

INSOLVENCY AND BANKRUPTCY MOOT COMPETITION 2017

28-29 October, New Delhi, INDIA

Organized by: -

Centre for Transnational Commercial Law

National Law University, Delhi. INDIA

Supported by: -

The Insolvency and Bankruptcy Board of India (IBBI)

United Nations Commission on International Trade Law - Regional

Centre for Asia and the Pacific (UNCITRAL - RCAP)

In Association with: -

INSOL India and Society of Insolvency Practitioners (SIPI)

<http://nludelhi.ac.in/up-event1.aspx?id=3055>

Moot Proposition¹

New Age Technology Limited (New Age) is the fourth largest manufacturer of solar panels in the world and the largest in India. New Age has three plants, one located in the State of Gujarat and the other two in Karnataka. The shares of New Age are listed at Bombay Stock Exchange and National Stock Exchange. New Age has raised an amount of Rs. 10 crore in the year 2015 from issuing Masala Bonds with maturity date of July 2018. The largest maturity amount is owed to PEG Developers Ltd, a London based

¹ For the purposes of this Moot Problem, it is assumed that India has adopted the UNCITRAL Model Law on Cross-Border Insolvency 1999

Infrastructure Company. The FCCBs issued by New Age are listed on New York Stock Exchange. The Registered Office of New Age is in Delhi. The corporate office of New Age is located in Mumbai. There is one sales office in Rajasthan and another in Hyderabad. Hyderabad office is on lease from Mr. R.S. Reddy. The Rajasthan office is self-owned property located in a commercial building in Jaipur. The office space is shared with a travel agency. The company has a guesthouse in Hyderabad, which was taken on lease for three years in 2014. The lease can be extended by another three years at the option of the lessor. Between the two plants and its various employees, New Age employs over 3000 employees. New Age also owns a property "New Age House" in Jaipur, which has been given on lease to People's Bank, Jaipur Branch under a registered lease deed dated 06.01.2011. Lease rental of Rs. 15,06,900/- per month is payable to New Age. The company owns six luxury cars, including a Mercedes Benz, BMW and Audi, for use by its Managing Director, CEO and CFO and other senior executives. The company owns an apartment in Juhu, Mumbai, which is occupied by the managing director of the company who is also the main promoter. New Age also owns a parcel of land in Raipur in Chhattisgarh.

In 2015, the promoters of New Age diversified into hotel and real estate business. They set up a company, Radha Hospitality Private Limited (RHPL) that bought an operational 5-star hotel in Jaipur. An international hotel operating company, Seven Points, manages the Jaipur hotel. New Age entered into a JV with RHPL to develop a hotel on Raipur land (owned by New age) to be operated by Seven Points. The JV development agreement requires that RHPL will construct the hotel and commercial tower on the land by contributing 50% cost while New Age will pay for the balance (in kind and cash). The Contribution in kind was by way of transfer of the Raipur piece of land owned by New Age to the JV and the cash contribution was approximately Rs. 65 crore. As New Age received large advance from its US clients against orders, the company paid nearly 90% of its obligations towards construction amount of Rs. 65 crore over a short period of time. The balance was to be paid at the time of completion of the project. The JV requires

New Age will receive revenue from commercial tower and RHPL from the hotel, after meeting operational expense and management fee. The hotel is scheduled to commence in March 2018 and New Age expects good returns.

New Age obtained financial assistance from a consortium of banks in the year 2008 at the time of the setting up of the Gujarat plant. The company later borrowed further from these banks in the year 2011 for setting up the Karnataka plants. A total term loan of Rs. 2195 crore was borrowed from three banks – Indo Bank, RST Bank and People’s Bank. The working capital assistance of Rs. 195 crore was obtained from Bank of North India. The company owns the lands on which the plants are built. While the term loan lenders have first charge on the land and building of New Age and second charge on plant and machinery, the working capital lender has first charge on plant and machinery and second charge on land and building. The principal amount and outstanding dues of the lenders of New Age are as detailed below:-

Particulars	Principal Amount (In Rs. crore)	Outstanding as on 31.12.2016 (In Rs. crore)
INDO BANK	1000	1650
RST BANK	500	650
PEOPLES BANK	500	790
BANK OF NORTH INDIA	195	279

