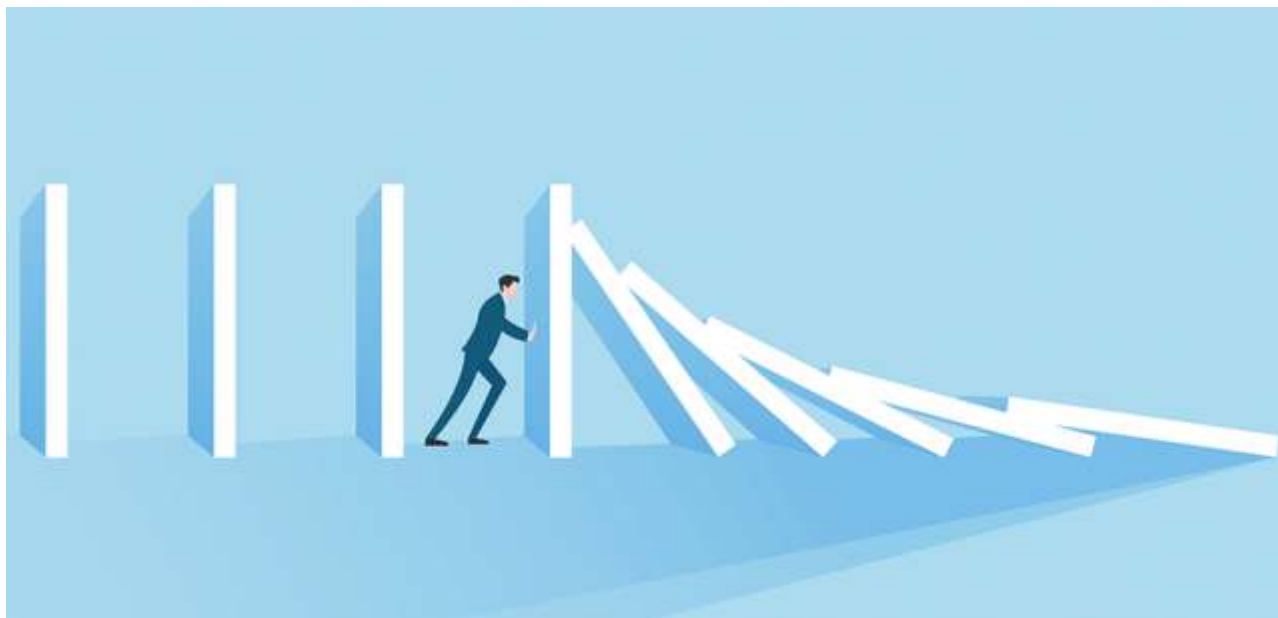


Withdrawal of Application Under Section 12A of IBC: Key Issues and Areas of Concern



*Section 12A of the IBC, 2016 was inserted through an amendment in 2018. This amendment empowers the NCLT to allow withdrawal of an ongoing CIRP, if such an application is approved by CoC with 90% vote share. Subsequently, Regulation 30 A was added into IBBI (CIRP) Regulations, 2016. In fact, this provision provides a last chance to the promoters to regain control of the Company provided he/she either clears all the dues payable to creditors or makes partial payment but satisfies the CoC that remaining dues shall be paid as per mutually agreed terms and conditions. In this article, the author presents an account of practical challenges faced in implementation of this provision and related judicial decisions. **Read on to know more...***



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1. Overview

Section 12A was inserted in the Insolvency and Bankruptcy Code, 2016 (IBC) with effect from (w.e.f.) June 06, 2018, to facilitate withdrawal of applications admitted for Corporate Insolvency Resolution Process (CIRP) under Section 7, 9 or 10 of the IBC. Regulation 30A was inserted in the IBBI (CIRP) Regulations w.e.f. July 03, 2018, and was later amended on July 25, 2019, to provide a detailed procedure with timelines to be followed for such withdrawal.

Withdrawal process under Section 12A facilitated several corporate debtors (CDs) to come out from the rigours of the CIRP process through settlement. As per the data released by IBBI, 740 CIRP cases were closed through withdrawal under Section 12A by September 30, 2022. Out of the said 740 cases, 72% of the cases were initiated by the Operational Creditors (OCs), 27% of the cases were initiated by the Financial Creditors (FCs) and 01% of the cases were initiated by the Corporate Debtor (CD) itself. Section 12A has acted as an important tool for resolution of CDs which are solvent and against which CIRP has erroneously been initiated.

2. Brief overview of the process of withdrawal under Section 12A read with Regulation 30A

For withdrawal from the rigours of the CIRP, the applicant is required to submit an application in Form FA to the Interim Resolution Professional (IRP)/ Resolution Professional (RP) either before or after the constitution of the Committee of Creditors (CoC). The said application is to be accompanied by a bank guarantee towards the amount of CIRP cost incurred in the process till the date of filing of the application.

