ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

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1st April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (37): NCLT (Mumbai Bench) holds that task of an RP is to limit itself to confirm that claims received by him are true and correct. An RP is not required to enquire into facts *inter se* parties to determine their rights and liabilities.

In a matter pertaining to the Corporate Debtor, *M/s Chaubey Realties Private Limited,* (CP No. 870/IBC/NCLT/MB/MAH/2017), while disposing of an application (M.A. 1453/2018) filed by the Financial Creditor (Dr. Ramakant Suryanath Pande) *inter alia* challenging rejection of his claim by the RP, the NCLT (Mumbai Bench) has *vide* its order dated 05th February 2019 held that *an RP is not an adjudicating authority and is not required to enquire into the factual scenario between parties and determine their rights and liabilities*.

Referring to the language of Regulations 13 and 14 of the *Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016*, the Tribunal came to a finding that *the scope of an RP is limited to **verifying** the claims received in the light of the Regulations*.

The application was accordingly allowed with directions to RP to consider the applicant as a Financial Creditor and treat his claim as a Financial Debt.

Regards,

CS Alka Kapoor
Chief Executive Officer

ICSI Institute of Insolvency Professionals

2nd April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (38): Resolution Plan is to be approved only on recording a *"satisfaction"* by the NCLT.

In the proceedings initiated by *Kotak Mahindra Bank Ltd.* (FC) against M/s *Parekh Aluminex Ltd.* (CD), an application (M.A. 1259/2018 in C.P. (IB) – 1262/(MB)/2017) was filed by one, *Janjit Kamdar Sangh*, *inter alia* seeking an order allowing the workmen to ***resubmit*** their claims to the IRP.

While disposing off the application, NCLT (Mumbai Bench), *vide* its order dt. 8th January 2019 observed, *"it is necessary to keep in mind that multiple intermediate Applications, Intervention Applications or Miscellaneous Applications are to be avoided or to be disposed of in summary manner to avoid delay in deciding the main petition."*

In the matter, contentions were also raised that there has been a violation of *principles of natural justice*, since, the Resolution Plan has been approved by the CoC, while the Labourers have not been given any chance to explain their claim. Based on these facts, it was argued that approval of a Resolution Plan (as prescribed under section 31) requires a *satisfaction* by the NCLT, and thus, the Labourers need to be heard on the quantum of their claim.

Answering the legal contention raised, the NCLT, referred to its own orders dt. 19th April 2018 (passed in the matter of *Raj Oil Mills Ltd.*), wherein following observations were made:

"9. The procedure as prescribed under The Code is that a Resolution Plan is required to be submitted by Resolution Application... On approval, the Resolution Professional is to submit u/s 30(6) the Resolution Plan, as approved by the Committee of Creditors, to the AA. Thereafter, u/s 31, AA is to examine the contents of the Resolution Plan. The mandate of the section is that if the AA is "satisfied" that the Resolution Plan, as approved by the Committee of Creditors, meets the requirements as referred to in section 30(2), it shall by an order, approve the Resolution Plan. So, the prerequisite is that recording of "satisfaction" by AA is a condition precedent... "Satisfaction" is required to be based upon a conscious decision on examination of the terms of the Resolution Plan. In my humble opinion, a thorough study of a Resolution Plan is required before recording a "satisfaction" in writing by AA. The 'satisfaction' as mandated in the statute can either objective or subjective or both, but it is a condition precedent. Naturally 'satisfaction' is to be recorded in writing with reasons after

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proper application of mind. <u>The pros and cons of the scheme is required to be studied before recording subjective satisfaction</u>. If the CoC has submitted the scheme of Resolution after visualising the advantage and disadvantage then such proposal can be termed as just and equitable fit for according satisfaction. An 'objective satisfaction' revolves around the object of enactment of the Code as enshrined in the Preamble of the I & B Code i.e. to revive the financially stressed corporate body. And the 'subjective satisfaction' depends upon logical analysis of the Financial Data supplied so as to match with the business model of the Corporate Debtor. A methodical scrutiny of Financial Statement is expected before concurring with approval of the CoC. Per contra, absence of recording of subjective satisfaction may lead to situation that, being sanctioned without judicial analysis, thus may not be sustainable in the eyes of law. There are no two views, and must not be, that this I & B Code provides greater accountability both on the Insolvency Professional, as also on CoC, mainly comprise of lender Banks. <u>Their approval of a Resolution Plan ought to be judged with due diligence</u>. To sum up, in our humble interpretation the recording of an analytical 'satisfaction' is a condition precedent before granting of approval."

