Indian Chamber of Commerce

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IBC Updates

A Newsletter on developments of IBC

July – September, 2019

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Foreword

Insolvency and Bankruptcy Code (**"IBC"**) was introduced with an aim to provide a mechanism for restructuring and rehabilitation of stressed entities. The Code is being regarded as an important corporate reform.

The Code has attained significance as Indian banks were facing with the challenge of burgeoning Non-performing Assets or bad loans. As of March 2019, 94 cases had been resolved under IBC, with a recovery rate of 43% and an average resolution timeline of 324 days – much better than for other recovery mechanisms available.

Compared with the recovery rate of 27% for India as per the World Bank's Ease of Doing Business Report 2019, too, this is nothing sort of a achievement. Little surprise, IBC has helped improve India's 'ease of doing business' ranking to 77 in 2019 from 130 in 2017.

Being a time-bound process to resolve cases (within 180 +90 days), the IBC has received praise from the World Bank and IMF and has materially contributed to India's improved ranking in 2018's 'Ease of Doing Business' by 30 places. The Code has also received significant attention from foreign investors. However, issues such as the proposed eligibility criteria for bidders have left it bogged down and suppressed its capacity to help out creditors efficiently. The strict time line for the resolution process, as mandated by the IBC, is an area that has drawn much attention and it.

The year 2019, witnessed several legal and regulatory developments in terms of the Court's interpretation of the Code, modification to the Code to plug loopholes and fine tune it along with modifications in allied laws. A further amendment was enacted to make the Code more efficient. The dynamic activity in terms of number of applications filed for resolution, their outcome and quantum of NPA to be resolved has put the IBC Code in the forefront.

The Indian Chamber of Commerce (ICC) is bringing out this edition of newsletter with an objective to communicate the latest developments in the insolvency and bankruptcy scenario.

Mr Ashish Chhawchharia,

Chairman, ICC Expert Committee on Stress Asset Resolution

Key Regulatory Developments

The Insolvency and Bankruptcy Code (Amendment) Act, 2019

The Parliament passed the Insolvency and Bankruptcy Code (Amendment) Act, 2019 which received Presidential assent on 5 August 2019.

The amendment has addressed mainly three issues: **resolution in a time-bound manner of 330 days**, **manner of representation of financial creditors on the Committee of Creditors (CoC)**, and **the minimum amount to be paid out to operational creditors in case of Insolvency**.

IBC requires the Adjudicating Authority, mostly the National Company Law Tribunal, to determine the existence of a default within 14 days when an application initiating the insolvency process is made.

The amendment to this provision introduces judicial discipline to say if such a determination hasn't been made; the NCLT has to pass an order within 14 days from the insolvency commencement date to record the reasons in writing for such delay in determination.

Prior to the Amendment, the Code required that the corporate insolvency resolution processes (CIRP) should be concluded within a maximum period of 180 days (with a maximum one-time extension of 90 days) from the insolvency commencement date (the Code denotes this to be the date of appointment of interim resolution professional). However, many CIRPs were exceeding this overall 270-day limit on account of legal proceedings. The Amendment provides that the CIRP must mandatorily be completed within an overall timeline of 330 days from the insolvency commencement date (including all or any extensions granted as well as any litigations and related legal proceedings).

In order to facilitate decision making in the CoC, the Code provided that if an authorized representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received, to the extent of his voting share.

To simplify this voting process for CIRPs involving a large number of financial creditors (such as homebuyers, beneficiaries of securities or deposits held with a trustee, etc.), the Amendment clarifies that the authorised representative of a particular class of financial creditors will vote in the CoC, on behalf of all financial creditors represented by him as per the decision taken by a vote of more than 50% of the voting share of the financial creditors of such class, who have cast their vote.

The most important change brought by the Amendment is in terms of the inter-creditor distribution of payments during CIRP. Prior to the Amendment, the Code provided that

payment to operational creditors under a resolution plan must not be less than the amount that the operational creditors would have received in a liquidation scenario.

The Amendment clarifies that the manner of distribution of claims must take into account the order of priority amongst creditors as specified under the liquidation waterfall provided under section 53 of the Code, including the priority and value of the security interest of a secured creditor.

The amendments resolve the issue of the central or state government or a local authority raising demands post approval of the resolution plan by the Adjudicating Authority. It makes clear that the central or state government or local authorities - to whom statutory dues are owed - are also bound by the resolution plan as stakeholders.

