

Amendments due to Covid-19 – A creditor's pain, a debtor's gain?
NCLT Ruling on Insolvency and Bankruptcy Code

Snapshot

With a view to avoid hardships for corporate persons being pushed into insolvency proceedings, the Union Finance Minister had announced changes to Insolvency and Bankruptcy Code ('IBC') as a part of the Atmanirbhar Package including suspension of fresh proceedings for default arising during the Pandemic Period for a period of six months (which could be extended up to one year) and exclusion of defaults occurring during the Pandemic Period from the applicability of insolvency proceedings.

In a recent ruling* by Chennai Bench of NCLT, the Bench has taken into consideration the objective of the Ordinance along with the law and held that the Ordinance would apply retrospectively from 25 March 2020 as is clearly provided by the law and the Statement of Objects and Reasons. In the process, the NCLT has also made some very interesting observations about permanent exclusion of defaults during the Pandemic Period from initiation of proceedings under the Code. Interestingly, the newly inserted section 10A provides much room for interpretation and could have far reaching implications which should be factored by any Operational Creditor before initiating any proceeding under the Code.

Facts and Ruling

In January 2020, it was announced that Mr. Ramesh Kymal would step down as the Chairman and Managing Director of Siemens Gamesa Renewable Private Limited and on April 30, 2020, Mr. Ramesh Kymal formally separated from Siemens Gamesa Renewable Private Limited.

In May 2020, Mr. Ramesh Kymal sued the company over "unpaid dues" of around INR 104.11 crore to him.

While proceedings under Section 9 of the IBC, at the behest of operational creditor (Mr. Ramesh Kymal), were pending against the Corporate Debtor (Siemens Gamesa Renewable Private Limited), on June 5, 2020, the Central Government, on account of COVID-19, promulgated Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 to suspend Sections 7, 9 and 10 of the IBC by adding Section 10A to the IBC stating that no application for initiation of corporate insolvency resolution process ("CIRP") of a corporate debtor shall be filed for any default arising on or after March 25, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified therein. It is pertinent to note that the said Ordinance further stated that no application could "ever" be filed for initiation of CIRP of a corporate debtor for the said default occurring during the said period. The said Section also clarified that the provisions of the same would not apply to any default committed before March 25, 2020.

* *Siemens Gamesa Renewable Power Private Limited vs Ramesh Kymal in IA/342/2020 in IBA/Sr.No.347/2020 NCLT Chennai*

Section 7, 9 and 10 of the IBC provide for the process regarding initiation of corporate insolvency resolution by such persons as provided therein.

The Operational Creditor sought to draw a distinction between the already filed insolvency petitions under IBC from the ones that are yet to be filed and argued that Section 10A was not applicable to pending proceedings since the ordinance was passed on June 5, 2020 and the date of the alleged default was April 30, 2020.

In response to the question as to what would happen to those cases which had been filed between March 25, 2020 and June 5, 2020, NCLT stated that to say that Section 10A would only apply to those applications which were filed after June 5, 2020, was untenable and confining the applicability of the Section 10A to only those applications which are filed after June 5, 2020 is contrary to the legislative intent and object expressed of its promulgation.

The NCLT thus concluded that the Ordinance of June 5, 2020 was applicable retrospectively to the defaults arising on or after March 25, 2020 and consequently, since the alleged default in the case at hand had arisen on April 30, 2020, the NCLT held that the instant case was hit under Section 10A.

The main insolvency plea was accordingly rejected.

However, the NCLT made certain important observations regarding the proviso to section 10A and observed that "*the proviso to main provision of Section 10A makes it abundantly clear that the hands of the clock were not required to be temporarily frozen for a period of six months or such further period not exceeding one year but are required to be permanently interdicted*". While this observation of the NCLT had no or little bearing on the question to be answered by the NCLT, it surely calls for an analysis.

KCM Note

At the outset, it is important to note that the way the Ordinance has been drafted, it leaves a lot of room for different interpretations, especially when one reads it in the context of the intent with which the Ordinance has been notified.

On reading the new section 10A with the intent as is captured in the Ordinance, one can infer that while the main provision of section 10A deals with '**suspension**' of initiation of CIRP for a period of six months (or one year, as the case may be) from March 25, 2020 (such period being referred to as "Pandemic Period") in respect of defaults '**arising**' during the said period, the *Proviso* deals with '**exclusion**' of the said defaults '**occurring**' during the said period, from the purview of section 10A for '**ever**'. Further, an *Explanation* has been inserted to clarify that the new provision shall not apply to defaults that are '**committed**' before March 25, 2020. The provision, especially the *Proviso*, throws up the following questions:

- a. Whether the proviso expands the main provision?
- b. Whether the proviso renders the main provision redundant?
- c. Will the defaults 'arising' during the Pandemic Period be protected forever even if the same are continuing in nature and continue after the Pandemic Period?

