved person has to wait till he is in receipt of a certified copy of the impugned order before preferring an appeal. Hence, Sanket filed a civil appeal before the Supreme Court.

On appeal, the Supreme Court referred to Section 12(2) of the Limitation Act which provides that the time taken for obtaining a copy of order to be filed with an appeal, has to be excluded while computing the period of limitation. The Supreme Court thereafter held that the time taken by the NCLT for providing the certified copy of the order should be excluded from computation of limitation under Section 61(2) of IBC.

Position on intervention applications filed in Section 7 proceedings

In the case of ***Vikash Kumar Mishra & Ors. vs. Orbis Trusteeship Service Pvt. Ltd. & Anr***[19], an application was filed by Orbis Trusteeship Services Pvt. Ltd. ("**Orbis**") to initiate CIRP against Kindle Infraheights Pvt. Ltd. ("**Kindle**"). During pendency of the Section 7 application, some of Kindle's homebuyers filed an intervention application on the ground that the Section 7 application ought to be dismissed in view of an order of the UP RERA in their favour. The NCLT, New Delhi rejected the intervention application as non- maintainable. The decision of NCLT was challenged before NCLAT.

---

[16] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Ins.) No. 729 of 2020]
[17] This judgement partially overruled the earlier position on recall taken by the NCLAT in the cases of ***Agarwal Coal Corporation Pvt Ltd v. Sun Paper Mill Ltd & Anr.*** [NCLAT, New Delhi [Company Appeal (AT) (Ins.) No. 412 of 2019]] and ***Rajendra Mulchand Varma & Ors v. KLJ Resources Ltd & Anr.*** [NCLAT, New Delhi [Company Appeal (AT) (Ins.) No. 359 of 2020].
[18] May, 2023, Supreme Court, [Civil Appeal No 748 Of 2023]
[19] May 2023, NCLAT New Delhi, [Comp. App. (AT) (Ins) No. 246 of 2023]

NCLAT relied on its judgments passed in *Surinder Pal Singh & Ors. Vs. Spaze Towers Pvt. Ltd.*[20] *and Prayag Polytech Pvt. Ltd. v Hind Tradex Ltd.*[21], and held that till the application for initiation of CIRP against Kindle is admitted, the intervention application filed by homebuyers would not be maintainable – the NCLT to consider only issues of default.

However, in contrast to the judgment of *Vikash Kumar Mishra & Ors. vs. Orbis Trusteeship Service Pvt. Ltd. & Anr* the NCLAT in the case of *Airwil Intellicity Social Welfare Society v. Ascot Projects Private Limited and Ors.*[22], has held that an intervention application by a society of unit buyers alleging fraud against the CD under Section 65 of IBC, could be allowed even prior to admission of a Section 7 application. The reason for this distinction is that a CIRP initiated with fraud and malicious intent would be a nullity before law.

Impacting resolution process and resolution plans

Secured creditor can retain security interest

In the case of ***M/s Vistra ITCL (India) Ltd v. Mr. Dinkar Venkatasubramanian***[23], loans availed by Brassco Engineering Limited ("**BEL**") and W.L.D. Investments Private Limited ("**WIPL**") were secured by pledges on certain shares created by Amtek Auto Limited ("**Amtek Auto**"). CIRP was initiated against Amtek Auto. The claims filed by the security trustee for BEL and WIPL, as secured financial creditors were rejected by the RP. In the interim, the CoC was considering a resolution plan submitted by Deccan Value Investors ("**DVI**"). The NCLAT held that the security trustee was not a financial creditor of Amtek Auto and could not be treated as such in the resolution plan.

On appeal, the Supreme Court noted that a highly peculiar situation would arise in so far as secured creditors, who are neither financial creditors nor operational creditors are concerned, wherein such creditors would be denied the benefit of 'security interest', and yet not be treated as financial creditors or operational creditors.

