



# IBC AU-COURANT

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## ➤ **Withdrawal Application U/S 12a Can't Be Entertained After Approval Of Resolution Plan By CoC: NCLAT Delhi**

The National Company Law Appellate Tribunal ("NCLAT"), Principal Bench, comprising of Justice Ashok Bhushan (Chairperson) and Mr. Barun Mitra (Technical Member), while adjudicating an appeal filed in Hem Singh Bharana v M/s Pawan Doot Estate Pvt. Ltd. & Ors., has held that once the Committee of Creditors approve a resolution plan, no withdrawal application under Section 12A of IBC can be entertained. Approval of a Resolution Plan by the CoC prohibits the Resolution Applicant to modify or withdraw from the Plan, the same embargo is placed on CoC from changing its stand.

### Background Facts

On 10.05.2019, Pawan Doot Estate Pvt. Ltd. ("Corporate Debtor") was admitted into Corporate Insolvency Resolution Process ("CIRP") by the Adjudicating Authority. M/s Mehar Footwear Pvt. Ltd. ("Successful Resolution Applicant/SRA") submitted a Resolution Plan for the Corporate Debtor, which was approved by the Committee of Creditors ("CoC") on 17.01.2020. On 18.01.2020, the Resolution Professional issued a Letter of Intent to the SRA and the same was unconditionally accepted by the latter.

The Resolution Professional filed an application before the Adjudicating Authority for approval of the Resolution Plan on 04.02.2020. Subsequently, on 11.08.2022 Mr. Hem Singh Bharana (Ex-Promoter of Corporate Debtor) submitted a Settlement Proposal under Section 12A of IBC before the Financial Creditors. Further, the Ex-Promoter filed an application before the Adjudicating Authority praying that the application for approval of resolution plan be kept in abeyance.

The Adjudicating Authority rejected the application of the Ex-Promoter vide an Order dated 23.11.2022, which was challenged by the Ex-Promoter before NCLAT. It was contended that approval of a Resolution Plan by CoC is no impediment in acceptance of a Settlement Proposal under Section 12A by the CoC. The CoC in its commercial wisdom can accept the Settlement Proposal, which is a better financial proposal as compared to the approved Resolution Plan.

## Issue

Whether after approval of Resolution Plan by CoC and filing of an Application before the Adjudicating Authority for its approval, any Settlement Proposal under Section 12A (filed by Ex-Promoter) can be entertained while deferring consideration of approval of Resolution Plan by the Adjudicating Authority?

Relevant Law Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 “30 A. Withdrawal of application – (1) An application for withdrawal under section 12A may be made to the Adjudicating Authority – (a) before the constitution of the committee, by the applicant through the interim resolution professional; (b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be: Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

(2) The application under sub-regulation (1) shall be made in Form FA of the 68[Schedule-I] accompanied by a bank guarantee- (a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1); or

(b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).....”

NCLAT Verdict The Bench observed that under Regulation 30A of CIRP Regulations, an application for withdrawal under Section 12A can be made after issuance of ‘Expression of Interest’ only when sufficient reasons exist to justify the withdrawal.

If Section 12A application was contemplated to be filed even after approval of the Resolution Plan by the CoC, then Regulations 30A(2)(a) and 30A(2)(b) ought to have included the expenses both under Regulations 33 and 34. Non mention of Resolution Professional costs in Regulation 30A(2) supports the contention that Section 12A Application cannot be filed after approval of Resolution Plan by the CoC.

Reliance was placed on the Supreme Court judgment in Ebix Singapore Pvt. Ltd. vs. Committee of Creditors of Educomp Solutions Limited and Anr., Civil Appeal No.3224 of 2020 and it was observed as under:

“The Hon’ble Supreme Court in the Ebix itself has laid down timelines provided in the Code have to be adhered to. In event, the submission of the Appellant is accepted that even after the approval of the Plan by the CoC, the CoC be given power to entertain a Settlement Proposal by the Ex-Promoter, the timelines for the different process and its finality shall be breached. Approval by the CoC of a Resolution Plan has to be in accordance with its commercial wisdom and when CoC approves a Plan and the Resolution Applicant is prohibited to modify or withdraw from the Plan, same embargo has to be accepted on CoC also from changing its stand. The judgment of the Hon’ble Supreme Court in Ebix Singapore lays down that after approval by the

CoC of a Resolution Plan, CoC itself is bound by its decision and cannot be allowed to go back from its decision and pass any other resolution..”