Where the application is submitted before the constitution of the CoC, the IRP is mandated to submit the said application before the Adjudicating Authority (AA) within three days of its receipt and where the application is submitted after the constitution of the CoC, the CoC has to consider the said application within seven days of its receipt and if the application is approved by the CoC with 90% or more vote share, the IRP/RP is mandated to submit the said application before the AA within three days of its approval by the CoC.

If the application is approved by the AA, the applicant is required to deposit within three days of such approval, the actual amount of CIRP expenses incurred till the date of the said approval by the AA in the bank account of the CD, failing which, the bank guarantee submitted by the applicant shall be invoked.

3. Issues/ Concerns Around Withdrawal under Section 12A of CIRP Applications Already Admitted

Section 12A is a beneficial legislation, however, there are certain areas of concern which needs to be resolved by way of an amendment to the CIRP Regulations / IBC as detailed below:

- a) What is the status of CIRP after filing the application for withdrawal under Section 12A? Are the duties of the IRP/RP suspended during the period in which the application for withdrawal under Section 12A is pending before the AA?
- b) Can a Section 12A application be filed during the Liquidation Process i.e., after an order for liquidation of the Corporate Debtor is passed by the AA?
- c) Can an application for withdrawal under Section

12A be filed by a person other than the applicant who had filed petition for initiation of CIRP?

- d) The application for withdrawal under Section 12A is to be filed by the IRP/RP or the applicant who initiated the CIRP?
- e) Can an application admitted for CIRP under Section 10 of the IBC be allowed to be withdrawn?

Each of the issues as stated above has been discussed pointwise below with their related judicial pronouncements for better clarity on the subject.

Concern No. 1

What is the status of the CIRP process post filing of an application for withdrawal under Section 12A? Are the duties of the IRP/RP suspended during the period in which the application for withdrawal under Section 12A is pending before the AA?

The IBC and the Regulation are silent on this fundamental/critical issue as to what are the duties of the IRP/RP during the interim period when the application for withdrawal under Section 12A is pending before the AA.

In this context, it is pertinent to refer to the judicial pronouncement in the matter of *Shri Alok Kaushik, Erstwhile RP of Cheema Spintex Ltd Vs. Cheema Spintex Ltd & Ors*¹.

Facts of the Case

An application filed under Section 9 of the IBC by *Kotak Commodity Services Pvt Ltd.* was admitted against the CD *M/s. Cheema Spintex Ltd.* Before constitution of the CoC, a settlement agreement was signed, and Form FA was submitted to the IRP on October 12, 2021. The IRP submitted the application for withdrawal under Section 12A on October 18, 2021. However, the IRP, post filing of the application under Section 12A, proceeded to constitute the CoC, filed an application under Section 19(2) towards non-cooperation, undertaken valuation of the assets, six CoC meetings were also held post filing of the application under Section 12A. The AA passed orders dated May 30, 2022, and allowed closure of the CIRP process, disallowed substantial part of expenses incurred by the IRP, the AA also passed some adverse remarks against the conduct of the IRP.

¹ Company Appeal (AT) (Insolvency) No.896 of 2022 dated September 05, 2022.

Issues before the NCLAT

- I. Whether it was justified on the part of the IRP to continue with the CIRP proceedings?
- ii. Whether the AA had erred in disallowing certain CIRP expenses claimed by the Appellant/IRP by treating them as “non-essential”?
- iii. Whether the remarks disapproving the conduct of the IRP in the present matter by the AA stands to reason?

The IRP's continuance with the CIRP process without making adequate efforts to seek pointed clarification from the AA on whether to proceed with the CIRP or not, does not reflect well on his conduct.

Decision of the NCLAT

- i. The IRP's continuance with the CIRP process without making adequate efforts to seek pointed clarification from the AA on whether to proceed with the CIRP or not, does not reflect well on his conduct.
- ii. Instead of pursuing the withdrawal application with greater vigour, the IRP has rather chosen to mechanically proceed with CIRP by taking the plea of adherence to CIRP Regulations. We therefore agree with the AA that the conduct of the IRP though may be technically correct, the same cannot be countenanced given the attendant circumstances.
- iii. The disallowance of expenses by the AA was justified.
- iv. We concur with the impugned order (i.e., order passed by the NCLT) and are of the considered opinion that the IRP seems to have taken advantage of the fluid situation and unnecessarily added to the costs by carrying out activities which could have otherwise been put on hold and find the conduct of the IRP, deprecatory.

In light of the above judgement of the NCLAT, it can be concluded that the IRP/RP are required to take directions of the AA with respect to the continuation of the CIRP process post filing of the application under Section 12A.

Concern No. 2

Can a Section 12A Application be filed during the Liquidation Process i.e., after an order for Liquidation of the Corporate Debtor is passed by the AA?

The IBC and the Regulation are silent on this issue. However, the judicial pronouncements in the matter can assist us in drawing conclusions.

In this context, it is pertinent to refer to the judicial pronouncement in the following matters:

- (a) *S. Rajendran, Liquidator of M/s. Arohi Infrastructure Private Limited Vs. Tata Capital Financial Services Private Ltd & Ors*².
- (b) *V. Navaneetha Krishnan Vs. Central Bank of India, Coimbatore & Anr*³.

