PRIMER ON INSOLVENCY AND BANKRUPTCY CODE 2016

ANALYSIS OF THE SEMINAL SUPREME COURT RULINGS THAT SHAPED THE CODE

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TABLE OF ABBREVIATION

CIRP	Corporate Insolvency Resolution Process
CoC	Committee of Creditors
Code	Insolvency and Bankruptcy Code
IRP	Interim Resolution Professional
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
NPA	Non-Performing Assets
RFP	Request for proposal
RP	Resolution Professional
RBI	Reserve Bank of India
SC	Supreme Court

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INTRODUCTION

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The Insolvency and Bankruptcy Code, 2016 **("Code")** was enacted to introduce a regime of reorganization and insolvency resolution in India which would function in a 'time bound manner for maximizing the value of the assets' of such entity undergoing the insolvency resolution process.

The Code was promulgated to achieve the goals of value maximization and timely resolution since previous enactments, such as the Sick Industrial Companies (Special Provision) Act, 1985 **("SICA")**, Recovery of Debt Due to Banks and Financial Institutions Act, 1993 **("DRT Act")**, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 **("SARAESI Act")**, were considered to be inadequate and ineffective on account of high erosion of asset value flowing from unsuccessful and delayed debt resolutions. [1] As noted by the Hon'ble Supreme Court **("SC")** in the case of Innoventive Industries v. ICICI Bank Ltd., [2] the average time taken for insolvency resolution under the erstwhile legal regime in India took around 4.3 years on average compared to 1 year in UK and 1.5 years in the USA. [3] As indicated by the statements of object and reasons, such tardy insolvency laws was the primary reason for a low ease of doing business ranking of India. Thus, there was a pressing need for a single Code which could bring the insolvency law within a single umbrella for an efficient and timely resolution process.

The Code provides for a creditor in possession model and is a marked departure from the debtor in possession model earlier. The unequivocal theme is that erstwhile management are no longer entitled to continue in management if they cannot service the debts of the corporate debtor.

The principle driving the design of the Code is to give stronger legal rights to the creditors, in events of defaults by the corporate debtor. This was done to instill confidence in credit markets. The Code aims at revival of the corporate debtor, with liquidation kept as a last resort, while maintaining the time limit for such resolution. Therefore, instead of closing the company, the inefficient management is replaced by an insolvency professional who is appointed as the Interim Resolution Professional **("IRP")** / Resolution Professional **("RP")** who manages the company as a going concern during the Corporate Insolvency Resolution Process **("CIRP")** under the aegis of the Committee of Creditors **("CoC")**. The functions of the various stakeholders in the process as mentioned above, including the IRP/RP and the CoC has been discussed below.

Since its inception, the Code has undergone several changes to make it more efficient towards achieving its purpose. The Code has largely been viewed as a successful economic and legislative experiment.

SCHEME OF THE CODE

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While the Code is equipped to deal with insolvency and bankruptcy processes for various kinds of entities, including partnership firms, individuals as well as corporate entities, the provisions of the Code have been brought in a phased manner. It was only the provisions relating to insolvency resolution and liquidation process for corporate persons as given under Part II of the Code which have been in force for the longest duration since the inception of the Code. Part III of the code, which provides for a separate scheme of insolvency resolution for individuals and partnership firms, has only recently been notified by the Central Government. [4]

The SC in the case of Innoventive Industries (supra) has explained the scheme of the Code, in so far as corporate insolvency resolution process (CIRP) for corporate persons is concerned. Once a default takes place, the minimum threshold for which is INR 1,00,000/-, the insolvency resolution process can be triggered either by a financial creditor, operational creditor or corporate debtor itself under section 7, 9 and 10 of the Code, respectively. An application must be submitted before the Adjudicating Authority, which is the National Company Law Tribunal **("NCLT")**. The NCLT after examining the application can either reject or accept the same. Once it has been accepted, the CIRP is set into motion, which has to be completed within 180 days but can be extended up to 330 days. [5] After an application for initiation of CIRP is admitted, a public announcement is made, and a moratorium is declared. The NCLT also appoints an Interim Resolution Professional (IRP) whose major roles include (i) taking over the management of the corporate debtor, (ii) responsibility for running the company as a going concern and (iii) forming a Committee of Creditors (CoC), which is comprised only of financial creditors and (iv) collation of claims. The creditors of the corporate debtor then submit their respective claims to the IRP in the prescribed forms [6] as per the coordinates mentioned in the public announcement.The CoC, once formed, has to then either confirm the Interim Resolution Professional **(IRP)** as the Resolution Professional **(RP)** or appoint a new RP. The RP occupies a central role during the CIRP and is in charge of ensuring the process is carried out efficiently and swiftly. As part of one amongst his many duties, the RP makes a Request for Proposal **("RFP")** for inviting resolution plans for the corporate debtor going through CIRP. The RP vets the resolution plans so received from various resolution applicants to make sure such resolution plans conform to the legal requirements under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The RP then presents such resolution plans which meet the

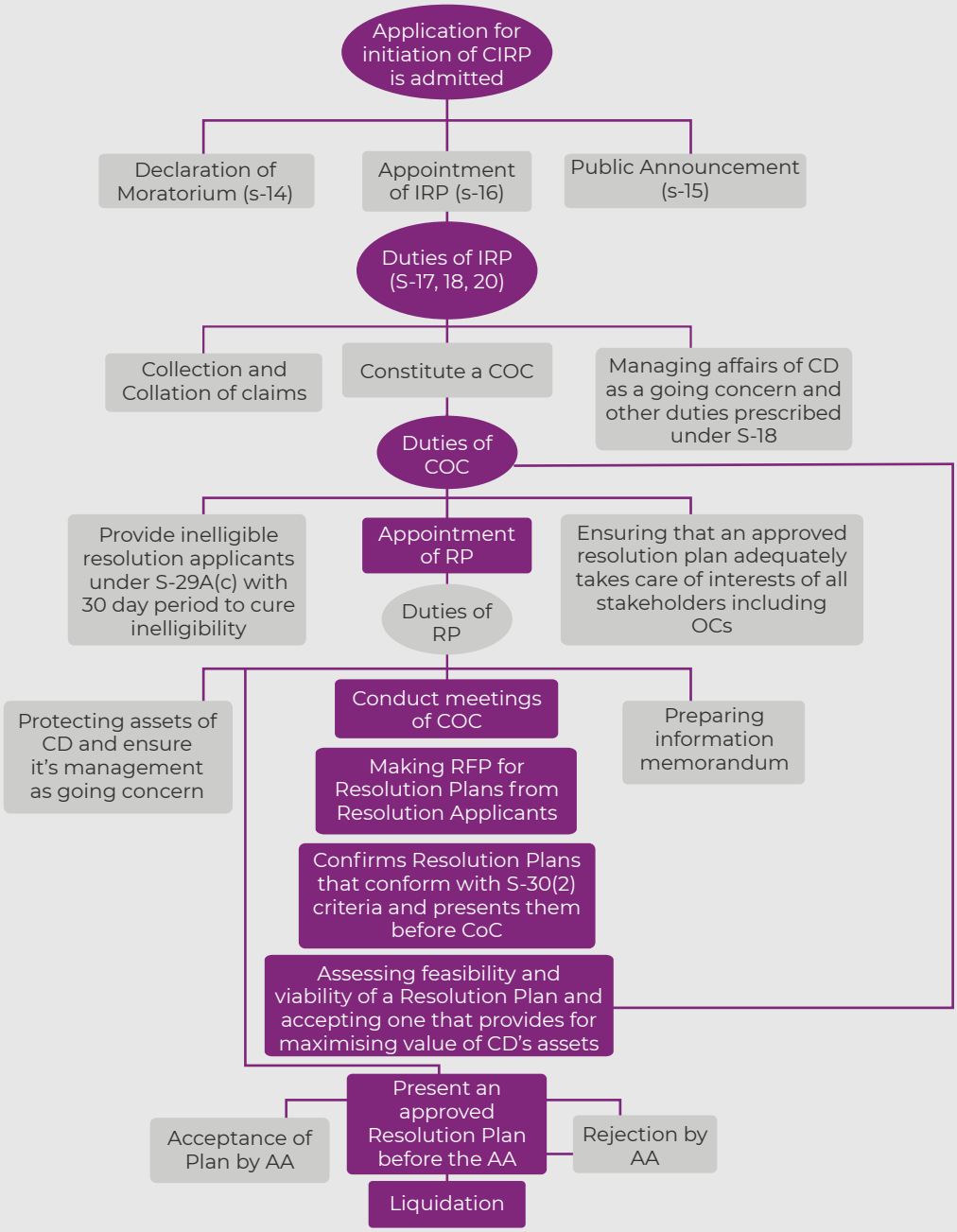
threshold requirement before the CoC which, by a 66% vote, ultimately finalizes aresolution plan after assessing the viability and feasibility of the same. A Resolution Plan which is approved by the CoC is then presented by the RP before the NCLT. The NCLT thereafter undertakes a limited judicial scrutiny, the scope of which has also been delineated in the Code, and then either accepts or rejects the Resolution Plan.

The Code provides for a judicial hands-off approach, and as has also been delineated in the Code, and then either accepts or rejects the Resolution Plan.
The Code provides for a judicial hands-off approach, and as has also been observed by the SC and discussed below, the NCLT is only required to see whether the requirements of law are met and not to opine on the commercial wisdom of CoC. NCLT is merely required to satisfy that a resolution plan has been made in terms of the Code. [7] Going through the scheme, it is evident that while the RP conduct the resolution process and act as a facilitator in the process, the ultimate control over assessing the viability of resolution plans and accepting the same lies with the CoCwith minimal judicial interference.

