NUALS
IBC E- NEWSLETTER

Vol. 4, December, 2018 – February, 2019

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LIST OF ABBREVIATIONS

S. NO.	ABBREVIATION	MEANING
1.	&	And
2.	AA	Adjudicating Authority
3.	AT	Appellate Tribunal
4.	BIFR	Board for Industrial and Financial Reconstruction
5.	BoD	Board of Directors
6.	CA	Company Appeal
7.	CD	Corporate Debtor
8.	CDR	Corporate Debt Restructuring
9.	CIRP	Corporate Insolvency Resolution Process
10.	CoC	Committee of Creditors
11.	COMI	Centre of Main Interests
12.	CPSLR	The Centre for Parliamentary Studies & Law Reforms
13.	DRT	Debts Recovery Tribunal
14.	ECB	External Commercial Borrowing
15.	ED	Enforcement Directorate
16.	EoI	Expression of Interest
17.	FC	Financial Creditor
18.	Govt.	Government
19.	HC	High Court
20.	Hon'ble	Honourable
21.	IBBI	Insolvency & Bankruptcy Board of India
22.	IBC	Insolvency & Bankruptcy Code, 2016
23.	IRP	Interim Resolution Professional
24.	NCLAT	The National Company Law Appellate Tribunal
25.	NCLT	National Company Law Tribunal
26.	No.	Number
27.	NPA	Non-Performing Asset
28.	OC	Operational Creditor
29.	OTS	One time settlement
30.	PMLA	Prevention of Money Laundering Act, 2002
31.	r.w.	Read with
32.	RBI	Reserve Bank of India
33.	RP	Resolution Professional
34.	RRC	Revenue Recovery Certificate
35.	S./Ss.	Section/Sections
36.	SARFAESI	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002
37.	SBI	State Bank of India
38.	SC	Supreme Court
39.	SEBI	Securities & Exchange Board of India
40.	SFIO	Serious Fraud Investigation Office
41.	SICA	Sick Industrial Companies Act, 1985
42.	u/S.	Under Section

43.	v.	Versus
44.	Vol.	Volume
45.	w.r.t	With reference to

KEY HIGHLIGHTS				
Serial No.	Case Name	Date	Key Findings	Page No.
SUPREME COURT OF INDIA				
1.	**Jaipur Metals & Electricals Employees Organization v. Jaipur Metals & Electricals Ltd. & Ors., Civil Appeal No. 12023 of 2018 [arising out of SLP(Civil) No.18598 of 2018]**	**December 12, 2018**	The ineligibility u/s 29 A of the Code can be removed if the overdue amounts are paid along with the interest & charges relating to NPA. Only those who foul provisions of S.29A will not be eligible to submit resolution plans.	**27**
2.	**Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajagopal & Ors., Petition(s) for Special Leave to Appeal (C) No(s). 31557/2018**	**December 14, 2018**	Limitation Act is procedural in nature & shall apply retrospectively.	**27**
3.	**Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd., Civil Appeal No. 818 of 2018**	**January 22, 2019**	When the claims were time barred & subject to arbitration, an application can't be accepted u/s 9. Since there subsits a 'dispute in existence' between the parties. The Code is not a substitute for a recovery forum.	**27**
4.	**Swaraj Infrastructure Pvt. Ltd. v. Kotak Mahindra Bank Ltd., Civil Appeal No. 1291 Of 2019 (Arising out of SLP (Civil) No.6221 Of 2018)**	**January 29, 2019**	A secured creditor can file a winding up petition even after obtaining a decree from DRT & a recovery certificate thereon. The debtor cannot resist a winding up petition which is otherwise maintainable without there being any *bona fide* defence to the same.	**28**
5.	**Vijay Kumar Jain v. Standard Chartered Bank, Civil Appeal No. 8430 of 2018**	**January 29, 2019**	Disbanded BoD of the CD have right to gain access regarding resolution plans, as the position of directors is similar to that of an OC. Eventhough, the BoD have no voting rights their participation in the meetings is vital for them to get a favourable resolution plan. However, a director who is an FC of the company would be disqualified from participation in the CoC meetings & therefore cannot claim access to the resolution plans.	**29**

6.	**K. Sashidhar v. Indian Overseas Bank & Ors., Civil Appeal No. 10673 of 2018**	**February 5, 2019**	The voting share of 75% for approval of the resolution plan was upheld as mandatory. AA can order liquidation only if 75% requirement is not reached, it cannot go into the justness of rejection of the commercial decision taken by the CoC. NCLT & the NCLAT do not have the jurisdiction to reverse the commercial wisdom of dissenting FCs.	**29**
NCLAT				
7.	**Shyam Sunder Bhatter v. Punjab National Bank & Anr., CA (AT) (Insolvency) No. 728 of 2018 with Rockside Impex Pvt. Ltd. v. Punjab National Bank & Anr., CA (AT) (Insolvency) No. 729 of 2018**	**December 3, 2018**	A guarantor is not a 'necessary party' for admission of an application u/S. 7 of the IBC.	**29**
8.	**Export-Import Bank of India & Anr. v. Astonfield Solar (Gujrat) Pvt. Ltd. & Anr., CA (AT) (Insolvency) No. 754 of 2018**	**December 4, 2018**	Shareholders have a right to approve or disapprove, regarding the decision to proceed u/S. 10 of the IBC. The same cannot be curtailed by the 'Deed of Pledge'.	**30**
9.	**Alok Kaushik v. ASREC (India) Ltd., CA (AT) (Insolvency) No. 760 of 2018**	**December 7, 2018**	IRP is entitled to payment of fees as approved by the CoC & he should not be allowed to wait for liquidation.	**30**
10.	**The Dhar Textile Mills Ltd. v. Asset Reconstruction Company (India) Ltd., CA (AT) (Insolvency) No. 11 of 2019**	**December 7, 2018**	The speed, within which NCLT is to ascertain the existence of a default from the records of the IU or on the basis of evidence furnished by the FC, is important. If NCLT is satisfied that a default has occurred, the application must be admitted unless it is incomplete.	**30**
11.	**Sanjay Kumar Ruia v. Catholic Syrian Bank Ltd. & Anr. CA (AT) (Insolvency) No. 560 of 2018**	**January 3, 2019**	Fast Track CIRP u/S. 55 cannot be invoked against those CDs whose assets & income are not below a level as notified by Central Govt. After completion of 270 days, the CoC will have no jurisdiction to replace RP u/S. 22 of the IBC. Also CoC is required to determine the resolution cost including resolution fee payable to the RP and not AA.	**30**

12.	**Alloysmin Industries v. Raman Casting Pvt. Ltd., CA (AT) (Insolvency) No. 684 of 2018**	**January 21, 2019**	Demand notice u/S. 8(1) can be served at the registered/ corporate office & the same should be considered as valid service.	**31**
13.	**Ranvir Ranjit v. Vijay Vakharia & Ors., CA (AT) (Insolvency) No. 646 of 2018**	**January 22, 2019**	CoC has the right to decide whether any FC can receive amounts under assignment deed.	**31**
14.	**Assam Company India Ltd. v. Numazar Dorab Mehta & Ors., CA (AT) (Insolvency) No. 82 of 2019**	**January 23, 2019**	An appeal filed by an erstwhile director against an order allowing parties to raise their pleas before Special Referee is not maintainable if an order is already passed u/S. 31 of the IBC	**31**
15.	**Sanjeev Azad & Anr. v. Punjab National Bank & Anr., CA (AT) (Insolvency) No. 65 of 2019**	**January 23, 2019**	The meaning of 'debt' read with S. 3(11) includes even a disputed claim & the CD is only entitled to take the plea that the amount is not payable in law or in fact.	**31**
16.	**S.C. Sekaran v. Amit Gupta & Ors., CA (AT) (Insolvency) No. 495 & 496 of 2018**	**January 29, 2019**	A company can be sold as a going concern even during its liquidation & the liquidator can carry on the business of the company for its beneficial liquidation.	**31**
17.	**M/s Dyenpro Pvt. Ltd. v. Mr. V. Nagarajan, CA (AT) (Insolvency) No. 229 of 2018**	**January 30, 2019**	AA cannot decide claims & counter-claims u/S. 60(5) of the IBC if the claim is not against the CD or its subsidiaries.	**32**
18.	**Shailesh Sangani v. Joel Cardoso, CA (AT) (Insolvency) No. 616 of 2018**	**January 30, 2019**	Interest is not a sine qua non of FD & a long term borrowing by CD to boost financial health would be commercial borrowing.	**32**
19.	**Mohan Kumar Chimar v. Indian Base Metals Co. Ltd. & Anr., CA (AT) (Insolvency) No. 105 of 2019**	**February 1, 2019**	A party can also file separate application u/S. 7 even after service of the notice u/S. 8(1) of the Code. An application u/S. 9 can be modified as S.7 application if all the requirements under S.7 are satisfied.	**32**
20.	**M/s Prasad Gempex v. Star Agro Marine Exports Pvt. Ltd. & Ors., CA (AT) (Insolvency) No. 291 of 2018**	**February 1, 2019**	RP has no jurisdiction to decide the claim of one or other creditor. It was also held that suit or application can be filed even after an order is passed u/S. 31.	**32**
21.	**Vandana Industries Ltd. v. IL & FS Financial Services Ltd. & Anr.,**	**February 1, 2019**	CIRP initiated u/S. 10 by BoD is not maintainable if the shareholders have no knowledge of the same.	**33**

	CA (AT)(Insolvency) No. 630 of 2018			
22.	**Sonal Jayesh Shah v. Sanjeev Gupta & Anr., CA (AT) (Insolvency) No. 110 of 2019**	**February 4, 2019**	The body which is to oversee the resolution process (CoC) must be consulted before any CD is allowed to settle its claim.	**33**
23.	**Naresh Kumar Dhingra & Ors. v. Indian Overseas Bank & Anr., CA (AT) (Insolvency) No. 73 of 2019**	**February 4, 2019**	Once a debt becomes due & payable, the non-payment of even a part of the debt or an installment amount constitutes a default.	**33**
24.	**Ramanathan Bhuvaneshwari v. Vipin Kumar & Ors., CA (AT) (Insolvency) No. 543 - 544 of 2018 & Zuventus Healthcare Ltd. v. Ramanathan Bhuvaneshwari & Anr., CA (AT) (Insolvency) No. 571 of 2018**	**February 4, 2019**	An application of fraudulent transfer cannot be entertained & referred to the SFIO by the RP if CoC moves an application u/S. 12A.	**33**
25.	**Tata Steel Limited v. Liberty House Group Pte. Ltd & Ors., CA (AT) (Insolvency) No. 198 of 2018**	**February 4, 2019**	The AA can direct CoC to consider an improved financial offer to ensure value maximization. Also, no discrimination is to be made between FCs, OCs & other Resolution Applicants.	**34**
26.	**SBI v. Jai Balaji Industries Limited & Ors., CA (AT) (Insolvency) No. 788 of 2018**	**February 8, 2019**	An application u/S. 7 is maintainable even if a winding up proceeding is pending & no winding up/liquidation order was passed by the HC.	**34**
27.	**Vikas Aggarwal v. SBI & Asian Colour Coated Ispat Ltd. Through Resolution Professional, CA (AT) (Insolvency) No. 587 of 2018**	**February 8, 2019**	The Code gets triggered when the AA approves that the default is rupees one lakh or more.	**34**
28.	**Centrum Capital Ltd. v. Orient Green Power Company Ltd., CA (AT) (Insolvency) No. 508 of 2018 & Centrum Capital Ltd. v. Shriram EPC Ltd., CA (AT) (Insolvency) No. 632 of 2018**	**February 8, 2019**	Application u/S. 9 rejected as there was a pre-existing dispute raised through email stating there was no agreement to pay the full amount and the agreement letter didn't bear signatures of both the parties.	**35**
29.	**Srei Infrastructure Finance Ltd. v IDBI Bank Ltd & Anr., CA (AT) (Insolvency) No. 126 of 2019**	**February 11, 2019**	A party cannot intervene at the admission stage of an application. Once the application is accepted or rejected only then issues regarding the cause of actions can be raised.	**35**

NCLT				
30.	**Mr. Puneet Kumar Jindal (HUF) through Karta Mr. Puneet Jindal v. M/s Crown Realtech Private Limited, C.P. No. IB-769 (PB)/2018**	**December 3, 2018**	U/S. 5(8) of the Amended Code, 2018 home buyers can initiate CIRP against defaulting builder/ developer as FCs.	**35**
31.	**Metco Tracom Ltd. v. M/s Associated Machinery Corporation Limited, CP (IB) 297/ALD/2018**	**December 4, 2018**	CIRP cannot be initiated u/S. 9 if there was no assignment or transfer of debt to the Applicant u/S. 5(20).	**35**
32.	**Union Bank of India v. Era Infra Engineering Limited, C.A. No. 997(PB)/2018 IN C.P. No. IB-190(PB)/2017**	**December 6, 2018**	A loan purchase agreement, non-disposal undertaking, & a shortfall arrangement can be considered as contracts of guarantee. The amount can be considered as 'financial debt' as per S. 5(8) for initiation of the application under u/S. 7 of the Code.	**36**
33.	**IDBI Bank Ltd. v. Jaypee Infratech Ltd, C.A. No. 225/2018 in C.P No. (IB)77/ALD/2017**	**December 10, 2018**	The object of Regulation 13(2) of IBBI Regulations, 2016 is to maintain transparency regarding the claim of the creditors & to determine their voting shares. It does not violate the right to privacy of any of the allottees.	**36**
34.	**Praveen Kumar Mundra v. CIL Securities Ltd, CP (IB) No.339/HDB/2018**	**December 10, 2018**	A financial service provider is not a "CD" & insolvency proceedings cannot be initiated u/S. 9 of the Code.	**36**
35.	**In the matter of AML Steel & Power Ltd., MA-630-2018 In CP-632-IB-2017**	**December 11, 2018**	RP along with CoC were unable to devise a resolution plan due to non-cooperation of the promoters in providing physical possession of the factory of CD. Hence, the tribunal u/S. 19 application excluded 90 days of the CIRP period in light of the genuineness of the efforts made by the RP relying on the case of *Quinn Logistics India Pvt. Ltd.* v. *Mack Softech Pvt. Ltd.*	**37**
36.	**M/s The Great Indian Linen & Textile Infrastructure Company Pvt. Ltd. v. Mr. Raghvendran, MA-181-2018 In CA-61-2018 In CP-510-IB-2017**	**December 11, 2018**	Limitation Act is applicable to the claims filed before IRP/Liquidator.	**37**

