HSA ADVOCATES
HEMANT SAHAI ASSOCIATES

Restructuring & Insolvency

Monthly Newsletter

February 2021

TABLE OF **CONTENTS**

STATUTORY UPDATES

Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2021

- In exercise of the powers conferred under Sections 196, 203 and 205 read with Section 240 of the Insolvency and Bankruptcy Code, 2016 (**IBC**), the IBBI vide notification dated January 14, 2021 amended the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (**Principal Regulations**).
- The key amendments are as follows:
  - The IBBI introduced various amendments to the Regulation 5 of the Principal Regulations by inserting Sub-Regulation (4A) which providesad the qualifications to be a 'Shareholder Director', thereby stating that any individual satisfying the eligibility norms laid down by the Governing Board shall be eligible to be the same. Furthermore, in Sub-Regulation 6 which defines 'An Independent Director', under Clause (b) the words *'who has expertise in the field of finance, law, management or insolvency'* have been substituted by *'who has expertise in the field of finance, law, economics, accountancy, valuation, management or insolvency.'* Additionally, a Sub-regulation 14 has also been inserted in Regulation 5 of the Principal Regulations which mandates every director to disclose any order of any authority that affects his character or reputation, to the Insolvency Professional Agency (**IPA**), within one week of issue of such order. The proviso to this Sub-Regulation provides that a copy of the order shall be uploaded on the website of the IPA and such director shall forthwith cease to be a director of the IPA on account of him being disqualified to be a director of the company (in case the order provides for the same).
  - Further, a new Regulation 6 'Self-Evaluation' has been inserted which provides for a timeline of three months to the Governing Board to evaluate its performance.
  - Lastly, Regulation 7 'Compliance Officer' pertaining to duties of a Compliance Officer has been inserted wherein such officer designated or appointed by the IPA shall be responsible for ensuring compliance with the provisions of the IBC and Regulations, Circulars, Guidelines, and Directions issued thereunder. In addition to this, the Compliance Officer shall immediately and independently, report to IBBI about any non-compliance of the provisions of the IBC or any Regulations, Circulars, Guidelines, and Directions issued thereunder. An annual compliance certificate verifying that the IPA has complied with the aforementioned provisions also has to be submitted by the Compliance Officer.
- These amendments would ensure transparency in the functioning of Insolvency Professional Agencies and would also expand the current limitations to be an Independent Director in an IPA by also including the professionals belonging from areas such as economics, accountancy, and valuation.