What is interesting is that liquidation onlytakes place as a last resort, when either no resolution plans are submitted to the NCLT for its approval, or when the NCLT rejects a resolution plan presented for its approval for failing to meet the legislative threshold prescribed under the Code. It is well settled that the judicial review in respect of rejecting a plan is circumscribed within section 31(2) read with 31(1) and the NCLT has to satisfy itself that the plan fulfils the requirements mandated by section 30(2) of the Code. [8]

The scheme of the Code has therefore been observed by the SC, as a legislation which focuses on revival of the corporate entity, so as to save such entity from corporate death by liquidation while simultaneously ensuring maximization of value of assets and returns to the various stakeholders involved in the process. [9] The Code has thus primarily been seen as a beneficial legislation focused on corporate revival and catalyzing capital infusion into the economy rather than a plain vanilla recovery legislation for creditors. [10]

Bird's Eye view of the Corporate Insolvency Resolution Process



ADMISSION

ADMISSION

The procedure for admission of applications made by financial creditors and operational creditors differ significantly under the Code. However, the SC in a recent decision, clarified that no applications can be made and admitted against government entities which essentially act as extended limbs of the Central Government and perform sovereign functions, since such functions cannot be taken over by a RP or any other corporate body under the Code. [11]

a. Financial Creditors

Financial creditor refers to any person to whom a financial debt is owed or to whom such debt has been legally assigned or transferred. [12] Such debt includes any debt along with interest, which is disbursed against the consideration for the time value of money. [13]

A financial creditor can file an application before the NCLT in respect of any financial debt where default in repayment has occurred. The application is admitted when the NCLT is satisfied with the existence of a default. There is no requirement to look into any dispute for financial creditors.

b. Operational Creditors

An operational creditor has been defined as creditor to whom an operational debt is owed. Operational debt includes claim in respect of any goods or services provided including employment or any debt arising under any law which is payable to the government.

Unlike Section 7, application by an operational creditor under Section 9 has to meet a precondition in the form of a demand notice or an invoice for payment sent to the corporate debtor under Section 8 demanding the payment of unpaid operational debt.

The corporate debtor must respond to such notice or invoice within 10 days, either by paying the amount, or bringing into notice that payment has already been made or by pointing out any pre-existing dispute. Only after expiry of these 10 days of sending of demand notice, the operational creditor can file an application under section 9 of the Code.

However, as opposed to an application filed by a financial creditor under Section 7, an application for initiation of CIRP filed by an operational creditor cannot be admitted in case there is a pre-existing dispute, It is pertinent to note herein that the dispute has to be pre-existing, i.e. before the receipt of the demand notice or invoice. [14] As a result of the scheme under Section 9, the scope and ambit of the word “dispute” assumes seminal importance.

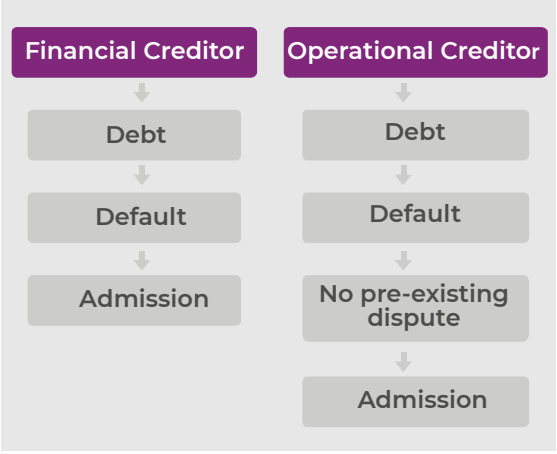
c. Pre-existing Dispute - A Bar to Initiation

There have been several litigations on the point of pre-existing dispute since the inception of Code. Dispute has been defined under section 5(6) which statesthat dispute includes a suit or

arbitration **r**elating to-(a) the existence of the amount of debt; (b) the quality of goods or service; (c) the breach of a representation or a warranty. The SC has also clarified the scope of the term 'dispute' in the case of *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*[15] . In this case, an objection raised by corporate debtor was that the operational creditor has violated the confidentiality agreement because of which it suffered a huge loss in market. However, the operational creditor submitted that said dispute did not fall within the definition of 'dispute' provided in the Code and such violation merely invited claims of damages that can be filed for separately. It was observed that the definition of 'dispute' under section 5(6) was inclusive in nature and the NCLT only has to see that there is an existence of a dispute is based on 'plausible contention requiring further investigation' and which is not a feeble legal argument or any assertion of fact unsupported by evidence or a bluster just to avoid liability under the Code.[16] On facts, the SC held that there is a dispute and subsequently, the application was directed to be rejected.

Similarly, in K. Kishan v. M/s Vijay NirmanCompany Pvt. Ltd. , the question before the SC was whether an operational creditor can invoke the Code where an arbitration award was passed but not finally adjudicated in appeal. It was held that the fact that a challenge to arbitral award was pending before the court was sufficient to establish that there was a dispute. Therefore, the application was held to be inadmissible.

A chart showing the difference in admission process of operational creditors and financial creditors is here in below,



POST ADMISSION

POST ADMISSION

After admission of the application, the resolution process is set in motion with the declaration of a moratorium as per Section 14 of the Code.

Simultaneously, a public announcement for initiation of CIRP is also made giving the details of the IRP appointed for the CIRP along with his/her coordinates and details pertaining to the last date for submission of claims along with such other information that is prescribed.[18]

One of the principal duties of the IRP is to manage the operations of the corporate debtor as a going concern so as to avoid erosion of asset value. The IRP (and subsequently the RP) then convenes and conducts meetings of the CoC and invites resolution plans. The plan approved by the CoC is verified by the RP in terms of the provisions of the Code who subsequently, submits the plan to the NCLT.

a. Moratorium

The NCLT declares moratorium after admission of application in terms of Section 14 of the Code. The moratorium imposes negative as well as positive restraints with respect to actions which may be taken against a corporate debtor. As negative restraints, four classes of actions mentioned under Section 14(1) are barred, which are a) institution or continuation of proceeding, b) transferring, encumbering or alienating assets, c) action to recover security interest and d) recovery of any property which is in possession of corporate debtor. The moratorium also imposes a positive restraint in the form of requiring continuity in supply of essential goods or services to the corporate debtor under Section 14(2).[19] Herein, it is pertinent to note that criminal actions do not fall within the purview of the moratorium. An instance of criminal proceedings which may continue against the debtor could be proceedings which relate to cases for dishonored cheques, criminal liability of directors, etc.

The question of whether the moratorium would apply to a personal guarantor of a corporate debtor or not came up for adjudication before the SC in *State Bank of India v. V. Ramakrishna & Anr.* [20]

In the impugned order, the NCLAT observed that since the resolution plan binds the guarantor under section 31 of the Code, moratorium would apply in favour of the personal guarantor as well. The SC rejected such reasoning by holding that section 31 merely states that the guarantor cannot escape the payment as the resolution plan may include the payments to be made by the guarantor himself. The Court drew a contrast between the moratorium under Part II and Part III of the Code and noted that unlike in part III, the moratorium under Section 14 is only applicable to the 'corporate debtor'. [21] The Court further observed that intention of the legislature was to not allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt. [22] The Court further held that the amendment in

section 14 [23] of the Code, which was brought in to explicitly put guarantors outside the scope of moratorium was merely clarificatory in nature and would therefore, apply retrospectively. [24]

b. Resolution Professional

One of the primary roles of the IRP/RP is to receive and collate all claims submitted by the creditors and constitution of a CoC in terms of Section 21 of the Code. The CoC can then either resolve to appoint the IRP as the RP or replace the IRP with another RP. This decision has to be made by majority vote of not less than 66% of voting share.

The RP conducts the entire CIRP and replaces the management of the corporate debtor to manage its operations as a going concern. It is the duty of the RP to protect all the assets of the corporate debtor including its business operations. In furtherance of this duty, RP has to maintain the updated lists of claims, convene and attend all the meetings, prepare the information memorandum, invite prospective resolution plan and present the same before the CoC. [25] Once the plan is approved by the CoC by a voting share of 66%, the RP has to submit the same before the NCLT.

It is the responsibility of the RP to convene the CoC meeting, prepare an updated list of claims, prepare an information memorandum and ensure that agenda is circulated to all the attendees such as the CoC members, operational creditors and suspended board of directors.

The operational creditors have a right to sit in the meeting of the CoC if their aggregate dues are not less than 10 percent of the total debt. Additionally, members of the suspended board of directors also have a right to sit in such meetings. However, these operational creditors and members of suspended Board are only allowed to attend the meeting but not to vote.

It was held by SC in *Vijay Kumar Jain v. Standard Chartered Bank & Ors.* [26] that suspended Board of Directors are also entitled to receive the relevant documents, including the resolution plan, from the resolution professional. It was observed by the SC that even though these retired members of the Board and operational creditors are not members of CoC, they have a right to discuss along with the members of the CoC and comment on the resolution plan to safeguard their interests.[27]

Further, once the resolution plan is submitted, the RP provides a fair value and liquidation value under Regulation 35. The Resolution Applicant has a right to receive the complete information regarding debts owed by corporate debtor and its activities as a going concern, before the admission of an application under section 7, 9 or 10 of the Code.[28] Herein, the information collected by the RP in information memorandum as well as 'evaluation matrix' [29] under the Regulation 36-B assists the resolution applicant.

Therefore, it has been noted by the SC that RP does not only manage the affairs of the corporate debtor as a going concern, but also acts as a key to facilitate the proceedings by CoC to assist them to make reasoned resolution plan. [30] However, what is also important to note here is that while an RP conducts the corporate resolution of the corporate debtor, he/she cannot by themselves take any major decisions without first having the requisite ratification of the CoC. [31] Further, it is pertinent to note the observations made in *Swiss Ribbons and Anr. v. Union of India and Ors.* [32] that RP is given an administrative role and its decisions are subject to an adjudicatory body overseeing it. One of the examples noted by the SC was Regulation 35A of the CIRP Regulations, wherein the RP can make a determination whether a transaction was preferential, extortionate, undervalued or fraudulent, but cannot directly take any action. In such a case, the RP has to apply to the NCLT for an appropriate relief. [33] Therefore, the RP is a 'facilitator of the resolution process' who functions are overseen by the CoC and NCLT.

Similar observations were made by the SC in *Arcellor Mittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors.* [34] that RP only confirms that the resolution plan is not contrary to any provisions of law, including section 29A of the Code and section 30(2)(e) of the Code foes not empower the RP to decide. Opinions of the RP are given to CoC which makes any further decision.