37.	**In the matter of Jaypee Infratech Ltd., C A No. 223 & 266-2018 In CP No. (IB) 77-ALD-2017**	**December 13, 2018**	Threshold are directory, if 50% of the CoC consists of Real Estate class of Credits and there is a deadlock in passing resolutions. But threshold are mandatory for the purposes of withdrawal of the application, the approval of resolution plan, & liquidation.	**37**
38.	**In the matter of Merchem Ltd., MA-523-2018 In CP-689-(IB)-CB-2017**	**December 13, 2018**	Resolution applicant has a right to be heard & to attend the meetings of CoC.	**37**
39.	**In the matter of Nicomet Industries Ltd., CP 619-IBC-NCLT-MAH-2018**	**December 14, 2018**	Dispute not raised by CD in reply to S. 8 demand notice is belated & spurious.	**37**
40.	**In the matter of Metal Closures Pvt. Ltd., C.P. (IB) No.103-BB-2018**	**December 14, 2018**	Unintentional non-payment, delay due to laches & limitation cannot be claimed as a defence. If the loan disbursed is not paid, it is deemed to be a continuous cause of action.	**37**
41.	**Anant Overseas Private Limited v. Global Houseware Limited, CA No. 884(PB) of 2018, CA No. 190(PB) of 2018 & CA No. 626(PB) of 2018**	**December 19, 2018**	The tribunal can interfere with the decisions of CoC in relation to the legal aspects other than the commercial aspects.	**38**
42.	**In the matter of Kiev Finance Ltd., IA No. 905-KB-2018 In CP(IB) No.110-KB-2018**	**December 20, 2018**	The order of liquidation passed cannot be reviewed or revoked by the tribunal passing it if the order is appealable.	**38**
43.	**Satyanarayan Malu v. SBM Paper Mills Ltd., C.P (IB)-1362(MB)-2017**	**December 20, 2018**	CD can withdraw applicaton u/S.10 application if OTS is reached & the same is a more viable option than liquidation.	**38**
44.	**ICICI Bank Ltd. v. Unimark Remedies Ltd., CP No. 197-2018**	**December 21, 2018**	CoC rejecting a resolution plan without even looking into its merits acts against the spirit of IBC.	**38**
45.	**M/s Algor Supply Chain Solutions Pvt. Ltd v., CP (IB) NO. 78/BB/2018**	**January 8, 2019**	A petition u/S. 9 should be filed with an intention to initiate CIRP and not to recover outstanding amounts.	**39**
46.	**M/s Orchid Pharma Ltd. v. M/s Northstar Health Care Ltd. & Mr. Kailasam Raghavendra Rao., CP/540/IB/CB/2017**	**January 8, 2019**	For an application u/Ss. 45, 49 & 66 of the IBC, the applicant has to prove that the CD carried the business to defraud the creditors or for any fraudulent purpose.	**39**

47.	**In the matter of Rotomac Global Private Ltd., IA No.150-2018 In CP No. (IB)70-ALD-2017**	**January 10, 2019**	There is no repugnancy in the procedure followed by PMLA authorities & AA. Also, one authority cannot interfere with the functions of another.	**39**
48.	**In the matter of Visa Infrastructure Limited, C.P.(IB) No. 23-KB-2018**	**January 11, 2019**	A debt includes any obligations or liabilites created as per the agreement of guarantee. No debt is payable by the CD upon performance of the terms of guarantee.	**39**
49.	**In the matter of Kindle Developers Pvt. Ltd., C.A. No. 815-C-II-ND-2018 In C.P. No. IB – 470-ND-2017**	**January 14, 2019**	If there exist a reasonable cause, the AA/AT can 'exclude a certain period' for counting the total period of 270 days.	**40**
50.	**In the matter of Crest Steel & Power Private Limited CP 577-I&B-NCLT-MAH-2018**	**January 14, 2019**	To see whether a dispute exists the AA shall see that the dispute is not a feeble legal argument or an assertion of fact unsupported by evidence.	**40**
51.	**Mr. Rajendra Bandal v. M/s Forever Entertainment Pvt. Ltd., CP.(IB)-292/(MB)/2018**	**January 21, 2019**	CD cannot take the defence that default in payment occurred due to the omissions of erstwhile directors.	**40**
52.	**Mr. Qamruddin Faizi v. Kaizen AAC Blocks Pvt. Ltd., CP.(IB)-2668/(MB)/2018**	**January 23, 2019**	If shares are not allotted & advance not refunded, the money will be treated as a "Deposit" and it could be considered as "Financial Debt" u/S. 5(8) of the Code.	**40**
53.	**Madhya Pradesh State Industrial Development Corporation Limited v. M/s Siddharth Tubes Ltd., CP. No. (IB) 67/7/NCLT/AHM/2018**	**January 24, 2019**	An application can be admitted against the CD where its intention is to prolong the claim by approaching different forums.	**41**
54.	**IDBI Ltd. v. Amar Industries Ltd., CP (IB) 1053 (MB) -2017**	**January 29, 2019**	CD is liable to be punished u/S. 77(a) of IBC for suppression of material facts while filing an application u/S. 10.	**41**
55.	**Essar Steel Asia Holdings Ltd. v. Satish Kumar Gupta, CP (IB) No. 39-7-NCLT-AHM-2017 & CP (IB) No. 40-7-AHM-2017 with Inv. P. No. 77-2018 in IA No. 430-NCLT- AHM -2018**	**January 29, 2019**	The application for consideration of OTS before permitting withdrawal of application was held to be not maintainable as it would dilute the mandate of SC in Arcelor Mittal's case.	**41**

56.	**Shri Veeraganapathi Steels Pvt. Ltd., CP-229-IB-2018**	**January 30, 2019**	There can be no exclusion of time from the 270-day period on the ground of non-cooperation by promoters.	**41**
57.	**Sai Enterprises Pvt. Ltd. v. Florind Uppers Pvt. Ltd., CP/1471/IB/2018**	**February 1, 2019**	CIRP cannot be initiated for a time barred debt. The acknowledgment of debt u/S. 18 of the Limitation Act, 1963 would prevail over S. 25 of the Contract Act, 1872.	**41**
58.	**Bank of Baroda v. Neo Infrastructure Pvt. Ltd., C.P. No. (IB) – 875 (PB)/2018**	**February 1, 2019**	A petition filed by an appointee of the Bank (FC) is valid if Board issues a circular authorising him to sign & execute documents.	**42**
59.	**Nuvoco Vistas Corporation Ltd. v. Maxout infrastructure Pvt. Ltd., IB-433-ND-2018**	**February 1, 2019**	Pending of winding up petition before the HC is not a bar to initiate CIRP if no official liquidator is appointed & no winding up order is passed.	**42**
60.	**M/s Hassan Brothers v. M/s Keller Ground Engineering India Pvt. Ltd. [CP-419- (IB)-CB-2018]**	**February 4, 2019**	CD cannot claim that debt due under a contract to be vitiated by frustration if the contract was agreed to be performed despite strikes, fire, floods etc.	**42**
61.	**Dr. Ramakant Suryanath Pande v. C.S. Prakash K. Pandya, CP No. 870/IBC/NCLT/MB/MAH/2017**	**February 5, 2019**	RP is not an AA & the role of RP is only to confirm that the claims received are true & correct.	**42**
62.	**Good Value Financial Services Pvt. Ltd. v. Landscapes LLP, CP (I&B) 586/NCLT/MB/MAH/2018**	**February 11, 2019**	If there is nothing on record to show that Financial Debt existed the application u/S. 7 is not maintainable.	**42**
63.	**Dr. Vikram Goyal v. M/s Metro Mas Hospital Pvt. Ltd. Company Petition No. IB- 1184/ND/2018**	**February 11, 2019**	If the CD does not appear before the tribunal, ex-parte order can be passed admitting the application u/S. 9(5) & moratorium can be declared u/S. 14(1).	**43**
64.	**SREI Infrastructure Finance Ltd. v. Sterling International Enterprise Ltd., M.A 169/MB/2019 in C.P. 402/MB/2018**	**February 12, 2019**	S.238 of IBC will prevail over S. 71 of PMLA. The AA under PMLA has no jurisdiction & cannot attach property as the same is hit by S. 14 of the Code.	**43**
65.	**Asset Reconstruction Company (India) Pvt. Ltd. v. Shivam Water Treaters Pvt. Ltd., C.P. No. (IB) 1882(MB)/2018**	**February 18, 2019**	RP acts as a Court Officer while discharging his duties. The non-compliance with RP's directions	**43**

			will be deemed as Contempt of Court.	
66.	**PAN Chemicals INC v. M/s Sainath Texport Limited, CP (IB) NO.56/Chd/Hry/2018.**	**February 20, 2019**	RP shall act as liquidator unless replaced by AA. All necessary provisions & regulations relating to the liquidation process shall be strictly complied with.	**43**
67.	**Standard Chartered Bank v. Prag Distillery Private Limited, CP (I&B) 1067/NCLT/MB/2017.**	**February 21, 2019**	A transaction is considered a preferential transaction u/S. 43 only if it is entered into 2 years before the commencement of the CIRP in case of a related party & 1 year with any other person.	**44**

SPECIAL INTERVIEW

[Suharsh Sinha, Partner, AZB & Partners, Mumbai.]

1. According to the decision in *TATA Steel Limited* v. *Liberty House Ltd. & Ors.*[1], it has been held that only the votes of the members present for the meeting will be taken into account to meet the threshold for approving an agenda whereas the CIRP regulations (No. 25 & 26) paint a different picture (by allowing e-voting). How can this be harmoniously construed?

The judgment of the NCLAT requires rethinking. Due consideration has to be given to the BLRC report & the underlying intention for the minimum requirement of voting criteria. Initially, the joint lender forum which was earlier under the RBI restructuring mechanism required to consent in terms of percentage as well as no.requirement for presence. It was found that many important decisions were stuck due to lack of minimum presence requirement. The Drafting Committee felt that the no.requirement may be counter-productive as a meeting might not be attended by all the members. Keeping in mind the difficulty in physical presence, voting by video-conferencing & e-voting was made possible. Moreover, it was observed in a recent Apex Court decision, *K. Shashidhar* v. *Indian Overseas Bank*,[2] that voting should not be on the basis of present & voting but on the basis of overall percentage. Thus, in this light, the present decision requires to be revisited.

2. Recently, a committee has been set up by IBBI under UK Sinha to recommend facilitation of group insolvency for corporate groups. What is your take on it being a useful aid in future?

Group insolvency has been an entrenched issue not just in India but globally. In a country like India, large industrial houses tend to be organized as conglomerate group companies. The structure is such that a company functions across industries. *Firstly*, the lending structure leads to complexities as in a particular group, companies may have taken a corporate guarantee from other group companies. In case one company goes into bankruptcy, the primary debtor/guarantor company may not be taken into bankruptcy at the same time. This may raise issues of double counting in calculating the financial debt of the company without resolving the stress of the other entity. *Secondly*, the existence of inter-company relationships owing to common customer base, supply base, other related party transactions, make it difficult to have a holistic resolution in resolving bankruptcy of one without taking into account the other. *Thirdly*, group companies are organized in a defensive structure adopted by promoters where critical supply chain arrangements are sourced from within the group. If one of them becomes bankrupt, the new bidder becomes handicapped unless access is obtained to all the other companies as well.

These can be tackled through two ways. Procedural consolidation with respect to the appointment of resolution professionals, jurisdiction of NCLT, day & time of meetings, will ensure coordination. Substantial consolidation can be used by merging the debts, liabilities, & assets of all companies & resolving the dispute with respect to this one mega-entity. It should be noted that the notion of separate legal personality is at risk here.

[1] TATA Steel Limited v. Liberty House Ltd. & Ors., (CA)(Insolvency) No. 198 of 2018.

[2] Civil Appeal No. 10673 of 2018

3. There can be a situation when default is made even after the resolution plan is accepted & the debt has been restructured. This will result in CIRP being initiated again. Should there be some mechanism of performance guarantee to ensure that the vicious cycle does not continue?

In many cases like *Amtek Auto Ltd.*[3] & *Adhunik Metaliks Ltd.*,[4] Liberty House emerged as a winning bidder but was unable to perform. Consequently, the company can be liquidated & penal consequences of penalty & fine will be imposed. The applicant, the company & the CD will be adversely affected. Although deterrence is provided by the IBC, a financial cost should be imposed on the applicant. This should be supplemented with a performance guarantee of a significant amount. An amendment has been made to the regulations to make provision for an earnest money deposit. A note of caution is that high earnest money deposit will dissuade genuine bidders from engaging. It also raises the cost of acquisition for bidders. These two approaches should be well-balanced & need to be decided on a case by case basis. Alternatively, in case the plan fails, an option of negotiation with other bidders should exist for the bidders.

4. What is your opinion on the latest developments with regard to the position decided in the *Sterling Case*[5] involving a variance between the proceedings under IBC & the Prevention of Money Laundering Act, 2002?

This decision should be welcomed. The assets of the company are pledged or secured with the senior lenders. At the same time, an attachment is also envisaged under PMLA for payment of a fine. Using principles of statutory interpretation, the latter law, IBC, shall prevail, which has a non-obstante clause. Moreover, PMLA dues should be considered under the category of other debtors in order to eliminate the chance of undue priority to them. With respect to the deterrence effect, the personal liability imposed on directors under PMLA still exists.

5. In reference to the clash between the IBC & S. 138 of the Negotiable instruments Act, what would be the position with regard to the meaning of the word 'proceedings' under S. 14 of the Code so as to exclude all criminal proceedings (even if the given punishment is just fine)?

The IBC does not proscribe any stay on criminal proceedings which ensures their continuance under S.138 of the Negotiable Instruments Act. A fine or penalty imposed on the individual (director or promoter) as a personal liability will remain unaffected & can be enforced. Furthermore, any matter under IBC or the Companies Act which has to be referred to a special criminal court (imprisonment or penalty), will fall outside the ambit of the moratorium.

6. What is the remedial relief that the contractual counter parties might resort to once the termination of existing contractual arrangements takes place in accordance with the Resolution Plan?

A resolution plan comes into effect on the condition that certain onerous contracts will automatically stand terminated. This is relevant in cases of power company distress which have long term power purchase agreements. These have to be revisited & re-negotiated when a new bidder comes in or else the business is rendered unviable. A resolution plan cannot unilaterally alter contractual rights & obligation to exercise undue influence on the CD to adhere to certain terms & conditions. This is against the freedom of contract & fundamental rights. Therefore, a resolution plan

[3] CA Nos. 114/2018 in CP (IB) No. 42/Chd/Hry/2017.
[4] CA (IB) Nos. 422 & 404/KB/2018 in CP (IB) No. 373/KB/2017
[5] SREI Infrastructure Finance Limited v. Sterling SEZ & Infrastructure Limited, M.A. No. 1280 of 2018.

can seek termination of the old contracts & enter into fresh negotiations to avoid these situations.

7. A recommendation has been made by the Insolvency Law Committee for the adoption of the UNCITRAL Model Law on Cross-border Insolvency. What are the issues that might arise in the Indian context?

The most important factor is to determine the centre of main interest for an Insolvency proceeding. If assets are spread over various countries, the hub of these activities has to be determined to decide which law will be applicable. The amount of discretion to be given to the NCLT judges in deciding matters of jurisdiction is still unclear. Moreover, Foreign Insolvency Proceedings can be denied recognition in India on the ground of public policy. The power to determine what constitutes 'public policy' rests with the Central Government. This increases the risk of arbitrariness & the law should either borrow from principles & jurisprudence from other laws & limit executive discretion.

8. What do you think might still be a grey area in IBC?

Contingent liabilities can be considered as a problem area existing in IBC which requires due attention. These are the debts which are not dealt with in the resolution plan. Hence, at the time of crystallization of these debts, they might not get due consideration. Comparing such a contingent creditor with a similarly placed creditor, wherein both the causes of action arose at the same time before the insolvency commencement date, they are not treated equally. This parity, which is detrimental to both the contingent debtor as well as the bidder, should cease to exist.