Pre-Packaged Insolvency Resolution Process under the IBC

- Vide order dated June 24, 2020, the Government constituted a sub-committee of the Insolvency Law Committee to look into the possibility of including what are called 'Pre-Packs' under the current insolvency regime to offer faster insolvency resolution under the IBC and thereafter, to prepare a detailed scheme for implementing Pre-Packs and prearranged insolvency resolution process.
- The sub-committee designed a Pre-Pack framework (**Draft framework**) within the basic structure of the IBC, for the Indian market and thereafter, vide notice dated January 08, 2021, public comments were invited on the Draft framework.
- The aim of the Draft framework is to aid the existing insolvency framework, cut the cost and accelerate the time involved in the Resolution Process. Few observations regarding the Draft framework are as under:
  - **Pre- Package Insolvency Resolution and its working mechanism:** This is a quasi-formal procedure which integrates the essence of an out of court private restructuring. Under this structure, the Debtor and the Creditor are given an opportunity to arrive at an arrangement to resolve the debt through an agreement directly between the creditors and potential investors instead of a public bidding process. Thereafter, the resolution arrived at between the parties will be placed before the NCLT for its implementation as currently required under Section 30(6) and Section 31 of the IBC.
  - **Need for this framework:** The Bankruptcy Law Reforms Committee (**BLRC**) in its first report mentioned that *'Speed is of essence for the working of the bankruptcy code'* and observed that *'the most important objective in designing a legal framework for dealing with firm failure is the need for speed'*. However, even after almost 4 years of IBC coming into effect, certain issues regarding strict adherence to the timelines as provided under the IBC are still being faced. Therefore, there is a need to introduce an improved mechanism for efficient functioning of NCLT Benches to deal with the pending caseload and to reduce the time taken for resolution of the Corporate Debtors.
- **Salient features of this framework:**
  - The option of Pre-Pack can be availed by all Corporate Debtors for any stress - pre-default and post-default.
  - It could be implemented in phases commencing from defaults from INR 1 lakh to INR 1 crore and COVID-19 defaults for which CIRP is not available today, followed by default above INR 1 Crore, and then default from INR 1 to INR 1 Lakh. Pre-Pack in respect of pre-default may be considered with consent of higher threshold (say 75%) of all creditors, after successful implementation of post-default resolution.
  - A simple majority of shareholders and Financial Creditors would be sufficient to initiate Pre-Pack process, during the operation of which CIRP cannot be commenced, as no two proceedings are allowed to run simultaneously.
  - A cooling off period has also been proposed such that a Pre-Pack cannot be initiated within three years of closure of another Pre-Pack.
  - In contrast to the CIRP, the Corporate Debtor shall remain in control and possession of the management during Pre-Pack process. However, decisions on matters mentioned under Section 28 of the IBC shall be subject to approval by the Committee of Creditors (CoC).
  - A Resolution Professional shall be appointed, with the approval of Financial Creditors, in order to ensure transparency and compliance with law.
  - The Resolution Professional shall constitute the CoC comprising of unrelated Financial Creditors, conduct due diligence and get valuation done by 2 valuers.
  - Section 29A will apply in full with regards to Resolution Plans. Similarly, the moratorium under Section 14 of the IBC shall be available till the process concludes, however, it will be limited and will not cover essential and critical services.
  - The CoC shall take decisions with the approval of required majority of votes, present and voting. Only the decision to liquidate the Corporate Debtor would require approval by 75% of voting share, and the decision to close the process would require approval of 66% of voting share.
  - Proposal has also been put forward for start of the Pre-Pack with a base Resolution Plan, which will be put to a Swiss Challenge. This should come first from the promoters if they are eligible and interested. Otherwise, the CoC may arrange a base plan.
  - The Pre-Pack should offer two optional approaches, namely, (i) without Swiss Challenge but no impairment to Operational Creditors, and (ii) with Swiss Challenge with rights of Operational

Creditors and dissenting Financial Creditors subject to minimum provided under section 30(2)(b).

- The process can be terminated when the CoC decides to liquidate the Corporate Debtor with 75% voting share.
- No liquidation can take where Pre-Pack was initiated for (i) pre-default stress, (ii) default below the threshold for initiation of CIRP and (iii) COVID-19 defaults.
- Under the Draft framework, a timeline of 90 days for submission of a Resolution Plan plus 30 days for the NCLT to approve or reject the plan has been proposed. The approved Resolution Plan shall be binding on all stakeholders.

- With the increase in Non-Performing Assets at an alarming rate, the Draft framework might prove to aid the resolution process under IBC and reduce the burden on the NCLTs. Furthermore, proper implementation of the Pre-Packaged Insolvency regime would benefit both the Debtor and the Creditors as higher resolution values could be achieved due to the quick process involved as compared to the steps involved in the Resolution Process under the IBC. Overall, it is expected that with the pursuit of the proposed Draft framework, a positive impact will be seen on the financial health of the debt market. However, a concrete conclusion can only be arrived at after this framework is approved and comes into effect.

IBBI Circular dated January 06, 2021 pertaining to retention of records relating to the Corporate Insolvency Resolution Process

- The IBBI vide circular dated January 06, 2021 emphasized upon the duty of the Resolution Professional (**RP**)/ Interim Resolution Professional (**IRP**) to maintain the records in relation to assignments conducted during the Corporate Insolvency Resolution Process (**CIRP**) of a Corporate Debtor. The IBC read with Regulation 39A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) mandates the IRP and the RP to preserve a physical as well as an electronic copy of such records as per the record retention schedule as communicated by IBBI in consultation with IPAs.
- In view of the same, the Circular dated January 06, 2021 has directed the retention of records by the Insolvency Professionals (**IPs**) as required under Regulation 39A of CIRP Regulation as under:
  - An electronic copy of all records (physical and electronic) for a minimum period of eight years, and
  - A physical copy of physical records for minimum period of three years, from the date of completion of the CIRP or the conclusion of any proceeding relating to the CIRP, before the Board, the NCLT, Appellate Tribunal or any Court, whichever is later.
- It is pertinent to note that such records have to be preserved by the IP when he acted as IRP or RP, irrespective of the fact that he did not take up the assignment from its commencement or continue the assignment till its conclusion.
- The directions given by the IBBI vide this Circular would lead to the preservation of records of the CIRP of the Corporate Debtor for a longer period of time. This would ensure a proper check on the functioning of the IPs and would also give an opportunity to the appropriate authorities to look into the records of the CIRP, if needed at a later stage.