Since the Adjudicating Authority found no adequate reason to keep the plan approval application in abeyance, no error was committed in rejection of the Ex-Promoter’s Application. The Bench upheld the decision of Adjudicating Authority and dismissed the appeal.

**Source: Live Law**

**Read Full news at:** [Withdrawal Application U/S 12a Can’t Be Entertained After Approval Of Resolution Plan By COC: NCLAT Delhi \(livelaw.in\)](#)

## ➤ **Karaikal Port insolvency: How Adanis got into pole position in the bidding race**

On December 2, 2022, a media report stated that Adani Ports & SEZ Limited (APSEZ) has won the bid for Karaikal Port with an INR1,200 crore offer, surpassing its rival Vedanta. However, the very next day, APSEZ clarified in a stock exchange filing that no conclusion has yet been reached in the insolvency proceedings of Karaikal Port — the resolution plan approved by the committee of creditors (CoC) would further need NCLT's nod. APSEZ and a Vedanta group entity are the only two bidders in the fray and have submitted the financial bid in September 2022.

Chennai-based Omkara Asset Reconstruction Company (ARC), is the only member of the CoC of Karaikal Port with 100% voting rights to approve a resolution plan. Karaikal Port has faced allegations — from MARG Group, erstwhile promoters of Phoenix ARC, a former CoC member — both hinting at APSEZ acting in concert with Omkara ARC to get hold of Karaikal Port. Even though both the allegations got dismissed at the respective judicial forums, a deeper investigation into the books of accounts of APSEZ and Omkara ARC does reveal a strong financial link between the two entities.

Under Section 30(5) of the insolvency and bankruptcy code (IBC) does allow a financial creditor or its related parties to be a resolution applicant. But since Omkara ARC is the sole member of the CoC evaluating the resolution plan of an entity with which it has strong financial linkage, it raises questions of conflict of interest, say legal experts. As of now, IBC doesn't make it clear on how to deal with such conflicts and that remains a grey area. These instances are taken up on a case-to-case basis if challenged by any aggrieved party, otherwise commercial wisdom of the CoC prevails.

APSEZ declined to comment when reached out with a detailed set of queries by ET Prime over an email. Omkara ARC responded to the queries sent by ET Prime saying that, "We are not in a position to comment anything considering the corporate debtor is at an advanced stage in CIRP we are bound by confidentiality obligations under the IBC code." E-mail queries sent to Vedanta Limited did not elicit a response till the time of publication.

The backstory On April 28, 2022, the Chennai bench of NCLT admitted a plea for insolvency against Karaikal Port by the lender Omkara ARC, seeking to recover unpaid dues worth almost INR3,000 crore. Incorporated in 2006, owned by Chennai-based Marg group, Karaikal Port is an all-weather deep water port spread across 600 acres. It was developed as a build, operate, and transfer project under the Public Private Partnership (PPP) model on 30-year concession awarded by the government of Puducherry.

The port has been under a debt trap for over a decade. The company had taken loans from a consortium of 11 public sector banks led by Indian Bank, but soon after that, the port ran into financial stress and started defaulting on repayments.

The lenders then restructured the debt during 2012-13 as the first measure but then subsequently, assigned their debt to ARCs. Nine lenders in the consortium assigned their debt to Edelweiss ARC and the rest of the lenders assigned it to Phoenix ARC during 2015-16, with an eight-year timeframe to restructure the loan. As the timeline to restructure the loan was about to end in June 2023, Edelweiss ARC started looking out for options to recover the unpaid dues from Karaikal Port and soon it found a suitor in Omkara ARC with an offer of INR1,500 crore.

Omkara ARC's entry Edelweiss ARC ran a 'Swiss Challenge' method to sell the debt. The Swiss Challenge method is an auction process where bids from other entities are also invited after the highest bidder gives an entry. Later, once the other entities have made their bids, the entity that had originally bid (in this case, Omkara ARC) is given another chance to match the highest bid discovered through an open auction.

If the entity that had put in the original offer declines to participate, then the deal is given to the highest bidder discovered through the auction. With lack of counter bids in the Swiss Challenge, Edelweiss ARC sold its debt to Omkara ARC for INR1,500 crore in November 2021 taking a 27% haircut. Ever since Omkara ARC bid to takeover the company's debt from Edelweiss ARC, speculation started doing the rounds that it is being backed by Adani Group. It was alleged that this was done for the Adani Group to take over the Karaikal Port.