RECAPITULATION OF INSOLVENCY & BANKRUPTCY CODE, 2016

By: Riya Gulati & Ishita Gulati[6]

The IBC is a prodigious legislation that has offered a uniform & comprehensive single code by consolidating all the insolvency & bankruptcy provisions which were contained in multiple acts & hence withered away the convolution of multiplicity of laws. Consequently, the Code has provided a faster mechanism for the resolution of insolvency cases by fixing the time period for CIRP, maximized the value of assets of the interested parties (i.e. shareholders), fostered entrepreneurship, increased the availability of credit, balanced the interest of all the stakeholders & established a regulatory body. The Code has also created new institutional structure encompassing of a regulator, information utilities, insolvency professionals & adjudicatory mechanisms, that has facilitated in a formal & time bound CIRP & liquidation.

The focal point of the Code is to provide renascence & resolution in a time bound manner to maximize the value of debtor's assets. Prior to the introduction of the IBC, it used to take companies about 4-5 years to dissolve its operations, but now the no. has drastically dropped down to a year. This uniform code has made the procedure more facile & has also engulfed a strong sense of trust in lenders & investors. Despite of constructive outcomes, the constitutionality of the IBC has been challenged.

CONSTITUTIONALITY OF IBC

***Swiss Ribbons Pvt. Ltd.* v. *Union of India*[7]**

A batch of petitioners confronted the constitutional validity of the various provisions of the IBC. The decision of the upholding the constitutionality of the provisions of the IBC is a

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[7] Writ Petition (Civil) No. 99 of 2018.

milestone in the development of the Code. The Court contemplated that the prime focus of the legislation is to ensure revival & protraction of the CD by safeguarding him from its own management & from a corporate obliteration by liquidation. Hence, the IBC is beneficial legislation not only for the creditors but also for the CDs.

For the sake of brevity, the judgment of the Supreme Court on the issues raised by the petitioners has been encapsulated below:

- **The appointment of the members of the NCLT & NCLAT is not discordant to the Apex Court's discernment**

It was alleged that the appointment of the Tribunal members was unconstitutional as it resulted in the judicial members of the Selection Committee to be outweighed by the bureaucrats. The Court contemplated that all the appointments to the NCLT & NCLAT had been made by a Selection Committee composed in accordance with the Apex Court's decision & hence repudiated the challenge regarding the constitutionality of the NCLT & NCLAT. It was also insinuated that the dominion of the HC was taken away as NCLAT have only been constituted in Delhi which has divested the litigants of the expediency of approaching the jurisdictional HC in a state. Hence, the Attorney General reassured to set up Circuit Benches of the NCLAT within a duration of 6 months from the date of the adjudication.

- **The NCLTs & NCLAT are operating under the wrong ministry: Ministry of Law & Justice should regulate the functioning of the Tribunals**

The UoI was directed to obey the discernment of the Constitution Bench of the Court both in letter & spirit. It was held that the administrative support of the tribunals shall fall under the exclusive domain of the Ministry of Law & Justice instead of the Ministry of Corporate Affairs.

- **The divergence between Financial & Operational Creditor is not discriminatory, arbitrary & violative of Art. 14 of the Indian Constitution**

FCs are clearly disparate from the OCs in multitudinous ways & thus, there is an intelligible differentia between the two which has a direct connection to the objects sought to be attained by the Code. It was also pointed out that the OCs are discriminated as they have no vote in the CoC. The Court distinguished between the qualifications of the financial & operational creditors to underpin the exclusion of OCs from the CoC. It held that the FCs (financial institutions & banks) are best equipped to appraise the viability & practicality of the business of the CD as against the OCs who do not have the requisite prowess as they are involved in the supply of goods & services.

- **S. 12A is not in contravention to Art. 14**

S. 12A of the Code was accosted as it prescribes a high threshold limit, requiring 90% approval of the members of the CoC to authorize withdrawal of CD from CIRP. It was held if the CoC arbitrarily rebuffs a just resolution or withdrawal claim, the NCLT & thereafter the NCLAT (u/S. 60 of the Code) can always set aside such decision.

- **Evidence furnished by the private Information Utilities is merely prima facie evidence of default & can be refuted**

It was purported that the private information utilities are not regulated by proper norms & therefore their certification cannot be irrefutable evidence of default. The Court held that the Information Utilities are regulated by stern norms by virtue of which the moment information default is received, it is divulged to all parties & sureties to the debt. The Court contemplated that the certification of default by the Information Utilities is merely prima facie evidence of default, which is confuted by the CD.

- **RP lacks adjudicatory powers**

On the issue whether a RP (which is a non-adjudicatory authority) possess powers of adjudication, the Court elucidated that the RP is accorded administrative powers as opposed to quasi-judicial powers. The RP is a facilitator of the resolution procedure whose administrative functions are supervised by the AA & CoC.

- **Constitutional validity of S. 29A of the Code**

S. 29A of the Code enumerate the persons who are unqualified to be resolution applicants in a CIRP.

It was being argued that S. 29A had retroactively impeded the right of former promoters to engage in the recovery procedure for the CD. In this context, the Court appraised that S. 29A is not retrospective in nature. Also, S. 29A(c) is not constricted to malfeasance. The Court whilst recapitulating the absence of a vested prerogative of the former promoter of a CD to bid for the CD's property, illuminated that malfeasance was not the only ground for disqualification u/S. 29A. This Section provided other grounds which disqualifies a person to submit a resolution plan. Additionally, S. 29A(c) interdicts a person in management/ control of a CD which has remained classified as a NPA for a period of one year as per RBI guidelines. The one-year period in S. 29A(c) was confronted as arbitrary. It was held that neither the policy nor the one-year period can be found fault with as it has been decided by the RBI.

The constitutionality of S. 29A(j) perused with the definition of related party u/S. 5(24A) of the Code was accosted, based on the trepidations concerning disqualifications of relatives of persons as a resolution applicant having no business relationships with the disqualified persons intrinsically. Hence, the Court held that the definition of "related party" contained in S. 5(24A) shall only include the persons who are associated with business activity of the resolution applicant.

In order to ensure that there are copious opportunities to revive the companies, the MSMEs have been exempted from the purview of S. 29A.

- **S. 53 of the Code does not infract Article 14**

The status of OCs in the waterfall provided u/S. 53 of the IBC was expostulated to be inimical to their interest as they rank beneath the other creditors including unsecured financial creditors. The Court upheld the constitutionality of S. 53. The reimbursement of financial debts permeates capital into the economy as the financial institutions & banks can further lend such reimburse money to other entrepreneurs for their business. This rationale creates an intelligible differentia between financial & operational debts, which are unsecured, which is directly allied to the object sought to be achieved by the IBC.

CONCLUSION

In this landmark judgment, the SC upheld the IBC in 'entirety'. This verdict is a crucial decision for the financial institutions & for the economy. It will clean up the bad debt problem of the Indian financial institutions. Hence, by the virtue of the verdict, "*the economy's rightful position has been regained.*"

SECTION 12A – A HALF BAKED PROVISION?

By: Tanvi Prabhu[8]

It is well established that the ideal purpose of civil litigation is conflict resolution which is normally achieved through the active role of courts but also through parties reaching an out of court settlement as allowed by the law. Thus, it is surprising to note, that the IBC, when first enacted, contained Ss. 7, 9, & 10 to initiate CIRP but provided only Rule 8 of The Insolvency & Bankruptcy (AA) Rules, 2016 for withdrawal of application on discretion of the AA, that too, only before its admission.

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The inevitable question of 'whether settlement after the admission of a CIRP could be allowed?', arose in multiple cases. In *Lokhandwala*[9] & *Uttara Foods*[10], the Apex Court discussed Rules 8 & 11 of the CIRP Regulations, 2016 allowing such settlement & withdrawal under Art. 142 of the Constitution of India also directing the competent authority to issue rules addressing this question. The report of the Insolvency Law Committee too recommended amendment of Rule 8 to allow withdrawal after the admission of CIRP.[11] Subsequently, S. 12A was inserted via Amendment Ordinance of 6th June 2018 which gave the AA power to allow withdrawal on application by CIRP applicant with 90% voting share approval of CoC in such manner as "*prescribed*". Also, S. 239 was amended to include "(fa) the manner of withdrawal of an application under S. 12A" giving the Central Government power to make rules for the same. However, on 4th July 2018 the IBBI issued Regulation 30A laying down the procedure for withdrawal & a time limit i.e. before the issue of invitation for EoI. Consequently, The IBC (Second Amendment) Act on 17th August 2018 replaced the word "*prescribed*" with "*specified*" in S. 12A & simultaneously omitted S. 239(fa) as well to make Regulation 30A issued by IBBI completely applicable through S. 240. This led to a weird situation wherein the Central Govt. has made the rules to file for CIRP while the IBBI laid down the procedure for its withdrawal.

Whether the IBBI has overstepped its powers by laying down Reg. 30A (instead of the Central Govt. doing so) or by setting a time limit for withdrawal application at the issue of EoI whilst the Code itself in S. 12A does not provide for any such time constraint is debatable. The implied reason for the time limit seems to be that the CIRP is estopped from being withdrawn once the bidders act on the issue of EoI. Withdrawal after this stage will cause wastage of bidders' time, money & erode the credibility & certainty of completion of the CIRP, thus discouraging bidders from participating in the absence of such assurance. It can also be argued that the extremely high threshold of 90% voting share, along with the requirement that withdrawal application can be filed only by the CIRP applicant who must also furnish a bank guarantee to cover all costs will safeguard bidders' interests. These costs may be made to include payment of damages to the bidders for their expenditure based on the stage at which withdrawal is sought, as ascertained by the AA. Thus, it may stand to reason that only a legitimate & very profitable settlement between the CD & the CoC could cause the fulfillment of the stringent requirements under Reg. 30A.

In the recent case of *Brilliant Alloys Private Limited* v. *Mr. S. Rajagopal & Ors*[12] NCLT, Chennai had refused to allow withdrawal of CIRP though the CD & Creditors were in complete support of the same, only because Reg. 30A imposed the condition of EoI. On Appeal, The Apex Court held that Regulation 30A has to be read along with S. 12A which contains no such time stipulation of withdrawal. Accordingly, the stipulation was construed not mandatory, the only directory depending on the facts of each case. The *Swiss Ribbons*[13] case also quotes that Regulation 30A (1) is directory & not mandatory & AA can decide its applicability by examining each case. Obviously, allowing such determination on a case to case basis will open doors for numerous appeals thus sidelining Reg. 30A. Also, the complete removal of a time limit will influence even extreme cases like that of Essar Steel where a settlement offer is being

[9] Lokhandwala Kataria Construction Private Limited v. Nisus Finance & Investment Managers LLP, Civil Appeal No. 9279 of 2017 (SC).

[10] Uttara Foods & Feeds Private Limited v. Mona Pharmachem, Civil Appeal No. 18520 of 2017 (SC).

[11] Ministry of Corporate Affairs, Report of the Insolvency Law Committee, ¶ 29.2 (Mar. 2018), http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf

[12] Brilliant Alloys Private Limited v. Mr. S. Rajagopal & Ors,, Special Leave to Appeal (Civil) No. 31557 of 2018.

[13] Swiss Ribbons Private Limited & Anr. v. Union of India, Writ Petition (Civil) No. 99 Of 2018.

made at the fag end of the CIRP after the successful bidder's resolution plan has been approved by the CoC.

Undoubtedly, S. 12A has gaping holes. *Firstly*, it does not itself lay down a time limit, neither does it call for nor specifically refuse such a limit. In such a situation, the time limit set by another body (IBBI/Central Govt.) is ultra vires or not can only be decided by the Apex Court. *Secondly*, it consciously does not provide the procedure for withdrawal leading the IBBI to lay down the same. Although one may think that since the CIRP filing procedure was made by Central Govt., it would have been more prudent for the Central Govt. to have laid the withdrawal procedure as well, thus avoiding any confusion regarding the powers of each, in this matter. *Thirdly*, a major flaw which will lead to more litigation is that S. 12A does not lay down the grounds on which the AA may refuse the withdrawal of an application. Improvements need to be made keeping in mind the time bound nature of the Code. An example would be, avoiding burdening of the AA with the case to case analysis for S. 12A by letting this responsibility remain with the CoC. One stop solution is required for all the questions raised above. An effective answer would be to insert a new S. 12A which contains a well reasoned, practically effective time limit for withdrawal, lays down its procedure & also outlines the grounds on which the AA may accept or reject a withdrawal application along with the addition of other necessary changes.

GROUP INSOLVENCY IN INDIA: A SOLUTION OR A PROBLEM

By: Shubh Agrawal & Abhijeet Srivastava[14]

The IBC is one of the most effective mechanisms to recover the debt. According to the recent report of RBI, IBC recovered 41.3% in a financial year, 2018 which was earlier just 12.4% through other debt recovery mechanisms such as the SARFAESI, DRT, & Lok Adalat. IBBI has set up a committee of 11 members under the Chairmanship of former chief of SEBI U.K. Sinha to suggest a suitable framework for "Group Insolvency" in India. Evolution of Group Insolvency will escalate the effectiveness of the resolution process because it gives a chance to the creditors to seek joint proceedings where two or more applications are pending against the corporate group in multiple (NCLT) jurisdictions.[15] This will improve the efficiency of the insolvency process concerning different members of the group companies & will encourage them to coordinate among the group & come up with a rescue plan for the corporate group.[16]

NEED FOR GROUP INSOLVENCY IN INDIA:

Presently, the IBC only provides the framework for the resolution of individual stressed companies. The past experience in sectors like infrastructure shows that holding company goes through the insolvency process leaving behind subsidiary companies. Consequently, it creates difficulty in the resolution of the individual stressed company. As a result, many a times such companies face liquidation which defeats the ultimate purpose of the Code. Contrarily, Group Insolvency will prevent the corporate group from unnecessary

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[15] Sanjeev Krishnan, *Institution of IBC & its objectives*, *in* Decoding the Code: Survey on Twenty One Months of IBC in India (Aug. 2018), https://www.pwc.in/assets/pdfs/publications/2018/decoding-the-code-survey-on-twenty-one-months-of-ibc-in-india.pdf

[16] Deloitte Legal, *Outline of the key EU Regulations, in* A guide to pre insolvency & insolvency proceedings across Europe, (Jan. 2017), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Legal/dttl-legal-deloitte-europe-insolvency-proceedings-guide.pdf

liquidation & will increase the probability of restructuring.[17]

The need behind this framework is to avoid administrative inconveniences that could be achieved by allowing single court proceedings wherever more than two applications of creditors are pending against the corporate group in different (NCLT) jurisdictions.

Furthermore, it is pertinent to note that quite often corporate group enters into corporate guarantees to secure borrowings of a group member or a debtor may transfer assets to group companies to defraud creditors. Subsequently, Group Insolvency will allow the CoC to pierce the corporate veil in such scenarios & bring insolvency proceedings against all these groups within the companies.[18]

GROUP INSOLVENCY IN OTHER COUNTRIES:

Europe:

The EU Legislators enacted Group Insolvency provisions in their insolvency regulations after facing several challenges for restructuring the international group of companies. This was done to introduce a more effective & speedy process.[19] Group Insolvency enumerates certain rules for cooperation & coordination regarding the group of companies. The foundation of these principles is that they should not run counter to the interests of the creditors of the corporate group. This could be achieved when insolvency practitioners of the corporate group will coordinate with each other through the coordinator for efficient administration & supervision.[20]

It is pertinent to note that the insolvency practitioners should not be the coordinator so as to maintain the neutrality & strive for resolution of all the groups of the companies.[21] It is the duty of the Coordinator to coordinate with these groups & work on building a systematic approach towards the resolution of the corporate groups.

