

30th December, 2022

RIGHT TO HAVE ACCESS TO THE RESOLUTION PLAN UNDER IBC

INTRODUCTION & BACKGROUND

In a significant decision, on 20 January 2022, a division bench consisting of Justice Ashok Bhushan (Chairperson) and Dr. Ashok Kumar Mishra (Technical Member) of the National Company Law Appellate Tribunal [“NCLAT”] held that a Resolution Plan does not remain a confidential document, so as to deny its perusal to a claimant, who is aggrieved by the order of the Adjudicating Authority approving the Resolution Plan.¹ In this backdrop, this short article attempts to decode the right to have access to the resolution plan under the Insolvency and Bankruptcy Code, 2016 [“IBC”].

CONFIDENTIALITY DURING THE CIRP PROCEEDINGS

Under IBC

- After the public announcement for initiation of Corporate Insolvency Resolution Process [“CIRP”], the Interim Resolution Professional is to collect all information relating to the assets, finances and operations of the Corporate Debtor for determining the financial position of the Corporate Debtor; receive and collate all the claims submitted by the creditors; constitute a Committee of Creditors; and to perform other functions as enumerated in Section 18 of IBC. Section 24 of the IBC deals with meeting of Committee of Creditors and requires Resolution Professional to give notice of each meeting to the Committee of Creditors.
- Section 29(2)(a) provides that Resolution Applicant is to comply with provisions of law for the time being in force relating to confidentiality and insider trading and further the Resolution Applicant is not to share relevant information with third parties unless clauses (a) and (b) of Section 29(2) are complied with.
- After Resolution Plan is submitted the same is to be scrutinized by Resolution Professional and Resolution Professional is to examine each Resolution

Plan and when Resolution Professional is satisfied that it complies with the requirements as laid down in Section 30(2), he shall present it to the Committee of Creditors for approval. Section 30(6) further provides that Resolution Professional shall submit the Resolution Plan as approved by the Committee of Creditors to the Adjudicating Authority.

Under Regulations framed under IBC

- Regulation 35(3) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulation, 2016 [“Process Regulation 2016”] provides that Resolution Professional and registered valuers shall maintain confidentiality of the ‘fair value’ and the ‘liquidation value’.
- Regulation 21 deals with ‘Contents of the notice for meeting’ of Committee of Creditors. Regulation 21(3) provides that along with notice copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting shall be sent.
- The First Schedule, which deals with ‘Code of Conduct for Insolvency Professionals’ in Item No.21 under the heading ‘Confidentiality’ provides that an Insolvency Professional must ensure that confidentiality of the insolvency resolution process, liquidation or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties or required by law.

Hence Section 24 of IBC read with Regulation 21 (3) (iii) of the Process Regulation 2016, makes it clear that all Members, who were to participate in the meeting of the Committee of Creditors had to be provided copies of all relevant documents.

Thus, the entitlement of copy of documents during

¹ Association of aggrieved Workmen of Jet Airways (India) Limited v. Jet Airways (India) Ltd. and Others, Company Appeal (AT) (Insolvency) No. 643 of 2021 & I.A. No.1700 of 2021.



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the CIRP is for only those who are to participate in CIRP. As per Section 24 of IBC, Operational Creditors or their representatives, if the amount of their aggregate dues is not less than 10% of the debt, are also entitled for notice of meeting of Committee of Creditors. Thus, the category of creditors including the Members of the suspended Board of Directors or the partners of the corporate persons, who are entitled to participate in the meeting of the Committee of Creditors are entitled to receive copies of all documents.

JUDICIAL DECISIONS

- **Supreme Court of India:** In the context of right to have access to Resolution Plan by erstwhile/ suspended Board of Directors of the Corporate Debtor in *Vijay Kumar Jain v. Standard Chartered Bank and Ors.*², the Hon'ble Supreme Court of India held that Members of suspended Board are entitled to participate in the meeting of Committee of Creditors. They are also entitled to be given a copy of Resolution Plan before such meetings are held. However, this observation came while dealing with entitlement of Resolution Plan during the CIRP proceeding.
- **NCLAT:** In *Committee of Creditors of Meenakshi Energy Ltd. v. Consortium of Prudent ARC Limited & Vizag Minerals and Logistics P Ltd.*³, the NCLAT clearly stated that Resolution Plan furnished by one or other Resolution Applicant is a confidential one and cannot be disclosed to any competing Resolution Applicant. The Resolution Plan has been held to be confidential in nature. However, these observations were in reference to CIRP proceeding and the NCLAT in this case as well had no occasion to consider the situation where Appellant who is aggrieved by the order of the Adjudicating Authority of approving the Resolution Plan is claiming the copy of the Resolution Plan.

CONFIDENTIALITY AFTER THE APPROVAL BY THE ADJUDICATING AUTHORITY

NCLAT Rules, 2016

- Part XIV of the NCLT Rules, 2016 deals with 'Inspection of Record'.
 1. **Rule 114(1)** provides that parties to any case or their authorised representative may be allowed to inspect the record of the case.
 2. **Rule 114(2)** provides that a person, who is not a party to the proceeding, may also be allowed to inspect the proceeding after obtaining the permission of Registrar in writing.
- When Resolution Plan is submitted to the Adjudicating Authority with an Application to accept the Plan, the Application as well as Plan is on the record of the case or proceeding and then right to inspection is granted statutorily. Hence, when inspection is permitted of record of the Adjudicating Authority, the inspection can also very well be made of the Resolution Plan, which is part of the proceedings before the Adjudicating Authority.

- Rule 117 of the NCLT Rules, 2016 deals with 'Mode of inspection'. Sub-rule (3) of Rule 117 provides that note of any record can also be taken in pencil by a person inspecting the record.

Under IBC

- Section 31(3) of IBC provides that Resolution Professional after approval of Resolution Plan shall forward all records relating to the conduct of the CIRP and the resolution plan to the Board to be recorded on its database.
- Section 196(1) deals with 'Powers and functions of the Board'. Sub-clause (h) of subsection (1) empowers the Board to call for any record from the Insolvency Professional, which may also include the Resolution Plan. Sub-clause (k) further empowers the Board to collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases.
- Thus, sending of the records by the Resolution Professional to Board as contemplated by Section 31(3) is not only for proper data research studies only and the records and information can be recorded in its database and also can be published.

In the Appeal

- Additionally, the Appellant who has challenged a Resolution Plan in this Tribunal is entitled to know the contents of the Resolution Plan to effectively prosecute his Appeal as per the grounds mentioned in Section 61(3).

CONCLUSION

The IBC read with the Rules and Regulations framed therein indicates that after Resolution Plan is submitted to the Adjudicating Authority and it is approved by the Adjudicating Authority, it no longer remains a confidential document, so as to preclude Regulator and other persons from accessing the said document.

However, while holding so, the NCLAT observed that the same cannot be made available to each and to anyone who has no genuine claim or interest in the process. Hence, the access to Resolution Plan even if it is not a confidential document, after approval can be denied in proper and appropriate cases, the NCLAT observed.

² (2019) 20 SCC 455.

³ Company Appeal (AT) (CH) (Insolvency) No. 166 of 2021 decided on 25.10.2021.