*Can Tribunal pass an order directing Corporate Debtor who had not appeared before the Adjudicating Authority to settle the dispute/issue merely on grounds that claim amount is small under Insolvency and Bankruptcy Code, 2016 ("**IBC**")?*

Aster Technologies Pvt. Ltd. "Operational Creditor" or "OC"	**Solas Fire Safety Equipment Pvt. Ltd. "Corporate Debtor" or "CD"**

- The OC have supplied requisite goods and service to the CD. *The CD has addressed a letter dated 13.03.2018 to the OC stating that due to some un-avoidable circumstances, payments are delayed from their clients and funds flow was also not good since financial year ending, promised to clear the dues within 30 days period.*
- When CD failed to honour their promise, OC issued Demand Notice and thereafter CD raised dispute vide reply dated 13.12.2019.
- OC filed the Application under provision of IBC and the Tribunal issued Notice.
- On the date of return of Notice, the Appellant claimed that service is complete but none had appeared for Respondent.
- The Tribunal observed that the amount of the Operational Debt was small amount of Rs. 4.35 lakhs and thus instead of admitting the Application under IBC directed the CD to settle the issue and disposed of the Application with a direction to the CD (who was not yet served) to settle the issue or the OC would be at liberty to file fresh Company Petition.
- Thus aggrieved by the Order by the Tribunal, OC preferred an Appeal. CD submits that there was pre-existing dispute. CD also submits that the claim is barred by Limitation.
- ***Appellate Tribunal is of view that the approach of the Tribunal not in accordance with law. If the CD is not served, it has to be ensured that the CD is served with the notice and if after serving notice, CD does not appear, the Tribunal would be required to consider if the Application under IBC is complete and if there is debt due and default. If application is complete, it has to be admitted.***
- ***The present order however directs the Respondent to settle the issue who had not appeared before the Adjudicating Authority, which is most inappropriate. Thus the Appellate Tribunal directed to restore the application.***
- ***The Tribunal is requested to consider the Application as per provisions of IBC and decide the same as per law, after hearing the parties.***

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

What is the perquisite for the existence of operational debt under Insolvency and Bankruptcy Code, 2016 ("IBC")?

M/s. Shruti Impex **"Operational Creditor" or "OC"**	**M/s. N.R. Commercials Pvt. Ltd.** **"Corporate Debtor" or "CD"**

Brief Fact of the Case: -

- The application was dismissed by the Appellant Tribunal under IBC on the ground that there was dispute existed between both the parties.
- OC supplied polymer granules*on verbal orders* against 14 different invoices which amounts to Rs.2,40,95,981/-. Against this CD paid a total amount of Rs.24,51,080/- through cheque and RTG for which no valid proofs were produced by OC.
- The OC sent a statement of ledger account but received no response to this communication.
- Thereafter, the OC sent a demand notice ("**Notice**") on 08.07.2019 wherein OC has mentioned total amount due as Rs.3,24,31,116/- inclusive of interest calculated @ 18% per annum.
- On receipt of Notice, CD in reply denied existence of any business relationship between him and OC and also denied existence claim and unpaid operational debt by stating documents are fabricated.
- The CD also asked for forms trail including VAT returns and remittances of output taxes and also asked OC to substantiate their claims by furnishing details of the cheques and RTG mentioned in demand notice. The OC prima facie failed to prove the case.
- Thereafter, the OC filed an application on 25.9.2019 under IBC for initiation of Corporate Insolvency Resolution Process under "**CIRP**".
- Appellant Tribunal considered pleadings of the parties and the documents of the OC in order to confirm the supplies made to the CD and the payment made thereon by the CD to OC and they found discrepancy in those documents.
- It was also found that only one invoice dated 21.11.2016 for the amount of Rs.16,76,194/- is within limitation as the application was filed on 27.9.2019, which is within three years from the date of invoice.
- In view of the complete denial by the CD and the discrepancies found in various documents submitted by OC, Tribunal has inferred that the OC has not been able to, prima facie, prove her case and therefore, dismiss the application filed under Section 9 of IBC.
- The Appellant Tribunal noted that all the invoices contain just a stamp of CD stating "**Stocks Received**" which doesn't have signatures above the stamp and no clear identification of the person receiving the supplies mentioned in transportation for evidence.
- Provision of the IBC defines operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues**. Quite obviously provision of goods or services is a pre-requisite for the existence of operational debt.**
- In the present appeal CD has not only vehemently and flatly denied giving any purchase order for the said supply of polymer granules as claimed by OC or receiving any supply from her, he has in his reply to Notice challenged the OC to provide proof to substantiate their claim.
- Thus, the OC has not been able to prove any purchase order being given by the CD for supply of polymer granules by her and rebut the averment and argument of CD calling the claim false and fabricated.

Therefore, OC cannot claim any relief under Section 9 of the IBC. The appellant fails in her case and the appeal is, therefore, dismissed. There is no order as costs.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Does non-communication of order passed by Tribunal be the reason for seeking condonation of delay under Insolvency and Bankruptcy Code, 2016 ("IBC")?

M/s. Kuntal Construction Private Limited "Operational Creditor" or "OC"	M/s. Bharat HotelsLimited "Corporate Debtor" or "CD"

Brief Fact of the Case: -

- The CD approached the OC for availing itsservices and work orders dated 04.10.2011 and 14.10.2013 were issued forRs. 47,50,000/- and Rs. 2,07,00,000/- respectively.
- Partial payments were receivedfrom the CD from time to time and post adjustmentthe OC is claiming that there is an o/s liability of Rs.14,89,967/- including retention amount of Rs. 6,74,247/-.
- The OC contended that the main issue arrived from themutual settlement letter.It is noteworthy, that the CD has paid Rs. 18,67,489/-but stopped from clearing the balancecertified outstanding of Rs. 14,89,964/- without any reasons.
- The OC issued the demandnotice against the CD raising the payment of outstanding dues from the CD and later, the OC filled the petition before the Tribunal initiatingCorporate Insolvency Resolution Process ("**CIRP**") under IBC.
- The application was dismissed by the Tribunal under the IBC on the ground that there was **pre-existing dispute existed between both the parties.**
- Therefore the OC preferred an appeal and submitted that the impugned order passed by the Tribunal has not been communicated or served upon the OC, but the same was observed and downloaded from the web page of NCLT, Delhi. Thus there has been a delay of 13 days caused in filling the present appeal. For this an application seeking condonation of delay is filled before this Appellate Tribunal.
- The CD on the contrary contended that OChas not disclosed any patent illegality/perversity/misconduct.
- The CD also contended that the OC has not come to this Appellate Tribunal with clean hands in asmuch as the OC has not stated the facts as pleaded or argued by itbefore the Tribunal. The OC has concealed the factsthat it had neither disclosed nor filed the copy of **full and final SettlementLetter** written by them in the application before the Tribunal as well as the facts that the CD hasduly sent Reply/Notice of dispute under IBC to the OC.
- The CD argued that the OC is estopped to plead otherwise as there has been noclaim/outstanding liability of Rs. 14,89,967/- as alleged. The emailswritten by the OC only states about the retention amounts.The OC was fully informed about the retention moneybeing adjusted against the **"defects liability"**of the OC in terms of the Work Order. ***All other bills have been paid and final bill after adjusting mobilization, recoveries, etc.***
- From the above the Appellate Tribunal can conclude that since there was a ***dispute existing prior to the issuance of demand notice, the insolvency provisions cannot be invoked.*** The email communication dated23.01.2016 states about the OC having knowledge of retentionmoney being adjusted. Whether the CD was entitled to adjustthe retention amount are disputed question of law and fact and shall bedecided by the appropriate forum.
- Further it should be the duty of the counsel **to keep a track after the matter is reserved for pronouncement**. This is not avalid ground for requesting the condonation of delay. *There should be a sufficient cause for the delay and no one can claim condonation as a matter of right.*
- Thus the **Appeal is dismissed due to pre-existing dispute and being barred by Limitations Act.**

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Whether initiation of Arbitral Proceedings by the Corporate Debtor after Receiving Demand Notice qualify as pre-existing dispute under Insolvency and Bankruptcy Code, 2016 ("**IBC**")?

Ahluwalia Contracts (India) Limited **"Operational Creditor or OC"**	**Raheja Developers Limited** **"Corporate Debtor or CD"**

- The OC filed an application under IBC against the CD for initiating Corporate Insolvency Resolution Process ("**CIRP**").
- The Tribunal **rejected the application** on the ground that there is an **existing dispute as it is observed that the arbitration proceedings in respect of the same cause of action have been initiated.**
- Aggrieved by the order of the Tribunal, the OC has appealed to Appellate Tribunal contending that the **CD initiated arbitration proceedings after the receipt of Demand Notice** from the OC.
- The OC submitted the following-
    1. That the notice invoking arbitration was sent by the CD to the OC. The OC sent a letter to the Sole Arbitrator with a copy to the CD stating that the appointment of the Sole Arbitrator made by the CD was not acceptable to the OC.
    2. That the bill for civil and plumbing work executed by the OC was raised and certified by the CD.
    3. That the OC sent an e-mail to the CD requesting to provide the pending WCT ("Works **contract tax**") certificates for the years 2014-15 and 2015-16
    4. The OC also sent e-mail to the CD for the outstanding payment of Rs. 6,51,11,525/- towards actual work executed by the OC.
- The CD by letter alleged that there is a delay in execution of the works asserting that the claims of the OC were baseless and unsubstantiated.
- An e-mail was again sent by the OC for pending WCT certificates for the period from 2014-15 onwards, followed by e-mail dated 22nd March, 2018 requesting the CD to release long pending dues of Rs. 5.50 Crores and drawing attention of the CD of non-compliance of statutory requirements.
- On failure of payment, Demand Notice was issued by the OC to the CD;
- It was submitted that there is no pre-existing dispute with regard to the work done by the OC for which bills were raised which have been certified by the CD without any objection which suggest that the work performed by the OC are to the satisfaction of the CD.
- The amount claimed by the OC were derived from the CD's own admission in "Comparative Statement of Payment Status between OC and CD", therefore the CD cannot dispute the amounts.
- The CD contended that the OC failed to complete the work by due date and thereafter, abandoned the work. The work was subsequently completed and rectified by the CD, for which the CD had to incur Rs. 4,60,00,000/- approx. Therefore, the OC is not only liable to pay the said amount to the Respondent but also liable to pay interest @5% towards 'liquidated damages' in terms of the 'General Conditions of the Contract'.
- From the aforesaid findings, Appellate Tribunal is of view that it is clear that ***'claim' means a right to payment even if it is disputed***. Therefore, merely the CD has disputed the claim by showing that there is certain counter claim; it cannot be held that there is pre-existence of dispute, in absence of any evidence to suggest that dispute was raised prior to the issuance of demand notice or invoice.
- In the present case, it is not in dispute that the arbitration proceeding was initiated by the CD vide notice after about one month from the date of issuance of demand notice. Therefore, the CD cannot rely on arbitration proceeding to suggest a pre-existing dispute.
- Tribunal has wrongly rejected the claim on the ground that the claim raised by the Appellant falls within the ambit of disputed claim. Thus the impugned judgment is set aside and the Appeal is allowed.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team ~ K. Bagla& Associates
Company Secretaries
Insolvency Professionals

Can the Tribunal allow the pre-admission proceedings to be converted into an adversarial litigation under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Mirambica Infrastructure Private Limited "Operational Creditor or OC"	**Sanskrut Jewel Residency LLP & Ors. "Corporate Debtor or CD"**

- The OC filed an application under IBC before the Tribunal in the year 2019 is still pending consideration for admission and the order has been reserved on 23rd March, 2021 only to decide the ***Intervention Application***.
- Aggrieved by the impugned order dated 19th February, 2021 by virtue whereof the matter was adjourned to 23rd March, 2021, the OC preferred an appeal.
- The Appellate Tribunal after hearing the contentions of the OC before disposing of the Appeal, asked the Tribunal
  1. To abide by the provision of the IBC which provides for passing of an order of ***'admission' or 'rejection'*** of the Application of Operational Creditor filed within 14 days of the receipt of such Application.
  2. The Tribunal, not being a Civil Court and it ***being enjoined upon it to conduct the Corporate Insolvency Resolution Process in a time bound manner as delineated by the IBC.***
  3. The Tribunal should ***not allow the pre-admission proceedings to be converted into an adversarial litigation.***
  4. Speed being the password in CIRP proceedings, the Adjudicating Authority has to act in a ***swift manner and not allow the proceedings to be hijacked by a person or entities to put a spoke in the wheel, so as to render the process nugatory (of no value).***
- The Tribunal would do well by focusing upon the issue in regard to admission or otherwise to ***consider the Application on merit and pass an order in that regard most expeditiously, preferably within 10 days.***

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Is there any provision in the Insolvency and Bankruptcy Code, 2016 ("IBC") for serving free copies of the Order passed by the Tribunal to the Parties?

Spacevision Impex Pvt. Ltd. "Corporate Debtor or **CD**"	Mr. Gursharan Singh "Director and Shareholder of CD or **Director**"	The State Trading Corporation of India Ltd. "Operational Creditor or **OC**"	Mr. Devinder Arora Interim Resolution Profession ("**IRP**")

- ✓ The OC filed application under IBC before the Tribunal and the application was admitted on 08th May, 2019.
- ✓ Aggrieved by the order the CD preferred an appeal along with appeal for condonation of delay.
- ✓ The Director claims that the Impugned Order ("**Order**") was passed ex-parte. In the first week of June, 2019, an envelope from IRP was received in his absence. It is claimed that the envelope was not opened and kept by the wife of Director.
- ✓ He came to know about the Order on 25th June, 2019 when he returned from his trip to Bangalore. It is claimed that the envelope did not contain the copy of the Order ***and no free copy of the Order was received by the Director or the CD.***
- ✓ The Director filed application for inspection of records on 28thJune, 2019 and the inspection was received on 05thJuly, 2019 and application for certified copy was filed on 08th July, 2019 which was received on 15th July, 2019. According to the Director then he had knowledge of the Order and after taking necessary steps, the Appeal was filed on 13th August, 2019. Thus, according to the Director, there is delay only of four days.
- ✓ The OC has filed reply opposing the application to condone the delay. They claimed that the record of IRP shows that various efforts were made to serve the Director, the CD as well as the other Director and the Appeal is time-barred.
- ✓ The IRP stated that he had sent communication that Corporate Insolvency Resolution Process ("**CIRP**") has been initiated against the CD. He has sent another letter requesting the suspended Board of Director of the CD the Information/Documents/Books along with a copy of the Order.
- ✓ The Reply of IRP shows that IRP also sent e-mail on the official e-mail as found on the website of Ministry of Corporate Affairs. The IRP made genuine efforts to communicate the order to the Director.
- ✓ The Appellate Tribunal is of view that if on the address of the Director, the IRP had served letter and the ***communication having been served on adult member of the family of the Director, service of the letter must be said to be complete on that date.***
- ✓ The certified copy of Order was received on 15th July, 2019. After receiving the certified copy, the Appellant consumed another 28 days and the Appeal was filed only on 13th August, 2019.
- ✓ ***The Appeal under IBC has to be filed within 30 days. The Tribunal may allow an Appeal to be filed after the expiry of said Period of 30 days if it is satisfied that there was sufficient cause for not filing the Appeal in time but such period shall not exceed 15 days.***
- ✓ Even if limitation was to be counted from 07thJune, 2019 as mentioned above, the Appeal filed on 13th August, 2019 and is said to be barred by limitation as it was not filed within 30 days plus 15 days of knowledge. ***The Application to condone the delay is rejected. The Appeal being time barred, the same is rejected.***

There is no such provision in the IBC for serving free copies of the Order passed by the Tribunal to Parties!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

*What if the Authorisation to file applicationis prior to the enactment of Insolvency and Bankruptcy Code, 2016 ("**IBC**")?*

Altius Travels Private Limited "Corporate Debtor or **CD**"	TekTravels Private Limited "Operational Creditor or **OC**"

Brief Facts of the Case

- The OC made an application for initiating Corporate Insolvency and Resolution Process ("**CIRP**") against the CD but the same got rejected on the grounds of maintainability for want of proper authorisation, which is of the year 2013 when I&B Code 2016 was not in existence.
- It is contended:-
    1. There is no specific provision neither in IBC nor under its rules and regulations, which mandates authorisation post-enactment of the IBC. Instead of deciding the application on merit, the Tribunal rejected the application as not maintainable for want of proper authorisation, which happens to be of 2013 when the IBC was not in existence.
    2. The Tribunal should have granted the liberty to rectify the defects, if any. However, it failed to neither provide an opportunity of being heard to the OC on account of principles of natural justice nor account of non-compliance of the proviso the IBC.
- ***The CD contended*** that the authorisation contemplated under the IBC could only be of the post-enactment of the Code and since authorisation goes to the root of the matter, the same cannot be treated as a 'curable defect' that can be rectified within seven days. ***An incomplete or improper authorisation vitiates the entire proceedings at the inception itself.***

Discussions and Finding:

1. *Whether Authorisation for filing a Petition under IBC before the commencement of the IBC can be treated as a valid authorisation?*

- In the case of Ramesh Murji Patel v Aramex India Pvt Ltd. Company Appeal (AT) (Ins)No 1447 of 2019 wherein it is held that; "***authorisation letter, even if, issued prior to the enactment of I&B Code can be looked into for the purpose of entertaining an Application under Section 7 or 9 of the Code***".Thus evenif Authorisation is prior to the enactment of the Code, then it cannot be treated as a defect in the application and authorisation letter, even if, issued prior to the enactment of I&B Code can be looked into for the purpose of entertaining an Application under Section 7 or 9 of the Code.

2. *Whether Tribunal instead of dismissal of the Petition should have given the opportunity to rectify the defects as per proviso under IBC?*

Proviso of IBC

The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order— reject the application and communicate such decision to the operational creditor and the corporate debtor, if—a) the application made under sub-section (2) is incomplete;
Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

- Authorized Representative is required to write his name and address and position in relation to the Financial Creditor / Operational Creditor. If there is any defect, in such case, an application cannot be rejected and the applicant is to be granted seven days' time to produce the Board Resolution and remove the defect.

Thus from the above findings, Appellate Tribunal allowed the appealgrant permission to remove the defects within seven days as mandatory and on failure, Applications to be rejected, is set aside.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

If the debt fell due on 01.02.2017 and the Application under Insolvency and Bankruptcy Code, 2016 ("IBC") is filed in the year 2019 does the same is said to be filed within the period of Limitation?

SMS Integrated Facility Services Private Limited **"Operational Creditor or OC"**	Expat Educational Institute **"Corporate Debtor or CD"**

- The Tribunal has disposed the application filed by the OC against the CD initiating Corporate Insolvency Resolution Process ("**CIRP**") under IBC, against which an appeal has filed by the OC.
- The Tribunal while passing order observed that, it is necessary that the CD should be aware ofCIRP mandates that be aware of proceedings and principles of natural justice.
- It is also relevant to the point out here that consideration of mere debt theand default in question, without knowing/serving notice on the **information notice on to the CD**, would be pointless exercise.
- Claim in question relates since March 2017 to December, 2017, wherein the invoices issued by the OC were still pending and due and on 15.11.2017, the Director of the CD through email assured that they would make payments in respect of the dues on monthly instalment basis, as they were passing through a financial crisis.
- Due to non-payment of the dues the OC issued Demand Notice to the CDon 12th June, 2019 and thereafter filed the Petition.
- The OC has not initiated any legal proceedings prior to the instant proceedings and also has not explained the reasons for not initiating proceedings earlier.
- As per the MCA, the CD is Active non-compliant and if the Company failed to comply with statutory compliances, the Registrar of Companies **("ROC")**can takeappropriate action to strike off it. And while striking off the Company, the ROCcan take into consideration of interest of the OC.
- **The Tribunal held that, as per the circumstances of the case, the Company petition is barred by Laches and Limitation**, and it is filed with an intentionto recover alleged debts, which is against the object of Code.The Tribunal on the aforementioned reasons disposed of the application and directed the ROC to check compliances and to take appropriate action.
- The OC submits that the Tribunal had committed an error despite of the fact that **the notices was served upon the CD on 03.02.2020 and later on 08.01.2021 and 'Affidavit of Service' was filed before the Tribunal.**
- The OC submitted that the OC had fulfilled the criteria as specified for the application under IBC; still the Tribunal had passed an irrational order, which is in violation ofLaw of the Land.
- **In this case the debt fell due on 01.02.2017 being the date of last invoice raised by the OC.**
- **The application was filed before the Tribunal in the year 2019 which is well within the period of Limitation.**
- The Appellate Tribunal found that, the Tribunal had committed anerror in making an observation that the 'Application' suffered from 'Delay and Latches'.
- The Appellate Tribunal comes to the conclusion after considering the facts of the case that the Tribunal had committed an error in issuing directions to the ROC to examine compliances of the CD.
- The Appellate Tribunal set asides the impugned order passed by the Tribunal and appeal is allowed. **Thus the debt fell due on 01.02.2017 and application under IBC if filed in the year 2019, the same is said to be filed within the period of Limitation.**

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can a demand notice issued before the notification dated 24.03.2020 debars the claim which is below revised limit of Rs. 1 crore under Insolvency and Bankruptcy Code, 2016 (IBC)?

RMS Power Solutions Private Limited. "Corporate Debtor or CD"	**BLS Polymers Limited. "Operational Creditor or OC"**

The OC filed an application under IBC for initiation of Corporate Insolvency Resolution Process ("**CIRP**") against the CD for the total amount of Rs. 35,74,942/-. Objection was raised in the light of the notification, *minimum amount limit to trigger the insolvency proceedings is enhanced from* ***1 lakh to 1 crore***.