Germany:

The German Parliament passed the law for facilitation of group insolvency proceedings which is effective from 21 April, 2018.[22] It escalates efficiency by providing every single entity a group venue & a coordinator whose duty is to work on the overall restructuring of the corporate group.[23] In order to attain effectiveness in the resolution process, it is mandatory for the insolvency courts, creditors & the insolvency practitioners to coordinate & exchange their information with each other.[24]

Therefore, the newly introduced provision for group insolvency will be useful for the corporate group. However, the challenge will be how coordinators will coordinate with all the insolvency practitioners & what will be the rights of the coordinator which can be enforced to ensure the effectiveness of the mechanism.[25]

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[17] Sanjeev Krishnan, *supra* note 8, at 1.

[18] Deloitte Legal, *Group Insolvency, in* A guide to pre insolvency & insolvency proceedings across Europe, (Jan. 2017), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Legal/dttl-legal-deloitte-europe-insolvency-proceedings-guide.pdf

[19] Jasper R. Berkenbosch, & Sid C. Pepels, Group Insolvency Proceedings Under the Revised EU Insolvency Regulation, JONES DAY (June 2017), https://www.jonesday.com/Group-Insolvency-Proceedings-Under-the-Revised-EU-Insolvency-Regulation-05-31-2017/

[20] Dr. Irit Mevorach, *INSOL Europe's proposals on groups of companies: a critical appraisal* (Sept. 14, 2012).

[21] *Id.* at 3.

[22] Renato Mangano, Germany Enacts Statute on Group Insolvency, OXFORD BUSINESS LAW BLOG (July 13, 2017), https://www.law.ox.ac.uk/business-law-blog/blog/2017/07/germany-enacted-statute-group-insolvencies

[23] Fernando Daniel Hernandez, *Argentina: Overview of restructuring & insolvency activity*, 11 THE RESTRUCTURING REV. 1 (2018).

[24] Dr. Christian Mock. German Insolvency Reform – Introduction of Group Insolvency Proceedings, PAUL HASTINGS - INSIGHTS (Apr. 24, 2017), https://www.paulhastings.com/publication-items/details/?id=2844ec69-2334-6428-811c-ff00004cbded

[25] Ansgar Hein, New "group insolvency law" before German parliament, GRAF VON WESTPHALEN (Feb.

<u>CHALLENGES</u>:

A situation of conflict of interest might arise where a single or the same insolvency representative is appointed to administer the insolvency proceedings of a No. of group members.[26] Due to which maximizing the interest of the group may not result into maximization of the interest of individual member companies because sometimes the situation may arise where the interest of individual companies is sacrificed in pursuance of combined Resolution Plan. As a result, the creditors of subsidiary companies will face the repercussions.

The group insolvency process contradicts the doctrine of separate legal entity which is strictly applicable in company law. The question arises "*Why the creditors of company should suffer for the protection of interest of the creditors of Parent Company?*" The intent behind this doctrine is to provide certainty in business dealings.[27] The Group insolvency process will decrease this certainty.[28]

The idea of group insolvency is also to avoid the multiplicity of proceedings where two companies are deemed as a *single economic entity* but to deal with such situation the provisions of "*lifting of corporate veil*" are already in existence. The committee legislating the provisions must also find the effective mechanism to deal with the challenges.

<u>THE WAY FORWARD</u>:

In the case of corporate groups, there are multiple applications pending in the different court which ultimately delays the resolution process. Group Insolvency will help to remove this loophole by giving the chance to creditors to seek joint proceedings. It is expected that the group insolvency will escalate the percentage of debt recovery & will make the process more effective & efficient.

In order to deal with challenges, there is a need to enact a mechanism where if the insolvency proceedings to the corporate group are initiated, then the tribunals will deliberate whether it is in the interests of the creditors to appoint merely one person as insolvency professional. In this deliberation, it should particularly be discussed whether this person can look after all proceedings concerning the debtors belonging to an enterprise group with the required independence & whether possible conflicts of interest can be eliminated by the appointment of separate insolvency professionals.[29] Hence, we suggest that the provisions concerning Group Insolvency should be applied on a case to case basis.

CROSS-BORDER INSOLVENCY IN INDIA – NOT AS SMOOTH AS IT LOOKS

By: Avishek Banerjee & Sahil Bhatia[30]

Insolvency law, being one of the pillars on which commercial laws stand, the existence of an efficient legal framework is paramount. With the sudden & phenomenal rise in international business, the possibility of corporate persons be incorporated, established & operate in different jurisdictions makes it difficult to conduct an equal & orderly distribution of assets due to differences *inter alia*, in

2013), https://www.gvw.com/cn/news/newsletter/gvw/february-2013/new-group-insolvency-law-before-german-parliament.html

[26] *See* UNCITRAL, LEGISLATIVE GUIDE ON INSOLVENCY LAW PART THREE: TREATMENT OF ENTERPRISE GROUPS IN INSOLVENCY, at 44, U.N. Sales No. E.12.V.16 (July, 2012).

[27] Salomon v. Salomon & Co. Ltd. [1897] AC 22 (U.K.) at 30.

[28] Sandeep Gopalan & Michel Guihot, *Cross Border Insolvency Law & Multinational Enterprise Groups: Judicial Innovation as an International Solution,* 48 INT'L L. REV. 549 (2016).

[29] Mark Roelof Fidder, Conflict of interest involving liquidators (Leiden University Faculty of Law Thesis for the Master of Laws in Company Law)(June 18, 2014), https://www.njb.nl/Uploads/2014/9/Thesis---Conflict-of-interest-involving-liquidators---mrfidder.pdf

[30] Avishek Banerjee, 4th Year Student, School of Law, UPES, Dehradun; Sahil Bhatia, 4th Year Student, School of Law, UPES, Dehradun.

legal systems, thereby requiring uniform insolvency laws to govern disputes arising out of these cross-border businesses. Feeding the need for such a uniform common code, the UNCITRAL Model Law on Cross-Border Insolvency, 1997 ('**Model Law**') was introduced.

The Model Law applies in instances where an insolvent Debtor has its assets in more than one state; where assistance (including access, recognition, cooperation and/or coordination) is sought with respect to foreign proceeding in one state by a foreign court or foreign representative; concurrent proceedings in respect of the same debtor in different jurisdiction; or creditors including other interested persons in initiating or participating in an insolvency proceeding against a debtor in one state. Noteworthy here is that the Model Law does not attempt to substantially unify the laws on insolvency, rather provides a framework wherein jurisdictions cooperate between one another facilitating a uniform approach to **CB-Insolvency**.

EXISTING LAWS IN INDIA

The existing Indian law on CB-Insolvency is minimal & codified under sections 234 & 235 of the IBC. S. 234 of the Code empowers the '**CG**' to enter into bilateral treaties with other countries in order to agree to apply the Code in their jurisdiction. S. 235 allows the AA to issue letters of request to courts in such foreign jurisdictions competent to deal with such request. However, both these provisions are likely to cause uncertainty & delay for all interested parties, thereby disrupting the basic essence of the Code to dispose of matters in a time bound manner. Moreover, general laws for recognition of foreign judgements in the Code of Civil Procedure, 1908 are not sufficient.

RECENT DEVELOPMENTS – INSOLVENCY LAW COMMITTEE REPORT

Insolvency Law Committee ('**Committee**'), in its report dated March 26, 2018, had recorded that the aforementioned provisions do not provide a comprehensive framework on the CB-Insolvency matters & thus agreed that the Model Law be adopted vide a separate report. Accordingly, vide a separate report dated October 16, 2018, the Committee proposed a Draft Part-Z on CB-Insolvency to be introduced in the Code ('**Proposed Law**') in lines with the Model Law, thereby amending the draft issued on June 20, 2018.

Few key provisions of the Proposed Law are deliberated upon hereunder:

1. Clause 1 of the Proposed Law restricts its applicability only to 'CD' whether incorporated in India or elsewhere, with certain exclusions as may be notified by the CG, implying that Ss. 234 & 235 of the Code will apply only to individuals & partnership firms.
2. The Model Law, in its Articles 12 & 13, allows the foreign representative to commence & participate in domestic insolvency proceedings while the Proposed Law, under its Clauses 5-9, only grants participatory rights to them, etc. Therefore, the right of access to foreign representatives is granted in the Proposed Law in a conservative manner.
3. Chapter III of the Proposed Law empowers a foreign representative to seek recognition of a foreign proceeding, be it a 'foreign main proceeding' or a 'foreign non-main proceeding', from the NCLT in order to avail appropriate relief, following Articles 15-20 of the Model Law. For a proceeding to be recognized as a foreign main proceeding, it is necessary to show that the Centre of Main Interest of the Debtor is in the same place where the proceeding is being carried out, as per Clause 15(2)(a).
4. Clauses 22 & 23 of the Proposed Law, reflecting Articles 25-27 of the Model Law, provides for cooperation & communication with foreign courts & foreign representatives. Cooperation is attributed as the only realistic way to prevent dissipation & maximizing the value of assets etc. Having realized that the

Code is in its budding age & an obligatory provision for cooperation & communication may lead to inconveniences, the Committee recommended that such framework be notified by the CG in consultation with the NCLT.

5. Multiple proceeding in various jurisdictions is permitted to take place simultaneously by enabling coordination & cooperation of such proceedings under Clauses 24-28 of the Proposed Law, incorporating Articles 28-32 of the Model Law. Instances like commencement of domestic proceedings after recognition of foreign main proceedings are also provided, besides providing for modification of relief to maintain consistency thereof.
6. However, Clause 4 of the Proposed Law mirrors Article 6 of the Model Law in vesting discretion to the NCLT to refuse the recognition of such proceedings which are manifestly contrary to public policy.

CHALLENGES TO PROPOSED LAW

At this juncture, when India is all set to adopt the Proposed Law, the clouds of challenges threaten the same. Few of the challenges are enlisted hereunder:

1. If the Proposed Law stands incorporated, it is anticipated that there will be amendments to Ss. 234 & 235 of the Code excluding Corporate Persons from their scope, which will incapacitate India from entering into any possible arrangements with such other country who has not incorporated the Model Law.
2. The Model Law does not appreciate any choice of law concern, leaving it for the states to decide, thereby deviating from uniformity, & causing serious malpractices like forum shopping by the debtors, jeopardizing the rights of foreign creditors.
3. The UNCITRAL advises all states to "*make as few changes as possible in incorporating the Model Law*"[31], apprehending that more changes to the Model Law would mean lesser harmonizing effect on the resulting domestic law. However, most adopting countries including India have made significant amendments which are inconsistent with its nature & proposed universalism.
4. The Proposed Law seeks to incorporate the clause on Public Policy from the Model Law with negligible alterations. Neither laws, however, defines the term, thereby leaving a wide discretion to the judges to decide upon what constitutes as Public Policy, which may be detrimental to, & adversely affect legitimate claims of the foreign creditors.

CONCLUSION

One issue that remains unaddressed in the Proposed Law pertains to contracts governed by English Law between Indian debtors & foreign creditors. Will those creditors prove their debts through Indian Law or English Law? Whether creditors having rights under the English Law are bound by the resolution plan approved by the NCLT as per the Code? These questions arise due to the long-standing principle of English Law as propounded by the *Gibbs Rule*[32] & reaffirmed by the England & Wales High Court in 2018[33], holding that a debt governed by English Law cannot be discharged by a proceeding other than English Law, unless that creditor submits to another foreign proceeding. As evident from the complex discussion above, mere adoption of the Model Law does not mean that the provisions of the Code will apply to a foreign jurisdiction. If clarity in this regard is not sought, it could lead to serious mishaps in the enforcement of the Proposed Law.

[31] UNCITRAL, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT & INTERPRETATION, at 25, U.N. Sales No. E.14.V.2 (Jan. 2014).

[32] Anthony Gibbs & sons v. La Société Industrielle et Commerciale des Métaux [1890] 2 QBD 399 (U.K.).

[33] Bakhshiyeva v Sherbank of Russia & Ors [2018] EWHC 59 (Ch).

CROSS BORDER INSOLVENCY: QUEST FOR COMI

By: Ankesh Kumar & Satwik R. Prakash[34]

Cross border insolvency includes situations where a CD may have creditors from countries except where it is established, where it has assets in countries except where it has its principal place of business or a combination of both. Cross border insolvency cases have the main proceeding which is in a country where a CD has its centre of main interests (COMI) & non-main proceedings where it has an establishment. Determination of COMI is always subjective & depends on a case-to-case basis.

Last year, the Indian government rolled out a draft on cross border insolvency based on UNCITRAL Model Law.

The instruments relating to cross border insolvencies have left COMI undefined which has led to a comedy of errors with respect to varying judgments across the globe. The UNCITRAL Model Law & European Convention Rules (ECR) on Cross Border Insolvency have emphasised on the 'presumption' of COMI at a CD's place of registered office.[35] Further, the 'draft' talks about factors that shall be prescribed by the central government, that are to be taken into consideration by the AA while conducting an assessment with respect to a debtor's COMI.[36] In situations where the registered office of a CD coincides with its COMI, the courts do not face any hurdle. However, in cases where the place of a debtor's registered office differs from its COMI, the courts have to take into consideration several other factors for determining COMI. Hurdles also exist when courts in two distinct jurisdictions are on a disagreement with respect to COMI; e.g., where courts of two jurisdictions may be emphasising upon placing COMI under their jurisdiction.

It can be concluded that no specific determining criteria for or a definition of COMI can be brought out, as has been evident from countless endeavours by committees & courts across the globe. *Eurofood*,[37] the first landmark case in this regard where the court went on to say that the presumption of COMI determination on the basis of place of registered office can be rebutted if such factors exist which are objective & ascertainable by third parties & if it can be proved that an actual situation exists that enables it to be proved otherwise. In the landmark U.S. case of *Bear Stearns*,[38] the court laid down eleven factors that may be taken into consideration to determine COMI. Other important U.S. cases in this regard are *Basis Yields*,[39] *Fairfield Sentry*[40] & *Saad Investments* (SIFCO)[41] where the courts took into consideration other factors as & when it suited the respective facts & circumstances in hand. Other cases such as *Stanford*[42] in U.K., *Tucker*[43] in Australia, *Massachusetts Elephant & Castle*[44] & *Lightsquared*[45] in Canada have

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[35] UNCITRAL, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT & INTERPRETATION art. 16, U.N. Sales No. E.14.V.2 (Jan. 2014).

[36] UNICTRAL, Draft Model Law On Cross-Border Insolvency With Guide To Enactment & Interpretation Sec. 14(3).

[37] Bondi v. Bank of America [2006] Ch 508 (ECJ).

[38] In Re Bear Sterns Ltd., 374 B.R. 122 (Bankr. S.D.N.Y. 2007) [CLOUT case no. 760]; On appeal: 389 B.R. 325 (S.D.N.Y. 2008)[CLOUT case no. 794].

[39] SAMUEL BUFFORD, US INTERNATIONAL INSOLVENCY LAW (2009).

