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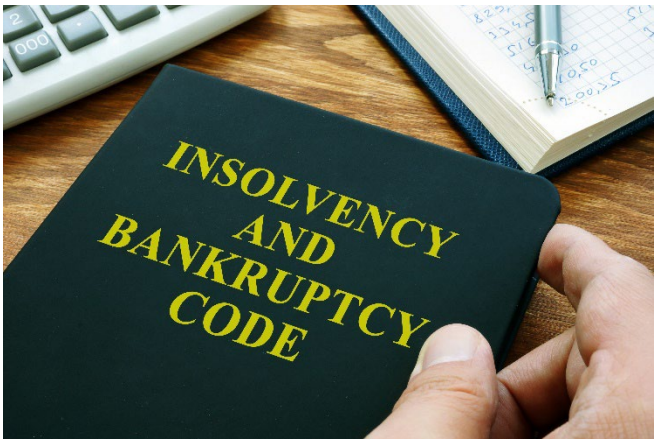
JSA Annual IBC Compendium
January – December 2023



This Compendium consolidates all the case laws and notifications under the Insolvency and Bankruptcy Code, 2016 circulated as prisms and summarised in the newsletters during the calendar period from January 2023 till December 2023.

Application under Section 7 or 9 of the IBC is extendable only by an application under Section 5 of Limitation Act on grounds of sufficient cause

The Supreme Court of India ("**Supreme Court**") in the case of ***Sabarmati Gas Limited vs. Shah Alloys Limited***[1] held that (a) in an application under Section 7 or 9 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), the period of limitation would be 3 (three) years from the date when the right to apply accrues, i.e. the date when default occurs and is extendable only by an application under Section 5 of the Limitation Act, 1963 ("**Limitation Act**") on grounds of 'sufficient cause'; and (b) while considering existence of a pre-existing dispute between the parties, the courts need not be satisfied that the defence is likely to succeed; it is enough that a dispute exists between the parties, i.e. there is a plausible contention requiring investigation for adjudication.

The Supreme Court has strictly interpreted the provisions relating to limitation of time for filing proceedings before adjudicating authority. This decision has also clarified the position that the adjudicating authority must take into consideration the aspect of condonation of delay under Section 5 of the Limitation Act while dealing with an application for corporate insolvency resolution process ("**CIRP**") in cases where the party was statutorily prevented from doing so, within the ambit of the wide powers granted conferred on it. Further, relying on the well-settled principle laid down by the Supreme Court in *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.*[2], that while considering an application under Section 9 of the IBC, the adjudicating authority must consider whether the dispute raised by the corporate debtor is (a) pre-existing; and (b) a plausible contention requiring consideration for the purpose of adjudication, without getting into aspect of whether such defence raised by way of a dispute is likely to succeed.

For a detailed analysis, please refer to the JSA Prism of January 13, 2023.

Bank guarantees (including advance bank guarantees) can be invoked even during the period of moratorium under Section 14 of the IBC

In ***IDBI Bank v. Indian Oil Corporation Limited***[3], the National Company Law Appellate Tribunal ("**NCLAT**") has held that an irrevocable and unconditional bank guarantee can be invoked even during moratorium period in view of the amended provision under Section 14 (3) (b) of the IBC.

In 2018, the amendment to Section 14 made the moratorium under IBC inapplicable to contracts of surety, and being a clarificatory amendment, it is applied retrospectively[4] by courts[5]. This decision clarifies (though not explicitly) that the inapplicability of moratorium also extends to advance bank guarantees also since the provision excludes the broad category of 'contracts of surety'.

This position originates from the contract law principles of co-extensive liabilities of guarantees which is applied under the IBC to prevent guarantors (personal and corporate) from escaping their independent repayment liabilities. Marrying this with the concept of the IBC moratorium, i.e., to safeguard the dissipation of the corporate debtor's assets during the CIRP, the rationale to exclude guarantees from the purview of the moratorium is that the guarantees are

[1] Civil Appeal No. 1669 of 2020 decided on January 4, 2023
[2] (2018) 1 SCC 35
[3] IDBI Bank v. Indian Oil Corporation Ltd. & Anr., judgement dated January 10, 2023 in Company Appeal (AT) (Insol.) No.543 of 2021, NCLAT, New Delhi
[4] State Bank of India v. V. Ramakrishnan, (2018) 17 SCC 394
[5] Bharat Aluminium Co. Ltd. v. JP Engineers Pvt. Ltd., CA (AT) (Insol.) No.759 of 2020 dated February 26, 2021, NCLAT, New Delhi

issued by independent third parties, which are outside the purview of the IBC regime and therefore, the IBC proceedings against the corporate debtor will not be affected by action of third-party sureties.

For a detailed analysis, please refer to the JSA Prism of February 13, 2023.

The adjudication of an avoidance application under the IBC can survive the CIRP of a corporate debtor

The Division Bench of the Delhi High Court ("**Delhi HC**") in the case of ***Tata Steel BSL Limited v. Venus Recruiters Private Limited & Ors., etc.***[6] has put to rest the issue on avoidance applications proceedings surviving the conclusion of the CIRP under the IBC. The Delhi HC has held that the avoidance applications can survive even after the approval of the resolution plan in cases where the resolution plan does not account for these transactions.

1. **This decision is a welcome development for the avoidance transaction regime under IBC**.

   a) Letter and spirit: As the Union of India had pointed out, accepting the Single Judge's interpretation would allow those persons responsible for the corporate debtor's liquidation because of their unscrupulous transactions will get away with their deeds. The scheme of IBC is not purely commercial in nature and its purpose is also to ensure that public money is brought back into the system.

   b) Practically: The IBC stipulates the conclusion of CIRP in 330 (three hundred thirty) days and the liquidation process within 365 (three hundred sixty five) days. Within these timelines, most often the resolution professional ("**RP**")/ liquidator are unable to identify avoidable transactions and apply to the National Company Law Tribunal ("**NCLT**") to reverse them. Even the NCLT, most often, cannot decide the issue before the resolution plan is approved. The purpose of avoidance transactions is to prevent unjust enrichment of one party at the expense of the other and recognizing that the detection and adjudication of such transactions can take longer than the entire CIRP is furtherance of spirit of avoidance provisions in the IBC.

2. **The CIRP (Fourth Amendment) Regulations, 2022**

   This decision also takes note of the amendment being introduced w.e.f. May 14, 2022, stipulating that a resolution plan submitted after May 14, 2022, to provide for treatment of post-approval avoidance proceedings, and it proceeds. The Delhi HC now clarifies that even for resolution plans approved *prior* to the CIRP (Fourth Amendment) Regulations, 2022 which do not provide for treatment of avoidance application and its proceeds, its adjudicated dues must be appropriated to the creditors of the erstwhile corporate debtor.

3. **RP's timelines for filing avoidance applications are directory, not mandatory**

   The timelines under Regulation 35A of the Insolvency and Bankruptcy Board of India ("**IBBI**") (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") for RP to file avoidance applications were held to only be directory in view of: (i) the practical difficulties of the RP collating information and forming an opinion on the transactions; and (ii) IBC neither stipulates a penalty, nor timelines for the filing/ adjudication of these applications.

4. **Maintainability of a writ against the NCLT Order**

   The Delhi HC also decides on the NCLT having the power to adjudicate on all matters *'arising out of'* and *'in relation to'* insolvency resolution, which terms were interpreted broadly to even include avoidance applications, notwithstanding the approval of a resolution plan. Accordingly, the NCLAT was found to be the appropriate forum to entertain an appeal against the NCLT order and the Division Bench found that the Single Judge erred in entertaining the writ petition.

For a detailed analysis, please refer to the JSA Prism of February 14, 2023.

[6] 2023/DHC/000257 dated January 13, 2023

A shortfall undertaking has been recognised as a financial debt under IBC

In the case of ***IL&FS Infrastructure Debt Fund v. McLeod Russel India Limited***,[7] the Kolkata bench of the NCLT ("**NCLT Kolkata**") held that in order to determine whether a shortfall undertaking will qualify as an instrument of guarantee as defined under Section 126 of the Indian Contract Act, 1872 ("**Contract Act**"), one has to look into the intention of the parties as reflected in the terms of such undertaking. Further, the NCLT Kolkata observed that a guarantee given in respect of a financial debt will qualify to be a financial debt under Section 5(8)(i) of the IBC.

This decision of NCLT Kolkata is a welcome move for the lender community who often provide credit facilities based on shortfall undertakings from promoters or group entities of the borrower, without an explicit corporate guarantee. NCLT Kolkata has emphasised the importance of substance over form and has not focused on technicalities when rendering this order. NCLT Kolkata did not consider the contention of the corporate debtor i.e., McLeod Russel India Limited, that the shortfall undertaking was not a guarantee under the Contract Act as it was only for infusion of funds in the debt service reserve account in case of default by the borrowers (Babcock Borsig Limited and Williamson Magor & Company Limited) and not for repayment of any debt in respect of the facilities. It appears to have adopted a fact-based interpretive approach to make sure that the corporate debtor was not wrongfully safeguarded under the garb of technicalities, when the intention (evidenced by the shortfall undertaking, letter of comfort, indemnity bond and post-dated cheques) was to ensure repayment of the facilities.

However, it should be noted that this judgement is not binding on other NCLTs, the NCLAT or the Supreme Court. Considering some other prior judgements of the NCLAT and Supreme Court on interpretation of "financial debt" and "financial creditors", it would still be prudent for lenders to obtain guarantees or indemnities for the financial debts that they provide, wherever commercially feasible, to avoid any ambiguities under the IBC.