COMMITTEE OF CREDITORS

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The CoC has one of the most important roles to play in the CIRP. The CoC is formed by the IRP after which it takes the lead role in the CIRP. To understand the structure and function of the CoC, this section is divided into the following sub heads;

a) Creditor in Possession Model

The Code focuses on creditor-in-possession model', i.e. where there is a default by a corporate debtor, the control of the company should shift to the creditors. Provisions of the Code along with regulations outline in detail the importance of the CoC and makes it clear that the CIRP is ultimately in the hands of the majority vote of the CoC, while the RP and NCLT act as facilitators. The Courts have repeatedly held that the scheme of Code gives primacy to the 'commercial wisdom' of the CoC to decide the fate of the corporate debtor by majority of vote.

b) CoC consists of only Financial Creditors

The Code mandates that CoC shall comprise all the financial creditors. [35] The Code has clearly made a neat division between the financial creditors and operational creditors. It also has been observed that most of the financial creditors are secured creditors while the operational creditors are usually unsecured creditors. The CoC is entrusted with the responsibility of financial restructuring. Therefore, the Code has made a distinction between these two classes of creditors based on their capability to assess viability and willingness to modify the existing terms of liabilities in negotiations.

c) Roles and Responsibility of CoC

The CoC decides whether or not to rehabilitate the corporate debtor by accepting any resolution plan. The CoC can approve the proposed resolution plan by no less than 66% of the votes after considering its feasibility and viability. [36] The voting share assigned to each financial creditor is based on the financial debt owed to such creditors. [37]

Even though the RP runs the business of the corporate debtor as a going concern, there are several decisions relating to management of the corporate debtor that cannot be taken without prior backing of 66% of votes of the CoC. These may include raising any interim finance, creation of any security interest over the assets, undertake any related party transaction etc. [38]

The CoC can choose to proceed with the liquidation of corporate debtor by not approving any resolution plan.

d) Creation of Sub-committee

In the case of *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta and Ors.* [39] , one of the challenges dealt with by the SC was against creation of 'core committee' within the CoC which was alleged to have made secret negotiations with resolution applicant. Even though the Court noted that the powers with the CoC are 'administrative in

nature' and cannot be delegated, that would not prohibit forming of sub-committee for any ministerial and administrative acts. The only condition is that the ultimate analysis has to be approved and ratified by the CoC. It is pertinent to note that unless the code otherwise provides for higher vote, all the decisions by the CoC has to be taken by 51% vote.

e) Withdrawal of petition

The Code allow withdrawal of any application either before or after the constitution of the CoC. Before the Constitution of CoC, the applicant can file an application as per Regulation 30A of the CIRP Regulation, under Form FA as prescribed in the schedule of CIRP Regulations, along with a bank guaranteefor estimated expenses incurred by the IRP in the process. However, after the constitution of the CoC, the application has to meet special condition.

Under section 12A of the Code, withdrawal of any application filed under section 7, 9 or 10 can be withdrawn if approved by 90% member of the CoC. The said provision was challenged before the SC in *Swiss Ribbons* (supra). as being unconstitutional for giving unbridled power to the CoC and derailing the settlement process. The SC observed that once an application is accepted before the NCLT, insolvency becomes a proceeding in rem. Therefore, it is necessary that the body which oversees the CIRP, i.e. the CoC, must be consulted before the individual settlement. Therefore, the criteria of approval by 90% of the member of CoC was held valid.

POSITION OF DIFFERENT CLASS OF CREDITORS UNDER THE CODE

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The scheme of the Code clearly makes a division between different class of creditors including financial, operational, secured and unsecured creditors.

a) Financial and operational creditors

Section 21 of the Code mandates that financial creditors are to be the members of CoC. Consequently, only financial creditors vote on any decision that pertains to restructuring of the company during the CIRP. It was challenged before the SC in *Swiss Ribbons* (supra) that the provisions of the Code are violative of constitution as operational creditors are discriminated from the financial creditors.

In the case of *Swiss Ribbons* (supra), while dealing with the issue of discrimination against operational creditors , the SC observed that only financial creditors are in a position to assess the viability and feasibility of various resolution plans for the corporate debtor. [40] Financial creditors, by virtue of being engaged in the business of lending, undertake a detailed market study including techno economic valuation of the debtor, evaluation of business, report etc. before sanctioning of loan. Therefore, it puts them in a better. position to evaluate the resolution plan.

On the other hand, the operational creditors are only involved in recovering the amount which is due and lack the interest as well as the capability to assess the viability and feasibility of the business and take all necessary steps aimed towards a successful debt resolution of the corporate debtor.

The SC further noted that the Code has sufficient measures to ensure that the rights of operational creditor are protected despite of not having any voting rights. Section 30(2)(b) of the Code provides that the resolution plan has to provide for payment of debt to operational creditors which shall not be less than the amount in the event of liquidation. The NCLT while approving the plan ensure that such condition is satisfied. The plan can either be rejected or modified by the NCLT accordingly. Further, Regulation 38 of the CIRP Regulations mandates that the operational creditors are to be given priority over financial creditors in the resolution plan.

For the sake of clarity, the complete distinction laid down by the SC in *Swiss Ribbons* (supra) is concisely tabulated herein;

POSITION OF DIFFERENT CLASS OF CREDITORS UNDER THE CODE

KEY DIFFERENCES

INDEX DIFFERENCE	FINANCIAL CREDITORS	OPERATIONAL CREDITORS
Secured/ Unsecured	They are usually secured creditors.	They are usually unsecured creditors.
Type of business	They lend finance that enables thecorporate debtor to operate.	They are engaged in supply of goods and services in the business.
Quantum of debt	Quantum due is generally large.	Quantum due is generally less.
Number of creditors	Number of FCs is comparatively less	OCs can be large in number.
Repayment schedule	They have specified repayment schedule	There is no such condition.
Proof of debt	Financial debts are well documented,and defaults are easily verifiable.	Possibility of genuine disputes, suchas quality of service, is much higher.
Viability assessment of Corporate Debtor	They are engaged in assessing the business of the debtor before lending the finance.	They are only involved in recovering the money due in to them.

b) Equitable Treatment of Creditors

Even through there is a clear distinction in the rights of different class of creditors during the CIRP, the Code ensures and promotes equality and overall fair treatment of all the creditors.

However, the equitable treatment of creditors in the code does not mean equal treatment. The scheme of Code clearly differentiates between all the classes of creditors and they are to be treated accordingly depending on the class to which they belong.

In the case of *Essar Steel* (supra), the SC dealt with such issue where the impugned order by the NCLAT stated that there can be no difference in the terms of amount to be repaid to creditors, whether they are secured or unsecured, or whether they are financial or operational creditors. The SC, referred to its previous judgment of *Swiss Ribbons* (supra) wherein it had observedthat the CoC while approving the resolution plan has to ensure that the operational creditors are given 'roughly' the same treatment as financial creditors.The scheme of the Code clearly differentiates between the financial and secured creditors.

The SC noted that the Code mandates that operational creditors must receive an amount not less than liquidation value, whereas there is no such requirement for the financial creditors. In furtherance of the same, the NCLT has power to either modify or reject the resolution plan to protect the rights of the operational creditors. However, the SC also looked at the market realities that emanate from the CIRP. Noting, that this guaranteed liquidation value may be zero in most cases, the SC went on to state that such an apportionment of only a minimum value would amount to playing lip service to the requirement to treat the operational creditors equitably. There may be a situation where operational creditors are supplying goods/services that are vital for the business of the corporate debtor. In such a situation, financial creditors would certainly not be able to ensure that the corporate debtor is kept as a going concern in case only a minimum (nil) liquidation value is given to such operational creditors and they consequently stop the provision of these vital goods/services as a result. Therefore, a balanced approach to resolution would also involve the financial creditors keeping the operational creditors interest in mind so as to not have any consequent negative impact on the business.

Further, it was noted that the amended regulation 38 of the CIRP Regulations gives priority to operational creditors in respect of payment under the resolution plan. Moreover, under Regulation 13 of the CIRP Regulations, the security interest of secured creditors is is also taken into consideration. Information pertaining to security interest in also included in the informationmemorandum. Making all the observations the SC held that the equitable principle cannot be stretched to treat unequal equally. Therefore, while fair and equitable treatment of the operational creditors does not mean that they must be

paid the same amount of their debt proportionately, the SC has observed that a concomitant reading of the provisions and the business realities have more often than not ensured that operational creditors obtain a fair share of their dues under the CIRP. [41]

TIMELINE

TIMELINES

The Code lays down a strict time limit under section 12 within which the CIRP has to be completed. Previously, the limit, after an extension by the NCLT on request of CoC, was 270 days. However, recently, a proviso was added to extend the limit up to 330 days which was to include period of litigation as well. This was done to reversethe SC ruling in *ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors*.[42] India case wherein the Court observed that l the time taken in legal proceedings must be excluded from section 12. The amendment was challenged before the SC again in *Essar Steel* (supra) wherein the Court struck down the word 'mandatorily' from the proviso but refused to strike it down completely. The Court relied on the fundamental principle which states that an act of the court shall prejudice no one, as a result of which whilethe limit of 330 days is to be followed including the time taken in legal proceedings and must be followed as closely as possible, the provision would not act as a bar upon the NCLT/NCLAT to extend the time limit in extraordinary cases.

Apart from the overall time limit for CIRP, the Code provides for specific timelines for deferent stages. For example under Regulation 40A of the CIRP Regulations, timeline for each stage of the CIRP has been provided, which has to be followed as closely as possible.[43] Similarly, the period of examination of application by the NCLT and period for making any correction in the application were also considered directory.[44] Therefore, the principle follows is that in order to give effect to purpose of Code, the Court has insisted to follow the time limits as strictly as possible but no time limit has been interpreted as mandatory.

WHO CAN BE A RESOLUTION APPLICANT ?

WHO CAN BE A RESOLUTION APPLICANT?