Apparently, the *proviso* expands the scope of the main provision that merely provides for a 'suspension' whereas the *Proviso* on the other hand, deals with a blanket and permanent 'exclusion' of such defaults, leading to a *prima facie* conclusion that the main provision is effectively rendered redundant by the proviso. This could lead to an interpretation that no proceedings could be initiated

post the Pandemic Period even if the default continues post the Pandemic period.

However, a minute reading of the proviso could throw an interesting proposition:

*"Provided that no application shall **ever** be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period"*

To clarify, if we break down the language of the said proviso, it can be observed that the legislature's intent is to correlate and connect the "occurrence" of default, with the reason of its occurrence i.e. disruption of business activities due to COVID-19, which is majorly due to the nationwide lock down imposed on March 25, 2020. The proviso refers to '**said default**' which takes us to the main provision that refers to *"any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf"*.

Accordingly, the term '**said default**' already refers to the default 'arising' during the Pandemic Period. Hence, it may mean that any default arising during the Pandemic Period would get a permanent exclusion even without the use of the phrase "occurring during the said period". It is a settled principle that each word used in the law has to be given a meaning and cannot be considered otiose. This principle could possibly provide us with an answer to the question of what the need could be to follow the term '**said default**' with the phrase '**occurring during the said period**', if the term 'said default' already conveyed the intended meaning and purpose.

Accordingly, a possible interpretation could be that once read with the main provision, the Proviso would mean that only a default that '**arises**' as well as '**occurs**' during the Pandemic Period would get a permanent exclusion from initiation of CIRP, however, if the default '**occurs**' post the Pandemic

Period (say, a continuing default), it will not get the perpetual benefit of section 10A even if it 'arises' during the Pandemic period. The proviso, on such an interpretation, shall cover only cases of default against which a claim is made during the Pandemic Period itself and CIRP under Section 7,9 or 10 as the case may be, have been filed.

In the instant case, the operational creditor had applied for initiation of CIRP against the operational debtor in respect of a default arising during the Pandemic Period (i.e. on April 30, 2020) and accordingly, the NCLT ruled in favour of the Operational Debtor by taking recourse to section 10A with observations to the proviso to section 10A. The NCLT has not gone into the interpretation of the terms 'arising' and 'occurring' and also use of the phrase 'occurring during the said period' after the 'said default' and has observed that as per intent of the Ordinance, no proceedings can ever be initiated in respect of defaults arising / occurring during the Pandemic Period. The Hon'ble NCLT has, in its judgement, also mentioned and acknowledged that the legislature has incorporated such a proviso to correspond to the fact of logic behind the applicability of law of limitation to IBC. NCLT has also not distinguished between the point where a default arises and situations in which such defaults continue.

It is pertinent to note that Section 10A draws no exception for initiation of CIRP against such companies that have defaulted in paying to their creditors in spite of having suffered no financial distress. It outrightly provides a blanket ban on initiation of CIRP against corporate debtors, on the assumption and belief that all the business operations may have been more or less affected due to the pandemic, for the default that occurs in the Pandemic Period.

Accordingly, to honor the intent and stand of the legislature and due to the subsistence of such unprecedented situation, it is suggested that, to be on

the safer side, even if there is any default in payment that has occurred during the Pandemic Period, a creditor should not make any claims by way of issuing any demand notice or the like for it, until the lapse of the Pandemic Period. A claim should be made by the creditor only once the Pandemic Period has officially lapsed (which in any case will not be later than March 25, 2021) and Section 7, 9 or 10 of IBC become operative again. In case the claim that is made by the creditor after such lapse of Pandemic Period is still not met by the corporate debtor, then the creditor should be in a position to establish that the default

has occurred outside the ambit of the proviso of Section 10A and hence, the said creditor may be able to exercise his right under Section 7, 9 or 10 of IBC, as the case may be.

This NCLT Ruling coupled with the language of the Ordinance shall surely open up a Pandora's Box and is likely to keep the judiciary busy for times to come, or should we say, for 'good' times to come post the Pandemic Period, if one were to apply for initiation of a proceedings in respect of a continuing default after the stipulated period.

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