For a detailed analysis, please refer to the JSA Prism of February 15, 2023.

CoC cannot reconsider a resolution plan when it is pending for final approval before the adjudicating authority

The NCLAT in the case of ***Express Resorts and Hotels Ltd.* v. *Amit Jain, RP, Neesa Leisure Ltd. & Ors.***[8] has held that once the committee of creditors ("**CoC**") has approved a resolution plan under the IBC, it is binding between the CoC and the successful resolution applicant. The CoC cannot ask for the resolution plan to be remitted back for its reconsideration pending the approval of the resolution plan by the adjudicating authority.

In *Ebix Singapore Pvt. Ltd. & Ors.* v. *Committee of Creditors of Educomp Solutions Limited & Ors.*[9] ("**Ebix Judgement**"), the Supreme Court has held that once a resolution plan is approved by the CoC, it is binding *inter se* the CoC and the resolution applicant. The Ebix Judgement has been followed by the NCLAT in other cases[10] as well where the NCLAT had to decide on whether the CoC can review new resolution plans after they had approved a resolution plan which was pending for approval of the adjudicating authority.

The NCLAT's order re-iterates that once the CoC has approved a resolution plan and submitted it for approval to the adjudicating authority, it cannot seek to revisit the same or review other plans on the

[7] CP (IB) No. 1986/KB/2019
[8] Company Appeal (AT) (Insolvency) No.1158 of 2022, decided on February 9, 2023
[9] 2021 (4) RCR (Civil) 282, decided on September 13, 2021
[10] *Steel Strips Wheels Ltd.* v. *Shri Avil Menezes, Resolution Professional of AMW Autocomponent Ltd. & Ors,,* Company Appeal (AT) (Insolvency) No. 89 of 2022, decided on April 18, 2022; *Kalinga Allied Industries India Private Limited* v. *Committee of Creditors (Bindals Sponnge Industries Limited) & Anr.,* Company Appeal (AT) (Insolvency) No. 689 of 2021, decided on December 19, 2022

grounds of maximization of value of assets of the corporate debtor. While maximization of value is an important criterion in a CIRP and the commercial wisdom of the CoC in approving or rejecting a resolution plan is also paramount, the NCLAT has given primacy to completion of the CIRP in a time bound manner to bring finality to the process.

For a detailed analysis, please refer to the JSA Prism of February 20, 2023.

Certain employee statutory dues are not a part of the "liquidation estate" of a corporate debtor

In the case of ***State Bank of India v. Moser Baer Karamachari Union & Ors.***,[11] the Supreme Court has upheld the order of the NCLAT in the matter of ***State Bank of India v. Moser Baer Karamachari Union & Anr.*** ("**Moser Baer Case**")[12]. In the Moser Baer Case, the NCLAT held that the provident fund, the pension fund and the gratuity fund owed by a corporate debtor to its workmen do not fall within the purview of "liquidation estate" for the purpose of distribution of assets under Section 53 of the IBC.

Further, the Supreme Court overruled the order of the NCLAT in the matter of ***Savan Godiwala v. Apalla Siva Kumar***[13] ("**Savan Godiwala Case**") where the NCLAT had held that a liquidator is not required to make payment of gratuity to employees if there is no separate fund for gratuity payments.

In its report dated April 28, 2016, the Joint Parliamentary Committee on the Insolvency and Bankruptcy Code, 2015 had observed that the provident fund, the pension fund and the gratuity fund provide a social safety net to workmen and employees and hence they need to be secured in the event of liquidation of a company. Accordingly, Section 36(4) of the IBC provides that all sums due to any workmen from the provident fund, the pension fund and the gratuity fund do not form part of the liquidation estate assets of a corporate debtor and cannot be used in recovery in liquidation of the corporate debtor.

On various occasions,[14] the NCLT, the NCLAT and the High Courts have recognised the need to protect the rights and interests of the workmen and employees of a corporate debtor. This judgment of the Supreme Court puts to rest the contradiction created by the differing views taken by the NCLAT in the Moser Baer Case and the Savan Godiwala Case.

The judgement upholds the principle that since amounts due towards the provident fund, the pension fund and the gratuity fund are not part of the liquidation estate of the corporate debtor, they cannot be utilized for payments under the liquidation waterfall under Section 53 of the IBC and such payments must be made separately to the employees and workmen. By overruling the NCLAT judgement in the Savan Godiwala Case, the Supreme Court appears to have affirmed the view that even where there are no funds available towards payment of provident fund, pension and gratuity, the liquidator must make such payments.

Given this interpretation by the Supreme Court, it would be prudent for liquidators to consider if adequate funds are available for payment of such statutory dues, and if not, then whether the proceeds from the sale of any assets should be used for payment of such statutory dues.

Further, lenders must also actively consider if they want to diligence the pending statutory dues for employees and workmen to understand the potential outstanding liabilities of a borrower on this account before they lend. Additionally, appropriate covenants may also be built into financing documents on timely discharge of such statutory dues by borrowers as well as periodic information to lenders on the paid and outstanding statutory dues to employees.

For a detailed analysis, please refer to the JSA Prism of February 24, 2023.

[11] Civil Appeal No. 258 of 2020 with Civil Appeal No. 2520 of 2020
[12] Company Appeal (AT) (Insolvency) No. 396 of 2019
[13] Company Appeal (AT) (Insolvency) No. 1229 of 2019
[14] UCO Bank v. EPFO & Anr., (2022) ibclaw.in 222 HC
Supriyo Kumar Chaudhuri & Anr. v. JVL Agro Industries Ltd., 2020 SCC OnLine NCLT 1470
Precision Fasteners Limited v. EPFO Thane & Ors., [2018] ibclaw.in 10 NCLT

Supreme Court holds that an application for withdrawal of corporate insolvency resolution process under IBC can be allowed even prior to the constitution of the committee of creditors

A 2 (two) judge bench of the Supreme Court in its recent judgment ***Abhishek Singh v. Huhtamaki PPL Ltd. and Anr.***[15] has *inter alia* held that an application for withdrawal of the corporate insolvency resolution process under Section 12A of the IBC can be allowed by the adjudicating authority even before the constitution of the CoC in terms of Regulation 30A of the IBBI Regulation (Insolvency Resolution Process for Corporate Persons), 2018 ("**IBBI Regulations**").

By this judgment, the Supreme Court has clarified the contours of Section 12A of the IBC and Regulation 30A of the IBBI Regulations. In doing so, the Supreme Court has not only filled the void appearing in Section 12A of the IBC by clarifying that withdrawal applications can be filed even prior to the formation of the CoC but has also acknowledged the binding nature of Regulation 30A of the IBBI Regulations, which are subordinate to the IBC.

For a detailed analysis, please refer to the JSA Prism of April 5, 2023.

[15] 2023 SCC OnLine SC 349

Supreme Court holds that revised resolution plan cannot be approved by the adjudicating authority without being placed before the committee of creditors

The Supreme Court in the case of ***M. K. Rajagopalan v. Dr. Periasamy Palani Gounder & Anr.***,[16] has held that, while commercial wisdom of the Committee of Creditors ("**CoC**") must be respected, certain factors having a material bearing on the process of approval of the resolution plan should also be borne in mind. The Supreme Court dealt extensively with the objections raised by the Resolution Applicant ("**RA**") as well as the Resolution Professional and held that: a) it could not have been overlooked that the RA was ineligible due to the restriction under Section 88, Indian Trusts Act, 1882 ("**Trusts Act**") as well as Companies Act, 2013 ("**Companies Act**"), and b) the revised resolution plan was directly sent for approval of the adjudicating authority instead of being placed before the CoC.

The Supreme Court decision is to the effect that while respecting the commercial wisdom of the CoC, the resolution plan submitted by the resolution applicant could not have been approved by the adjudicating authority primarily for two reasons, namely –

1. That the RA was ineligible to submit Resolution Plan in view of Section 88 of the Trusts Act and Section 166(4) of the Companies Act; and
2. The revised resolution plan was not put up before the CoC prior to presenting it before the adjudicating authority for approval.

The Supreme Court has observed that under the garb of commercial wisdom of CoC, glaring irregularities in the submission and approval of a resolution plan and not affording an opportunity to the CoC to deliberate on every aspect of the resolution plan including its financial layout cannot be ignored. Therefore, while considering and voting with respect to a resolution plan, the CoC must consider every aspect. If this process is not followed, it cannot be said that the CoC has duly approved the resolution plan and exercised its commercial wisdom.

The Supreme Court stated that presenting the revised resolution plan directly to the NCLT without final approval from the CoC cannot be dismissed as a mere technicality. It is necessary for the CoC to consider the financial layout of the plan before reaching a final

[16] Civil Appeal Nos. 1682 – 1683 of 2022

decision. 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 adjudicating authority for approval is a serious irregularity that cannot be rectified.