IBC Orders

A brief of trend setting decisions of judicial and quasi-judicial bodies during the months of July to September 2019 is as under:

Sagar Sharma & Anr. Vs Phoenix Arc Pvt. Ltd. & Anr. Respondent(S) [Civil Appeal No. 7673 of 2019]

In the matter titled as Sagar Sharma vs. Phoenix Arc Pvt. Ltd. the Supreme Court set aside the order of NCLT and directed the petition be considered afresh.

The Supreme Court has observed that the date of coming into force of the Insolvency and Bankruptcy Code does not and cannot form a trigger point of limitation for applications filed under the Code.

The Court reiterated that, since such "applications" are petitions which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications.

Referring to the judgment in B.K. Educational Services Private Limited vs. Parag Gupta and Associates, the Court said that the Insolvency and Bankruptcy Code's coming into force on 01.12.2016 is wholly irrelevant to the triggering of any limitation period for the purposes of the Code.

The court also made it clear that an application under Section 7 of the Code does not purport to be an application to enforce any mortgage liability. It is an application made by a financial creditor stating that a default, as defined under the Code, has been made, which default amounts to Rs. 1,00,000/- (one lakh) or more which then triggers the application of the Code, the bench added.

Gaurav Hargovindbhai Dave Appellant Vs Asset Reconstruction Company (India) Ltd.& Anr. [Civil Appeal No. 4952 of 2019]

The Supreme Court was considering an appeal against the NCLT order [upheld by NCLAT] that admitted a Section 7 application on the ground that, as per article 62, the limitation period was 12 years from the date on which the money sued has become due.

The Court has held that Article 62 of the Limitation Act would only apply to suits and not to "an application" which is filed under Section 7 of the Insolvency and Bankruptcy Code, which would fall only within the residuary Article 137.

Before NCLT, a Section 7 application was filed seeking to recover the original debt together with interest which now amounted to about 124 Crores of rupees.

Challenging this order, it was contended before the Apex Court that Article 137 being a residuary article would apply on the facts of this case, and as right to sue accrued only on and from 21.07.2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. Countering this argument, it was urged that IBC being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

As per Article 137, the limitation period is three years and it runs from the time when the application for right to apply accrues.

The court also observed that the Report of the Insolvency Law Committee itself has stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.

With regard to the contention based on 'commercial interpretation', the Court observed that it is not for the Court to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular article gets attracted. The Court further added that it is well settled that there is no equity about limitation - judgments have stated that often time periods provided by the Limitation Act can be arbitrary in nature.

Elektrans Shipping Pte Ltd Vs. Pierre D'silva [Company Appeal (AT) (Insolvency) No. 754 of 2019]

In the matters of Elektrans Shipping Pte Ltd Vs. Pierre D'silva the NCLAT held that an application for initiation of corporate insolvency resolution process under Sections 7 and 9 of the Insolvency and Bankruptcy Code will be maintainable against a Corporate Debtor even if its name has been struck off from the Register of Companies (RoC).

The NCLAT also held that in terms of Section 248 (5) of the Companies Act, 2013 the Adjudicating Authority i.e. NCLT is empowered to restore the Company's name, as well as the positions held by the officers in the Company, for the purpose of initiation of insolvency proceeding under Sections 7 and 9. However, such an application has to be filed within twenty years from the date of the removal of the Company's name from the Register.

To decide the issue, the NCLAT adverted to Sections 248, 250, 252 of the Companies Act along with Section 60 of the IBC.

It observed that as per Section 248(6), before passing an order of removal from the Register of Companies, the Registrar has to satisfy himself that sufficient provision has been made for realization of all amount due to the company and for the payment or discharge of its liabilities and obligations within a reasonable time.

It further noted that as per proviso to Section 248(6), the assets of the Company are to be

made available for payment or discharge of its liabilities and obligations even after the date of the order removing the name of the Company from the Register of Companies. Additionally, it recorded that Section 248(7) provides for the continuance and enforcement of liability of every director, manager or other officers of the management and its member under such a situation.

Lastly, the NCLAT asserted that Section 248(8) clarifies that removal of a Company from the Register will, in no manner; affect the power of the NCLT to wind up the company.

Observing that the assets of the Corporate Debtor may continue even after its name is struck-off; the NCLAT observed that whether there are assets of the Corporate Debtor or not could be looked into only by the Resolution Professional.