RECENT JUDGMENTS

Sri D. Srinivasa Rao v. Vaishnovi Infratech Ltd.

Judgment dated January 05, 2021 in Company Appeal (AT) (Insolvency) No. 880 of 2020

Background facts

- Sri D. Srinivasan Rao (**Appellant**), the Operational Creditor, preferred an Application against Vaishnovi Infratech Ltd (**Vaishnovi Infra**), the Corporate Debtor, under Section 9 of the IBC for initiation of CIRP of Vaishnovi Infra. The National Company Law Tribunal, Hyderabad Bench rejected the Application vide order dated June 09,2020 on the ground that prior to filing such Application under Section 9, the Appellant failed to serve the Demand Notice to Vaishnovi Infra as required under Section 8(1) of the IBC.
- Aggrieved by the order of the NCLT, the Appellant filed an Appeal before the National Company Appellate Tribunal (**NCLAT**) primarily on the ground that the delivery of Demand Notice sent by the Appellant was refused by the Corporate Debtor. It was further contended by the Appellant that refusal to accept Demand Notice would not amount to non-delivery of notice and the only inference available thereunder is that the Vaishnovi Infra, being aware of the contents of the notice, refused to accept the delivery thereof to avoid the legal consequences.

Issue at hand?

- Does refusal to accept Demand Notice by Corporate Debtor amount to non-delivery of notice as required under Section 8(1) of the IBC?

Decision of the Tribunal

- The NCLAT re-iterated the pre-requisite mentioned under Section 8(1) of the IBC and was of the opinion that it is now well settled that in case of default by the Corporate Debtor, delivery of Demand Notice in terms of Section 8(1) of the IBC is a sine-qua-non for initiation of CIRP at the instance of Operational Creditor.
- The delivery of the Demand Notice is intended to put the Corporate Debtor on notice so that in the event of there being a pre-existing dispute like in the form of a civil suit or arbitration proceedings pending in regard to the amount in respect whereof default is alleged to have been committed, the Corporate Debtor can bring such pre-existing dispute to the notice of the Operational Creditor.
- In consonance with the above pre-requisite, the NCLAT straightened out the issue regarding what amounts to non-issuance/non-delivery of the Demand Notice and held that in case the Demand Notice is returned unserved on account of the addressee being not available on the given address or the venue of addressee being non-existent or the delivery of notice being frustrated because of some reason other than that attributed to the Corporate Debtor, the fact of notice having been returned unserved would amount to non-delivery of notice.

- However, in a case where it is the Corporate Debtor who refused to accept delivery of notice, the only inference available is that the Corporate Debtor was aware of the consequences and it deliberately refused to acknowledge the notice. The fault lies on the part of the Corporate Debtor for which it cannot be rewarded. No fault can be attributed to the Operational Creditor as it had taken the necessary and requisite steps for service of the Demand Notice.
- In this background and basis the facts and circumstances of the case, the NCLAT stated that Impugned Order suffered from grave legal infirmity and is required to be set aside. In view of the same, the NCLAT allowed the Appeal. Furthermore, the NCLAT also directed the NCLT to provide Vaishnovi Infra an opportunity to settle the claim and on failure of the same, pass an order of admission of the Application under Section 9 of the IBC filed by the Appellant.

Our viewpoint

In our opinion, the said judgment is of great importance for the Operational Creditors who are denied their legitimate claims by the Corporate Debtors by refusing the service of the Demand Notice under Section 8 of the IBC in order to escape the legal consequences.