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

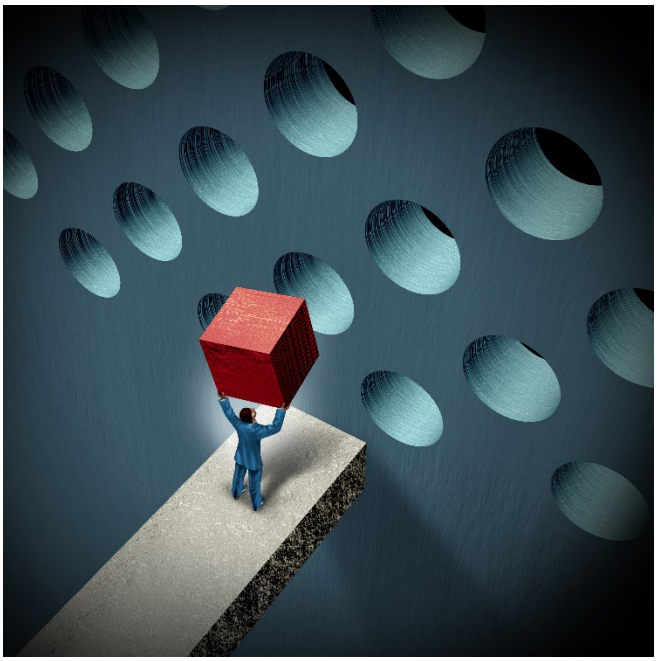
Once default of payment has been established, an application filed under Section 7 of the IBC must be admitted

The Supreme Court has in ***M. Suresh Kumar Reddy v. Canara Bank & Ors***[17] reiterated that upon being satisfied of the occurrence of a default in making payment by a corporate debtor, the NCLT is mandatorily required to admit applications filed by financial creditors under Section 7 of the IBC and the NCLT does not have any discretion in such matters. In doing so, the Supreme Court has clarified that its decision in *Vidarbha Industries Power Limited v. Axis Bank Limited*[18] ("**Vidarbha Industries Judgment**"), which provided a discretion to the NCLT to admit an application under Section 7 of the IBC, was limited to the facts and circumstances of that case.

This judgment settles the issue regarding the discretionary power of the NCLT to admit an application filed under Section 7 of the IBC. Importantly, the scope of the Vidarbha Industries Judgment, which was being used by corporate debtors to avoid admission of applications filed under Section 7 of the IBC, appears to have been finally and authoritatively clarified.

For a detailed analysis, please refer to the JSA Prism of May 24, 2023.

Committee of creditors can allow submission of resolution plans through the challenge process



A 2 (two) member bench of the NCLAT, Chennai in the matter of ***Consortium of Prudent ARC Ltd. vs. Mr. Ravi Shankar Devarakonda & Ors***[19] has applied the ratio in the judgment of *Vistra ITCL (India) Ltd. Vs. Torrent Investments Private Limited*[20] to hold that the CoC of Meenakshi Energy Limited in its commercial wisdom can allow resolution applicants to submit revised resolution plans through the challenge process.

The NCLAT has upheld that the CoC for value maximization of the corporate debtor can in its commercial wisdom negotiate with the resolution applicants. The NCLAT has also upheld that Regulation 39(1A) of the CIRP Regulations ought not be read as a fetter on the powers of the committee of creditors to negotiate with the resolution applicants. However, the only caveat to this is that the same ought to be done before expiry of the CIRP period of the corporate debtor. The judgment has helped in clarifying the lacunae in the jurisprudence with respect to Regulation 39(1A) of the CIRP Regulations.

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

[17] Civil Appeal No. 7121 of 2022
[18] 2022 (8) SCC 352
[19] (2023) SCC OnLine NCLAT 287
[20] (2023) SCC OnLine NCLAT 110

Does the IBC recognize inter-se ranking of charges among financial creditors for the distribution of sale proceeds during liquidation?

In a judgement of the Hyderabad bench of the National Company Law Tribunal ("**NCLT, Hyderabad**") in the cases of ***PTC India Financial Services Ltd. v. Vikas Prakash Gupta & Ors.***[21] and ***Indo Unique Flame Limited v. Vikas Prakash Gupta & Anr.***[22] the NCLT, Hyderabad held that the waterfall mechanism under Section 53(1) of the IBC does not recognise any *inter-se* ranking of charges among the financial creditors of a corporate debtor (which has been agreed upon prior to the initiation of its CIRP) for the purpose of distribution of the proceeds during liquidation.

The rights of secured creditors with different ranking have been a subject matter of debate and deliberation in many judgements. Issues in relation to treatment of secured creditors with different ranking and different value of security interest have been discussed in the ILC Reports of 2018 and 2020. It would be interesting to see how the appellate tribunal will interpret this issue in the appeal filed by the aggrieved parties. The outcome of the appeal will play an important role in how lenders structure their security in a pre-insolvency scenario.

For a detailed analysis, please refer to the JSA Prism of September 5, 2023.

'Operational Debt' cannot be converted into 'Financial Debt' through an agreement

In the matter of ***Mr. Santosh Mate (Prop. of Mahalaxmi Traders)*** vs. ***M/s Satyam Transformers Private Limited***[23], the Mumbai bench of the NCLT ("**NCLT Mumbai**") held that the conversion of an operational debt into financial debt through an agreement is invalid and impermissible as it would defeat the very objective of the IBC and have the effect of rewriting it.

The constitutionality of the distinction between an operational creditor and financial creditor under IBC was upheld by the Supreme Court in the *Swiss Ribbons case*[24] due to existence of an intelligible differentia between the two, which as per the Supreme Court, "*has a direct relation to the objects sought to be achieved by the Code*".

In the said case, the Supreme Court also referred to the 'Notes' on Clause 8 of the bill which introduced IBC in Parliament. The 'Notes' attributed the distinction between the process for initiating CIRP by an operational creditor and a financial creditor to, amongst other things, operational debts being usually smaller in amount and recurring in nature. It is further evident from the 'Notes' that a stated objective was to prevent the operational creditors from putting the corporate debtors into CIRP prematurely or for extraneous considerations.

NCLT Mumbai has implicitly recognised the aforesaid objectives of IBC in differentiating between a 'financial creditor' and an 'operational creditor' and consequently between a 'financial debt' and an 'operational debt' under IBC. It has also applied a long-established judicial principle of interpretation that statutory provisions override a contractual agreement between parties to a contract if such a contract has terms and conditions contrary to a statute.

This is not the first attempt in India to convert an operational debt into a financial debt through a contract to gain certain advantages in the CIRP under IBC. Similar instances can be seen in the matters of *Jambudwip Exports and Imports Limited vs. UP Bone Mills Private Limited*[25] and *Step Stones Infras Private Limited vs. Yes and Yes Infracon (P) Limited*[26] wherein the parties entered into similar agreements to effectively convert their outstanding operational debt into financial debt. Such attempts were also thwarted by the Delhi and Chennai benches, respectively, of the NCLT.

Accordingly, the suppliers of goods and services need to recognise that any attempt of conversion of operational debt into financial debt through an agreement does not satisfy the legal ingredients of a 'financial debt' under IBC as there is no disbursement of money against the time value of money.

For a detailed analysis, please refer to the JSA Prism of September 5, 2023.

[21] IA No. 1341 of 2022 in CP (IB) No. 377/7/HDB/2018
[22] IA No. 254 of 2023 in CP (IB) No. 377/7/HDB/2018
[23] CP (IB) No. 253 of 2023 (NCLT, Mumbai)
[24] Writ Petition (Civil) No. 99 of 2018 (Supreme Court of India)
[25] (IB)-447(ND)/2021 (NCLT, New Delhi)
[26] IBA/403/2020 (NCLT, Chennai)

Supreme Court interprets Regulation 39(1A) of the CIRP Regulations to hold that prior modification/ amendment of resolution plans received does not bar the committee of creditors from taking recourse to a challenge mechanism to enable resolution applicants to improve/ better their plans

On August 25, 2023, the Supreme Court in the case of ***Vizag Minerals and Logistics Pvt. Ltd. Vs. Ravi Shankar Devarakonda & Ors***[27]**,** while dismissing the civil appeal filed by Vizag Minerals and Logistics Pvt. Ltd. (unsuccessful resolution applicant), has clarified that Regulation 39(1A) of the CIRP Regulations does not bar the CoC of Meenakshi Energy Limited to adopt a challenge process/mechanism for value maximisation even after resolution plans have been modified/ amended. In doing so, the Supreme Court has upheld the order dated June 27, 2023 in the case of *Consortium of Prudent ARC Ltd. Vs. Mr. Ravi Shankar Devarakonda & Ors*[28] passed by NCLAT, Chennai.

The Supreme Court has brought much needed clarity to Regulation 39(1A) of the CIRP Regulations by clarifying that the word 'or' is not used disjunctively to prevent the committee of creditors from undertaking a challenge process even after seeking amendments/ modifications to resolution plans. Prior to this judgment, the conundrum faced by the resolution professionals and committee of creditors with regards to the issue was whether both processes envisaged under Regulation 39(1A) of the CIRP Regulations can be adopted by the stakeholders for value maximisation and if so, in what circumstances. This judgment provides much needed clarity on this and aids in achieving the objective of the IBC which is value maximization of the corporate debtor.

For a detailed analysis, please refer to the JSA Prism of September 6, 2023.

Termination of related party agreements during a CIRP

In a recent case of ***Hemalata Hospitals Limited*** vs. ***Sh. Siba Kumar Mohapatra RP of Medirad Tech India Limited***[29] the NCLT New Delhi Bench (Court-II) ("**NCLT Delhi**") adjudicated on the continuation of related party agreements during the CIRP and upheld the termination of related party agreements by the RP during the CIRP. NCLT Delhi approved the same as (a) it was done after obtaining the approval of the CoC with at least 66% vote and (b) it was required by the successful resolution applicant under its resolution plan.

NCLT Delhi has interpreted section 28(1)(f) of IBC to include a right of the RP to terminate related party transactions as long as the approval of the committee of creditors with a minimum 66% vote is obtained. This may prove to be useful in situations where a corporate debtor's operations are dependent on contracts with related parties and such operations are suffering due to non-cooperation from such related party during the CIRP. It would provide the RP and the CoC with the ability to terminate such contracts and enter into new contracts with non-related parties to revive and continue operations of a corporate debtor during the CIRP period.