It therefore held that the security trustee (acting for BEL and WIPL) will be entitled to all rights and obligations as applicable to a secured creditor in terms of Sections 52 and 53 of IBC and in accordance with the pledge agreement executed in favor of the security trustee.

No payment to related party under approved resolution plan

In the case of ***M.K. Rajagopalan v. Dr Periasamy Palani Gounder***[24], a revised resolution plan received by the RP of Appu Hotels Limited ("**Appu Hotels**") was directly placed for NCLT's approval by the RP instead of it being placed before the CoC, for voting and approval. The NCLT subsequently approved the revised resolution plan. The approved resolution plan envisaged no payments to the related parties of Appu Hotels. The related parties of Appu Hotels challenged the approval order of the NCLT before the NCLAT. The NCLAT in its order held that the claims of a related party financial / operational creditor cannot be discriminated against from that of unrelated financial / operational creditor.

The order of the NCLAT was appealed before the Supreme Court. Some of the key questions which arose before the Supreme Court were as follows:

a) (i) whether the NCLT had erred in approving the resolution plan which was directly placed before it for approval after re-submission, instead of it being put up before the CoC for voting and approval; and (ii) was the NCLT order therefore void and non-est in law; and

b) whether the related party financial / operational creditor of a corporate debtor should be paid at par with unrelated financial / operational creditor.

[20] March, 2023, NCLAT New Delhi, [Company Appeal (AT) (Insolvency) No. 354 of 2023]
[21] August 2019, NCLAT New Delhi, NCLAT, [Company Appeal (AT) (Insolvency) No. 535 of 2019]
[22] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Insolvency) No. 755 of 2021]
[23] May 2023, Supreme Court [Civil Appeal No. 3606 of 2020]
[24] May 2023, Supreme Court [Civil Appeal No. 1682-1683 of 2022]

On the first issue, the Supreme Court observed that what is necessary under the law concerning commercial wisdom of CoC is that the CoC ought to examine all the relevant information available before it and duly deliberate on the same. Every aspect relating to resolution plan, including its financial layout, must be placed before the CoC before it could be said to have arrived at a considered decision in its commercial wisdom. Therefore, if a modified resolution plan, regardless of how minor the modification/revision may be, is not approved by the CoC, then presenting it to the NCLT for approval is a serious irregularity that cannot be rectified.

On the second issue, it held that IBC does not provide for parity in payment between a related party financial / operational creditor and an unrelated party financial / operational creditor.

For a detailed analysis, please refer to the JSA Prism of May 18, 2023**.**

Time spent on pending litigations is not a modification of the resolution plan and cannot, therefore, be a ground to stop its implementation

In the case of ***State Bank of India v. MBL Infrastructure Limited***[25], the NCLAT held that the NCLT's order for exclusion of time from calculation of the period for implementation of an approved resolution plan on account of pending litigations could not be construed as *modification* of resolution plan. Hence, this was no ground for the CoC to stop the implementation of the resolution plan.

Further, the NCLAT observed that in a case where a resolution plan has been approved and the approval has also received confirmation from the Supreme Court, it is obligatory on all stake holders to initiate the implementation of the resolution plan. The viability and feasibility of the resolution plan is required to be considered at the stage when the plan is to be approved by the CoC. After the plan has been approved, the issue of viability and feasibility cannot be raised.

ARC does not require prior approval of RBI for participating as RCA

In the case of ***Puissant Towers India Pvt. Ltd v. Neueon Towers Limited and Ors.***[26], NCLT, Hyderabad rejected the resolution plan which was approved by the CoC of Neueon Towers Limited ("**Neueon Towers**") and ordered liquidation of Neueon Towers. The NCLT observed that given that one of the RAs was an ARC, RBI approval was required for the ARC to be able to implement the plan, and such requirements made the resolution plan conditional.

On appeal, the NCLAT, taking note of RBI's submission to this effect, held that prior permission of the RBI is not required for submission of a resolution plan by an ARC. Noting that the principal objective of IBC is '*revival of corporate debtor and resolution*', the NCLAT set aside the order of liquidation passed by the NCLT and remanded the matter to the NCLT for approval of the resolution plan.

