

**THE TERM 'EXISTENCE OF DISPUTES'
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In its recent judgment of *Kirusa Software Private Ltd. vs. Mobilox Innovations Private Ltd. Company Appeal (AT) (Insolvency) 6 of 2017*, the National Company Law Appellate Tribunal (“Appellate Tribunal”) has adjudicated upon the issue as to what does “dispute” and “existence of dispute” mean for the purpose of determination of a petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“Code”).

Under the provisions of Section 8 of the Code, on the occurrence of a default, it is mandatory for the Operational Creditor, to issue a notice demanding payment of the default amount. This is a condition precedent under Sections 8 and 9 of the Code before making an application before the Adjudicating Authority (National Company Law Tribunal). Further, as per sub-Section (2) of Section 8 of the Code, the Corporate Debtor is under an obligation to bring to the notice of the Operational Creditor the payment of debt or the existence of a dispute, if any, within a period of ten (10) days. The Code does not stipulate any such condition on the Financial Creditor under Section 7 of the Code.

After the expiry of ten (10) days, the Operational Creditor has a right to file an application before the Adjudicating Authority under Section 9 of the Code. Once such an application is received, the Adjudicating Authority, within a period of fourteen (14) days, has to either admit or reject the application. It is pertinent to note that Section 9(5)(ii) casts an obligation on the Adjudicating Authority to reject the application of the Operational Creditor if it has received a notice of dispute from the Corporate Debtor.

In *Kirusa Software Private Ltd. (supra)*, the Appellate Tribunal whilst interpreting Section 8 and 9 of the Code, has laid down that the Adjudicating Authority will examine whether the notice of dispute in fact raises the dispute and that too within the parameters of the definition of ‘debt’ and ‘default’. Then the Adjudicating Authority will reject the application if it apparently finds that the notice of dispute does really raise a dispute. Otherwise, if the Adjudicating Authority finds that the notice of dispute lacks in particulars or does not raise a dispute, it may admit the application.

The Appellate Tribunal has thereafter proceeded to interpret the definition of the term “dispute”. Sub-section (6) of section 5 of the Code defines “dispute” to include a suit or arbitration proceedings relating to-

- (a) the existence of the amount of debt;
- (b) the quality of goods or services; or
- (c) the breach of a representation or warranty.



The Appellate Tribunal has held that the term “dispute” as defined under the Code is “inclusive” and not “exhaustive”. The term has been given a wide meaning on the condition that it is in relation to the three grounds provided for in the definition i.e. the existence of the amount of debt, the quality of goods or services or the breach of a representation or warranty.

The Appellate Tribunal explains that sub-Section (6) of Section 5, if read harmoniously with sub-Section (2) of Section 8 of the Code means that disputes, if any, relate to all kinds of disputes, pertaining to debt and default. The Appellate Tribunal holds that sub-Section (2) of Section 8 of the Code cannot be read to mean that a dispute must be pending between the parties prior to the notice of the demand and that too in arbitration or a civil court. Once parties are already before any judicial forum/authority for adjudication of disputes, notice becomes irrelevant and such an interpretation will render the expression ‘existence of dispute’ in sub-Section (2) of Section 8 otiose.

The Appellate Tribunal has further held that the provisions of sub-Section (6) of Section 5 read with sub-Section (2)(a) of Section 8, cannot be limited merely to pending arbitration and or a civil suit. It must include disputes pending before every judicial authority including proceedings initiated or pending before consumer court, tribunal, labour court or mediation, conciliation etc. If any action is taken by corporate debtor under any act or law including while replying to a notice under section 80 of CPC, 1908 or to a notice issued under Section 433 of the Companies Act or Section 59 of the Sales and Goods Act or regarding quality of goods or services provided by 'operational creditor', the same will come within the ambit of dispute, raised and pending within the meaning of sub-Section (6) of Section 5 read with sub-Section (2) of Section 8 of the Code as long as there are disputes as to existence of debt or default etc.. Such disputes must be raised in a Court of law or authority and proposed to be moved before the Court of law or authority and not merely to delay the insolvency process. The Appellate Tribunal further clarifies that mere raising of a dispute, unrelated or related to the conditions mentioned in clauses (a)-(c) of sub-Section (6) of Section 5, if not raised prior to the application and not pending before any competent Court of law or authority, cannot be relied upon to hold that there is a ‘dispute’ raised by the Corporate Debtor.

The aforementioned interpretation has been reiterated by the Appellate Tribunal in its subsequent judgment of *Philips India Limited vs. Goodwill Hospital & Research Centre Ltd. & Ors.*, wherein the Appellate Tribunal relying on its judgment of *Kirusa Software Private Ltd. (supra)*, held that the prior to the notice under section 8 of the Code issued by the Operational Creditor (Philips India Limited), the Corporate Debtor (Goodwill Hospital & Research Centre Ltd.) had already issued a notice to the operational Creditor under Sections 433(e) and 434(1)(a) of the Companies Act, 2013 and therefore, it can be safely being stated that there is 'existence of dispute' about the claim of debt. The appeal by the Operational Creditor was accordingly dismissed.



In April 2017, the National Company Law Tribunal, Mumbai (“NCLT”), in its judgment of *DF Deutsche Forfait AG and Ors. vs. Uttam Galva Steel Ltd.*, had taken a restrictive view to hold that the only meaning that could be drawn out from the word "includes" is that the dispute means the dispute solely pending in a suit or arbitration proceeding. By relying on various judgments of the Apex Court, the NCLT interpreted the word "includes" in the definition of "dispute" to be read as "means" not as "includes". Consequently, the NCLT held that the word dispute is to be qualified as the dispute in a suit or arbitration pending not otherwise. With the aforementioned judgment of *Kirusa Software Private Ltd. (supra)*, the Appellate Tribunal has taken a step forward in widening the scope of the definition of the term “Dispute” to include disputes pending before every judicial authority. This interpretation has brought clarity to the provisions of the Code which is a relatively new legislation and shall act as a greater measure in avoiding multiplicity of proceedings and delaying of insolvency process.

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