A resolution applicant is a person who either individually, or jointly with any other person, submits a plan for the insolvency resolution of the corporate debtor as a going concern. Such a plan for the insolvency resolution of the corporate debtor may include provisions for the restructuring of the corporate debtor by way of a merger, demerger or an amalgamation.

In order to provide a suitable resolution plan, a prospective resolution applicant would therefore require complete information relating to the Corporate Debtor, including debts owed by it, and its activities as a going concern, prior to the commencement of CIRP. It has a right to receive information contained in the information memorandum as well as the evaluation matrix under Regulation 36B of the CIRP Regulation.

However, at the very threshold, it is also important for a resolution applicant to be eligible to submit a resolution plan and not be barred by the provisions of the Code in the first place. It is worth noting that the legislature has taken considerable precautions to ensure that a debt-defaulter does not gain control over the corporatedebtor through indirect means. Theseefforts have translated into the introduction of Section 29A in the Code, which bars certain persons from submitting resolution plans. Thus, it is important that resolution applicants ensure that they do not fall foul of Section 29A and are not connected to the corporate debtor or its management. The main objective of introducing this provision was to ensure that it acted as a safeguard against a situation where persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, do not gain or regain control of the corporate debtor through a misuse of the Code.

a. Ineligibility of the resolution applicant:
The provisions of Section 29A have undergone various Changes since its inception when it was first introduced through the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017.[45]

ArcelorMittal (supra) was a seminal decision, wherein the Hon'ble SC clarified the extent and ambit of the application of Section 29A of the Code while laying down the law on Section 29A for the very first time.

In this decision, while observing the provisions of Section 29A, the SC has observed that the wordings of the provisions evinces an intention to rope in not only the person actually submitting the resolution plan, but also any and all such persons acting in concert with the resolution applicant.[46]

In *ArcelorMittal* (supra), SC has noted that applying the provisions of Section 29A to afactual matrix would require a

determination of de facto, as opposed to a strictly de jure position of the category of persons who are barred thereunder. This becomes necessary in light of the objects that the provision seeks to achieve, as it is important to discover in such cases as to who are the real individuals or entities who are acting jointly or in concert, and who have set up such a corporate vehicle solely for the purpose of submission of a resolution plan.[47]

Section 29A is therefore a see-through provision; a provision that mandates the tearing of the corporate veil to give effect to its provisions when it comes to the "person" whose eligibility is to be gone into, so as to make a determination of the person(s) who is actually in "control", whether jointly, or in concert, with such person. [48] Thus, wherever a person acts jointly or in concert with the person who submits a resolution plan, all such persons are also covered under the ambit of Section 29A. To appreciate the expanse of application of Section 29A, one must look at the construction of some of theexpressions contained in the opening words of this provision. The idea of Section 29A is to see who will have the ultimate control.

i. Person acting jointly:

In *ArcelorMittal* (Supra), the Hon'ble SC has clarified that the phrase person acting jointly must be given a purposive interpretation so as to cover persons who have got together and are acting "jointly", in the sense of acting together.[49] Therefore, the intent of the provision is not to encumber the application of Section 29A with the rigors of a statutory definition of "joint venture" [50], but to ensure, on a given set of facts, that all such persons who are acting jointly in the sense of acting together for the purpose of submission of the resolution plan, are also covered by the provision.

i.Person acting in Concert:

The next such term that appears in Section 29A is the phrase "in concert". Though the phrase person acting in concert has not been defined under the Code, reference weas drawn by SC to the definition assigned under Regulation 2(1)(q) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the "Takeover Regulations"). The interpretation of words used in the Code but not defined thereunder can be done by virtue of Section 3(37) of the Code, which allows for such words to be understood in terms of their meanings assigned under the SEBI Act, 1992 and the Companies Act, 2013. The Takeover Regulations have been promulgated by the SEBI under Section 11 and Section 30 of the SEBI Act. Therefore, the definition of a "person acting in concert" concert as given under the Takeover Regulations was referred to by SC to determine the contours of the phrase as it appears under Section 29A(c) of the Code.

WHO CAN BE A RESOLUTION APPLICANT?

A bare perusal of the definition of persons acting in concert under Regulation 2(1)(q) of the Takeover Regulations would show that any person falling under one of the categories mentioned under Regulation 2(1)(q)(2) is deemed to be acting in concert with any other person falling in the same category. By virtue of this deeming fiction, the ambit of persons deemed to be acting in concert is kept extremely wide. Operating under this definition, a company, its holding company, subsidiary company and any company under the same management or control would all be deemed to be acting in concert unless proven otherwise.[51] Similarly, a company, its directors, and any person entrusted with the management of the company would all be persons deemed to be acting in concert.[52] In order to illustrate the expansive ambit of the definition, the SC has also clarified that "immediate relatives", would include father and son, brothers, etc.[53] Further, the SC has also clarified that the definition of "associate"[54] would subsume not merely immediate relatives, but also other forms in which a person may be associated with another such person, be it in the form of a trust or a partnership firm, etc. [55]

The legislative intent to expand the ambit of the provision becomes even clearer when one observes that even the suggestions of the Insolvency Law Committee[56] to curtail the ambit of the provisions had not been accepted by the legislature as no such curtailment of the provisions was done through any amendment.

b. Standard of Proof under Section 29A:

The SC relied on its earlier decisions in order to conclude that the standard of proof required to establish a concert between persons for the purpose of Section 29A would be one of probability, as "evidence of actual concerted acting is normally difficult to obtain, and is not insisted upon"[57] The SC further clarified that the presumption created by virtue of Regulation 2(1)(q)(2) is a rebuttable presumption. As a result, it is open for a prospective resolution applicant to show how it is not acting in concert with any person barred under Section 29A. In order to be covered in the ambit of "persons acting in concert" there must be a shared common objective for substantial acquisition of shares of a target company under the Takeover Regulations. Therefore, a fortuitous relationship coming intoexistence by accident or chance obviously cannot amount to "persons acting in concert".[58]

c. Malfeasance not the sole bar

There are various categories of persons mentioned under Section 29A of the Code that are not allowed to submit resolution plans. In *Swiss Ribbo*ns (Supra), the Hon'ble SC has clarified that malfeasance is not a sine qua non for a person to be barred under Section 29A. Section 29A(a) for

instance, only states that an undischarged insolvent may not submit a resolution plan and does not prescribe criminal intention as an additional factor that merits consideration. Similarly, clause (e) of Section 29A disqualifies a person who has been disqualified to act as a director under the Companies Act, 2013. Under Section 164(2)(a) of the Companies Act, 2013, a person can be disqualified from being appointed as a director of a company if such company has not filed its financial statements or annual returns for any continuous period of 3 years. Clause (h) disqualifies a person who has executed a guarantee in favour of a creditor in respect of a corporate debtor which is already undergoing a CIRP and the guarantee has been invoked by the creditor. Such a person would also not be eligible to submit a resolution plan unless the amounts guaranteed have not been paid to the creditor.

The disqualification upon a person attracted under such clauses of Section 29A as mentioned above would show that consideration of malfeasance or criminal intent of a prospective resolution applicant is not a sine qua non for disqualification under Section 29A. Rather, the raison d'être of the provision appears to be to keep persons who are themselves defaulters, or are otherwise undesirable on account of the various categories of ineligibility mentioned under Section 29A, away from getting back control over their assets.

The SC also clarified that this legislative intent would permeate even to liquidation proceedings. Therefore, just as a resolutionapplicant does not have any vested rights in getting its plan accepted, even an erstwhile promoter does not have any vested right to bid for the immovable or movable property of the corporate debtor.[59]

d. When a person's account is classified as a non- performing asset:

The SC has clarified the ingredients for attracting the bar under Section 29A(c), which relate to accounts which have been declared as non-performing assets (NPA). The ineligibility under clause (c) attaches when a person has an account which has been classified as NPA, for a period of at least one year from the date of such classification till the date of commencement of CIRP.

It is important to note at this juncture that an account being declared as NPA is different from a situation where a person is a willful defaulter. While a willful defaulter is someone who has the ability to pay but does not do so, an NPA is an account belonging to any person which has been declared as such by the RBI. Such a declaration occurs only after a protracted period whereby a defaulter is granted considerable time to ensure that its dues are paid off and its account is not declared as such. The RBI's "Master Circular on Prudential Norms on Income Recognition, Asset Classification and

WHO CAN BE A RESOLUTION APPLICANT?

Provisioning pertaining to Advances", dated 01.07.2015 (hereinafter referred to as the "**RBI Master Circular**"), inter alia,consolidates the instructions on declaration of an account as an NPA.

The RBI Master Circular provides that a person who is not able to clear an instalment or interest on the principal amount for a period of 90 days, the account is declared NPA by the bank. Even after the declaration of an account as NPA, the banks are required to further categorize the NPA as either a sub-standard asset (i.e., an account which has remained NPA for a period of up to 12 months), a doubtful asset (an account which has been under the sub-standard category for a period of up to 12 months) or a loss asset (where an asset is considered of such little value that its continuance as a bankable asset is not warranted).

The RBI Master Circular declares a defaulter as sub-standard asset for a period of up to one year after the declaration of NPA, after which it is to be relegated to the status of a doubtful asset. Referring to the RBI Master Circular, the SC noted that Section 29A(c) does not operate as a bar for sub-standard cases as the resolution applicant is allowed to bid for a period of up to one year after the declaration of an account as NPA. This effectively gives the resolution applicant a total of 1 year and 3 months (3 months before classification as NPA and 1 year thereafter for an asset to remain in the sub-standard asset category) to clear its pending dues, during which period the bar under clause (c) does not apply.

The SC further noted that as a matter of practice, even prior to this 1 year 3 months period, banks and financial institutions do not declare accounts of defaulters as NPA as they first try to resolve disputes with defaulters.

The bar under Section 29A(c) therefore only applies in case the resolution applicant is unable to repay a loan taken, in whole or in part, within this period of 1 year and 3 months. The SC observed that the ineligibility is attracted upon such a person since its inability to clear its dues for such a protracted period would show that such person is itself under financial stress, thus rendering it unfit to bid for any other stressed assets without first remedying its own situation.