MARG Group, the promoter of Karaikal Port, tried to stall the process and filed a petition in the Madras High Court alleging that Edelweiss ARC has opted for a different procedure in the case of auction of assets of Andhra Cements, but in this case, it is trying to restrict the participation to favour Omkara ARC. The petition got dismissed and the promoters challenged it in the Supreme Court, but again the promoters lost due to lack of substantial evidence.

Omkara ARC, one of the 29 registered ARCs India, was incorporated in 2014 and was granted a Reserve Bank of India (RBI) licence to operate as an ARC in 2015. The company was promoted by A. Sakthivel, a textile industry veteran from Tamil Nadu, and Manish Lalwani, a chartered accountant by profession, also serving as the managing director and chief executive officer since March 2018. Its overall asset under management is worth INR4,591 crore as on September 30, 2021, as per a recent Infomerics Ratings report.

The speculation further gained steam when Omkara ARC started inducting Adani Group veterans in the management of Karaikal Port as directors and key managerial positions soon after taking over the debt from Edelweiss ARC. Just a few months after taking over the debt from Edelweiss ARC, in January 2022, Omkara ARC nominated two new directors on the board of Karaikal Port as its representatives, Ameet Desai and Surender Kumar Tuteja.

This move further reinforced the market speculation that Omkara ARC has APSEZ's backing as both Desai and Tuteja have a long-term association with the Adani Group and both hold multiple directorship positions of various Adani Group companies, especially including Adani Logistics Limited, a 100% owned subsidiary of APSEZ. Desai is currently on the board of as many as six Adani Group companies.

He has also previously served as the whole-time director of Adani Enterprises between May 2014 to August 2017, and that of APSEZ, during September 2005 to October 2009. Apart from being a director in Adani group companies, Desai was also serving as the advisor to the chairman at the Adani Group and previously served as group chief financial officer and had led the listing of four out of the five listed entities of the Adani group.

Desai has also helped the Adani Group in setting up their family office and privately-held real estate businesses, as per the website of JM Financial ARC, where he serves as an independent director. Desai has recently founded Anubhuti Value Trust — a Sebi registered alternative investment fund. Tuteja, a former IAS officer of the 1968 batch and also a fellow member of the Institute of Company Secretaries of India, currently serves on two boards of Adani group companies.

He has also previously served the board of Adani Enterprises for a period of five years between February 2011 and 2016. Two months later, Omkara ARC made two more additions in the top management. They hired Vettah Raghunandan and Nilanjan Bhattacharya as the new chief executive officer and chief financial officer, respectively. Raghunandan and Bhattacharya are both former senior level executives at Adani group. Raghunandan was the head of M&A and market intelligence at APSEZ until April 2021 and had a 10-year stint with the company.

Unlike Raghunandan, who had left Adani group a year before, Bhattacharya was serving APSEZ until recently as a financial controller based out of Trivandrum, Kerala. Bhattacharya had joined APSEZ in September 2015.

Omkara ARC had earlier clarified to ET Prime that the selection of the directors and the key managerial personnel was on merit. "We were entitled to nominate one director to the board. We appointed a director having diverse industry experience and who is an independent director in more than 15 companies." "Also, we had recommended professionals having in depth experience in the ports industry which was duly approved by the board of the company," he adds.

The Adani-Omkara link Inducting directors of the board and other professionals with close ties with the Adani Group did raise some eyebrows, but a deep dive into the books of accounts of APSEZ and Omkara ARC reveals further connections. As per APSEZ's annual report for the year 2021-22, a subsidiary company of APSEZ had



extended an inter corporate loan worth INR230 crore to Omkara ARC. First tranche of the loan worth INR196.25 crore was given on November 25, 2021 and another tranche of INR33.75 crore was released on March 23, 2022. The annual report stated that the loan has been extended to invest into security receipts of the assets reconstruction trusts (ARC trusts) and the said amount advanced has been secured by the security receipts issued by the ARC trusts.

It further stated the security receipts of "Omkara ARC Trusts PS 14-18/ 2021-22" have been pledged against the loan sanctioned. Interestingly, Omkara ARC Trusts PS 14-18/ 2021-22 also appears among the list of creditors of Karaikal Port. The assets are acquired by the ARCs on either a cash basis or by issuing security receipts or a combination of both. In case of cash purchase, assets are taken on the balance sheet of the ARC, while in case of security receipts, a trust is set up which holds the acquired assets and ARC acts as the trustee.

The trust issues asset-backed security receipts to the investor which may be the selling bank or a financial institution, the ARC itself and or any other investor. Digging deeper into the books of accounts of Omkara ARC provides further details. The charge document filed by the ARC with the registrar of companies (RoC) reveals that the loan facility was extended by Dhamra Port Company Limited, a 100% subsidiary of APSEZ.

