Page 1675 - 1682 **DOI:** *https://doij.org/10.10000/IJLMH.113448*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 4

2022

Brief Overview on National Company Law Tribunal

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ABSTRACT

The National Company Law Tribunal (NCLT) is a quasi-judicial body that adjudicates issues relating to Indian companies. It was established under the Companies Act, 2013, and was constituted on June 1, 2016 by the Union government. It was based on the recommendation of the Justice Eradi Committee on the law relating to insolvency and winding up of companies. All proceedings under the Companies Act, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, shall be disposed of by the NCLT. It is tasked with the key job of helping recover corporate loans. The NCLT is the adjudicating authority for the insolvency resolution process of companies and limited liability partnerships under the Insolvency and Bankruptcy Code, 2016. Decisions of the NCLT may be appealed at the National Company Law Appellate Tribunal (NCLAT). The NCLAT decisions can be challenged at the Supreme Court on a point of law. The government has appointed Justice Ramalingam Sudhakar, former chief justice of Manipur High Court, as the current president of the National Company Law Tribunal (NCLT).

I. BACKGROUND

National Company Law Tribunal had started its functioning in the month of June 2016 in Delhi and its other benches in the month of July 2016. The tribunal was established under the Companies Act, 2013 and was constituted on 1 June 2016 by the government of India. The constitution of the tribunal is based on the recommendation of the Justice Eradi Committee on Law Relating to Insolvency and Winding up of Companies. The demand of a specialized tribunal was perceived by the Hon'ble Supreme Court of India in its judgement passed in the matter of *S.P. Sampath Kumar* v. *Union of India* wherein Hon'ble Court adopted the alternative institutional mechanism theory and held that since independence, the population of the country is constantly increasing because of which disputes before the courts are also increasing. Furthermore, the report presented by *Shah Committee* in relation of specialized tribunal said that there is an urgent need of reform the laws in relation to setting up of independent tribunal

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in order to resolve the problem of backlogs of cases before the courts.

The National Company Law Tribunal is a quasi-judicial body initially constituted to adjudicate upon corporate disputes under the Companies Act, but its jurisdiction was increased to adjudicate the corporate insolvency cases under the Insolvency and Bankruptcy Code, 2016 (IBC). Through this, the NCLT took over all related cases pending before the High Courts (approx. 3989), Company Law Board (approx. 5345) and Board of Industrial and Financial Reconstruction and the Debt Recovery Tribunal. Since then there are around 83,000 cases filed in NCLT out of which 62,000 were disposed of as on March, 2022. The NCLT has provided an effective and time bound adjudication mechanism to deal with matters related to the Companies Act, 2013, the Insolvency and Bankruptcy Code (IBC), 2016 and the LLP Act, 2008.

The NCLT helped to resolve Insolvency and Bankruptcy proceedings involving more than Rs 80,000 crore in 2018(just after 2 year from the implementation of IBC,2016) including big-ticket cases like those involving Bhushan Steel and Binani Cement. This sum is expected to cross Rs. 1,73,359 Crores in 2019, with several big-ticket default cases pending.

According to a January 2019 blog post by then finance minister ArunJaitley, 1,332 cases pertaining under the code have been admitted by the NCLT in the past two years. Out of these, 66 have been resolved while 260 cases were ordered for liquidation adding that another 4,452 were disposed of at the pre-admission stage.

The tribunal has 16 (including the Principal Bench). Justice M.M. Kumar, a retired Chief Justice of the Jammu & Kashmir High Court is the First President of the tribunal. Shri Ramalingam Sudhakar is the present President of National Company Law Tribunal, New Delhi since 01.11. 2021. He is the retired Chief Justice of High Court of Manipur

The National Company Law Tribunal has the power under the Companies Act to adjudicate proceedings:

1. Initiated before the Company Law Board under the previous act (the Companies Act 1956);
2. Pending before the Board for Industrial and Financial Reconstruction, including those pending under the Sick Industrial Companies (Special Provisions) Act, 1985;
3. Pending before the Appellate Authority for Industrial and Financial Reconstruction; and
4. Pertaining to claims of oppression and mismanagement of a company, winding up of companies and all other powers prescribed under the Companies Act.