The ineligibility under clause (c) also attaches in either of the following three cases:

a. When the corporate debtor is under the management of such person whose account has been declared as NPA (**the management test);**

b. When the corporate debtor is under the control of such person whose account has been declared as NPA (**the control test**);

c. When the corporate debtor is an entity of which the person whose account has been declared as NPA is a promoter (**the promoter test).**

The SC has further clarified that the three tests are disjunctive, i.e., either of the above tests may be satisfied for the purpose of attracting the bar under clause (c).

It is worth noting that the ineligibility attracted under clause (c) can be lifted as per the proviso to clause (c), i.e., when the resolution applicant clears the dues of the corporate debtor whose account has been declared as NPA. This is a unique feature of clause (c), as such a proviso which allows an otherwise ineligible persons to make themselves eligible has not been provided in any other provision under Section 29A.

i) Management Test

In order for the bar under Section 29A(c) to operate against a person, it may be shown that the corporate debtor can be shown to be under the management of a person who's account has been classified as NPA in case such person is either a "manager"[60] , "managing director"[61] or "officer"[62] as The test of management of the corporate debtor vesting with a person barred under Section 29A(c) can would therefore be a *de jure* test, i.e., it need only be shown that such a person is either a manager or a managing director or an officer of the corporate debtor, as defined under the Companies Act, 2013.[63]

ii) Control Test

The bar under clause (c) is also attracted in case the person submitting the resolution plan exercises control over a corporate debtor which in turn has its account classified as NPA. Once again, since the term "control" has not been defined under the Code, Section 3(37) thereof allows us to look at the definitions give under the Companies Act, 2013. The term "control" is defined under Section 2(27) of the Companies Act, 2013, as the right to appoint majority directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly". The definition therefore makes it clear that the term control is sought to be understood as both de jure as well as de facto control.

The control test under Section 29A(c) can be met when positive, or proactive control is shown to be exercised either in fact or in law and negative control would not attract the rigors of Section 29A©. The power to block resolutions, for instance, would not be seen as an effective form of control for the purpose of determining an ineligible person under Section 29A(c). Further the wordings used in Section 29A(c) refer to a corporate debtor which is "under the management or control of such person", which would further show that only positive or proactive control is envisionedunder the provision, as opposed to any reactive control or power.

iii) Promoter test.

Ineligibility for a person to submit a resolution plan under Section 29A attaches under clause (c) when a person is a promoter of a corporate debtor whose account has been declared NPA. This is the "promoter test", last of the three

disjunctive tests which may be used to determine if a person is ineligible under clause (c).

The provisions of Section 2(69) of the Companies Act, 2013 define the term "promoter" as a person who has either been named as such in the company's prospectus or annual returns, or someone who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise. Promoter is also defined under the provision as a person in accordance with whose advice, directions or instructions the board of directors of the company is accustomed to act. The definition of the term under the Companies Act would therefore clearly show that both de jure as well as de facto position of a person can be tested when determining whether such person occupies the position of a promoter of a corporate debtor whose account has been declared as NPA.[63]

iv) Proximate cause

While laying down the law on Section 29A(c), the SC has also stressed on the need for courts to look at antecedent facts reasonably proximate to the point of time of submission of the resolution plan.

This means that courts are not restricted from looking at the state of affairs of a resolution applicant before the submission of a resolution plan so as to ascertain whether any reorganization/other such efforts have been made by such persons with the sole objective of avoiding paying the amounts under the proviso.

The extent and degree to which the Court has actually applied this provision becomes clear upon appreciation of certain facts which led to the rejection of the resolution plans submitted by Numetal as well as ArcelorMittal on application of Section 29A(c).

v) Application of Section 29A(c) to Numetal

Section 29A applies to a person who falls under any of the categories of disqualifications laid down thereunder. As discussed above, it also applies to any other person acting jointly or in concert with such person who would be disqualified under Section 29A.

Numetal had been expressly incorporated for submitting a resolution plan for the CIRP of Essar Steel (ESIL). Before submission of the resolution plan, AEL heldthe entire share holding in Numetal.

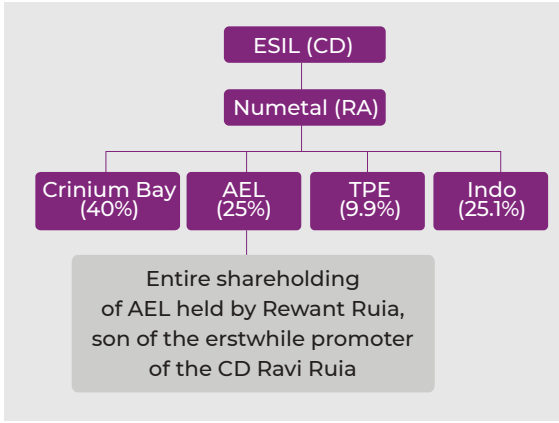
AEL's ultimate beneficiary was Rewant Ruia, who was also the son of Ravi Ruia, the ESIL's promoter. At this stage, Rewant Ruia, was deemed to be acting in concert with his father, Ravi Ruia in terms of Regulation 2(1)(q)(2)(v) of the Takeover Regulations. ESIL's account being classified as an NPA for more than 1 year, prior to the commencement of the CIRP of ESIL on 02.08.2017, the provisions of Section 29A(c) would apply to bar Numetal from submitting a resolution plan.

WHO CAN BE A RESOLUTION APPLICANT?

An attempt was therefore made, before the submission of the resolution plan, to dilute AEL's interest in Numetal, the resolution applicant. To this end, AEL undertook a series of transaction to transfer 40% of its share capital in Numetal to Crinium Bay, an indirect wholly owned subsidiary of VTB Bank, whose shares were held by the Russian GovernmentAEL also transferred shares representing 25.1% of the share capital of Numetal to Indo International Trading FZCO ("Indo"), and also transferred shares representing 9.9% of the share capital of Numetal to Tyazhpromexport JSC ("TPE").

All such transactions took place between .2-3 days before the date of submission ofthe resolution plan. Ultimately, at the time of submission of the first resolution plan, Numetal was comprised of 4 shareholders, being Crinium Bay, Indo, TPE and AEL.

Since Numetal was a newly incorporated entity, having been incorporated for the sole purpose of submitting a resolution plan, the credentials of its constituent shareholders were required to be checked. Once the corporate veil was so lifted, it would show that the four shareholders of Numetal were persons who were acting "jointly" towards submitting a resolution plan by forming Numetal for the acquisition of ESIL's assets. They were persons who were acting jointly, within the meaning of Section 29A and Numetal was thus ineligible to submit a resolution plan without first paying off the dues of the NPA of ESIL.



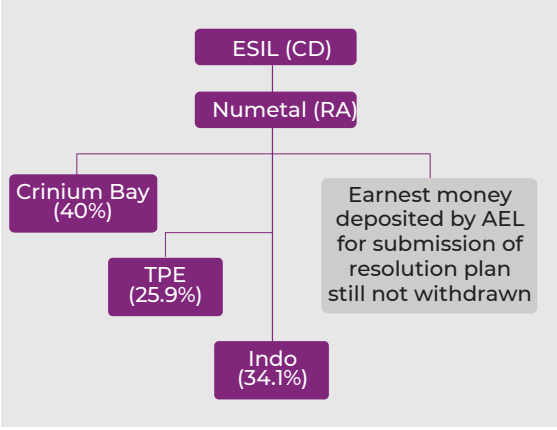
What is interesting is that when Numetal was given an opportunity to cure the disqualification in terms of the provision to clause (c), the Resolution Plan submitted by Numetal sought to show that this time AEL had been completely removed from the picture.

However, the SC closely parsed the facts leading up to the submission of the 2nd resolution plan and observed that the earnest money deposited for submission ofNumetal's resolution plan was submitted by AEL, and the said earnest money remained deposited till date. The SC also looked at the proximate state of affairs of the resolution applicant in the period leading up to its submission of the resolution plans, whereby AEL had transferred its entire shareholding to Crinium Bay, Indo and TPE, who were stated to be independent entities.

As such, in Numetal's case, an attempt was made to show that AEL and consequently

Rewant Ruia no longer had any stake in Numetal, the resolution applicant. Importantly, before the submission of the 2nd resolution plan, the SC closely observed the various reorganization efforts of Numetal and its shareholders, which showed that the ultimate object of the chain of all such transactions was to circumvent the provisions of Section 29A.

While this was an exercise which was undertaken by the SC in the backdrop of these facts, what is borne clearly from such an exercise by the SC is that the ambit of analysis undertaken under Section 29A is extremely wide and expansive so as to prevent the promoters or persons connected to promoters of the corporate debtor from getting back in control of the corporate debtor.



vi)Application of section 29A(c) to Arcelormittal:

ArcelorMittal India Private Limited (AMIPL), the resolution applicant, is a wholly owned subsidiary (WOS) of Oakey holdings BV, which is a WOS of ArcelorMittal Belvel & Differdange Societe Anonyme (AMBD), which is in turn the WOS of ArcelorMittal Societe Anonyme (AMSA).

On 4.9.2009, a Co-Promotion Agreement was executed between AMNLBV and the Indian promoters of Uttam Galva, vide which AMNLBV was entitled to nominate half of all non-independent directors on Uttam Galva's board.

While the shareholding of AMNLBV in Uttam Galva was 32%, it was subsequently diluted to to 29.05% in December 2017. The Co Promotion Agreement, explicilty named AMNLBV as the foreign promoter of Uttam Galva, while also making it clear that Uttam Galva would be jointly managed and controlled by the foreign and Indian promoters.

On 31.3.2016, Uttam Galva's accounts were declared as NPA. It is important to note that, in all the annual returns of Uttam Galva till 2019, AMNLBV's shareholding had been shown as 'promoter's shareholding.'

few days before AMIPL submitted its resolution plan, AMNLBV sold its entire shareholding in Uttam Galva through an off market sale, to Sainath Trading Company PrivateLimited, a company owned by the Indian promoters of Uttam Galva. The transfer of shares was done without making an open offer under the 2011 Takeover Regulations. An exception to the Takeover Regulations was invoked by stating that the transaction was only an inter se transfer of shares between

promoters, and therefore exempt from such requirement under Regulation 10(1)(a) of the Takeover Regulations.