Relying on the aforementioned dicta, NCLT concluded:

"This Bench is aware about the judicial function while dispensing justice that opportunity of hearing must be granted to all who are going to be affected by a judgement and that the fundamental rights, such as Civil rights be protected. Therefore, <u>in the process of Insolvency we have taken due cognizance of the problem of the labourers/ workmen, which shall be dealt with at the time of approval of the Resolution Plan pending for consideration. This Bench shall examine the financial capacity of the Resolution Applicant and also consider the proposed settlement with other Claimants and only thereafter shall decide a fair and reasonable amount be disbursed to the members of this Labour Union</u>."

Regards,

CS Alka Kapoor
Chief Executive Officer

ICSI Institute of Insolvency Professionals

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3rd April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (39):In case voting rights of shareholders are put to an end pursuant to a Default Clause in a Deed of Pledge of Securities, it shall not *ipso facto* deprive their status as shareholders.

In an appeal (*Export Import Bank of India & Anr. v. Astonfield Solar (Gujarat) Pvt. Ltd. &Anr.*, CA (AT) (Insolvency) No. 754 of 2018) filed by FCs, NCLT orderdt. 20th November, 2018 admitting an application u/s 10, IBC, was challenged *inter alia* on the grounds that the *shareholders had no voting right to approve the decision of the Board of Directors for initiation of CIRP*. Reliance was placed on the *'Deed of Pledge of Securities'* executed *inter se* the CD and FCs whereunder, in case of a default, the Pledger had authorised the Security Agent *inter alia* to attend the General Meetings of members and to exercise the voting rights.

After perusing the documents produced on record, NCLAT found that in case of default, the voting rights of shareholders shall cease to exist, however, the same shall not deprive the shareholders to continue to be a shareholder and thus their shares do not stand transferred to the FC.

Elaborating on the requirements for filing an application under section 10, the Appellate Tribunal held that, in terms of section 10(3)(c), the special resolution passed by shareholders of CD or a resolution passed by at least three fourth of the total number of partners of the CD approving to file the application, is to be enclosed and thateven if it is presumed that the shareholders ceased to exercise their rights to vote, their right u/s 7(3)(c) does not stand suspended.

Thus, concluding, it was held that the shareholders had a right to decide to proceed with an application for CIRP u/s 10, IBC. The appeal was accordingly dismissed.

Regards,

CS Alka Kapoor
Chief Executive Officer

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

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4th April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents: -

Learning Curve (40): Supreme Court strikes down RBI Circular dt. 12th February, 2018 as *ultra vires* section 35 AA of Banking Regulation Act, 1949.

In a landmark judgment dt.2nd April 2019 pronounced by the Hon'ble Supreme Courtwhereby a bunch of petitions (Writ petitions and Transfer petitions), challenging the constitutional validity of sections 35AA and 35AB of the Banking Regulation Act, 1949, were disposed of, the RBI Circular dt. 12th February, 2018 (which was termed as the *real bone of contention*) has been struck down as *ultra vires* section 35AA of Banking Regulation Act, 1949. The judgment is reported as *Dharani Sugars and Chemicals Ltd. v. Union of India, (Transfer Case (Civil) No. 66 of 2018 in Transfer Petition (Civil) No. 1399 of 2018)*.

The Court, while analysing the language of section 35AA (*supra*), found that the section requires an authorisation to be issued by the Central Government to the RBI to issue directions in respect of '*a default*'. Interpreting the term '*a default*', the Court clarified that the section confers power only in case of "*a particular defaultofa particular debtor*", and thus, any direction issued in exercise of the said powers to the "*Debtors generally*" would be *ultra vires* the section. Elaborating on the rationale thereof, the Court held that since the power is to be exercised after due "*deliberation and care*", it provides for the specific defaults only. Further, the Court also found that the requirement of issue of authorisation by Central Government to the RBI is not satisfied and is wanting in the present case. The provision (section 35AA) is reproduced for a ready reference: "*35AA. Power of Central Government to authorise Reserve Bank for issuing directions to banking companies to initiate insolvency resolution process.-The Central Government may, by order, authorise the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of* ***a default****, under the provisions of the Insolvency and Bankruptcy Code, 2016 (31 of 2016).*

Note: In the case, while the *vires* of sections 35AA and 35AB of the Banking Regulation Act, 1949 were challenged as being unconstitutional, the Court found that the provisions are neither excessive in any way nor do they suffer from want of any guiding principle, which were the main grounds of challenge.

Regards,

CS Alka Kapoor
Chief Executive Officer

5th April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (41): Delhi High Court rules that the objective of PMLA being distinct from those of RDBA, SARFAESI Act and IBC, the latter three legislations do not prevail over the former.