The Appellate Tribunal has nonetheless clarified that such an order of restoration cannot be in case of Voluntary Liquidation of Corporate Persons under Section 59 of IBC.

ICC Expert Committee on Stress Resolution

Mr Ashish Chhawchharia, Chairman, ICC Expert Committee on Stress Resolution & Practice Head – Eastern Region Grant Thornton India

Mr Ashish Chhawchharia is a Partner at Grant Thornton India and heads the Restructuring services practice for the Firm. He is a Chartered Accountant and qualified Insolvency Professional with over 23 years of professional experience. He is also the Chairperson of ICC Committee on Stressed Assets Resolution

Mr Chhawchharia has substantial experience restructuring companies in financial distress and managing insolvent companies on behalf of stakeholders. His sector experience includes industry verticals such as metals & mining; energy; banking and capital markets, manufacturing, healthcare and real estate.

Mr Anshuman Nathany, Member, ICC Expert Committee on Stress Resolution & Director, LSI Resolution (P) Ltd

Mr Anshuman Nathany has rich experience in Debt syndication, Mergers & Acquisition, Restructuring and Resolution / Liquidation under Insolvency & Bankruptcy Code, 2016.

Mr Arun Kumar Gupta, Member, ICC Expert Committee on Stress Resolution & Partner, Arun Tarun & Co.

Mr Arun Kumar Gupta is a practicing Chartered Accountant with more than 18 years of experience of working in various fields of accounts and finance in multinational companies in India and abroad. He is currently advising and consulting clients on Insolvency, Business & Finance and Corporate Law related matters. In a short span of time, Mr Gupta has successfully completed multiple corporate insolvency resolution assignments as its IRP and related resolution plans have been approved by the Hon'ble NCLT.

Mr Debanjan Mandal, Member, ICC Expert Committee on Stress Resolution & Partner, Fox and Mandal

Mr DebanjanMandal is a partner at Fox & Mandal ("F&M") a premier multi-disciplinary law firm in Kolkata. His areas of practice are varied including Alternative Dispute Resolution, Banking Law, M&A, Commercial Law, Commercial Litigation, Companies Law, Constitutional Law, Contract Law, Family Law and Land Law to name a few. He is a member of the Executive Committee of Indian Chamber of Commerce and Chairman of ICC National Expert Committee on Corporate and Legal Affairs.

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About ICC

Founded in 1925, Indian Chamber of Commerce (ICC) is the leading and only National Chamber of Commerce operating from Kolkata, and one of the most pro-active and forward looking Chambers in the country today. Its membership spans some of the most prominent and major industrial groups in India. ICC's forte is its ability to anticipate the needs of the future, respond to challenges, and prepare the stakeholders in the economy to benefit from these changes and opportunities.

Set up by a group of pioneering industrialists led by Mr G D Birla, the Indian Chamber of Commerce was closely associated with the Indian Freedom Movement, as the first organised voice of indigenous Indian Industry. Several of the distinguished industry leaders in India, such as Mr. B M Birla, Sir Ardeshir Dalal, Sir Badridas Goenka, Mr. S P Jain, Lala Karam Chand Thapar, Mr. Russi Mody, Mr. Ashok Jain, Mr. Sanjiv Goenka, have led the ICC as its President. Currently, Mr. Mayank Jalan is leading the Chamber as its President.

ICC is the only Chamber from India to win the first prize in World Chambers Competition in Quebec, Canada.

ICC's North-East Initiative has gained a new momentum and dynamism over the last few years. ICC has a special focus upon India's trade & commerce relations with South & South East Asian nations, in sync with India's 'Act East' Policy, and has played a key role in building synergies between India and her Asian neighbours through Trade & Business Delegation Exchanges, and large Investment Summits.

ICC also has a very strong focus upon Economic Research & Policy issues - it regularly undertakes Macro-economic Surveys/Studies, prepares State Investment Climate Reports and Sector Reports, provides necessary Policy Inputs & Budget Recommendations to Governments at State & Central levels.

The Indian Chamber of Commerce headquartered in Kolkata, over the last few years has truly emerged as a national Chamber of repute, with full-fledged offices in New Delhi, Mumbai, Guwahati, Ranchi and Bhubaneshwar & Hyderabad functioning efficiently, and building meaningful synergies among Industry and Government by addressing strategic issues of national significance.

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