Copy of the resolution plan under adjudication cannot be disclosed to a non-stakeholder

In the case of ***Rupinder Singh Gill vs. Three C Universal Developers Pvt. Ltd. Through Resolution Professional Rakesh Kumar Gupta***[27], Rupinder Singh Gill ("**Rupinder**") had entered into an agreement to sale dated October 8, 2018 with Three C Universal Developers Pvt. Ltd. ("**Three C**") to purchase the entire shareholding of Challengerz Websolutions Pvt. Ltd. and Hacienda Infosoftech Pvt. Ltd ("**Companies**"). However, the transfer of the sale shares was stopped pursuant to an injunction order of the NCLT dated April 5, 2019. Pending the final transfer of the shares, CIRP was initiated against Three C on December 17, 2019.

[25] May 2023, NCLAT New Delhi [Company Appeal (AT) (Insolvency) No. 539 of 2022]
[26] June 2023, NCLAT, Chennai [Company Appeal (AT) (CH) (Ins) No. 181/2022]
[27] May, 2023, NCLT New Delhi, [Comp. App. (AT) (Ins) No. 729 of 2021]

The resolution plan submitted by M/s Ace Infracity Developers was approved by the CoC ("**Ace Resolution Plan**"). The RP of Three C filed an application under Section 31 of IBC before the NCLT seeking approval of the Ace Resolution Plan. During pendency of the Section 31 application, Rupinder filed an intervention application seeking a copy of the Ace Resolution Plan. The intervention application filed by Rupinder was rejected by the NCLT, New Delhi on the ground that Rupinder did not have any locus. Further, Rupinder had not filed any claim in the CIRP of Three C. The decision of NCLT was challenged before NCLAT.

NCLAT relied upon the judgments of *Association of Aggrieved Workmen of Jet Airways (India) Limited Vs. Jet Airways (India) Ltd.*[28] and *Vijay Kumar Jain Vs. Standard Chartered Bank & Ors*.[29] to hold that the copy of the resolution plan, which is still pending adjudication by the adjudicating authority, cannot be given to a party who is neither a claimant nor a creditor nor a person entitled to attend a meeting of the CoC or a person authorized by the CoC to attend the meeting in the CIRP of a CD.

CoC in its commercial wisdom can allow revision of resolution plans through challenge process inter-se the prospective resolution applicants

In the case of ***Consortium of Prudent ARC Ltd. vs. Mr. Ravi Shankar Devarakonda & Ors***[30], Prudent ARC Ltd. ("**Prudent**") filed an application challenging the *inter-se* challenge process run by the RP and the CoC of Meenakshi Energy Limited. The challenge process was being run for selection of the final resolution plan amongst the 3 (three) plans submitted by prospective resolution applicants ("**Challenge Process**"). Prudent contested that the Challenge Process was in contravention of Regulation 39(1A) of CIRP Regulations, 2016. NCLT dismissed the application. Prudent filed an appeal before NCLAT challenging the NCLT dismissal order.

NCLAT, following the judgment of *Vistra ITCL (India) Ltd. Vs. Torrent Investments Private Limited*[31] held that the CoC, in its commercial wisdom, can allow resolution applicants to submit revised plans through an *inter-se* Challenge Process. NCLAT also observed that the decision of the CoC to conduct the Challenge Process was supported by enabling clauses in the request for resolution plan. Hence, in view of the same the NCLAT, Chennai observed that there was no violation of Regulation 39(1A) of the CIRP Regulations, 2016 in the method adopted by the RP and the CoC in this case for finalizing resolution plans. The NCLAT's view has been recently upheld by the Supreme Court as well.

For a detailed analysis, please refer to the JSA Prism of July 31, 2023.

