



ASC

INSOLVENCY TIMES



Editorial



IBBI proposes amendments to norms to streamline corporate resolution process

To streamline the corporate resolution process and prevent delay in implementation of the resolution plan, the Insolvency and Bankruptcy Board of India (IBBI) proposed amendments to some regulations to structure the corporate resolution plan into two parts as inflow of funds and distribution to various stakeholders under the Insolvency and Bankruptcy Code (IBC). Amendments have been proposed to seven areas, that include approval of committee of creditors (CoC) for Insolvency Resolution Process Cost, monthly CoC meetings, discussion of valuation methodology and report with the CoC, and disclosure of the valuation reports. The other areas include continuation of process activities pending disposal of extension application by the Adjudicating Authority (AA), clarity in minimum entitlement to dissenting financial creditors and mandatory contents of resolution plan.

It is reported that as per the suggested amendments, Part A of the resolution plan shall deal with the inflow i.e. payment under the resolution plan (total value of the resolution plan), payment of insolvency resolution process cost, payment schedule, feasibility and viability of the resolution plan, etc, while Part B will deal with distribution to various stakeholders. The motive behind such suggested amendments have been stated as structuring the resolution plan into two parts will enable the AA to first approve the resolution plan effectuating control by the resolution applicant so that inflow can take place and the corporate debtor (CD) may start functioning again. The second part shall deal with distribution amongst the various stakeholders. In case of any dispute or litigation the disputed amount may be kept in an escrow account and be distributed after the litigation in respect of distribution attains finality.

The IBBI has also sought comments from stakeholders on the discussion paper till November 22. Expect more vibrancy from Insolvency Resolution Process.

Stay Alert!

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IBBI Suspends Partha Sarathy Sarkar's IP Registration for Conducting Innovari Technologies' CIRP in 'Brazen Manner'

The Insolvency and Bankruptcy Board of India (IBBI/Board) has suspended the registration of insolvency professional (IP) Partha Sarathy Sarkar for two years after finding that he had conducted the entire corporate insolvency resolution process (CIRP) of Innovari Technologies Pvt Ltd (corporate debtor-CD) in a 'brazen manner', without having due regard to the provisions of the IBBI code of conduct (Code) and the regulations. In an order passed earlier this month, Sudhaker Shukla, a whole-time member (WTM) of IBBI, says, "The disciplinary committee of IBBI notes that the IP has shown utter disregard and contempt towards the established monitoring activity of the Board. Rather than cooperating with the Inspecting Authority (IA) in effectively carrying out of the statutorily mandated monitoring functions of the Board, the IP had tried to evade his duties entrusted on him under the Code and regulations on one pretext or the other. Actions, bereft of logic, taken in utter disregard to laid down compliances are against the professional conduct and ought to be avoided by the IP."

Further, IBBI noted that as per the provisions of the Code, the IP is required to form an opinion within 75 days of the insolvency commencement date (ICD), make a determination within 115 days of ICD and file an application before the adjudicating authority (AA) within 135 days of ICD. However, in the case of Innovari Technologies, IBBI observed that Mr Sarkar, the IP, has taken more than twice the permissible time to form the opinion. "Even if he had some corroborative evidence, he was required to hand over the details to the liquidator of the CD who could have pursued these transactions." During the hearing, Mr Sarkar contended that Regulation 17(1) of CIRP Regulations nowhere mandates that while filing a report certifying the formation of a committee of creditors (CoC) with the AA, a list of creditors containing certain mandatory information is to be mentioned.

However, IBBI elucidated that in the absence of any specific provision, an interim resolution professional (IRP) is not expected to maintain different lists of creditors for different purposes. It noted that "the IP has also not provided any document to the IA to prove otherwise that the list of creditors is maintained in accordance with Regulation 13. Therefore, the reliance of IA on the list of creditors submitted by the IP to the AA along with the report certifying the constitution of the committee is valid."

Opining that it is plain for anyone willing to see that the IP has not done anything to show that he intended to complete the CIRP with required diligence, IBBI emphasised that continuing with the assignment without following the due processes establishes wilful contravention of procedures provided in the Code. "An IP has a larger responsibility owed towards the whole insolvency ecosystem, the acts of an insolvency professional should, therefore, be in consonance with the letter and spirit of the Code of Conduct of IBBI," the order concludes.