Decisions of the tribunal may be appealed to the National Company Law Appellate Tribunal,

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the decisions of which may further be appealed to the Supreme Court of India on a point of law. The Supreme Court of India has upheld the Insolvency and Bankruptcy Code in its entirety.

II. ECONOMIC SURVEY ON NCLT

- Chief Economic Adviser K V Subramanian's maiden Economic Survey 2018-19 points out that the Insolvency and Bankruptcy Code (IBC), 2016, has systematically bettered India's debt recovery mechanism and it further proposes the strengthening of the National Company Law Tribunals (NCLT) and the appellate tribunal.
- The Survey finds that the ecosystem for insolvency and bankruptcy is getting systematically built out with recovery and resolution of a significant amount of distressed assets. As of March 31, 2019, corporate insolvency resolution process resolved 94 cases, resulting in settlement of claims worth Rs 1,73,359 crore.
- Till February 28, 2019, 6,079 cases involving a total amount of Rs 2.84 lakh crore have been withdrawn before admission under provisions of the IBC. The Survey termed IBC as "one of the most important economic reforms of recent times designed to effectively deal with non-performing corporate debtors".
- The Survey also notes that the IBC has brought about a cultural change in the lender-borrower dynamics. "Before enactment of the IBC, the recovery mechanisms available to lenders were through LokAdalat, Debt Recovery Tribunal and SARFAESI (Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest) Act. While the earlier mechanisms resulted in a low average recovery of 23%, the recoveries have risen to 43% under the IBC regime," the Survey shows.
- The Survey also notes that since the enactment of the IBC, India has significantly improved its ‘Resolving Insolvency’ ranking to 108 in 2019, from 134 in 2014, where it remained stagnated for several years. Last year India won the Global Restructuring Review award for the most improved jurisdiction.
- An IMF-World Bank study in January 2018 observed that “India is moving towards a new state-of-the-art bankruptcy regime “The Survey said that most developed economies have well-formed cross border insolvency laws and India has initiated steps to adopt the United Nations Commission on International Trade Law (UNCITRAL) model on Cross-Border Insolvency.

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III. RESERVE BANK OF INDIA ON NCLT

- With the Supreme Court current ruling, the banks will now have discretion in taking the defaulting companies to NCLT under Insolvency and Bankruptcy Code (IBC), said experts.

- The Supreme Court on Tuesday quashed the RBI's February 12 circular, which prescribed rules for recognising one-day defaults by large corporates and initiating insolvency action as a remedy.

- In the best interest of customers, banks will take a call on referring cases to National Company Law Tribunal (NCLT) on case by case basis. Prior to February 12 circular of the RBI, the resolution mechanism available to banks were Corporate Debt Restructuring Scheme (CDR), Scheme for Sustainable Structuring of Stressed Assets (S4A), and Joint Lenders' Forum (JLF).

- It would be difficult to say now cases would be resolved only through a particular mechanism like CDR, S4A or JLF, the official said, adding it would depend on the gravity of the default cases. Last year, over two dozen lenders, led mostly by state-run banks, signed the inter-creditor agreement (ICA) under 'Project Sashakt' to speed up the resolution of stressed assets that are under the ₹500 crore bracket.

- According to former RBI Deputy Governor R Gandhi banks can now take defaulting companies on their own instead of being directed by the regulator. "It is for the banks now to take a call on case to case basis whether the default is such that it can be taken to NCLT or they are willing to give some more time or restructure it. All these options are within the commercial domain of banks...they will still remain answerable to the RBI," Lakshmi kumaran & Sridharan Executive Partner Punit DuttTyagi said.

- The Reserve Bank of India substituted the previous guidelines with a harmonised and simplified generic framework for resolution of stressed assets in view of the enactment of the Insolvency and Bankruptcy Code. "The Committee are of the opinion that the coinage of restructuring in resolution plan is hollow without having any serious meaning or business which only reflects the blurred vision of RBI in understanding and appreciating the problems. The Committee expect that clarity of thought and transparency in approach should be the guiding factor to streamline and strengthen the sector squirming under ineluctable hardships," it said.