Kalinga Allied Industries India Pvt Ltd v. Hindustan Coils Ltd & Ors

Judgment dated January 11, 2021 in Company Appeal (AT) (Insolvency) No. 518 of 2020

Background facts

- Bindals Sponge Industries Ltd., the Corporate Debtor, was admitted into insolvency and Mr. Dinesh Sood was appointed as the Resolution Professional. The RP issued the Expression of Interest on August 24, 2018, pursuant to which Kalinga Allied Industries Pvt Ltd (**KAIPL, Appellant**), submitted its Resolution Plan. After several rounds of deliberations with the CoC, a revised Resolution Plan was submitted by KAIPL and the same was approved by the COC by requisite majority.
- Thereafter, the RP filed an Application before the NCLT, Special Bench under Section 30(6) of the IBC for the approval of the Resolution Plan. During the pendency of this Application for approval, Hindustan Coils Ltd. (HCL), the Respondent, filed an Interlocutory Application (IA) before the NCLT seeking direction for consideration of its Resolution Plan which offered a value which was allegedly 12% more than the value offered by the Successful Resolution Applicant (**KAIPL**). HCL was not a part of the CIRP of the Corporate Debtor.
- After examining the issue, the NCLT held that the object of the IBC is maximization of the value of assets of the Corporate Debtor, which is also advantageous to all the stakeholders and therefore, vide order dated February 27, 2020 (Impugned Order), the NCLT allowed the IA with the direction that the plan of HCL be placed before the CoC for consideration. Aggrieved by the Impugned Order, KAIPL filed an Appeal before the NCLAT.

Issue at hand?

- What are the powers of the NCLT under Section 31 of the IBC? Can the NCLT direct the COC to consider the Resolution Plan of a person/party who was not part of CIRP?

Decision of the Tribunal

- While dealing with the extent of the powers of the NCLT under Section 31 of the IBC, the NCLAT observed that when a Resolution Plan is presented before the NCLT for approval, the NCLT has a very limited power of judicial scrutiny and the statutory provision does not permit the NCLT to interfere with the commercial wisdom of the COC even for maximization of value of assets of the Corporate Debtor.
- Thereafter, on the issue of interference by the NCLT in the approval of the Resolution Plan for the Corporate Debtor, the NCLAT was of the view that there is no provision in the IBC or the CIRP Regulations, which provides that while exercising the power under Section 31 of the IBC, the NCLT can direct the CoC to consider the Resolution Plan of such person who has not been part of CIRP.
- The NCLAT also held that once the Resolution Plan has been opened and fundamentals and financials of the Plan and offer made therein were disclosed to all the participants including Resolution Professional, then anyone can increase its offer before the NCLT in the guise of maximization of realization. Therefore, no further fresh bid or offer could be accepted or considered

post the last date for submission of the Expression of Interest, even by the NCLT, including when such person is ready to pay more amount in comparison to the successful Resolution Applicant.

- Further, the NCLAT held that when the Application for approval of Resolution Plan is pending before the NCLT, then the NCLT cannot entertain an Application of an entity who has not participated in CIRP, even when such entity is ready to pay more amount in comparison to the successful Resolution Applicant.

Our viewpoint

This judgment raises a lot of questions regarding the interpretation as well as adoption of the objects of the IBC. We are of the opinion that if a Resolution Applicant offers a better Resolution Plan for the Corporate Debtor then such Resolution Applicant may be given an opportunity to atleast table the plan before the Committee of Creditors. This would lead to better price discovery which would be in the best interest of all the stakeholders. However, the NCLAT may be justified in prescribing a cut off date after which no offers can be accepted from parties who did not even participate in the process.

Manish Kumar v. Union of India & Anr

Judgment dated January 19, 2021 in WP(C) No. 26 of 2020 with 40 other writ petitions

Background facts

- The Insolvency and Bankruptcy Code (Amendment) Act, 2019 (**Impugned Amendment**), among others, inserted three provisos to Section 7(1), an additional explanation to Section 11, and Section 32A in the IBC. These provisions were challenged by various Home Buyers (**Allotees**) vide Writ Petitions before the Supreme Court stating that the Impugned Amendment is arbitrary and discriminatory.
- The Second Proviso to Section 7(1) of the IBC provides that for Financial Creditors who are allottees under a real estate project, an Application for initiating CIRP against the Corporate Debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent of the total number of such allottees under the same real estate project, whichever is less.
- The Allotees contended that 10% of allotted units is a dynamic figure and keeps changing. With the constant change in number of allotees, filing of Application under Section 7 by the homebuyers might become impossible. Furthermore, the date of default of various home buyers may be different making it difficult to ascertain a definite date of default to file a common Application.
- The Allotees also argued that there was no intelligible differentia to distinguish the home buyers from other Financial Creditors and such a differentiation does not bear any nexus with the objectives of the IBC.
- Issues were also raised with respect implementation of Section 32A of the IBC which provides a blanket protection to the Corporate Debtor and its property for offences committed prior to the commencement of the CIRP, when there is the approval of the Resolution Plan resulting in the change of management of control of the Corporate Debtor. However, this is subject to the successful Resolution Applicant being not involved in the commission of the offense.