This decision of NCLT Delhi is a welcome move for a successful resolution applicant who wishes to take over the management of the corporate debtor pursuant to the approved resolution plan. NCLT Delhi has followed the view of the Supreme Court in the matter

[27] Civil Appeal (Diary) Nos 27746 of 2023
[28] (2023) SCC OnLine NCLAT 287
[29] IA. NO. 2750/ND/2022 in CP (IB) No. 1243(ND)/2018

of *IDBI Bank vs. Jaypee Infratech Limited*[30] that a successful resolution applicant has the right to include relevant clauses in its resolution plan to seek termination of the related party transactions. This would avoid any dependence on the erstwhile promoters or management of the corporate debtor and enable a resolution applicant to successfully turn around the affairs of the corporate debtor.

For a detailed analysis, please refer to the JSA Prism of September 11, 2023.

NCLAT: Stock broking companies are 'financial service providers' under IBC, proceedings for initiation of CIRP not maintainable against them

In a recent decision in the case of ***Nitin Pannalal Shah Vs. Vipul H Raja & Ors.***[31] and ***National Stock Exchange of India Limited Vs. Mr. Hemant Kumar Gupta***[32], the principal bench of the NCLAT has held that a stock broking company is a 'financial service provider' under Section 3(16) of the IBC, and thus, outside the purview of the IBC. Therefore, an application for CIRP against a stockbroker (being a financial service provider) is not maintainable.

In a big relief to stockbrokers, the NCLAT brings quietus to the conflicting views of the NCLTs and NCLAT to finally decide that stockbrokers do not fall under the purview of IBC.

3. The NCLAT has applied a literal interpretation of the IBC provisions to determine the status of stockbrokers as a 'financial service provider' under the IBC. The NCLAT's reliance on the National Stock Exchange's ("**NSE**") submissions and the Sub-Committee Report will go a long way in this decision attaining finality.
4. This judgement throws light on the Sub-Committee's rationale behind the exclusion of financial service providers from the purview of the IBC. The Sub-Committee takes a view that financial firms are different from other firms. The Sub-Committee takes a view that while other firms mostly rely on equity and debt, many financial service providers handle large amounts of consumers' money. Thus, some of these financial service providers are systemically important as their failure has the effect of disrupting the financial system and having an adverse effect on the country's economy.

The NSE's proactivity in these proceedings is laudable and noteworthy. It is unusual and noteworthy for the NSE to proactively file an appeal and an intervention (in cases where it was not a party) to safeguard its trading members from the purview of the IBC. Typically, regulators only plead their position on sectoral matters when they are called upon by courts and do not usually interfere unless the regulator is directly affected.

For a detailed analysis, please refer to the JSA Prism of September 25, 2023.

Extinguishment of personal guarantee permissible in a resolution plan under IBC.

NCLAT has in the case of ***SVA Family Welfare Trust & Anr v. Ujaas Energy Limited & Ors***[33] *inter alia* held that a resolution plan can contain a clause which extinguishes security interest, such as personal guarantees, after paying compensation to the financial creditor in whose favour such security interest was created. The NCLAT further observed that as a consequence, once a resolution plan has been accepted by the committee of creditors with the requisite majority in its commercial wisdom, the same cannot be impugned before the adjudicating authority.

The decision of the NCLAT is commensurate with the legal position repeatedly enunciated by the Supreme Court that the commercial wisdom of the committee of creditors is non-justiciable. The finding of the NCLAT appears to have nullified the recovery rights of a financial creditor under an independent contract, i.e., personal guarantee agreements. In a meeting of the committee of creditors, a financial creditor may have opted to dissent however, such dissent, even if treated as a commercial wisdom of a dissenting financial creditor, cannot be questioned before the Adjudicating Authority. As Bank of Baroda's (a member of the CoC holding 5.83% of the voting share) decision was not accepted by CoC in its collective decision, what could be and was enforceable was only the collective commercial decision of the CoC.

[30] IA. NO. 2836/PB/2021, IA. NO. 3457/PB/2021 IA. NO. 3306/PB/2021, and IA. NO. 2521/PB/2022 in CP (IB) No.-77(ALD)/2017

[31] (Company Appeal (AT) (Insolvency) No. 379 of 2021
[32] Company Appeal (AT) (Insolvency) No. 749 of 2022
[33] Company Appeal (AT) (Insolvency) No. 266 of 2023

It remains to be seen whether the Supreme Court will have the opportunity to consider the issue as the law, as it stands currently, effectively wipes out a financial creditor's rights of recovery under personal guarantee agreements.

For a detailed analysis, please refer to the JSA Prism of September 26, 2023.

NCLAT: A written financial contract is not mandatory to prove the existence of financial debt under the IBC

In a significant decision, the NCLAT in the case of ***Agarwal Polysacks Ltd. vs K. K. Agro Foods & Storage***[34] has recently held that a written financial contract is not the only basis for proving the financial debt. Financial debt can be proved from other relevant documents such as the balance sheet entries of the financial creditor, the corporate debtor's balance sheet and the Form 26AS showing TDS deductions on the interest.

This judgement is a step in the right direction to make the IBC regime all-inclusive and give a more expansion finding on the nature and validity of financial debts without formal loan agreements. While Courts have previously held that balance sheets, etc. are evidence of financial debt, this is one of the first findings on a financial creditor's right to initiate insolvency proceedings for unpaid loans, in the absence of a written financial contract.

Informal loan documentation is not uncommon in India, especially in cases of unsecured loans. Hence, this decision has tested the documentation of financial debt on the 2 (two) essential conditions of financial debt with regard to time value for money, viz. disbursement and interest. This judgement clarifies that these tests need not necessarily only be satisfied by a written financial contract but can also established by *other* documentary evidence and thus, the absence of a written financial contract does not defeat a financial creditor's right to trigger corporate CIRP against an errant corporate debtor under IBC.

While as of today the position stands as such, with M/s K. K. Agro Foods and Storage Limited (i.e. corporate debtor) challenging this NCLAT decision before the Supreme Court, it is yet to be seen whether the Supreme Court would endorse such an expansive reading of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 or take a more conservative view on this proposition.

For a detailed analysis, please refer to the JSA Prism of October 11, 2023.

A resolution plan cannot negate any third-party security provided by the corporate debtor

In the recent case of ***Vistra ITCL (India) Limited & Ors. v. Mr. Dinkar Venkatasubramanian & Anr.***[35], the Supreme Court re-affirmed the legal position that persons who are merely beneficiaries of security by a corporate debtor do not qualify as financial creditors in the CIRP of the corporate debtor. However, the Supreme Court also held that a resolution plan cannot dilute the security interest provided by the corporate debtor in favour of such beneficiaries.

The Supreme Court has upheld the legal position that in case a corporate debtor provides security for the borrowing of a third party, the beneficiaries of such security will not be considered as the financial creditors of the corporate debtor under the provisions of the IBC. In order for them to be treated as financial creditors of the security provider if they want to be a part of the CoC and exercise voting rights in case of the insolvency of such security provider, such third-party beneficiaries of a security would need to also benefit from a guarantee or indemnity for a financial debt from the corporate debtor. Nevertheless, even if such third party beneficiaries are not classified as financial creditors, this judgment has provided a safety net to them by preserving their security interest against any

[34] Company Appeal (AT) Insolvency No. 850 of 2023

[35] Civil Appeal No. 3606 of 2020

dilution or negation by an approved resolution plan in the CIRP of third-party security provider.

However, the judgment does not provide any clarity or guidance on the value that needs to be provided by a resolution applicant to the security beneficiaries. It appears to leave the determination of such value up to a negotiation between the security beneficiaries and the resolution applicant.

For a detailed analysis, please refer to the JSA Prism of October 12, 2023.

NCLAT: Interest accrued during the suspension period under Section 10A not to be excluded while calculating the claim threshold under IBC

In a recent decision, the NCLAT in the case of ***Beetel Teletech Ltd. v. Arcelia IT Services Private Limited***[36] made 2 (two) relevant findings on the maintainability of applications under the IBC:

5. The interest accrued during the suspension period under Section 10A of IBC can be claimed under Section 9 of the IBC and can be computed to trigger the threshold under the IBC.
6. The operational creditor can adjust part-payments received from the corporate debtor towards other debts (as opposed to the unpaid operational debt (invoices) claimed under the Section 9 application).

In one judgement, the NCLAT has made 2 (two) important findings on distinct, but inter-related issues which go to the core of many operational creditor applications under the IBC.

Findings on inclusion of interest accrued during the Section 10A Period

7. Since the law has been settled that interest can be a component to calculate the threshold under IBC, it has become significant to understand what period of interests can be included in a Section 9 application.
8. This NCLAT's decision is a reaffirmation of its earlier position in *Narayan Mangal v. Vatsalya Builders & Developers Private Limited*[37] and is in-line with most creditors' arguments today, i.e., that the debt in itself was not suspended during the Section 10A Period, it was only the remedy under Section 7, 9 and 10 of the IBC that was suspended. Hence, if the debt continues to accrue during the Section 10A Period, there is no basis for the clock on the interest on that debt to stop ticking during that period.
9. The NCLAT's clarification that "*It [Section 10A] was never intended to cover any default which occurred before Section 10A period and continuing thereafter*" also goes a long way in preventing debtors from exploiting the safeguard under Section 10A of the IBC.

Finding on operational creditor's discretion to appropriate payments against any outstanding dues

This interplay on Section 60 of the Indian Contract Act, 1872 and the IBC comes in an important finding upholding the fundamentals of contract law and ensuring that those are not compromised, exploited or ignored in an attempt to further a case under IBC.