The following are the admitted facts of the case:

- The invoice was raised by the OC on 07.08.2019 & 05.09.2019 for PO dated 04.09.2019 was prior to the issuance of the notification.
- The demand notice was delivered on 16.03.2020, prior to the issuance of the notification.
- The CD has received the demand notice on 21.03.2020.
- The CD in its reply to the demand notice has raised the question of maintainability, in view of the minimum threshold amount enhanced from Rs. **1 lakh to 1 crore vide notification dated 24.03.2020**

The OC submits that the CD had issued two cheques but the said cheques were dishonored. As per the invoices, the amount became due and payable after 15 days from the date of invoices.

The statute is presumed to have a prospective effect to tackle large scale insolvencies as a result of lockdown due to COVID-19 pandemic unless it is held to be retrospective either expressly or by necessary implication.

The question is whether by issuance of said notification under IBC, can a right, which has already accrued to a person, can be taken away by that notification, which is admittedly issued thereafter. As we have observed that every notification has prospective effect and so far as the filing of application is concerned, it can only be filed, if the default in making payment has occurred, and where Demand Notice is to be delivered after the default in case of section 9 application.

The Limitation Act is also applicable from the date when the default has occurred which is *"Three Years, When the right to apply accrues."*

Right to apply accrues when default has occurred. Therefore, the application can be filed within three years from the date when right accrues when the default has occurred. If the statute provides a person to file an application within a prescribed period, when the right accrues, then by exercising delegated powers, an executive cannot take away that right and it is also not the intention of the executive. A right, which is vested, cannot be divested. No doubt, it is a well settled principle of law that once a right is vested, it cannot be divested.

The Tribunal is of the considered view that once the default has occurred prior to the issuance of notification dated 24.03.2020 and demand notice was also sent/ delivered prior to notification, the enhancement of the threshold limit from one lakh to one crore rupees is not applicable in such matters.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team ~ K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Whether a Civil Suit filed after receipt of demand notice amounts to pre-existing dispute under Insolvency and Bankruptcy Code, 2016 ("IBC")?

G. T. POLYMERS "Operational Creditor or OC"	Keshava Medi Devices Private Limited "Corporate Debtor or CD"

The OC filed an application under IBC for initiation of Corporate Insolvency Resolution Process ("**CIRP**") against the CD. The Tribunal dismissed the same on the ground that the claim of the Appellant falls within the ambit of disputed claim.
The OC supplied goods to the CD and raised invoices for the same but the CD did not honour the invoices and clear the dues.
The OC issued demand notice to the CD under IBC which was disputed by the CD through reply to the demand notice indicating that it had filed a civil suit and seeking declaration that CD has no outstanding dues to be paid to the OC.
The CD resisted the claim on the ground that invoices were paid but the OC forged an undated letter of balance confirmation showing as an acknowledgement of debt of Rs. 23,04,537/-. After receiving the notice, the Respondent has filed suit before City Civil Court Chennai. There is a pre-existing dispute. Therefore, an Application under IBC is not maintainable.
The Tribunal has reached to the conclusion that the OC failed to prove that the CD owns an operational debt and there is pre-existing dispute about claim and rejected the application filed under IBC.
The OC contended that the goods were received and accepted by the CD and there was *no dispute at the time of delivery of goods in regards to quantity and quality of goods* and CD had filed civil suit after receipt of demand notice with an intention to resist the application filed under IBC.
The Appellate Tribunal found that, the CD has received the Demand Notice on 28.09.2018 and sent a reply to the notice on 05.10.2018. Thereafter CD has filed civil suit, thus it is clear that the CD has filed suit after receipt of Demand Notice, therefore, it will not be a pre-existing dispute under IBC.
Appellate Tribunal was of the view that the operational debt is due and payable and has not been paid. There is no dispute or a suit pending before receipt of Demand Notice.
The Appellate Tribunal from the records found that the CD has defaulted to pay operational debt and in the absence of any pre-existing dispute, the application filed by the OC was fit to be admitted.
The Appellate Tribunal remitted the case to the Tribunal for admitting the application under IBC after notice to the CD to enable the CD to settle the matter prior to admission.

The Civil Suit filed after receipt of the demand notice, will not amounts to pre-existing dispute under IBC.

Can a shareholder of the Corporate Debtor file application under section 7 of Insolvency and Bankruptcy Code, 2016 ("IBC")?

Joel Cardoso "Financial Creditor or FC"	Priority Marketing Private Limited "Corporate Debtor or CD"	Shailesh Sangani Promoter/Shareholder/Director of CD or Director

- The FC had filed an application under IBC for initiation of Corporate Insolvency Resolution Process ("**CIRP**") against the CD and the same was admitted by the Tribunal.
- Aggrieved by the order Director preferred an appeal on the ground that the amount claimed by FC is not a '*Financial Debt'* within the meaning of under provisions of IBC and the FC cannot be treated as a '*Financial Creditor'* for the purposes of IBC.
- The FC, is the Shareholder of CD, and have filed an application under IBC on the ground that the FC had granted unsecured loan repayable on demand to the CD which was duly reflected in the financial statements of CD and CD also issued balance confirmation as on 1st April, 2016 and since the CD did not repay the loan amount, FC served a notice of demand upon the CD, which was not complied.
- The CD further stated that the unsecured loan was a part of overall settlement and it was ready to settle the cross holding of shares and loans inter-se the respondents. The CD further contended that none of the loans under the quasi partnership arrangement inter-se the CD had any term for repayment or interest.
- The Tribunal was of the view that the said amount was arrived at after the parties mutually agreed and the same was reflected in the books of the CD under the head 'long term borrowings', the amount of debt fell within the purview of 'financial debt' notwithstanding the fact that no interest was payable. The contention raised by the CD was accordingly repelled.
- It is submitted by FC that the ledger account maintained by the CD clearly reflects the loan amounts provided by FC at different intervals and repayments made to him by the CD.
- A plain look at the definition of 'financial debt' brings it to fore that **the debt along with interest**, **if any**, should have been disbursed against the consideration for the time value of money. Use of expression ***'if any' as suffix to 'interest' leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of 'financial debt'.***
- **The amount disbursed as debt against the consideration for time value of money may or may not be interest bearing.** What is material is that the disbursement of debt should be against consideration for the time value of money.
- It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Company as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the part of CD notwithstanding the fact that no provision is made for interest thereon.

Thus a shareholder of the Corporate Debtor can file application under section 7 of IBC!

Can a claim of Operational Creditor be rejected if the entire principal amount is paid by the Corporate Debtor within 10 days after receipt of the demand notice under Insolvency and Bankruptcy Code, 2016 ("IBC")?

M/s. Good Luck Traders "Operational Creditor or OC"	M/s. Valley Iron & Steel Co. Ltd. "Corporate Debtor or CD"

- The OC had filed an application under IBC for initiation of Corporate Insolvency Resolution Process ("**CIRP**") against the CD and the same was rejected by the Tribunal on the following grounds:
  1. *The entire principal amount was paid within 10 days of receipt of demand notice. Accordingly, it can be concluded that CD has already paid the principal amount due towards unpaid invoices and no amount towards invoices remained to be paid by the CD to the OC.*
  2. *In the present application, the OC has failed to explain the delay as their claim pertains of the year 2012, which is beyond the limitation period of 3 years. The same should not be entertained for triggering CIRP under IBC."*
- Having found that the observations made by the Tribunal is contradictory as at one stage, it is stated that the entire principal amount has been paid and at another stage it observed that the application is beyond the period of limitation.
- CD submits that the total amount has been paid and the CD has not raised the question of limitation. However, such submission cannot be accepted as the Tribunal has observed that the OC failed to explain the delay which pertains to the year 2012.
- Appellate Tribunal have noticed that by Demand Drafts of February, 2018, CD paid certain amount. In such case, the Appellate Tribunal is of the view that the amount having last paid in February, 2018 the application is not barred by limitation.
- The OC submits that after issuance of Demand Notice, the CD also paid a sum of Rs. 39,46,440.26 through RTGS dated 31st May, 2018, therefore, it cannot be said to be a delay or held to be beyond limitation.
- ***The meaning of "debt", tells us that a debt means a liability of obligation in respect of a "claim" and the meaning of "claim", is a right to payment even if it is disputed.***
- It is evident that the claim is disputed, Appellate Tribunal find that the ground of delay wrongly shown by the Tribunal. Further no ground has to be given as to why the claim of the OC has not 'Operational Debt'.
- CD submits that the total amount as was due to the OC has already been paid but Appellate Tribunal have noticed that it is disputed. However, such issue cannot be determined by them so it would have been brought to the notice of the Tribunal.
- Appellate Tribunal set aside the order dated 17th December, 2018 and remit the case to the Tribunal to pass order issue after notice and hearing the parties.

No, claim of Operational Creditor cannot be rejected if the entire principal amount is paid by the Corporate Debtor within 10 days after receipt of the demand notice if such claim is disputed!

Team ~ K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can a Corporate Debtor take a stand of no default alleged, if there are directions of Hon'ble Supreme Court to stop payment of Operational Creditor under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Mr. S. Gurumoorthi "Operational Creditor or OC"	M/s. Sahara Q Shop Unique Products Range Limited "Corporate Debtor or CD"	Sh. Romi Datta, Shareholder of CD

- The OC had filed an application under IBC for initiation of Corporate Insolvency Resolution Process ("**CIRP**") against the CD and the same was admitted by the Tribunal.

- Aggrieved by the order, the Shareholder of CD preferred an appeal as the order was passed ex-parte and suffers from various infirmities. According to him, the Hon'ble Supreme Court has prohibited 'Sahara Group of Companies' to pay any amount to any person.

- The Hon'ble Supreme Court disposed of the applications of Sahara Group Companies with the observation that the prayers herein are deferred for the time being and would be considered upon the deposit of the balance amount therein in compliance of its judgment/ final. Thus CD being one of the 'Sahara Group Companies' cannot pay any amount even to OC and therefore, ***no default can be alleged.***

- It is further submitted that CD is a trading member and client of the 'Indian Bullion Market Association Ltd.' and as such it was supposed to receive a sum of Rs. 226.96 crores from the 'National Spot Exchange Ltd.' (NSEL), however, the 'Security Exchange Board of India' (SEBI) vide its to NSEL called upon it not to release any amount due and payable to CD till further instructions.

- OC submitted that the orders, relied upon by Shareholder, have no implication on CD's hand because even after passing of the said orders, the CD has paid salary, Income and Provident Fund.

- The Contempt Petitions were preferred by 'Sahara India Real Estate Corporation Ltd.' and 'Sahara Housing Investment Corporation Ltd.'. resultantly, all orders that have been passed by the Hon'ble Supreme Court are to be read and understood in the context of these two companies only. ***Thus it is clear that the 'Corporate Debtor' is nowhere within the frame of the Contempt Petitions.***

- The Appellate Tribunal is not inclined to interfere with the impugned order on purported ground that there is no default on the part of the 'Corporate Debtor'.

No, a Corporate Debtor cannot take a stand of no default alleged, if the directions of Hon'ble Supreme Court for stop payments is nowhere for the Corporate Debtor!

Can the order triggering Corporate Insolvency Resolution Process be vacated if the Corporate Debtor agreed for the settlement and Committee of Creditors was not constituted under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Olive Tree Trading Private Limited **"Corporate Debtor or CD"**	Sujeet Suresh Shah **"Appellant or Shareholder of the CD"**	Savino Del Bene Freight Forwarders India Pvt. Ltd. **"Operational Creditor or OC"**

Brief Facts

- An Application with the Tribunal has been filed by the OC for initiating Corporate Insolvency Resolution Process (**"CIRP"**) and the same was accepted by the Tribunal.
- When the matter was taken up, the Appellant has agreed to pay the default amount and settle the matter but the Committee of Creditors (**"COC"**) having not been constituted in the meantime.
- An Interim Resolution Professional (**"IRP"**) submits that IRP has received *six claims* but COC has not been constituted.
- The Appellant in its affidavit agreed ***to pay the outstanding amounts towards full and final settlement of all outstanding dues of OC on or before the due dates.***
- Another affidavit has been filed by OC wherein OC ***intends to accept the defaulted amount of Rs. 10,12,101/- in two equal installments and the balance amount restricted to Rs.5 lakhs which includes the fee of IRP as suggested by this Appellate Tribunal and agreed to by the Appellant.***

- The Appellate Tribunal is of the view that, the parties have reached the settlement which undertake to pay fee and cost of the IRP and that the COC have yet not been constituted.
- Therefore, Appellate Tribunal set aside the order passed by Tribunal initiating CIRP and disposed of the application filed by OC as withdrawn.
- The Appellant was directed to comply with the undertaking given before the Appellate Tribunal, failing which CIRP may be restored.
- The CD released from the rigour of CIRP by the Appellate Tribunal.

The order triggering CIRP can be vacated if the CD agreed for the settlement and Committee of Creditors was not constituted.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Wednesday Weekly Series 104
Date: - 27.10.2021

Team- K. Bagla & Associates
Company Secretaries
Insolvency Professionals

*Can a Successful Resolution Applicant ("**Successful RA**") be allowed to face the claims filed or admitted after the Resolution Plan ("**RP**") is approved by Committee of Creditors ("**CoC**") under Insolvency and Bankruptcy Code, 2016 ("**IBC**")?*

M/s Jyoti Structures Ltd. **"Corporate Debtor or CD"**	Deputy Commissioner of Customs DEEC **"Appellant"**

- An Application with the Tribunal for initiating Corporate Insolvency Resolution Process (**"CIRP"**) was accepted by the Tribunal.
- Appellant made an application for condonation of delay of 1111 days in submitting proof of claim against the CD to accept and admit the claim of Appellant and the same was rejected by the Tribunal.
- Thus Appellant aggrieved of rejection of its application preferred an appeal to recall the order on the ground that the Resolution Professional failed to check/consider Book of Accounts vis a vis Appellant while making the Resolution Plan and the Tribunal failed to appreciate the important issue.
- RP in the CIRP against the CD has been approved by the CoC as also by the Tribunal.
- Section 31 (1) of the IBC would come into play which provides that the RP approved by the CoC shall be binding on all stakeholders.
- After approval of the RP by the Tribunal, the Successful RA could not be allowed to be faced with claims filed or admitted after the RP was submitted by such Successful RA.
- The Successful RA, before submission of the Prospective RP is entitled to know the liability of the CD so that he can tailor his Prospective RP accordingly and make provision for satisfaction of the claims and making payments in terms of the approved RP.
- It is not disputed that the claim has been filed by the Appellant not only at a highly belated stage but also after approval of the RP. In these circumstances, the Tribunal was right in rejecting the application as being non maintainable.

A Successful RA cannot be allowed to be faced with claims filed or admitted after the RP was approved by CoC under IBC!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Wednesday Weekly Series 105
Date: - 10.11.2021

Team- K. Bagla & Associates
Company Secretaries
Insolvency Professionals

*Can the Tribunal impose moratorium before initiation of Corporate Insolvency Resolution Process ("**CIRP**") under Insolvency and Bankruptcy Code, 2016 ("**IBC**")?*

NUI Pulp and Paper Industries Pvt. Ltd. "Corporate Debtor or **CD**"	M/s. Roxcel Trading GMBH "Operational Creditor or **OC**"

- OC filed an application under IBC against CD for initiating CIRP.
- Appellant made an application for condonation of delay of 1111 days in submitting proof of claim against the CD to accept and admit the claim of Appellant and the same was rejected by the Tribunal.
- CD submitted that there is an existence of dispute between the parties and thereby prayed for time for filing reply.
- On the request of CD, time was allowed to file reply affidavit and time was also allowed to OC for file rejoinder.
- However, the Tribunal passed as order *restraining the Corporate Debtor and its Directors from alienating, encumbering or creating any third party interest on the assets of the CD till further orders.*
- Thus CD preferred an appeal stating that before admission of an application under IBC, the Tribunal has no jurisdiction to restrain the CD and its Directors from alienating, encumbering or creating any third party interest on the assets of the CD.
- This inherent power can be exercised if it comes to the notice on receipt of reply that CD somehow or other trying to get adjournment or to alienate the matter. No such ground having shown by OC on the first day of issuance of notice or allowing CD to file reply. The Tribunal has no jurisdiction to pass interim order.
- *OC submitted that there was an apprehension that CD and its Directors are intended to sell the assets of CD to defeat the purpose of IBC and cause wrongful losses to all the creditors including the OC. It is always open to the Tribunal to pass interim order.*

Inherent Powers.- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

- From the aforesaid Rule 11, it is clear that the Tribunal can make any such order as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.
- It is clear that once an application under IBC is filed by Tribunal, it is not necessary for the Tribunal to await hearing of the parties for passing order of 'Moratorium' under IBC.

Yes, the Tribunal can impose moratorium before initiation of CIRP under IBC!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team- K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can a Corporate Debtor undergoing liquidation initiate Corporate Insolvency Resolution Process "CIRP" against its Debtors by filing an application under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Gupta Coal India Pvt. Ltd. "Corporate Debtor or **CD**"	Abhay N. Manudhane "Liquidator of CD"

- The Liquidator on behalf of the CD preferred an application under IBC for initiating CIRP against the Debtors of the CD and the same was rejected by the Tribunal.
- The appeal has been preferred by the Liquidator against the order passed by Tribunal.
- The Liquidator submitted that, as per the provisions of IBC no suit or other legal proceedings shall be instituted by or against the CD, provided that a suit or other legal proceedings may **be instituted by the liquidator on behalf of CD**, with the prior approval of Tribunal.
- The Liquidator intends to file application under IBC for initiating CIRP against different companies, there being debt payable to the present CD against other companies or against other corporate debtors.
- However, such submission was not accepted in view of specific prohibition under Section 11 of IBC. As Section 11 talks about the persons who are not entitled to make application to initiate CIRP.

> *Section 11 of IBC. Persons not entitled to make application: -*
>
> a) *a corporate debtor undergoing a corporate insolvency resolution process; or*
> b) *a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or*
> c) *a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or*
> d) *a corporate debtor in respect of whom a liquidation order has been made.*

- ***Thus as per section 11(d) of IBC***, no application can be filed by the CD, which is under liquidation.
- Thus from the above the Appellate Tribunal dismissed the appeal

CD undergoing liquidation cannot initiate CIRP against its Debtors by filing an application under IBC.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Wednesday Weekly Series 107
Date: - 24.11.2021

Team- K.Bagla & Associates
Company Secretaries
Insolvency Professionals

Whether exchange of legal notice between Operational Creditor and Corporate Debtor prior to issuance of Demand Notice amounts to existence of dispute under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Narender Sharma "Operational Creditor **or OC**"	Vistar Construction Pvt. Ltd. "Corporate Debtor or **CD**"

- The OC was Civil Engineer of CD and he was forced to resign from service on 27th May, 2015. Subsequently he issued a Demand Notice under IBC on 21st July, 2017 to one 'Three C. Developers' showing him as 'Corporate Debtor'.
- However, an application with the Tribunal under IBC was filed by the OC against CD.
- The Tribunal has noticed that the notice issued on 21st July, 2017 was addressed to one 'Three C. Developers' and not to the CD.
- In this background, OC withdrew the petition filed against CD with liberty to file fresh petition which was granted by the Tribunal.
- Subsequently Demand Notice was issued to CD on 5th October, 2017 which was followed by an application under IBC and the same was rejected by the Tribunal on the ground of pre-existing dispute.Thus OC preferred an Appeal.
- The OC submitted that there is no pre-existing dispute and the suit was filed in the court of Noida on 16th October, 2017 itself much after the Demand Notice dated 5th October, 2017 and therefore, such suit cannot be relied upon to hold pre-existing dispute.
- However, on perusal of the records the Appellate Tribunal found that the OC earlier sent a legal notice on 4th April, 2017 to the CD.
- The reply by the CD dated 5th October, 2017 to the legal notice of the OC, raising allegations on account of the wilful negligence and default on part of the OC and dispute relating to payment which was much prior to the issuance Demand Notice issued under IBC.
- The Appellate Tribunal is of the view that there was a pre-existing dispute and the appeal was accordingly dismissed.

Thus exchange of legal notice between OC and CD prior to issuance of Demand Notice under IBC amounts to existence of dispute under IBC!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can a Financial Creditor challenge the admission of Corporate Insolvency Resolution Process ("CIRP") of other Financial Creditor under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Srei Multiple Asset Investment Trust **"Appellant"**	**IDBI Bank Ltd.** "Financial Creditor **or FC"**	Odisha Slurry Pipeline Infrastructure Limited "Corporate Debtor or **CD**"

- FC filed an application under IBC for initiation of the CIRP against CD alleging default in paying financial debt of Rs.4,71,59,37,171/- which has been admitted.
- Appellant had filed an intervention petition to oppose the prayer. However, it was not entertained by the Tribunal.
- Appellant moved before the "**AT**" wherein it held that Appellant has no right to intervene at the stage of admission. However, Appellant was allowed to file written submissions not more than three pages before the AT on direction of the AT to consider the same.
- Appellant opposed the application only on the ground that they also gave loan of Rs.136.50 Crore to the CD on the basis of the Business Transfer Agreement ("**Agreement**").
- The Appellant contended that the claim of the FC was considered by the Resolution Professional ("**RP**") in the CIRP which was initiated against 'Essar Steel India Limited' and was pending before the Tribunal. Therefore, for the same claim amount the FC cannot file application against CD.
- In the present appeal, the Appellant has taken a plea with no record in support to such plea. However, as AT find that FC had also granted loan to the CD, they hold that the application filed by the FC has been rightly admitted.
- The Appellant had enclosed a copy of Agreement between 'Essar Steel India Limited' and CD. From the said Agreement, it is clear that CD was treated as integral part for functioning of 'Essar Steel India Limited'. However, the Agreement shows that the two entities remained separate entities (companies) under the Companies Act, therefore, separate application was maintainable against CD
- The Tribunal has also noticed that the loan was taken by the CD was not refunded and the CD defaulted to pay the debt, which is not in dispute. The 'Loan Agreement' which was reached between CD and FC also show that a sum of Rs. 400 Crores was borrowed by CD from FC
- the Promoters/ Directors of the CD who are aggrieved parties have not preferred any appeal IBC. Thus the AT is of the view that the contention of the Appellant is not correct.