Issues at hand?

- Whether constitutional validity of the amendments brought via the Impugned Amendment was maintainable along with whether the legislature had the power to implement the Impugned Amendment vis a vis estopped by the principle of promissory estoppel?
- Were the Allotees discriminated from other categories of Financial Creditors and was the basis of such distinction in line with the objects of the IBC?
- Whether the basis behind the immunity given to the Corporate Debtor and its properties under Section 32A of the IBC was justified?

Decision of the Court

- SC upheld the Constitutional validity of the Impugned Amendment and observed that they do not require any interference.

- While arriving at this conclusion, with regard to the introduction of second proviso to Section 7(1) of the IBC, SC observed that a supreme legislature cannot be cribbed, cabined, or confined by the doctrine of promissory estoppel or estoppel. Furthermore, reference was made to the provisions of the Companies Act, 1913 (Sections 153-C), Section 399 of the Companies act, 1956 and Section 244 of the Companies Act, 2013 which contain similar provisions regarding collective filling of an Application and have been followed without any issues. It was therefore observed that the Second Proviso to Section 7(1) does not cause any damage to the legal right of any allotee.
- With respect to the issue regarding different dates of default, the SC was of the view that to successfully move an Application under Section 7 of the IBC, there must be a default. Such default need not be qua the Applicant or Applicants. Any number of Applicants, without any amount being due to them, could move an Application under Section 7, provided that they are Financial Creditors and there is a default, even if such default is owed to none of the Applicants but to any other Financial Creditor. Thus, the SC made it crystal clear that there need not be a common date of default to initiate an Application under Section 7 of the IBC by the Allotees.
- Thereafter, regarding the issue of the basis of distinction of the Allotees from other creditors, the SC observed that what distinguishes Allotees from other Financial Creditors are numerosity, heterogeneity and the individuality in decision making of every individual allottee. There can be hundreds or even thousands of allottees in a real estate project. Different allottees may have a different take of the whole scenario. Some of them may seek remedy under the RERA, some may resort to the Consumer Protection Act and others may use civil suit. In such circumstances, if the legislature distinguishes taking into consideration, the sheer numbers of a group of creditors and finds this to be an intelligible differentia, which distinguishes the allottees from the other Financial Creditors, who are not found to possess the characteristics of numerosity, then, it is not for the Supreme Court Court to sit in judgment over the wisdom of such a measure.
- SC deliberated upon the issue of no intelligible differentia bearing a nexus with the object of introduction of the Impugned Amendment and purpose of the IBC and stated that if a single Allottee, as a Financial Creditor wants to move an Application under Section 7, the interests of all the other Allottees must not be put in peril. The legislature became alive to the peril of object of the IBC, being derailed by permitting the individual players crowding the docket of the Authorities. Instead, having regard to the numerosity, the legislature thought it fit to adopt a balanced approach by not taking the Allottee out of the fold of the Financial Creditors altogether. The Allottee continues to be a Financial Creditor.
- Further, with regard to the validity of Section 32A, SC was of the view that it was important for the IBC to attract bidders who would offer reasonable and fair value for the Corporate Debtor to ensure the timely completion of the CIRP. Protection must be granted to such bidders from any misdeeds of Corporate Debtor in the past which did not include any involvement of such Resolution Applicant. The protection extended to the properties of the Corporate Debtor shall also assist the banks to clean up their books of bad loans. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the Corporate Debtor is important to the new management to make a clean break with the past and start on a clean slate.

Our viewpoint

While this judgment by SC has not been welcomed by the home buyers, it seems that it would be beneficial in the long run as it would help various homebuyers to either recover their dues or get possession collectively in a better manner than what could have been individually possible. Furthermore, upholding the validity of Section 32A will give confidence to Resolution Applicants to bid for disputed companies and their assets, resulting in resolution of more Corporate Debtors.