In transactions where there are running accounts, or even where there are recurring and parallel financial transactions between 2 (two) parties, the creditor's discretion to appropriate payments is an essential feature for the creditor's internal accounting, risk and financial management.

For a detailed analysis, please refer to the JSA Prism of October 12, 2023.

NCLAT: Realization of certain monies after invocation does not change the 'date of default' to a subsequent date when the corporate debtor may have defaulted on repayment of the adjusted amount

In a recent decision the NCLAT, in the case of ***IDBI Trusteeship Services Ltd. vs. Direct Media Distribution Ventures Pvt. Ltd.***[1] held that even if the creditor realizes certain amounts after the original date of default / invocation, the date of a subsequent demand notice (for the adjusted amount) cannot be treated as the "date of default" for purposes of the IBC.

This judgement comes as a blow to the most common strategy of most creditors' advocates, i.e., to issue a fresh

[36] Company Appeal (AT)(Insolvency) No. 1459 of 2022

[37] Judgement dated August 18, 2023, Company Appeal (AT) (Ins.) No. 294 of 2023 (Narayan Mangal v. Vatsalya Builders & Developers Private Limited), NCLAT, New Delhi

demand notice post the Section 10A Period to overcome any objections on the maintainability of the claim.

This judgement settles the long-standing debate on whether the adjudicating authority (and the NCLAT) are supposed to determine the actual date of default or go by a plain reading of the application filed before it. The debate is between one school of thought which upholds the sanctity of pleadings and going strictly by what is pleaded in the application, versus another school of thought which holds that the adjudicating authority must look into the actual date of default to determine whether a creditor hasn't only shifted the date of default to avoid the Section 10A suspension. This judgement endorses the latter view and goes a long way to safeguarding corporate debtors from the rigors of IBC in cases of actual defaults during the Section 10A Period.

For a detailed analysis, please refer to the JSA Prism of October 12, 2023.

A guarantor can question the valuation of security being enforced by a secured creditor

In the matter of ***Mr. Shantanu Prakash vs. Mr. Mahendar Singh Khandelwal (resolution professional of Educomp Solutions Limited) and others***[38], while disposing of an interim application filed under Section 60(5) of the IBC, the New Delhi bench of the National Company Law Tribunal held that a guarantor can question the valuation at which the security pledged by the borrower with its secured creditor is enforced.

The decision of the NCLAT is commensurate with the legal position repeatedly enunciated by the Supreme Court that the commercial wisdom of the committee of creditors is non-justiciable. The finding of the NCLAT appears to have nullified the recovery rights of a financial creditor under an independent contract, i.e., personal guarantee agreements. In a meeting of the committee of creditors, a financial creditor may have opted to dissent however, such dissent, even if treated as a commercial wisdom of a dissenting financial creditor, cannot be questioned before the Adjudicating Authority. As Bank of Baroda's (a member of the CoC holding 5.83% of the voting share) decision was not accepted by CoC in its collective decision, what could be and was enforceable was only the collective commercial decision of the CoC.

It remains to be seen whether the Supreme Court will have the opportunity to consider the issue as the law, as it stands currently, effectively wipes out a financial creditor's rights of recovery under personal guarantee agreements.

For a detailed analysis, please refer to the JSA Prism of October 26, 2023.

Due diligence of resolution applicants by resolution professionals: Mere reliance on an affidavit is not enough to check ineligibility under Section 29A of the IBC

In an application filed by Vishram Narayan Panchpor, resolution professional of Blue Frog Media Private Limited ("**Corporate Debtor**") in the matter of ***M/s Blue Frog Media Private Limited***[39] for approval of a resolution plan, the NCLT Mumbai ruled that the object of Section 29A of the IBC requires a resolution professional to conduct adequate due diligence on a prospective resolution applicant and its related parties. The NCLT Mumbai implied that the resolution professional cannot merely rely on an affidavit provided by such an applicant to ensure that the resolution applicant does not fall under the criteria set out in Section 29A of the IBC.

This order of NCLT Mumbai serves as a reminder for resolution professionals to carefully examine the material placed on record while undertaking the due diligence of a prospective resolution applicant and not simpliciter rely on the contents of the documents furnished by a resolution applicant. The resolution professional may request clarifications, additional documents or information from a prospective resolution applicant to achieve the purposes of the IBC and to protect the interests of the creditors.

Whilst Form H of Schedule I of the CIRP Regulations contains a certification by a resolution professional to the effect that an affidavit from a resolution applicant with respect to its eligibility under Section 29A of the IBC has been obtained and that the contents of such affidavit are in order, NCLT Mumbai implicitly referred to Regulation 36A(8) of the CIRP Regulations to

[38] IA. No. 187/ND/2022 in Company Petition No. (IB)-101/(PB)/2017

[39] IA No.2828 of 2021 In CP (IB) No. 4360 /MB/C-I/2018 – Order dated August 18, 2023

conclude that mere submission of such an affidavit was not sufficient. A resolution professional needs to conduct an effective due diligence within the prescribed timelines to ascertain that the prohibitive criteria under Section 29A of the IBC are not met by a resolution applicant.

For a detailed analysis, please refer to the JSA Prism of November 3, 2023.

A preference shareholder is not a financial creditor unless the preference shares become due for redemption

NCLT Kolkata, in ***EPC Constructions India Limited through its Liquidator – Abhijit Guhathkurtha v. M/s Matix Fertilizer and Chemicals Limited***[40] has ruled that preference shareholders cannot step into the shoes of a financial creditor unless their preference shares become redeemable.

The NCLT Kolkata has summarized the fundamental difference between raising capital through debt instruments and *via* issuance of shares. The decision is a classic example of the doctrine of literal interpretation while construing statutes. Section 55 of the Companies Act, 2013 squarely covers the position that preference shares can only be redeemed out of the profits of the company available for dividend or through issuance of fresh shares. This decision removes the ambiguity surrounding the issue concerning treatment of preference shareholders, and conclusively holds that non-redemption of preference shares does not result in preference shareholders becoming creditors.

For a detailed analysis, please refer to the JSA Prism of November 9, 2023.

JSA represented a financial creditor in a significant judgment where the Supreme Court has upheld the constitutional validity of Sections 95 to 100 of the IBC (concerning insolvency resolution process of individuals/personal guarantors and partnership firms)

In the case of ***Dilip B Jiwrajka v Union of India & Ors***[41], a 3 (three) judge bench of the Supreme Court has upheld the constitutional validity of Sections 95 to 100 of IBC.

In case of a debt, the liability of a company and its personal guarantor (who is generally the promoter of the company) are co-extensive. Accordingly, in case of defaults, creditors have a legal right to demand payment of the guaranteed amounts from the personal guarantors. Upon failure to discharge such obligations, the creditors have been constrained to take steps for initiation of insolvency resolution processes against the personal guarantors – such that the assets and liabilities of the personal guarantors are systematically and equitably dealt with. The challenge to the validity of the provisions of the IBC blocked the insolvency resolution process of the personal guarantors. With this judgment, insolvency resolution processes against personal guarantors can now progress without any legal impediments.

The judgment brings relief and re-assurance to the lenders that like the principal borrowers, IBC provides for an effective mechanism to manage insolvencies also of personal guarantors - to systematically resolve the obligations assumed by such guarantors. This is a major step in bolstering the credit ecosystem of India.

For a detailed analysis, please refer to the JSA Prism of December 12, 2023.

RP cannot be directed by NCLT to convene CoC meetings to consider resolution plans

Buildwell was an unsuccessful prospective resolution applicant in the CIRP of Nucleus Premium Properties Private Limited. Buildwell requested the NCLT to direct the RP to convene a meeting of the CoC to consider its revised resolution plan. This request was sought by Buildwell after the CoC of Nucleus Premium had passed a resolution for the liquidation of Nucleus Premium and the RP had filed an application before the NCLT, Kochi seeking an order for the liquidation under Section 33(1) of IBC.

The NCLT, Kochi held that it is the RP's prerogative to convene a meeting of the CoC. Thereby, the RP cannot be directed by the NCLT, Kochi to convene such

[40] Company Petition (I.B.) No. 156/KB/2022

[41] 2023 INSC 1018

meeting at the request of an outsider. (***Buildwell v. Mr. Dileep KP and Anr***.[42])

Issuance of a fresh invitation for EoI does not amount to 'modification' under Regulation 36A(4A) of the CIRP Regulations, 2016

The NCLT observed that the word "modification" under Regulation 36A(4A) of the CIRP Regulations, 2016 refers to minor changes to the invitation for expression of interest ("**EoI**") and does not include the issuance of a fresh invitation for EoI during a CIRP. (***Anil Khandelwal v. Rajendra Kumar Jain and Ors.***[43])

Application for initiating resolution process can be withdrawn even if objected to by other creditors (which have not filed the application for initiating CIRP against the corporate debtor)

The withdrawal of CIRP proceedings under Section 12A of IBC on account of settlement with the applicant initiating the CIRP process was objected by certain other financial creditors of the corporate debtor.