In a landmark judgment, while disposing-off a bunch of five appeals *(The Deputy Director Directorate of Enforcement Delhi v. Axis Bank & Ors.*, CRL.A. 143/2018 *and four others*) filed under section 42 of the *Prevention of Money-Laundering Act, 2002* (PMLA) against the orders of Appellate Tribunal (under PMLA), wherein ordersfor provisional attachment as issued by the Enforcement Officer were confirmed/upheld, the High Court of Delhi,*vide* its judgment dt. 2nd April, 2019, has held that *"the objective of the legislation in PMLA being distinct from the purposes of three other enactments, viz. RDBA, SARFAESI Act and Insolvency Code, the latter cannot prevail over the former."*

The *question of law*addressed in these appeals pertained to the effect of *non-obstante* clause contained in each of the four legislations, *viz.*, RDBAct, 1993 (section 34); SARFAESI Act, 2002 (section 35); IBC, 2016 (section 238) and PMLA, 2002 (section 71).The High Court,while addressing the said issue, held *"139. ...it is clear that the objects and reasons of enactment of the four legislations are distinct, each operating in different fields. There is no overlap..."*

Thus, drawing a distinctionbetween the objective(s) sought to be achieved and the powers conferred thereof, under the PMLA and those of other statutes, High Court held, *"141. ...The Government, when it exercises its power under PMLA to seek attachment leading to confiscation of proceeds of crime, does not stand as a creditor, the person alleged to be complicit in the offence of money-laundering similarly not acquiring the status of a debtor..."*.

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8th April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (42): *(A)* NCLT held that in case rent is received from lessee *wrt* a property of which CD was the lessor (and the property was subsequently allotted to different buyers/allottees), such rent shall not be subject to section 14(2), IBC, if rent is distributed by CD to such allottees; *(B)* RP can entertain claims received beyond 90 days, but such claims would not entitle claimant to be a part of CoC.

In the proceedings initiated under section 7, IBC, against *M/s Ranajit Das & Ors.* (CD), the relevant part of the factual matrix was that, the CD held a commercial space which was given on lease to *M/s Haldiram*, and subsequently, the said land was allotted to different buyers on receipt of full payment. After collecting the rent from the lessee (*M/s Haldiram*), CD use to distribute the proportional rent to various allotees in respect of their individual units.

In these circumstances, an application (CA 615/2018) was filed seeking to keep the rent received from the lessee (M/s Haldiram) out of the purview of Moratorium clause. The grounds given thereof were that the *rent due from a lessee to the actual owner should not be a subject matter of resolution as the CD is only collecting it on behalf of the allottees.*

While upholding the contention raised (as aforementioned), the Tribunal *vide* its order dt. **26.11.2018** held that *such an act, if permitted, would neither be legal nor just and equitable to the allottees who have invested in commercial properties to supplement their monthly income,* and accordingly directions were passed that the rent received from *Haldiram* or any other lessee which the CD has allotted for a purchase consideration will be out of the purview of Section 14(2) of the Code.

In the matter, the RP also filed an application (CA 709/2018) seeking directions to entertain claims received beyond period of 90 days. The NCLT, while allowing the application, observed that a legitimate claim of an investor or creditor cannot be turned down or rejected till it is a point of no return, however, receipt of late claims would not entitle the claimant to be a part of the CoC.

Regards,

CS Alka Kapoor
Chief Executive Officer

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9th April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (43): NCLAT imposes cost of Rs. 1 lakh on Promoter (Appellant) who refused to hand over assets of CD to the RP.

The NCLAT, while dismissing an appeal (***Gaurav Hargovindbhai Dave v. Hema Manoj Shah & Ors.***, Company Appeal (AT) (Insolvency) No. 186 of 2019) filed against order dt. 18th February, 2019 (impugned order) passed by the NCLT, Mumbai, has come down heavily on the Appellant/Promoter (of the CD), and *vide* its order dated 25th March 2019 imposed a cost of Rs. 1,00,000/- (Rs. 1 lakh) on the Promoter/Appellant. In the impugned order, the NCLT had observed that the RP has not been given control of the CD, and that it is only after taking control of the CD that the RP can comply with directions of the Appellate Tribunal.

Before the NCLAT, the Promoter/Appellant had taken a plea that the properties in question do not belong to the CD, and thus, it cannot be a subject matter of Insolvency Proceedings. The NCLAT had, however, *vide* its order dated 26th February 2019, directed the Promoter to first hand over properties to the RP in terms of NCLT order, and then show as to whether the said properties belong to the CD or any other individual.