[40] In Re Fairfield Sentry Ltd., 440 B.R. 60 (Bankr. S.D.N.Y. 2010)(U.S.); On appeal: No. 10 Civ. 7311 (S.D.N.Y. 2011)[CLOUT case no. 1316].

[41] PricewaterhouseCoopers v. Saad Investments Company Ltd., Case No. 09-13 985 (KG).

[42] In Re Standford International Bank [2009] EWHC 1441 (Ch)(2010); On appeal [2010] EWCA Civ. 137, [CLOUT case no. 1003].

[43] Tucker, in the matter of Aero Inventory (UK) Ltd. V. Aero Inventory (UK) Ltd., (2009) FCA 1481 [CLOUT case no. 922].

[44] In Re Massachusetts Elephant & Castle Group Inc., 2011 ONSC 4201 (Ont. SCJ)[CLOUT case no. 1206](Can.).

[45] In Re Lightsquared LP, 2012 ONSC 2994 (Ont. SCJ)[CLOUT case no. 1204](Can.).

taken other differing factors which have resulted in dark clouds looming over COMI determination.

The courts are apparently coming to a more or less settled stance on the faltering position of COMI. All be it, dark clouds loom more often than not. The first of such dark clouds can be seen in the Canadian judgment of the *Stanford* case. To an utter surprise, the Superior Court of Quebec reached a wholly opposite decision to that of the UK court, despite having almost similar provisions of international insolvency based on *the Model Law* & having similar facts & situations to that in the UK *Stanford* case. The court of appeal in Quebec dismissed the case on the grounds that Antiguan liquidators had no "reasonable chance of success". The US case of *SIFCO* is another such cloud which was brought before the District Court of Delaware under Chapter 15 of the US Insolvency law. It was a company registered in the Cayman Islands as an 'exempted company', thereby exempting it from conducting domestic business in the Cayman Islands. Nonetheless, the company was permitted for carrying on foreign business from within its territory. The court, however, determined the COMI of *SIFCO* be situated in the Cayman Islands. The judgement is not only vague & inconsistent with respect to *Bear Stearns,* but also with that of the UK decision in *Stanford*. It is strongly doubtful if this case would pass the *Stanford* test of ascertainability by third parties based on factors in public domain. Additionally, what was found to be seen as peculiar to this case was that the court used evidence not to rebut *the presumption*, but in support of it, with respect to COMI being in Cayman Islands.[46]

In another Australian decision of *Tucker,* the court ruled that the debtor's registered office was in Quebec but its COMI was in the UK because it had an international business was found to be listed on London Stock Exchange & was administered & managed from the UK.

Therefore, it can be concluded that though courts are endeavouring to move towards a settled stance on COMI, inconsistency, & vacillations, due to cross-border-insolvency being an evolving arena in law & jurisprudence, may be expected for quite a few years.

To this end, a rather maverick approach towards the determination of COMI is required for legal certainty & ascertainment by third parties as has been discussed in cases above to be cardinal for COMI determination. A statistical index to determine COMI has been proposed below which takes into account the important factors evolved through landmark cases mentioned above, with marking points allotted to them correspondingly. The factors have been further categorised into categories A, B & C with points 3, 2 & 1 respectively:

Factors which are of primary importance & are readily ascertainable by third parties have been placed in category A. These include those factors as averred by Lewison J, in *Stanford* as those factors which are in public domain. Additionally, these factors are conveniently ascertainable by third parties.

Other factors which may be purported to hold importance next in position to those in category A have been placed in category B.

The last category includes factors which are easily convenient for the debtor to manipulate & may, therefore, wreak havoc in COMI determination & have therefore been given the lowest significance.

Category A	**Points**
Place of debtor's majority (50% or more) income.	3
Place of debtor's majority (50% or more) assets.	3
Location of debtor's majority (50% or more) of employees.	3

[46] Prof. Bob Wessels, *COMI: Are English Courts coming out?,* 1 INT'L. INSOLVENCY L. REV. 2 (2010).

Category B	Points
Location of CD's directors' offices.	2
Place of debtor's majority of creditors.	2
The site of law which governs main contracts.	2
Place of debtors majority (50% or more) of shareholders.	2
Category C	**Points**
Location of people making key managerial & commercial decisions.	1
Location of debtor's headquarters.	1
Place of debtor's books & records.	1
Place of reorganisation for a CD	1

According to this index, if a debtor has assets in several countries, a computation of points on this index may assist in determining in the COMI. COMI shall be attributed to that country which scores the highest on this Index. In case of two or more countries receiving similar scores, regard shall be had to maximum factors for a country falling in category A, B, & C, in the order of priority.

In culmination, the factors mentioned & the respected points allotted correspondingly above are not final but may be subject to changes or modifications by the Central Government as mentioned in the 'draft'. However, this index may provide a framework for the central government to roll out factors on this model which may not only be beneficial for third parties with respect to legal certainty.

CASE UPDATES

[SUPREME COURT]

December 12, 2018

Jaipur Metals & Electricals Employees Organization v. Jaipur Metals & Electricals Ltd. & Ors., Civil Appeal No. 12023 of 2018 [arising out of SLP(Civil) No.18598 of 2018]

The appeal was filed against the order of Rajasthan HC which refused to transfer winding up proceedings pending before it to the NCLT & had set aside an order of NCLT by which order, an FC's application u/S. 7 of the IBC was admitted. Held, *firstly*, that u/S. 434 of the Companies Act, 2013, all the proceedings relating to winding up of companies shall stand transferred to the NCLT from such date as notified by the Central Govt.; *secondly*, Rules 5 & 6 of the Transfer Rules, 2016 refers to 3 types of proceedings & relate to winding up on ground of inability to pay debts that were pending before the HC. These three will be treated as applications u/Ss. 7, 8, or 9 of the IBC; *thirdly*, the cases where BIFR forwarded an opinion to HC to wind up a company u/S. 20 of the SICA, shall continue to be dealt with by the HC as per SICA; & *fourthly*, any application u/S. 7 of the Code, which has nothing to do with the pending winding up proceedings before the HC shall not be barred by such pending proceedings.

December 14, 2018

Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajagopal & Ors., Petition(s) for Special Leave to Appeal (C) No(s). 31557/2018

A stipulation under Regulation 30A of the CIRP Regulations, 2016 that withdrawal of an insolvency proceeding cannot be permitted after the issue of invitation for expression of interest has to be read along with S. 12A of the IBC which contains no such stipulation. Hence, such a stipulation should only be construed as 'directory' depending on the facts of each case.

January 22, 2019

Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd., Civil Appeal No. 818 of 2018

This case settled the law between the divergent views regarding the interpretation of Rules 26 & 27 of the Companies (Court) Rules, 1959 between the Bombay & the Madras HC. The Bombay HC in *Ashok Commercial Enterprises* v. *Parekh Aluminex*

Ltd.,[47] stated that the notice referred to in Rule 26 was a pre-admission notice & hence, held that all winding up petitions where pre-admission notices were issued & served on the respondent will be retained in the HC. On the other hand, the Madras HC in *M/s M.K. & Sons Engineering* v. *Eason Reyrolle Ltd.*,[48] has held that the notice under Rule 26 is referred to a post-admission position of the winding up petition & accordingly held that only those petitions where a winding-up order is already made can be retained in the HC. To support its view, the Madras HC relied upon Form No. 6 appended to Rule 27 & the expression "was admitted" occurring in the Notice of Petition contained in the said Form.

The SC held the Madras HC view to be plainly incorrect upholding the Bombay HC view as being correct in law. It was held that Rules 26 & 27 referred to a preadmission scenario as it was clear from a plain reading of Rules 26 & 27, which stated that the notice contained in Form No. 6 had to be served in not less than 14 days before the date of hearing. Hence, the expression "was admitted" in Form No. 6 meant that notice has been issued in the winding up petition which is then "fixed for hearing before the Company Judge" on a certain day.

January 29, 2019

Swaraj Infrastructure Pvt. Ltd. v. Kotak Mahindra Bank Ltd., Civil Appeal No. 1291 Of 2019 (Arising out of SLP (Civil) No.6221 Of 2018)

The Respondent in the present case approached the DRT to recover the debt owed and successfully obtained recovery certificates for the same. However, no money could be recovered through various attempts to auction the property. Meanwhile, as they had also sent statutory notices u/Ss. 433 & 434 of the Companies Act, 1956 & consequently filed a company petition praying for the appellant company to be wound up.

In the appeals that were filed to the Division Bench of the Bombay HC against such an exercise, the main point argued was that once a secured creditor has obtained an order from the DRT, & a recovery certificate has been issued thereupon, such secured creditor cannot file a winding-up petition as the Recovery of Debts Act is a special Act which vests exclusive jurisdiction in the DRT. Also, a secured creditor can file a winding-up petition only on giving up its security, which has not been done in the present case. The Division Bench dismissed the appeals in question. In the appeal to the Apex Court, along with the abovesaid contentions, the appellants also argued that the secured creditor is put to an election where it must either relinquish its security & stand in line in the winding up proceeding or realize its security outside the winding up proceeding. Therefore, the issue to be decided in this case was whether a secured creditor has the right to file a winding-up petition after such a secured creditor has obtained a decree from the DRT & a recovery certificate thereon.

While referring to a judgment of Lord Atkin,[49] the court stated that the Respondent does not have to choose between the alternate remedies & when secured creditors like the respondent are driven from pillar to post to recover what is legitimately due to them, in attempting to avail of more than one remedy at the same time, they do not "blow hot & cold", but they blow hot & hotter. It was held that the appellant could not be allowed to resist a winding up petition which is otherwise maintainable without there being any *bona fide* defence to the same.

[47] (2017) 4 Bom. CR 653.
[48] CP/364/2016.
[49] Lissenden v. C.A.V. Bosch, Ltd., [1940] 1 All E.R. 425.

January 29, 2019

Vijay Kumar Jain v. Standard Chartered Bank, Civil Appeal No. 8430 of 2018

SC was deciding an appeal from the NCLAT's judgment which rejected the application from a director of the disbanded BoD to gain access to the resolution plans. As per provisions of the Code, the disbanded BoD are given the right to participate in the CoC meetings but have no voting rights.

The Court drew a comparison with the position of the directors with that of an OC & held that although no voting rights are bestowed upon both parties, their participation in the meetings is vital in order for them to get a favourable resolution plan. Therefore, as per Reg. 21, the RP must send notice of every meeting & the relevant documents that are to be attached includes the resolution plans as well. Further, held that an undertaking in the form of a Non-disclosure agreement can be taken from the directors to maintain the confidentiality of the resolution plans. Finally, it clarified that a director who is an FC of the company would be disqualified from participation in the CoC meetings & therefore cannot claim access to the resolution plans.

February 5, 2019

K. Sashidhar v. Indian Overseas Bank & Ors., Civil Appeal No. 10673 of 2018

Order of the NCLAT, which held that the approval of resolution plan by vote of not less than 75% voting share of FCs is mandatory, was challenged before the SC. The SC while rejecting the appeal observed that the liquidation process is avoidable only on satisfying the minimum requirement of 75% vote. The fact that substantial or majority per cent of FCs have accorded approval to the resolution plan would be of no avail unless the approval is by a vote of not less than 75% (after the amendment of 2018 w.e.f. 06.06.2018, 66%) of voting share of the FCs.

The SC also discussed the aspect of approval or rejection of resolution plan by the CoC. SC stated that u/S. 33(1) of the IBC, AA has nothing more to do than to order for liquidation if it receives a rejected Resolution Plan. The legislature nowhere authorises AA to analyse or evaluate the justness of rejection of the commercial decision taken by the CoC. Further, w.r.t. legislative intent, the SC reiterated that under the IBC, 'commercial wisdom' of the individual FCs or their collective decision cannot be challenged before the AA on any ground. The SC opined that grounds for challenge u/Ss. 30(2) or 61(3) of the IBC are w.r.t. testing the validity of the approved resolution plan by the CoC & not for approving a resolution plan that has been disapproved or deemed to have been rejected by the CoC in the exercise of its business decision. Therefore, it was held that the NCLT & the NCLAT do not have the jurisdiction to reverse the commercial wisdom of dissenting FCs.

NCLAT

December 3, 2018

Shyam Sunder Bhatter v. Punjab National Bank & Anr., CA (AT) (Insolvency) No. 728 of 2018 with Rockside Impex Pvt. Ltd. v. Punjab National Bank & Anr., CA (AT) (Insolvency) No. 729 of 2018

The appeals were preferred by two guarantors namely Mr. Shyam Sunder Bhatter, Guarantor of M/s Dynamic Shells (India) Pvt. Ltd. (CD) & another by M/s Rockside Impex Pvt. Ltd. against the common order dated 27th September 2018 passed by the AA (NCLT) Principal Bench, New Delhi. By the impugned order the AA had initiated CIRP against the CD.

The Appellants who were guarantors to the CD challenged the order of the AA on the ground that they were not impleaded as a party respondent to the CIRP proceedings. NCLAT held that he, as a guarantor, is not a necessary party at the time of admission of an application u/S. 7 of IBC.

December 4, 2018

Export-Import Bank of India & Anr. v. Astonfield Solar (Gujrat) Pvt. Ltd. & Anr., CA (AT) (Insolvency) No. 754 of 2018

The appeal was preferred by the 'Export-Import Bank of India' & 'Power Finance Corporation Limited' (FCs) jointly against the order passed by the NCLT whereby the application u/S. 10 of the CD had been admitted. The appellants contested that the shareholders had no voting rights to approve the decision of the BoD for initiation of CIRP u/S. 10 of the IBC. This was because a 'Deed of Pledge' was entered between the FCs & the corporate applicant which contained provisions that did away with the voting rights of shareholders on default by the debtor.

Finding on the issue, it was held that, the shareholders have a right to decide whether to approve or disapprove the decision to proceed with the CIRP u/S. 10 of the IBC. Such a right does not stand curtailed by the 'Deed of Pledge'.

December 7, 2018

Alok Kaushik v. ASREC (India) Ltd., CA (AT) (Insolvency) No. 760 of 2018

The Appellant was appointed as IRP. However, on completion of thirty days, another person was appointed as the RP. The grievance of the Appellant was that the expenditure incurred & professional fees were not paid to him. The AA ordered to pay the expense/ fee incurred by the Appellant at the time of liquidation.

The impugned order was challenged by the Appellant. NCLAT held that the IRP is entitled to payment of fees as approved by the CoC & he should not be allowed to wait for liquidation as it is not yet clear that the matter will be resolved or order of liquidation will be passed. NCLAT directed payment of a fee to be made preferably within 30 days.

December 7, 2018

The Dhar Textile Mills Ltd. v. Asset Reconstruction Company (India) Ltd., CA (AT) (Insolvency) No. 11 of 2019

The CD approached NCLAT being aggrieved by an order of NCLT Ahmedabad which granted seven days' time to the FCs for filing an application after removal of the defects.

The NCLAT while referring to *Innoventive Industries* case,[50] observed that the speed, within which NCLT is to ascertain the existence of a default from the records of the IU or on the basis of evidence furnished by the FC, is important. Where NCLT is satisfied that a default has occurred, the application must be admitted unless it is incomplete.

NCLAT observed that NCLT cannot adjourn the matter on one or the other ground considering the specific time frame provided by the IBC, to complete its process. NCLAT thus directed NCLT to pass appropriate orders u/S. 7 on merits.

