

# THE HORIZON

October-December 2017



## About Us

Established in 1993, Dhir & Dhir Associates is a full service law firm with a pan India presence in prime cities of New Delhi, Mumbai, Hyderabad and strategic alliance with associate lawyers in more than 15 States. The firm also has an international presence with a representative office in Japan. This network of alliances gives the benefit to the clients of a single window service provider, to deal with all kinds of matters within the country and cross-border transactions under one umbrella. With over 100 professionals including lawyers, some with dual qualifications of chartered accountants, company secretaries, cost accountants, MBAs and engineers, the firm is adept in handling complex legal and financial matters. The firm and its partners have been recognized as the leaders in "Restructuring and Insolvency" and "Dispute Resolution", and have also been highly ranked for "Banking and Finance", "Projects, Infrastructure & Energy", "Technology, Media and Telecommunication", "Project Finance", "Corporate /M&A", "Financial Service Regulatory" and "Private Equity" in leading legal publications including Chamber and Partners, Legal 500, IBLJ, IFLR1000 and Asia Law Profile.



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& Dhir**  
Advocates & Solicitors

## IN THIS ISSUE

### Key Highlights

- Operational Creditors – Reconciling Differences
- Winding Up vis-a-vis Insolvency
- Awards and Accolades
- Seal the Deal – a Glimpse of New Mandates
- Notable Speakerships and Making Headlines

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# Operational Creditors – Reconciling Differences

*By Ms. Varsha Banerjee, Associate Partner and Mr. Kunal Godhwani, Associate*

The Insolvency & Bankruptcy Code, 2016 (“the Code”) has introduced new measures to deal with insolvency and offers uniform, far reaching solutions to meet the Code’s envisioned objective. The code has brought revolutionary transformations in the corporate realm. Amidst various amendments, an important aspect that needs to be addressed is whether an individual or a corporate body other than the Operational Creditor itself can act on behalf of the Operational Creditor when authorized for the same. Since the Code has far-reaching consequences once the process is set in motion, one will get to learn and identify various checks and balances that need to be in place to abide by the rules of the code.

The Operational Creditors at the threshold need to meet the criterion of absence of any dispute qua the defaulted amount, place on record a certificate from the financial institution as defined under the Code along with a demand notice as stipulated. The demand notice is strictly required in accordance with the Form as prescribed under the Regulations. There are quite a few instances wherein the concerned authorities have issued very strict instructions and reminded the parties of the rules laid down, failing abidance to which, the process may not be furthered at all. A few have been mentioned below for a better understanding of the same.

The National Company Law Appellate Tribunal (NCLAT) in the matter of Goa Antibiotics and Pharmaceuticals Ltd. v. Lark Chemicals Pvt. Ltd, while reiterating the law as laid down in the matter of Uttam Galva Steels Ltd. V. DF Deutsche Forfait AG, held that as the demand notice had been issued by a law firm and there was nothing on record to suggest that the said law firm held any position with or in relation to the respondent – Lark Chemicals Pvt. Ltd. Additionally the demand notice had not been issued as per Form 3 or Form 4, as stipulated under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Keeping the aforesaid in mind, the initiation of resolution process at the request of such an operational creditor is not as per the law and accordingly set aside. The NCLAT in the said judgment also held that the resolution process cannot be either initiated/processed in the absence of justification regarding the delay on the part of the Operational Creditor.

In the matter of Uttam Galva Steels Ltd. V. DF Deutsche Forfait AG, the NCLAT further held that sub-section (1) of Section 8 states that during occurrence of any default, the Operational Creditor is required to deliver a demand notice of unpaid operational debt and a copy of the invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as prescribed.

Rule 5 states the format in which the demand notice or invoice demanding payment is to be issued by the Operational Creditor. Therefore, in view of the provisions of the code, read with the said rules, a person, be it an Advocate or a Lawyer or Company Secretary or Chartered Accountant, in the absence of any authority by Board of Directors and holding no position with or in relation to the Operational Creditor cannot issue any notice under Section 8 of the code, which otherwise is a lawyer's notice as distinct from notice given by the Operational Creditor in terms of Section 8 of the code.