In the year 2016, whilst diversifying into the hospitality and real estate business, the promoters also acquired, Ten Hospitality Services Pvt. Ltd (THSPL), a Singapore based company, which owns a 5 Star hotel, The Davisson Continental in Singapore. In January 2017, THSPL raised capital through a private equity fund, LAVCA Capital Advisors (LAVCA) for its re-development and expansion needs to the tune of USD 50 million. The investment came partly in cash and partly as a loan against which THSPL created security interest in favour of LAVCA’s sister company AFB Investment Pte, based in Mauritius and created *First charge* by way of equitable mortgage on immovable

properties of the Davisson Continental consisting of land and building of the hotel. THSPL is required to repay the entire funding within a period of 3 years i.e. by 30.07.2018.

New Age has many suppliers of raw material. Two main suppliers are based out of China and Taiwan. New Age has many clients but 85% of its production is captive with two major clients - Dan Morris Energy Inc. (Morris), a Delaware company, and Texas Power International (TPI), a company incorporated in Houston. Both the US based companies operating major solar power plants around the world, including in India. New Age has large orders from these two clients that will keep the plants busy for at least four years operating on full capacity.

New Age has been servicing its debts regularly and has excellent relations with the bankers. Its payments to suppliers are also regular.

On 15 September 2016, Morris filed for a chapter 11 proceeding under the US Bankruptcy Code due to the stress caused by shutting down of its two plants in Muhaba in North Africa due to social unrest in the country following a military coup. At the same time, the holding company of TPI faced a major legal action from the US government for bribing government officials in one of the South East Asian countries in return of permission to set by a power plant in that country. Tremors were felt in TPI as many of its contracts in that country were also put under scrutiny.

On 18 September Morris asked New Age to put some of its orders on hold. Morris conveyed inability to pay the next tranche of purchase money due on 15 October 2016. But it did not cancel the orders as it was hoping for some relief in chapter 11 proceedings. Around the same time TPI wrote to New Age expressed inability to take delivery of solar panels already ready for delivery for which payment had been made as it was blacklisted in the country where they were to deliver. They were facing prosecution both in US and

that country in South East Asia.

The next instalment of interest payable by New Age to term loan lenders fell due on 31st October 2016 which New Age paid. The working capital lender was to be paid its next instalment of interest on 31st December 2016. Around 4th November New Age paid the balance amount of 10% to RHPL for completing construction works. The company did not have any cash to service the instalment of Rs. 35 lakh due on 31st December 2016. On 4th December 2016 the Board of Directors of New Age passed a resolution to sell the Mumbai house to its managing director for Rs. 5 crore to raise funds to pay the next installment. An advance of Rs. 55 lakh was received.

On 16th December New Age received a copy of an order from their lawyer in Bangalore informing that the High Court of Karnataka had rejected their appeal against an order of attachment passed by Customs Department pursuant to an order passed by them for concealment of real value of plant imported from France in 2011 to avoid payment of duty of Rs. 45 lakh depriving the government of revenue. That amount together with penalty now worked out to Rs. 95 lakh. The High Court had allowed Customs Department to attach the amount of Rs. 55 lakh lying in New Age bank account in Mumbai. Mumbai account had only Rs. 14 lakh left. There was a Rs. 32 lakh in another account. It could have paid the salaries and other bills or the bank. It decided to default to banks.

On default, Bank of North India at once informed the other banks. On 4th March 2017, RST Bank filed an application before the NCLT under the Insolvency and Bankruptcy Code, 2016 (IBC) and proposed Mr. S. Mahesh , its empanelled lawyer as interim resolution professional.

(Please identify the key issues at this stage)

The Application was listed for admission hearing before the NCLT on 17th March.2017,

wherein the Corporate Debtor raised objections to the maintainability of the Application before NCLT on various grounds. The Bench whilst recording the objections raised in detail by a speaking order listed the application for admission hearing on 5th April 2017.

On 5th April 2017, NCLT admitted the application whilst declaring Moratorium and referred the appointment of an IRP to the Insolvency and Bankruptcy Board of India (IBBI) for recommendation. IBBI recommended and confirmed Mr. Amit Thakur as Interim Resolution Professional to carry the functions as mentioned under the IBC 2016.

