

## IN BRIEF – INSOLVENCY & BANKRUPTCY



### INSOLVENCY & BANKRUPTCY ORDER OF APRIL 2023

The National Company Law Tribunal (NCLT) on April 3, 2023, by way of an ‘order’ directed that any new insolvency application filed by a financial creditor under Section 7 or Section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC), must be accompanied by a default record from an Information Utility. The order was purportedly issued pursuant to a new regulation being Regulation 20(1A) of the IBBI (Information Utilities) Regulations, 2017, inserted with effect from June 14, 2022, which mandates the filing of information of default with Information Utilities.

An Information Utility is an entity which is a repository of financial information like loans, defaults and security interests etc., for corporations and firms. The utility procures, maintains and provides such undisputed financial information for initiation of Corporate Insolvency Resolution Processes (CIRPs).

The Information Utility accepts, stores and makes readily available authenticated financial information submitted by creditors that helps establish defaults as well as verify claims under the IBC expeditiously, thereby facilitating completion of the insolvency resolution transactions under IBC in a time-bound manner.

### NATIONAL E-GOVERNANCE SERVICES LTD. (NESL)

National e-Governance Services Ltd. (NESL) is the only Information Utility in India authorized by the Insolvency and Bankruptcy Board of India (IBBI). Its objectives are:

*To accept, store and make readily available authenticated financial information submitted by creditors that helps establish defaults as well as verify claims under the Insolvency and Bankruptcy Code, 2016 expeditiously and thereby facilitate completion of the insolvency resolution transactions under IBC in a time-bound manner.*

The NCLT order dated April 03, 2023 effectively means that every insolvency application filed by a financial or an operational creditor must necessarily be accompanied by a default record obtained from the NESL.

This direction is contrary to the provisions of Section 7 of the IBC, more specifically contrary to Section 7(3)(a) of the IBC. The said Section clearly provides that a financial creditor may either furnish a record of default recorded with the Information Utility or such other record or evidence of default as may be specified. The choice has therefore been left up to the financial creditor under the IBC. Further, Section 9(3)(d) of the IBC provides that an operational creditor too shall file the default record from an Information Utility, if available.

The NCLT cannot, that too by way of an administrative order, override the directory nature of the provisions to make it mandatory. It is pertinent to note that the new Regulation 20(1A) of the IBBI (Information Utilities) Regulations, 2017, does not refer to any such filing to be made with the NCLT. Therefore, the reliance on the new regulation to mandate filing of the default record is misplaced.

Further, the NCLT is the adjudicating authority under the IBC, and not a regulatory authority like the IBBI. Section 196 of the IBC provides the powers and functions of the IBBI. Section 196(1)(u) empowers the IBBI to make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under the IBC. Various provisions in the IBC empower the IBBI to prescribe the requirements under such provisions. There is no such corresponding power vested in the NCLT under the IBC.

Even if the IBBI would have issued such a direction/ regulation, it is settled law that rule making powers given to an authority to support a legislation cannot be used to restrict the provisions of the enabling act. In *St. Johns Teachers Training Institute vs. Regional Director, National Council for Teacher Education and Ors.* [(2003) 3 SCC 321] the Supreme Court held that:

*“10.A Regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and Regulations are all comprised in delegated legislations. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details.”*

Similarly, the Supreme Court in *Indian Young Lawyers Association and Ors. vs. The State of Kerala and Ors.* [(2019) 11 SCC 1] held that:

*“266. When the rule-making power is conferred by legislation on a delegate, the latter cannot make a Rule contrary to the provisions of the parent legislation. The rule-making authority does not have the power to make a Rule beyond the scope of the enabling law or inconsistent with the law. Whether delegated legislation is in excess of the power conferred on the delegate is determined with reference to the specific provisions of the statute conferring the power and the object of the Act as gathered from its provisions.”*

In view of the above, no form of delegated legislation under the IBC can restrict the scope of Section 7(3)(a) or Section 9(2)(d) to make furnishing of a default record from an Information Utility mandatory. Therefore, the NCLT ‘order’ dated April 03, 2023, does not appear to be tenable in the eyes of law on any account.

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***This newsletter has been compiled by:***

Chitranshul Sinha and Team, Dua Associates, New Delhi

***For further information contact:***

Chitranshul Sinha, Partner, Dua Associates, Delhi  
Mail: [chitranshul@duaassociates.com](mailto:chitranshul@duaassociates.com)

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