No, a Financial Creditor cannot challenge the admission of CIRP of other Financial Creditor under IBC!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can Financial Creditor withdraw concessions of Corporate Debtor or prepone date of Repayment if provided in the Agreement to trigger Default under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Oriental Bank of Commerce & Others "Financial Creditor or FC"	M/s. L&T Halol Shamlaji Tollway Limited "Corporate Debtor or CD"

1. FC filed an application under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process ("**CIRP**") against CD which was admitted by the Tribunal.
2. Aggrieved by the order, CD preferred an appeal on the ground that there was no default on the part of the CD and therefore, the application under IBC was not maintainable.
3. CD contended that a project was allotted to the CD and pursuant to the 'Concession Agreement', the Gujarat State Road Development Corporation "**GSRDC**" has granted a concession in accordance with the terms and conditions set forth in the 'Concession Agreement'.
4. For the purpose of the aforesaid project, CD reached Common Loan Agreement "**CLA**" with FC on 28th August, 2009.
5. Pursuant to CLA the amount was disbursed in different phases which was subsequently amended vide Master Restructuring Agreement "**MRA**" reached on 14th February, 2017.
6. One of the clause of the CLA suggests 'Events of Default and Remedies'. One of the clause says that *FC shall have a right to reverse any waivers or concessions that has been granted as a part of these Agreement if any defaults occurs.*
7. FC contended that it on 08.11.2016 wrote a letter to GSRDC stating that the revival package of CD will be based on adoption/ implementation of measures proposed by Banks and GSRDC, which are- conversion of debt to the tune of Rs.410 crores into equity and GSRDC to take share of Rs.210 Crores out of the proposed equity of Rs.410 crores by 31.12.2017 but GSRDC didn't take the equity.
8. FC in the Recall Notice intimated the CD that CD failed to comply with the concession mentioned in the MRA. CD failed to repay the loan as demanded by the FC.
9. From the facts as referred and noticed above, Appellate Tribunal find that the CD in terms of Clause of 'Event(s) of Default' of MRA failed to ensure that the GSRDC has purchased equity share of Rs.210 Crores out of Rs.410 Crores debt converted into equity within 90 days thereby defaulted in terms of the MRA. Thus Appellate Tribunal find debt and default is proved and the Tribunal did not commit error in admitting application under IBC.

Yes a FC can withdraw concessions of CD or prepone date of Repayment if provided in the Agreement to trigger Default under IBC!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

CBRE South Asia Private Limited "Operational Creditor or OC"	M/s. United Concepts and Solutions Private Limited "Corporate Debtor or CD"

1. CAN A PRINCIPAL AND INTEREST AMOUNTS OF OPERATIONAL DEBT BE CLUBBED WHILE DETERMINING THRESHOLD LIMIT AS SPECIFIED UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016 ("IBC") FOR FILING AN APPLICATION UNDER IBC BY OPERATIONAL CREDITOR?

The facts observed by Tribunal: - The Tribunal during the course of hearing observed that the OC has claimed a total amount of Rs. 1,39,84,400/- as Operational Debt, out of which Rs. 88,50,886/- only is the Principal amount and the remaining Rs. 51,33,514/- is the interest component.
The Tribunal while deciding this question has given the reference of various relevant definitions of IBC out of that, definitions of Operational Debt and Financial Debt are reproduced below: -

> "**Operational Debt**" means a claim in respect of the provision of goods or services including employment or a debt in respect of the of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;
>
> "**Financial Debt**" means *a **debt alongwith interest**, if any, which is disbursed against the consideration for the time value of money and includes –*
> .....

Thus from the above discussion, it can be inferred that the "**interest**" can be claimed as the Financial Debt, but neither there is any provision nor there is any scope to include the interest to constitute as the Operational Debt.
Therefore, Tribunal was of the view that the interest amount cannot be clubbed with the Principal amount of debt to arrive at the minimum threshold of Rs.1 Crore for complying with the provision IBC.

2. WHAT THRESHOLD LIMIT WILL BE APPLICABLE FOR FILING AN APPLICATION IN THE YEAR 2021 UNDER IBC?

The facts observed by Tribunal: - The OC had taken another plea in the hearing that since the **date of default is of 2019** hence, the limit of 1 Crore shall not be applicable to it.
The Tribunal giving reference to the settled law, wherein it was held that "*It is seen that notification dated 24.03.2020 makes it unambiguously clear that the threshold limit to be considered for section 9 applications will be Rs. 1 Crore. This threshold limit will be applicable for application filed u/s 7 or 9 on or after 24.03.3020 even if debt is of a date earlier than 24.3.2020*".
Since the present application has been filed in the year 2021, therefore, the Tribunal find no force in the argument of OC that the limit of Rs. 1 Crore is not applicable to its case.

The Tribunal concluded that since the Principal amount of operational debt claimed by the OC is less than Rs. 1 Crore and the Application is filed in the year 2021, the Application is not maintainable under IBC and is accordingly, dismissed.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can a threshold limit of Rs. 1 Crore save the Corporate Debtor from the initiation of Corporate Insolvency Resolution Process ("CIRP") under Insolvency and Bankruptcy Code, 2016 ("IBC") if the default occurs before the date of notification?

M/s Tharakan Web Innovations Pvt. Ltd. "Corporate Debtor or CD"	Cyriac Njavally "Operational Creditor or OC"

Date	Particulars
06.07.2019	Date when debt of OC become due
25.02.2020	Date of Demand Notice sent by the OC to the CD
02.03.2020	Date of receipt of Demand Notice by the CD
07.03.2020	Date mentioned on application to be filed with the Tribunal by the OC against the CD initiating **CIRP**
24.03.2020	Date of Notification wherein, the minimum amount of default to file an application was enhanced to Rs. 1 Crore
25.09.2020	On verification by CD from the Registry of this Tribunal, date of actual filing of an application by OC against CD for initiating CIRP.

- CD claimed that it had time till 12.03.2020 to file its reply disputing the demand as the application under IBC becomes maintainable only after the expiry of the period of 10 days from the date of delivery of Demand Notice on CD and argued that that OC could under no circumstances have maintained a complaint on 07.03.2020 when the notice was received by the CD only on 02.03.2020. Therefore, the mandatory period of 10 days to object to the notice or repay the alleged debt had not elapsed and hence making the application under IBC is not an application at all in the eyes of law.
- The OC contended that the intention of the notification dated 24.03.2020 can be reasonably interpreted as constituting a relief-oriented measure to protect CD from the deleterious impact of the Covid-19 pandemic upon their businesses.
- The said notification does not result in any general relaxation or waiver of the provisions of the Code and amendment by way of delegated legislation can only be prospective and cannot act retrospectively unless made retrospective.
- Tribunal on perusal of documents found that the Notification dated 24.03.2020 does not save the CD from the initiation of CIRP especially in cases where defaults towards creditors have taken place before the pandemic and the resultant financial crisis.
- The debt has become due on 06.07.2019. That on 25.02.2020, the Demand Notice under IBC demanding payment of Rs. 31,33,595/- was sent to the CD vide speed post. However, no reply raising any dispute has been received by the OC within the stipulated period of ten days from 25.02.2020.
- Since, the Demand Notice has been sent by the OC to the CD and after waiting for 10 days, OC filed the application; the contention of the CD has no legs to stand. Hence the appeal filed by CD was dismissed.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Wednesday Weekly Series 115
Date: - 16.02.2022

Team- K.Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an application under Insolvency and Bankruptcy Code, 2016 ("IBC") be maintainable if there is an Oppression & Mismanagement petition covering similar matter pending before the Tribunal?

Vivek Pasricha and Anr. **"Appellant"**	Amit Sachdeva and Anr. **"Operational Creditor or OC"**	M/s. Axiss Dental Pvt. Ltd. (**"Corporate Debtor or CD"**)

- The OC filed an application under IBC against the CD which has been admitted by the Tribunal;
- The Appellant submitted that there was pre-existing dispute; therefore, the application under IBC was not maintainable. But according to the OC, there was no pre-existing dispute;
- Appellant placed reliance on company petition preferred by the OC under Companies Act, 2013 alleging acts of *oppression and mis-management'* against CD and others.
- The said Petition is pending for consideration before the Tribunal wherein the OC has filed one Interlocutory Application for various relief(s) including credit the salary owed to the OC as CEO and Managing Director of the CD for the Months of February 2018 and March 2018 and to get access of Board Meetings;
- CD contended that the OC as on date still remains as the *Board Director of the CD and the OC has complete access to Minutes of Meeting. Further after voluntary resignation of the OC, it is wrongly stated by the OC before the Tribunal that the OC requested for the copies of the Minutes of Board Meeting in view of his status as a Managing Director*
- OC submitted that the he is a shareholder of the CD and was also the CEO & Director of the CD and he has not paid salary for certain months and in spite of Demand Notice issued under IBC, the CD defaulted to pay his salary;
- The Appellate Tribunal observed that during the pendency of the aforesaid application for payment of salary without waiting for decision of Tribunal, the OC issued Demand Notice under IBC for the same amount in dispute.
- The Appellate Tribunal found that there is pre-existence of dispute with regard to salary payable to the OC and the matter is pending for decision before the Tribunal prior to issuance of Demand Notice under IBC and therefore, the application filed by Respondent was not maintainable.
- Hence, the Appellate Tribunal set aside the order of the Tribunal and dismisses the application filed by the OCunder IBC.

An Application under IBC is not maintainable as an Oppression & Mismanagement petition is already pending before the Tribunal covering similar matter which amounts to PRE-EXISTING DISPUTE!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team- K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can a mediation order and dishonored cheques imply extension of Limitation for an application filed under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Ravi Iron Ltd. **"Appellant or Operational Creditor or OC"**	**Jia Lal Kishori Lal Pvt. Ltd.** **"Corporate Debtor or CD"**

- This Appeal has been filed against the order passed by Tribunal **dismissing the application filed by OC against CD under IBC as barred by limitation.**

The Application claiming for payment amount of Rs. 14,01,320/- with interest up to 31.12.2019 was filed by the OC against the CD. In an application the following was mentioned:

"Date of default- 10/01/2008 (after 30 days credit period")

- The **OC himself has given the date of default as 10.01.2008** as mentioned above;
- Afterwards, the OC submits that although the date of default was mentioned as 10.01.2008 in the application but there was **District Court Mediation on 16.11.2015** wherein CD accepted their liability and the postdated cheques issued which were also dishonored.
- **Last cheque was dishonored on 31.12.2016** hence; the application filed was within limitation.

Observations of the Appellate Tribunal

- ✓ When the Applicant comes with date of default and no other reasons given in the Application or any details for extension of limitation, then the Application shall be considered as well within time.
- ✓ The Mediation which was ordered on 16.11.2015 shall not give any extension of limitation to the OC.
- ✓ The purpose of Mediation and post-dated cheques are different and the fact that the cheques were dishonored may give any right to the OC to take appropriate proceeding but that shall not give extension of the limitation for the Application under IBC

The Appellate Tribunal held that the Application was clearly barred by time and no error has been committed by the Tribunal for rejecting the Application.

Mediation order and dishonored cheques does not imply extension of Limitation for an application filed under IBC!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Wednesday Weekly Series 117
Date: - 02.03.2022

Team- K.Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an amount received by the Corporate Debtor for allotment of shares be termed as financial debt for the purpose of filing an application under Insolvency and Bankruptcy Code, 2016 ("IBC") where such amount is not against time value of money?

Mr. Satya Sadasiva Basava Prasad Maley "Financial Creditor or FC"	M/s. Pattela Projects Private Limited "Corporate debtor or CD"

Brief facts

- ✓ The CD had received Rs. 10 lakhs from the FC towards share application money and failed to allot shares.
- ✓ CD intentionally denied to allot shares to the FC inspite of the regular follow-up
- ✓ Thereafter in a meeting dated 20.11.2019, CD admitted and agreed to pay the amount of Rs. 10 lakhs in monthly installments by way of post-dated cheques and written agreement but the CD failed to submit post-dated cheques and the agreement.
- ✓ Hence, the application is filed by the FC seeking to initiate Corporate Insolvency Resolution Process ("**CIRP**") against the CD for the default of CD to discharge the debt due to the FC.
- ✓ The application for seeking CIRP was first made to NCLT, Hyderabad and later the same was returned and presented to NCLT, Amaravati.

Three major questions were raised before the Tribunal

1. **Whether this application is maintainable and whether it is within the pecuniary jurisdiction of the Tribunal?**
   - ✓ The date of Default mentioned 13.02.2018, but this *Petition filed before the Tribunal on 10.11.2020* and *date of notification enhancing the pecuniary limits from Rs. 1 lakh to Rs. 1 Crore was 24.03.2020*
   - ✓ The notification issued by the Central Government does not confer power upon the Tribunal to act retrospectively.
   - ✓ Hence, *even if the earlier application was filed prior to the notification,* the *disputed amount being less than the pecuniary jurisdiction of this Tribunal, the application needs to be rejected on that count.*

2. **Whether the Whats App conversation between the Parties can be admitted as evidence?**
   - ✓ The Whats App conversation was between two third parties and the person involved in that chats *(who has admitted via Whats App text that he shall repay the amount to the FC)* ceased to be an additional director w.e.f. 02.06.2015 and for shareholder w.e.f. 14.07.2017. Hence his chats cannot bind the CD, since the amount transferred to the CD took place on 29.11.2017.
   - ✓ Further, *Whats App chat is not admissible as evidence unless it is accompanied by the certificate as required as per the provisions of Evidence Act.*
   - ✓ Also provisions of Companies Act does not permit a party to produce electronic evidence without it being accompanied by the Certificate as required as per the provisions of Evidence Act. *Hence the petition fails on this ground also.*

3. **Whether the petitioner can be termed as Financial Creditor and whether amount i.e. admittedly received by the CD can be termed as financial debt for filing an application under IBC?**
   - ✓ *Unless the FC proves that the amount given to CD is against time value of money, it does not qualify as financial debt* and there was no single evidence in this case to prove the same. **Hence this Petition is dismissed.**

No an amount received by the CD for allotment of shares cannot be termed as financial debt which is not against time value of money under IBC!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team- K.Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an application filed by the Operational Creditor under Insolvency and Bankruptcy Code, 2016 ("IBC") be admitted if there are no proof of payment made by the Corporate Debtor to the Operational Creditor within 3 years of filing of the petition?

Shyam Metalics and Energy Limited "Operational Creditor or OC"	**Rathi Steel and Power Limited "Corporate debtor or CD"**

Brief facts

- CD had placed three purchase orders with the OC in 2012 and 2013 for supply of goods and the OC claimed that it had supplied the said material but in spite of raising the invoices, payments have not been made. Various cheques issued in 2013 by the CD had been dishonored.
- OC issued a notice demanding payment to the CD on 19.03.2018 and the CD disputed the said notice by reply on 09.04.2018 claiming that it had made the payments and also claimed that the material supplied was defective/ of inferior quality and caused huge losses for which the CD had initiated arbitration proceedings.
- OC issued another notice mentioning therein that it was withdrawing its earlier Notice dated 19.03.2018 without prejudice to its rights and contentions.
- CD claimed that there was pre-existing dispute and the CD also appointed an arbitrator and the order of arbitrator was also served on the OC and CD had sent reply on 09.04.2018 raising dispute which was before the second notice issued by the OC.
- OC had filed an application for initiation Corporate Insolvency Resolution process ("**CIRP**") against the CD claiming outstanding debt and the same was rejected by the Tribunal on 20.12.2018 referring to arbitration.
- The Tribunal also observed that the OC had not satisfied the Tribunal on the ground of limitation as there was no proof of payments made within three years of filing of the petition.
- Hence OC filed this appeal before the Appellate Tribunal.

Observations of the Appellate Tribunal

- ✓ Appellate Tribunal mentioned that the Tribunal had rightly observed that OC has not been able to satisfy the Tribunal on the grounds of limitation as no proof of payments made by the CD to the OC within three years of filing of the Petition.
- ✓ Appellate Tribunal held that merely making vague statement of '**time to time**' '**ah-hoc payment**' without evidence of payment or without showing written acknowledgement so as to save limitation, will not help.
- ✓ Appellate Tribunal observed that the orders were placed in 2012 and 2013 and even the cheques dated April, 2013 had admittedly bounced. Notice under IBC was issued only in 2018.
- ✓ The Appellate Tribunal does not found any reason to interfere with the order passed by the Tribunal rejecting application filed by OC.
- ✓ Accordingly, appeal dismissed

An application filed by the OC under IBC is considered as time barred if there are no proof of payment made by the CD to the OC within 3 years of filing of the petition!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team- K.Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an appeal preferred by Corporate Debtor ("CD") be admitted against the order of Tribunal admitting an application, wherein no plea has been raised by the CD which was required to be raised under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Janmejaya Mahapatra "Director of CD or Appellant"	**Jhabua Power Limited "CD"**	**FLSmidth Private Limited "Operational Creditor or OC"**

Contentions of the CD

- This appeal has been preferred by Appellant against order passed by the Tribunal admitting the application filed by OC under IBC.
- Appellant submitted that the Financial Creditor had taken over the management of the CD and after taking over the Company, it is in profit.
- The Settlement Agreement was made but it could not be given effect as the financial control is with the Financial Creditors and not with the Board of Directors.
- It was submitted that the Tribunal without taking into consideration the above facts passed an order.

Facts Observed by the Appellate Tribunal

- The Appellate Tribunal observed that it is not clear as to who ordered to pay the amount pursuant to which Rs.5 Crores had been paid on 21st February, 2018 though the settlement reached on 8th February, 2018.
- The Appellant, who intended to settle the matter with the OC, informed that no settlement has been reached and addressed this Appellate Tribunal that there is no default.
- However, the record shows that there is a 'debt' payable by CD to OC.
- The management of the CD has not taken plea before the Tribunal which was required to be raised while the application under IBC was considered.
- It is also not in dispute that the OC issued a Demand Notice to CD demanding payment on 12th September, 2017 and in spite of receipt of Demand Notice, the CD failed to pay the debt within 10 days and thereby the CD defaulted to make payments.
- The application under IBC, otherwise being complete, it was rightly admitted. Hence appeal dismissed.

An appeal of CD *against the order of Tribunal admitting an application under IBC* is liable to be dismissed if *no plea as to no default in repayment of debt has been raised by the CD!!*

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Wednesday Weekly Series 121
Date: - 30.03.2022

Team- K.Bagla& Associates
Company Secretaries
Insolvency Professionals

Can a failure or breach of Settlement Agreement be a ground to trigger Corporate Insolvency Resolution Process ("CIRP") against Corporate Debtor in Insolvency and Bankruptcy Code, 2016 ("IBC")?

M/s Brand Realty Services Limited **"Operational Creditor or OC"**	M/s Sir John Bakeries India Private Limited. **"Corporate Debtor or CD"**

Brief facts

- OC is consultant cum investor to the CD and the CD approached OC asking for investment and consultancy services, the OC invested some amount and also supplied the consultancy services.
- Accordingly, OC invested some amount and also supplied the consultancy services. Hereinafter OC and the CD entered into an Agreement dated 28.11.2014 which was further amended to a Settlement Agreement dated 15.06.2018 ("**Agreement**") and as per that Agreement CD agreed to pay remaining commission to be cleared vide post dated cheques and further agreed to do RTGS instead of post dated cheques but the CD did not transfer amount by either way.
- The default occurred when the cheques given in terms of Agreement have returned unpaid to the OC on 18.04.2019 due to reason of "**Stop Payment**" and CD has taken no steps to make the payment.
- OC later issued a Demand Notice under IBC against the CD, wherein, in reply to the Demand Notice which was given after the stipulated period of 10 days, the CD said that one of the Director of CD had access to signed cheques, crucial documents, etc. and was an authorised signatory at the relevant time stole these cheques to use them.
- After receipt of reply of CD to the Demand Notice, OC has filed an application against CD for initiating CIRP.
- CD contended that the account of CD stands settled with the OC and there remains nothing which is due and payable by the CD. Also there was deficiency in the service provided by the OC and there is pre-existing dispute between the parties regarding the existence of personal debt.

Decision: - The failure or breach of Settlement Agreement does not come under the definition of "Operational debt" hence it can't be a ground to trigger CIRP against CD in of IBC!!

Reason

- The Tribunal observed that, the present application has been filed for breach of terms and conditions of the Agreement.
- Further, '**Operational Debt**' *means a claim in respect of the provision of goods or services including employment or a debt in respect of the dues arising under any law for the time being in force.*
- In order to trigger provisions of IBC, OC is required to establish a default for non-payment of Operational Debt.