The NCLT, by relying on the judgments of the Supreme Court in *Swiss Ribbons Private Limited and Anr. v. Union of India and Ors.*[44] and *Ashok G. Rajani v. Beacon Trusteeship Limited and Ors.*[45], held that prior to the constitution of the CoC in the CIRP of a corporate debtor, an application for the withdrawal of the CIRP can directly be made by a party before the NCLT and there is no bar to such withdrawal of the CIRP. (***Satish Sadashiv Rane v. Shah Group Builders Limited***[46])

Claims filed after implementation of a resolution plan cannot be entertained

A resolution plan cannot be challenged on the grounds that it does not provide for full payment of outstanding electricity dues and instead only a part of it. The NCLAT stated that the CoC had found the resolution plan feasible and viable and hence, the plan was approved by the CoC after which it was approved by the NCLT. Further, the NCLAT held that after the implementation of a resolution plan, no subsequent claim can be entertained. (***Madhya Pradesh Paschim Kshetra Vidyut Vitaran Co. Limited v. Jagish Kumar, resolution professional for Madhya Bharat Phosphate Private Limited & Anr.***[47])

Approval of resolution plan can be challenged only if the plan is violative of any statutory provision

An unsecured financial creditor of the corporate debtor appealed against a resolution plan approved by the NCLT on the grounds that very limited amount had been paid to it and other operational creditors under the resolution plan. The NCLAT dismissed the appeal of the appellant and stated that the approval of a resolution plan by the NCLT can only be questioned only if the plan is violative of any statutory provision, including Section 30(2) of the IBC, which did not happen in the instant case. (***Pani Logistics, through its sole proprietor, Kiran M. Jain v. Vikas G. Jain***[48])

Operational creditors are not entitled to receive a full copy of the resolution plan till the time it is approved by NCLT

The NCLT held that a resolution plan remains a confidential document till the time it is approved by the NCLT as per the provisions of IBC, and hence, the RP cannot be directed to share a complete set of the resolution plan with operational creditors. (***Oceanic***

[42] March, 2023, NCLT, Kochi [IA(IBC) No. 79/KOB/2023 in CP(IB) No. 01/KOB/202***1***]
[43] March, 2023, NCLT, Chandigarh [IA No. 1782/2022 in CP(IB) No. 198/Chd/Pb/2021]
[44] (2019) 4 SCC 17
[45] 2022 SCC OnLine SC 1275
[46] March, 2023 NCLT Mumbai [IA No. 2209/2021 in CP(IB)/2207/MB-IV/2019]
[47] April, 2023, NCLAT, Delhi [Company Appeal (AT)(Ins) No. 1113 of 2020 & I.A. No. 443 of 2022]
[48] April, 2023, NCLAT, Delhi [2023 SCC OnLine NCLAT 172]

Technical Services v. Ajay Joshi, RP of Indian Steel Corporation Limited[49])

Dissenting secured financial creditors to not be given preference over other creditors

The NCLT referred to Supreme Court's judgment in *India Resurgence ARC Private v. Amit Metaliks Limited and Another*[50], and reiterated that a creditor should not be treated as higher than other creditors merely because it holds security interest over the corporate debtor's movable/immovable property. It further observed that if (dissenting) secured creditors are given preference over other creditors, then every secured creditor would dissent to the resolution plan and the same would lead to more liquidations rather than resolutions, which would not lead to the maximization of the value for the corporate debtor and the purpose of the CIRP would fail. ***(ICICI Bank Limited v. Mr. Pratim Bayal (Resolution Professional) & Anr., v. BKM Industries Limited***[51])

Recovery of amounts by tax authorities directly from the customers of the corporate debtor during CIRP is violative of the moratorium provisions

The goods and services tax ("**GST**") department had issued notices to various customers of the corporate debtor, calling upon them to deposit any amount due by them to the corporate debtor directly with the GST Department. The NCLT held that such recovery made by the GST Department after the commencement of the CIRP of the corporate debtor was violative of the moratorium prevailing in terms of Section 14 of IBC. (***CA Prashant Jain, RP of Greatwall Corporate Services Private Limited v. Mr. Sunil V. Chavan, Deputy Commissioner of State Tax***[52])

Even after completion of challenge mechanism under Regulation 39(1A) of the CIRP Regulations, the CoC retains its jurisdiction to negotiate with one or other resolution applicants, or to annul the resolution process and re-issue the request for resolution plan xx

The decision of the CoC to conduct an extended round of challenge mechanism with the existing bidders was challenged by one of bidders. While interpreting Regulation 39(1A) of the CIRP Regulations, 2016 the NCLAT held that:

Regulation 39(1A) cannot be interpreted to read that it contains any fetter on the right of the CoC to take further action as per the request for resolution plan, after receipt of the resolution plan consequent to the challenge mechanism.

1) There is no implied prohibition on the jurisdiction of the CoC to enter into any further negotiations with a resolution applicant or to further ask a resolution applicant to increase its resolution plan value.

2) Regulation 39(1A) contemplates modification of resolution plans and improvement of resolution plans at the instance of the resolution applicants. The above modification or improvement in the plan cannot be confined only to the value of the plan. It covers the entire plan and if it is held that any modification or improvement is not permissible after conclusion of process under Regulation 39(1A), it will become a handicap in successful resolution of the corporate debtor, since CoC may opine that certain modification and improvement in the resolution plan are necessary for successful resolution of the corporate debtor.

3) Conclusion of the challenge mechanism does not give the highest bidder the right to claim that its resolution plan should be put for voting before the CoC. The CoC is not obliged to approve the resolution plan which has the highest net present value or scored the highest as per the evaluation matrix. Any resolution plan will be approved solely on the basis of the commercial wisdom of the CoC. (***Vistra (ITCL) India Limited v. Torrent Investments Private Limited & Ors. with Indusind International Holdings Limited v. Torrent Investments Private Limited & Ors.***[53])

[49] April, 2023, NCLT, Mumbai [IA/351/2023 in CP(IB) No. 979/(MB)/2020]
[50] 2021 SCC Online SC 409
[51] March, 2023, NCLT Kolkata [IA. (IB) No. 471/KB/2022 In C.P. (IB) No. 2078/KB/2019]
[52] March, 2023, NCLT, Mumbai [IA No. 2474 of 2022 in CP No. 73 of 2021]
[53] March, 2023, NCLAT, Delhi [2023 SCC OnLine NCLAT 110]

The Vidarbha impact: Discretion of NCLT to admit CIRP

The application for CIRP of Madhucon Projects Limited by SREI Equipment Finance Limited was kept in abeyance for 3 (three) months as the amount receivable by Madhucon Projects Limited under the court decree and the arbitral award were more than the debt amount claimed to be in default under the application. The creditor was however granted liberty to approach the NCLT if its dues continue to remain unpaid after the said period of 3 (three) months.

The NCLT relied on the judgment of the Supreme Court of India in the matter of *Vidarbha Industries Power Limited v. Axis Bank Limited*[54], and observed that while dealing with an application for initiation of CIRP, the NCLT must necessarily apply its mind to the relevant factors of the case, including the feasibility of the initiation of CIRP. The NCLT must not confine the enquiry merely to see whether there has been a debt and a default in repayment of such debt. (***SREI Equipment Finance Limited v. Madhucon Projects Limited***[55])

Failure to settle within the time granted by the tribunal constitutes a fresh default

The NCLAT had granted a period of 6 (six) months to Green Gateway (corporate debtor) to settle its default with Union Bank of India. Upon failure by Green Gateway to settle the amount under default, Union Bank of India recommenced the CIRP proceedings. Such proceedings were contested by the shareholders of Green Gateway on the basis that the proceedings are barred by limitation as the date of default for the purposes of the application should be the date on which the account of Green Gateway was classified as a non-performing asset.

The NCLAT held that the date of default was the date on which the period of 6 (six) months ended and not the date on which the account of Green Gateway was classified as a non-performing asset. Such default should be treated as a fresh default. (***Air Travel Enterprises India Limited and Anr. v. Union Bank of India and Anr.***[56])

Dispute in relation to assignment of debt cannot halt IBC proceedings

The financial debt extended to C&M Farming Limited was acquired by Omkara Assets Reconstruction Private Limited from Business Co-operative Bank. The assignment of such debt was challenged by C&M Farming Limited. It sought that the hearing of the application for initiation of its CIRP be deferred till the dispute in relation to the assignment of debt is adjudicated upon by the Court of Civil judge.

The NCLT, while dismissing this application, held that CIRP proceedings cannot not be halted indefinitely on the ground that the legality of the said assignment was pending for adjudication before the Civil Court. The CIRP petition will need to be decided in a time bound manner as per the provisions of IBC. (***C&M Farming Limited v. Omkara Assets Reconstruction Private Limited***[57])

Default by the corporate guarantor necessary to initiate CIRP against it

SBI had extended a certain credit facility to Deogiri Infrastructure Private Limited (borrower), which was guaranteed by Shaliwahan Farms Private Limited (guarantor). On default in repayment of the loan by the borrower, SBI issued a demand notice to the borrower under the provisions of the SARFAESI Act. Thereafter,

[54] 2022 SCC OnLine SC 841
[55] March, 2023, NCLT Hyderabad [IA(IBC) 1131/2022 and Rst. A(IBC) 6/2023 in CP(IB) No. 12/7/HDB/2021]
[56] March, 2023, NCLAT, Chennai [CA(AT)(CH)(Ins.) No. 70 of 2023]
[57] March, 2023, NCLT, Mumbai [IA No. 1193 of 2022 in CP(IB) No. 1031 of 2021]

SBI filed an application under Section 7 of IBC seeking initiation of CIRP of the guarantor. SBI had not issued any demand notice to the guarantor.