Rajkumar Brothers and Production Pvt Ltd v. Harish Amilineni Shareholder and erstwhile Director of Amilionn Technologies Pvt Ltd & Anr

Order dated January 22, 2021 in Civil Appeal No. 4044 of 2020

Background facts

- Rajkumar Brothers and Production Pvt Ltd. (**RBPPL, Appellant**) filed a petition under Section 9 of the IBC before the NCLT, Hyderabad Bench against Amilionn Technologies Pvt Ltd, the Corporate Debtor, for initiation of CIRP of the Corporate Debtor.

- The NCLT vide order dated January 09, 2020 admitted the Section 9 Application preferred by RBPPL. Aggrieved by the Admission Order, Mr. Harish Amilineni (**Respondent**), the erstwhile director of the Corporate Debtor filed an Appeal before the NCLAT. Thereafter, the NCLAT set aside the order of the NCLT holding that there were pre-existing disputes between the Respondent and the Appellant, thereby stating that Section 9 Application cannot be admitted.
- RBPPL filed an Appeal before the Supreme Court (**SC**) against the order of the NCLAT only to the extent of the direction given in the Impugned Order stating that the Operational Creditor shall pay for the CIRP costs of the Corporate Debtor.

Issue at hand?

- Should an Operational Creditor bear the costs of the CIRP of the Corporate Debtor?

Decision of the Court

- SC was of the opinion that in cases where the Admission Order for initiation of CIRP is set aside, the Corporate Debtor cannot be saddled with the costs of the CIRP initiated at the behest of the Operational Creditor or with the fees of the IRP. In view of the same, the Supreme Court dismissed the Appeal.

Our viewpoint

This order by SC gives protection to the parties who are imprudently dragged into insolvency from bearing the high costs involved during the resolution process and also gives an indication to creditors that they shall not be given a leeway at the cost of the Corporate Debtor.

Naresh Sevantilal Shah v. Malharshanti Enterprises & Anr

Judgment dated January 19, 2021 in Company Appeal (AT) (Insolvency) No. 415/2020

Background facts

- CAN Enterprises Pvt Ltd (**CANEPL**), the Corporate Debtor, engaged the services of the Malharshanti Enterprises, the Operational Creditor, by a Work Order dated May 25, 2014, for carrying out some construction work.
- Malharshanti Enterprises filed a Company Application under Section 9 before the NCLT seeking initiation of CIRP against CANEPL on the grounds that CANEPL failed to make payment of the requisite sum. Accordingly, the NCLT admitted the claim of Malharshanti Enterprises and ordered the initiation of CIRP of CANEPL.
- Aggrieved by the Admission Order of the NCLT, Mr. Naresh Sevantilal Shah, the promoter of CANEPL, preferred an Appeal before the NCLAT.
- The counsel for Appellant argued that Malharshanti Enterprises first sent a Demand Notice under section 8 of the IBC to the CANEPL on December 02, 2017. On the basis of the same, a Company Petition was also filed before the NCLT but was thereafter withdrawn.
- After the withdrawal of the first Company Application, on March 13, 2018, the Corporate Debtor sent a detailed legal notice to Malharshanti Enterprises setting out several pre-existing disputes as to quality of work and delay in completion of work. Subsequently, on April 10, 2018, a notice invoking arbitration was sent to the Operational Creditor.
- Thereafter, on August 23, 2018, the Operational Creditor issued another Demand Notice under Section 8 of IBC, basis which a Company Application was filed under Section 9 of the IBC and the Admission Order was passed by the NCLT.
- It was argued by the Corporate Debtor that these arbitration proceedings still remain pending and were pending when the order of Admission was passed. Therefore, this constitutes a “pre-existing” dispute and thus, the Company Application under Section 9 could not have been admitted.
- Per contra, the Operational Creditor argued that the first Section 9 Application was withdrawn on technical grounds, as reflected in the order passed by the NCLT. It was only thereafter that the CANEPL chose to issue an arbitration notice, at a time when the Operational Creditor was curing the technical defects in question. Therefore, there were no pre-existing disputes prior to the issuance of the first Demand Notice under Section 8 of the IBC.

Issue at hand?

- Whether the pre-existence of disputes shall be seen from the date of the first Demand Notice or the second Demand Notice under Section 8 of the IBC?