The Tribunal found that the Settlement Agreement on the basis of which the present application is filed by the OC does not come under the definition of Operational Debt.

Can an application for withdrawal of application filed by the Financial Creditor / Operational Creditor is liable to be dismissed even if it is in compliance with the applicable provisions of Insolvency and Bankruptcy Code, 2016 ("IBC")?

Vipul Dilip Shah & Ors. "Promoters and Shareholders of Corporate Debtor"	Parinee Developers Pvt. Ltd. "Corporate Debtor or CD"	STCI Finance Ltd. "Financial Creditor or FC"

- FC filed application against the CD for initiation of Corporate Insolvency Resolution Process ("**CIRP**") which was admitted by the Tribunal and appointed Interim Resolution Process ("**IRP**").
- Committee of Creditor ("**COC**") was duly constituted and resolved to appoint IRP as RP.
- After that, the Promoters sent a settlement proposal which outlined plan for revival of operation of the CD and full payment to all the lenders.
- In the meeting of COC, they approved Resolution with 99.91% votes in favour of the Resolution, thereby withdrawal of the application filed by FC under IBC and the application for the same has been filed by RP but the same was dismissed by the Tribunal hence this appeal is preferred.
- The Tribunal dismissed the application for withdrawal on following grounds:-
  i. The IBC and CIRP regulation provide for various activities to be completed in a time bound manner and model time lines are provided for the same. However, the COC has not complied the provisions of IBC as well as Regulation;
  ii. In the Settlement there is condition that after receipt of the approval for withdrawal of the Application under IBC within 60 days, they would receive their outstanding amount constituting monetary committee is not inline of IBC and CIRP Regulation.
  iii. No backup plan is provided in case of failure to meet short fall within the time line agreed by the parties.
  iv. The Settlement proposal contends a lot of uncertainty and depends on future events.

Decision of Appellate Tribunal

An application for withdrawal of application filed by the Financial Creditor / Operational Creditor shall be admitted if it is in compliance with the applicable provisions of IBC!!

Reason

- The Appellate Tribunal observed that, there is provision in the Settlement Deed that in case the settlement fails, the lenders may file Application for revival of CIRP or may file application for initiation of contempt proceedings against the promoters of the Company.
- None of the condition of settlement is against the provisions of IBC and regulation and COC has taken a commercial decision by voting shares of 99.91%
- In such a situation, it is not appropriate to dismiss the application on the ground that COC has not taken steps in time bound manner as provided in IBC and Regulations.

Can a Financial Creditor intervene the Insolvency Proceedings initiated by another Financial Creditor on the ground of superior claim under Insolvency and Bankruptcy Code, 2016 ("IBC")?

L&T Infrastructure Finance Company Ltd. **"Appellant"**	Gwalior Bypass Project Ltd. **"Corporate Debtor or CD"**	ICICI Bank Limited **"Financial Creditor or FC"**	National highways Authority of India **"NHAI"**

- FC has filed application under IBC for Corporate Insolvency Resolution Process ("**CIRP**") against CD which was admitted by the Tribunal.
- Meanwhile Appellant filed a petition for intervention for impleadment as a party which was rejected by the Tribunalfor intervention not being a necessary party.
- The order of rejection and order of admission of application under IBC are under challenge in these Appeals.

FACTS OF THE CASE

- A Concession Agreement was executed between NHAI and the CD for construction development, operation and maintenance, in terms of which the concessionaire was barred from creating any encumbrance, lien or from creating any rights or benefits under this Agreement or any Project Agreement except with ***prior consent in writing from NHAI***.
- The CD approached the Appellant for refinancing the erstwhile loan advanced by erstwhile lender by subscribing to the non-convertible debentures proposed to be issued by the CD which was sanctioned by the Appellant.
- A Debenture Trust Deed ("**DTD**") was executed between the CD and Trustees. The DTD specifically barred an act whereby the payment of the Appellant's debt may be hindered or delayed.
- In the meantime, the FC sanctioned certain loan facilities to the CD in the absence of any approval of NHAI.
- Appellant argued that the sanction of loan by FC having not been approved by NHAI, the FC by filing application under IBC cannot deprive the Appellant from occupying position of senior lender.
- As per the provisions of IBC, it is always open to FC to file an application under IBC if the FC owes debt and the CD defaults in payment.
- Tribunal is required to notice as to whetherthe ***application is complete*** or not and if there is *debt and the CD defaulted in payment and the amount is more than Rs.1 lakh*, it is bound to admit an application. Though, it is open to the CD to object admission of application on the ground that the 'debt is not payable in law or in fact', but the application can be triggered even if the **debt is disputed** by the CD
- Thus the Appellate Tribunal hold that the Appellant being not a Member / Shareholder of the CD and has claimed to be a Financial Creditor of the CD has no right to intervene to oppose admission of the application filed by the FC against the CD.
- The Appellate Tribunal also provided that if the Appellant claims that it is one of the Financial Creditor, it can file claim before the Resolution Professional (**"RP"**), but it cannot challenge the order of admission in absence of any challenge by CD.

A Financial Creditor cannot intervene the Insolvency Proceedings initiated by another FC on the ground that it has superior claim over the claim of the other FC but can file claim before RP after admission of CIRP.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can a Financial Creditor intervene the Insolvency Proceedings initiated by another Financial Creditor on the ground of superior claim under Insolvency and Bankruptcy Code, 2016 ("IBC")?

L&T Infrastructure Finance Company Ltd. **"Appellant"**	Gwalior Bypass Project Ltd. **"Corporate Debtor or CD"**	ICICI Bank Limited **"Financial Creditor or FC"**	National highways Authority of India **"NHAI"**

- FC has filed application under IBC for Corporate Insolvency Resolution Process ("**CIRP**") against CD which was admitted by the Tribunal.
- Meanwhile Appellant filed a petition for intervention for impleadment as a party which was rejected by the Tribunalfor intervention not being a necessary party.
- The order of rejection and order of admission of application under IBC are under challenge in these Appeals.

FACTS OF THE CASE

- A Concession Agreement was executed between NHAI and the CD for construction development, operation and maintenance, in terms of which the concessionaire was barred from creating any encumbrance, lien or from creating any rights or benefits under this Agreement or any Project Agreement except with ***prior consent in writing from NHAI***.
- The CD approached the Appellant for refinancing the erstwhile loan advanced by erstwhile lender by subscribing to the non-convertible debentures proposed to be issued by the CD which was sanctioned by the Appellant.
- A Debenture Trust Deed ("**DTD**") was executed between the CD and Trustees. The DTD specifically barred an act whereby the payment of the Appellant's debt may be hindered or delayed.
- In the meantime, the FC sanctioned certain loan facilities to the CD in the absence of any approval of NHAI.
- Appellant argued that the sanction of loan by FC having not been approved by NHAI, the FC by filing application under IBC cannot deprive the Appellant from occupying position of senior lender.
- As per the provisions of IBC, it is always open to FC to file an application under IBC if the FC owes debt and the CD defaults in payment.
- Tribunal is required to notice as to whetherthe ***application is complete*** or not and if there is *debt and the CD defaulted in payment and the amount is more than Rs.1 lakh*, it is bound to admit an application. Though, it is open to the CD to object admission of application on the ground that the 'debt is not payable in law or in fact', but the application can be triggered even if the **debt is disputed** by the CD
- Thus the Appellate Tribunal hold that the Appellant being not a Member / Shareholder of the CD and has claimed to be a Financial Creditor of the CD has no right to intervene to oppose admission of the application filed by the FC against the CD.
- The Appellate Tribunal also provided that if the Appellant claims that it is one of the Financial Creditor, it can file claim before the Resolution Professional (**"RP"**), but it cannot challenge the order of admission in absence of any challenge by CD.

A Financial Creditor cannot intervene the Insolvency Proceedings initiated by another FC on the ground that it has superior claim over the claim of the other FC but can file claim before RP after admission of CIRP.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team- K.Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an application to initiate Corporate Insolvency Resolution Process ("CIRP") admitted by the Tribunal if the notice is not issued to the Corporate Debtor as required under provisions of Insolvency and Bankruptcy Code, 2016 ("IBC")?

Brian Lau "Respondent"	S3 Electrical & Electronics Private Limited "Corporate Debtor or CD"

Brief Facts

- An application under section 7 of IBC was preferred by Respondent claiming himself to be the Financial Creditor, with a prayer to initiate CIRP against CD which was admitted by the Tribunal with certain observations and directions. Hence, the appeal has been preferred against the said order of the Tribunal.
- The order has been challenged by Andhra Bank, who are the banker of CD and there is no default done by CD shown in the account.
- The CD challenged the impugned order on the following grounds: -
  - i The Tribunal has passed the order without notice to the CD, in violation of rules of natural justice;
  - ii The respondent, 'who claimed to be 'Financial Creditor' do notcome within the meaning of 'Financial Creditor' as definedunder IBC;
  - iii The Respondentfailed to produce any record of default or evidence of default with respect to his claim;
  - iv The notice as required by the provisions of IBC was not issued by the Respondentbut his lawyer which is not permissible.

Decision of Appellate Tribunal

An application to initiate CIRPcannot be admitted by the Tribunal if the notice is not issued to the CD as required under the provisions of IBC!!

Reasons for the Decision

- Respondenthas not disputed the fact that no notice was issued to the CD before admission of the application. He submitted that there are other records, such as 'Unsecured Loan Agreement' and communications on record to show evidence of default. However, such documents cannot be taken into consideration for the purpose of initiation of CIRP.
- During the pendency of appeals, the parties have settled their dispute and amount as claimed by the Respondenthas been satisfied by issuing cheques in his favour.
- Hence, the Appellate Tribunal was of the view that the order of Tribunaladmitting the application filed by Respondentis fit to be set aside.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can a Petition be filed before the Tribunal under Insolvency and Bankruptcy Code, 2016 ("IBC") where the Agreement executed between the Operational Creditor and Corporate Debtor provides for the jurisdiction of German Courts?

Excel Metal Processors Limited "Corporate Debtor or CD"	***Benteler Trading International GMBH and Anr. "Operational Creditor or OC"***

Brief Facts

- The OC, a German Company filed an application under Section 9 of IBC against the CD alleging that the CD committed default in making payment.
- The Tribunal by impugned order dated 25th June, 2019 admitted the application; the Director of the CD being aggrieved by the order, has challenged the said order of Tribunal and referred to the Agreement reached between the parties.
- As per the Agreement and as the office of the OC is in Germany, any suit or case is maintainable only in the court at Germany. No case can be filed in any Courts in India.
- Therefore, the CD raised the question of jurisdiction of the Tribunal in entertaining the application under Section 9 of the IBC.

Decision of Appellate Tribunal

A Petition can be filed before the Tribunal under Insolvency and Bankruptcy Code, 2016 ("IBC") even if the Agreement executed between the Operational Creditor and Corporate Debtor provides for the jurisdiction of German Courts!!

Reasons for the Decision

- ✓ Pursuant to provisions of Companies Act, 2013, the Central Government has notified and vested the power on respective Tribunal(s) to deal with the matter within its territory, where the registered offices of the Companies are situated.
- ✓ As per Section 60(1) of IBC, the Tribunal, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the Tribunal having the territorial jurisdiction over the place where the registered office of the corporate person is located.
- ✓ As admittedly, the registered office of the CD is situated at *132, B, Mittal Towers Nariman Point, Mumbai*, thus NCLT, Mumbai Bench has the jurisdiction to entertain application under IBC and the CD or any other party to the Petition cannot derive advantage of the terms of the Agreement reached between the parties which says that any suit or case is maintainable only in the Court at Germany.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can Financial Creditor file an application initiating Insolvency Corporate Resolution Process under Insolvency and Bankruptcy Code, 2016 ("IBC") against the other Financial Creditor?

Mayfair Capital Private Limited "Corporate Debtor or CD"	*Jindal Saxena Financial Services Private Limited "Financial Creditor or FC"*	*Randhiraj Thakur "Director of CD"*

Brief Facts

- The FC filed an application initiating Insolvency Corporate Resolution Process ("**CIRP**") under Section 7 of IBC against the CD alleging that the CD committed default in making payment.
- The Tribunal admitted the application; the Director of the CD being aggrieved by the order, has challenged the order on the ground that the said order was passed by the Tribunal without issuing notice to the CD.
- According to Director, CD is a 'financial service provider' as defined under IBC. CD was granted certificate of registration under the Reserve Bank of India Act, 1934. Thus the application under Section 7 of the I&B Code was not maintainable.

"**corporate person**" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force **but shall not include any financial service provider**.

"**corporate debtor**" means a corporate person who owes a debt to any person

Findings

- ✓ 'Inter Corporate Deposit Agreement' was reached between CD and FC, pursuant to which CD had undertaken a 'financial services' by accepting deposit from FC.
- ✓ Therefore, it cannot be held that the amount was accepted towards public deposits. For the said reason, in regard to transaction, in quest, CD cannot be treated to be 'Corporate Debtor'.
- ✓ CD being a 'financial service provider' and having excluded from the definition of 'corporate person' as mentioned above, the application under Section 7 was not maintainable against CD.
- ✓ The Tribunal has failed to notice the aforesaid provisions and passed the impugned order dated 8th January, 2018 initiating CIRP against CD which was a 'financial service provider' (non-banking financial company).

It was held by Hon'ble National Company Law Appellate Tribunal New Delhi that-
No, a Financial Creditor cannot file an application initiating CIRP under IBC against the other Financial Creditor as Financial Creditor does not fall under purview of "Corporate Person" under IBC!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Wednesday Weekly Series 127
Date: - 11.05.2022

Team- K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an act of Committee of Creditors making settlement with absconding and section 29A ineligible promoters be treated as an act of commercial wisdom under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Veda Biofuel Ltd "Corporate Debtor or CD"	*Bank of Baroda "Committee of Creditors or COC"*	*Mr. Madhusudhan Raju Chintalapati "Resolution Applicant or RA"*

- The application against CD was filed by Operational Creditor for triggering Corporate Insolvency Resolution Process ("**CIRP**") which was admitted by the Tribunal.
- Two prospective Resolution Applicants namely- 'M/s. Orion Ferro Alloys Private Limited' and RA submitted Resolution Plans.
- Meanwhile RA entered into an agreement with P. Vijay Kumar (*former Managing Director of the CD or "**MD**"*) undertaking to invest substantial amount and under the restructured shareholding pattern, RA was allotted 50% shareholding and MD was allotted 30.81% shareholding, remaining percentage of shareholding going to four other minor shareholders.
- MD and RA entered into a settlement agreement OC for withdrawal of the application which came to be placed before the COC. The COC after deliberating upon the materials placed before it approved the Resolution Plan in the nature of Restructuring Plan submitted by RA with 96.39% of voting share.
- Subsequently, under directions from the COC, Resolution Professional ("**RP**") filed an application before the Tribunal seeking approval.
- The Tribunal noticed the factum of the CD becoming insolvent and defaulting in repaying its debt obligations while being managed by its MD. It observed that the erstwhile management which had mismanaged the affairs of the CD rendering it insolvent could not be allowed a role in the forward continuance of the CD.
- Under the Restructuring Plan approved as the Resolution Plan by the COC, MD would continue to hold substantial stake in the new management under the Restructuring Plan though slightly less than before.
- The Tribunal viewed the Restructuring Plan as not being a Resolution Plan in terms of IBC. It accordingly declined to approve the Resolution Plan submitted by RA and proceeded to pass the order of liquidation.
- Aggrieved of the rejection of the Resolution Plan submitted by RA in respect whereof the RP, COC preferred an appeal.

Judgment

- *It is the settled law of land that the approval of the Resolution Plan depending upon various factors including feasibility, viability, financial matrix and distribution mechanism rests upon the business decision taken by the COC in its commercial wisdom which are not to be interfered with by the Tribunal or even by this Appellate Tribunal.*
- *But at the same time the Tribunal has to ensure that the Successful Resolution Applicant(s) are not ineligible to submit Resolution Plan within the ambit of Section 29A and that the approved Resolution Plan complies with the mandate of Section 30(2) of the IBC.*
- *The COC has overlooked the settlement offer and ignored the withdrawal plea without assigning any reason.*
- *The impugned order is well reasoned and in consonance with the object of the IBC as an act of COC making settlement with absconding and section 29A ineligible promoters cannot be treated as an act of commercial wisdom under IBC!!*

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

M/s. Surana Metals Limited "Corporate Debtor or CD"	*M/s. Mahaveer Construction "Principal Borrower or Borrower"*	*Union Bank of India "Financial Creditor or FC"*	*Laxmi Pat Surana Proprietor of Borrower and Promoter/ Director of CD or Appellant*

Question 1: Whether an action under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") can be initiated by the financial creditor against a corporate debtor concerning guarantee offered by it in respect of a loan account of the principal borrower, who had committed default and is not a "corporate person" under IBC?	**Question 2:** Whether an application under Section 7 of IBC filed after three years from the date of declaration of the loan account as NPA, being the date of default, is not barred by limitation?

Brief Facts:

1. FC extended credit facility to Borrower through two loan agreements in years 2007 and 2008wherein CD had offered guarantee to the two loan accounts of the Borrower.
2. The stated loan accounts were declared NPA on 30.1.2010. The FC then issued a recall notice on 19.2.2010 to the Borrower and CD demanding repayment of outstanding amount.
3. FC later filed an application against the Borrower before DRT, Kolkata;
4. During the pendency of the stated action initiated by the FC, the Borrower had repeatedly assured to pay the outstanding debt, but as that commitment remained unfulfilled, the FC eventually wrote to the CD on 3.12.2018 in the form of a purported notice of payment under IBC.
5. The CD replied to the said notice, clarifying that it was not the Borrower nor owed any financial debt to the FC and had not committed any default in repayment of the debt. This communication was sent without prejudice.
6. The FC later filed an application for initiating Corporate Insolvency Resolution Proceeding (**CIRP**) against the CD before the Tribunal
7. FC took a stand that the liability of the Borrower and of the CD is coextensive or coterminous, as predicated in Section 128 of the Indian Contract Act, 1872. Section 7 of IBC enables the FCto initiate CIRP against the principal borrower if it is a corporate person, including against the corporate person being a guarantor in respect of loans obtained by an entity not being a corporate person.
8. The Tribunal held that the action had been initiated against the CD, being coextensively liable to repay the debt of the Borrower, became CD and thus liable to be proceeded with under Section 7 of the Code. The Tribunal found that the Borrower, as also, the CD had admitted and acknowledged the debt time and again, lastly on 8.12.2018 and thus the application filed on 13.2.2019 was within limitation.
9. Aggrieved by the order of the Tribunal, Appellant preferred an appeal before the Appellate Tribunal, who also dismissed the appeal.

DECISION OF SUPREME COURT

Answer 1: The Hon'ble Supreme Court is of view that As aforesaid, the liability of the CD is coextensive with that of the Borrower and it gets triggered the moment the Borrower commits default in paying the debt when it had become due and payable. Thus an action under Section 7 of IBC can be initiated by the FC against CD concerning guarantee offered by it in respect of a loan account of the Borrower, who had committed default and is not a "corporate person" under IBC	**Answer 2:** Hon'ble Supreme Court affirms that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the Borrower from time to time and in particular the CD vide last communication dated 08.12.2018. Thus, the application under Section 7 of IBC filed on 13.02.2019 is within limitation.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

M/s. Surana Metals Limited "Corporate Debtor or CD"	*M/s. Mahaveer Construction "Principal Borrower or Borrower"*	*Union Bank of India "Financial Creditor or FC"*	*Laxmi Pat Surana Proprietor of Borrower and Promoter/ Director of CD or Appellant*

Question 1: Whether an action under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") can be initiated by the financial creditor against a corporate debtor concerning guarantee offered by it in respect of a loan account of the principal borrower, who had committed default and is not a "corporate person" under IBC?	**Question 2:** Whether an application under Section 7 of IBC filed after three years from the date of declaration of the loan account as NPA, being the date of default, is not barred by limitation?

Brief Facts:

1. FC extended credit facility to Borrower through two loan agreements in years 2007 and 2008wherein CD had offered guarantee to the two loan accounts of the Borrower.
2. The stated loan accounts were declared NPA on 30.1.2010. The FC then issued a recall notice on 19.2.2010 to the Borrower and CD demanding repayment of outstanding amount.
3. FC later filed an application against the Borrower before DRT, Kolkata;
4. During the pendency of the stated action initiated by the FC, the Borrower had repeatedly assured to pay the outstanding debt, but as that commitment remained unfulfilled, the FC eventually wrote to the CD on 3.12.2018 in the form of a purported notice of payment under IBC.
5. The CD replied to the said notice, clarifying that it was not the Borrower nor owed any financial debt to the FC and had not committed any default in repayment of the debt. This communication was sent without prejudice.
6. The FC later filed an application for initiating Corporate Insolvency Resolution Proceeding (**CIRP**) against the CD before the Tribunal
7. FC took a stand that the liability of the Borrower and of the CD is coextensive or coterminous, as predicated in Section 128 of the Indian Contract Act, 1872. Section 7 of IBC enables the FCto initiate CIRP against the principal borrower if it is a corporate person, including against the corporate person being a guarantor in respect of loans obtained by an entity not being a corporate person.
8. The Tribunal held that the action had been initiated against the CD, being coextensively liable to repay the debt of the Borrower, became CD and thus liable to be proceeded with under Section 7 of the Code. The Tribunal found that the Borrower, as also, the CD had admitted and acknowledged the debt time and again, lastly on 8.12.2018 and thus the application filed on 13.2.2019 was within limitation.
9. Aggrieved by the order of the Tribunal, Appellant preferred an appeal before the Appellate Tribunal, who also dismissed the appeal.