Resolution plan non-compliant if the performance bank guarantee expired and does not cover resolution plan implementation schedule

In the case of ***Viceroy Hotels Limited filed by Dr. Govindarajula Venkata Narasimha Rao***[32], the NCLT, Hyderabad noted that the performance bank guarantee submitted by the successful resolution applicant does not cover the plan implementation schedule and had expired by efflux of time. This made the resolution plan non-compliant with the provisions of the CIRP Regulations, 2016. Accordingly, the NCLT rejected the resolution plan and directed continuation of the CIRP of Viceroy Hotels Limited and to complete such CIRP within a period of 60 (sixty) days.

[28] January, 2022, NCLAT New Delhi, [Company Appeal (AT) (Insolvency) No. 643 of 2021]
[29] January, 2019, Supreme Court, [Civil Appeal No. 8430 of 2018]
[30] June, 2023, NCLAT Chennai, [Company Appeal (AT) (CH) (Insolvency) No. 37 of 2023]
[31] March, 2023, NCLAT New Delhi, [Company Appeal (AT) (Insolvency) No. 132, 133, 134 & 139 of 2023]
[32] June, 2023, NCLT, Hyderabad [I.A. NO. 1343/2022 in CP (IB) No. 219/7/HDB/2017]

In case of recategorization of a creditor (post plan approval), the resolution plan will have to be placed before the reconstituted CoC for reconsideration of the plan

In the case of ***Dauphin Cables Pvt. Ltd. v Praveen Bansal Resolution Professional & Ors.***[33], Chandgi Ram Real Estate Consultant Pvt. Ltd. ("**CRREC**") being previously classified as financial creditor formed a part of the CoC at the time of plan approval. Subsequently, the NCLT, New Delhi passed an order whereby CRREC was classified as "other creditors", and consequentially was no longer a part of the CoC. In this background, the NCLAT ordered that in view of a financial creditor going out of the CoC, the CoC has to be re-constituted and the re- constituted CoC has to re-examine the resolution plan which was considered and approved by the earlier CoC.

Full payment of admitted claims towards provident fund dues

In the case of ***Central Board of Trustees v Shri Kumar Rajan***[34], the approved resolution plan entailed payment of only 35.13% of the provident fund dues. The NCLAT relied on the decision of the Supreme Court in the case of *Jet Aircraft Maintenance Engineers Welfare Association v Ashish Chhawchharia*[35], and directed the full amounts of the admitted claims of provident fund dues to be included in the resolution plan.

CoC cannot be constituted with a single operational creditor

In the case of ***V. Duraisamy v Jeyapriya Fruits and Vegetables Commission Agent***[36], CIRP was initiated against H G S Dairies and Agro Limited ("**HGS Dairies**") by on order of the NCLT, Chennai pursuant to an application filed by one of its operational creditors. Prior to the insolvency commencement date, the name of HGS Dairies was struck off by the RoC for non-filing of returns. The RP of HGS Dairies received INR 20,000 (Indian Rupees twenty thousand only) towards publication expenses from the operational creditor. All other expenses were borne by the RP himself. No claims were received by the RP against HGS Dairies. The NCLAT held that since no claims were received by the RP and the name of HGS Diaries was struck off from the records of the RoC, the CoC cannot be constituted with a single operational creditor. Accordingly, the NCLAT ordered closure of CIRP of HGS Dairies.

Impacting liquidation

There is no priority for payment of workmen dues during liquidation

In the case of ***Moser Baer Karamchari Union v. Union of India***[37] petitioner-workers were aggrieved that they were not getting preferential payment (as contemplated under Sections 326 and 327 of the Companies Act).

Section 327 of the Companies Act provides for preferential payments to employees' wages and statutory dues in case of liquidations under Companies Act. However, Section 327(7) provides that Section 327 (and Section 326) of the Companies Act do not apply in the event of liquidation of a company under IBC.

The Supreme Court observed that the amendment introducing Section 327(7) was undertaken to avoid inconsistencies in the provisions for winding up under Companies Act and liquidation under IBC.