Taking note of the submissions made by the RP that the movable and immovable properties of the CD (including the Books of Accounts and other records) have not been handed over by the Appellant/Promoter, the NCLAT declined to entertain the appeal and also directed the NCLT to take appropriate action against the Appellant/Promoter in accordance with law. Directions were also passed that, if necessary, help of local police may be taken in order to take over assets and records of the CD, and thereafter the RP can find out if the movable properties in question belong to the CD or a third party.

Note: **It is important to note that the position, role and responsibilities of a Resolution Professional are being increasingly underlined and recognised by the Authorities under the IBC, 2016. This is particularly important, since the RP has a very crucial role to play in the entire process, and in case, any restraint is being put on his legitimate actions, the same needs to be redressed.**

Regards,

CS Alka Kapoor
Chief Executive Officer

ICSI Institute of Insolvency Professionals

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11th April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (45) Once a Company goes into liquidation, only the Liquidator appointed can apply for a scheme of arrangement/compromise.

While disposing of an appeal *(Rajesh Balasubramanian v. M/s. Everon Castings Pvt. Ltd. & Anr.,* Company Appeal (AT) (Insolvency) No. 182 and No. 183 of 2019) filed by promoters of CD against NCLT (Chennai Bench) orders whereby the AA had declined to grant the relief for exclusion of 120 days from the CIRP and had passed orders for liquidation of CD, the NCLAT *vide* its orders dt. 25th February, 2019 directed the liquidator to take steps under section 230 of Companies Act, 2013.

The matter pertains to the CD, *M/s Precision Machine & Auto Components Pvt. Ltd.*, wherein CoC had unanimously rejected the resolution plans submitted, and subsequently, the RP had applied for liquidation to AA. The NCLAT, after making a reference to its own orders dt. 29th January, 2019 passed in the matter of *S.C. Sekaran v. Amit Gupta & Ors.*, and the Supreme Court decisions in the matters of *Meghal Homes (P) Ltd.* and *Swiss Ribbons (P) Ltd.*, directed the liquidator as, *"if the members of the 'Corporate Debtor' or 'Creditors' approach the company through the liquidator for compromise or arrangement ... the liquidator on behalf of the company will move an application under section 230 of the Companies Act, 2013 before the NCLT"*.

Note: It is important to note that under the Companies Act, 1956 while interpreting the provisions of section 391 (*Power to Compromise or make arrangements with creditors and members)*, the consistent view of various High Courts was that the *liquidator is the additional person and not the exclusive person* entitled to file an application under section 391. However, with the coming into force of Companies Act, 2013 (*vide* section 230) and IBC, 2016, the Liquidator has been exclusively conferred with powers to file application for Compromise or Arrangements with Creditors or Members.

Regards,

CS Alka Kapoor
Chief Executive Officer

ICSI Institute of Insolvency Professionals

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12th April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (46): (*a*) Any adverse observation by NCLT in its orders against Resolution Professional must be preceded by issuance of a show-cause notice; (*b*) in the event of any lapse by the RP which has come to NCLT's notice, the competent authority to take appropriate action is IBBI.

The NCLAT, recently, in an appeal matter (*Dhinal Shah v. Bharati Defence Infrastructure Ltd. & Anr.*, Company Appeal (AT) (Insolvency) No. 175 of 2019), was called upon to redress a grievance raised by the Appellant (Ex-Resolution Professional of the CD) contending that the NCLT *vide* its orders dt. 14th January 2019 while passing orders for liquidation of the CD, has made adverse observations against him.

In the proceedings pertaining to the Corporate Debtor, a Resolution Plan was filed by '*Edelweiss Asset Reconstruction Company Ltd.*' which was also approved by CoC with 94.3% voting share, wherein questioning the viability and feasibility of the resolution plan the NCLT had directed for liquidation of the CD. An appeal against the liquidation orders (Company Appeal (AT) (Insolvency) No. 195 of 2019) was also filed, however,considering the nature of the grievance raised, the NCLAT directed the said appeal to be heard separately.

Upon finding that the adverse observations were made against the Ex-Resolution Professional without issuing any show-cause notice seeking his reply as to why adverse observations be not passed against him, the NCLAT held that *"the Adjudicating Authority was not competent to make any observations against the RP."* It further held that *"if there was any lapse on the part of the Resolution Professional which has come to the notice of the Adjudicating Authority, he should have referred the matter to the 'Insolvency and Bankruptcy Board of India' for taking appropriate action in accordance with law, which is the competent authority to take any action, after seeking explanation from the Resolution Professional"*.

Regards,

CS Alka Kapoor
Chief Executive Officer

ICSI Institute of Insolvency Professionals

15th April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (47): In a CIRP, RP is given Administrative as opposed to Quasi-Judicial Powers; *Per contra*, determination of value of claims by a liquidator is quasi-judicial in nature.