Decision of the Tribunal

- The NCLAT while arriving at the decision in the said Appeal referred to the decision of SC in the matter of *Mobilox Innovations Pvt Ltd v. Kirusa Software Pvt Ltd*, basis which it observed that the existence of the dispute must be pre-existing i.e., it must exist before the receipt of the Demand Notice. Section 9 of the IBC makes it very clear for the NCLT to admit the Application "if no notice of dispute is received by the Operational Creditor and there is no record of the dispute in the information utility." in the absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the Demand Notice of the unpaid 'Operational Debt'. Consequently, the Application cannot be rejected under Section 9 and is required to be admitted.
- Thereafter, basis the facts of the case, the NCLAT was of the opinion that CANEPL had not raised any objection pertaining to the work performed by the Operational Creditor prior to the issuance of the first Demand Notice. The first Company Application was dismissed by the NCLT at the request of the Operational Creditor to withdraw, with a liberty to proceed against the Corporate Debtor with a correct claim as envisaged under IBC. Therefore, the first Company Application was not dismissed on any technical grounds as mentioned under Section 9.
- Finally, the Appellate Tribunal, in concurrence with the arguments made by the Operational Creditor, was of the view that there was no dispute existing prior to the first Demand Notice and only disputes raised prior to the first Demand Notice are relevant to determine its pre-existence, and disputes raised thereafter are totally irrelevant for the same.
- In view of the above, the NCLAT decided that no interference was required with the Admission Order of the NCLT and dismissed the Appeal.

Our viewpoint

This judgment by the NCLAT clears the air around the issue as to which Demand Notice should be considered to determine the existence of 'pre-existing disputes'. This judgment would be extremely important in cases where the Operational Creditors are constrained to issue multiple demand notices and thereafter, file a Company Application for initiation of CIRP under the IBC.

RECENT DEALS

Resolution Plan approved for Garden Silk Mills Ltd

- The Resolution Process of Garden Silk Mills Ltd (**GSM**) came to an end vide an order dated January 01, 2021 passed by the NCLT, Ahmedabad Bench, wherein it approved the Resolution Plan submitted by MCPI Pvt Ltd (**MCPI**) in the CIRP of GSM.
- The Application for initiation of CIRP filed by Invest Asset Securitization and Reconstruction Pvt Ltd against GSM was admitted by the NCLT on June 24, 2020. Thereafter, after following the due process, the Resolution Professional received two EOIs, after which, the Resolution Plan submitted by MCPI was duly approved by the CoC with the requisite voting share in the 6th CoC meeting held on September 23, 2020.
- As per the approved Resolution Plan, MCPI will pay an amount of INR 747 Crore to different creditors who had claimed outstanding dues to the tune of INR 2,603 Crore. The Resolution Plan has provision of paying INR 717.5 Crore to Financial Creditors against their total dues of INR 2,095.8 Crore and payment of INR 21 Crore shall be made to the Operational Creditors (excluding workmen and employees). While the Resolution Plan provides for full payment of workmen, employees, and vendors' dues, no provision has been made for statutory dues/other stakeholders/related parties of GSM.
- It is also pertinent to note that MCPI has proposed to set up a Special Purpose Vehicle (SPV) to carry out the implementation of the Resolution Plan. Post the implementation of the Resolution Plan, the SPV will be merged with GSM and consequently MCPI will hold 100% stake in GSM, as the SPV shall stand dissolved without winding-up upon merger with the Corporate Debtor.
- As part of the implementation process, GSM will be delisted from both Bombay Stock Exchange (**BSE**) and National Stock Exchange (**NSE**) in accordance with Regulation 3(3) of the SEBI (Delisting of Equity Shares) Regulations, 2009. Upon delisting, GSM will stand converted to a Private Limited Company.