January 3, 2019

Sanjay Kumar Ruia v. Catholic Syrian Bank Ltd. & Anr. CA (AT) (Insolvency) No. 560 of 2018

The issues before NCLAT were threefold: *firstly*, the power of AA to convert CIRP process as a Fast Track CIRP u/S. 55 of the IBC; *secondly*, the jurisdiction of CoC to replace RP after completion of 270 days; & *thirdly*, the power of AA to decide resolution cost including resolution fee payable to RP.

While addressing the following issues, NCLAT observed that Fast Track CIRP is different from normal CIRP & S. 55 cannot be invoked against those CDs whose assets & income are not below a level as notified by Central Govt. Also, it was noted that after completion of 270 days, the CoC ceased to exist & thus have no jurisdiction to replace RP u/S. 22 of the IBC. *Thirdly*, it was observed that, on

[50] Civil Appeal Nos. 8337-8338 of 2017.

a combined reading of S. 30 of the Code with Regulations 31, 34 & 38, the CoC is required to determine the resolution cost including resolution fee payable to the RP.

January 21, 2019

Alloysmin Industries v. Raman Casting Pvt. Ltd., CA (AT) (Insolvency) No. 684 of 2018

Alloysmin Industries filed an application u/S. 9 for initiating CIRP against Raman Casting Pvt. Ltd. The AA rejected the application on the ground that the demand notice u/S. 8(1) was returned without delivery from the registered office. The OC had sent demand notices to the registered office & the corporate office of the CD, eliciting no response and nonappearance of the CD. The order of the AA was set aside on the ground that a demand notice can be served at the registered/corporate office & the same should be considered as valid service.

January 22, 2019

Ranvir Ranjit v. Vijay Vakharia & Ors., CA (AT) (Insolvency) No. 646 of 2018

Appellant was the ertwise director/shareholder of the CD, filed an appeal against the order of the AA admitting an application u/S. 7 of the Code. The Appeal was made on the ground that certain credit facilities had been availed against the rental income of the CD. The monthly installment of the facility was discharged in terms of execution of various assignment deeds. After payment of the monthly installment, excess was returned to the CD for its day to day operations. It was contended that during the moratorium period, FC will be unable to deduct any amount from the assignment deed generating money from the assets of the CD, due to the application of moratorium u/Ss. 14(1) (b) & (d). The AA rejected prayer of the FC to receive amounts under the assignment deed & stated that the right to decide on such issue shall lie with the CoC.

January 23, 2019

Assam Company India Ltd. v. Numazar Dorab Mehta & Ors., CA (AT) (Insolvency) No. 82 of 2019

Appeal filed through an erstwhile director against an order of the AA whereby the parties were asked to raise their plea before the Special Referee in accordance with the provisions of the law. However, the appeal was dismissed on the ground that as an order u/S. 31 was passed, the CD was under the control of the successful Resolution Applicant & an appeal by an erstwhile director is not maintainable.

January 23, 2019

Sanjeev Azad & Anr. v. Punjab National Bank & Anr., CA (AT) (Insolvency) No. 65 of 2019

The appeal was preferred by the directors & shareholders of the CD, against the order of the AA admitting an application under S. 7 of the Code. It was contended that since the amount due was disputed & the Form-1 required to be filed u/S. 7 was incomplete, the application ought to have been rejected. NCLAT while dismissing the appeal held that the meaning of debt r.w. S. 3(11) includes even a disputed claim. Thus, the CD is only entitled to take the plea that the amount is not payable in law or in fact.

January 29, 2019

S.C. Sekaran v. Amit Gupta & Ors., CA (AT) (Insolvency) No. 495 & 496 of 2018

The appeal was filed by the management of the CD against the liquidation order passed by the AA. It was held that even during liquidation the company can be sold as a going concern & the liquidator can carry on the business of the company for its beneficial liquidation. Only in the failure of the revival of the company, the AA & the liquidator shall proceed with the sale of the company. If the company can't be sold as a going concern, then the assets of the company can be sold in part through an arrangement with the creditors u/S. 230 of the

Companies Act. Such an arrangement with the creditors must be completed within 90 days.

January 30, 2019

M/s Dyenpro Pvt. Ltd. v. Mr. V. Nagarajan, CA (AT) (Insolvency) No. 229 of 2018

A CIRP was initiated against CD & the respondent was appointed as RP. The original application was filed by the appellant with the prayer to transfer some materials that were under the possession of the CD as the property of the Appellants. However, the property was found to be that of the CD according to the RP. The issue was whether the AA could decide the claim & counter claim. It was held that as the claim is not against the CD or its subsidiaries but includes an inter-se claim for the very same material, such dispute cannot be decided by the AA u/S. 60(5) of the IBC.

January 30, 2019

Shailesh Sangani v. Joel Cardoso, CA (AT) (Insolvency) No. 616 of 2018

The issue arising out of the appeal was whether the debt as per facts could be classified as financial debt or not. In the instant case, the Respondent, a shareholder of the CD, had granted unsecured loan repayable to the CD. It was classified as long-term debt under the books of CD, however, as no interest was payable it could not be classified as FD. It was held that interest is not a *sine qua non* of FD. Any amount extended by a shareholder in the form of long-term borrowing to boost the financial health of the company would be commercial borrowing by CD, & cannot be re-classified as an investment.

February 1, 2019

Mohan Kumar Chimar v. Indian Base Metals Co. Ltd. & Anr., CA (AT) (Insolvency) No. 105 of 2019

The Respondent Company issued a demand notice u/S. 8(1) & filed an application u/S. 9. Thereafter, the NCLT held that respondent (FC) could change the format for treating application from S. 9 to S. 7. The Tribunal observed that for the purpose of application u/S. 7, no advance notice or demand notice is required to issue, unlike notice u/S. 8(1). It is open to the parties to file Format-1 i.e. application u/S. 7 after serving a copy of the same to the other side. The party can also file a separate application u/S. 7 after service of the notice. Even if this is allowed, the CD may not get any advantage as they merely disputed the amount. The case of *Innoventive Industries Ltd.*[51] was referred to taking into consideration that when a debt becomes due & not paid, the IRP begins.

February 1, 2019

M/s Prasad Gempex v. Star Agro Marine Exports Pvt. Ltd. & Ors., CA (AT) (Insolvency) No. 291 of 2018

An issue arose before NCLAT regarding the jurisdiction of RP to decide or reject the claims received. NCLAT held that the RP has no jurisdiction to decide the claim of one or the other creditor, including 'FC', 'OC', 'Secured Creditor' or 'Unsecured Creditor'. Further, it held that after completion of the period of moratorium, a suit or application can be filed against the 'CD' notwithstanding the order passed u/S. 31 of the IBC. While disposing of the appeal, NCLAT allowed that NCLT can entertain claims in terms of S. 60 on behalf of or against the CD, if the resolution plan is approved. In case the resolution plan is not approved & order of 'liquidation' is passed, claims can be filed before the 'Liquidator' u/S. 40 of the IBC.

[51] Civil Appeal Nos. 8337-8338 of 2017.

February 1, 2019

Vandana Industries Ltd. v. IL & FS Financial Services Ltd. & Anr., CA (AT)(Insolvency) No. 630 of 2018

An appeal was preferred by the shareholders of the CD, against the order of the NCLT for liquidation under IBC 2016. The CD had filed an application u/S. 10 of the IBC through its BoD where IL & FS was one of the FCs in respect of whom the alleged default was committed. The application was permitted, and the order of liquidation was passed subsequently. It was alleged that the application u/S. 10 was moved by the BoD without the knowledge of the shareholders & only when the order for liquidation was passed, they came to know of the same. The NCLAT held that the application u/S. 10 filed by the BoD was not maintainable & the initiation of CIRP is void. The impugned order of liquidation was held to be illegal. Thus, the application filed by the Respondent u/S. 10 of the IBC was dismissed.

February 4, 2019

Sonal Jayesh Shah v. Sanjeev Gupta & Anr., CA (AT) (Insolvency) No. 110 of 2019

The Appellants submitted that a settlement was reached, & the entire amount was paid to the OC. The IRP was also appointed, but the CoC was not constituted. The case of *Swiss Ribbons Pvt. Ltd. & Anr.* v. *Union of India*,[52] was referred to where it was ruled that the body which is to oversee the resolution process must be consulted before any individual CD is allowed to settle its claim. The IRP is not to issue public announcement nor constitute CoC without prior permission of the NCLT. He is to ensure that the company is a going concern & the manufacturing & production of the company does not suffer & payment of wages to employees/workmen are made on time. The banks having an account of the CD will also have to cooperate with the IRP.

February 4, 2019

Naresh Kumar Dhingra & Ors. v. Indian Overseas Bank & Anr., CA (AT) (Insolvency) No. 73 of 2019

The appeal was preferred by the CD against the order of the NCLT u/S. 7. It was contended that the Form-1 application was signed in a personal capacity. However, this was not accepted as it was submitted by an authorised officer of the Indian Overseas Bank. Another issue arose with the date of default; it was contended that the date of default was wrong in terms of subsequent development where the date of default goes to another date. The Tribunal relying on the case of *Innoventive Industries*[53] elucidated that a default is the non-payment of debt once it becomes due & payable which includes non-payment of even a part thereof or an installment amount. The Hon'ble Tribunal ruled that the FC can trigger the CIRP by applying in Form 1 accompanied by all documents & records required.

February 4, 2019

Mrs. Ramanathan Bhuvaneshwari v. Vipin Kumar & Ors., CA (AT) (Insolvency) No. 543 - 544 of 2018 & Zuventus Healthcare Ltd. v. Mrs. Ramanathan Bhuvaneshwari & Anr., CA (AT) (Insolvency) No. 571 of 2018

Appeals were preferred against the common order passed by the AA where it took into consideration the allegations made by the RP with regard to fraudulent transactions u/S. 66 of the IBC. It was questioned as to whether with regard to the transactions which were not covered by S. 43 r.w. Ss. 44 & 45, an application u/S. 66 can be entertained. Also, whether the AA had jurisdiction to direct the Central Govt. in terms of S. 213 of the Companies Act. NCLAT observed it wasn't a fit case to be referred to SFIO since no *prima facie* case was proved by the RP. During the pendency of this appeal, an application was moved before the CoC

[52] Writ Petition (Civil) No. 99 of 2018.

[53] Civil Appeal Nos. 8337-8338 of 2017.

u/S. 12A through RP, which was approved by 90% of the CoC. Hence, NCLAT rejected the reference to the SFIO & permitted withdrawal.

February 4, 2019

Tata Steel Limited v. Liberty House Group Pte. Ltd & Ors., CA (AT) (Insolvency) No. 198 of 2018

'Tata Steel Limited', one of the Resolution Applicants for 'Bhushan Power & Steel Limited' (CD) challenged the order of the AA in this appeal. The AA had directed the CoC of CD to consider the 'improved offer in the Resolution Plan' submitted by Liberty House. The case of *Binani Industries Ltd* v. *Bank of Baroda*[54] was relied on, wherein it was made clear that CoC can call for & consider the improved financial offer to ensure value maximisation prior to voting upon Resolution Process. The CoC in its meeting gave equal opportunity to all the three 'Resolution Applicants' to submit 'Improved Financial Offers'. The Tribunal also held that the CoC can also negotiate better terms with the Resolution Applicants. The Resolution plan of JSW Steel was approved with 97.12% voting shares of members being present in the meeting of the CoC thus validating the resolution plan. The NCLT also directed that no discrimination is to be made between FCs & OCs and gave JSW steel time to improve its plan with improvement.

February 8, 2019

SBI v. Jai Balaji Industries Limited & Ors., CA (AT) (Insolvency) No. 788 of 2018

The issue before NCLAT was whether the pendency of winding up proceeding before the Hon'ble HC would lead to non-maintainability of S. 7 application. The NCLT held that the application was not maintainable. Reliance was placed on the case of *Unigreen Global Private Limited* v. *Punjab National Bank & Ors.*,[55] wherein it was ruled that when the liquidation order has been passed in respect of CD, no application can be in view of ineligibility u/S. 11(d) of the IBC. Since no winding up/liquidation order was passed by the Hon'ble HC, the S. 7 application was maintainable. The NCLAT noted that an application shall be admitted if the particulars of the application are complete & there is no dispute on the debt being payable in law or in fact.

February 8, 2019

Vikas Aggarwal v. SBI & Asian Colour Coated Ispat Ltd. Through Resolution Professional, CA (AT) (Insolvency) No. 587 of 2018

FC filed an application u/S. 7 of the IBC for initiation of CIRP against the CD. The AA admitted the application u/S. 7 after notice & hearing the CD. The order was thus challenged by the Shareholder/Director of the CD stating AA could not accept the view of the Appellant that the FC failed to cure the defects in S. 7 application which remained incomplete. It was contended that the NCLT had wrongly admitted the application with no finding regarding the amount defaulted. NCLAT relied on the case of *Innoventive Industries*[56] to emphasise on the meaning of 'claim' & 'debt'. It was observed in this case that the moment the AA is satisfied that a default has occurred the application must be admitted unless it is incomplete. The Code gets triggered the moment the AA noticed that the default is rupees one lakh or more. It was observed that the FC had removed the defects & only then the AA had passed the impugned order of admission. The NCLAT thus ruled that no case has been made out to interfere with the impugned order. The appeal was thus dismissed.

[54] Civil Appeal Nos. 3638 of 2018.
[55] (2018) 145 SCL 272
[56] Civil Appeal Nos. 8337-8338 of 2017.

February 8, 2019

Centrum Capital Ltd. v. Orient Green Power Company Ltd., CA (AT) (Insolvency) No. 508 of 2018

&

Centrum Capital Ltd. v. Shriram EPC Ltd., CA (AT) (Insolvency) No. 632 of 2018

The Appellant filed applications u/S. 9 of the IBC for initiation of CIRP against both the companies. The issue before NCLAT was an objection to admission since there was an existence of dispute u/S. 8. The NCLAT observed that as there is a pre-existing dispute raised by the Respondent by their email stating that the Respondent never agreed to pay the full fee to the Appellant. The terms & agreement letter also do not bear the signatures of both the parties. Thus, it was held that the AA rightly rejected the application by impugned order dated 31st August 2018. Hence, both the appeals were dismissed.

February 11, 2019

Srei Infrastructure Finance Ltd. v IDBI Bank Ltd & Anr., CA (AT) (Insolvency) No. 126 of 2019

In the instant case, an appeal was preferred by the FC against the order of the AA. The Tribunal in its order noted that admission is not the stage for any party to intervene during the CIRP. It is for the AA to pass the order either admitting the application u/S. 7 or rejecting the same & only thereafter the cause of actions can be raised. Therefore, the Tribunal did not interfere with the impugned order holding that the AA to pass the order either admitting the application u/S. 7 or rejecting the same & only thereafter the cause of action arises for one or other party including the appellant herein if the appellant feels aggrieved against such order. The court also cited *Innoventive Industries* case[57] where the SC has already given guidelines for admission of an application u/S. 7.

