



INSOLVENCY PROFESSIONAL AGENCY  
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA



# IBC AU-COURANT

*Latest updates On Insolvency & Bankruptcy*

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**"Mindset is everything"**

## ➤ **A raw deal for operational creditors in IBC**

In case of liquidation, OCs hardly receive anything. And when the overall recovery is high, financial creditors get a larger share.

Business credit is the lifeblood of day to day commercial operations. Depending on the industry, firms enjoy credit on purchases for anywhere from 30 to 90 days. The Covid-19 pandemic saw these payable days stretching to 180 days, especially for MSME suppliers.

What happens if the operational creditors (OCs) — those supplying the above items on credit — begin to fear that their customer would go bankrupt and that they are likely to lose all their money in that event? This matter is of prime importance to the functioning of the commercial system, especially in times when business failure is becoming more common.

### **Controlled by CoC**

The overarching institutional arrangement for the resolution and liquidation of bankrupt companies in India is the Insolvency and Bankruptcy Code (IBC) 2016. The insolvency resolution process is controlled by a committee of creditors (CoC) comprising financial creditors (FCs). Jurisprudence has gradually moved towards letting the CoC apply commercial considerations. However, it has always been recognised that the claims of OCs need to be equitably addressed. Even the *Swiss Ribbons v. Union of India*, 2019 judgment that places the greatest emphasis on giving the CoC a free hand, states that the interests of OCs '...are to be placed at par with the interests of financial creditors, and if this is not done, then the Adjudicating Authority intervenes to reject or modify resolution plans until the same is done'.

In the judgment, figures pertaining to 80 cases that had been resolved up until that time were cited to show that the proportion of claims paid out to both sets of creditors was roughly the same. The number of cases resolved at the time of the judgment was relatively small. However, as on May 31, 2022, the Insolvency and Bankruptcy Board of India (IBBI) database shows 504 cases were resolved and 1,666 went into liquidation. Analysis of the larger data set reveals new insights. When we compare the payouts to the OCs and FCs as a proportion of their claims, we find that

OCs receive a disproportionately lower amount — approximately 24 per cent against a claims proportion of 33 per cent. However, when we factor in the priority of FCs with respect to liquidation proceeds, a different picture emerges.

As mentioned by Sahoo and Nair in a recent newspaper article, the original intent of the IBC was that in case the realisation of bankruptcy proceedings is equal or lower than the liquidation value (LV), then the agreed upon 'waterfall' in which FCs are given priority should be followed.

However, when bankruptcy proceeds exceed the liquidation value, the OCs and FCs should be treated at par. In other words, they should share the excess over the liquidation value in proportion to their remaining claims. We use this principle to yield the minimum payout to the OC that is normatively justifiable.

**Source: *The Hindu Business line***

**Read Full news at:** <https://www.thehindubusinessline.com/opinion/a-raw-deal-for-operational-creditors-in-ibc/article65751005.ece>

## ➤ **As Bankruptcy Reform Splutters Due to Shortage of Members, NCLT Denies a Circular About Shortages**

The shortage of judicial and technical members threatens to halt regular proceedings at the National Company Law Tribunal (NCLT), possibly derailing a big reform of the Narendra Modi government. The shortage of members is a fact and it seemed to be confirmed by an authentic-looking circular from NCLT that has been circulating on WhatsApp and other social media. The circular dated 8th August claimed that due to a shortage of members, NCLT has decided to hear only urgent cases via video conferencing from 10th August.

Strangely enough, the NCLT had clarified on Tuesday that the message being circulated is false, and no such circular was issued by it. The clarification is signed by the same person in whose name the ostensibly fake circular had been issued.

The clarification issued by Kamal Sultanpur, registrar (in-charge), says, "The said notification is not issued by NCLT and it is not authentic. The so-called notification dated 08.08.2022 has not been approved by president of NCLT (competent authority). The said notification to be ignored as not valid. It has not been uploaded on the NCLT website." NCLT was set up in June 2016 amidst much fanfare to help expedite adjudication matters under the Companies Act by dissolving the company law tribunal (CLT). NCLT was also expected to help further improve the ease of doing business in the country, a key focus area of the Narendra Modi government.

However, like other tribunals, NCLT is facing challenging times due to vacancies over the years. Currently, nearly 50% or 30 posts out of the 63 sanctioned for members of NCLT are vacant. A selection panel has recommended 15 names to the Union government, but there is no decision on filing up the posts. According to a banker

and resolution professional, the eligibility criteria to become a member of NCLT cause massive problems for candidates. "The criteria do not give enough passable members for NCLT," he says, referring to the delay in filing up the posts of members at the Tribunal.

Another aspect affecting the working of NCLT is the additional load of cases that are strictly not within the purview of the Companies Act. The Union government introduced the Insolvency and Bankruptcy Code (IBC). However, there is no adjudication authority (AA) in IBC.

"Even the Recovery of Debts and Bankruptcy Act, 1993 has its own AA, but for a strange reason, NCLT, which is an offshoot of the Companies Act, was made AA for IBC. Now that NCLT has failed, the government must create IBC Tribunal and IBC Appellate Tribunal, which will be designed and implemented for quality and timely approvals by a cadre with attractive performance incentives and disincentives for non-performance," the expert says.