DECISION OF SUPREME COURT

Answer 1: The Hon'ble Supreme Court is of view that As aforesaid, the liability of the CD is coextensive with that of the Borrower and it gets triggered the moment the Borrower commits default in paying the debt when it had become due and payable. Thus an action under Section 7 of IBC can be initiated by the FC against CD concerning guarantee offered by it in respect of a loan account of the Borrower, who had committed default and is not a "corporate person" under IBC	**Answer 2:** Hon'ble Supreme Court affirms that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the Borrower from time to time and in particular the CD vide last communication dated 08.12.2018. Thus, the application under Section 7 of IBC filed on 13.02.2019 is within limitation.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Wednesday Weekly Series 129
Date: - 25.05.2022

Team- K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an Operational Creditor file an application initiating Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor for non-payment of the TDS amount under the Insolvency and Bankruptcy Code, 2016 ("**IBC**")?

M/s. Bellagio Projects Private Limited **"Corporate Debtor or CD"**	Master Development Management (India) Pvt. Ltd **"Operational Creditor or OC"**	**Amitabh Roy "Director of CD or Appellant"**

1. An application initiating CIRP was filed by the OC against CD before the Tribunal. After issuance of notices in the application, there was certain settlement talks between the parties.
2. Both CD and OC made statement before the Tribunal on 03.10.2019 that they have settled the matter but terms of settlement are yet to be finalized. The Tribunal disposed off the application with liberty to revive, if settlement talks fails.
3. The parties entered into settlement. The agreement also mentioned that the claim is inclusive of TDS amount.
4. After settlement amounts were paid by the CD, OC filed an I.A. praying for revival of application on which Tribunal passed an order asking the CD to indicate the details of the payment.
5. An Affidavit was filed by the Appellant, where payment details of claim amount payable to OC were given however certain TDS amounts with respect to transactions between the parties could not be paid to Income tax authorities.
6. After the aforesaid affidavit was filed, the Tribunal has admitted the application under IBC;
7. The Appellant aggrieved by the order has come up in this Appeal.
8. He contended that settlement talks did not fail, hence, liberty should not be granted to revive the application.
9. The entire payment has already been made to the OC. He further submits that with regard to two TDS amounts, Supplementary Affidavit has clearly mentioned that TDS amount of Rs.66,884/- and Rs.1,10,820/- could not be paid which remained outstanding.
10. Non-payment of TDS amount could not be held to be a debt under IBC.
11. OC contended that as per the Agreement the payment of TDS was also part of the it and since TDS has not been paid by the CD default was committed and the Tribunal has every right to initiate proceeding under IBC.
12. The Appellate Tribunal is of the view that that in non-payment of the TDS amount by the CD there was no occasion for admitting Section 9 Application by the Tribunal.
13. Furthermore, in the Supplementary Affidavit which was filed by the CD it was clearly mentioned that entire dues of the OC have been paid off.
14. As **we are satisfied that OC has misused the process of IBC. We thus, allow this Appeal**

No, an OC cannot file an application initiating CIRP against the CD for non-payment of the TDS amount under the IBC!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

*Can the statutory requirement u/s 15 of Insolvency and Bankruptcy Code, 2016 ("**IBC**") be stretched to mean that Corporate Insolvency Resolution Process ("**CIRP**") publication has to be made from all places where the Corporate Debtor is receiving goods and supplies?*

M/s. Kitply Industries Limited **"Corporate Debtor or CD"**	IDBI Bank Ltd **"Financial Creditor or FC"**	M/s Akshar Plastchem Investment Private Limited **"Operational Creditor or Appellant"**

1. The Appellant supplied goods to the CD worth Rs.1,41,85,730/- against which CD made payment of only Rs.19,99,104/-. The amount of Rs.1,21,86,626/- remained outstanding against the CD;
2. The Appellant filed a Company Petition bearing for winding up of the CD in the Gauhati High Court. The CD filed an Application stating that winding up proceedings be kept in abeyance in view of pendency of case registered with the Board for Industrial and Financial Reconstruction ("**BIFR**") under Sick Industrial Companies (Special Provisions) Act, 1985;
3. Later, an application initiating CIRP was filed by the FC against CD before the Tribunal and the same was admitted by the Tribunal;
4. The IRP issued a public announcement in two newspapers having circulation where the registered office, corporate office, factory of the CD is situated. Notices have also been put on the website of the Corporate Debtor as well as on the website of the Board.
5. The IRP received only one Resolution Plan ("**RP**"). The RP submitted was considered by CoC and was approved by the CoC. The Tribunal approved the RP.
6. The Appellant filed an IA Tribunal praying for setting aside the order approving the RP. The Tribunal rejected the Application, aggrieved by which order, this Appeal has been filed.
7. The Appellant had been carrying its business in the State of Maharashtra and the Appellant could not know about the publication in the newspapers issued by IRP.
8. The Appellant further submits that the RP is not in accordance with provision of IBC. The filing of the winding up petition were certainly in the business record of the CD, but the IRP neither considered the claim of the Appellant nor considered the winding up proceedings pending before the High Court.

Regulation of IBC provides for public announcement 'be published' in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the Interim Resolution Professional, the corporate debtor conducts material business operations.

9. The Appellate Tribunal is of view that the mandatory requirement as mentioned above is compiled by the IRP. The IRP has made publication at other places as noted above, which indicates that there is compliance of requirement of Regulation of IBC.
10. Admittedly, the claim was not filed by the Appellant before the IRP. The last date for receiving the claim was 18.05.2018 and Appellant filed its claim after 20 months from the last date of receiving the claim. Thus the Appellate Tribunal dismissed the Appeal

The statutory requirement u/s 15 of IBC **cannot be stretched** to mean that CIRP publication has to be made from all places where the Corporate Debtor is receiving goods and supplies!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

*Can a Sale Deed which was executed by the Corporate Debtor prior to Corporate Insolvency Resolution Process ("**CIRP**") be cancelled during the CIRP under Insolvency and Bankruptcy Code, 2016 ("**IBC**")?*

Yes Bank Ltd. *"Financial Creditor" or* ***"FC"***	*K.K. Overseas Private Limited* *"Corporate Debtor" or* ***"CD"***	*Suresh Kumar Jain* *Resolution Professional or* ***"RP"***

BRIEF FACTS
The CIRP against the CD was initiated on Section 7 application filed by a FC.
The RP in the application has prayed for following reliefs: 1. *To take appropriate action thereby cancelling the sale deeds attached to this application and declare all of these sale deeds as null and void;* 2. *Restore physical possession and control of the properties/flats mentioned in sale deeds attached to this application for all purposes to the RP and permit to put the same in the pool of assets of CD.* The application was rejected by the Tribunal, thus the FC aggrieved by the order filed an appeal.
Upon perusal of records, the Appellate Tribunal can to knew that the Sale Deeds which were sought to be cancelled were executed by the CD prior to the CIRP.
The Appellate Tribunal is of the view that there was no occasion to cancel the Sale Deed in the application which was filed by the Resolution Professional and the Tribunal has rightly rejected the Application.
The Appellate Tribunal uphold the order of the Tribunal rejecting the application on the ground that such prayer cannot be entertained on an application filed by the RP.
Thus the Appeal is dismissed accordingly.
A Sale Deed which was executed by the CD prior to commencement of CIRP cannot be cancelled during the CIRP under IBC!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

*Sterling and Wilson Private Limited "Operational Creditor" or "**OC**"*	*Bridge and Roof Company (India) Limited "Corporate Debtor" or "**CD**"*

What is date of default and what will the time limit for making an application under Insolvency and Bankruptcy Code, 2016 (IBC)?	**Can an arbitration proceeding amounts to pre-existing dispute between the parties under IBC?**
The OC was given the work to carry out electrical works by the CD. The OC from time to time raised its running account invoices for the said project.	
The CD has released payments to the tune of Rs.8,70,90,292/- with last payment released on 31st October, 2014 for a sum of Rs.6,72,924/- nevertheless, the CD has failed to release an outstanding of Rs.97,80,494/-	
On 13th July, 2017 a meeting was held between the parties, wherein a letter dated 09 August, 2017 was hand delivered to the CD demanding to make outstanding payment of Rs.97,80,494/- plus interest from 01st June, 2014 till its realization.	
In pursuance to the said letter, the CD vide its letter dated 25 September, 2017 requested the OC to bear with the CD till the Arbitration proceedings between the CD and GGIPSU are concluded.	
In April, 2019, it came to the notice of the OC that the arbitration between the CD and GGIPSU got concluded and an award has been passed in favor of the CD.	
A demand notice under section 8 of IBC was sent to the CD. However, the CD did not reply to the said notice also. OC filed an application for initiation of Corporate Insolvency Resolution Process (**'CIRP'**) against CD.	
CD contended that OC have suppressed the fact that the OC has filed an application under Arbitration and Conciliation Act, 1996 for appointment of an arbitrator to adjudicate the disputes and differences between the parties.	
A **'debt'** is a liability or obligation against a claim which is due from any person, whereas, a **default** occurs when there is a non-payment of such debt, partly, or wholly, by the debtor. **'Date of default'** is the the date on which the debtor has failed to pay the debt. *In this instant case there is no date of default given by the OC.*	With respect to the pre-existing dispute, it is pertinent to mention that an arbitration proceeding was already initiated by the OC in the year 2020. Further, upon perusal of the record it would be apparent that one of the issues framed by the Ld. Sole Arbitrator is whether the Operational Creditor defaulted in performing its obligations under the contract or not?.
Even if the date of the final invoice is 30th December, 2013 which is to be taken as the date of default then also it is clear that as per the Limitation Act, three years would end in 2016. Further, on reading of the letter dated 25 September, 2017 by the CD nothing in the said letter would construe as an **acknowledgement of debt.**	In light of the above facts and circumstances the C.P (IB) No. 987/KB/2020 is dismissed. However, the petitioner is at liberty to pursue its remedy under the law available, if any. Further, the observations made herein shall not in any way prejudice the arbitration proceedings pending between the parties.
Thus The Application is timed barred as the same was filed after completion of 3 Years from the date of default.	**An arbitration proceeding amounts to pre-existing dispute between the parties under IBC!**

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

If the default occurs during the period specified in the section 10A of Insolvency and Bankruptcy Code, 2016 ("IBC"), can an application under IBC be filed?

Yes Bank Limited *"Financial Creditor" or "**FC**"*	*Laxmi Oil and Vanaspati Private Limited* *"Corporate Debtor" or "**CD**"*

The FC had sanctioned a cash credit limit of ₹10 crore to CD vide master facility agreement dated 29.03.2017 which was further renewed from time to time.
However, the CD failed to adhere to the terms and conditions and defaulted on interest service. On 20.12.2019, the FC asked CD to comply with the requirements as mentioned in the facility agreements, but the CD failed to make the repayment. Hence, the FC claims that the default occurred on 28.02.2020.
Upon failure of CD to comply with the requirements of facility letters/agreements and also considering the guidelines of RBI, the Corporate Debtor was declared as Non-Performing Asset (NPA) on 20.07.2020. On 27.08.2020, a loan recall notice was sent to the Corporate Debtor. It is further stated that, despite several reminders, the Corporate Debtor failed to make the payment. Hence, this application.
Thus the application has been filed IBC by FC seeking initiation of Corporate Insolvency Resolution Process ("**CIRP**") in respect of CD.
FC after narrating the abovementioned facts and submitted that the ***date of default was 28.02.2020 and date of NPA was 20.07.2020.***
On a query posed by the Bench as to how the date of default was ascertained as 28.02.2020, though the loan recall notice had been issued on 27.08.2020 and account was also classified as NPA on 20.07.2020, FC on 20.12.2019 wrote a letter to the CD, wherein it was pointed out that the CD has failed to repay the facility on respective due dates in spite of having sufficient time and opportunity.
In the very same letter, FC had asked the CD to take immediate and effective steps to regularise the facilities, failing which bank shall be constrained to take appropriate legal steps to recover the public money. On this basis***, the FC continued to reiterate that the date of 28.02.2020 was determined in view of the letter dated 20.12.2019.***
Upon perusal of records, it is noted that, the facilities have been extended up to July 2020. The Tribunal further finds that in the letter dated 20.12.2019, no timeline has been given to repay the loan and service the interest and hence, it cannot be considered as loan recall notice. Further, no other steps have been taken by FC till July 2020 when the account of CD was classified as NPA.
Therefore, there is no basis for determining the date of default as 28.02.2020. As noted, that loan recall notice has been issued on 27.08.2020, which falls in the period as specified u/s 10A of IBC, 2016. Hence, said date of default, in the Tribunal's view, has been fixed, just to circumvent the implications of the said section because if the default occurs during the period specified in the said section, an application under IBC cannot be filed.
Thus, considering the fact that the default has occurred during the prohibited period between 25.03.2020 and 31.03.2021, for which no action under IBC can be taken in terms of provisions of section 10A of IBC, 2016, the Tribunal hold that this petition is not maintainable.
Thus, **If the default occurs during the period specified in the section 10A of IBC, an application under section 7 of IBC cannot be filed**

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Wednesday Weekly Series 136
Date: 03.08.2022

Team- K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can Tribunal exercise its powers as per Companies Act, 2013 if the case is filed under Insolvency and Bankruptcy Code, 2016 ("IBC")?

A to Z Barter Private Limited "Corporate Debtor or CD"	*Inox Leisure Limited "Operational Creditor or OC"*	*Ashish Chaturvedi and Sanjay Kapoor "Ex – Director of CD or Appellants"*	*Mr. Anoop Kumar Goyal "Interim Resolution Professional or IRP"*

- An application under IBC was admitted and Corporate Insolvency Resolution Process ("**CIRP**") was initiated against the CD along with appointment of IRP.
- During the pendency of the CIRP, the IRP moved two applications under IBC one alleging that Appellants had withdrawn a sum of Rs. 32 lakhs during the moratorium period during the CIRP though the Appellants claimed that they had given a postdated cheque to one Mr. Kewal Kishan as repayment of a loan and the said cheque was not given by them during the ongoing CIRP. The Other was for providing records and other financial information relating to the CD to the IRP.
- The Tribunal, However, allowed both the applications and imposed a penalty of Rs. Five lakhs on each of the two Appellants.
- Aggrieved by the order, Appellants preferred an Appeal
- In view of the fact that the CD is in liquidation, this Appellate Tribunal ordered to join Mr. Sanjay Garg, liquidator as Respondent in the appeal. The liquidator was thereafter directed to file his reply-affidavit about the compliance of the order given by the Tribunal, particularly providing the account books and related records to the IRP.
- He has also stated in the Reply-Affidavit that despite the impugned order, the Appellants have neither paid the imposed penalty nor deposited the amount of Rs. 32 lakhs along with interest @ 12% per annum (as directed vide order dated 9.11.2020 in IA 2025 of 2020).
- The Appellants submits that the Tribunal has imposed penalty of 5 lakhs each on the Appellants exercising powers under Companies Act, 2013, though the Tribunal which is hearing the case under the IBC did not have jurisdiction to impose such a penalty under the Companies Act. Moreover, it would have served the cause of natural justice if the Appellants were given an opportunity to be heard before imposition of any penalty.
- Upon perusal of records Appellate Tribunal direct that the case be remanded to the Tribunal for taking a decision under the provisions of IBC after giving an opportunity to the Appellants to present their case. Appellate Tribunal set aside the Impugned Order whereby penalty of Rs. 5 lakhs each on the Appellants has been imposed and remand the matter to the Tribunal for passing necessary orders under the provisions of IBC.

No the Tribunal cannot exercise its powers as per Companies Act, 2013 if the case is filed under IBC!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can an interest component be included with the principal debt to arrive at the minimum pecuniary threshold of Rs. 1 Crore under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Chiranjilal Yarns Trading "Operational Creditor" or "OC"	*Mr. Prashat Agarwal,* ***"Member of Suspended Board of CD or Director"***	***Bombay Rayon Fashions Limited "Corporate Debtor" or "CD"***

The Present appeal is filed by the Director against the order passed by the Tribunal initiating Corporate Insolvency Resolution Process ("**CIRP**") against the CD, whereby the Tribunal admitted the Application filed by the OC.

Brief Facts:

OC supplied yarns to CD and raised invoices between March, 2017 and January 2020, wherein, OC supplied goods for Rs. 2,02,26,017/- under nine invoices. The CD has paid three invoices with substantial delay; for one invoice part payment made and remaining five invoices, CD has failed to make any payment.

Director's Submissions:

- He submitted that 4 of IBC mandate that for an application to be maintainable only if the minimum amount of Operational Debt is Rs. 1crore. However, the principal amount of debt is only Rs. 97,87,220/- which is below the prescribed threshold limit. He therefore, emphasis that application was ex-facie not maintainable and consequently is nullity in law and deserved to be dismissed.
- Director also raised issue regarding limitation stating that cause of action arose as early in 2017 but the petition was filed on 16 December, 2020 hence time barred by Limitation Act, 1963.

Findings

Issue of limitation:

(i) As regard time barred claims as per Limitation Act, it has been held by the Appellate Tribunal that last date of invoice was 01.02.2020 and date of filing of Application was 31.12.2020 and therefore Section 9 Application was made well within the limitation.

Issue of maintainability:

(ii) Appellate Tribunal have perused 9 invoices issued by OC raised against CD and noticed that it has clearly been mentioned under terms and condition "*interest will be charged @ 18% plus GST after due date of the bill*" unlike in cited judgment of NCLAT '*Steel India vs. Theme Developers Pvt. Ltd.' (Supra)* where there was no mention of interest in delayed payment at all. Hence, the cited case is not exactly and directly relevant.

(iii) Appellate Tribunal have also noted that Tribunal has also referred one Judgment while allowing interest on delayed payment to be part of total debt for calculation of minimum threshold limit for Section 4 of IBC;

(iv) In this context, as discussed above, all 9 invoices clearly stipulated provision of Interest on delayed payment. Since, interest on delayed payment was clearly stipulated in invoice and therefore, this will entitle for "right to payment" and therefore will form part of "debt"

(v) Thus, the total debt outstanding of OC is above Rs. 1 crore as per requirement of Section 4 IBC read with notification dated 24.3.2020, and meets the criteria of Rs. 1crore as per Section 4 of IBC and Application is therefore maintainable in present case.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Wednesday Weekly Series 139
Date: 07.09.2022

Team- K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an entity issuing a 'Letter of Comfort' be a Corporate Debtor or Guarantor within framework of Insolvency and Bankruptcy Code, 2016 ("IBC")?

ASF INSIGNIA SEZ PRIVATE LIMITED	*Shapoorji Pallonji and Company Private Limited*
"Corporate Debtor or CD"	*"Operational Creditor or OC"*

- The OC has submitted that the CD has executed a Comfort Letter dated 17.04.2018. On examination of the Paper-book it transpires that in response to notice under Section 8 of IBC issued by the OC, the C) has replied-

  "As apparent from the facts narrated above, at no point in time did CD assume any repayment obligations towards OC, not even in the capacity of a 'Guarantor' in terms of the Comfort Letter, as sought to be alleged by OC in the demand Notice. The relevant portion the Comfort Letter is extracted hereunder for reference:
  *"We, CD, undertake that if Black Canyon SEZ Private Limited ("**BCSPL**") does not make payment with regard to duly certified works delivered by OC, under the contract, then CD shall intervene and ensure prompt payment of such dues by BCSPL."*

- CD merely indicated its intention to get involved and ensure that BCSPL complied with its payment obligation in the event of default, without assuming any repayment obligation upon itself. There exist no express or clear provisions which foster any payment liability upon CD and therefore, the contents of the Comfort Letter cannot be construed in a manner to impose any guarantee obligation upon CD.
- Apart from the above, CD in his reply to notice has also stated that the settled position of law is that a ***contract of guarantee requires concurrence of three parties i.e. Principal Debtor, Surety and the Creditor and thereby Surety undertakes an obligation to repay the debt in case of default on part of the Principal Debtor. Therefore, the contract of guarantee is a separate independent contract by itself whereby Surety consciously agrees & accepts the repayment obligation and as such obligations cannot be levied by placing reliance upon the terms of the Comfort Letter.***

- Another noteworthy development is the order of the co-ordinated Bench of this Tribunal in the matter of OC V/s BCSPL filed under Section 9. The Tribunal declined to admit his claim against the 'principal borrower'.

- The CD in the present case is an entity which has issued a Comfort Letter to BCSPL. On examination, the nature of transaction between the OC and the CD does not constitute as an 'operational debt' as the expression 'operational debt' or "Corporate Guarantee" is defined under IBC.