In the case of Goa Antibiotics (supra), the Adjudicating Authority admitted insolvency resolution process against the Company against debts which were due since 1998. The Appellant (Corporate Debtor) submitted that the demand notice made under sub-section (1) of Section 8 was not issued by the Operational Creditor but by a legal firm 'Dhruve Liladhar & Co., Advocates, Solicitors and Notary'. It was further submitted that the legal firm has not mentioned its position and relation with the Operational Creditor.

**Another topic of contention in the case of Operational Creditors is whether two or more Operational Creditors having same cause of action can file an application jointly.**

A notice under Section 8 of the Code is required to be issued by the operational creditor prior to filing of a petition under Section 9 of the Code by the Operational Creditor. Since the claim of different

operational creditors are distinct and date of default for each operational creditor is also different, therefore, separate Section 8 notices are required to be issued independently by each of the Operational Creditors. It is only in the independent Section notices under Section 8 that each Operational Creditor can raise its claim and seek due payment of the amount in default.

In the case of *Uttam Galva Steels Ltd. V. DF Deutsche Forfait AG*, the NCLAT also held that a joint petition u/s 9 by one or more operational creditors is not maintainable. In the case of the joint petition which was filed by operational creditors, the respondents relied upon Rule 23A of NCLT Rules, 2016, however, since Rule 23A has not been adopted in terms of Regulation 10 of the Code, Rule 23A was held to be inapplicable by the NCLAT.

## Closing Statement

The operational creditors have barely recovered from the ambiguity revolving around the term 'dispute', however, with each passing day the Operational Creditors continue to encounter other challenges. It is only after meeting the diverse requirements as envisaged under the Code that the Operational Creditor will be entitled to trigger the process and seek due resolution under the Code. Key amendments have triggered diverse speculations and while loopholes exist, efforts are being made continuously to plug in the same to safeguard the key provisions.

# Winding Up vis-a-vis Insolvency

*By Ms. Varsha Banerjee, Associate Partner and Mr. Kunal Godhwani, Associate*

Prior to coming into force of the Insolvency and Bankruptcy Code, 2016 ('IBC') the winding up proceedings was a subject matter of proceedings under the Companies Act, 1956. With the coming into force of the Companies Act, 2013 as well as the IBC, the earlier winding up regime has undergone an overhaul. The aspect of inability to debts which was earlier a ground for winding up under the Companies Act, 1956 is no longer a statutory right under the Companies Act, 2013. The only alternative as on date is occurrence of default qua either a financial debt or operational debt for initiating proceedings under IBC.

Section 434 of the Companies Act, 2013 provided for transfer of pending proceedings under the Companies Act, 1956. The said Section of Companies Act, 2013 read with the subsequent notifications issued by the Central Government led to a situation of ambiguity as far as initiation of proceedings under IBC was concerned. The various Benches of the National Company Law Tribunal (NCLT), primarily admitted proceedings under the IBC in cases where winding up proceedings were merely pending before the respective jurisdictional High Courts, however no order of winding up was passed by the concerned High Courts.

Recently, the National Company Law Appellate Tribunal (NCLAT) in the matter

of Forech India Pvt. Ltd. Vs. Edelweiss Asset Reconstruction Company Ltd. & Anr., vide its order dated 23.11.2017 and in the matter of Unigreen Global Pvt. Ltd. Vs. Punjab National Bank & Ors, vide its order dated 01.12.2017, settled the said ambiguity. The Appellate Tribunal vide its judgments has held that where winding up proceedings have been ordered by the Hon'ble High Court, the same stand initiated and accordingly, any application under Section 10 of the IBC is not maintainable.



Quite interestingly, for the purpose of coming to the conclusion that in cases wherein winding up order has been passed by the High Courts, proceedings under IBC are not maintainable, the Appellate Tribunal has held that the term "winding up" as mentioned under the Companies Act, 2013 is synonymous to the word "liquidation" as mentioned under the IBC. In view of the same, a winding up order passed under the provisions of the Companies Act, 1956



has been equated with a liquidation order under the IBC and accordingly the bar under Section 11(d) has been held to be applicable in such cases.