The NCLT held that in absence of a demand being made on the corporate guarantor to repay the facility amount, the corporate guarantor cannot be said to have committed any default. Accordingly, CIRP cannot be initiated against the corporate guarantor in such case. (***State Bank of India v. Shaliwahan Farms Private Limited***[58])

Default in payment of interest amount only cannot be a ground for initiaiting CIRP

The corporate debtor was liable to pay a total amount of INR 28,00,000 (Indian Rupees twenty eight lakh) to a financial creditor on account of certain consent terms. However, the corporate debtor defaulted in making a payment of INR 8,00,000 (Indian Rupees eight lakh), out of the total payable amount under the consent terms. The financial creditor filed an application under Section 7 of IBC seeking initiation of CIRP against the corporate debtor.

The NCLT observed that the whole of the principal amount claimed by the financial creditor was paid and the unpaid amount under the consent terms was on account of balance interest amount due. In view of this, the NCLT held that since IBC envisages the resolution of debts and is not a recovery legislation, the application for initiation of CIRP only on account of unpaid interest amount was not maintainable. (***Ganak Technologies Private Limited v. Vaishvik Foods Private Limited***[59])

Principal amount of CCDs cannot be admitted as 'financial debt' once an event occurs which triggers their mandatory conversion into equity shares

Agritrade Power Holding Mauritius Limited ("**APHML**") was the holder of certain compulsorily convertible debentures ("**CCDs**") issued by SKS Power Generation (Chattisgarh) Limited (corporate debtor) which were mandatorily convertible into the equity shares of the corporate debtor, to the extent of their aggregate principal amount in case, and on the date on which, any application for winding up, liquidation or dissolution of SKS (or any analogous event) is filed. Upon commencement of the CIRP of the corporate debtor, APHML filed its claim with the RP of the corporate debtor. The claim amount comprised of the principal and the interest amount payable by the corporate debtor in respect of such CCDs. However, the said claim was rejected by the RP.

The NCLT stated that the said CCDs will be considered to be debt till the date of their mandatory conversion into equity shares. It further held that the initiation of CIRP of the corporate debtor triggered the mandatory conversion of the CCDs into the equity shares of the corporate debtor to the extent of the aggregate principal amount of the CCDs and such CCDs ceased to exist on the insolvency commencement date ("**ICD**"). Therefore, such principal amount cannot be claimed by APHML as "debt" due to it by the corporate debtor as on the ICD. However, the NCLT noted that the CCDs were subscribed by APHML against payment of interest, which duly constitutes disbursement against consideration of time value of money. Therefore, the NCLT directed that the amount of accrued interest in respect of the CCDs as on the ICD should be admitted as a 'financial debt' in the CIRP of the corporate debtor. (***Agritrade Power Holding Mauritius Limited v. Ashish Arjunkumar Rathi***[60])

[58] March, 2023, NCLT, Mumbai[CP(IB)-1280(MB)/2022]
[59] March, 2023, NCLT, Mumbai [CP(IB) No. 3195/MB-IV/2019]
[60] March, 2023, NCLT, Mumbai [IA No. 2551/2022 in CP(IB) No. 893/MB/C-IV/2021]

Acknowledgment of debt by principal borrower is considered to be deemed acknowledgement of debt by the guarantor

The NCLAT held that the one-time settlement proposals made by Victory Electricals Limited (principal borrower) to SBI constitute acknowledgment of debt for the purposes of extending the limitation period under the provisions of the Limitation Act, 1963. Since the liability of a guarantor is co-extensive with that of the principal borrower in terms of the Section 128 of the Indian Contract Act, 1872, the acknowledgment of debt by Victory Electricals Limited would be considered to be deemed acknowledgement of debt by Hackbridge Hewittic and Easun Limited (the corporate debtor) being the guarantor. Therefore, the NCLAT set aside the order of the NCLT which had previously dismissed the application for initiating CIRP against the corporate debtor on the grounds that it was filed after expiry of the limitation period of 3 (three) years. (***State Bank of India v. Hackbridge Hewittic and Easun Limited***[61])

CIRP cannot be initiated by operational creditor pending resolution of dispute before the Council of Ministry of Micro, Small and Medium Enterprises

Arpana Packaging Private Limited (operational creditor) filed an application for initiation of CIRP against Regma Ceramics Private Limited (corporate debtor) on the ground of non-payment of certain amounts. The operational creditor had previously approached the chairman of the Micro and Small Enterprises Facilitation Council under Section 15 of Micro Small and Medium Enterprises Development Act, 2006 ("**MSMED Act**") in relation to non-payment of amounts by the corporate debtor.

The NCLAT held that the fact that operational creditor had approached the Micro and Small Enterprises Facilitation Council under the MSMED Act shows that there was a pre-existing dispute between the parties and the unpaid amount was the subject matter of a controversy pending for resolution before the Council. Consequently, the NCLAT held that the application of CIRP cannot be admitted due to pre-existing dispute between the parties. (***Arpana Packaging Private Limited v. Regma Ceramics Private Limited***[62])

The amount of interest cannot be clubbed with the principal amount to compute the threshold of INR 1,00,00,000 (Indian Rupees one crore) for initiation of CIRP

The issue under consideration by NCLT was whether 'interest' could be clubbed with principal debt to crossover the threshold limit of INR 1,00,00,000 (Indian Rupees one crore) for filing a Section 9 of IBC, application for initiating CIRP.

The NCLT was of the view that levying of interest was neither mentioned in any agreement entered into by the parties, nor was it specifically admitted or promised to be paid by the corporate debtor. Therefore, it could not be clubbed with the principal amount due, to hold the interest as a 'debt' to cross over the threshold amount of INR 1,00,00,000 (Indian Rupees one crore) for initiating CIRP against the corporate debtor. (***Gandhar Oil Refinery (India) Limited v. City Oil Private Limited***[63])

Application for CIRP cannot be filed prior to expiry of 10 (ten) days from the

[61] April, 2023, NCLAT, Chennai [(IA No. 614 of 2021) Company Appeal (AT) (CH) (Ins.) No. 05 of 2021
[62] April, 2023, NCLAT, Chennai [(IA No. 331/2023) in Company Appeal (AT) (CH) (Ins) No. 94/2023]
[63] April, 2023, NCLT, Kolkata [(IA No. 331/2023) in Company Appeal (AT) (CH) (Ins) No. 94/2023]

date the demand notice was actually received by the corporate debtor

The NCLAT considered whether the application under Section 9 was premature as it was filed before the expiry of 10 (ten) days from the date of demand notice under Section 8 of the IBC.

While the appellant contended that the demand notice was first offered to be delivered to the respondent on an earlier date (i.e., more than 10 (ten) days prior to the application being filed), the same could not be delivered as the premises of the respondent were locked. The NCLAT stated that the demand notice is to be considered as delivered on the day of actual receipt of the notice by the respondent and cannot be presumed to be delivered on the date it was first offered to be delivered and accordingly, the application was dismissed. (***J.K. Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mill Company Limited***[64])

Tax dues converted into interest free loans do not constitute 'financial debt'

A certain amount of sales tax owed by Haryana Telecom Limited (corporate debtor) to the government of State of Haryana was converted into interest free loan under a policy introduced by the Government. The NCLT held that the conversion of sales tax into an interest free loan, as envisaged under the policy of the Government, did not entail any consideration for time value of money since the payment of interest was not an integral part of the policy. Thereby, the claim of the Government did not constitute "financial debt" under Section 5(8) of IBC but was an "operational debt". (***State of Haryana v. Sanyam Goel***[65])

A decree holder will be classified as a "financial debt" or an "operational debt" depending upon the nature of the underlying transaction from which the decretal debt has arisen

NCLT held that the categorisation of the debt due by a corporate debtor to a decree holder as "financial debt" or "operational debt" under the provisions of IBC depends upon the nature of the transaction from which the decretal debt has arisen. If the decretal debt is in the nature of "operational debt" (i.e., arises in respect of supply of goods), the decree holder will be classified as an "operational creditor" of the corporate debtor. (***Pandit Associates v. Sanvijay Alloys and Power Limited***[66])

Advance amount converted into an interest bearing refundable advance is classified as a 'financial debt'

While considering whether the amounts claimed were 'financial debt' or 'operational debt, the NCLT observed that the advance amount was paid to the corporate debtor under a memorandum of understanding ("**MoU**") in consideration of the development rights in the property of the corporate debtor and did not constitute 'operational debt'. However, since the advance amount got converted into an interest bearing refundable advance upon the termination of the MoU, such advance amount should be considered to be 'financial debt'. (***Sheth Developers Private Limited & Anr. v. Vichitra Narayana Pathak (IRP of Golden Tobacco Limited) in the matter of Arrow Engineering Limited v. Golden Tobacco Limited***[67])

Appropriation of margin money by banks cannot be held to be a 'preferential transaction' under IBC

The NCLT held that the release and appropriation of the margin money held by banks is in their ordinary course of business of recovery of their outstanding dues. Such appropriation of fixed deposits do not constitute a preferential transaction in terms of Section 43 of IBC. Further, the NCLT held that as per Section 66(1) of IBC, the activities of only corporate debtors can be classified as fraudulent transactions and not that of its creditors. (***Dhiren Shantilal Shah v. Babyu Rajeev Chandrasekharan and Ors.***[68])

Inherent powers cannot be used to modify an earlier order

[64] March, 2023, NCLAT, Delhi [Company Appeal (AT)(Ins) No. 82 of 2017]
[65] March, 2023, NCLT, Chandigarh [IA No. 829/2020 in CP(IB) No. 515/Chd/2019]
[66] March, 2023, NCLT, Mumbai [CP(IB)-562(MB)/2022]
[67] March, 2023, NCLT Ahmedabad [IA No. 690 (Ahm) 2020 in CP(IB) No. 268/NCLT/AHM/2020]
[68] April, 2023, NCLT, Mumbai [IA-972/2021 in CP(IB)4164(MB)2019]

Rule 11 of the NCLT, 2016, cannot be used to revisit the findings of the NCLAT or re-open to examine the findings on questions of fact. Further the NCLAT is not empowered under the said rule to modify or review its earlier order. (***Punjab National Bank v. Ashish Chhawchharia & Ors***[69])

NCLT does not have jurisdiction to determine any and every question relating to the corporate debtor

During liquidation of the corporate debtor, the Income Tax authorities issued a provisional attachment notice and attached certain land of the corporate debtor which was challenged by the liquidator.