Omkara ARC has also filed the copy of the loan disbursement letter for the second tranche of the loan, with the RoC. The letter states: "...it is further agreed that the additional amount shall be deposited into the account of the company on receipt of a 3-day prior notice and completion of registration of assignment agreement between the original lenders and Edelweiss Asset Reconstruction Company.

The same is expected to be completed by Wednesday, 16th March 2022 and the payment is required to be made to Edelweiss Asset Reconstruction Company by Wednesday, 16th March 2022..." The letter also stated that such a condition was agreed between Dhamra Port Company and Omkara ARC as per the inter-corporate borrowing agreement signed on November 24, 2021. As per the agreement, INR230 crore was sanctioned to Omkara ARC. Out of which INR196.25 crore has already been received and it was agreed that an additional amount not exceeding INR33.75 crore will be given as and when required to pay under the assignment agreement with Edelweiss ARC to acquire the financial asset.

Though the document didn't specify that the financial asset to be acquired is Karaikal Port, the security receipts pledged for the loan makes it evident. Additionally, APSEZ made another investment during 2021-22. As per the annual report, APSEZ invested INR1,129.49 crore in Areion Special Situation Infra Scheme.

Apart from APSEZ, another group company, Adani Properties Limited also invested INR141 crore in the Areion Special Situation Infrastructure scheme. The said infrastructure scheme is part of Areion Special Situation Fund, a Sebi-registered AIF. The fund is sponsored by Areion Asset Management Private Limited, a sister company of Omkara ARC. Both the companies are majorly owned by Manish Lalwani directly or indirectly through his family and companies owned by him.

As per the website of Areion Asset Management, the Areion Special Situation Infra Scheme has a fund size of INR1,000 crore can be extended up to INR4,000 crore. An AIF, however, can even have a single investor though not more than a quarter of the fund corpus can be invested in a single entity. E-mail queries sent by ET Prime to Areion Asset Management, did not elicit a response.

However, when reached out to Nikita Wagh, associate, Areion Asset Management, she confirmed to ET Prime that Areion Asset Management and Omkara ARC have common promoters even though the management of both the companies is different. She further confirmed that the Areion Special Situation Infra Scheme has exposure to security receipts of Omkara ARC. However, she couldn't provide details of those investments as those are confidential in nature.

In all INR1,500 crore were invested in Omkara ARC and sister companies. That amount was specifically used to acquire debt of Karaikal Port from Edelweiss ARC.

Added to cart Karaikal Port has always been in APSEZ's wishlist. In October 2020, APSEZ formally expressed interest in purchasing the 49% stake in Karaikal Port along with Brookfield Asset Management, Shapoorji Pallonji Group and four private equity firms. However, the deal didn't go through.

In August 2021, Karan Adani, son of Gautam Adani, and the chief executive officer at APSEZ said in an analyst call, post June quarter results for 2021-22, that the company is weighing the acquisition of Karaikal and Gopalpur ports. The announcement came at a time when Edelweiss ARC was looking to sell the debt and equity stake in Karaikal Port. However, APSEZ found themselves ineligible to participate in the sale process.

As per the SARFAESI Act and RBI's guidelines, only banks, financial institutions or ARCs can participate in the auction in order to buy debt of a non-performing asset from an ARC. Karaikal Port is the not the first case of a port operating company reaching the insolvency court. In April 2018, Dighi Port Limited was dragged to insolvency and coincidentally, APSEZ participated in the process and emerged as the successful bidder.

APSEZ is the largest commercial ports operator in India and boasts of handling nearly one fourth of the cargo movement in the country. APSEZ currently has 13 domestic ports spread across seven states, the latest addition being the Dighi Port, Mumbai. Echoes from the past As per the IBC, the commercial wisdom of CoC is considered supreme and this has been reaffirmed time and again by the NCLT, NCLAT and even by the Supreme Court.

Currently under IBC, the financial creditors or their related parties are not barred from being a resolution applicant. Also, there is no clarity on how to deal with conflict of interest between the CoC and the resolution applicant and to ensure if the Chinese wall was being maintained in the entire proceedings. This has been interpreted differently on a case-to-case basis. In October 2022, Sathavahana Ispat — a very similar case to Karaikal Port — got an adverse judgment. In this case, JC Flowers ARC was the only CoC member.