- **India won the Global Restructuring Review Award for the Most Improved Jurisdiction on February 20th, 2GRR ON NCLT**

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- In the course of less than a year, India's National Company Law Tribunals – the first port of call for hearing insolvency cases – have gone from a standing start to becoming fully fledged adjudicatory bodies capable of handing down tens of thousands of final decisions. With the first real test of the new system looming in the form of the Indian banking system's huge volume of non-performing assets, *GRR'*s Richard Woolley spoke to practitioners in and outside the country about the opportunities presented for lawyers, advisers and distressed investors.

- The various interlocking suites of regulations – which take their cues from international best-practice norms established by English law and the US Bankruptcy Code – are one of the more prominent legal examples. India was languishing at 142 in the World Bank's global "Ease of Doing Business" ranking and the incumbent has made the country's improved performance in the survey one of his policy goals. In the latest edition of the research, India is up to number 100 in the overall list and placed 103rd for "Resolving Insolvency" – up from 136 when that metric was introduced in the 2016 edition of the research.

- Whether reforms to the country's insolvency and restructuring laws – which, as we will see, are ongoing – will have a material impact on India's attractiveness as a business destination is, commentators agree, too early to predict. However, international investors (and their lawyers) are increasingly interested in the market, particularly special situations funds that see opportunities in the combination of a more dependable restructuring regime and the working out of historical bad debts.

- The Insolvency and Bankruptcy Code, 2016 ("Code"/ "IBC"), was introduced amidst various other reforms introduced by the Government, with focused emphasis on the "Ease of Doing Business in India." Ease of Doing Business not only means speedy and easy entry, and ease of carrying out operation of businesses; it also covers in its ambit, the ease of exit.

IV. FEW IMPORTANT JUDGMENTS OF SUPREME COURT ON IBC, 2016

1. Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [2019] ibclaw.in 03 SC:

The first point was the clearing the difference between Financial Creditor and Operational creditor. The Legislative scheme that is contained under Section 7 of the Code was challenged for the fact that there is no intelligible differentia between the financial and the operational creditor in Code, regard being had to the object sought to be achieved by the Code, namely, insolvency resolution, if that is possible, then ultimately, liquidation. As, only the financial creditor have the place in the Committee of creditors **("COC")** and hence it was contented that this legislative design amounted to discrimination under Article 14 of the Constitution of India.

The Supreme Court upheld the Constitution validity which also tried to resolve the dichotomy between the financial creditor and the Operational Creditor.

Secondly**; the Constitutionality of Section 12, the** Court upheld the Constitutionality of the said section, while discussing the reason for this high threshold the Apex Court was of the view that they did not see any difficulty in the need for such high threshold for the withdrawal as the proceeding under the code is the collective proceedings. As, under Section 60 of the Code if the COC arbitrarily rejects the withdrawal claim the NCLT/NCLAT can always set aside such decision. And thus Section 12A passes the Constitutionality. Thirdly; the Constitutionality of Section 29Aof the Code was also challenged. Section 29A list down the person who are not eligible to be a resolution applicants. The First issue which came into picture was whether there was a Retrospective Application of the Section 29A. It was contented that Section 29A of the Code had retrospectively violate the rights of the erstwhile promoters to participate in the recovery process for the Corporate Debtor. It is not retrospective in nature. Also **Section 29A(c) Not Restricted To Malfeasance.**

2. B.K. Educational Services Private Limited Vs. Parag Gupta And Associates [2018] ibclaw.in 32 SC

The Issue before the Supreme Court was dealing with Section 238A, which was stated into the Code by an amendment which states that the Limitation Act "shall, as far as may be," apply to the proceedings before the National Company Law Tribunal (NCLT). The issue that arose before the Supreme Court was whether the Limitation Act is applicable to applications that are made under Section 7 and/or Section 9 of the Code from its commencement till came into force. The Supreme Court held as follows:

(a) an application filed after the IBC came into force in 2016 cannot revive a debt which is no longer due as it is time- barred.