AMNLBV then addressed letters to the National Stock Exchange and the Bombay Stock Exchnage in order to record the said inter se transfer. It is pertinent to note that NSE and BSE had declassified AMNLBV as a promoter of Uttam Galva on 21.3.2018 and 23.3.2018 respectively.

However, despite a formal declassification of AMNLBV as a promoter by the NSE and the BSE, the SC noted that Uttam Galva's Annual Returns continued to show AMNLBV's shareholding as the "promoter's shareholding". The SC noted that AMNLBV's name appearing as a promoter in the Annual Returns of Uttam Galva would show that it was a promoter under Section 29A(c) in so far as AMNLBV would be a de jurepromoter under Section 2(69)(a) of the Companies Act, 2013, i.e., a promoter who hadbeen identified as such in the annual returns of Uttam Galva.

However, the SC also noted that the reasonably proximate facts prior to the submission of resolution plan by AMIPL showed that the transfer of shares had taken place with the sole object of circumventing the need to meet thecondition of the proviso to Section 29A(c). It was specifically noted by the SC that condition of the proviso to Section condition of the proviso to Section 29A(c). It was specifically noted by the SC that shares of Uttam Galva, which were otherwise valued at INR 19.50sold to the Indian Promoter's company at a distress value of INR 1. Therefore, while declaring AMIPL ineligibile under Section 29A(c), the SC undertook a concomitant analysis of the proximate state of affairs which included the transaction, its timing as well as the the manner of carrying it out.

A chart showing AMIPL's ineligibility on account of Uttam Galva's dues not having been cleared is given below:

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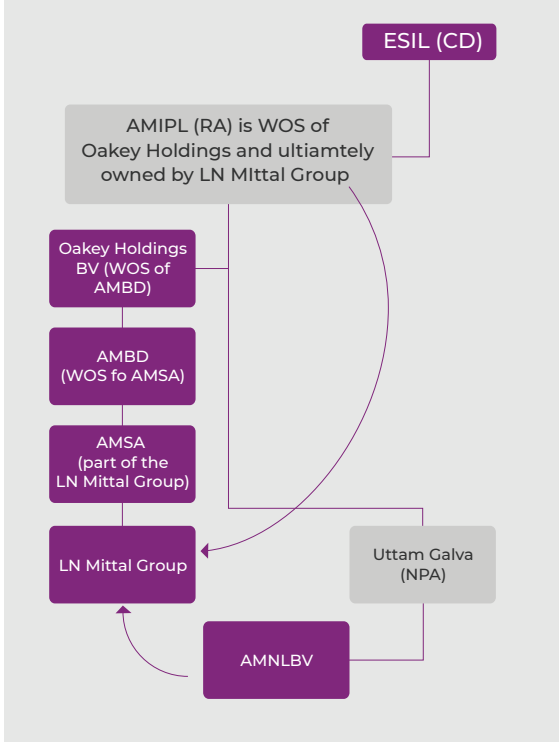

The ineligibility under Section 29(A)(c) was also attached to AMIPL vide its relationship with entities that exercised control over KSS Petron, which had also been declared as NPA.

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Fraseli Investments Sarl (Fraseli) is an entity owned and controlled by the LN Mittal Group, who are also the promoters of AMIPL.. Fraseli held 32.22% of the shareholding of KSS Global, a company domiciled in the Netherlands. On 19.5.2011, by a Fraseli had ente red intoa Shareholders Agreement **(SHA)** with KSS Holding, KSS Infra EALQ, whereby the parties were given the right to acquire equal number of directors in KSS Global. KSS Petron, a company incorporated in India, was a WOS of KSS Global. Under the SHA, Fraseli was also granted affirmative voting rights on decisions pertaining to certain specified matters with respect to KSS Global and its subsidiaries, which included KSS Petron.

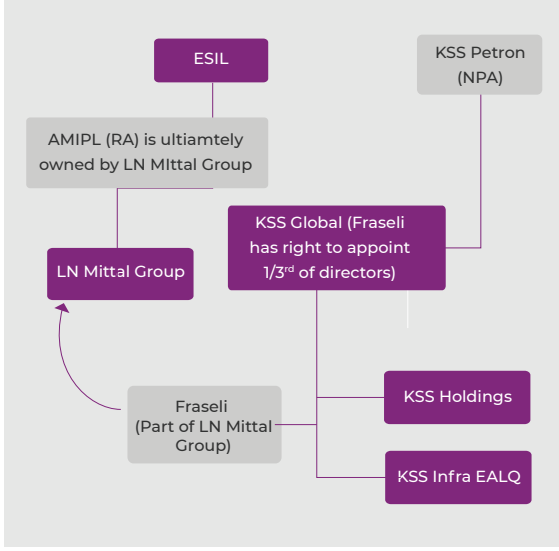
KSS Petron was declared as a NPA on 30.9.2015. Similar to Uttam Galva's situation, Fraseli divested its shareholding in KSS Petron on 9.2.2018, i.e., only three days before AMIPL submitted the resolution plan. On the very same day, the directors nominated by L.N. Mittal, through Fraseli, resigned from the board of KSS Global.

The SC noted that Fraseli was a company which was ultimately controlled by L.N. Mittal. Once the corporate veil was pierced, it could be seen that Fraseli was in joint control of KSS Petron, which was owned by KSS Global, in which one third of the shares were held by L.N. Mittal's Fraseli.

Further, the SHA gave Fraseli affirmative voting rights on certain important specified matters. The SC noted that under this structure, AMIPL would undoubtedly be hit by Section 29A(c), as a group company of L.N. Mittal which was in a position to exercise positive control over

KSS Petron through its parent company KSS Global, in which Fraseli had affirmative voting rights and the right to appoint directors.

As in the case of Uttam Galva, the SC once again analysed transactions which were reasonably proximate to the date of submission of the resolution plan which included Fraseli's divestment in KSS Global, along with the resignation of the directors of KSS Global who were appointed by L.N. Mittal. Once again, as in the case of Uttam Galva and Numetal's ineligibility, the SC determined these as transactions which were undertaken with the sole object of avoiding the consequence mentioned in the proviso to Section 29A(c).



The SC also clarified that an ineligibility of a person under clause (c) can be removed when such person pays off the overdue amounts, interest and such other charges relating to the NPA in question before the submission of a resolution plan.

e. When a person is involved in a preferential / undervalued or an extortionate transaction relating to any corporate debtor:

While dealing with the interpretation of Section 29A(c), the SC has also clarified the provisions of Section 29A(g). Under clause (g), ineligibility to submit a resolution plan is attached to a person who has either been a promoter of or in the management or control of a corporate debtor in which an extortionate credit transaction, or a fraudulent / preferential or undervalued transaction has taken place.

While clarifying the extent and scope of control that is to be shown as being exercised by a person over a corporate debtor, the SC observed that a bare reading of the class of transactions on account of which the ineligibility under clause (g) attaches would show that such person would necessarily have to be in a position of exercising positive control over the corporate debtor. As such, the terms management or control appearing under clause (g) were held to aid the understanding of the extent of management or control that is to be shown to be exercised by a person under Clause (c).

Per contra to the ineligibility of NPA in clause (c), ineligibility attracted under clause (g) cannot be removed by paying off the debts of the corporate debtor.

f. When a person is prohibited from trading in securities or accessing the securities market

Section 29A (f) of the Code makes a person ineligible to submit resolution plans when such person has been prohibited by SEBI from trading in the securities market. Such a person, or a person acting jointly or in concert with such person would therefore not be eligible to submit a resolution plan.

The SC has also clarified the extraterritorial application of Section 29A by taking an instance of a person falling under Clause (f) in any other jurisdiction. Section 29A(i) extends the ineligibility to submit resolution plans in case a person is subject to any disability attracted under Clauses (a) to (h) of Section 29A. Therefore, in case a prospective resolution applicant has been prohibited from trading in securities in any jurisdiction by a competent authority, such a person would not be eligible to submit a resolution plan as the ineligibility under Clause (f) would extend to such person by virtue of the application of Clause (i).

However, it is interesting to note that the SC has clarified that a prohibitory sanction by an authority situated outside India for political reasons would not be covered under Clause (i). Therefore, if a prospective resolution applicant is able to show that any of the categories of ineligibility under Section 29A of the Code are attached to it

not by the operation of law in the ordinary course of events, but by virtue of some political imposition, it may be possible for such a resolution applicant to escape the rigors of Section 29A.

g. When a person has a connected person to whom the ineligibility attaches

Clause (j) makes any person who is connected to any person ineligible under Clause (a) to (i) of Section 29A also ineligible to submit a resolution plan. A connected person has been defined under Explanation I to Clause (j). In terms of the Explanation I, a person is considered as being connected to a prospective resolution applicant who has been declared ineligible under any of the categories mentioned from Clause (a) to (i) of Section 29A in case (1) such a person is the promoter/in management or control of the resolution applicant, or (2) such a person would be the promoter/ in management or control of the corporate debtor during the implementation of the resolution plan, or (3) such a person is the holding company, subsidiary company, associate company or related party of a person referred in the other categories of the definition of a connected person in clause (i) or (ii) of Explanation I.

As can be seen, Clause (j) expands the scope of Section 29A even further. In the absence of clause (j), the ineligibility under Section 29A would extend to (i) a resolution applicant directlyhit by any of the categories ineligibility under Section 29A and (ii) person acting jointly or in concert with a prospective resolution applicant who was hit by any ineligibility under any of the categories mentioned in Section 29A. However, Clause (j) also adds a person who is connected to any of such ineligible resolution applicants in the list of persons who are not allowed to submit a resolution plan. This clause shows the intent of legislature to ensure that only genuine resolution applicants can bid for a company.

The expression “related party” in relation to a corporate debtor[65] as well as in relation to a person[66] has been defined extremely broadly under the Code. The term “relative”, as appearing in Section 5(24A) of the Code, has further been defined in the explanation to Section 5(24A) and includes all persons which may fall up to the third-degree of relatedness, i.e., up to the individual’s great grandchild.