NCLT

December 3, 2018

Mr. Puneet Kumar Jindal (HUF) through Karta Mr. Puneet Jindal v. M/s Crown Realtech Private Limited, C.P. No. IB-769 (PB)/2018

A unit in Ghaziabad was purchased by the Applicants under 'Assured Return/Monthly Rent' scheme. The CD undertook to hand over the possession of the said unit to applicants by 31.12.2016 & to pay Rs. 54,904/- each month as Assured Returns w.e.f. 01.01.2013. The matter came before NCLT when the Respondent Company defaulted in making payments on various occasions. The Tribunal after hearing the parties held that in accordance with S. 5(8) of the Amended Code, 2018 & following the decision in *Rajendra Kumar Saxena* v. *Earth Gracia Buildcon Pvt. Ltd.*,[58] home buyers can initiate CIRP against defaulting builder/developer as FCs. The objection by Respondent regarding the calculation of amount was also rejected by the Tribunal by stating that as long as the amount exceeds Rs. 1,00,000/- CIRP can be initiated & actual calculation may be left open to be decided by the CoC.

December 4, 2018

Metco Tracom Ltd. v. M/s Associated Machinery Corporation Limited, CP (IB) 297/ALD/2018

An application was filed by Metco Tracom Ltd. under S. 9 of the Code. The Respondent raised an issue that the Applicant did not fall under the category of 'OC' as the disputed purchase order was entered into between Respondent & M/s Sanjay Associates Pvt. Ltd. which was the franchise of Applicant Company. The Tribunal in order to appreciate the submissions, analyzed S. 5(20) of the

[57] Civil Appeal Nos. 8337-8338 of 2017.

[58] CA (AT) (Insolvency) No. 187 of 2018.

IBC & held that since the financial transaction took place between Respondent Company & M/s Sanjay Associates & it was not stated anywhere in the work order that the payment of M/s Sanjay Associates was "on behalf of the Applicant", no assignment of debt from M/s Sanjay Associates to the Applicant took place. Therefore, it was held that the Applicant is not entitled to trigger CIRP against the Respondent Company.

December 6, 2018

Union Bank of India v. Era Infra Engineering Limited, C.A. No. 997(PB)/2018 IN C.P. No. IB-190(PB)/2017

The application was filed by ICICI Bank u/S. 60(5) of the IBC, aggrieved by the decision of the RP rejecting its claims against Dehradun Highways Project Limited (DHPL) & Era Infrastructure (India) Limited (EIIL) submitted in the CIRP of EIIL. The issue before the Tribunal was whether a loan purchase agreement, non-disposal undertaking, & a shortfall arrangement can be considered as contracts of guarantee within the meaning of S. 126 of the Contract Act & thereby treating a default thereunder as a financial debt. The Tribunal held that the promoter's undertaking relating to DHPL & loan purchase agreement, non-disposal undertaking relating to the claim of EIIL, can be construed as a contract of guarantee as they fulfill all the essential ingredients mentioned in the S.126. The Tribunal also held that the amount due can be considered as 'financial debt' as per Ss. 5(7) & 8 of the Code.

December 10, 2018

IDBI Bank Ltd. v. Jaypee Infratech Ltd, C.A. No. 225/2018 in C.P No. (IB)77/ALD/2017

An application was filed by the RP u/S. 60(5) of the Code. RP submitted that a unique code no. be assigned to the creditors instead of their names while publishing the details of allottees of real estate project on CD's website, stating that it amounts to infringement of the right to privacy of the creditors, thus seeking an exception under Regulation 13(2) of IBBI (IRP for Corporate Persons) Regulations, 2016. It was also submitted that the IBBI had directed him to NCLT for obtaining appropriate orders. The Tribunal rejected the prayer of RP on the ground that the object of Regulation 13(2) is to maintain transparency regarding the claim of the creditors & to determine their voting shares. It does not violate the right to privacy of any of the allottees as the right to property is only a statutory right. NCLT also observed that RP was neither requested nor permitted by the creditors to disclose their details nor could he provide any material to show that IBBI has directed him to NCLT.

December 10, 2018

Praveen Kumar Mundra v. CIL Securities Ltd, CP (IB) No.339/HDB/2018

Application was filed by the OC u/S. 9 of the Code seeking admission and initiation of CIRP against the CD. CD argued that since it was a financial service provider, it does not fall within the meaning of CD. It placed relianece on the NCLAT decision in *Randhiraj Thakur* v. *M/s Jindal Saxena Financial Services & Anr.*.[59] NCLT examined Ss. 3(15),(16),(17) & (18) and held that the respondent is a financial service provider, thus, not a "CD" & therefore, insolvency proceedings cannot be initiated by the Applicant u/S. 9 of the Code. While rejecting the application, NCLT also pointed out that the Respondent was ready to pay & settle the claim of the Applicant before admission, which was not accepted by the petitioner. Hence, it was held that the Applicant cannot seek the remedy provided under the Code to settle a personal vendetta.

[59] CA (AT) (Insolvency) Nos. 32 & 50 of 2018

December 11, 2018

In the matter of AML Steel & Power Ltd., MA-630-2018 In CP-632-IB-2017

The RP requested for the exclusion of time u/S. 60(5)(c). The NCLT noted that the CoC & the RP genuinely made their efforts to get the Plan approved but it didn't happen. Hence, the Bench has excluded the 90 days of time & disposed off the application. The Tribunal relied upon the NCLT's Judgement of *Quinn Logistics India Pvt. Ltd.* v. *Mack Softech Pvt. Ltd.*[60]

December 11, 2018

M/s The Great Indian Linen & Textile Infrastructure Company Pvt. Ltd. v. Mr. Raghvendran, MA-181-2018 In CA-61-2018 In CP-510-IB-2017

Based upon the decision of SC in the case of *B.K. Educational Services* v. *Parag Gupta & Associates*,[61] the Court held that the Limitation Act is also applicable to the claims filed before RP/Liquidator. If the claim is filed after the expiry of three years, the same is time barred & cannot be entertained by RP/Liquidator.

December 14, 2018

In the matter of Nicomet Industries Ltd., CP 619-IBC-NCLT-MAH-2018

Most of the disputes raised by the CD during the hearing of the petition were not raised by the CD in the reply to S. 8 demand notice served before filing of the petition & have been raised belatedly at the time of the hearing. The disputes were also raised without any proof & hence, the Court held that the dispute raised is spurious defence & admitted the application.

December 13, 2018

In the matter of Jaypee Infratech Ltd., C A No. 223 & 266-2018 In CP No. (IB) 77-ALD-2017

The question of law involved was whether the thresholds given in the Code are mandatory or merely directory. The Court held that in the particular situation where more than 50% voting shares in CoC consists of Real Estate class of Creditors and there is deadlock in passing the resolution, then, the highest no. of voting shares in favour of the resolution has to be taken into consideration without looking into the requirement of threshold. However, NCLT has carved out certain exceptions such as withdrawal of the petition, the approval of resolution plan, & liquidation u/Ss. 12A, 30(4) & 33(2) respectively. Central Govt. may bring in the required amendment & Regulations for prescribing the procedure to be followed in determining the voting share for passing various regulations in this case.

December 13, 2018

In the matter of Merchem Ltd., MA-523-2018 In CP-689-(IB)-CB-2017

In this case, the Resolution Applicant expressed his unavailability to attend the CoC meeting due to some religious constraints but RP rejected the request. The NCLT held that the Resolution Applicant has to be given a right to be heard & to attend the meetings of CoC to explain his views. Hence, NCLT ordered the consideration of plan afresh by CoC.

December 14, 2018

In the matter of Metal Closures Pvt. Ltd., C.P. (IB) No.103-BB-2018

The Respondent contended that there is no default as the debt is barred by laches & limitation & respondent has unintentionally not paid the

[60] CA (AT) (Insolvency) No. 185 of 2018

[61] Civil Appeal No.23988 of 2017.

amount. The court held that as long as the loan disbursed is not paid, it is deemed to be the continuous cause of action. Moreover, this contention does not hold good when public interest is involved. Hence, the Court admitted the application.

December 19, 2018

Anant Overseas Private Limited v. Global Houseware Limited, CA No. 884(PB) of 2018, CA No. 190(PB) of 2018 & CA No. 626(PB) of 2018

An order of liquidation u/S. 33 of the IBC, 2016 with all the attendant consequences was passed in the instant case after due consideration of the various proposed resolution plans. As no resolution plan met the criteria which were fixed, it was held that the scope of resolving the insolvency is not in existence. Since the only resolution plan thereby available before the CoC was rejected unanimously, the only recourse available is liquidating the CD in view of the same. Reliance was placed on the SC decision of *Arcelormittal India Private Ltd.* v. *Satish Kumar Gupta & Ors.*,[62] to highlight that the intervention of the NCLT in the decision of the CoC should be in relation to the legal aspects more than the commercial aspects of the decision of the CoC as to whether it is sustainable. The NCLT found no legal infirmity in rejection of the resolution plan by the CoC.

December 20, 2018

In the matter of Kiev Finance Ltd., IA No. 905-KB-2018 In CP(IB) No.110-KB-2018

An application was filed by the liquidator to revoke the order of liquidation passed by the NCLT as the Resolution Applicant had approached the RP & expressed its willingness to submit a resolution plan two days before the said order. The NCLT stated that the real question in this application was whether the NCLT can recall, review & revoke its own order when the order is appealable. The NCLT held that the order of liquidation passed cannot be reviewed or revoked by NCLT itself. Hence, it was held that the application is not maintainable.

December 20, 2018

Satyanarayan Malu v. SBM Paper Mills Ltd., C.P (IB)-1362(MB)-2017

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.

December 21, 2018

ICICI Bank Ltd. v. Unimark Remedies Ltd., CP No. 197-2018

Resolution Applicant filed an application against the CD seeking to quash the decision of CoC in refusing the resolution plan even without considering its merits. The legal question involved in the matter was whether the CoC could refuse to accept the resolution plan offered by any applicant even without opening the letter containing the same. It was held that the rejection of resolution

[62] Civil Appeal Nos. 9402-9405 of 2018

plan without even considering its merits by CoC on the ground that the said application was filed after expiry of time fixed by it, is against the spirit of the IBC. Hence, the application was accepted.

January 8, 2019

M/s Algor Supply Chain Solutions Pvt. Ltd v., CP (IB) NO. 78/BB/2018

The petition was filed seeking CIRP against the Respondent u/S. 9 of the IBC, 2016 r.w. Rule 6 of I&B Rules, 2016. Having to receive the outstanding amount the petition was filed. The Tribunal held that the instant petition is filed with an intention to recover the outstanding amount rather that to initiate CIRP that was prayed. Hence, the petition was dismissed.

January 8, 2019

M/s Orchid Pharma Ltd v. M/s Northstar Health Care Ltd. & Mr. Kailasam Raghavendra Rao., CP/540/IB/CB/2017

A Miscellaneous Application was filed by the RP u/Ss. 45, 49 & 66 of the IBC, 2016 against the Respondents for a direction that payments under the fraudulent transaction by the CD to be vested in the CD. The NCLT held that the applicant has to prove that the CD carried the business to defraud the creditors or for any fraudulent purpose. The duty is cast upon the person making such allegation.

January 10, 2019

In the matter of Rotomac Global Private Ltd., IA No.150-2018 In CP No. (IB)70-ALD-2017

The Liquidator filed an application asking for a direction to de-attach the properties of the CD attached under various Ss. of PMLA, IPC & Prevention of Corruption Act for misappropriation/diversion of bank funds & laundering the money so diverted. It was contended that the moratorium order passed by the AA is not applicable to the criminal proceedings, thus, there exists a direct inconsistency between the provisions for the liquidation of the CD under the IBC & the provisions for attachment/freezing/seizure of properties contained in the PMLA.

It was held that claimant having secured interest can ask for release of properties but the final decision lies with the PMLA authorities to decide issues of whether they acted in good faith & they parted with the properties for valuable consideration in the form of sale consideration or debt and/or that the properties attached are not proceeds of crime. Thus, there is no repugnancy in the procedure followed by the two authorities & one authority cannot interfere with the functions of another.

January 11, 2019

In the matter of Visa Infrastructure Limited, C.P.(IB) No. 23-KB-2018

The Visa Steel Limited (VSL) had availed the credit facility from the various lenders including the applicant & other bankers and/or financial institutions. The CDR Cell of the applicant considered the request of the VSL for the restructuring of the proposal, thereby CD was required to furnish a conditional corporate guarantee with a negative lien on its property. By reason of an amalgamation, the assets & liabilities of Visa Bao Ltd. (VBL) got taken over by the principal borrower i.e., VSL, thereby the obligation of the CD as a guarantor has been discharged. It was held that a debt includes any obligations created as per guarantee agreement or any liability created as per guarantee. In the instant matter, the CD has succeeded in establishing discharge of the obligation created as per the guarantee. So, no debt is payable by the CD upon the performance of the terms of the guarantee.

January 14, 2019

In the matter of Kindle Developers Pvt. Ltd., C.A. No. 815-C-II-ND-2018 In C.P. No. IB – 470-ND-2017

In the instant matter, the RP pleaded to exclude two time phases constituting the 143 days. The First Phase, from which 105 days from the date of admission of S. 7 application to the date when the then IRP became aware of his appointment. The Second Phase, from which 38 days from the date when the IRP became aware of his appointment to the date when the first IRP was replaced with second IRP. It was held that on an application filed by the RP or the CoC or 'any aggrieved person' for justified reasons, it is always open to the AA/AT to 'exclude certain period' for the purpose of counting the total period of 270 days, if the facts & circumstances justify exclusion, in unforeseen circumstances. Hence, the period of 143 days was excluded from CIRP & thus, the RP was given further 143 days to complete the CIRP.

January 14, 2019

In the matter of Crest Steel & Power Private Limited CP 577-I&B-NCLT-MAH-2018

In the present matter, the CD has communicated the issue regarding poor quality of goods to the Applicant multiple times. It was held that, the law regarding petitions u/S. 9 of IBC is well settled by the Hon'ble SC in its judgment *Mobilox Innovations Pvt. Ltd.* v. *Kirusa Software Pvt. Ltd.*,[63] & *K. Kishan* v. *M/s Vijay Nirman Company Pvt. Ltd.*[64] The AA has only to see whether the said debt can be said to be disputed & that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence without examining the merits of the dispute. If the AA is of the opinion that there exists a dispute to the extent as aforesaid then it has to reject the petition. Thus, in the instant case, since there existed a dispute with regard to the alleged unpaid operational debt, the petition was rejected.

January 21, 2019

Mr. Rajendra Bandal v. M/s Forever Entertainment Pvt. Ltd., CP. (IB)-292/(MB)/2018

In this case, the CD did not raise any disputes against the established occurrence of "default". The defence advanced by the CD for causing the 'default' of the debt amount, revolved around the omissions committed on the part of the two erstwhile Directors of the CD. The Tribunal refused to consider the CD's argument & observed that a dispute between the directors was an internal matter of the company & the debtor company is a judicial person subject to legal action. The bench deliberated that if the argument of the CD were to be accepted then no Company could be held responsible for the recovery of the Debt since in every case the affairs of the Company are being managed & controlled by the Directors. Hence, the application was admitted and moratorium was declared.

