



## IBC16's Easy Explainers

### A COMPLETE ACCOUNT OF THE WITHDRAWAL OF A CIRP APPLICATION UNDER IBC, 2016

#### ABBREVIATIONS & ACRONYMS USED

Committee of Creditors	CoC
Corporate Debtor	CD
Corporate Insolvency Resolution Process	CIRP
Financial Creditor	FC
The Insolvency and Bankruptcy Board of India	IBBI
The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016	CIRP Regulations
Insolvency and Bankruptcy Code, 2016	the Code
National Company Law Appellate Tribunal	NCLAT
National Company Law Tribunal	NCLT
Operational Creditor	OC



## INTRODUCTION

One of the core objectives of the Code is rescuing a viable CD, and resorting to liquidation only after making all plausible attempts at revival. The scheme of the Code has put a market-driven mechanism in place for rescuing a stressed CD, in which the FCs of the CD are the final decision-makers. However, this mechanism is not immune to mistakes and an unwarranted CIRP can lead to the death of a viable CD through liquidation.

At its inception, neither the Code nor the various insolvency regulations allowed the withdrawal of a CIRP application after its admittance. Subsequently, to provide an option to reconsider and rectify mistakes while maintaining the policy of non-interference, post-admission withdrawal of CIRP applications was allowed by introducing Section 12A to the Code. Section 12A empowers the Adjudicating Authority to allow an applicant to withdraw the application made to initiate a CIRP under Sections 7, 9 or 10 of the Code, after at least a 90% voting share of the CoC has agreed to it.

## EVOLUTION

### The Origin of Section 12A

**Initially**, Rule 8 of the [Insolvency and Bankruptcy \(Application to Adjudicating Authority\) Rules, 2016](#) allowed withdrawal of an insolvency application provided such a request was made before it was admitted by the Adjudicating Authority. The rationale behind not allowing post-admission withdrawal was discussed in the case of [Parker Hannifin India Pvt. Ltd. v. Prowess International Pvt. Ltd.](#) (May 2017).

## **Conflict with Regulation 30A and the Gradual Development**

The originally inserted Regulation 30A of the [CIRP Regulations](#) provided for a time stipulation that was not provided under Section 12A. The Regulation required the withdrawal application to be made before inviting expressions of interest, under Regulation 36A of the CIRP Regulations.

Despite this position, in the case of [V. Navaneetha Krishnan v. Central Bank of India, Coimbatore & Another](#) (“V. Navaneetha Krishnan”) (August 2018), the NCLAT held that any person who satisfies the requisite majority of creditors with an offer and persuades them to withdraw the application for CIRP is not barred from doing so under Section 12A even at the liquidation stage. Regulation 30A was not mentioned in this case.

However, in November 2018, in the case of [Vimal Chandrunwal v. Brilliant Alloys Private Limited](#), NCLT rejected the plea for withdrawal of CIRP application under Section 12A on the grounds of the prohibition provided in Regulation 30A, as the expression of interest had already been invited.

Shortly after this order, another question arose in the case of [Francis John Kattukaran v. The Federal Bank Ltd. & Anr.](#) – whether the application for withdrawal has to be filed by the CIRP applicant as provided under Section 12A, or by the Resolution Professional as provided under Regulation 30A? The NCLAT held that Regulation 30A cannot override the substantive provision of Section 12A, and therefore, a withdrawal application had to be filed by the applicant under Sections 7, 9 or 10 of the Code, as the case may be.



The NCLT observed in this case that after admission, a CIRP application “acquires the character of a representative suit”. The point made in the case was that the mechanism provided in the Code involves public announcements and inviting claims from creditors, and therefore it ceases to be a concern confined between the applicant creditor and the CD.

However, in the case of [Lokhandwala Kataria Construction Private Limited v. Nisus Finance and Investment Managers LLP](#) (July 2017), the Supreme Court allowed post-admission withdrawal by exercising its plenary powers under Article 142 of the Constitution, as the Corporate Debtor and the creditor who filed the CIRP application managed to reach a compromise with respect to the default. Shortly after, post-withdrawal admission was similarly allowed in the case of [Mothers Pride Dairy India Pvt. Ltd. v. Portrait Advertising and Marketing Pvt. Ltd.](#)(July 2017).

Finally, in the case of [Uttara Foods and Feeds Pvt. Ltd v. Mona Pharmachem](#) (November 2017), the Supreme Court was directed to incorporate a provision to allow post-admission withdrawal, to prevent every such application from being filed before the Supreme Court.