On a first glance, the provisions of Section 29A(j), especially read in terms of a related party mentioned under clause (iii) to Explanation I, may appear to be expansive to the point of being unnecessarily cumbersome. However, in Swiss Ribbons (Supra), the SC has clarified that the categories mentioned in Section 29A(j) deal with persons, natural as well as artificial, who are “connected” with the business activity of the resolution applicant. Therefore, applying the doctrine of nexus, the SC has clarified the interpretation of clause (j) to extend only to persons who are connected to the business activities of the resolution

applicant.

Just as in the case of a person acting in concert as mentioned above, the presumption created for a connected person is also a rebuttable presumption, as the moment it can be shown that a deemed-to-be connected persons does not have any interest or connection with the business of a corporate debtor, such a person ceases to be a connected person. This curtails the limits of the provision to workable limits and removes unnecessary hurdles that may be created when reading the provisions simpliciter.

h . No bar under Section 29A for promoters of MSME debtors:

A specific exception to the application of clause (c) and (h) of Section 29A on prospective esolution applicants has been carved out for cases where the CIRP relates to a corporate debtor which is either a micro, small or medium enterprise (MSME) as defined under the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act). Section 7 of the MSMED Act defines the threshold investment in plant and machinery (P&M) in case of manufacturing or production of certain prescribed categories of goods as an indicium to determine whether an enterprise is a micro, small or mediumenterpri-
se. In case the investment by an enterprise in P&M is below INR 25 lakh, such an enterprise is classified as a micro enterprise. An investment in the range of INR 25 lakh – 5 Crore puts the debtor in the small enterprise category and investments in the range of INR 5 to 10 Crores in the medium category of enterprises. For enterprises engaged in rendering services, the respective thresholds are defined asinvestments in equipment when such investments are made in the range of up to INR 10 lakh for micro enterprises, INR 10 lakh to 2 crore for small enterprises and INR 2 Crore to 5 Crore as medium enterprises.

MSMEs are significant contributors to the economy and as such the government has taken many steps to spur entrepreneurship in the sector. The rationale for carving out this exception was observed by the SC in Swiss Ribbons (supra) wherein the SC noted that there may not be resolution applicants apart from the promoters of the debtors themselves who would be interested to bid for these companies. In such a scenario, the initiation of CIRP would inevitably lead to liquidation on account of failure to attract resolution plans. The exception in terms of Clause (c) and (h) of Section 29A allows a promoter, who is not a willful defaulter, from submitting resolution plans for the insolvency resolution of an MSME debtor. Such an exception of the application of Section 29A of the Code for MSMEs shows that the legislature has been receptive to hardships that may be faced by certain classes of persons and appropriate changes are made to the Code when such matters are discovered in the application of its provisions.

RESOLUTION PLAN

RESOLUTION PLAN

Once the Resolution Professional makes an nvitation for expression of interest, as per the criteria decided by the CoC under Section 25(2)(h), Resolution Applicants submit their respective resolution plans to the RP as per the conditions laid down in the invitation for Expression of Interest.

While a resolution plan is made to conform with the criteria laid down by the CoC under Section 25(2(h), which would necessarily differ from case to case based on the complexity and scale of operations of a particular corporate debtor, each and every resolution plan must conform to the criteria laid down under Section 30(2) in order to ensure that a resolution plan is presented by the RP before the CoC for its consideration.

It is only when the resolution plan conforms to the requirements of Section 30(2) that it is presented to the CoC for its approval. Even after an approval given by the CoC to any particular resolution plan under Section 30(4), the NCLT is again required to confirm if the requirements under Section 30(2) have been satisfied while considering such an approved resolution plan.

Under Section 30(2), a resolution plan must necessarily provide for the payment of the insolvency resolution process costs, in priority to the payment of all other dues. The plan must also provide for the payment of the operational debts which should in no case be lower than the liquidation value. The plan must also ensure that it provides for the management of the affairs of the corporate debtor and the implementation and supervision of the Plan. A resolution plan l must not contravene any of the provisions of law, which includes the provisions of the Code.

The CIRP Regulations provide for certain criteria and directions in order to ensure that a resolution plan satisfies the conditions mentioned under Section 30(2).Regulation 37 of the CIRP Regulations provides an illustrative and inclusive list of measures as may be necessary for the insolvency resolution of the corporate debtor for maximization of the value of its assets. Under Regulation 37, a resolution plan submitted by the prospective resolution applicant must provide for such measures which may include transfer or sale of assets, or part thereof, whether subject to security interests or not. The plan may provide for either satisfaction or modification of any security interest of a secured creditor and may also provide for reduction in the amount payable to different classes of creditors.

A resolution plan may also provide for payments to be made by the guarantors of the corporate debtor. As such, in the case of Essar Steel (supra), while relying on its earlier judgment in the case of SBI v. Ramakrishnan, the SC has clarified that a resolution plan binds all stakeholders including guarantors.

Regulation 38 also provides for a list of mandatory contents of a resolution plan. A resolution plan must contain, inter alia, a provision that the amount due to operational creditors shall be given priority in payment over financial creditors. It must then provide for the term of the plan, management and control of the business of the corporate debtor during such term, and its implementation. It must also demonstrate that it is feasible and viable, and that the resolution applicant has the capability to implement the said plan. Importantly, under Regulation 38 (1A), a resolution plan is required to include a statement as to how the plan has dealt with the interests of all stakeholders, including financial and operational creditors.

However, a common issue that has been raised by operational creditors from the inception of the Code is that the liquidation value being nil in most cases, such operational creditors are often short-changed during the process.

In *Swiss Ribbons* (supra), the SC has clarified that a resolution plan cannot pass muster under section 30(2)(b) read with Section 31 unless alminimum payment is made to operational creditors, being not less than liquidation value.[67] Further, in Essar Steel (supra), the SC has alsonoted that a concomitant reading of the various provisions of the Code and the CIRP Regulations evince the importance given to ensuring that the corporate debtor is kept running as a going concern during the insolvency resolution process.[68] What is seen from these decisions is that the SC has noted that the priority in payment and the minimum guaranteed quantum of such payment, being the liquidation value, would show that the Code has attempted to balance the interest of alstakeholders, including the operational creditors. In Swiss Ribbons (supra), the SC had noted that empirically the interest of the operational creditors have been safeguarded in the resolution plans.

In *Essar* (Supra), while adverting to the requirement under Regulation 38(1A), which provides that a resolution plan must contain a statement as to how it has dealt with theinterest of all stakeholders, the SC has specifically mentioned that a resolution plan which provides only for the liquidation value to the operational creditors, which may be nil in most cases, would not balance the interest of all stakeholders.[69] Therefore, a resolution plan must provide for a minimum payment of dues to operational creditors, which in any case cannot be less than the liquidation value.

SCOPE OF JUDICIAL REVIEW UNDER THE CODE

SCOPE OF JUDICIAL REVIEW UNDER THE CODE

The SC has delineated and clarified the scope and extent of judicial interference that is permissible under the Code. In its decision in the case of *K. Sashidhar v. Indian Overseas Bank & Ors.*[70] , the SC clarified that the scope of judicial interference is constrained to the assessment of factors listed under Section 30(2) of the Code which mandatorily require a resolution plan to conform to certain prescribed criteria.

What has been clarified by the SC in K. Sashidhar (supra) as well as subsequent decisions, is that the commercial decisions that the CoC takes in its role as an evaluator of which resolution plan is best suited to maximize the value of the corporate debtor's assets, falls in the realm of commercial considerations, and has thus been explicitly held to be outside the bounds of justiciability.

Under the Code, judicial review by the NCLT has been circumscribed by Section 31, which limits judicial scrutiny only to approved resolution plans. The grounds for enquiry under such a review have also been extended only to matters mentioned under Section 30(2) and can beundertaken to check if the stated requirements have been met by an approved resolution plan or not.

An enquiry by the NCLT would therefore necessarily extend only to an enquiry as to whether an approved resolution plan provides for (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervsion of the resolution plan.

Finally, under Section 30(2)(e), the NCLT is required to ensure that a resolution pan approveof the resolution plan. d by the CoC does not contravenes any of the provisions of the law for the time being in force, which would include the provisions of the Code, thus the Resolution Plan must contain the mandatory requirements as provided in the Code and the attendant regulations.

A significant degree of judicial interference can still be brought to be exercised under clause (e) of Section 30(2). In Essar Steel (supra), the SC noted that while a commercial decision taken by the CoC would not be open to judicial review what can be pursued under the scope of judicial interference is whether the CoC has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of.

However, in Essar Steel supra, the SC has clarified that even when the CoC takes a commercial decision during the evaluation and acceptance of a particular resolution

plan, it must necessarily give consideration to the maximization of the value of the assets of the corporate debtor and that it has adequately balance the interests of all stakeholders, including operational creditors.

While balancing the interests of all stakeholders, the equitable treatment of creditors must weigh on the mind of the CoC as it reviews the resolution plan(s) presented before it. However, equitable treatment of creditors must not be the Cexpanded to the point of compelling the CoC to mete out equal treatment to creditors, irrespective of the nature of debt owed to them. If the Code mandated equal treatment of creditors while giving decision making powers to financial creditors, so as to put an operational creditor (who may be supplying raw materials/services which enable the corporate debtor to run its business) on the same pedestal as a secured financial creditor (who may have funded the very business of the corporate debtor by extending loans which may be secured by the land on which the corporate debtor carries on its business), the secured financial creditor would always move for liquidation, where it would recover its costs from sale of the debtors assets. However, this would beat the very object of the code, which is to ensure that corporate death is left as a last resort. Understanding the businessof the corporate debtor, assessing the viability of resolution plans, judging business projectionsbased on normative data, etc.

are all important commercial decisions that are integral to a successful resolution process. The consideration of interests of all stakeholders, including operational creditors, are nothing but cogs in the wheel of an ultimately successful resolution process of a corporate debtor.