The present view of the NCLTs as upheld by the Appellate Tribunal is that mere pendency of winding up proceedings before the High Court is not a ground to reject an application filed by either a Financial Creditor or an Operational Creditor under Section 7 or 9 of the IBC respectively.

The view as to mere pendency of winding up proceedings before High Court under Companies Act, 1956 being not a bar for IBC proceedings is in consonance with the object and purpose of the IBC, which is time bound resolution / reorganization in case of Companies undergoing financial crunch. However, the finding of the Appellate Tribunal as to “winding up order” under the Companies Act being synonymous to “liquidation order” under IBC appears to be a very broad general categorization. It is also to be seen as to what all can fall within the meaning ambit of the order of the Appellate Tribunal as the Appellate Tribunal has held that winding up proceedings has been initiated against the Corporate Debtor where winding up proceedings has been ordered by the Hon’ble High Court. What can be considered as a winding up order, can be also a subject matter of dispute as to whether the mere admission order will be a winding up order or the final order of dissolution will be the winding up order. Maybe with time the said anomaly will also be put to rest in an appropriate matter. With the coming into force of the IBC, the Companies Act, 2013 was

amended to define “winding up” to also include “liquidation order” under IBC. Whether the amendment in the Companies Act can be read to enlarge the scope of the term “liquidation order” as mentioned exclusively under IBC is a subject matter, the scope and applicability of which is not clear even as on date. IBC has been enacted with a specific objective and held to be a complete Code in itself by the Hon’ble Supreme Court in the matter of Innoventive Industries Ltd. Vs. ICICI Bank & Anr., (2017) SCC OnLine SC 1025.

When the IBC has been enacted and recognized as a complete Code, to what extent the terms and the words mentioned in other Acts can be read in IBC to restrict the applicability of the IBC. The bar under the IBC for initiating proceedings pertains only to cases wherein liquidation order has been passed. Since the term “liquidation order” has been statutorily recognised and come into force only under the IBC, whether the said term can be enlarged to include within its ambit winding up order passed by the Company Court under the Companies Act, 1956.

As on date the jury is out as to the maintainability of proceedings under the IBC in cases where Petitions are pending before the High Courts under the Companies Act, 1956 as well as in cases wherein winding up order has been passed by the High Courts under Companies Act, 1956. It has been clearly held that in cases where winding up proceedings have been initiated in the form of an order by the Hon’ble High Court, proceedings under IBC are not maintainable.

# Awards and Accolades



The managing Partner, Mr. Alok Dhir is recognized as an exceptional lawyer and featured this year also in 'The A-List: India's top 100 lawyers 2017' by India Business Law Journal and the Indian Corporate Counsel Association

Leading law firm in Restructuring & Insolvency



Leading Individuals for Restructuring & Insolvency - Alok Dhir and Nilesh Sharma

Band 2 in Dispute Resolution, Capital Markets, Banking & Finance

Band 3 in Corporate and M&A, TMT, Projects & Energy

Band 4 in Labour & Employment, Real Estate & Construction



Leading individuals: Alok Dhir & Nilesh Sharma-Restructuring & Insolvency and Maneesha Dhir-Technology, Media, Telecoms by Chambers & Partners 2018

Ranked in band 3 in Dispute Resolution 2018 by Chambers & Partners

Ranked in band 4 in Projects, Infrastructure & Energy 2018 by Chambers & Partners



Recommended as an Outstanding Firm in Restructuring & Insolvency 2018 by Asia Law Profiles

Highly Recommended in Dispute Resolution, Banking & Finance, and Capital Markets 2018 by Asia Law Profiles

Leading Lawyer – Maneesha Dhir for Dispute Resolution

Leading Lawyers – Alok Dhir and Nilesh Sharma for Dispute Resolution –Insolvency



Tier IV firm in Banking and M&A 2018 by IFLR1000

Tier III firm in Capital Markets, Project Finance and Private Equity 2018 by IFLR1000