The NCLAT held that the NCLT is not the proper fora to determine the issues of attachment of property under the Prohibition of Benami Property Transaction Act, 1988 and that Section 60(5) of the IBC is not an all pervasive section conferring jurisdiction upon the NCLT to determine any and every question relating to the corporate debtor and the liquidator cannot take umbrage under Section 32A for avoiding such an attachment since the said section is attracted only when the resolution plan is approved by the NCLT. (***Mr. P. Eswaramoorthy v. the Deputy Commissioner of Income Tax (Benami Prohibition)***[70])

Forum for filing insolvency proceedings against personal guarantor

The NCLAT held that since the insolvency resolution process of the corporate debtor had come to an end, the NCLT having jurisdiction in the state where the registered office of the corporate debtor is located, would be the appropriate forum for insolvency resolution of the personal guarantor of such corporate debtor. (***Mr. Ankit Miglani v. State Bank of India***[71])

The assets of a corporate debtor have immunity against any action taken by the ED for an offence committed prior to insolvency commencement date

The NCLT held that Section 32A(2) of IBC provides immunity to the property of a corporate debtor, which forms part of the approved resolution plan, from any action taken by any authority in relation to an offence committed prior to the commencement of the CIRP. Thereby, the attachment order of the Enforcement Directorate cannot continue to operate after the commencement of the CIRP of the corporate debtor and the Enforcement Directorate must release the assets attached thereunder. (***STCI v. DSK Southern Projects Private Limited***[72])

Duty of the liquidator to protect the existence of the corporate debtor as far as possible

In case of an auction during liquidation, if an option is given to the parties that they could purchase the corporate debtor as a going concern along with its assets or only purchase a set of assets of the corporate debtor and if equal bids are received from bidders under the different options, the liquidator if free to choose the bidder which would ensure survival of the corporate debtor. (***Torrecid India Private Limited v. Arrhum Tradelink Private Limited & Ors.***[73])

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***[74], 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

[69] April 28, 2023, NCLAT, Delhi [I.A. No. 4254 of 2022 in Company Appeal (AT)(Ins) No. 584 of 2021]
[70] March, 2023, NCLAT, Chennai [Company Appeal (AT) (CH) (Ins.) No. 188 of 2022]
[71] April, 2023, NCLAT, Delhi [2023 SCC OnLine NCLAT 165]
[72] April, 2023, NCLT, Mumbai [IA-383/2022 in CP.(IB)178/MB-IV/2021]
[73] March, 2023, NCLAT, Delhi [Company Appeal (AT)(Ins) No. 943 of 2022]
[74] May, 2023, Supreme Court [Civil Appeal No. 7121 of 2022]

admission order before the NCLAT, and subsequently before the Supreme Court.

The Supreme Court, following its decisions in *Innoventive Industries Limited v. ICICI Bank*[75] ("**Innoventive Industries Judgment**") and *E.S. Krishnamurthy v. Bharath Hi-Tech Builders Private Limited*[76] ("**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 corporate debtor. 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 corporate debtor.

The Supreme Court further clarified that its decision in *Vidarbha Industries Power Limited v. Axis Bank Limited*[77] 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***[78], 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, 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*[79], 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.***[80], 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 corporate debtor in the jurisdiction of the registered office of the corporate debtor, even if the

[75] August, 2017, Supreme Court [Civil Appeal Nos. 8337-8338 of 2017]
[76] December, 2021 Supreme Court [Civil Appeal No. 3325 of 2020]
[77] July, 2022, Supreme Court [Civil Appeal No. 4633 of 2021]
[78] May 2023, NCLAT New Delhi, [Company Appeal (AT) (Insolvency) No. 117 of 2023]
[79] April, 2021, NCLAT New Delhi, [Company Appeal (AT) (Insolvency) No. 294 of 2021]
[80] May 2023, NCLAT, New Delhi [Company Appeal (AT) (Insolvency) No. 53 of 2023]

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***[81], 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.*[82] ("**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.

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***[83] 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 corporate debtor.

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***[84], 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

[81] May 2023, NCLAT, New Delhi [Company Appeal (AT)(Insolvency) No. 982 of 2022]
[82] (2023) 3 SCC 753
[83] May, 2023, NCLT Mumbai, [C.P. 4427/IB/MB/2019]
[84] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Insolvency) No. 772 of 2022]

form the basis of initiation of CIRP. Insufficiency of stamp duty would not bar such claims.

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***[85]**,** 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***[86], the NCLAT held that once the corporate debtor 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 corporate debtor to recover such further interest in event the liability in respect of further interest is not discharged by the corporate debtor.

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.***[87]**,** 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.

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

[85] May, 2023, NCLAT, New Delhi [Company Appeal (AT)(Insolvency) No. 846 of 2022]
[86] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Insolvency) No. 34 of 2023]
[87] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Insol.) No. 593 of 2023]

In the case of ***Union Bank of India v. Dinkar T Venkatasubramanian & Ors.***[88] 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[89]. 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***[90], 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***[91], 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.

NCLAT relied on its judgments passed in *Surinder Pal Singh & Ors. Vs. Spaze Towers Pvt. Ltd.*[92] *and Prayag Polytech Pvt. Ltd. v Hind Tradex Ltd.*[93], 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. &

[88] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Ins.) No. 729 of 2020]

[89] 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].

[90] May, 2023, Supreme Court, [Civil Appeal No 748 Of 2023]

[91] May 2023, NCLAT New Delhi, [Comp. App. (AT) (Ins) No. 246 of 2023]

[92] March, 2023, NCLAT New Delhi, [Company Appeal (AT) (Insolvency) No. 354 of 2023]

[93] August 2019, NCLAT New Delhi, NCLAT, [Company Appeal (AT) (Insolvency) No. 535 of 2019]

Anr the NCLAT in the case of Airwil Intellicity Social Welfare Society v. Ascot Projects Private Limited and Ors.[94], has held that an intervention application by a society of unit buyers alleging fraud against the corporate debtor 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.

Secured creditor can retain security interest

In the case of ***M/s Vistra ITCL (India) Ltd v. Mr. Dinkar Venkatasubramanian***[95], 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.

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***[96], 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.***[97], 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

[94] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Insolvency) No. 755 of 2021]
[95] May 2023, Supreme Court [Civil Appeal No. 3606 of 2020]
[96] May 2023, NCLAT New Delhi [Company Appeal (AT) (Insolvency) No. 539 of 2022]
[97] June 2023, NCLAT, Chennai [Company Appeal (AT) (CH) (Ins) No. 181/2022]

an asset reconstruction company ("**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 Reserve Bank of India's ("**RBI**") 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***[98], 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.

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.[99] and Vijay Kumar Jain Vs. Standard Chartered Bank & Ors.[100] 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 corporate debtor.

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***[101], 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.

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.***[102], 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.

[98] May, 2023, NCLT New Delhi, [Comp. App. (AT) (Ins) No. 729 of 2021]
[99] January, 2022, NCLAT New Delhi, [Company Appeal (AT) (Insolvency) No. 643 of 2021]
[100] January, 2019, Supreme Court, [Civil Appeal No. 8430 of 2018]
[101] June, 2023, NCLT, Hyderabad [I.A. NO. 1343/2022 in CP (IB) No. 219/7/HDB/2017]
[102] May, 2023, NCLAT, New Delhi [Company Appeal (AT) (Insolvency) No. 634-636 of 2023]

Full payment of admitted claims towards provident fund dues

In the case of ***Central Board of Trustees v Shri Kumar Rajan***[103], 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*[104], 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***[105], 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 registrar of companies 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 registrar of companies, the CoC cannot be constituted with a single operational creditor. Accordingly, the NCLAT ordered closure of CIRP of HGS Dairies.

There is no priority for payment of workmen dues during liquidation

In the case of ***Moser Baer Karamchari Union v. Union of India***[106] 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.

Amendments to the Corporate Insolvency Resolution Process

The IBBI *vide* notification dated September 18, 2023, has issued the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2023 ("**CIRP Amendment Regulations**") amending the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The CIRP Amendment Regulations *inter alia* introduces relaxations in timelines for submission of claims, increase in the obligations of the resolution professionals, allows members of CoC to call for an audit, increase the role and responsibilities of authorized representatives of a class of financial creditors, streamline the CoC meetings.

For a detailed analysis, please refer to the JSA Prism of October 12, 2023.

[103] June, 2023, NCLAT Chennai [Company Appeal (AT) (CH) (Ins.) No. 268/2021]
[104] January, 2023, Supreme Court [Civil Appeal No. 407/2023]
[105] June 2023, NCLAT Chennai [Company Appeal (AT) (CH) (Ins.) No. 25/2022]
[106] 2023 SCC OnLine SC 547

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 the 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.

The authors of this compendium are:

Aashit Shah
Partner

Dheeraj Nair
Partner

Dhirendra Negi
Partner

Farhad Sorabjee
Partner

Varghese Thomas
Partner

Sidharth Sethi
Partner

Soumitra Majumdar
Partner

Utsav Johri
Partner

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For more details, please contact km@jsalaw.com

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