In addition to determining the judicial interference by the NCLT/NCLAT while considering resolution plans, the SC, in the case of Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors.[71] has also clarified the jurisdiction of the NCLT while deciding incidental matters that relate to CIRP. In Embassy (supra), the SC was called on to decide whether the NCLT could issue directions to the state government under the Mines and Minerals (Development and Regulation) Act, 1957, which dealt with regulation of mines and development of minerals and, thus, fell in the realm of public law. The SC concluded that while the powers given under Section 60(5)(c) is very broad in its sweep as it confers power on the NCLT to decide any question of law or fact arising out of or in relation to CIRP, such powers could not be extended to issuing directions to the government or statutory authorities in relation to matters which fall in the realm of “public law”. To clarify the ambit of public law which is kept out of the scope of NCLT’s powers, the SC has also given an instance of decisions rendered by other statutory bodies, such as the central revenue authority (the Income Tax Appellate Tribunal), against which the NCLT cannot issue directions/decisions.

LIMITATION PERIOD IN THE CODE

LIMITATION PERIOD IN THE CODE

Section 238A was introduced in the Code vide Insolvency & Bankruptcy Code (Second Amendment) Act, 2018 which provided for the application of the Limitation Act, 1963 to proceedings before the NCLT and NCLAT.

The SC in B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates clarified the ambiguities around applicability of limitation. The SC has observed that limitation, being procedural in nature, would allow 'retrospective application' of the Limitation Act, 1963 to proceedings initiated under the Code.[73] However, the retrospective application of the Limitation Act would not revive a debt which is otherwise time barred.

The SC further held that Article 137 of the Limitation Act would be attracted for an application under the Code which gives three years of limitation once the 'right to apply accrues'.[74] Such rights right to file an application accrues when a default occurs. Therefore, any application filed after the coming of Code into force would not sustain if the debt mentioned therein is time barred and can thus, no longer be held to be a default in terms of Section 3(12) of the Code.

NON-OBSTANTE CLAUSE

NON-OBSTANTE CLAUSE

Section 238 of the Code gives the provisions of the code an overriding effect on any law or an 'instrument' having effect by virtue of any law. It is established that the Code is a consolidating and amending act, being a complete code in itself. 'instrument' having effect by virtue of any law. It is established that the Code is a consolidating and amending act, being a complete code in itself.

The Code was given an overriding effect over the Tea Act, 1953 to promote revival rather than liquidation in furtherance of the purpose of Code. [75] The Tea Act, 1953 was restricted to winding up proceeding and the Court noted that the Code cannot be limited/restricted to only winding up. In furtherance of such purposive interpretation and noting that theCode was enacted subsequent to the Tea Act,the Code was given an overriding effect.

'Earlier in the case of Innoventive Industries (supra), the SC used the non-obstante clause of the Code to give it an overriding effect on Maharashtra Relief Undertakings (Special Provisions Act), 1958, which was a state legislation.

The SC clarified that the non-obstante clause of the Parliamentary enactment will prevail over the similar clause of a state law which was limited.

It was observed therein by the SC that non-obstante clause is contained in the Code to ensure that no right of corporate debtor under any other law can come in the way of Code.

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[1] Statement of Objects and Reasons of the Insolvency and Bankruptcy Code, 2016.
[2] M/S Innoventive Industried Ltd. v. ICICI Bank & Anr., Civil Appeal Nos. 8337-8338 of 2017.
[3] Ibid, ¶ 13.
[4] Vide Notification No. S.O. 4126(E) dated 15.11.2019, the Central Government notified the provisions of Part III of the Code, except for provisions relating to Fresh Start Process contained in Chapter II of this Part, in so far as they relate to personal guarantors to corporate debtors.
[5] See Section 12 of the Code as amended by the Amendment Act No. 26 of 2019 (August 6, 2019).
[6] The respective forms in which different classes of creditors are required to submit their claims are contained in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
[7] See Committee of Creditors Essar Steel India Ltd. v. Satish Kumar Gupta & Ors., Civil Appeal 8766-67 of 2019, ¶ 46.
[8] K. Shashidhar v. Indian Overseas Bank & Ors., Civil Appeal No. 10673 of 2018, ¶ 38.
[9] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors. Writ Petition (Civil) No. 99 of 2018, ¶ 11.
[10] Ibid, ¶ 12.
[11] Hindustan Construction Company Limited and Anr. v. Union of India and Ors. Writ Petition (Civil) No. 1074 of 2019, ¶ 63.
[12] Section 5(7) of the Code.
[13] Section 5(8) of the Code.
[14] Mobilox Innovations Pvt. Ltd. v. Kirusa Software, Civil Appeal No. 9405 of 2017.
[15] Id.
[16] Ibid, ¶ 45.
[17] K. Kishan v. M/s Vijay Nirman Company Pvt. Ltd., Civil Appeal No. 21824 of 2017.
[18] See regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
[19] Essential goods and services have been defined as “essential supplies” under Regulation 32 of the CIRP Regulations andmean (1) electricity; (2) water; (3) telecommunication services, and (4) information technology services, to the extent the same are not a direct input to the output produced or supplied by the corporate debtor.
[20] State Bank of India v. V. Ramakrishnan & Anr., Civil Appeal No. 3595 of 2018.
[21] Ibid, ¶ 23.
[22] Id.

[23] The amended provision brought in through The Insolvency and Bankruptcy Code (Amendment) Ordinacne, 2018 (dated 06.06.2018) substituted clause (3) of section 14 excluded surety in a contract of guarantee from moratorium.

[23] State Bank of India v. V. Ramakrishnan & Anr., Civil Appeal No. 3595 of 2018, ¶ 29.

[24] Committee of Creditors Essar Steel India Ltd. v. Satish Kumar Gupta & Ors., Civil Appeal 8766-67 of 2019, ¶ 22

[26] Vijay Kumar Jain v. Standard Chartered Bank & Ors., Writ Petition (Civil) No. 1266 of 2018.

[27] Ibid, ¶ 9.

[28] Committee of Creditors Essar Steel India Ltd. v. Satish Kumar Gupta & Ors., Civil Appeal 8766-67 of 2019, ¶ 29.

[29] Under Regulation 2(ha), of the CIRP Regulations, an "evaluation matrix" is defined as such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plans for its approval.

[30] Committee of Creditors Essar Steel India Ltd. v. Satish Kumar Gupta & Ors., Civil Appeal 8766-67 of 2019, ¶ 26.

[31] Section 28(1) of the Code gives a list of actions/decisions that require mandatorily require an approval of 66% of the voting shares and includes such important decisions such as creating any security interest over the assets of the corporate debtor, changing its capital structure or constitutional documents and raising interim finance, amongst others.

[32] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors. Writ Petition (Civil) No. 99 of 2018, ¶ 60.

[33] Regulation 35A, CIRP Regulations. See also Ibid, ¶ 59-60.

[34] Arcelormittal India Pvt. Ltd. v. Satih Kumar Gupta & Ors., Civil Appeal No. 9402-9405 of 2018, ¶ 80.

[35] Section 21(2) of the Code.

[36] Section 30(4) of the Code.

[37] Section 24(6) of the Code.

[38] See Section 28 of the Code.

[39] Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta & Ors., Civil Appeal No. 8766-67 of 2019.

[40] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors. Writ Petition (Civil) No. 99 of 2018, ¶ 44.

[41] Ibid, ¶ 46.

[42] ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors., Civil Appeal Nos. 9402-9405 of 2018.

[43] Ibid.

[44] Surendra Trading Company v. M/S Juggilal Kamlapat Jute Mills Co. Ltd. & Ors., Civil Appeal Nos. 15091 of 2017

[45] A succinct comparison of Section 29A in its various forms is reproduced in ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors., Civil Appeal Nos. 9402-9405 of 2018 at Para 21-25

[46] ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors., Civil Appeal Nos. 9402-9405 of 2018, ¶ 28.

[47] Ibid, ¶ 29.

[48] Id.

[49] Ibid, ¶ 35.

[50] Explanation (b) of Section 2(6) of the Companies Act, 2013

[51] Regulation 2(1)(q)(2)(i) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

[52] Ibid, Regulation 2(1)(q)(2)(ii).

[53] Ibid, Regulation 2(1)(q)(2)(v)

[54] Ibid, Explanation to Regulation 2(1)(q)(2)

[55] ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors., Civil Appeal Nos. 9402-9405 of 2018, ¶ 39.

[56] The Committee was constituted by the Central Government with the mandate of making recommendations pertaining to issues arising from the functioning and implementation of the Code, and such other ancillary matters. The Report of the Insolvency Law Committee may be accessed at: http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf

[57] ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors., Civil Appeal Nos. 9402-9405 of 2018, ¶ 40, while relying on its earlier decision in the case of Technip SA v. SMS Holding (Pvt.) Ltd. & Ors., (2005) 5 SCC 465, ¶ 54.

[58] Daiichi Sankyo Company Ltd. v. Jayaram Chigurupati & Ors., (2010) 7 SCC 449, ¶ 49.

[59] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors. Writ Petition (Civil) No. 99 of 2018, ¶ 69.

[60] Section 2(53) of the Companies Act, 2013

[61] Ibid, Section 2(54).

[62] Ibid, Section 2(59).

[63] ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors., Civil Appeal Nos. 9402-9405 of 2018, ¶ 45

[64] Ibid, ¶ 53

[65] For the detailed definition, please refer to Section 5(24) of the Code.

[66] For the detailed definition, please refer to Section 5(24A) of the Code.

[67] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., Writ Petition (Civil) No. 99 of 2018, ¶ 46.

[68] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors. Civil Appeal No. 8766-67 of 2019, ¶ 45-46.

[69] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors. Civil Appeal No. 8766-67 of 2019, ¶ 46

[70] Civil Appeal No.10673 of 2018

[71] Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors., Civil Appeal No. 9170 of 2019, ¶ 36

[72] B.K. Educational Services Pvt. Ltd. v. Parag Gupta Associates, Civil Appeal No. 23988 of 2017.

[73] Ibid, ¶ 14.

[74] Ibid, ¶ 27.

[75] Duncans Industries Ltd v. A.J. Agrochem, Civil Appeal No. 5120 of 2019.

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