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## **Withdrawal of CIRP Proceeding pursuant to Settlement under Insolvency and Bankruptcy Code, 2016**

### **Introduction**

This is well proven that the ultimate aim of civil lawsuits is to resolve disputes, which are typically accomplished by the constructive intervention of the judiciary, and sometimes by parties reaching out to court settlement as allowed by statute.

Previously, in accordance with the Insolvency and Bankruptcy Code, 2016 ("IBC"), no provision was made for the withdrawal of an application filed before the NCLT except as provided for in Rule 8 of the Insolvency and Bankruptcy (Application to the NCLT) Rules of 2016, where the NCLT could permit the withdrawal of the application on a request made by the applicant prior to its admission. The report of the Insolvency Law Committee too recommended amendment of Rule 8 to allow withdrawal after the admission of CIRP. Subsequently, Section 12A was inserted via Amendment Ordinance of 6th June 2018 which gave the Adjudicating Authority power to allow withdrawal on application by CIRP applicant with 90% voting share approval of CoC in such manner as "prescribed".

### **Relevant Sections and Regulations related to withdrawal of CIRP under IBC:**

- Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
- Section 12A of Insolvency and Bankruptcy Code, 2016 read with Regulation 30A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

An application filed before the Hon'ble NCLT for initiation of Corporate Insolvency Resolution Process (CIRP) by the financial creditor, operational creditor and corporate debtor itself under Sections 7 or 9 or 10 of the IBC respectively can be settled and be withdrawn in a manner prescribed under IBC.

**For ease of understanding, the withdrawal procedure, it can be divided into two parts:**

- (A) Under rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 i.e. Before admission of application under Sections 7 or 9 or 10.
- Under section 12A of Insolvency and Bankruptcy Code, 2016 read with Regulation 30A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 i.e.
- (B) 1. After admission but before constitution of committee of creditors(CoC)  
 2. After constitution of CoC but before issue of invitation for expression of interest &  
 3. After issue of invitation for expression of interest

**(A) Before admission of application u/s 7, 9 or 10 i.e. before admission of application under Sections 7 or 9 or 10.**

As per rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the National Company Law Tribunal may allow withdrawal of the application on a request by the applicant before its admission. The rule 8 is mentioned below:

*“8. Withdrawal of application—The Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission”.*

**Relevant Case Law:**

In the case titled as **“Lokhandwala Kataria Construction Private Limited V. Nisus Finance & Investment Managers LLP [2017] ibclaw.in 04 SC** before Hon'ble Supreme Court (Bench of Hon'ble Mr. Justice Rohinton Fali Nariman and Hon'ble Mr. Justice Sanjay Kishan Kaul) an interesting question was raised as to whether, in view of Rule 8 of the I&B (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal could utilize the inherent power recognized by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 to allow a compromise before it by the parties after admission of the matter.

Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 as under:

**“11 Inherent Powers**

*Noting in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.”*

**Brief Background of the case:**

The financial creditor namely Nisus Finance and Investment Managers, LLP, filed an insolvency application under section 7 of the Code before the NCLT Mumbai Bench against the corporate

debtor, Lokhandwala Kataria Construction Limited. The application was admitted by the NCLT. However, subsequently the parties settled the matter between themselves. The parties thereafter approached the National Company Law Appellate Tribunal (“NCLAT”) with a prayer to set aside the decision of the NCLT since the dispute was now settled.

The vital question before the NCLAT was whether an application can be withdrawn after the same has been admitted. The NCLAT, in view of Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, did not allow the creditors to withdraw the application.

It was observed that “before admission of an application under Section 7, it is open to the Financial Creditor to withdraw the application but once it is admitted, it cannot be withdrawn and is required to follow the procedures laid down under Sections 13, 14, 15, 16 and 17 of I&B Code, 2016.

Hon’ble Supreme Court answered the above-mentioned question where an appeal was filed by the appellant/Corporate. The Supreme Court upheld that in view of Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the NCLAT could not utilize the inherent power recognized by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 to allow a compromise before it by the parties after admission of the matter. The Supreme Court exercised its power under Article 142 of Constitution of India “to put a quietus to the matter” and disposed of the appeal based on the consent terms entered into by the party. Pertinently, since the Court invoked its discretionary power under Article 142[i], this order does not attain the status of a binding precedent under Article 141[iii] of the Constitution of India.

**(B). Under section 12A of Insolvency and Bankruptcy Code, 2016 read with Regulation 30A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 , the application can be withdrawn at three stages which are as follows:**

1. After admission but before constitution of committee of creditors(CoC)
2. After constitution of CoC but before issue of invitation for expression of interest &
3. After issue of invitation for expression of interest

Section 12A of the Code provides that the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of 90% voting share of the committee of creditors.