# Seal the Deal – a Glimpse of New Mandates

## **DHIR & DHIR ASSOCIATES ACTS AS LENDERS' LEGAL COUNSEL TO POWER FINANCE CORPORATION LIMITED (PFC)**



**POWER FINANCE  
CORPORATION LIMITED**

The Firm has acted as the Lenders' Legal Counsel to PFC for the financial assistance of upto INR 562.70 Million to Jyoti Solar Solutions Private Limited, for the purposes of setting up of the 10 MWAc (12.5 MWp) solar power project at Ganjaudar Village, Patnagarh Town, Balangir District in the State of Odisha. The scope of work included conducting due diligence of the borrower, its promoters and project documents, drafting of the financing and security documents, conducting title verification exercise pertaining to the land admeasuring approximately 52 Acres situated at Ganjaudar Village, Patnagarh Town, Balangir District in the State of Odisha and issuing opinion on the legal issues.

## **DHIR & DHIR ASSOCIATES WINS CASE IN NGT ON BEHALF OF GREFA**



Dhir & Dhir Associates represented the Greater Faridabad Residents Association (GREFA) in a matter related to dysfunctional sewage treatment plants (STPs) and gathered a landmark judgement at the National Green Tribunal (NGT) in favour of the residents' association on 20th November, 2017. Thirteen builders of the Greater Faridabad area have been penalised by the NGT for not following the prescribed sewage disposal norms. NGT directed builders to deposit Rs 25 lakh as security until they have setup the requisite STPs within a 4 week stipulated time period. The tribunal imposed a penalty of Rs 5 lakh each on 12 builders for violation of norms for running below capacity or partially operational STPs. It also directed the management of a residential society in Sector 78 to deposit Rs 25 lakh within a week as it did not have an STP. The judgment also stated that after 4 weeks of the provided timeframe, a joint inspection will be carried out by a team comprising of CPCB, HUDA, TCP.

## **DHIR & DHIR ASSOCIATES ADVISED IIFCL and IREDA ON ISSUE OF THE CREDIT ENHANCED NON-CONVERTIBLE DEBENTURE ISSUED BY RENEW AKSHAY URJA PRIVATE LIMITED**



Dhir & Dhir Associates advised the India Infrastructure Finance Company Limited ("IIFCL") and Indian Renewable Energy Development Agency Limited ("IREDA") in connection with the 'credit enhanced' secured, rated, listed, redeemable non-convertible debentures aggregating upto INR 7600.00 Million issued by Renew Akshay Urja Private Limited ("Issuer"). The said non-convertible debentures were partially guaranteed by IIFCL and IREDA under their respective credit enhancement schemes. The proceeds of the said non-convertible debentures are proposed to be utilized by the Issuer inter-alia for the purposes of refinancing of the existing loans of its 124 MW solar power projects in State of Telangana.

# Glimpse of New Mandates-Contd

## **DHIR & DHIR OFFERS LEGAL SERVICES TO HINDUSTAN POWER PROJECTS PRIVATE LIMITED (HPPPL)**

Advised and represented HPPPL who encashed Bank Guarantees (BGs) amounting to INR 506 crores issued by 9 Banks on behalf of Lanco Infratech Limited (Lanco). The BGs were invoked due to unfulfilled contractual obligations related to engineering and construction work at the HPPPL's 2 X 600 MW Anuppur Thermal Power Plant at district Anuppur, Madhya Pradesh. Lanco had approached the Delhi High court seeking stay on invocation and encashment of BGs. The Delhi High Court while accepting the contentions of HPPPL for invocation and encashment of BGs, refused the stay to Lanco enabling HPPPL to encash the BGs.

**HINDUSTAN POWER**



Controller of Certifying Authorities

Department of Electronics and Information Technology  
Ministry of Communications and Information Technology

## **DHIR & DHIR ASSOCIATES REPRESENTS CONTROLLER OF CERTIFYING AUTHORITY**

The Firm is advising and representing the Controller of Certifying Authority ("CCA") before Madras High Court in T Ramesh vs. J. Jayakrishnan and Others. In the said Petition, the Petitioner has alleged that his forged Digital Signatures were used and he wants the CCA to submit a report on the misuse of the alleged forged Digital Signature Certificate and also to produce the same before the Court.