The Supreme Court held that in the event of liquidation under IBC, there is no preferential payment to workmen (in terms of Section 327 of the Companies Act) and in such cases Section 53 of IBC is applicable.

[33] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Insolvency) No. 634-636 of 2023]
[34] June, 2023, NCLAT Chennai [Company Appeal (AT) (CH) (Ins.) No. 268/2021]
[35] January, 2023, Supreme Court [Civil Appeal No. 407/2023]
[36] June 2023, NCLAT Chennai [Company Appeal (AT) (CH) (Ins.) No. 25/2022]
[37] 2023 SCC OnLine SC 547

GLOSSARY OF TERMS

Arbitration Act	Arbitration and Conciliation Act, 1996
ARC	Asset Reconstruction Company
CD	Corporate Debtor
CIRP	Corporate Insolvency Resolution Process
CIRP Regulations, 2016	IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
CoC	Committee of Creditors
Companies Act	The Companies Act, 2013
Corporate Applicant	CD initiating CIRP under Section 10 of IBC
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code, 2016
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
RA	Resolution Applicant
RBI	Reserve Bank of India
RoC	Registrar of Companies
RP	Resolution Professional
Supreme Court	Supreme Court of India

Insolvency and Debt Restructuring Practice

JSA is recognized as one of the market leaders in India in the field of insolvency and debt restructuring. Our practice comprises legal professionals from the banking & finance, corporate and dispute resolution practices serving clients pan India on insolvency and debt restructuring assignments. We advise both lenders and borrowers in restructuring and refinancing their debt including through an out-of-court restructuring as per the guidelines issued by the Reserve Bank of India, asset reconstruction, one-time settlements as well as other modes of restructuring. We also regularly advise creditors, bidders (resolution applicants), resolution professionals as well as promoters in connection with corporate insolvencies and liquidation under IBC. We have been involved in some of the largest insolvency and debt restructuring assignments in the country. Our scope of work includes formulating a strategy for debt restructuring, evaluating various options available to different stakeholders, preparing and reviewing restructuring agreements and resolution plans, advising on implementation of resolution plans and representing diverse stakeholders before various courts and tribunals. JSA's immense experience in capital markets & securities, M&A, projects & infrastructure and real estate law, combined with the requisite sectoral expertise, enables the firm to provide seamless service and in-depth legal advice and solutions on complex insolvency and restructuring matters.

This Newsletter has been prepared by:

				
Soumitra Majumdar Partner	**Utkarsh Bandhu** Partner	**Abhay Agarwal** Principal Associate	**Vishrutyi Sahni** Senior Associate	**Akhil Nene** Associate

Chambers TOP RANKED Asia-Pacific 2023 JSA

17 Practices and
24 Ranked Lawyers

The LEGAL 500

16 Practices and
11 Ranked Lawyers

BENCHMARK LITIGATION

7 Practices and
2 Ranked Lawyers

IFLR1000

11 Practices and
39 Ranked Partners
IFLR1000 APAC Rankings 2022

Banking & Finance Team of the Year

Fintech Team of the Year

Restructuring & Insolvency Team of the Year

INDIA BUSINESS LAW JOURNAL
BEST OVERALL LAW FIRMS
2023
LAW ASIA

Among Top 7 Best Overall Law Firms in India and
9 Ranked Practices

---

11 winning Deals in IBLJ Deals of the Year

---

10 A List Lawyers in IBLJ Top 100 Lawyer List

ALB
EMPLOYER OF CHOICE 2021
THOMSON REUTERS

Banking & Financial Services Law Firm of the Year 2022

Dispute Resolution Law Firm of the Year 2022

Equity Market Deal of the Year (Premium) 2022

Energy Law Firm of the Year 2021

Ranked #1
The Vahura Best Law Firms to Work Report, 2022

Top 10 Best Law Firms for Women in 2022

For more details, please contact km@jsalaw.com

www.jsalaw.com

advocates & solicitors

Ahmedabad | Bengaluru | Chennai | Gurugram | Hyderabad | Mumbai | New Delhi