New Age filed an appeal against the order of NCLT and IBBI recommendation.

(Please identify the key issues at this stage)

Upon appointment, Mr. Amit Thakur (IRP) visited the plant to take possession of New Age's assets. He was not allowed to enter the unit of New Age as the local political leaders in support with the union workers led an agitation against Mr Amit Thakur to prevent him from taking possession. Mr. Amit Thakur took appropriate steps and took possession of the unit and appointed XYL Security services for preserving the unit of New Age.

(Please identify the key issues at this stage)

On 06th March 2017, the electricity supplier GSES issued a demand notice for Rs. 85 lakhs towards the dues of the electricity for the past 9 months to be paid within 10 days failing which electricity will be disconnected with immediate effect.

On 08th March .2017, one of the suppliers of New Age, JSEW LTD who regularly supplies EVA Film for manufacturing of the solar panels refused to supply EVA Film till the time New Age clear its past dues and agreed to pay future dues as and when payable against future supplies.

On 09th March.2017, IRP to run the company as going concern wrote to People's Bank to deposit the lease rental in terms of the lease from April 2015 to February 2017 amounting to Rs. 79,41,026/- with the company, to which People's Bank refused and informed the IRP that the Bank has been adjusting the said lease rental towards its dues.

(Please identify the key issues at this stage)

Pursuant to the public announcement, the IRP received claims from all the other lenders Indo Bank, RST Bank and People's Bank. IRP also received claims from various operational creditors and statutory authorities including the Customs & Excise department. Accordingly, the Resolution Professional segregated the claims of the financial institutions, operational creditors, statutory authorities and the public depositors (Singapore).

During the scrutiny, the IRP observed that Marvel Organics Ltd one of the financial creditor of New Age filed its claim but failed to file any documents in support to substantiate its claim. Marvel Organics Ltd filed a claim of Rs. 136 crore. Marvel Organics Ltd provided transformers to the tune of Rs. 20 Crore to New Age, which it claimed, remained unpaid by New Age. Marvel did not file documents to support how its 20 crore had escalated to 136 crore. IRP added the claim of Marvel to the list and invited it to the committee of creditors.

(Please identify the key issues at this stage)

On 08th March 2017 IRP appointed M/s. KGB Valuers and M/s AKP Valuers being registered valuers to determine the liquidation value of New Age. However, during the valuation it was found that M/s AKP valuers were a related party to New Age.

In the year 2012, New Age had for its working capital needs invited public deposits. However, due to the financial crunch New Age could not service the interest to the public depositors and various public depositors filed their claim before the IRP. The IRP however rejected the claims of the public depositors on the ground that they do not fall within the purview of operational creditor. The aggrieved public depositors approached NCLT. However, NCLT vide its order dated 22th March 2017 dismissed the application of the public depositors.

The public depositors aggrieved with the order of NCLT filed an appeal before the NCLAT.

The NCLAT vide its order dated 20.02.2017 directed that public depositors may file its claim before the IRP and in case, Resolution professional or the Tribunal do not accept the claim on the ground that they are not operational creditor, the public depositor to raise the question before the Tribunal.

Pursuant to the above, public depositors re-filed their claim before the Interim Resolution Professional which was again rejected on the ground that their claim does not fall under the definition of operational creditor. Aggrieved by the said order, the public depositors approached NCLT in terms of the order passed by NCLAT.

(Please identify the key issues at this stage)

In the meantime, RST Bank challenged the claim filed by People's Bank and Marvel on the ground that the claim filed by People's Bank is inflated.

In order to take possession of the flat of New Age in Mumbai, the IRP wrote to the Director for taking possession who neither replied nor handed over the possession of the flat. IRP accordingly filed an application before NCLT seeking appropriate orders for

taking possession of the Mumbai flat.

(Please identify the key issues at this stage)

As one of the largest supplier of raw material to New Age was Xi Mao, a Chinese company, upon coming to know that New Age is under CIRP refused to supply raw material till the time past dues of 10 crores are cleared by New Age and future payments are regularized.

Thereafter the IRP verified the claims received and prepared a list containing the names of creditors along with the amount claimed by them.