According to the expert, adjudicating on IBC requires excellent command over business, accounts and finance so that the AA can quickly understand issues and make swift decisions. While they have these professional limitations, they sometimes may not read the applications.

"This can be fixed by creating a cadre of judges like Indian Administrative Services (IAS). Indian Law Services exists for hiring law graduates in government. The government should also create Indian Judicial Services to create an army of high-class members for NCLTs and debt recovery tribunals (DRTs)," the expert suggested.

NCLT has one principal bench in New Delhi and 15 benches at other locations across the country. NCLT has benches in New Delhi, Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata, Mumbai, Cuttack, Jaipur, Kochi, Amravati, and Indore.

The tenure of 23 members of NCLT came to an end in June-July. A high-powered committee chaired by the chief justice of India decided to increase the term of eight members to five years. A notification issued by NCLT says that the tenure of two judicial and six technical members has been extended for five years until they attain 65 years. In July, the ministry of corporate affairs (MCA) issued an advertisement for filling up eight posts of judicial members and 11 posts of technical members of NCLT. Earlier this month, the Supreme Court (SC) turned down a plea to extend the tenure of 23 members of NCLT to five years from three years, as per a notification issued by MCA on 20 September 2019. It, however, clarified that for future appointments, the Union government is bound by Section 413 of the Companies Act, which prescribes a tenure of five years for members of NCLT.

The bench of justice DY Chandrachud and justice Sudhanshu Dhulia also told the NCLT Bar Association that the tenure of NCLT members is not something they should be interested in. "The plea of the Bar Association can only be that the vacancies be filled at the earliest. Bar Association cannot have a choice in who is a member of the Tribunal and for what length of time they are members," SC says. The MCA notification issued on 20 September 2019 prescribed tenure of three years or until

attainment of 65 years for members of NCLT. On 11 September 2021, the ministry issued another notification to appoint 18 members for five years.

**Source: Money life**

**Read Full news at:** <https://www.moneylife.in/article/as-bankruptcy-reform-splutters-due-to-shortage-of-members-nclt-denies-a-circular-about-shortages/68016.html>

## ➤ **NCLAT rejects Satra Properties plea, sends company into insolvency**

Rejecting a plea filed by the promoter of realty developer Satra Properties (India), the National Company Law Appellate Tribunal (NCLAT) has upheld the ruling of the National Company Law Tribunal's Mumbai bench to admit the company under corporate insolvency resolution process (CIRP).

Praful Nanji Satra, promoter of the listed company, had challenged a plea filed by VISTRA ITCL India with regards to the company's default on secured redeemable non-convertible debentures (NCDs) worth ₹56 crore.

The debenture holders were to be secured with first equitable mortgage charge of corporate debtor's leasehold rights in a commercial plot in Jodhpur and a personal guarantee of Praful Nanji Satra. As per the funding agreement entered into in March 2014, all the monies to be received through the development of the Jodhpur land parcel were to be deposited in an escrow account. These NCDs were to be redeemed after a year of issuance, but the company could not repay the funds and hence the date of redemption of debentures was revised in February 2015. Meanwhile, in November 2017, the escrow account was frozen by Maharashtra VAT authorities and the developer started depositing the monies due to be deposited in the escrow account, in the current bank account of Satra Properties (India).

In October 2017, the Satra Group including Satra Properties (India) entered into negotiations with MJS Group and IIFL Group for settlement of liabilities and the same was arrived at in January 2018. The developer had opposed the insolvency application on grounds that both the documents were not sufficiently stamped, and as per the Maharashtra Stamps Act could not be admitted as evidence of debt and default.

The company's resolution professional has received a claim of over ₹718 crore. so far including financial creditors' claim worth over ₹621 crore. Nishit Dhruva, managing partner of law firm MDP & Partners, who appeared for Vistra ITCL (India), confirmed the development.

While dismissing this argument, the tribunal had admitted the application stating the insufficiency of stamp duty is irrelevant in determining admissibility of an insolvency application. The judicial and technical members, however, had different views as to the necessity of stamp duty payment. According to the respondent, the insufficiency in the payment of stamp duty is attributable only to the corporate

debtor and the company cannot take advantage of its own wrong by setting up the defence of insufficient stamping of the documents, which is basically its own failing.

"We note that the issue of debt being due and payable in the present case is not interdicted by any law but only a technical deficiency of insufficiency of their stamping has been raised which .. can be cured," the appellate tribunal said.

The appellate tribunal, while dismissing the developer's application, concluded that an unstamped NCD subscription agreement is sufficient and relevant in proving debt obligation.

**Source: The Economic Times**

**Read Full news at:** [https://economictimes.indiatimes.com/industry/services/property/-construction/nclat-rejects-satra-properties-plea-sends-company-into-insolvency/articleshow/93463057.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/industry/services/property/-construction/nclat-rejects-satra-properties-plea-sends-company-into-insolvency/articleshow/93463057.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)



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