In an appeal matter pertaining to ***M/s Monnet Power Company Limited*** **(CD)**, the NCLAT had an occasion to determine the question as to "*whether the RP has jurisdiction to reject a claim of an OC (in its entirety) without getting into the evidence of such claim.*" The appeal, titled as ***Mr. Navneet Kumar Gupta v. Bharat Heavy Electricals Limited*** (Company Appeal (AT) (Insolvency) No. 743 of 2018 dated 28th February 2019), was preferred by the RP against NCLT (Mumbai Bench) order dt. 12th October, 2018 *vide* which, the NCLT, while holding that RP had wrongly disallowed a substantial claim made by BHEL (OC), in its entirety, had directed the RP to re-examine the claim with its evidence.

In order to determine the abovementioned legal question, the NCLAT referred to Apex Court decision rendered in the matter of *Swiss Ribbons (P) Ltd. & Anr. v. Union of India & Anr.*, (judgment dt. 25th January 2019), wherein, after referring to the language of section 18 (r/w Regulations 10, 12, 13, 14 and 35A), it was *inter alia* held that "*the Resolution Professional has no adjudicatory powers.*"

In *Swiss Ribbons* (*supra*), *vide* para 88, the SC had further held, that, as against the role of an RP, the determination by a liquidator of the value of claims is quasi-judicial in nature and can be appealed before the NCLT, and that the RP cannot act in a number of matters without the approval of the CoC obtained u/s 28, IBC.

The appeal was accordingly dismissed.

[**Note**: When the liquidator "determines" the value of claims admitted under s.40, such determination is a "decision", which is quasi-judicial in nature, and which can be appealed before the NCLT under s.42, IBC. Unlike the liquidator, the RP cannot act in a number of matters without the approval of CoC obtained under s.28.]

Regards,

CS Alka Kapoor
Chief Executive Officer

16th April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (48): The Adjudicating Authority, while dealing with a section 9 application, is required to reject any spurious defence raised by the CD.

In an appeal (*Sarla Tantia v. Ramaanil Hotels & Resorts (P) Ltd. Company Appeal (AT) (Insolvency) No. 513 of 2018)*, filed before NCLAT, the NCLT order dt. 23rd July 2018 dismissing an OC's application u/s 9, IBC, was challenged. The grounds of dismissal (by NCLT) were *that the CD established that there was a pre-existing dispute in regard to the amount due to OC.*

The factual matrix of the case was that the Respondent (CD) took some premises from Appellant (OC) under a *Leave and License Agreement*. After initial payment of rent for 11 months, the Respondent (CD) started defaulting, and eventually, Appellant (OC) served it with a notice u/s 8, IBC. Though the Respondent (CD) did not respond to the said notice, however, in the proceedings before NCLT, Kolkata, Respondent (CD) started raising disputes as regards rate of rent, thereby seeking dismissal of Appellant's application. *Vide* the impugned order, the NCLT had agreed with Respondent's (CD) contention and dismissed Appellant's (OC) application.

While deciding the appeal, NCLAT made a reference to Apex Court's dicta in the matter of *Innoventive Industries Ltd. v. ICICI Bank* which *inter alia* involved interpretation of language of section 9, IBC. In the said case it was held, *"It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster."* As regards the dispute raised by the Respondent (CD), the NCLAT held, *"It was therefore absurd on the part of Respondent to question calculation of licence fee".*

The Appeal was accordingly allowed with the observations *"8. The Adjudicating Authority was not supposed to conduct a roving enquiry though it could have been within the rights to go for a limited exercise of sifting the material available before it for separating the grain from the chaff and to reject the spurious defense…"*

Regards,

CS Alka Kapoor
Chief Executive Officer

ICSI Institute of Insolvency Professionals

22nd April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (50): (a) Initiation of CIRP against Principal Borrower is not a prerequisite for initiating CIRP against Guarantor; (b) For the same set of debt, claim cannot be filed by same FC in two separate CIRPs filed against two separate Corporate Guarantors.

In the case of *Dr. Vishnu Kumar Agarwal v. M/s Piramal Enterprises Ltd.* (Company Appeal (AT) (Insolvency) No. 346 of 2018), the NCLAT was seized of two appeals filed against two different NCLT orders whereby CIRP was directed to be initiated respectively in respect of two different **Corporate Guarantors,** though for the same debt. Considering the legal contentions raised, two principal issues were framed by the NCLAT: *(a) whether the CIRP can be initiated against a Corporate Guarantor, if the 'Principal Borrower' is not a Corporate Debtor' or 'Corporate Person'*; and *(b) whether the CIRP can be initiated against two 'Corporate Guarantors' simultaneously for the same set of debt and default.*

To answer the first question, NCLAT *vide* its order dt. 8th January 2019 referred *inter alia* to the provisions of section 3(6), 3(10), 3(11), 3(12), 5(7) and 5(8) as also the Supreme Court's dicta delivered in the matters of *Bank of Bihar v. Damodar Prasad & Anr., Ram Bahadur Thakur v. Sabu Jain Limited, State Bank of Indiav. Indexport Registered & Ors.* to conclude that,it is not necessary to initiate CIRP against the Principal Borrower before initiating CIRP against the Corporate Guarantors,and that the creditor is also the Financial Creditor qua Corporate Guarantor.