Future Retail: NCLT extends deadline till September 15 for completing insolvency process

The National Company Law Tribunal (NCLT) has extended the deadline to September 15, 2023 for completion of the insolvency resolution process of debt-ridden Future Retail Ltd. (FRL). The decision came on an application moved by the company's Resolution Professional before the Tribunal's Mumbai bench seeking to exclude a period of 29 days from the process, according to a regulatory filing. The NCLT on September 7, 2023, heard the application and granted the said exclusion of 29 days' for CIRP of FRL. Consequently, the last date for completion of CIRP of FRL is September 15, 2023. This is the third extension for FRL. Last month, NCLT extended the deadline to August 17 after allowing the plea of FRL to exclude 33 days from the CIRP. In April, the NCLT had granted the company an extension of 90 days till July 15, 2023 for concluding the process. The Insolvency & Bankruptcy Code (IBC) mandates the completion of CIRP within 330 days, which includes time taken during litigations. The insolvency proceedings against FRL was started by the tribunal on July 20, 2022.

NCLAT Dismisses Plea Seeking CIRP Against Wipro

The National Company Law Appellate Tribunal (NCLAT) at Chennai has dismissed a Corporate Insolvency Resolution Process (CIRP) application filed against the Indian multinational corporation, Wipro Limited. The Bench, consisting of Justice M Venugopal and Technical Member Shreesha Merla was hearing an appeal filed by the tech company, Tricolite Electrical Industries Ltd (TEIL), challenging the decision of the National Company Law Tribunal (NCLT) Bengaluru.

The National Company Law Tribunal (NCLT) in Bengaluru had previously dismissed TEIL's application filed under Section 9, which deals with the initiation of the corporate insolvency resolution process by an operational creditor. The reason for this dismissal was that Wipro was considered a commercially solvent company, making it ineligible for admission under Section 9 of the Insolvency and Bankruptcy Code. The dispute revolved around payment for services provided by TEIL to Wipro. TEIL claimed that Wipro had made 97% of the payment for the services rendered but had not paid the remaining 3%. TEIL argued that through an email, Wipro had admitted the existence of the amount due. Wipro argued that the 3% payment was withheld as a measure to assess customer satisfaction.

It was established that there had been a six-week delay on the part of TIPL in executing the assigned job, resulting in the deduction of liquidated damages amounting to 3%.

The NCLAT while dismissing the appeal noted that the primary focus of the legislation is revival and protection of corporate debtors. "The Hon'ble Supreme Court in the

matter of 'Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Anr.' (Supra) has held that 'the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors," the tribunal observed. The tribunal further noted that the spirit of IBC is the maximisation of assets and not recovery. "Regarding whether Section 9 Application can be entertained against a Solvent Company, the scope and objective of the Code has to be kept in mind before admission of such an Application. The spirit of the Code is maximization of the assets and Resolution and not Recovery," the tribunal recorded.



Bankruptcy court admits insolvency resolution plea against Goli Vada Pav

The NCLT has admitted Mumbai-based quick service restaurant (QSR) chain Goli Vada Pav Pvt. Ltd. under the corporate insolvency resolution process (CIRP) and has appointed Vinod Radhakrishnan Nair as the resolution professional of the company. Goli Vada Pav was taken to the Mumbai bench of the National Company Law Tribunal (NCLT) by Vista Processed Foods Pvt. Ltd, an operational creditor of the company, after it defaulted on dues of about Rs 3.56 crore.

The Bench, vide its order dated 5th September, 2023, observed that the application has been filed within the limitation and fit one to be admitted. Before the NCLT issued its order, the counsel for Vista Processed Foods argued that after numerous defaults in paying the outstanding dues, it had served a demand notice to Goli Vada Pav on November 15, 2022, followed by a revised demand notice on November 29, 2022, under the Insolvency & Bankruptcy Code (IBC). It submitted that despite the debt being an admitted debt, the corporate debtor has failed to pay the same.

Countering this, Goli Vada Pav argued through its counsel that the demand notice was buried by the limitation. The company also argued that the operational creditor (Vista Processed Foods) has wrongly claimed interest as there is no mention of any interest clause, either in the invoices or in the purchase orders. The Suspended management (of Goli Vada Pav) has the option to challenge the order before the appellate tribunal (NCLAT) or alternatively, it can settle the dispute with the operational creditor before the formation of the Committee of Creditors (CoC). Vista Processed Foods is part of the US-headquartered OSI Group that supplies frozen vegetable and chicken patties to several QSR brands across India. Founded in 2004 by Venkatesh Iyer and Shiv Menon, Goli Vada Pav has about 300 stores in 100 cities, according to the company website.