The NCLAT in the above mentioned applications held that “even during the liquidation period if any person, not barred under Section 29A, satisfy the demand of 'CoC' then such person may move before the AA by giving offer which may be considered by the 'CoC', and if by 90% voting share of the 'CoC', accept the offer and decide for withdrawal of the application under Section 7 of the IBC, the observation as made above or the order of liquidation passed by the AA will not come in the way of AA to pass appropriate order”. In light of this order, an application for withdrawal under Section 12A may be filed even during liquidation proceedings.

Concern No. 3

Can an application for withdrawal under Section 12A be filed by a person other than the applicant who initiated the CIRP process?

As per Section 12A, “The AA may allow the withdrawal of application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant (emphasis added) with the approval of ninety per cent voting share of the CoC, in such manner as may be specified”.

Hence Section 12A requires the applicant to file an application for withdrawal of CIRP. However, the NCLAT in the matter of *Sukhbeer Singh Vs. Dinesh Chandra*

² IA(IBC)/514(CHE)/2022 in CP/672/IB/2017 dated June 20, 2022.

³ Company Appeal (AT) (Insolvency) No.288 & 289 of 2018 dated August 09, 2018.

Agarwal, (Resolution Professional), Maple Realcon Pvt. Ltd. & Ors⁴, held that “promoters of the real estate company namely Maple Realcon Pvt. Ltd can settle the matter with all the 'Financial Creditors', 'Operational Creditors' including the Allottees and for that they may give their proposal and the 'Resolution Professional' is bound to place it before the 'CoC', which is supposed to consider such application in the light of Section 12A”. Hence there is no bar on any person and a person other than the applicant can also propose withdrawal of CIRP under 12A.

Concern No. 4

The Application for Withdrawal under Section 12A is to be filed by the IRP/RP or the Applicant who initiated the CIRP process?

Section 12A requires the applicant to file an application for withdrawal of CIRP. However, Regulation 30A requires the application to be filed through the IRP/RP. The Regulations need to be in sync with the IBC and there should be no ambiguity on this count. This issue arose before the NCLAT in the matter of *Francis John Kattukaran Vs. The Federal Bank Ltd. & Anr⁵*

Initially *vide* an order dated November 13, 2018, the NCLAT held that “30A cannot over-ride the substantive provisions of Section 12A according to which the 'applicant' can only move application for withdrawal of the application before the AA and not by the RP. However, the NCLAT *vide* its order dated December 11, 2018, changed its stand and allowed the application filed by the RP.

Hence it can be concluded that the application for withdrawal as per Section 12A is to be filed by IRP/RP.

Concern No. 5

Can an Application Admitted for CIRP under Section 10 of the IBC be allowed to be withdrawn?

The heading of Section 12A categorically states as “Withdrawal of application admitted under section 7, 9 or 10”. (Emphasis added)

Hence there is no ambiguity as to whether an application admitted for CIRP under Section 10 of the IBC can be allowed to be withdrawn or not. However, this legal issue



was raised before the NCLT, Mumbai Bench in the matter of *Satyanarayan Malu Vs. SBM Paper Mills Ltd⁶*.

The NCLT observed that “whether such an attempt of a CD be encouraged to first allow an Application/ Petition u/s 10 for its insolvency and later on after consuming precious time of few months of the Court, as also RP along with the

Withdrawal of an application admitted under Section 10 needs to be discouraged if the said application for withdrawal is filed by the CD itself.

members of the CoC, be allowed to withdraw Section 10 Petition? Because the jurisprudence is developing everyday concerning various provisions of this IBC, hence in the absence of any precedent my conscientious view is that if deem fit such an attempt is required to be discouraged. The IBC shall not be made a tool for deferment of payment of liabilities which ought to happen due to declaration of moratorium”.

NCLT also imposed a cost of 5 lacs on the CD for wasting the precious time of the court. Hence it could be concluded that, withdrawal of an application admitted under Section 10 needs to be discouraged if the said application for withdrawal is filed by the CD itself.

4. Concluding Remarks

IBC, 2016 is an evolving law and there are grey areas which shall gradually be resolved with passage of time as the law matures with experience. It is suggested that the duties of the IRP/RP during the period where an application for withdrawal under Section 12A is pending before the AA may clearly be spelled out in Regulations to avoid any confusion in the minds of the practicing IPs. Explanatory notes may be inserted to Regulation 30A for removing the various ambiguities as discussed above.

⁴ Company Appeal (AT) (Insolvency) No. 259 of 2019, August 07, 2019.

⁵ Company Appeal (AT) (Insolvency) No. 242 of 2018, November 13, 2018, and December 11, 2018.

⁶ M. A. 1396/2018, 827/2018, 1142/2018, & 828/2018 in C.P. (IB)-1362(MB)/2017 dated 20.12.2018.