January 23, 2019

Mr. Qamruddin Faizi v. Kaizen AAC Blocks Pvt. Ltd., CP. (IB)-2668/(MB)/2018

In this case, the Applicant paid share application money to the CD but the shares were not allotted. In the books of the CD, the amount was treated as 'Loan Liability' under the head of 'Unsecured Loan' as per Balance Sheet. The bench, referred to S. 42(6) of the Companies Act, 2013 which provides that after the lapse of prescribed time, the money shall be treated as a "Deposit" if shares are not allotted & advance not refunded. Therefore, the debt was treated as a "Financial Debt" as per S. 5(8) of the Code.

[63] Civil Appeal No. 9405 of 2017.

[64] Civil Appeal No. 21824 of 2017.

January 24, 2019

Madhya Pradesh State Industrial Development Corporation Limited v. M/s Siddharth Tubes Ltd., CP. No. (IB) 67/7/NCLT/AHM/2018

The Applicant issued an RRC in May 2002 against the CD. Later, the CD then approached the Hon'ble Revenue Board of Madhya Pradesh & eventually to BIFR. Then, the Applicant approached the Hon'ble HC of Madhya Pradesh to challenge the quashing of RRC by the Revenue Board. The HC also disposed off the writ petition as CD had registered as a sick unit in BIFR. The bench observed that the RRC was filed well within the period of limitation since the claim of the Applicant continued till Dec. 2016 until proceedings under SICA had been abated. Held, that CD had prolonged the claim by approaching different forums from time to time, thus, proving their intention was to delay the matter. Hence, the default was ascertained & the application was accepted.

January 29, 2019

IDBI Ltd. v. Amar Industries Ltd., CP (IB) 1053 (MB) -2017

In the instant case the CD while filing an application to initiate CIRP u/S. 10 of the IBC suppressed the fact that a liquidation order has already been passed against it. The CD suppressed this fact, knowing it to be material & filed the instant application u/S. 10 of IBC which was a contravention of Rule 10 of IBC (Application to AA) Rules, 2016 & S. 11(d) of IBC, 2016. Resultantly the AA held that the CD is liable to be punished u/S. 77(a) of IBC, 2016 & the application was rejected with cost.

January 29, 2019

Essar Steel Asia Holdings Ltd. v. Satish Kumar Gupta, CP (IB) No. 39-7-NCLT-AHM-2017 & CP (IB) No. 40-7-AHM-2017 with Inv. P. No. 77-2018 in IA No. 430-NCLT- AHM -2018

An application was filed by majority shareholders of CD u/Ss. 12A & 60(5) of the IBC seeking direction to RP and CoC for giving due consideration to settlement plan for CD & withdrawing the CIRP once it gets approved with the majority. Aforesaid settlement plan was extended before the AA subsequent to Hon'ble SC's verdict in *Arcelormittal* case[65] where CoC was ordered to consider resolution plan & in case no satisfactory plan is found, then, order liquidation of the CD. Conclusively, the AA after close perusal of submissions of the Applicants, RP & CoC, rendered the application not maintainable as the same would dilute the direction or mandate of the SC.

January 30, 2019

Shri Veeraganapathi Steels Pvt. Ltd., CP-229-IB-2018

Applicant prayed before AA to extend the time period for CIRP, on account of delay caused due to non-cooperation of promoters in bringing viable resolution for CD. It was prayed to exclude the time lost due to the non-cooperation of promoters from 270 days period. The AA in its order rejected CD's request & ordered liquidation stating the case to be devoid of merits.

February 1, 2019

Sai Enterprises Pvt. Ltd. v. Florind Uppers Pvt. Ltd., CP/1471/IB/2018

An application was filed u/S. 9 of the IBC by the OC against the CD which defaulted in making payment against the invoices dating beyond the

[65] Civil Appeal Nos. 9402-9405 of 2018

limitation period. The issue before the NCLT was, when & as per which law is the acknowledgment of debt set to extend the period of limitation. The NCLT held that when the debt was acknowledged after it had become time barred, the S. 9 application was made. It was held that the acknowledgment of debt u/S. 18 of the Limitation Act, 1963 would prevail over the S. 25 of the Contract Act, 1872.

February 1, 2019

Bank of Baroda v. Neo Infrastructure Pvt. Ltd., C.P. No. (IB) – 875 (PB)/2018

The issue before NCLT was that there was improper Power of Attorney conferred by the FC to defend itself in suits. An application u/S. 7 was filed by an appointee of the AGM of the Bank (FC) but without a board of directors(BoD) approved power of attorney. It was held that if a BoD issued circular gives powers to sign & execute documents in legal proceedings to the AGM's appointee then such petition is valid.

February 1, 2019

Nuvoco Vistas Corporation Ltd. v. Maxout infrastructure Pvt. Ltd., IB-433-ND-2018

The issue in the present case was whether the pendency of winding up a petition in an HC is a bar to initiate CIRP of the CD. The NCLT answered in the negative on the pendency of winding-up proceedings barring the initiation of CIRP. It relied on the cases of *Jaipur Metals*[66] & *Era Infra Engineering*[67] wherein it was held that there is no bar to initiate the CIRP by NCLT unless the official Liquidator has been appointed & a winding up order has been passed in a pending winding up petition.

[66] Civil Appeal No. 12023 of 2018
[67] No.- IB- 190(PB)/2017

February 4, 2019

M/s Hassan Brothers v. M/s Keller Ground Engineering India Pvt. Ltd. [CP-419- (IB)-CB-2018]

CD claimed that the contract itself stands discharged in view of the impossibility of performance of the contract. The reason attributed was the local protest over which the CD had no control as per S. 56 of the Indian Contract Act, 1872. The NCLT answered in the negative, holding that a debt due under a contract can't be claimed to be vitiated by frustration since the contract was agreed to be performed despite strikes, fire, floods etc. Hence, the insolvency petition was admitted.

February 5, 2019

Dr. Ramakant Suryanath Pande v. C.S. Prakash K. Pandya, CP No. 870/IBC/NCLT/MB/MAH/2017

The scope of an RP is limited to verifying the claims received in the light of Regulations 13 & 14 of the IBBI (IRP for Corporate Persons) Regulations, 2016. The RP is not an AA & is not required to enquire into the factual scenario between parties. The RP shall not determine their rights & liabilities. The task of the RP is to limit itself to confirm that the claims received by him are true & correct.

February 11, 2019

Good Value Financial Services Pvt. Ltd. v. Landscapes LLP, CP (I&B) 586/NCLT/MB/MAH/2018

In this case a petition u/S. 7 of the IBC was filed against the CD for recovery of a loan & interest amount. The court relied on the law laid down in *Nikhil Mehta & Sons* v. *AMR Infrastructure Ltd.*,[68] & the concept of time value of money to decide if the

[68] CA (AT)(Insolvency) No. 07 of 2017

same was a financial debt. Held, that since there was nothing on record besides bank statements to prove the amount lent to the CD was a Financial Debt u/S. 5(8) of the IBC. Letters & notices were sent to the CD, but both were not acknowledged by the same. Hence, as per the law laid down in the above-mentioned case, the application was held to be not maintainable.

February 11, 2019

Dr. Vikram Goyal v. M/s Metro Mas Hospital Pvt. Ltd. Company Petition No. IB-1184/ND/2018

The OC in the instant case was a doctor working for the hospital of the CD & had filed the application due to non-payment of his dues/professional fee in time & at times short of the amount actually due. On default of demand notice sent u/S. 8 of the IBC the instant application was filed. The CD though in spite of replying to the notices did not appear before the NCLT & proof of service of the application was presented. The NCLT was thus constrained to proceed with the matter ex-parte & as a consequence, the application was admitted as per S. 9(5) of the IBC.

February 12, 2019

SREI Infrastructure Finance Ltd. v. Sterling International Enterprise Ltd., M.A 169/MB/2019 in C.P. 402/MB/2018

The application was filed by the IRP against the office of the ED under PMLA, 2002 in order to proceed with the CIRP process. The Submissions of the appointed amicus curiae were considered by the NCLT & observed that the purpose & object of the IBC is for resolution of the CD by maximizing the value that can be received by the Creditors & stake holders. After considering the provisions of S. 238 of the IBC, it was held that it will prevail over the former as this will provide the earliest solution. In view of S. 63 of the IBC & the case of *Bank of India* v. *Deputy Directorate Enforcement, Mumbai*,[69] the NCLT further adjudged that the AA under PMLA has no jurisdiction & thus the attachment under passed by the same is hit by S. 14 of the Code.

February 18, 2019

Asset Reconstruction Company (India) Pvt. Ltd. v. Shivam Water Treaters Pvt. Ltd., C.P. No. (IB) 1882(MB)/2018

The RP filed the status report & despite the moratorium order, Municipal Authorities had sealed the Corporate Office/Registered Office of the CD. S. 238 of the IBC provides the overriding effect. After the Moratorium order had been passed, the Municipal Corporation had no authority to seal the property of the CD. The Municipal Corporation of Ahmedabad was directed to immediately open the seal & hand over the possession of the entire property of the CD to the RP. The CD & the Business Head were directed to file affidavit relating to non-co-operation with the RP. It was clarified by the NCLT that the RP is discharging duties as a Court Officer & any noncompliance of the Court Officer will be deemed as Contempt of Court.

February 20, 2019

PAN Chemicals INC v. M/s Sainath Texport Limited, CP (IB) NO.56/Chd/Hry/2018.

An application was filed by the RP u/S. 33(1)(a) of the IBC for passing an order of liquidation. The learned counsel for RP referred to Ss. 33(1), (2) & 34(1) of the Code, which provided that the RP appointed shall act as a Liquidator unless replaced by the AA under sub-section (4). As per S. 34(1), where the AA passes an order for liquidation u/S.

[69] FPA-PMLA-2173/MUM/2018, MP-PMLA-4604/MUM/2018 (E.H.) in MP-PMLA-4224/MUM/2018 & FPA-PMLA-2155/MUM/2018

33, the RP appointed for the CIRP under Chapter II shall, subject to submission of written consent by the RP to the AA, act as the liquidator for the purpose of liquidation, unless replaced by AA. The Bench directed that all necessary provisions & regulations relating to the liquidation process were to be strictly complied with.

February 21, 2019

Standard Chartered Bank v. Prag Distillery Private Limited, CP (I&B) 1067/NCLT/MB/2017.

CIRP was initiated by one of the FCs due to a breach of an existing facility agreement. A forensic audit of the CD was also conducted in the 2nd CoC meeting & relying on the report, the application was filed by the RP u/Ss. 43, 49, 60(5), & 66 of the IBC r.w. Rule 11 of NCLT Rules, 2016. One of the contentions by the RP was that the change in the business model was in the form of preferential transaction, to which, the respondents contended that it was necessary to meet the capital requirements & was done in a standard manner. On perusal of S. 43 of the IBC, it was made clear that the look back period is 2 years from the date of commencement of CIRP with a related party & 1 year with any person other than the related party. Hence, the Bench held that the transactions were out of the purview of preferential transactions.

CIRCULARS

February 7th, 2019

External Commercial Borrowings (ECB) Policy – ECB facility for Resolution Applicants under CIRP

RBI/2018-19/121
A.P. (DIR Series) Circular No. 18

The RBI on February 7, 2019 amended the revised policy on External Commercial Borrowings (ECB) (January 16th circular) to facilitate resolution applicants under CIRP. This paved a new route for them for repayment of existing domestic rupee loans in the country. Through a series of events the RBI, in an attempt to improve the ease of doing business in India, gradually allowed & introduced a streamlined process for External Commercial Borrowings, which initiated with the notification of the Foreign Exchange Management (Borrowing & Lending) Regulations, 2018 on December 17, 2018 & subsequently issued a revised External Commercial Borrowings Policy on January 16, 2019 & further amending the same through the February 7 circular. These new developments eradicate the sectoral curbs & allow entities who are eligible to raise foreign funds to do so as per the provisions of the framework.

The February 7th amendment which amended the January 16, 2018 Circular supplements the CIRP by further easing the scheme of external commercial borrowings in India. Prior to the February 7th circular, repayment of rupee loans with foreign funds was not authorized by the RBI, hence, this is a welcome change for persons undergoing CIRP under the IBC as it speeds up the insolvency process under the IBC, provided that prior permission has been obtained from the RBI. This door serves as an auxiliary step, the resolution applicant can use to repay the loan to the CD by availing cheaper foreign funds, which would help resolve the ever-increasing stressed assets situation in the country. These norms are applicable exclusively to companies falling under the IBC & not for companies which have not yet initiated proceedings under the IBC or has availed ECB funds as per the provisions of the revised framework on stressed assets by RBI, February 12, 2018. It is to be noted that the new framework comes with strict guidelines & RBI's prior approval is mandatory to raise ECB funds. Moreover, Resolution Applicants availing ECBs would have to adhere to hedging costs, pricing norms & minimum average maturity requirements. The framework also mandates that the ECB funds cannot be benefited from overseas branches of Indian Banks or its subsidiaries.

Even though RBI's January 16th circular broadened the group of recognized eligible borrowers & lenders who could avail ECB, it only enabled an entity to utilize the yield of external commercial borrowings to pay off domestic rupee loans in the case where the ECB fund was from a foreign equity holder. Hence, the February 7th amendment comes as a welcome change introducing a well-regulated process which is only applicable to companies going through CIRP under the IBC with prior approval of the RBI.

With the amendment, the ambiguity regarding the type of debt the circular envisages persists as it uses the term "rupee term loans" which could include working capital facilities, non-fund based facilities along with rupee denominated non-convertible debentures. Even though the resolution applicant can now acquire relatively cheap foreign funds, since the framework gives discretionary powers to the RBI, it might affect the time bound fashion in which CIRP is carried out, necessitating a framework which allows the raising of ECBs under the automatic route for this purpose. The RBI could consider extending the applicability of the framework to aid more issues like operational debts, repayment plan u/S. 12A of the IBC & finally for the restructuring scheme of stressed assets by RBI.

REGULATIONS

January 15, 2019

Notification No. IBBI/2019-20/GN/REG039, dated 15th January, 2019 (w.e.f. 15-01- 2019)

It has amended the IBBI (Voluntary Liquidation Process) Regulations, 2017 & has made two changes:

1) In Regulation 6(1)(c)(i), term "Company Secretaries" has been replaced by Secretarial Auditors.
2) In Schedule 1, Form A which is regarding public Announcement, previously 'date falling thirty days after the liquidation commencement date' had to be mentioned, but now it has been substituted by 'date falling thirty days from the liquidation commencement date'.

January 24, 2019

Notification No. IBBI/2019-20/GN/REG040, dated 24th January, 2019 (w.e.f. 24.01-2019)

It has amended IBBI (IRP for Corporate Persons) Regulations, 2016 & has made seven changes:

1) Regulation 36B (4A) has been inserted which provides that the applicant should be asked to submit the performance security in case its resolution plan is approved under sub-section (4) of S. 30, to provide a performance security & can be forfeited in case of failure in implementation of Plan.
2) Regulation 38 (1B) is inserted which provides that the information about failure to implement or contributed to the failure of implementation of any other resolution plan approved, has to be mentioned in the Plan.
3) In Regulation 39(4), the resolution plan has to be submitted to the committee along with the evidence of receipt of performance security required under sub-regulation (4A) of regulation 36B
4) In Regulation 39, Sub-regulation (9) has been added which provides the right to creditor to apply to AA when aggrieved.
5) Form H has been amended & the format of 'The amounts provided for the stakeholders under the Resolution Plan is as under' is amended.
6) Subsequent changes have been made based upon the previous amendments in Rules.