Jalan Kalrock Consortium files caveat in SC against lenders

Jalan Kalrock Consortium, the winning bidder for the revival of the grounded Jet Airways, has urged the Supreme Court to give it a hearing first before deciding a likely appeal by the Committee of Creditors (CoC) against the National Company Law Appellate Tribunal (NCLAT) order that gave it more time to pay Rs 350 crore to the lenders. The caveat was filed after NCLAT on August 28 allowed the consortium time till September 30 to pay Rs 350 crore. Jalan Kalrock Consortium agreed to to pay Rs 100 crore by August 31, another Rs 100 crore by September 30 and the remaining Rs 150 crore will be adjusted from an already existing performance bank guarantee. While the lenders did not object to the extension of time till September 30, they objected to the adjustment of the performance bank guarantee. On August 31, the consortium deposited the first tranche of Rs 100 crore.

A caveat is a filed by a litigant informing the court that the opposing party, which has not succeeded in the lower court, may file a case against them. The court has to hear both sides before passing any order if a caveat is filed. A committee of creditors is formed once a company is admitted to insolvency. It is a body of financial creditors that represents the interest of stakeholders.

On January 13, NCLT allowed the transfer of the beleaguered airline to the consortium led by London-based Kalrock Capital and UAE-based entrepreneur Murari Lal Jalan. However, the CoC took it to NCLAT opposing the transfer. Jet Airways was grounded in April 2019 over growing losses and a debt of about Rs 8,000 crore. In October 2020, the airline's CoC approved the revival plan submitted by the Jalan-Kalrock consortium.





RECENT JUDGMENTS

IDBI Trusteeship Services Limited v. Direct Media Distribution Ventures Private Limited

Mere fact that default amount is reduced by certain amount realised after the invocation of Corporate Guarantee and issued a new notice to Corporate Guarantor cannot change the date of default: NCLAT

The NCLAT held that where the date of default fell within the period covered under Section 10A, any subsequent payment made after the Section 10A period does not shift the date of default to take the same outside the Section 10A period for a Section 7 application to be maintainable.

Venkat Rao Marpina v. Vemuri Ravi Kumar

Advances made by Property Buyers To Real Estate Developers Are 'Borrowing' And Financial Debt: NCLAT Chennai

The NCLAT upheld the decision of the Adjudicating Authority to admit the Section 7 petition, by observing that the advances given by a real estate buyer to the developer would be considered as a borrowing and such amounts raised from real estate buyers would amount to financial debt within the meaning of Section 5(8)(f) of the Code.

Ahluwalia Contracts (India) v. Jasmine Buildmart Private Limited

Breach of a memorandum of settlement is capable of sustaining a Section 9 petition: NCLAT Principal Bench

The Principal Bench of NCLAT, in the aforementioned case, held that breach of a memorandum of settlement, arising out of an underlying operational debt which only specifies the mode and manner of payment, is capable of sustaining a Section 9 petition.

Anuratan Textiles Private Limited v. Amaira International Pvt Limited

When a petition is filed to initiate CIRP, before entertaining any application filed under Section 8 of the Arbitration Act, the application filed under the Code needs to be adjudicated first: NCLAT Delhi

The NCLAT, relying upon the decision of the Supreme Court in Indus Biotech Private Ltd Vs Kotak India Venture (Offshore) Fund and others (Arbitration Petition (Civil) No. 48/2019), rejected a decision of the Adjudicating Authority to direct the parties to refer the matter to arbitration based on an application filed under Section 8 of the Arbitration and Conciliation Act, 1996. The NCLAT observed that when a petition is filed to initiate CIRP, before entertaining any application filed under Section 8 of the Arbitration Act, it needs to first adjudicate on the application filed under the Code by recording a satisfaction with regard to debt and default.