Further, the NCLAT also referred to the Supreme Court decision rendered in *Innovative Industries Ltd. v. ICICI Bank & Ors.,*to conclude that for same claim amount and default, two applications under section 7 cannot be admitted simultaneously. This was based on the reasoning that, since, for same set of debt, claim cannot be filed by same FC in two separate CIRP, and thus, once, for the same claim CIRP is initiated against one of the CD, after such initiation, the FC cannot trigger CIRP against the other CD for the same claim amount.

Thus, while upholding the NCLT order directing for initiation of CIRP in respect of one of the Corporate Guarantors, the NCLAT held that the CIRP proceedings initiated against the other Guarantor for the same very claim/debt is not permissible in law.

Regards,

CS Alka Kapoor
Chief Executive Officer

ICSI Institute of Insolvency Professionals

23rd April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (51): Disposal of an application u/s 7, IBC requires a hearing to be given merely to the FC and CD, and not to any third party or intervenor.

In a grievance raised by the Financial Creditor (IDBI Bank Ltd.) claiming long pendency of his application (section 7, IBC) filed before NCLT, Kolkata, without any disposal, the NCLAT, while reiterating the guidelines laid down by the Supreme Court in the matter of *M/s Innoventive Industries Ltd. v. ICICI Bank Ltd., vide* its order dt. 15th January, 2019, held that except the FC and the CD, there is no requirement of hearing any third party, including any intervenor, at the stage of admission of the application.

In the aforementioned appeal, IDBI Bank Ltd. (FC) had disclosed that it had filed the application before NCLT, Kolkata, on 12th March, 2018, and despite a passage of more than 10 months, no final order has been passed on its application.

The NCLAT, while refusing to pass any specific directions to the NCLT to either admit or reject the application, reiterated the legal principle as: *"if there is a debt and default and the record is otherwise complete, the application is to be admitted. On the other hand, if there is no debt payable in law or in fact then it is to be rejected.*

The relevant extracts from *M/s Innoventive Industries (supra)* as regards scheme of the Code are reproduced below for a ready reference:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency process begins… 30. … in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

Regards,

CS Alka Kapoor
Chief Executive Officer

ICSI Institute of Insolvency Professionals

Dear Professionals, **24th April, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals presents:

Learning Curve (52): Rule 3(2) of Companies (Registered Valuers and Valuation) Rules 2017 which makes eligible only companies other than subsidiary, associate and joint venture companies for registration as "Valuer" does not violate Article 14, 19(1)(g) and 301 of the Constitution of India.

In a bunch of four writ petitions filed before Hon'ble Delhi High Court (*Cushman And Wakefield India Private Limited v. Union Of India & Anr.* and 3 other writ petitions), the vires of Rule 3(2) of Companies (Registered Valuers and Valuation) Rules, 2017 were challenged as unconstitutional for being violative of Article 14, Article 19(1)(g) and Article 301 of the Constitution of India.

Rule 3(2) of the Companies (Registered Valuers and Valuation) Rules 2017 provides that "*no partnership entity or company shall be eligible to be a registered valuer if it has been set up for objects other than for rendering professional or financial services, including valuation services and that in the case of a company, it is a subsidiary, joint venture or associate or another company or body corporate."* Further, in case of voluntary liquidation of a company, **Section 59(3)(b)(ii), IBC** requires valuation of assets of the company to be carried out by a registered valuer.

The chief contention raised was that the rule does not satisfy the criteria of "*reasonable classification*" and that there is no "*intelligible differentia*" to distinguish the class of a company, other than a *subsidiary company*, *joint venture* or *associate* of other company. The justification provided for the said rule by the *Union of India,* which also found favour with the Court, was, however, that *since the subsidiaries, joint ventures and associates cannot be said to be completely independent of the parent company and that if a registered valuer company is either a subsidiary, joint venture or associate of another company, the said entity may not be able to stand out as an independent professional body.*

Thus, after taking into account the contentions raised as also the case-law referred to by both the parties, *viz.*, *Dr. Haniraj L Chulani v. Bar Council of Maharashtra & Goa* and *Swiss Ribbons (P) Ltd. & Anr. v. UOI & Ors*.), the Court, *vide* its order dated 31.01.2019, dismissed the writ petitions with following observations:

"22. The objective and intention behind laying down the impugned Rule is clearly to introduce higher standards of professionalism in valuation industry, specifically in relation to valuations undertaken for the purpose of Companies Act and IBC, 2016. The impugned Rule obviates the possibility of conflict of interest on account of diverging interests of constituent / associate entities which resultantly shall undermine the very process of valuation, being one of the most essential elements of the proceedings before NCLT".