The ARC was assigned all debt of Sathavahana Ispat through a Swiss Challenge auction and was funded by Jindal Saw which later also emerged as the successful resolution applicant, similar to the Karaikal Port. Interestingly, Vedanta Limited was also a resolution applicant even for Sathavahana Ispat outbid by Jindal Saw. An application was filed by Trimex Industries before NCLT Hyderabad, which was an operational creditor and had also shown interest in Sathavahana Ispat earlier.

The application received a split verdict from a two-judge bench in May 2022. Later, it was referred to a special bench of NCLT, Cuttack which dismissed the application. In a split verdict, the judicial member rejected the plea while the technical member allowed the application and directed the CoC not to consider the resolution plan of the PRA as the entire process is vitiated and there could be collusion between the parties.

However, when the matter was referred to the special bench, it concurred with the findings of the judicial member of NCLT Hyderabad and dismissed the application. In another case, Dignity Buildcon Private Limited where Alchemist ARC, which is a financial creditor with a 35.36% voting share in the CoC is also doubling up as a resolution applicant in the case.

Experion Developers Private Limited, a resolution applicant has challenged before the Delhi High court that Alchemist ARC is blocking its resolution plan which had received 64.64% votes from all other members of the CoC. 52 meetings of CoC have been held so far in last three years and yet no resolution has taken place. The petitioner has claimed that due to conflict of interest, as Alchemist ARC is also a resolution applicant, it is blocking all other plans to get approved abusing its power as a CoC member.

The case is pending for judgment whether the financial creditor should be allowed to vote at the time of its resolution plan. According to Anjali Jain, partner, insolvency and restructuring practice at Areness, a Delhi-based law firm, "The transaction in relation to the acquisition of debt of Karaikal Port by Omkara ARC in November 2021 was apparently funded by Adani Ports and now the approval of resolution plan of Adani Ports by the sole member of the CoC seems to raise an issue of a possible conflict of interest." "Since the CoC and the successful resolution applicant are related-parties, it disables the former to adhere to the Regulation 35 of IBC requiring CoC to maintain confidentiality of fair value and liquidation value to prevent undue loss/gain, and thus, also enabling the successful resolution applicant to be a selector in the voting process and thereby indirectly controlling the entire process of resolution," she adds.

Jain further specifies that, though Section 30(5) of the Code allows a member of CoC to submit the resolution plan and thus a direct or indirect relation of the successful resolution applicant with the CoC does not statutorily restrict its participation in the resolution process. There are a few pending writ petitions which have challenged the constitutionality of Section 30(5) to address this conflict of interest.

There have also been judgments on the similar line of facts which indicate that unless the facts suggest otherwise, prima facie no conflict of interest arises as such resolution is primarily considered consistent with the principles of value



maximisation and the commercial wisdom of the CoC prevails. "As far as the collusion of CoC and the successful resolution applicant is concerned then prejudice to the interest of corporate debtor, or other creditors or any violation of law or procedural requirements needs to be substantiated with tangible evidence to enable the adjudicating authorities to lift the corporate veil," says Jain.

"Such indirect assignments and acquisitions need to be strictly scrutinised to avoid any grave injustice to the stakeholders and more statutory checks and balances may be incorporated to address such issues, probably by mandating all assignment related disclosures by CoC during the resolution process or by appointment of independent observer to oversee the transparency and fairness of the process or mandating the impleadment of various regulatory authorities for flagging any spurious or fraudulent transactions," she adds. While Shivek Sharma, an insolvency lawyer, believes that the CoC code of conduct could be helpful in resolving such conflicts.

"At present, the IBC does not restrict a financial creditor or its related parties to submit a resolution plan. Conflict related issues under IBC are dealt on a case-to-case basis. But it does make a strong case for having a code of conduct for the CoC. Currently, there is no such framework. The insolvency law committee, in its fifth report submitted on June 15, 2022 had recommended issuance of guidelines by IBBI providing standard code of conduct for members of the CoC in the form of a normative framework. Though such a normative framework will prove to be quite helpful, it should not conflict with the exercise of the commercial wisdom of the CoC," he says. In the case of Karaikal Port, the resolution plan submitted by APSEZ is yet to be approved by NCLT and the ball is in NCLT's court to decide whether the Chinese wall was maintained in the entire set of insolvency proceedings.

**Source: The Economic Times**

**Read Full news at:** [Adani: Karaikal Port insolvency: How Adanis got into pole position in the bidding race - The Economic Times \(indiatimes.com\)](https://www.indiatimes.com/Adani-Karaikal-Port-insolvency-How-Adanis-got-into-pole-position-in-the-bidding-race-The-Economic-Times/indiatimes.com)