Agarwal Polysacks Limited v. K. K. Agro Foods and Storage Limited

To prove a Financial Debt a Financial Creditor is not obligated to have entered into a 'written' Financial Contract: NCLAT Delhi

While examining the issue of whether a written contract is a pre-condition for proving a financial debt, the NCLAT noted that the usage of the word 'or' in Regulation 8 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, ("CIRP Regulations") would indicate that the said regulation does not contemplate execution of all the documents mentioned in such regulation and that the existence of debt can be proved by any of the documents referred to in sub-regulation (2). Further, while noting that a financial debt could be proved from other relevant documents, and not necessarily a written contract, the NCLAT observed that Form 26AS entries could be used to prove financial debt if it corroborates to the claim of the financial debt.

Engineering Mazdoor Parishad Devas Through Its General Secretary v. Teena Saraswat Pandey, Resolution Professional of S & H Gears Private Limited

Resolution Professional was justified in admitting the claim of workmen on the basis of the amount specified in the balance sheet: NCLAT Principal Bench

The NCLAT, in the aforementioned matter, held that the resolution professional was justified in admitting the claim of workmen on the basis of the amount specified in the balance sheet of the corporate debtor, where the workmen failed to provide relevant records to substantiate their claim.

Mayuras Industrial Services v. S R Shriraam Shekher

Withdrawal of CIRP approved with more than 90% of voting share cannot be rejected by the Adjudicating Authority: NCLAT Delhi

The NCLAT held that where the Committee of Creditors (CoC) has approved withdrawal of CIRP with more than 90% of voting share, such decision cannot be rejected by the Adjudicating Authority.

Deputy Commissioner, UTGST, Daman v. Rajeev Dhingra

Decision of Resolution Professional or CoC to reject a belated plan which contained various infirmities like non-submission of duly signed net worth certificate, audited financial statements, etc. could not be successfully challenged: NCLAT New Delhi

The NCLAT held that the decision of resolution professional or CoC to reject a belated plan which contained various infirmities like non-submission of duly signed net worth certificate, audited financial statements, etc. could not be successfully challenged, even where such a plan was more viable than the accepted resolution plan. The NCLAT further held that where a plan is rejected by CoC, the Adjudicating Authority cannot question the commercial wisdom of the CoC nor deal with the merits of resolution plan unless it is found to be contrary to the express provisions of law and against the public interest.

Further, the NCLAT held that the decision of resolution professional to not accept a delayed statutory claim filed after the approval of the resolution plan by the CoC could not be challenged as the CIRP Regulations do not enable the resolution professional to admit a claim beyond the prescribed time period.

Nitin Pannalal Shah v. Vijay Raja

An entity, registered as stock brokers under the SEBI Act, 1992 read with the SEBI (Stock-Brokers and Sub-Brokers) Regulations, 1992, would qualify as a financial service provider and would be outside the ambit of a corporate person defined under Section 3(7) of the Code: NCLAT Principal Bench

While analysing the definition of a corporate person, the NCLAT, in the aforementioned matter, noted that an entity which is registered as stock brokers under the SEBI Act, 1992 read with the SEBI (Stock-Brokers and Sub-Brokers) Regulations, 1992 would qualify as a financial service provider and would be outside the ambit of a corporate person defined under Section 3(7) of the Code and a corporate debtor defined under Section 3(8) of the Code for a Section 7 application to be maintainable against such entity.

Further, on the point of maintainability of appeals filed by the NSE against an order of admission filed against a stockbroker, the NCLAT noted that NSE being the market regulator had the locus to maintain such an appeal.

SAJ housing Private Limited v. Priyanka Chouhan

The concept of time value of money would also include a transaction that does not necessarily culminate into money being returned to the lender or interest being paid in respect of money that has been borrowed: NCLAT Delhi

The NCLAT, relying upon the decision of the Supreme Court in Orator Marketing (P) Ltd. v. Samtex Desinz (P.) Ltd. (Civil Appeal No. 2231 of 2021), noted that that the concept of time value of money would also include a transaction that does not necessarily culminate into money being returned to the lender or interest being paid in respect of money that has been borrowed and can include anything which is equivalent to the money that has been loaned as long as commercial effect of borrowing or profit as the aim is discernible. It, therefore, held that a financial debt does not exclude an interest free loan and merely because there was no interest associated, the nature of financial debt would not change. However, eventually the NCLAT noted that no financial debt existed as the amount was invested as return of profit share.

For enquiries related to:

- **Insolvency Process,**
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