## **DHIR & DHIR ASSOCIATES ACTS AS LENDER'S LEGAL COUNSEL TO TATA CLEANTECH CAPITAL LIMITED**

The Firm acted as the Lenders' Legal Counsel for Tata Cleantech Capital Limited in relation to the financial assistance of rupee term loan facility by Jakson Solar Private Ltd. for developing, constructing and operating the 1.455 KW solar rooftop power project at various locations of CPWD in Delhi and Haryana. The transaction includes the drafting of financing and security documents, conducting due diligence, and issuing legal opinions etc.

**TATA CLEANTECH CAPITAL LIMITED**

## **DHIR & DHIR ASSOCIATES OFFER LEGAL SERVICES TO BINANI CEMENT FACTORY LLC on the conduct of CIRP under Insolvency and Bankruptcy Code 2016.**

The firm offers legal services and guidance to IREDA with respect to M/s JHV Sugar Limited and M/s Saikrupa Sugar & Allied Industries Limited in matters relating to IBC Preparation and filing of application under section 7 of IBC on behalf of the corporate debtor and to appoint as IRP and then later act as RP. Indian Renewable Energy Development Agency Limited (IREDA) is a Mini Ratna (Category – I) Government of India Enterprise under the administrative control of Ministry of New and Renewable Energy (MNRE). IREDA is a Public Limited Government Company established as a Non-Banking Financial Institution

**Binani**





# Select Speakerships



Mr. Alok Dhir addressing the **6th Annual CFONEXT100 Conference & Felicitation Ceremony** on December 15, 2017 in New Delhi

Mr. Alok Dhir addressing the **Workshop on “Insolvency & Bankruptcy Code** organised by The Institute of Directors (IOD) on 14th December 2017 in Hyderabad



Mr. Alok Dhir addressing the ‘**Training Program for the Senior Law Officers of State Bank of India**’ 28th -29th November 2017 at National Judicial Academy, Bhopal



# Select Speakerships



**Mr. Alok Dhir** addressing the 2nd Conference organized by **India Infrastructure** on **Insolvency & Bankruptcy Code** on “**Implications for the Infrastructure Sector**” - 27th November 2017 in New Delhi

**Mr. Alok Dhir** speaking at the **National Conference on Insolvency & Bankruptcy Code** held on 25th October 2017 in New Delhi



**Mr. Alok Dhir** speaking at the **Insolvency Summit 2017** held on 22nd October 2017



# Select Speakerships - Contd

**Mr. Siva Gopinatham** addressing the **Pharma Legal & Compliance summit 2017** on 6th October, 2017 in Mumbai



**Mr. KPS Kohli, Associate Partner,** addressed the **Media, Advertising & Entertainment Legal Summit** on 'The new digital India Wave-An Untamed beast' organised by Lex Witness in Mumbai on 5th October, 2017



**Mr. Siva Gopinatham, Partner,** addressed the **Media, Advertising & Entertainment Legal Summit** organised by Lex Witness in Mumbai on 5th October, 2017





# Making Headlines



THE ECONOMIC TIMES

## IBC: Move to forbid 'dirty dozen' to impact competitive bidding

**Nov 24, 2017-** The latest government move to forbid the promoters of India's so-called 'dirty dozen' from bidding for stressed companies by labelling them as willful defaulters could reduce the competitive intensity for assets that may help recover a part of about Rs 9 lakh crore in outstanding debt. "What the government has unwittingly done by this move is to ensure that the pool of bidders remains small. This will impact competitive bidding," said Alok Dhir, managing partner at law firm Dhir and Dhir Associates. [The Economic Times](#)

