Insolvency & Bankruptcy Laws Alert

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Foreign Operational Creditors to face difficulty in seeking remedy against debtor under Insolvency and Bankruptcy Code, 2016 for not having a bank account in India.

The National Company Law Appellate Tribunal ("NCLAT") [Appellate Authority under the Insolvency & Bankruptcy Code, 2016 ("IBC")] has recently passed a judgment in *Smart Timing Steel Ltd. v. National Steel and Agro Industries Ltd.*[1] which has resulted in creating a bar against foreign companies/ entities which do not hold a bank account in India from seeking remedy under the IBC.

Under Section 9 of the IBC, an operational creditor to which an operational debt[2] is to be repaid is required to provide to the Adjudicating Authority, alongwith its application, a copy of a certificate from a financial institution (maintaining accounts of the operational creditor) confirming that there is no payment of an unpaid operational debt by the corporate debtor.

"Financial Institution" has been defined under Section 3(14) of the IBC to include the following:

a) a scheduled bank;

b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934;

c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013; and

d) such other institution as the Central Government may by notification specify as a financial institution.

Relevant Facts of the Case

- Smart Timing Steel Limited ("STSL"), acompany incorporated and registered in Hong Kong, filed an application before the National Company Law Tribunal, Mumbai Bench ("NCLT"), under Section 9 of the IBC, as an operational creditor, against National Steel and Agro Industries Ltd.
- STSL being a company incorporated outside India and having no bank accounts in any Indian Bank, did not file a certificate from any 'Financial Institution' in terms of the provisions of Section 9 of the IBC.
- NCLT Mumbai rejected the admission of the application on the ground that it is mandatory to provide a certificate from a financial institution in accordance with the provisions of Section 9.
- STSL preferred an appeal from this decision of the NCLT, Mumbai before the NCLAT under Section 61 of the IBC.

Observation of the Court

- Section 9 of the Code, while mentioning production of certificate of financial institution uses the word 'shall' and not 'may', making the production of such certificate mandatory and not an empty statutory formality. The Tribunal held that

1 Company Appeal (AT) (Insolvency) No. 28 of 2017

2 Section 5(21) of the IBC defined 'operational debt' as follows:

"operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

the words of the statute are plain, clear and unambiguous and therefore, the courts are bound to give effect to that meaning, irrespective of the consequences involved.

- Adjudicating Authority must dismiss an application if it did not provide the mandatorily required documents as mentioned in Section 9, as being incomplete.

Decision

NCLAT dismissed the appeal of the foreign operational creditor, holding that furnishing of certificate from a financial institution is mandatory and non-furnishing of the same renders the application as 'incomplete', thus, liable to be dismissed. It was further held that foreign companies wishing to recover debt from Indian corporate debtors have other avenues of recovery like preferring civil suit etc.

VA Comment

The judgment of NCLAT results in creating an embargo on the rights of the companies and entities incorporated outside India, which do not hold any bank account in India, from availing remedy under IBC. The view taken by NCLAT may seem to be hyper-technical. However, the Tribunal is bound by the definitions and provisions as stipulated under the Code. Tribunals can only interpret a provision but cannot make a provision/exemption, when there appears to be none. The question thus arises is whether the legislature intended to keep foreign companies out of the definition of operational creditors. The definition of operational creditor and operational debt as per IBC does not suggest so. Will it be then correct to say that the legislature ought to have made a provision / exemption for such cases? It appears more to be a case where the intention of legislature, if gathered from the definition clauses, depicts a different picture and an amendment in the Code can perhaps cure the lacuna unless the Hon'ble Supreme Court of India reverses the judgment of NCLAT and holds that the requirements are directory in nature and not mandatory.

For any details and clarifications, please feel free to write to:

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