Regards,

CS Alka Kapoor
Chief Executive Officer

ICSI Institute of Insolvency Professionals

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Dear Professionals, **25th April, 2019**

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavor to develop and educate insolvency professionals presents:

Learning Curve (53) – Where a member of CoC who is not present in the meeting, either directly or through Video Conferencing, and thereby not considered its feasibility and viability of the Resolution Plan, their voting shares cannot be counted for the purpose of counting voting shares of members of CoC.

In the Insolvency Proceedings initiated in respect of *M/s Bhushan Power and Steel Limited* (Corporate Debtor), while disposing of an appeal (Company Appeal (AT) (Insolvency) No. 198 of 2018) filed by one of the Resolution Applicants, *Tata Steel Limited*, challenging order dated 23rd April, 2018 passed by NCLT, Principal Bench, New Delhi in C.A. 152(PB)/2018 in C.P. (IB)-202(PB)/2017) whereby the Adjudicating Authority *inter alia* directed the CoC to consider the resolution plan submitted by the Resolution Applicant, '*Liberty House Group Pte. Limited*', the NCLAT, after referring to the provisions of section 30(4), IBC, *vide* its order dated 4th February, 2019, also discussed the powers of CoC in detail *vis-à-vis* consideration and approval of resolution plan by the CoC. The relevant extract of the order passed by the NCLAT are reproduced below:

"*45. A member of the 'Committee of Creditors' who is not present in the meeting either directly or through Video Conferencing and thereby not considered its feasibility and viability and such other requirements as may be specified by the Board, their voting shares, therefore, cannot be counted for the purpose of counting the voting shares of the members of the 'Committee of Creditors'. Therefore, we hold that only the members of the 'Committee of Creditors' who attend the meeting directly or through Video Conferencing, can exercise its voting powers after considering the other requirements as may be specified by the Board. Those members of the 'Committee of Creditors' who are absent, their voting shares cannot be counted.*".

Referring to facts of the particular case at hand, the NCLAT observed that the Resolution Plan submitted by *JSW Steel* has been approved by the CoC with 97.12% voting shares while voters having 2.88% voting shares remained absent, and thus, if some members of the CoC having 2.88% voting shares remained absent, it cannot be held that they have considered the feasibility and viability and other requirements as specified by the Board. Therefore, their shares should not have been counted for the purpose of counting the voting shares of the 'Committee of Creditors'. The NCLAT, after taking cognizance of the fact that 97.12% voting shares of members who were present in the meeting of the 'Committee of Creditors' have casted their votes in favour of *JSW Steel*, held the *Resolution Plan* submitted by 'JSW Steel' to have been approved with 100% voting shares.

With the above observations, the NCLAT declined to interfere with impugned order passed by NCLT and the appeal was accordingly dismissed.

Regards,
CS ALKA KAPOOR
Chief Executive Officer

ICSI IIP

26th April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals presents:

Learning Curve (54): Giving Public Notice in a paper publication regarding initiation of CIRP will be considered as sufficient notice to the creditors for making their claims.

An application was filed by a bona fide creditor as an allottee in the real estate projects of a Corporate Debtor, namely, BCIL Red Earth Developers India Pvt. Ltd. The CIRP was initiated against the Corporate Debtor in the matter of *BCIL Red Earth Developers India Pvt. Ltd. [I.A. No.86-2019] vide order dated 9th August, 2018 in C.P. (IB) No.03-BB-2018]*. Accordingly, the Resolution Professional published public notice for inviting claims from creditors as per the Code. But, there was a delay in submitting the claim by an Applicant as she was out of country and did not know about the notice in time. IRP rejected the claim due to delayed submission.

NCLT, Bengaluru Bench in its order dated 27.02.2019 stated, "*It is settled position of law that the object of the Code is to initiate, conclude process of CIRP/Liquidation in a time bound manner by fixing time frame as 180 days in the beginning with the provision for extension of time for further period upto 90 days. Failing to get Resolution Plan within stipulated time, Corporate Debtor will go for liquidation. There may be several people like the applicant herein, who may not be aware of initiation of instant CIRP. In order to give notice to the concerned public, due process of law is to give paper publication. Therefore sufficient notice is given by the IRP for parties to respond by submitting their claim. Therefore, the impugned decision taken by learned IRP/RP cannot be found fault with.*"

The Bench was not convinced with the reasons for condonation of delay and thus the Application was rejected.