Accordingly, on June 06, 2018, the [Insolvency and Bankruptcy Code \(Amendment\) Ordinance, 2018](#) was passed, by which Section 12A was inserted into the Code. Soon after, on July 03, 2018 Regulation 30A was introduced through [The IBBI \(Insolvency Resolution Process for Corporate Persons\) \(Third Amendment\) Regulations, 2018.](#)



The positions taken in both of these orders were reiterated in the case of [Federal Bank Ltd. v. Trio Fab \(I\) Pvt. Ltd.](#) – that the additional time stipulation in Regulation 30A could not be ignored, and that the application for withdrawal had to be filed by the applicant and not the Resolution Professional.

It was only in the case of [Brilliant Alloys Private Limited v. S. Rajgopal & Ors](#) (“Brilliant Alloys”) (December 2018) that the Supreme Court held that Regulation 30A had to be read along with Section 12A and since no time stipulation was present in the main provision of Section 12A, the one in Regulation 30A could not be held to be mandatory. Following the ratio in the case of Brilliant Alloys, the NCLAT in the case of [Navin Heavy Lifter & Anr. v. Canbuild Precast Solutions Pvt. Ltd.](#) (July 2019) allowed withdrawal of a CIRP that was initiated before insertion of Section 12A of the Code.

As can be observed from these judgements, gradually, the provisions for withdrawal of CIRP applications were made flexible through the interpretations in these judgements. In January 2019, the position taken in the case of Brilliant Alloys was reiterated in the landmark judgement of the Supreme Court in [Swiss Ribbons & Ors. v. Union of India & Ors](#) (“Swiss Ribbons”), and supported with the reasoning that exceptional circumstances may render it necessary to allow withdrawal of CIRP after an invitation for expression of interest had been issued.

In consonance with the interpretations in these judgements, Regulation 30A was amended in July 2019 vide [The IBBI \(Insolvency Resolution Process for Corporate Persons\) \(Second Amendment\) Regulations, 2019](#). The substituted Regulation 30A stipulated the withdrawal at three stages – before the constitution of CoC, after the constitution of CoC and after issue of invitation for expression of interest.

## **Supplemented by Rule 11**

In both the cases – Lokhandwala Kataria and Mothers Pride, the Supreme Court held the NCLAT’s judgment in these respective cases to be correct, that it is beyond the powers of NCLAT under Rule 11 of the [NCLT Rules, 2016](#) to allow post-admission withdrawal of CIRP applications. Section 12A, which was subsequently inserted, required approval by 90% of the voting share of CoC for withdrawal of a CIRP application. This created a lacuna, leaving no provision for withdrawal of a CIRP after it had initiated but before the constitution of CoC. This provision was clarified in the Swiss Ribbons case, wherein the Supreme Court held that the inherent powers of NCLT under Rule 11 of the NCLT Rules, 2016 include the power to allow withdrawal of CIRP application before the constitution of CoC.

Following the decision in the Swiss Ribbons case, the application of Rule 11 in matters of post-admission withdrawal was witnessed in the case of [Jogendra Kumar Arora v. Dharmendra Sharma & Ors.](#) (“Jogendra Kumar Arora”) (February 2019). In this case, the OC had filed an application under Section 9 of the Code for initiation of CIRP against the CD, but later they reached a settlement. Consequently, the CD sought withdrawal of the admitted application. The NCLAT allowed the withdrawal in the exercise of its powers under Rule 11 of the NCLT Rules, 2016, and rejected the intervening applications of eight FCs.

## **Interface with Section 29A**

In the V. Navaneetha Krishnan case, the NCLAT held that any person who is not barred to present a resolution plan under Section 29A of the Code may make an offer and convince the requisite majority of the CoC for withdrawal of the CIRP application based on such offer, even at the liquidation stage.



Therefore, initially, the position laid down by this judgment was that a promoter or a shareholder, barred from moving a resolution plan under Section 29A, is also barred from making a settlement offer and moving an application for withdrawal of CIRP based on such offer.

This position was maintained in the case of [M/s Andhra Bank v. M/s Sterling Biotech Ltd. & Ors.](#) (May 2019). In this case, the CoC accepted a one-time settlement ("OTS") from the promoters of the CD and also gave their approval for withdrawal of CIRP under Section 12A. However, the promoters of the CD were ineligible for moving a resolution plan under Section 29A. The NCLT noted the dictum given in the case of [Chitra Sharma v. Union of India](#), that Section 29A was aimed at preventing the persons responsible for the insolvency of the CD from participating in CIRP in the larger public interest. Accordingly, the NCLT held that an offer in the guise of an OTS would defeat the purpose of bar imposed by Section 29A of the Code and rejected the withdrawal application under Section 12A, as it was based on such an OTS.

This decision was set aside by the NCLAT in [Shweta Vishwanath Shirke & Ors. v. The Committee of Creditors & Anr.](#) (August 2019). The appeal was preferred by the employees of the CD. The NCLAT noted the observation made in the Swiss Ribbons case that shareholders and erstwhile promoters may make settlement offers to the CoC to convince them for withdrawal of CIRP application, under the design of Section 12A. It was clarified in this order that such settlement offers are untouched by Section 29A and that the bar under it is inapplicable to Section 12A.