## Corporate defaulters may lose much protection under new code

**Nov 30, 2017-** On November 30, the government ended protection under the Sick Industrial Companies Act (SICA) and replaced it with a new insolvency code. Alok Dhir, founding member, Dhir & Dhir, said a corporate insolvency resolution process (CIRP) regulation under the newly notified bankruptcy code would replace the earlier protection. His firm is one of the most active in bankruptcy protection. The process for it was notified by the government on Thursday. [The Economic Times](#)

THE TIMES OF INDIA

## Exiled promoters may legally test ordinance barring their rebid

**Nov 24, 2017-** Insolvency lawyer Alok Dhir said, "While the intent to weed out those who gamed the system is understandable, its broad sweep is troubling. This will lead to litigation by those who aren't maligned and reduce the bidding fray, thereby depressing the price discovery." Dhir added that amendments posed another peculiar problem: "How do you ensure that foreign investors do not attract similar broad-brush disqualifications?" [The Times of India](#)

The Telegraph

## Concern over asset valuation

**Nov 24, 2017-** Alok Dhir, managing partner at Dhir & Dhir Associates, said though the main idea behind the ordinance was to keep out those who had diverted funds from bidding, some of the norms were harsh. "There will not be adequate pool of those making resolution application. As a result, the values will not be attained," he said. [The Telegraph](#)

Bloomberg | Quint <sup>beta</sup>

## Essar Steel Insolvency: Real Deal Or Window Shopping?

**Oct 26, 2017-** Some resolution professionals are also creating a data room to give bidders access to more meaningful information, says bankruptcy lawyer Alok Dhir in a phone chat. But he agrees that in cases where the promoter is permitted to bid, other bidders will be at a disadvantage and this may hurt bid pricing. [Bloomberg Quint](#)

# Making Headlines

## Business Standard

### Ruias want to pay up, bid for Essar Steel

**Dec 05, 2017-** The Essar Group is planning to pay its dues to lenders so that it can take part in the bidding process for its steel plant in Hazira, Gujarat. "According to the clarification issued by the government, any company or promoter which has paid its dues to the banks can participate in the bidding process - provided the banks have not recalled the entire loan," said Alok Dhir, Managing Partner, Dhir & Dhir Associates. [Business Standard](#)



### Insolvency Code all set to kick in: Dhir & Dhir registers maximum IPs

**Dec 05, 2017-** In total, twenty-one IPs have also been registered. Founding partners at Dhir & Dhir Associates, Alok Dhir & Manisha Dhir, along with partners Sandeep Kumar Gupta and Nilesh Sharma have also become certified IPs under the Code. Read more: [Bar & Bench](#)

### Nearly 70% of stressed SMEs face liquidation

**Nov 30, 2017-** Around 70 per cent of small and medium enterprises (SMEs) undergoing insolvency proceedings face liquidation, as their promoters are the only ones presenting resolution plans. "These small and medium sized companies do not have strong managements, which is why investors are not interested", said Nilesh Sharma, Senior Partner in Dhir & Dhir Associates. [Business Standard](#)

### Creditors set sights on corporate guarantors

**Nov 09, 2017-** Creditors are seeking to recover dues by invoking corporate guarantees even as defaulters undergo insolvency proceedings in the National Company Law Tribunal (NCLT). Nilesh Sharma, Senior Partner at Dhir and Dhir Associates, said the code only granted the moratorium to a firm under resolution and not to a corporate guarantor. [Business Standard](#)



### Dhir & Dhir advises IIFCL on Mihit Solar's \$23.8m solar project financing under its takeout financing scheme

Dhir & Dhir Associates acted as the lenders' legal counsel for IIFCL represented by partner Girish Rawat, who led the firm's banking and project finance team along with senior associate Amit Prakash and associates Shobhit Batta and Amit Pal Singh. The transaction included drafting of financing and security documents, conducting due diligence, and issuing legal opinions. [Legally India](#)

## Links to Electronic Media Coverages

CNBC TV18 – Blow for Defaulting Promoters

<https://www.youtube.com/watch?v=tYr47x4dZwo>

Bigbusinesshub.com

<https://www.youtube.com/watch?v=vIhkl0W6Tml>





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