NCLT, Hyderabad approves NHPC's Resolution Plan for Jalpower Corporation Ltd

- Jalpower Corp Ltd (**JPCL**) was admitted into insolvency vide order dated April 09, 2019 passed by the NCLT, Hyderabad Bench. Thereafter, after following the due process, the Resolution Professional of JPCL issued public announcement inviting the Expression of Interest from the potential Resolution Applicants. The Resolution Plans submitted by National Hydro Power Corp (**NHPC**) and Sterlite Power Transmission Limited (Sterlite) were shortlisted and placed before the CoC for consideration.
- After several rounds of deliberations and modifications, the Resolution Plan submitted by NHPC was found to be feasible and was therefore unanimously approved in the 16th and 17th meetings of the CoC. Thereafter the Plan was placed for approval before NCLT and was finally approved vide order dated December 24, 2020.
- The approved Resolution Plan provides a total dispensation of INR 165 Crore against the admitted debt of approximately INR 1322.59 Crore. Therefore, a haircut of approximately 87.46% would be borne by all the creditors except the Workmen.
- Furthermore, the Plan also provides for keeping JPCL as a going concern, however, the existing Equity Shares of JPCL shall cease to exist and fresh equity shareholdings shall be issued in favour of NHPC. A monitoring agency shall be constituted for supervising the implementation of the approved plan and a period of 180 days from the date of order of approval has been granted for full and final settlement of dues of all the stakeholders.
- NHPC is a premier organization in the country for development of hydropower. In fact, NHPC is the first public sector company which has successfully acquired Lanco Teesta Hydro Power Ltd (LTHPL) through the CIRP process.

Resolution of Parabolics Drug Ltd by Akums Drugs & Pharmaceuticals Ltd

- The NCLT, Chandigarh Bench, vide an order dated January 12, 2021 approved the Resolution Plan submitted by Akums Drugs & Pharmaceuticals Ltd (**ADPL**) in the CIRP of Parabolic Drugs Limited, the Corporate Debtor.
- Vide order dated August 23, 2018, the NCLT, Chandigarh Bench admitted the Company Petition filed by the Operational Creditor, i.e., Weather Makers Private Limited under Section 9 of the IBC and ordered for initiation of the CIRP of Parabolic Drugs Limited.
- The Resolution Professional issued Form-G inviting EoIs from Prospective Resolution Applicants. Pursuant to the public announcement, EoIs were received from 6 Prospective Resolution Applicants. However, only ADPL submitted a Resolution Plan for the Corporate Debtor on March 13, 2019. After numerous revisions of the Resolution Plan, the CoC in its 10th meeting held on May 18, 2019, after detailed discussions, approved the revised Resolution Plan submitted by ADPL by 71.67% voting share.
- A perusal of the Resolution Plan shows that the term of the plan is 4 years from the date of approval by the NCLT. The Resolution Plan by ADPL provides for a total payment of INR 114.95 Crore against an admitted debt of INR 1891.31 Crore. Apart from this, ADPL also proposes to infuse additional capital of approximately INR 40 Crore for investment in capital expenditure in plant, machinery, and equipment and working capital needs.

CONTRIBUTIONS BY:

Abhirup Dasgupta | **Partner**

Avishek Roy Chowdhury | **Associate**

Pratik Ghose | **Partner**

Ishaan Duggal | **Associate**

HSA AT A GLANCE

FULL-SERVICE CAPABILITIES

- BANKING & FINANCE
- COMPETITION & ANTITRUST
- CORPORATE & COMMERCIAL
- DEFENCE & AEROSPACE
- DISPUTE RESOLUTION
- ENVIRONMENT, HEALTH & SAFETY
- INVESTIGATIONS
- LABOR & EMPLOYMENT
- PROJECTS, ENERGY & INFRASTRUCTURE
- PROJECT FINANCE
- REAL ESTATE
- REGULATORY & POLICY
- RESTRUCTURING & INSOLVENCY
- TAXATION
- TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

GLOBAL RECOGNITION

STAY CONNECTED

www.hsalegal.com

mail@hsalegal.com

HSA Advocates

PAN INDIA PRESENCE

New Delhi

81/1 Adchini
Sri Aurobindo Marg
New Delhi – 110 017

Phone: (+91) (11) 6638 7000

Email: newdelhi@hsalegal.com

Mumbai

Construction House, 5th Floor
Ballard Estate
Mumbai – 400 001

Phone: (+91) (22) 4340 0400

Email: mumbai@hsalegal.com

Bengaluru

Aswan, Ground Floor, 15/6
Primrose Road
Bengaluru – 560 001

Phone: (+91) (80) 4631 7000

Email: bengaluru@hsalegal.com

Kolkata

No. 14 S/P, Block C,
Chowringhee Mansions
Kolkata – 700 016

Phone: (+91) (33) 4035 0000

Email: kolkata@hsalegal.com