Requirement of filing Certificate by 'Financial Institution' under Section 9 (3)(c) of the Insolvency and Bankruptcy Code, 2016 by foreign Operational Creditors

CLASIS LAW

Section 9 (3) (c) of the Insolvency and Bankruptcy Code, 2016 ("Code") requires that a copy of a certificate from the Financial Institution maintaining the accounts of the Operational Creditor confirming that there is no payment of an unpaid operational debt by the Corporate Debtor, 'shall' be filed along with an Application for initiation of Corporate Insolvency Resolution Process by an Operational Creditor. Recently, interpreting this provision strictly and in isolation with the legislative intent of the Act as well as the Rules made thereunder, the National Company Law Appellate Tribunal ("NCLAT"), in the case of Macquarie Bank Limited Vs. Uttam Galva Metallics Limited (Uttam Galva case), has held that an Operational Creditor which is a foreign bank, not having any account with a "Financial Institution" as defined under Section 3 (14) of the Code and thereby not being able to file a certificate under Section 9 (3) (c) of the Code, cannot initiate Insolvency Proceedings under Section 9 of the Code as the filing of the said certificate is mandatory and not directory in nature. Therefore, the certificate by the Financial Institution is a strict requirement for initiating Insolvency Proceedings.

The NCLAT further rejected the Application by Macquarie Bank on the ground that an Advocate/lawyer, a Chartered Accountant or a Company Secretary or any other person, in absence of any authority by the Operational Creditor, do not hold any "position with or in relation to the Operational Creditor" (as mentioned under Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) ("Rules") and cannot issue the Demand Notice under Section 8 of the Code read with Rule 5 of the Rules.

Smart Timing Case

The NCLAT while passing the above mentioned Order, relied upon its judgment in Smart Timing Steel Limited Vs. National Steel and Agro Industries Limited ("Smart Timing Case") where it categorically held that the certificate from the 'Financial Institution' maintaining accounts of the Operational Creditor confirming that there is no payment of the unpaid operational debt by the Corporate Debtor as prescribed under Section 9 (3) (c) of the Code, is mandatory and not an empty statutory formality.

The NCLAT's judgment in Smart Timing Case was appealed before the Supreme Court, however, the Supreme Court did not find any reason to interfere with NCLAT's Order and dismissed the appeal.

Recent Developments

Basis its judgments passed in the Smart timing Case and the Uttam Galva Case, the NCLAT has dismissed many such Applications where Operational Creditors do not have an account with a Financial Institution and/or where the Demand Notices under Section 8 of the Code have been issued by Advocates. Hence, the present matter has become an issue which affects the public at large.

In view of the above, recently, a Civil Appeal (Civil Appeal No. 15481 of 2017) has been filed on behalf of Macquarie Bank Limited before the Supreme Court against the Order passed by the NCLAT in the Uttam Galva case inter alia on the following grounds:

That the NCLAT in the Uttam Galva Case failed to appreciate the legislative intent behind the Code which is inter alia to protect the interests of all the creditors;

1) The word 'shall' in Section 9 (3) of the Code is directory in nature as the purpose behind filing the certificate by the Financial Institution is to prove the existence of debt against the Corporate Debtor which is possible by way of enclosing a certificate of any bank which maintains the account of the Operational Creditor;

3) The NCLAT has disregarded the usage of words "if available" with respect to the requirement of the certificate from the Financial Institution as mentioned under Annexure III of Form 5 under the Rules, thereby making the said requirement directory in nature;

4) Section 9 of the Code violates Article 14 of the Constitution of India as it does not treat all the creditors, foreign as well as domestic, with equality; and

5) NCLAT has failed to appreciate that the Code is silent on the requirement of an authority letter in favour of an Advocate issuing the Demand Notice under Section 8 of the Code and hence the same should not be the ground to dismiss the Application under Section 9 of the Code at its threshold.

Further, two other similar Civil Appeals (Civil Appeal No. 015447 of 2017 and Civil Appeal Number 15135 of 2017) have been filed on behalf of Macquarie Bank Limited against Shilpi Cable Technologies Limited impugning the Order of the NCLAT where the NCLAT has relied on the Order passed in Uttam Galva Case and rejected the Applications of Macquarie Bank Limited. However, in these two cases the NCLT had allowed the Application and accepted the certificate filed by Macquarie Bank as the certificate within the meaning of Section 9 (3) (c) of the Code.

These Civil Appeals were listed before the Supreme Court on October 6, 2017 where Macquarie Bank was represented by Clasis Law. Submissions were made on behalf of Macquarie Bank bringing into the knowledge of the Court, the dire need to interfere in the matter as the rights and interests of creditors at large were getting affected by the Order in Uttam Glava Case. At the time of the hearing in the above mentioned three Civil Appeals before the Supreme Court, the judgment passed by the same bench in the case of Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited was also brought into the attention of the Court, where the Supreme Court categorically held that given the fact that the adjudicating authority has not dismissed the application on the ground of absence of certification from the Financial Institution and that the appellant has raised this ground only at the appellate stage, the application cannot be dismissed at the threshold for the want of the certificate alone.

The Bench heard the submissions made on behalf of Macquarie Bank and after due consideration of the same, was of the opinion that the issues involved in the matter are recurring and it is important to settle the said issues conclusively. Accordingly, the Supreme Court has issued notice in all the three Civil Appeals and the matters will now be listed for arguments on November 21, 2017.

Contact us

Mumbai

1st Floor, Bajaj Bhawan
226 Nariman Point
Mumbai – 400 021

T : +91 22 4910 0000
F : +91 22 4910 0099

New Delhi

14th Floor, Dr Gopal Das Bhawan
28, Barakhamba Road
New Delhi – 110 001

T : +91 11 4213 0000
F : +91 11 4213 0099

Email us : info@clasislaw.com

Visit us : www.clasislaw.com