(b) The amendment of Sec 238A would not serve its object unless it is construed as being retrospective. Otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation. (c) It is clear from a reference to the Insolvency Law Committee Report of March, 2018, that the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of IBC.

(d) Since the Limitation Act is applicable to applications filed under Sections 7 and 9 of IBC from the inception of IBC, Article 137 of the Limitation Act gets attracted. Article 137 of the Limitation Act provides the period of limitation in case of "any other application for which no

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period of limitation is provided elsewhere" as three years from the time when the right to apply accrues. "The right to sue", therefore, accrues when a default occurs.

3. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. [2017] ibclaw.in 02 SC

NCLT had struck down the company's plea and admitted the case in January and an interim resolution professional (IRP) from consulting firm EY was appointed for the company. The company's promoters had also approached the Bombay high court and the Supreme Court but their pleas were rejected.The judgement of the Supreme Court, in the case of Innoventive Industries vs ICICI Bank is a shot in the arm for the regime established under the Insolvency and Bankruptcy Code, 2016. The Supreme Court's bench comprising of Justice Nariman and Justice Kaul settled the law in terms of repugnancy of any other law with respect to the Code. It seems that the case involved more adjudication on grounds related to Constitutional Law than on the Code. This case related to the first-ever application filed for initiating insolvency proceedings under the new Code. The Court was cognizant of the fact and hence wanted to settle the law so that all 'Courts and Tribunals take notice of the paradigm shift in the Law'. This state law provided for overtaking of industries by the state by declaring them 'relief undertakings'. Such overtaking can be done through government notifications to that effect under the Act. This is done to protect employment of the people who are working in such an undertaking. The Code instead provides for overtaking of an undertaking's business by an 'Insolvency Professional' through a committee of creditors. In the instant case, insolvency application was filed against Innoventive Industries which later claimed to be a relief undertaking under the Maharashtra Act. This brought the two legislation on a collision course, for the simple reason that enforcement of one will hinder the enforcement of the other. This doctrine stems from the operation of Article 254 of the Constitution. As per this doctrine, whenever central and state laws are framed on the same subject and are contradictory to each other, it is the central law which prevails and the state law is rendered void. In the instant case, however, the laws even though coming in conflict with each other, were framed under different entries of the concurrent list. This involved an adjudication by the Supreme Court on this point. The National Company Law Tribunal (NCLT) had ruled that Innoventive Industries can't claim any relief under Maharashtra Act. It also interestingly decided that there is no repugnancy between the two laws, as they operate in different fields.

4. Macquarie Bank Ltd. Vs. Shilpi Cable Technologies Ltd [2017] ibclaw.in 14 SC

i.The first question is whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory?

It is true that the expression "initiation" contained in the marginal note to Section 9 does indicate the drift of the provision, but from such drift, to build an argument that the expression "initiation" would lead to the conclusion that Section 9(3) contains mandatory conditions precedent before which the Code can be triggered is a long shot. Equally, the expression "shall" in Section 9(3) does not take us much further when it is clear that Section 9(3)(c) becomes impossible of compliance in cases like the present. It would amount to a situation where in serious general inconvenience would be caused to innocent persons, such as the appellant, without very much furthering the object of the Act, therefore, Section 9(3)(c) would have to be construed as being directory in nature.

ii. Whether a demand notice of an unpaid operational debt under section 8 can be issued by a lawyer on behalf of the operational creditor?

Sections 8, 9 and 238 of the Insolvency and Bankruptcy Code, 2016 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 30 of the Advocates Act – A fair construction of Section 9(3)(c), in consonance with the object ought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent – The non-obstante clause contained in Section 238 of the Code will not override the Advocates Act as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act -Since there is no clear disharmony between the two Parliamentary statutes in the present case which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also, we must not forget that Section 30 of the Advocates Act deals with the fundamental right under Article 19(1)(g) of the Constitution to practice one's profession. Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms there under would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

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