***Section 12A: Withdrawal of application admitted under section 7, 9 or 10:***

*12A. the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be prescribed.*

**Following steps to be considered for withdrawal of an application:**

1. An Application under section 12A read with regulation 30A **has to be filed** before Hon’ble NCLT:

- By the applicant through the Interim Resolution Professional (IRP) if the withdrawal is filed after admission but before constitution of committee of creditors (CoC)
  - By the applicant through the IRP or Resolution Professional (RP) as the case may be if the withdrawal is filed after constitution of CoC.
2. The said application has to accompany by **FORM FA** (Application for withdrawal of corporate insolvency process) of the CIRP Regulation 2016 Schedule.

**Note:** *It is important to note that in case the withdrawal application is filed after issue of invitation for expression of interest under CIRP Regulation 36A, the applicant mandatorily has to state the reasons justifying withdrawal.*

3. A **Bank Guarantee** has also to be accompanied along with the Form FA.

**If the withdrawal is filed after admission but before constitution of CoC :** The amount of bank guarantee will be the estimated expenses incurred on or by the IRP for purposes of regulation 33 such as the fee to be paid to the IRP, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses incurred till the date of filing of the withdrawal application. However, **If the withdrawal is filed after the constitution of CoC** then the amount of bank guarantee will be estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application.

4. **Time Limit:** If the withdrawal is filed before the constitution of COC then the time limit to submit the withdrawal application to the Adjudicating Authority (AA) by the IRP on behalf of the applicant must be **within 3 days of its receipt**. However If the withdrawal is filed after the constitution of CoC then the CoC shall consider the application within 7 days of its receipt and has to approve the withdrawal by 90% voting share.
5. In case the application is approved by the CoC with 90% voting share, the RP shall submit such application along with the approval of the CoC, to the AA on behalf of the applicant, **within 3 days of such approval**.
6. Thereafter AA may, by order, approve the application.

### Relevant Case Law:

**Brilliant Alloys Private Limited Vs. Mr. S. Rajagopal & Ors [2018] ibclaw.in 35 SC** - *Insolvency Application that is admitted can be withdrawn at any point during the insolvency process.*

The Hon'ble Supreme Court while hearing the matter ruled that the parties are allowed to withdraw the application at any point of time during the insolvency process. It was stated that the Regulation 30A states that withdrawal cannot be permitted after issue of invitation for expression of interest. However, this Regulation has to be read along with the main provision of Section 12A which contains no such stipulation and thus this stipulation can only be construed as directory depending on the facts of each case.

**Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [2019] ibclaw.in 03 SC**

The Hon'ble Supreme Court has cleared in the above mentioned case that at any stage where the

CoC is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case.

**Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh & Others.** [\[2020\] ibclaw.in 03 SC](#)  
- *The exit route prescribed in Sec. 12A is not applicable to a Resolution Applicant:*

Hon'ble Supreme Court in the above said case had held that the Resolution Applicant, cannot withdraw from the proceeding in the manner they have approached this Court. The exit route prescribed in Section 12A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and 10 of the code.

**Satyanarayan Malu v. SBM Paper Mills Ltd.** [\[2018\] ibclaw.in 01 NCLT](#)

An application was filed u/S. 7 of the Code. Later, the approved resolution plan was presented before the AA for approval. Simultaneously applicant made a proposal of OTS to FC & justified the same before CoC. Consequently, the RP withdrew the resolution plan & left the CoC to go for the liquidation of CD's assets. Thereafter, the applicant prayed for grant of withdrawal u/S. 12A of the IBC being the most viable option at hand for CD. The primary issue was whether the Applicant who has filed an application u/S. 10 entitled to withdraw its own petition u/S. 12A of the IBC, especially when the said applicant has furnished the impugned petition & now offering OTS as a director in the suspended management of the debtor Company. It was held that withdrawal of application was more viable option for CD than liquidation. Hence, the application was accepted.

**Conclusion:** A major flaw, which will lead to more litigation, is that Section 12A is that it does not lay down the grounds on which the Adjudicating Authority may refuse the withdrawal of an application. Therefore, the improvements need to be made keeping in mind the time bound nature of the Code.

[Read more about Sec. 12A.](#)

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## Reference

[\[i\]](#) Enforcement of decrees and orders of Supreme Court and unless as to discovery

[\[ii\]](#) Law declared by Supreme Court to be binding on all courts

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