Thus an entity issuing a 'Letter of Comfort' cannot be termed as a Corporate Debtor or Guarantor within framework of IBC!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Electricity supply service being critical to preserve the value of CD, can the dues towards such supply be paid by the RP during Corporate Insolvency Resolution Process ("CIRP") under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Lavasa Corporation Limited ***"Corporate Debtor or CD"***	*Maharashtra State Electricity Distribution Company Limited* ***"Respondent or MSEDCL"***	*Shailesh Verma* ***"Resolution Professional of CD or RP or Appellant"***

- The CD had entered into Distribution Franchisee Agreement ("DFA") with MSEDCL, under which, the MSEDCL was to supply electricity at certain injection points from where the electricity was to further supplied to consumers in the township through distribution infrastructure of the CD. The DFA expired on 24.10.2019.
- The CIRP against the CD was commenced by an order dated 30.08.2018. The RP requested to the MSEDCL to continue the DFA as an interim arrangement till the Resolution Applicant took over the CD. The notices were issued by the MSEDCL declaring its intention not to renew the DFA of the CD and to take over the Distribution Franchisee.
- Thus RP filed an IA to quash and set aside the Impugned Notices issued by the MSEDCL;
- The IA was opposed by the MSEDCL. It was stated that during the moratorium, the electricity was supplied to the CD, however, the dues amounting to 9.09 crores approx of the MSEDCL during the CIRP period remain unpaid.
- The Tribunal heard the parties and by the impugned order partly allowing the Application *directed the RP to pay the outstanding dues to the MSEDCL during the CIRP period within 90 days from the date of pronouncement of the order and also the MSEDCL to supply uninterrupted connection of electricity to the CD to keep the CD as a going concern and not to takeover the DFA."*
- The RP aggrieved by only part of direction by which RP was directed to pay outstanding dues to the MSEDCL during the CIRP period within 90 days has come up in this Appeal.
- The RP challenging the above direction of the Tribunal directing for payment of electricity dues during the CIRP period has submitted that the CD lacks necessary funds to make complete payment to the MSEDCL and it has been making payment on monthly basis to the extent possible. It is submitted that the Tribunal was not entitled to issue direction to pay electricity dues of during CIRP period because the said amount can only be paid as per Resolution Plan, after the Plan is approved. It is submitted that Section 14, sub-section (2) of the Code provides that supply of essential goods and services to the Corporate Debtor shall not be terminated or suspended or interrupted during the moratorium period, which provides an unconditional protection to the Corporate Debtor.
- The MSEDCL contends that the Tribunal has compelled the it to supply the electricity and continue with the DFA during moratorium period, hence the payment of electricity dues during CIRP period was required to be paid by the CD. However, RP is not correct in his submission that MSEDCL is obliged to continue to supply the electricity even if electricity dues during CIRP is not paid. It is submitted that RP himself has formed the opinion that supply of electricity is essential for continuing the CD as going concern and further supply of electricity is necessary to maximize the assets of the CD. Hence, RP was liable to pay the electricity dues during the CIRP period.
- The Appellate Tribunal after perusal of the case, came to the view that IBC delineated by Section 14(1) explanation as well as Section 14(2-A) is same, that is, all benefits, which were enjoyed by the Corporate Debtor given by Government or authority should be continued, **but subject to condition that there is no default of payment of current dues.**
- When CD took a decision that supply of electricity is necessary to make the value of CD as has been specifically pleaded in IA, the CD is obliged to make payment. Thus the Appeal is dismissed

If electricity supply service is critical to preserve the value of CD, then the dues towards such supply be MUST paid by the RP during Corporate Insolvency Resolution Process ("CIRP") under IBC!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can a Corporate Insolvency Resolution Process ("CIRP") be revived in case of failure of settlement agreement between the parties under Insolvency and Bankruptcy Code, 2016 ("IBC")?

M/s. OPTO Circuits (India) Limited "Corporate Debtor or CD"	M/s. ICICI Bank Limited "Financial Creditor or FC"

The Present Appeal is filed aggrieved by the order passed in I.A by the NCLT whereby the NCLT in the order observed that the ***FC is entitled to file fresh Company Petition in accordance with the provisions of the code instead giving liberty to resume the CIRP against the CD.***

BRIEF FACTS

- CD had approached the FC for various credit facilities and availed of non-fund based working capital facilities by the FC.
- In view of default committed by the CD to the tune of Rs. 1,07,85,59,340.96/- the FC had initiated proceedings under IBC and the NCLT admitted the application filed by the FC and initiated CIRP Proceedings against the CD.
- CD filed a Writ Petition before the Hon'ble High Court wherein the Hon'ble High Court granted interim stay on 24.03.2020. During subsistence of interim stay, the CD approached the FC with one time settlement proposal. In pursuance of OTS, the CD made a payment of Rs. 4.5 Crores to the FC as an upfront payment and the balance amount of Rs. 18.2 Crores shall be paid within a period of three months from the date of acceptance of OTS i.e. 14.07.2020.
- CD had filed I.A praying the NCLT to terminate the CIRP Proceedings in view of the settlement. The FC had also filed a Memo before the NCLT seeking liberty to revive/restore the order passed in the event of default/ not adhering to the terms as contained in the OTS sanctioned letter.
- NCLT in the impugned order instead of giving liberty to revive the very same IBC Petition, however given liberty to the FC herein to file a fresh Company Petition in accordance with the provisions of the IBC.

Decision:

The NCLAT after perusal of records stated that The NCLT ought to have taken note of the prayer made by the CD in I.A. wherein it is prayed that the matter may be disposed of as settled by giving liberty to the FC to resume the CIRP in case of non-compliance of the terms of the OTS.

However, the NCLT committed grave error in giving liberty to the FC to file fresh Company Petition instead of giving liberty to revive/resume the CIRP Proceedings in case the CD failed to adhere to comply with the terms of settlement in strict sense. Even the NCLT failed to take note of the decision of this Tribunal being the Appellate Authority as a precedent in a similarly situated case in the matter of 'Vivek Bansal vs. Burda Druck India Pvt. Ltd., CA (AT) (Ins) No. 552 of 2020.

Thus the impugned order regarding the observation/liberty to file a fresh Company Petition by the FC is erroneous and without application of mind and without following the Principles of Natural Justice and not adhering to the decision of this Appellate Tribunal, is hereby quashed and set aside.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can a joint application filed u/s 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") maintainable if the individual claim of each of the joint applicant does not meet the threshold limit of Rs. 1 crore?

Mr. Brajesh Mishra and Others "Operational Creditor or OC"	M/s Dolphin Offshore Shipping Limited "Corporate Debtor or CD"

- Application u/s 9 of IBC is filed by OC seeking to initiate Corporate Insolvency Resolution Process ("**CIRP**") against CD alleging that the CD committed default in making payment to the OC a sum of Rs. 2,86,11,281/-.

SUBMISSIONS OF OPERATIONAL CREDITOR	SUBMISSIONS OF CORPORATE DEBTOR
• OC are the employees of CD and some of them are still serving the company. However, some of them have already resigned from their jobs. The CD have not paid the legal dues of the OC and therefore, the CD is liable to pay all the outstanding salary and other dues to all the OC as per their respective dues. • The CD was expressing inability to clear the dues of the OC and kept on putting off the matter on one pretext or the other. However, they have not paid the same till date and, therefore, total outstanding dues of all OC are of Rs. 2,86,11,281/- in the form of liquidated debt payable by the CD to all the OC jointly.	• The CD has, inter alia, pleaded that a joint Application under Section 9 of the IBC by one or more OC is not maintainable, the individual claim of each of the OC is less than the minimum threshold limit of Rs. 1 crore and therefore, the Petition is not maintainable and is liable to be dismissed on this ground alone. There is no default whatsoever, as alleged or at all. The OC have filed to demonstrate any default on the part of the CD and the Petition is not maintainable either in law or in fact is not conformity with the mandate requirements of the IBC.

Whether a joint Petition u/s 9 by more than one individual can be maintained if individually they do not fulfill the threshold limit of Rs. 1 crore.

Findings - ***Reference can, be made to the law laid down in Sadashiv Nomaya Nayak and Others. Vs. Gammon India and Contractors Private Limited (NCLAT), whereby it has been held that if an individual claim of each of the Operational Creditor, the amount of debt is less than rupees one lakh (as the threshold limit was at that time), it can be rejected being not maintainable.***

DECISION

In the light of the above brief discussion and the law laid down on the above cited case, it has to be held that the present Petition is not maintainable as the individual claim of each of the joint Petitioners do not meet the threshold limit of Rs. 1 crore.

Thus a joint application filed u/s 9 of the IBC is not maintainable if the individual claim of each of the joint applicant does not meet the threshold limit of Rs. 1 crore!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can a reply by the Operational Creditor to the arbitration notice issued by Corporate Debtor, stating the absence of a dispute be a reason to ignore pre-existing dispute under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC")?

NTT Data Business Solutions Pvt. Ltd. **Operational Creditor "OC"**	**Trident Ltd.** **Corporate Debtor "CD"**
1. OC had filed an application under section 9 against CD which was dismissed by the NCLT due to existence of dispute. 2. CD and OC had entered into a contractual agreement for services. The CD filed a case for deficiency in service as per agreement terms and a notice under Section 21 of Arbitration and Conciliation Act, 1996 was given to the OC. 3. OC submits that notice of arbitration was replied stating that there is no dispute between the parties. The OC thereafter issued a notice under Section 8 of the IBC and thereafter filed Section 9 Application. 4. NCLT dismissed the application stating there is pre-existing dispute between the parties.	5. OC filed an appeal against the impugned order stated that there was no pre-existing dispute between the parties and there was valid reason for which timelines could not be achieved by the OC. The Arbitration notice issued by CD was replied stating that there is no dispute between the parties. 6. NCLAT observed that the Notice of Arbitration was filed by CD before the Demand Notice was issued. The NCLAT has also referred to the meeting dated 18th June, 2021 and email dated 18th June, 2021 received from the OC and came to the conclusion that there was a pre-existing dispute. 7. Notice of Arbitration points out the deficiency in service and has thus given a notice for resolving the disputes between the parties by means of arbitration clearly proving the presence of dispute.

Decision

The Hon'ble NCLAT, New Delhi, dismissed the appeal and held that, "*We have looked into the notice dated 14th June, 2021 filed by CD which points out the deficiency in service and has thus given a notice for resolving the disputes between the parties by means of arbitration.* ***The mere fact that notice of Arbitration was replied by the OC stating that there is no pre-existing dispute cannot be reason to ignore the dispute as was raised in the notice dated 14th June, 2021 which is elaborate and details the deficiency in service as per the Corporate Debtor.***

We thus are of the view that the NCLT has not committed any error in rejecting Section 9 Application."

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can a section 9 application be denied when the Operational Creditor ("OC") is using Insolvency process as an inappropriate substitute for Debt Recovery procedure under Insolvency and Bankruptcy Code, 2016 ("IBC")?

M/s Agarwal Veneers **"Operational Creditor or OC"**	Fundtonic Service Private Limited **"Corporate Debtor or CD"**

The Application under Section 9 was rejected on the following ground-

- It is found that the OC has not produced on record documents like copy of the purchase order and delivery challan to substantiate its claim. Moreover, the OC has not produced on record a copy of bank statement showing that no payment is received from the CD towards the invoices against which the claim has been raised.
- The CD is a going concern generating revenue, and the CD, its Employees and stakeholders shall be subject to the rigors of the CIRP. It appears that the OC has filed the instant petition as a tool of recovery mechanism which is not the objective of the IBC.

SUBMISSIONS OF THE OC

- that the NCLT has erroneously observed that the CD a going concern having 20 employees and that initiating CIRP proceedings would defeat the purpose of the IBC. This cannot be a ground for dismissal of the Application under Section 9. It is argued that a perusal of the Section 20 of the IBC would make it amply clear that the objective of the Code is not to put the CD through rigors of the CIRP Process, but to instead maximize the value of assets of CD.
- that the NCLT has failed to appreciate the evidence of acknowledgment in the Ledger Statement and ought to have given a reasonable opportunity to the OC to file other documents.
- The CD did not raise any dispute regarding the products supplied or the invoices raised by the OC either before issuing the demand notice, or after receiving the same. In fact, the CD has also made part payments towards the invoices raised by the OC. It is argued that a copy of the certificate from the 'financial institutions' maintaining the accounts of the OC and conforming that there is no payment of an unpaid operational debt by the CD is not a condition precedent for triggering the CIRP. *The NCLT has failed to take into consideration that Section 9(3) (c) of the IBC was amended and the words* ***'by the Corporate Debtor, if available'*** *was substituted.*

SUBMISSIONS OF THE CD

- That as the OC has not placed on record any purchase order / delivery challan / bank statements in support of their Application before the NCLT. There can be no sale or supply of goods without a purchase order. The OC is only attempting to recover their claims through these CIRP proceedings.
- the demand notices issued by the OC were never served on the CD and the same was pointed out by the Corporate Debtor in their 'Affidavit in Reply' filed.
- and the present Application preferred by the Appellant is only an attempt to recover the dues.

Judgement

It is clear from the provisions of the IBC and also the Regulations therein that unless the OC along with its Application furnishes a copy of the invoices, the bank statements and the financial accounts, the NCLT is empowered to reject an incomplete Application. The Hon'ble Supreme Court in 'Vidarbha Industries Power Ltd. vs. Axis Bank Ltd' has observed that even if there is a 'debt' and 'default', the Adjudicating Authority should use its discretion in admitting/ rejecting an Application. **In the instant case, the NCLT has rightly rejected the Application on this ground too.**

Thus a section 9 application can be denied when the OC is using Insolvency process as an inappropriate substitute for Debt Recovery procedure under IBC!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can a Tribunal enter evidence and record findings like a Civil court under section 9 proceedings of the Insolvency and Bankruptcy Code, 2016 ("IBC")?

Avneet Goyal	**Radha Kishan Gobind Ram Ltd.**
Operational Creditor "OC"	***Corporate Debtor "CD"***

OC had filed an application under section 9 of IBC against CD for initiation of Corporate Insolvency Resolution Process ("CIRP") for outstanding dues.

CD has opposed the application and filed a reply stating that there was no supply and no delivery was received by the Corporate Debtor.

NCLT while considering the submissions of the parties had accepted the submissions of the CD and rejected application of filed by OC.

Aggrieved by the order of the NCLT, OC preferred an appeal. OC submits that certain observations have been made in the order which may be prejudicial to the OC, **if the matter is taken in a regular court for establishing case of the OC.**

Hon'ble NCLAT dismissed the appeal and held that,

*"We are of the view that in Section 9 proceeding the Court has not to enter into **evidence and record findings like a Civil Court.** Prima facie relying on the defence of the CD, the Section 9 application has been rejected. We do not find any error in the rejection of section 9 application which may warrant interference in the impugned order in exercise of our appellate jurisdiction. Appeal is dismissed. We, however, make it clear that the dismissal of Section 9 application shall not preclude the OC from taking any such remedy as available in law."*

No, a Tribunal cannot enter evidence and record findings like a Civil court under section 9 proceedings of IBC!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can an absence of formal written agreement would bar the Financial Creditor from initiating Corporate Insolvency Resolution Process ("CIRP") under Insolvency and Bankruptcy Code, 2016 ("IBC")?

M/s. **Anusmera Realty and Infra Private Limited** **"Corporate Debtor or CD"**	Mrs. Neeta Nagda **"Financial Creditor or FC"**

Appeal

The present appeal has been filed against the 'impugned order' NCLT, wherein the Application filed by the FC under Section 7 of the IBC was admitted by the CIRP was initiated against the CD. Aggrieved by the same, the CD has preferred the present appeal.

Submission of CD

- CD stated that it was engaged in the business of development and construction of residential and commercial buildings.
- Mr. Navin Shah alias Mr. Navin Nagda, a Practising Chartered Accountant, is the Husband of FC, and was also the Statutory Auditor of the CD from 01.04.2010 to 31.03.2013. During this period, Mr. Navin Nagda shown his intention to invest in the CD. As per Mr. Navin Nagda could not invest in his own name as per Regulations of Institute of Chartered Accountant of India, hence, Mr. Navin Nagda decided to invest in CD through his wife Mrs. Neeta Nagda.
- CD submitted that the FC contributed towards funds, holding around one-third of the equity shares, in the CD.
- Mr. Navin Nagda planned and ensured that investment by the FC were reflected as loans in the books of the CD, even though it was agreed upon informally and intended to be investment through equity participation in CD.
- No Loan Agreement was executed between the FC and CD and as such the NCLT erred in admitting Section 7 application of the FC treating as financial debt which in fact was investment in equity of the CD as per informal understanding between the parties.
- CD summarised his arguments that the FC is an investor of the CD as equity contributor and not a FC and therefore the 'Appeal' deserve to be allowed and the 'impugned order' need to be set aside.

Observations

- NCLAT observe that evidently from the records made available, the CD paid interest @ 9% and 12% to the FC for the FY 2016-17 and 2017-18 respectively. It is evident that on failure to receive due money on time, the FC wrote a letter to the CD upon to return the outstanding principal amount along with interest and the same was replied by the CD denying the liability and stating that payment was made towards share premium.
- CD could not present any details regarding share application money along with premium towards the alleged investment deemed to have been made by the FC in the CD, which does not substantiate the claims of the CD that money invested by the FC was not a financial debt and was merely equity infusion along with share premium.
- CD had also deducted TDS for two financial years as discussed earlier. The CD could not give any reason as to why interest was paid to the FC for two financial years and why TDS was deducted. The averments made by the CD is not convincing at all.
- Financial Creditor may file an application under Section 7 along with the proof of default for initiating CIRP against the Corporate Debtor when the default has occurred.
- IBC nowhere prescribes that there should be a written agreement between the parties to prove the loan and its disbursement to be treated as financial debts. It is also observed that if there are acknowledgments by the CD and where the statements of accounts of the CD are in position to proof disbursement of loan and payment of interest, the absence of formal written agreement would not bar the 'Financial Creditor' from initiating the CIRP.

*Thus **absence of formal written agreement would no bar the FC** from initiating CIRP **under IBC!***

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team ~ K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an Application for recovery of balance amount of interest is allowed under Section 9 against the Corporate Debtor under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Narbada Forest Industries Private Limited **"Corporate Debtor or CD"**	**Permali Wallace Private Limited** "Operational Creditor or OC"

- OC had filed earlier an application under Section 9 of IBC in the year 2017 which was withdrawn on basis of settlement entered into between the parties for payment of certain principal amount and the interest.
- After the settlement between the parties, the CD had made a payment of operational debt as per settlement amount of total principal amount and out of interest for Rs. 48 Lacs, amount of Rs. 16 Lacs was paid.
- There being some default in payment of the interest amount, Section 9 application was filed which has been rejected by the NCLT.
- The NCLT has made the outset that, we note that this application is filed by the OC for execution of terms of settlement agreement. In our considered opinion, the amount arising out of some settlement agreement cannot be termed as **operational debt within the meaning of Section 5(21) of the IBC**. Apart from above, it is not in dispute that the CD paid the OC the entire ***operational debt (principal)***. The CD has also paid a sum of Rs. 16 Lakhs towards the interest on principal sum.
- We sincerely feel that the OC has been using the IBC proceeding for recovery of disputed amount and which is not object of the IBC. On this ground alone, this application is not maintainable. Moreover, there appears to be a dispute about the terms of settlement agreement as far as calculation of interest amount is concerned. It cannot be resolved before this Adjudicating Authority."
- OC challenging the order contends that liberty was granted in the consent terms/settlement agreement that in event any breach is committed, the Application be revived. He further submits that postdated cheques were bounced and OC filed Application under Section 9 was for recovery of the balance interest amount which was unpaid.
- Having heard the parties, the NCLAT is of the view that NCLT did not commit any error in rejecting Section 9 Application. It has been laid down by *the Hon'ble Supreme Court in "Swiss Ribbon Pvt. Ltd. Vs. Union of India" ((2019) 4 SCC 17)*, IBC is not a recovery proceeding and the Application which has been filed by the OC in the present case is only the application for recovery of balance amount of the interest and application was not filed for resolution of any insolvency of the CD. We are of the view that no error has been committed by the NCLT in rejecting Section 9 Application filed by the Appellant. There is no merit in the Appeal, the Appeal is dismissed.

No, an Application for recovery of balance amount of interest is not allowed under Section 9 against the Corporate Debtor under IBC!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can an application for recovery of balance amount of interest be filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC")?

Permali Wallace Pvt. Ltd. **Operational Creditor "OC"**	**Narbada Forest Industries Pvt. Ltd** **Corporate Debtor "CD"**

Facts of the Case	**NCLT's observations**
1. An earlier application was withdrawn by OC as both the parties entered into settlement for payment of principal and interest amount. 2. After the settlement between the parties, the CD had made a payment of operational debt of Rs. 1,74,16,527/- as per settlement amount of total operational debt and out of interest for Rs. 48 Lacs, amount of Rs. 16 Lacs was paid. 3. Due to default in payment of remaining interest amount, an application under Section 9 was filed, however the same was dismissed by NCLT. 4. Thus the OC preferred an appeal. 5. OC stated that if the settlement terms were breached, the IBC application can be revived. Hence it made appeal to NCLAT.	1. There being some default in payment of the interest amount, Section 9 Application was filed by OC, however, amount arising is not considered as operational debt. 2. In pursuance of settlement, the CD paid principal amount and 16 lakhs out of 48 lakhs as interest. The OC is before NCLT to claim the interest amount. 3. OC has been using the IBC proceeding for recovery of disputed amount and which is not object of the IBC. 4. On this ground alone, this application is not maintainable with NCLT

Hon'ble NCLAT New Delhi held that,

"We are of the view that Adjudicating Authority did not commit any error in rejecting Section 9 Application. It has been laid down by the Hon'ble Supreme Court in "Swiss Ribbon Pvt. Ltd. Vs. Union of India" ((2019) 4 SCC 17), IBC is not a recovery proceeding and the Application which has been filed by the OC in the present case is only the application for recovery of balance amount of the interest and application was not filed for resolution of any insolvency of the Corporate Debtor. We are of the view that no error has been committed by the Adjudicating Authority in rejecting Section 9 Application filed by the Appellant."