A similar position was taken by the NCLAT in the case of [Bank of Baroda, On behalf of the CoC of Veda Biofuel Ltd. v. Mr. Sisir Kumar Appikatla, Resolution Professional for Veda Biofuel Ltd. & Ors](#) (July 2020). In this case, CIRP was initiated by the OC under Section 9 of the Code. Mr. P. Vijay Kumar, an erstwhile promoter along with a Resolution Applicant, entered into a settlement agreement with the OC. A restructuring plan was also a part of this settlement agreement. Subsequently, the erstwhile promoter and the Resolution Applicant jointly moved an application for withdrawal of CIRP under Section 12A before the CoC. The CoC ignored the Section 12A application and approved the restructuring plan instead, treating it as a resolution plan. The erstwhile promoter was ineligible to place a resolution plan before the CoC under Section 29A. As a result, the NCLT rejected the restructuring plan holding that it had been 'camouflaged' as a resolution plan by the CoC, and instead passed a liquidation order against the CD in accordance with Section 33 of the Code.

The NCLAT upheld the order, reiterating the difference between a restructuring plan or settlement offer and a resolution plan. It was made clear that the bar of Section 29A does not apply to a settlement when the CoC's decision for withdrawal of CIRP is based on it. Accordingly, CoC can only approve or reject a withdrawal application that is based on a settlement offer, but cannot circumvent the bar of Section 29A by treating it as a resolution plan.



## RECENT REINFORCEMENTS

The Supreme Court of India discussed another facet of Section 12A in the case of [Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr.](#) (March 2021). In this case, the Court deliberated whether Section 29A was inapplicable to a scheme of compromise and arrangement under Section 230 of Companies Act, 2013, similar to its inapplicability to a settlement offer made prior to withdrawal under Section 12A of the Code. The Court answered this question in the negative while paying attention to the difference between the two mechanisms. It observed that a scheme of compromise or arrangement is binding on all the stakeholders of a CD and is aimed at providing a 'clean slate' to the CD, similar to Section 29A. This is distinct from a 'withdrawal simpliciter' under Section 12A of the Code, which simply restores status quo ante rather than culminating into a resolution and does not provide a clean slate to the CD. Therefore, a scheme of compromise or arrangement under Section 230 of the Companies Act is hit by the bar of Section 29A of the Code, unlike Section 12A of the Code.

Not long after, in [Sintex Plastics Technology Ltd. v. Zielem Industries Pvt Ltd & Anr](#) ("June 2021"), the OC had initiated CIRP against the CD and the claim was settled by the parent company of the CD. The NCLT reaffirmed the principles laid down in the cases Swiss Ribbons, Brilliant Alloys and Jogendra Kumar Arora, and held that Regulation 30A of the CIRP Regulations was directory in nature and therefore an application of withdrawal does not have to be placed through a Resolution Professional necessarily.

Lastly, the most recent decision involving the withdrawal of CIRP was taken in [Karaipudur Common Effluent Treatment Plant Private Limited v. Eco Pure Technologies \(P\) Ltd.](#) (July 2021). In this case, an application was filed against the order of the NCLT wherein it admitted a Section 9 application for initiation of CIRP against the CD.

The NCLT had granted time to the CD for settlement with the OC and stalled the admission, but requests for a further time extension were rejected and the application was admitted. The CD was successful in reaching a settlement post-admission of the CIRP application when the CoC had not been constituted. The NCLAT upheld the admission, but since a settlement had been reached and delay occurred due to the Covid-19 pandemic, in the interest of justice it directed the CD to file for an application for withdrawal of CIRP.

## **CONCLUDING REMARKS: DEFINING THE CONTOURS OF WITHDRAWAL OF A CIRP APPLICATION**

The provision for withdrawal of the CIRP application adds the necessary flexibility to the insolvency resolution mechanism in India. The provision is now frequently resorted to, particularly by the erstwhile management of the CDs. After undergoing a catena of alterations, the current position of law concerning the withdrawal of a CIRP application is as follows –

- Different provisions allow withdrawal of a CIRP application at different stages of CIRP– Rule 8 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 allows withdrawal before admission, Rule 11 of the NCLT Rules, 2016 allows withdrawal at the stage after the admission but before the constitution of CoC, and Section 12A after the constitution of CoC.
- Gradual judicial developments on the subject have rendered Regulation 30A to merely exist on paper.
- A settlement offer made by any person to persuade the applicant creditor or the requisite majority of CoC for withdrawal of CIRP application is not hit by the bar of Section 29A.
- As long as the CoC is not constituted, any resistance by FCs towards the withdrawal of CIRP application is futile.