LENDER	CLAIM FILED (IN CRORE) Rs.
INDO BANK	1650
RST BANK	650
PEOPLES BANK	790
BANK OF NORTH INDIA	279
MARVEL ORGANICS LTD	136
JSEW LTD	20
GSES	1.20
PUBLIC DEPOSITORS	45
CUSTOMS & EXCISE	2
EPF DUES	12
XI MAO	15

On 22th March, 2017, IRP constituted the Committee of Creditors (COC). As RHPL was not part of the creditors committee, RHPL filed an application before NCLT seeking representation, participation and voting right in the creditors committee.

(Please identify the key issues at this stage)

On 29th March 2017, the first meeting of COC was scheduled, wherein the IRP Mr. Thakur proposed to the COC that IRP be continued as RP. However, after much deliberation, the COC resolved to appoint Mr. Dhivesh Sharma as the Resolution Professional. During the meeting, People's Bank raised concern about sale of Mumbai Flat to the managing director of New Age in the month of December 2016 and the sale proceeds being siphoned off.

COC filed application before NCLT seeking appointment of Mr. Dhivesh Sharma as the Resolution Professional and NCLT vide its order dated 07th April 2017 recommended the name of Mr. Dhivesh Sharma as the Resolution Professional to the Board for confirmation. On 17th April 2017, the Board confirmed Mr. Dhivesh Sharma as the Resolution Professional of New Age (under CIRP).

(Please identify the key issues at this stage)

In the meantime, the RP received a notice from the lessor with regards to the guesthouse of New Age and its lease coming to end. In terms of the lease renewal for next three years can be done subject to 30% increase of rent of the said guesthouse. However, the Resolution Professional chose not to renew the lease and terminate the lease w.e.f. 31st March 2017 i.e. prior to the termination date. New Age filed an application before NCLT.

(Please identify the key issues at this stage)

Pursuant to the first COC meeting, RP received a letter from Mr. Chew John informing AFB Investments Pte had initiated insolvency proceedings against THSPL in Singapore in which he has been appointed as office holder. THSPL had defaulted in making payment of debt to AFB. Mr. Chew John requested the RP to put on hold any further action in the New Age insolvency proceedings claiming that since subsidiary company is

in insolvency proceedings and it was based in Singapore, Singapore would be considered as centre of main interest. RP replied to Mr. Chew John stating that since he was the office holder in New Age proceedings, the holding company of THSPL, the centre of main interest would be in India. Mr. Chew Hohn moved an application before NCLT for recognition of Singapore proceedings.

(Please identify the key issues at this stage)

Mr. Dhivesh Sharma, RP thereafter collected the information and prepared the Information Memorandum (IM) and invited expression of interest for Resolution Plan. Pursuant thereto, The Blue Plaza, a Thailand based hotel requested the RP for a copy of the IM. In addition, JKL Pvt. Ltd the fourth largest manufacturer of solar panels in India also requested the RP for a copy of the IM. The promoters of New Age also requested the RP for a copy of the IM.

RP refused to provide IM to JKL Pvt. Ltd and provided a copy of IM to both the promoters of New Age and The Blue Plaza. JKL filed an application before NCLT to seek a copy of IM.

(Please identify the key issues at this stage)

Thereafter, the promoters of New Age and The Blue Plaza submitted a resolution plan, each which is detailed as under:

PLAN SUBMITTED BY NEW AGE:

- (i) Sale of “New Age House” property in Jaipur;
- (ii) Proposal to the lenders for reduction/hair-cut by 45% in the amount payable to the lenders with 10 years repayment schedule.
- (iii) Payment to Operational Creditors within three years.
- (iv) Sale of part of share of New Age in Seven Points Hotel at Raipur;

PLAN SUBMITTED BY THE BLUE PLAZA:

The Blue Plaza will purchase the Jaipur, Raipur and Singapore hotel for an amount of 125 million USD

On 20th July 2017, RP received claim from PEG Developers Ltd to the tune of Rs. 15 crore.
(Please identify the key issues at this stage)

During the Creditors Committee meeting held on 01st August 2017, certain objections were raised with regards to modification of the resolution plan with regards to reduction in the amount payable to the creditors.

In the COC meeting held on 28th September 2017, the plan was approved with modifications and accordingly, RP filed the plan with NCLT.

NCLT vide its order dated 05th October 2017 approved the Resolution Plan.