Application filed under section 9 of IBC for recovery of interest on the o/s operational dues is not maintainable.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team ~ K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an application under Section 9 be considered admissible if a demand notice was served when the threshold limit was Rs. 1 Lakh, but the application was filed after the threshold limit was increased, invoking provisions under the Insolvency and Bankruptcy Code, 2016 ("IBC")?

Rajesh Sabharwal "Operational Creditor or OC"	Desein Private Limited "Corporate debtor or CD"

Date	Particulars
31.01.2020	Demand Notice issued by OC against the CD
24.03.2020	The Ministry of Corporate Affairs exercising its powers has issued a notification by which the minimum threshold amount to trigger the insolvency was enhanced from Rs. One lakh to Rs. One crore.
04.08.2020	An Application was filing against the CD for initiation of Corporate Insolvency Resolution Process ("**CIRP**")
27.04.2021	NCLT has dismissed Section 9 application filed by the OC.

An appeal has been filed against the NCLT order dismissing Section 9 application filed by the FC.

SUBMISSIONS OF OC	SUBMISSIONS OF CD
• The OC has served a demand notice for value of 41 lakhs, which was answered by CD. • OC contends that since the Demand Notice was issued on 31.03.2020 prior to notification dated 24.03.2020 the threshold of the case ought to have Rs. One lakh only and the notification dated 24.03.2020 is not applicable in the facts of the present case.	• CD submits that the relevant date for examining the threshold is the date when the application was filed. • He submits that the issue has been considered and decided by this Tribunal in *Hyline Mediconz Pvt. Ltd.Vs. Anandaloke Medical Centre Pvt. Ltd. and several other judgements of this Tribunal.* • He submits that the date of giving notice u/s 8 is not relevant for determining the threshold under IBC.

DECISION

NCLAT after considering the submission of the parties and perusal of the records came to the decision that -

"The application of the OC having been filed on 04.08.2020 i.e., subsequent to 24.03.2020 should fulfil the threshold of Rs. One crore and the NCLT did not commit any error in rejecting the Section 9 application. We do not find any merit in the Appeal. thus the Appeal is dismissed."

All the applications filed under section 9 should surpass the threshold limit of 1 crore to invoke IBC provisions, even if the demand notice is served before the notification mentioning new threshold limit was notified.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can an application u/s 7 be maintainable if a Guarantee is invoked during the period specified under Section 10-A under the Insolvency and Bankruptcy Code, 2016 ("IBC")?

Mr. Vikram Kumar, Proprietor "Financial Creditor or FC"	Aranca (Mumbai) Private Limited "Corporate Guarantor or CG"

- M/s. Aranca (Mumbai) Private Limited has issued an irrevocable Deed of Guarantee in favour of the FC against the borrowing raised by Meher Miracles Pvt. Ltd (Corporate Debtor or CD). The CD failed to repay the loan hence FC invoked the Guarantee.
- FC filed an application under section 7 against Corporate Guarantor but NCLT dismissed it as the guarantee was invoked on 25.08.2020 (The period under Section 10A)
- FC filed an appeal stating that the NCLT erred in taking the date of invocation of the Guarantee and the Guarantee was invoked vide letter dated 11.06.2019.

SUBMISSIONS OF CORPORATE GUARANTOR

- That the Application under Section 7 filed by FC before the NCLT, wherein the FC had himself submitted that the Deed of Guarantee was invoked on 25.08.2020.
- The earlier letter dated 11.06.2019 was addressed to Mr. Hemendra Aran and Mrs. Gitanjali Sinha in their personal names and was not addressed to the Corporate Guarantor. However, both person were not Directors of CG on the said date and this letter cannot be treated as an invocation of the deed of guarantee
- Thus, he submitted that the said letter dated 11.06.2019 cannot be said to be an invocation of the Guarantee given by the Corporate Guarantor.

DECISION

The Hon'ble NCLAT, New Delhi after perusal of records held that,
The formal Notice for Invocation of Deed of Guarantee dated 25.08.2020 did not refer to this letter dated 11.06.2019. Before the AA, the Appellant had clearly stated that the Bank Guarantee was invoked on 25.08.2020.

Since the Deed of Guarantee was invoked on 25.08.2020, CIRP cannot be initiated for default in repayment as the default arises in the period excluded by provisions of Section 10A of IBC, 2016. The NCLT has rightly held that the default falls within the specified period in Section 10-A of the IBC, 2016.

Application U/s 7 of IBC, 2016 is non maintainable."

Thus an application u/s 7cannot be maintainable if a Guarantee is invoked during the period specified under Section 10-A under IBC!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can an interest accrued on delayed payment contribute to the total debt amount for determining the minimum threshold required to file an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC")?

Bombay Rayon Fashions Ltd. ***Corporate Debtor "CD"***	**Chiranjilal Yarns Trading** ***Operational Creditor "OC"***

FACTS OF THE CASE	**SUBMISSIONS BY CD**
OC is supplier of different type of yarns and has supplied goods to CD. The OC has raised invoices between March, 2017 and January 2020, wherein, OC supplied goods for Rs. 2,02,26,017/- under nine invoices. The CD has failed to make any payment of five invoices. Thus OC filed and application under Section 9 application of IBC which was admitted by the NCLT. Aggrieved by the order, CD preferred an appeal.	❖ The principal amount of debt is only Rs. 97,87,220/- which is below the minimum amount of Operational Debt of Rs. 1crore. CD therefore, emphasis that application was ex-facie not maintainable and consequently is nullity in law and deserved to be dismissed. ❖ CD cited various case laws of NCLT and Supreme Court. namely, '*CBRE South Asia Pvt. Ltd. vs. United Concepts and Solutions Pvt. Ltd.*'; '*Steel India vs. Theme Developers Pvt. Ltd.*'; '*Reliance Cellulose Products Ltd.* vs. *Oil and Natural Gas Corporation Ltd.*' (2018). ❖ CD also raised issue regarding limitation stating that cause of action arose as early in 2017 but the application was filed on 16.12.2020 hence time barred by Limitation Act, 1963.

FINDINGS / OBSERVATION

- In case of '***Reliance Cellulose Products Limited v. Oil and Natural Gas Corporation Limited'***, Hon'ble Supreme Court of India touched upon interest issue but the references were not with respect to treatment of interest on delayed payment as debt especially to calculate threshold limit.
- In case of '***Steel India vs. Theme Developers Pvt. Ltd.***', *The interest for delayed payment was charged @2%, but there was no proof claiming that said term is accepted by CD. The alleged claim amount, towards interest on loan alone, cannot be termed as an 'Operational Debt'.*
- In case of *Pavan Enterprises v. Gammon India* while allowing interest on delayed payment to be part of total debt for calculation of minimum threshold limit for Section 4 of IBC in the Impugned Order itself. "*If in terms of any agreement, interest is payable to the Operational or Financial debtor then the debt will include interest".*
- NCLT held that last date of invoice was 01.02.2020 and date of filing Section 9 Application was 31.12.2020 and therefore Section 9 Application was made well within the limitation.
- NCLAT has perused 9 invoices issued by OC raised against CD and noticed that it has clearly been mentioned under terms and condition "interest will be charged @ 18% plus GST P.A after due date of the bill" unlike in cited judgment of NCLAT '*Steel India vs. Theme Developers Pvt. Ltd.' (Supra)* where there was no mention of interest in delayed payment at all. In present case there is specific mention of interest on delayed payment in all nine invoices. Hence, the cited case by CD is not exactly and directly relevant.

DECISION

All 9 invoices clearly stipulated provision of Interest on delayed payment. Since, interest on delayed payment was clearly stipulated in invoice and therefore, this will entitle for "**right to payment**" (Section 3(6) IBC) and therefore will form part of "debt" (Section 3(11) IBC). **It is, therefore, clear from these facts that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which was clearly stipulated in the invoice itself.** It is noted that the total principal debt amount of Rs. 97,87,220/- along with interest the total debt makes total outstanding as Rs. 1,60,87,838/-. Thus, the total debt outstanding of OC is above Rs. 1 crore as per requirement of Section 4 IBC and Application is therefore maintainable in present case. We, therefore, do not find any merit in the present appeal and dismiss the same.

If interest on delayed payment was clearly stipulated in invoice, it will entitle for "right to payment" and therefore will form part of "debt" under IBC!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can an issue of pre-existing dispute be examined/ raised in Appeal when the CD had not filed an objection previously before NCLT under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Vishal Steels "Operational Creditor or OC"	Indotech Industrial Solutions Pvt. Ltd. "Corporate Debtor or CD"
The NCLT accepted the Section 9 application filed by the OC seeking initiation of Corporate Insolvency Resolution Process ("**CIRP**") against the CD. Aggrieved by this impugned order, the appeal has been preferred by the CD.	
	The CD who on the date when the matter was heard appeared and asked for time from the NCLT. The NCLAT has returned a finding that CD has appeared on 22.04.2022, 19.07.2022 and 03.11.2022 but did not choose to file reply.
CD submitted that there was pre-existing Dispute and OC has not disclosed the said submission in the Application and they should be punished under IBC	
	NCLAT have considered the submissions of the OC and perused the record.
CD had appeared in the proceedings in the year 2022 which is recorded in the order dated 22.04.2022. For more than a year neither reply has been filed nor any step was taken by the CD regarding filing of the Reply. The CD choose to watch the proceedings and took a chance. No objection having been filed by the CD, the submission of CD regarding pre-existing dispute cannot be examined nor can be raised in this Appeal.	
	NCLAT is of the view that the NCLT having found debt due and default has rightly admitted the Application. NCLAT do not find any substance in the Appeal. The Appeal is dismissed

Thus, Issue of pre-existing dispute cannot be examined / raised in Appeal when the CD had not filed an objection previously before NCLT in IBC!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can an Operational Creditor change the 'date of default' for making application under section 9 of Insolvency and Bankruptcy Code, 2016 ("IBC")?

M/s Gajalee Coastal Foods Pvt. Ltd. **"Corporate Debtor or CD"**	**M/s Shri Sadguru Traders** "Operational Creditor or OC"

BRIEF FACTS

- The CD had placed purchase orders with the OC for supply of food grains and grocery items. Wherein the OC supplied the goods and thereafter raised the various invoices.
- The CD has made certain part payments towards some of the invoices and the last part payment of Rs. 1,70,000/- was made on 24.12.2018.
- On 15.05.2019 the OC issued demand notice to the CD, calling upon the CD to make the balance unpaid principle amounts of several unpaid invoices for a sum of Rs. 49,57,924/-. The CD replied to the said Demand Notice.
- The CD has failed to raise the notice of existence of dispute and also failed to make the payment stated in the demand notice.
- Therefore, the OC has filed the present application under IBC to recover the total debt.

The CD filed affidavit in reply opposing the above Company Petition. The main contentions raised by the CD is on limitation and pre-existing dispute, their reply submitted and:

I. The CD states that the amounts claimed by the OC is not due and payable by the CD. The amounts paid by the CD by cash, bank transfer (NEFT) and **credit notes for goods which were of substandard were returned to the OC** are taken into consideration.

II. The CD contends that this petition is filed in respect of the certain goods allegedly sold in the year 2016. And that there are certain bills/invoices, which are of May 2016, June 2016, July 2016 and August 2016 claimed in respect of the said bills are hopelessly barred by law of limitation and therefore even there are certain bills of 12.01.2015 i.e the majority of the invoices relied upon by the Petitioner are all dated 3 years prior to the filing of the Petitions.

III. The CD further contends that the OC supplied food grains to the CD's restaurant located Lower Parel, Vile Parle, MIDC and Versova. Undisputedly, each and every restaurant would have independent and distinct requirements as to quality and quantity. The location of all 4 restaurants are different from one another. However, the OC has clubbed over 382 no. of Invoices in the Petition and filed one composite petition which is impermissible in law.

The OC in Petition mentioned as if the debt fell due on 24.12.2018 i.e. the date on which part payment of Rs. 1,70,000/- was made on 24.12.2018 and thus, the OC computed the period of filing the above Company Petition from 24.12.2018 for invoices from 2015 till 24.02.2018.

Decision:

Hon'ble NCLT, Mumbai Bench is of the view that the Tribunal does not have jurisdiction in these Insolvency Proceedings to cut-short the invoices which would cause recurring dates of cause of action as it is not a suit for recovery. The Operational Creditor cannot change the 'date of default' by confining the invoices to a later period. Especially when the Demand Notice under Section 8 of IBC includes all the invoices from the date of default and the 'debt amount' is crystalized based on the invoices."

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team ~ K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an Operational Creditor opt for an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") instead of invoking the Arbitration clause?

Shahi Md Karim Susprnded Director of Corporate Debtor "CD"	Kabamy India LLP & Anr Operational Creditor "OC"

- The OC had filed an application under section 9 of IBC against the CD, which was admitted by the NCLT.
- Aggrieved by the order the Suspended Director of the 'Corporate Debtor' preferred this Appeal.
- Parties had entered into Carrying & Forwarding Agreement ('**Agreement**').
- CD contended that without availing the remedy available in the Agreement, the OC issued a 'Payment Notice' raising false allegations, which was later replied to by the CD.
- CD further contended that clause 32 of the 'Agreement' mentions 'Arbitration Clause' and it is the case of the CD that instead of resolving the dispute, the OC filed this Section 9 'Application'.
- After perusal of records, NCLT based on the material on record, had arrived at a conclusion that there were 'recurring defaults' on behalf of the CD and that the OC has requested for full and final payment of the outstanding dues. The CD vide Reply dated 01.02.2022, requested for dispatch of the inventory stocked in the warehouse in Mumbai. The OC in reply to the email, sent an email dated 02.02.2022, highlighting the `**outstanding dues'**, along with the '**Ledger'**
- But, there was no response from CD and the OC sent one more email dated 29.03.2022, demanding the outstanding total dues of Rs.3,12,81,028/- and therefore issued a '**Legal Notice**' dated 28.06.2022, for which, the CD sent a '**Reply'**, but the amounts were not paid.

NCLT's Decision:

The terms of the Agreement are not in dispute and Invoices raised by the OC as referred above are not in dispute. No payment has been made by the CD. No dispute is contemplated under Section 8(2) of IBC has been raised. NCLT was satisfied that there was a debt which was not discharged by CD and admitted the application.

NCLAT's Decision:

- The CD, has challenged the admission order on merits, on the ground that there was an arbitration clause', in the Agreement between the parties which was not invoked.
- NCLAT is of view that there is no embargo on the OC, to file a Section 9 Petition, under IBC, even if there is an arbitration clause, in the Agreement.
- For all the aforenoted reasons and discussions, this Tribunal, does not find any illegality or infirmity in order passed by NCLT, hence appeal in front of NCLAT is dismissed.

Thus an Operational Creditor can opt for an application under Section 9 of the IBC instead of invoking the Arbitration clause!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Wednesday Weekly Series R-1
Date: -14.06.2023

Team ~ K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can an unregistered Partnership Firm file section 9 application under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Metistech Fabricators Private Limited **"Corporate Debtor or CD"**	**M/S. Rourkela Steel Syndicate** "Operational Creditor or OC"

1) The Application was filed by the OC under Section 9 of IBC, which has been rejected on the ground that the application is barred by Section 69(2) of the Partnership Act, 1932 ("Act"). NCLT took the view that Section 69(2) of the Act bars a suit by an unregistered partnership, hence the present Application which was filed by the OC against the third party for enforcing a right arising out of contract is **barred**.

"Section 69(2) in the Act:- No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm"

2) OC challenging the order of the NCLT submits that although the NCLT accepted the submission of the OC, that the Application is not barred by Limitation, however, on interpretation of Section 69(2) of the Act, error has been committed in treating the Application akin to a Suit. It is submitted that Section 69(2) of Act is not attracted where an Application under Section 9 IBC is filed since Section 9 Application is not a suit so as to apply Section 69(2) of the Act.

3) CD refuting the submissions, contends that there are judgments of the Hon'ble Supreme Court, which has been referred by the NCLT holding that a suit by unregistered partnership is barred filed against the third party.

4) NCLAT after considering various supra cases are of the view that an application under Section 9 of IBC cannot be said to be a suit and analogy of ***Hon'ble Supreme Court judgment in Hargovindbhai Dave's case, supra, is fully applicable to the application filed under Section 9 IBC also.*** Further, also it is well settled by the judgment of the ***Hon'ble Supreme Court in B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633 that provision of Section 5 Limitation Act are also fully applicable in Section 7 & 9 IBC applications. Section 5 Limitation Act is not applicable in a suit which is also a clear indication that Application under Section 7 & 9 are not a suit.***

5) The Judgments of Hon'ble Supreme Court relied by the NCLT regarding bar of Section 69(2) of the Act is not attracted in the present case since the application under Section 9 cannot be treated as suit.

6) NCLAT is thus of the view that the NCLT has committed error in rejecting Section 9 Application on the ground that it is barred by 69(2) of the Partnership Act. We are thus in view that the order impugned cannot be sustained and deserves to the set aside. The Appeal is allowed accordingly

An application under Section 9 of IBC is not a suit and hence, the bar under Section 69(2) of Act is not applicable to a Section 9 application under IBC!
Thus an unregistered Partnership Firm can file section 9 application under IBC!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can disputes pertaining to contractual issues are to be resolved in proceedings under Section 9 of Insolvency and Bankruptcy Code, 2016 ("IBC")?

M/s Rattan India Power Ltd. **"Corporate Debtor or CD"**	**M/s a'XYKno Capital Services Pvt. Ltd.** **"Operational Creditor or OC"**

BRIEF FACTS

- The OC was engaged as Consultant for providing consultancy services to the CD.
- The invoices were issued by the OC in February, 2015. On 18.02.2015, the CD with regard to the consultancy services issued a letter raising various issues pertaining to the quality of service.
- After the receipt of said letter some clarification was issued on 09.03.2015 by the OC and thereafter no response was received and correspondence was made in 2016 only.
- Demand Notice under Section 8 was issued on 26.07.2018 by OC against the CD.

The Section 9 application was filed by the OC, thereafter which was replied by counter affidavit filed by the CD. The NCLT considering the materials on record came to conclusion that there was a pre-existing dispute, the dispute which was raised in letter dated 18.02.2015 **regarding poor quality and deficiency in service reflect the same.**

The observations which have been recorded by the NCLT in Para 9 of the impugned order rejecting section 9 application are to the following effect:

The OC has not disputed the letter dated 18/02/2015, page 52 of the petition. Since this letter is filed by the Petitioner, therefore, its genuineness cannot be doubted. And on the basis of this document, it is admitted fact that the ***Respondent has raised the dispute regarding the quality and deficiency in the service, which comes under the definition of dispute u/s 5(6) of the IBC, 2016. In view of the Section 9(5)(ii) IBC, the moment dispute is established by the CD, the Corporate Insolvency Resolution Process should not*** *be initiated against the CD..*

This Appeal has been filed against order by which NCLT has rejection Section 9 application filed by the OC. OC contended that it continued to render services even after letter dated 18.02.2015 and the contract was not terminated and there has been no further correspondence in this regard.

Decision:

The NCLAT after perusal of records stated that the submission of the OC that payment was never denied and contract continued even after letter dated 18.02.2015 also does not negate the dispute between the parties, since poor quality of service was explained by CD by letter dated 18.02.2015, hence, the dispute was very much there from the said date at least.

The disputes pertaining to contractual issues are not to be resolved in Section 9 proceedings*.*
Present is not a case where there is ***undisputed debt*** *for which insolvency can be asked by the OC to be initiated.*
We are of the view that no error has been committed by the NCLT in rejecting Section 9 application, there being a preexisting dispute. There is no merit in the Appeal. Appeal is dismissed.
Learned counsel for the OC lastly submits that TDS deductions were made even after 18.02.2015. Be that as it may. It is always open for the OC to seek remedy for its dues, if any, as permissible in law.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can NCLT dismiss an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") due to pre-existing dispute which is not a patently feeble legal argument or an assertion of fact unsupported by evidence?

M/s Nidhi Containers Private Limited *Operational Creditor "OC"*	**Bajaj Foods Limited (Bajaj group of Companies)** *Corporate Debtor "CD"*

FACTS OF THE CASE	**SUBMISSIONS BY OC**
• An application under section 9 was filed by OC against CD dated 22.06.2022 stating amount claimed as debt in default to be Rs. 1,06,06,409.77/- [outstanding amount against principal with 24% interest p.a.]. • OC and CD were in business relationship since 10 (ten) years.	• OC issued the Demand Notice on 11.02.2020 to which CD duly sent a notice of dispute dated 28.02.2020 raising objections against the frivolous demand so raised by the OC. • A fresh demand notice in compliance of IBC was sent on 01.03.2022 for the payment of debt aggregating to Rs. 1,06,06,409.77/-. CD sent a reply dated 14.03.2020. • The OC also submitted that the dispute raised in the reply to demand notice is on the basis of alleged fraud, confessed by the employee of CD on 17.01.2019. The OC contented that the conduct of CD defies logic that even after realizing that there was over pricing by the OC , the CD kept on making payments till December 2019.