Regards,
CS Alka Kapoor
Chief Executive Officer

ICSI IIP

29th April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (55):(a) Element of *realisability* under the Resolution Plan or liquidation is an important aspect which the CoC has to consider while taking decisions; (b) The Resolution Professional, Adjudicating Authority or the Appellate Authority are not empowered to reverse commercial decision of the CoCs.

In the proceedings initiated against *M/s Infinitas Energy Solutions Pvt. Limited* (CD) by *Indian Bank* (FC), an application (M.A. 416/2018 in C.P. 558/IB/2017) was filed by one of the Resolution Applicants, *Liberty House Group*, under section 60 (5), IBC, challenging rejection of its Resolution Plan by the CoC. The contentions raised *inter alia* were that the CoC, while rejecting the Resolution Plan, *relied on extraneous considerations* which do not find any place in either the *"Evaluation Matrix"* or the *"Expression of Interest"*.

Upon hearing the contentions raised as also perusing the records, NCLT *vide* its order dt. 12th March 2019, found that under the Resolution Plan submitted, there has been a significant haircut to which the creditors would be subjected to, and that the offer was materially lower than the OTS offer made earlier. Concluding that the Resolution Plan is commercially unviable, NCLT held that, *"element of realisability under the Resolution Plan or liquidation is an important aspect which the CoC has to keep in mind at the time of making decisions. The Resolution Applicant or the promoters of the CD cannot thrust their will on the creditors"*.

While underlining the role of CoC, NCLT also referred to the Apex Court dicta passed in the matter of *K. Sashidhar v. Indian Overseas Bank & Ors.* The relevant extracts from the SC judgment are reproduced below:

"33...Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code.........The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non justiciable.

61......Concededly, if the objection to the resolution plan is on account of infraction of ground (s) specified and expressly raised at the relevant time. For, the approval of the resolution plan by the CoC can be challenged on those grounds. However, if the opposition to the proposed resolution plan is purely a commercial or business decision, the same being non justiciable, is not open to challenge before the Adjudicating Authority (NCLT) or for that matter the Appellate Authority (NCLAT)......"

The NCLT also held that *"the Resolution Professional, Adjudicating Authority or the Appellate Authority is/are not empowered to reverse the commercial decision of the CoCs"*.

The application challenging rejection of Resolution Plan was accordingly rejected as being devoid of merit.

Regards,

CS Alka Kapoor
Chief Executive Officer

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30th April, 2019

Dear Professionals,

IBC Learning Curves – from ICSI IIP

ICSI Institute of Insolvency Professionals in its continuous endeavour to develop and educate the Insolvency Professionals, presents:

Learning Curve (56): Adjudicating Authority can take cognizance of a Decree passed by the Civil Court under which the claim has been crystallised.

In a recent case titled as ***M/s Cortica Manufacturing (India) Pvt. Ltd. v. M/s Victory Electricals Ltd.*** (CP No. 872/IB/2018) pending before NCLT (Chennai Bench), the CD had sought dismissal of OC's application (filed u/s 9, IBC) *inter alia* on the grounds that the OC suppressed the fact regarding pendency of CD's Revision Petition before Hon'ble Madras High Court. Countering the allegations, OC brought it to NCLT's notice that in the Original Suit filed by him (against the CD), a decree was passed and the challenge to the same filed by the CD also failed. He further informed that a Revision Petition has been filed before Madras High Court, but no stay order has been granted therein, and that *vide* its interim order dt. 18th December, 2018, the High Court has clarified that the pendency of the Civil Revision Petition shall not amount to an interim stay.

To buttress its case, CD had placed reliance on NCLT's ruling in the matter of *Dem Roll Tech Limited v. R.L. Steel & Energy Ltd.* arguing that *as against a Decree passed, an Execution Petition could be filed, but an Insolvency Proceedings cannot be used for execution.* The Tribunal was, however, convinced that the application (under consideration) is neither for execution of the decree nor for recovery of the decretal amount, but for initiating the CIR process which is on the basis of default by the CD in making payment of decretal amount which is in the nature of an operational debt.

Thus, concluding, NCLT rejected the objections raised by CD holding that it can take cognizance of the Decree passed by the Civil Court under which claim has been crystalized, and further directed for commencement of CIRP and declaration of moratorium.

ICSI Institute of Insolvency Professionals

Regards,

CS Alka Kapoor
Chief Executive Officer