SUBMISSION OF CD

- Prior to the issuance of the 1st Demand Notice, the CD had categorically notified through various written correspondence that the OC had indulged into serious fraud, malpractices and bogus billings in connivance with one of the employee of the CD.
- On confession of an employee on 17.01.2019, CD had acquired knowledge that, the OC, in connivance an employee of the CD, had procured purchase orders at escalated rates, as compared to the prevailing market rates. Thereafter, the OC used to raise invoices at such escalated rates and show over supply so as to receive payments from the CD based on such inflated invoices. (A translated copy of the confession letter is annexed in the reply).CD duly terminated the concerned employee.
- Later CD informed the OC vide an E-mail that they were under the process of raising a debit note for the difference in the rates/ huge gap in pricing of the materials purchased from the OC.
- On 31.01.2020, the CD had duly sent the rate/quantity difference report for last 5 (five) years, which reflected a substantial difference of more than Rs. 1.45 crores for last 5 (five) years. Subsequently, vide an E-mail dated 03.02.2020, the CD had clearly stipulated inter alia that in a case where such escalation of price would have not been taken place, then there would have been no amount outstanding and payable to the OC by the CD. CD also called for a meeting with the OC in order to discuss about the matter. Immediately upon raising of disputes by the CD and on claiming the differential amount, OC had issued the 1st Demand Notice on 11.02.2020.
- CD submitted that as on 15.02.2020, a total difference of Rs. 2,23,46,615/- is calculated on account of escalated rates, which is far higher than the amount claimed to be outstanding by the OC and therefore, the CD is not liable to pay a single penny to the OC.

OBSERVATIONS / DECISION

It is observed that CD had offered the OC to discuss the matter of price escalation and schedule a meeting with CA and Legal team, which was not held and demand notice was issued directly to CD. We observe that the communications of fraud and malpractice by the employee of the CD in collusion with OC were made by the CD to OC, prior to the issue of Demand Notice; which indicates that the disputes between the parties were prevailing even prior to the issuance of the Demand Notice. Further, the CD has also duly replied to the Demand Notice pointing out all the pre-existing disputes. ***The Hon'ble Supreme Court in Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd., has already amplified the role of Adjudicating Authority on the question of consideration of dispute.***

The pre-existing disputes in this case are not mere feeble arguments, instead they are backed by evidence. Considering all the facts and circumstances of the case, we hold that application is liable to be dismissed due to Pre Existing Dispute.

NCLT can dismiss an application filed under section 9 on existence of dispute which is backed by evidence and not a feeble argument.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can proceeding against the Principal Borrower and the Corporate Guarantor be initiated simultaneously under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Mohan Kumar Garg **"Corporate Guarantor of Corporate Debtor"** or **"Appellant"**	Omkara Assets Reconstruction Pvt. Ltd. **"Financial Creditor"** or **"FC"**

1. An Appeal has been filed against order passed by the NCLT by which an application under Section 7 filed by the FC against the Appellant has been admitted.
2. Appellant needed to approach the FC for settlement but he submits that no settlement has been fructified with the FC.
3. Appellant contended that the proceedings against the Corporate Guarantor ought not to have been initiated since proceeding under Section 7 against the Principal Borrower has already been admitted and proceeding. *He submitted that the Adjudicating Authority has relied on judgment of this Tribunal in "Athena Energy" whereas judgment of the Coordinate Bench in Vishnu Kumar Agarwal's Case* has taken the view that simultaneous proceeding against the Principal Borrower and the Corporate Guarantor cannot proceed. He further submits that documents of corporate guarantee was not placed on the record and not examined by the NCLT.
4. FC submitted that the corporate guarantee was never disputed by the Appellant, hence, necessity did not arise to bring the same on record.
5. Principal Borrower has defaulted in payment towards the outstanding amount.
6. The Notice was also issued to the Principal Borrower and the Corporate Guarantor on 14.03.2018. Corporate Guarantor has sent a reply contending that FC has not acted in due diligence while disbursing the loan.
7. Thus the NCLAT is of the view that the said reply in no manner dispute the existence of Corporate Guarantee. They are of the view that Appellant cannot be allowed to raise the issue of non-filing of the Corporate Guarantee on the record when the existence of Corporate Guarantee was not even disputed in the proceeding.
8. FC has **relied on subsequent judgment of this Tribunal in** *"Edelweiss Asset Reconstruction Co. Ltd. vs. Gwalior Bypass Projects Ltd.,", "State Bank of India vs. Mr. Animesh Mukhopadhyay" and "Kanwar Raj Bhagat vs. Gujarat Hydrocarbons and Power SEZ Ltd. & Anr."* **taking the view that simultaneous proceedings against the Principal Borrower and the Corporate Guarantor can be initiated.**

Decision of Hon'ble NCLAT, Principal Bench, New Delhi -

"The proceeding under Section 7 can be initiated against both the Principal Borrower and Corporate Guarantor and there is no inhibition in proceeding against the Corporate Guarantor although proceeding against Principal Borrower under Section 7 was admitted. This Tribunal is of the view that no error has been committed by NCLT in admitting Section 7 application against the Corporate Guarantor. There is no merit in the Appeal." **Appeal is dismissed.**

Thus, proceeding ***against the Principal Borrower and the Corporate Guarantor*** *can be initiated simultaneously* ***under*** *IBC!*

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team ~ K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Can related parties file an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") based on sham transaction?

Zoom Communications Pvt. Ltd ***Operational Creditor "OC"***	***M/s. Par Excellence Real Estate Pvt. Ltd.*** ***Corporate Debtor "CD"***

FACTS OF THE CASE

- A loan of Rs.7 Crores was obtained from India Bulls in favour of the CD. The loan was applied by the CD and Co-applicant was Mr. Gulshan Jhurani, the Director of the OC.
- OC had filed a Section 9 application claiming that a debt of Rs.57,25,000/- is due which was processing fee for procuring the loan for the CD.
- NCLT took the view that transaction which took place between two related companies in the year 2015 appears to be sham transaction and which could not be basis for initiating any CIRP. Challenging the said order dated 17.05.2022, this Appeal has been filed.
- NCLT has also issued show-cause notice ("SCN") under Section 65(1) to the parties for appropriate action.

SUBMISSION OF OC	**SUBMISSION OF CD**
• Present management of OC along with CD was unaware that about Mr. Jhurani who was Director being related party. • Findings and Observation had already been done in impugned order, so SCN is a mere formality and not purposeful. • Balance Sheet has been filed by the OC of the FY 2015-16 where there was no related party shown.	• Extract of Balance sheet of the CD for the FY 2017-18 clearly mentions that Mr. Jhurani was Director of both the CD as well as OC. • CD submit that under Section 188 of the Companies Act such transaction was permissible.

OBSERVATIONS

- By piercing the Corporate veil, it is clear that both OC and CD are related parties due to common directorship on date of invoice.
- In view of the aforesaid finding, NCLAT is of the considered view that the aforesaid transaction, which had taken place between the two related Companies in the year 2015 is sham and the CIR Process cannot be initiated on the basis of such a sham transaction.
- As per section 21(2) of IBC related party has no right of representation, participation or to vote has been granted to a 'Related Party' on initiation of CIRP of the CD. hence related party viz. CD and OC have no control in CIRP process.
- Since, the said transaction has turned out to be a sham transaction, we are of the considered view that both the parties are in collusion and the present Application has not been filed for the resolution of insolvency rather, the parties have attempted to kickstart the CIR Process with a malicious intent for a purpose other than the resolution of insolvency of the CD, which is not permissible under the IBC. Hence a SCN has been issued to parties as to why the penalty as stipulated under Section 65(1) of IBC, shall not be imposed on them within 15 days

Decision of NCLAT

As both OC and CD were applicants, NCLAT fail to see that how the OC can claim payment of fee for procuring the loan. No error has been committed by the NCLT in refusing to initiate the CIRP on such suspicious debt and NCLAT affirms the said order passed by the NCLT. Both OC and CD have replied to SCN, order regarding same is yet to be passed. The AA should consider Reply given by the CD and shall not be influenced by any observation made in the impugned order.

CIRP cannot be initiated on sham transaction entered between related parties under IBC!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Can simultaneous CIRP proceedings against the same Corporate Debtor be allowed under Insolvency and Bankruptcy Code, 2016 (IBC)?

Vrundavan Residency Private Limited **"Financial creditor or FC"**	Mars Remedies Private Limited **"Corporate debtor or CD"**

- In 2019, BDH Industries Limited had filed a petition under Section 7 of IBC, seeking initiation of Corporate Insolvency Resolution Process ("**CIRP**") against CD.
- During the pendency of this application, FC also filed Section 7 petition seeking initiation of CIRP against the same CD. The application of FC was rejected for being time barred. The aggrieved FC appealed to NCLAT, who set aside the order of NCLT and matter was remitted to NCLT.
- Aggrieved by the order of NCLAT, CD preferred an Appeal to Supreme Court which was dismissed as withdrawn.
- In meanwhile the first CIRP application was accepted, Thus the application of FC stands ineffective.
- CIRP was initiated against CD on application of BDH Industries. The FC was at liberty to file its claim before IRP as per the provisions of the IBC.
- FC later filed an instant application to NCLT to restore his application.

The CD has filed reply and submits as under:

a. *Another matter was filed by one another alleged financial creditor against the CD and pursuant to the order passed by NCLAT was admitted into CIRP. The order was challenged before Hon'ble Supreme Court and the Hon'ble Supreme Court gave direction that there shall be stay of all further proceedings as regards the CIRP.*

b. *The* ***FC has already filed its claim with the IRP appointed.***

Hence the instant application is not only pre-mature but a sheer abuse of the process of law and court.

Judgement

NCLT observed that the FC's petition could only be restored if the first application gets settled or the order is set aside. It was held that,

The prerequisites to revive/restore the CIRP Application of FC is clearly mentioned as '*to restore the application in case BDH Industries* ***get settled*** *or the* ***order is set aside***". Neither of the conditions are existing at present. Admittedly the matter is not settled and setting aside is yet premature. Thus the application of FC is dismissed.

Thus, simultaneous CIRP proceedings against the same Corporate Debtor cannot be allowed.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Team ~ K. Bagla & Associates
Company Secretaries
Insolvency Professionals

Does issuance of Cheques by Corporate Debtor amounting to Rs 1 Crore for balance payment out of advance paid for goods, due to deficient supply in favour of Operational Creditor meets the threshold under Section 4 of the Insolvency and Bankruptcy Code, 2016 ("IBC")?

Growthtree Ventures Pvt. Ltd. Operational Creditor "OC"	Umbrella Genomics Pvt. Ltd. (CD) Corporate Debtor "CD"

FACTS

- OC has made advance payments to the CD for supply the best quality coal within the prescribed time period. This advance payment cumulatively added up to Rs. 3,85,00,000/- from 31.08.2022 till the date of 21.09.2022.
- Against the said amount advanced by the OC, coal worth only Rs. 3,15,81,589/- was supplied. CD supplied a deficient quantity of 2405 MT of Coal, whereas the agreed quantity under the purchase order was 2600 MT of Coal. It must also be noted that the CD was holding an amount of Rs. 69,18,411/- at this instance.
- The Parties made endeavours to resolve the issues. As a result, the parties entered into an oral agreement whereby the CD agreed to pay to the OC a lump-sum sum of Rs 1,00,00,000/- towards the amount required to be refunded, with applicable interest and compensation payable to the OC as a result of CD in failing to meet its commitments.
- In order to honor the terms of the oral agreement, the CD issued the two Cheques in favour of the OC.
- The OC presented the said Cheques to the Bank for encashment. However, both the said Cheques were returned unpaid due to the reason "**Payment stopped by drawer**".
- Being aggrieved, OC was constrained to issue a demand notice under IBC for an amount of Rs. 1,00,00,000/- along with payment of interest at the rate of 18% per annum and the same was duly delivered to the CD.
- The application has been filed under Section 9 of the IBC, by the OC seeking initiation of CIRP against the CD.

Decision of NCLT

It is not in the realm of contention that issuance of a cheque becomes a promise to pay under section 25(3) of the Contract Act, 1872 and in accordance with section 118 of the Negotiable Instruments Act, 1881, a presumption arises to the effect that the cheque was drawn and accepted for consideration. However, these arguments do not help the OC in meeting the threshold set under IBC in this present instance.

The OC has not been able to establish by placing any evidence on record to point out that amount beyond Rs. 69,18,411/- is owed by the CD to the OC in relation to the same operational debt. There is no written agreement or document delineating the settlement of an amount to the tune of Rs 1,00,00,000/- or any interest arrangement vis a vis the existing debt, but the pleadings of the OC only point to an oral arrangement sans any other hard and concrete foundation for its assertions and arguments, which the CD has denied.

Therefore, the OC failed to establish that its operational debt meets the existing threshold of Rs 1,00,00,000 under the IBC. It would also appear that the OC has alternative remedies for the return of Cheques under law and can approach the relevant authorities for the same. Hence, the position taken by the OC is not legally tenable and the current Petition under Section 9 of the IBC cannot be admitted.

Thus issuance of Cheques by CD amounting to Rs 1 Crore for balance payment out of advance paid for goods, due to deficient supply in favour of OC meets the threshold under Section 4 of the IBC!!!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Does litigation in the SARFAESI and DRT preclude the Bank to take specific remedy provided under Section 7 of the Insolvency and Bankruptcy Code, 2016("IBC")?

Laxmi Engineering Industries (Bhopal) Private Limited "Corporate Debtor" or "CD"	Canara Bank Limited "Financial Creditor" or "FC"

- The Appeal has been filed against the order passed by the NCLT in which application filed by the FC under Section 7 of the IBC has been admitted.
- CD contends that the application is barred by time and further submits that the FC has approached several forums including the DRT. It is further submitted that the talks regarding OTS (one-time settlement) are still going on.
- CD's account was declared NPA on 04.06.2018 and thereafter the NCLT has noticed that in reply dated 29.10.2018, the CD has acknowledged the debt and thereafter OTS was submitted by the CD on 07.09.2021, 20.01.2022, 27.01.2022, 31.01.2022 and 18.02.2022. The NCLT has come to the conclusion that the acknowledgment in the reply as well as OTS offer makes the application on 20.12.2022.
- NCLT looked into the acknowledgment and reply dated 29.10.2018 which was in the year 2018 itself and thereafter within three years there has been OTS proposal by the CD, hence, the FC was clearly entitled for the benefit of Section 18 of the Limitation Act and the Adjudicating Authority has rightly held that Application was within time.

Hon'ble NCLAT, Principal Bench, New Delhi held that:

"the submission of the CD that the FC has approached the multiple forums including the DRT is concerned, it is well settled that litigation in the SARFAESI and DRT does not preclude the FC to take specific remedy provided under Section 7, hence, the said submission does not help the CD.

The last submission of the FC that the CD is taking steps for the OTS settlement, we only observe that in event any OTS is accepted, it shall be open for the CD to file an Application before the Adjudicating Authority for closing the settlement under Section 12A which may be considered in accordance with law."

Hence, the Appeal has been dismissed.

Thus the litigation in the SARFAESI and DRT does not preclude the Bank to take specific remedy provided under Section 7 of the Insolvency and Bankruptcy Code, 2016.

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Does the acknowledgement of debt be due and payable by the Corporate Debtor amounts to clear acknowledgment of debt and belies the existences of any dispute under Insolvency and Bankruptcy Code, 2016 ("IBC")?

Nik-San Engineering Company Ltd **"Corporate Debtor" or "CD"**	Sterling Enamelled Wires Pvt. Ltd. **"Operational Creditor" or "OC"**

An appeal has been filed by the CD aggrieved by the Order passed by the NCLT admitting the application filed by the OC for initiation of Corporate Insolvency Resolution Process ("CIRP") under Section 9 of IBC the against CD.

CD's Submission

- CD was engaged in a business relationship with OC who supplied material to the CD and raised invoices during February 2020. The OC has not received his outstanding dues issued a demand notice on 14.08.2021 claiming an amount of Rs. 2,07,11,209/- . This was followed by filing and admission of Section 9 application before the NCLT
- CD admitted that demand notice has been received by the CD and further submitted that a reply notice of dispute was sent to the OC but the receipt was falsely denied.CD has raised several disputes regarding sub-standard quality of goods from time to time which were communicated to the OC before the issuance of the demand notice.
- CD further contended that though these disputes were subsisting, the NCLT failed to take cognizance of these pre-existing disputes and wrongly treated a communication sent by the CD to CITI Commercial Bank as an acknowledgment of debt and erroneously admitted the Section 9 application.

OC's Submission

- **OC contended that** the letter addressed to the **CITI** Commercial Bank by the CD amounts to be a clear and unconditional acknowledgment of the debt having not been repaid by the CD amounts to default and these disputes have rightly been held by the NCLT as not sustainable.
- An emphatic assertion was made **by the OC** that the Appellant did not send any reply to the demand notice nor repaid the outstanding dues and hence the NCLT rightly admitted the application.
- **Further, a**n email dated 13.05.2021 was sent by the CD to the OC acknowledging that an amount of Rs.2,15,20,344/- was outstanding and agreeing to make 7.5% extra payment towards these dues. CD had **n**ot only acknowledged the outstanding amount but also assurance been given by CD to clear the amount and make extra payment towards old outstanding dues.

DECISION

After perusal of records, NCLAT is of the considered view that when the CD had admitted the outstanding debt and agreed to pay the same, it amounts to clear acknowledgment of debt being due and payable and belies the existence of any dispute.

All requisite conditions necessary to trigger CIRP under Section 9 stands fulfilled with operational debt having been acknowledged and default committed thereto and there being no real pre-existing disputes discernible from given facts. NCLAT is of the view that the NCLT has rightly admitted the application of the OC filed under IBC.

Yes, an acknowledgement of debt being due and payable by the CD amounts to clear acknowledgment of debt and belies the existences of any dispute under IBC

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

From when the period of limitation for filing an Appeal shall commence under Insolvency and Bankruptcy Code, 2016 ("IBC")?

M/s. EDUCOMP INFRASTRUCTURE & SCHOOL MANAGMENT LTD **"Corporate Debtor or CD"**	Directorate of Enforcement **"Appellant"**

Appeal

The application was filed praying for condonation of delay of 789 days in filing the appeal. The order impugned was passed by the Adjudicating Authority on 14.12.2020. The Appellant has filed this appeal on 13.03.2023.

Submission of Appellant

The Appellant submits that it came to know about the related party only in the end of the March, 2023 and then appeal was filed on 13.03.2023. It submit that limitation for filing the appeal shall run only when It came to know about the related party relying on Section 17 of the Limitation Act

Submission of CoC

- ✓ CoC has refuted the submission and submitted that limitation for filing the appeal starts on the date when the order was pronounced by placing reliance on the judgement of *Hon'ble Supreme Court in V. Nagarajan Vs. SKS Ispat & Power Ltd. & Ors. (2022) 2 SCC 244.*
- ✓ It is further submitted that Appeal filed by the Appellant with similar delays has already been rejected. Reference has been made to the order of this Tribunal dated 16.11.2022 in the matter of *Directorate of Enforcement Vs. Prashant Jain.*

Decision

The NCLAT after perusal of records stated that the limitation to file the appeal as per the judgement of ***Hon'ble Supreme Court in V.Nagarajan Vs. SKS Ispat & Power Ltd. & Ors. (2022) 2 SCC 244*** *shall commence when the order was pronounced, the said limitation cannot be remain suspended till the Appellant came to know about the relevant facts for filing the appeal.*

The delay condonation application is dismissed.

Period of limitation for filing an Appeal shall commence when the order was pronounced!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service

Whether the Banker's certificate is mandatorily required as documentary evidence of default, to trigger CIRP under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC")?

M.R. Nirman Private Limited, Corporate Debtor "CD"	M/s Quippo Infrastructure Limited Operational Creditor "OC"

BRIEF FACTS

- This Appeal is preferred under IBC, against the impugned order passed by the NCLT whereby the NCLT has rejected the Application filed u/s 9 of the IBC on the grounds that proof of delivery of Demand Notice is not found and claim of receipt of money is not evidenced by the documentary evidence of Banker's Certificate or details of cheques or any DD Note etc.
- OC contended that the Demand Notice and Application u/s 9 of the IBC was delivered to the CD at his Registered Office address and also CD has not specifically denied the receipt of the Demand Notice in their Affidavit of Reply.
- OC further contended that proof for the receipt of payment was duly placed on record and was also reflected in the certificate of the financial institution and the NCLT erroneously observed that the Application was not accompanied by any documentary evidence and Banker's Certificate. The entry in the statement provided by the financial institution clearly specified the receipt of Rs. 50,000/- through cheque and NCLT ought to have considered this aspect while passing the impugned order.
- CD submitted that creation of the operational debt in lieu of rent against hiring of the rig, by the CD is not maintainable u/s 8 and 9 of the IBC. Further, in the absence of any proof of delivery of the Demand Notice alleged to have been delivered on the CD, it cannot be said that the CD was in the knowledge of the said Demand Notice. In compliance of the General Clauses Act, 1897 the OC ought to have submitted the copy of the proof of delivery of the Demand Notice.

DECISION

Hon'ble NCLAT after perusal of judgement of ***The Hon'ble Supreme Court in the case of 'Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.'*** allowed the appeal and held that –

"Speed Post receipt and tracking consignment report evidencing the Demand Notice was duly served and the contention of the CD that the notice was never delivered upon is untenable, specially keeping in view that the address written is the Registered Office, which is undisputed. The Demand Notice was duly served upon the CD and we are satisfied that the requirement under Section 8 of the IBC, is complete. It is clear that a Banker's Certificate is not mandatorily required to trigger CIRP u/s 9 of the IBC. It is significant to mention that this Tribunal has not gone into the merits of the matter with respect to '**debt**' or '**default**', only addressed to the issue of the service of Demand Notice on the Corporate Debtor and that a Banker's certificate is not essential to trigger CIRP under Section 9 of IBC"

Thus the Banker's certificate is not mandatorily required as documentary evidence of default, to trigger CIRP under Section 9 IBC!

Disclaimer: -
The content herein is provided for understanding of Law and shall not be construed as Legal Advice or Legal Service