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Insolvency and Bankruptcy Code, 2016 – A Recap of the Last Quarter of the Decade!

The last quarter of 2019 saw a number of developments in the IBC landscape, both in terms of legislative and regulatory changes as well as landmark judgments. While some of the developments did clarify certain positions in law, some also added more ambiguity to the ever changing landscape.

In December 2019, the Indian Cabinet approved the IBC (Second Amendment) Bill, 2019, which was introduced in the Lok Sabha on December 12, 2019, and aimed to address certain loopholes and improve the effectiveness of the corporate insolvency resolution process (**CIRP**). As the bill could not be taken up in the Lok Sabha, the President, on December 28, 2019, promulgated the IBC (Amendment) Ordinance, 2019, with immediate effect. During this period, we also saw the introduction of rules and regulations to allow for the insolvency resolution of non-banking finance companies (**NBFCs**) within the framework of the IBC and for the insolvency resolution process to be initiated by or against personal guarantors of corporate debtors.

The Supreme Court delivered its high profile judgment on the Essar Steel insolvency, which, while providing some much needed clarity on the roles of different stakeholders in the CIRP, also raised some questions specifically with respect to the status of operational creditors.

Set out below are some of the key developments on the last quarter of the decade.

1. The Ordinance!

   The IBC (Amendment) Ordinance, 2019 (**Ordinance**) was promulgated by the President to come into immediate effect on December 28, 2019 and constitutes the fourth set of amendments to the IBC since its enactment. The amendments are intended to further streamline the CIRP and remove bottlenecks and practical difficulties faced by stakeholders in the process. Some of the principal amendments are:

- The Ordinance builds in thresholds for initiation of the CIRP for certain classes of financial creditors, including home buyers. For financial creditors whose financial debt is represented by securities or deposits, such as bond or debenture holders as well as for home buyers who wish to initiate a CIRP, the

application for initiation of the CIRP must be filed by at least the lessor of 100 financial creditors/ allotees or financial creditors holding at least 10% of that class of financial debt/ allotments from that real estate project. However, it should be noted that these thresholds do not apply to banks or financial institutions that provide financing through consortium arrangements.

Key Takeaway**:** *While, the Ordinance does not amend the trigger for initiating a CIRP (which remains a default of at least INR 1 lakh) and there are, therefore, no restrictions on operational creditors as well as financial creditors that are not part of a particular class from initiating a CIRP, this change may help in preventing filing of frivolous CIRP applications when there are a large group of financial creditors and with managing proceedings initiated by homebuyers.*

- The Ordinance clarifies that while a corporate debtor who is undergoing a CIRP or who has undergone a CIRP in the preceding 12 months is prohibited under Section 11 of the IBC from making a CIRP application with respect to itself, it may make an application for initiation of the CIRP with respect to another corporate debtor.

  Key Takeaway*: This would allow corporate debtors who are owed operational debt from other entities to commence CIRP proceedings against them.*

- Section 14 of the IBC regarding the moratorium has been amended to provide that any licenses, permits, concessions or other rights that have been granted to the corporate debtor by a government authority or sectoral regulator may not be terminated during the CIRP as long as the corporate debtor is current on any payments due on such license, permit or concession. Similarly, the Ordinance also provides that the supply of any goods or services that the resolution professional considers critical to preserving the value of the corporate debtor cannot be terminated during the CIRP, unless the corporate debtor fails to pay its dues for such services during the moratorium period.

  Key Takeaway*: These amendments have been made to facilitate the corporate debtor's operations as a going concern during the CIRP and address practical issues that have arisen in CIRPs specifically in the infrastructure sector where these projects are undertaken by special purpose vehicles whose primary source of revenue has been concession agreements and power purchase agreements with government authorities.*

- In order to address a lacuna in the existing legislation, the Ordinance clarifies that the resolution professional is to manage the affairs of the corporate debtor even after completion of the CIRP and until the NCLT either approves a resolution plan or passes a liquidation order.

***Key Takeaway**: This is a helpful clarification to address the management of the corporate debtor in the event that there is a time period between the CoC approving a resolution plan and the NCLT's order approving the plan.*

- The Ordinance introduces a new section 32A of the IBC regarding liability for actions of the corporate debtor prior to the insolvency commencement date. Post approval of a resolution plan, the corporate debtor may not be prosecuted for any offences committed (or alleged to be committed) by it prior to the insolvency commencement date if the resolution plan results in a change of control to a person was not *"(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court."* Similarly, no action can be taken against the properties of the corporate debtor for offenses prior to the insolvency commencement date if the resolution plan results in a change of control in accordance with the preceding sentence or if such properties are sold in liquidation to such a person.

  ***Key Takeaway**: The amendments introduced through Section 32A are intended to ring fence successful resolution applicants (or persons who purchase assets in liquidation) from liability for past offences of the corporate debtor. However, these amendments present an interesting conundrum when seen in the context of the developing jurisprudence on the scope of the moratorium. As discussed in 5 below, judicial decisions have held that the moratorium does not apply to criminal proceedings (though this position is far from crystal clear in light of the Supreme Court's direction staying the Enforcement Directorate's attachment in the Bhushan Steel insolvency). If criminal proceedings against the corporate debtor are to continue during the moratorium period, are they to suddenly abate once a resolution plan is approved? Further, if a verdict is delivered against the corporate debtor during the CIRP, would the successful resolution applicant be liable for carrying it out? Section 32A would need to be read in conjunction with the judgments on the scope of the moratorium as well as those on the extinguishment of undecided claims post approval of a resolution plan (discussed in the Supreme Court's decision on the Essar Steel insolvency below). These issues are likely to continue to arise during CIRPs despite the introduction of Section 32A.*

2. <u>Insolvency Resolution and Liquidation Proceedings for Financial Service Providers</u>

   While financial service providers were originally excluded from the scope of the IBC, given the current issues revolving around NBFCs, on November 15, 2019,

the Central Government notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (**FSP Rules**) to bring certain financial service providers within the ambit of the IBC. The FSP Rules provide a generic framework for insolvency and liquidation proceedings of FSPs and will apply to only those categories of FSPs that are notified by the Central Government under Section 227 of the IBC from time to time. To date, the Central Government has notified NBFCs with an asset size of at least INR 500 crores as one category of FSPs to which the FSP Rules will apply. Under the FSP Rules, the broad framework for CIRP and liquidation would apply to notified FSPs with the following modifications:

- An application for initiation of CIRP against an FSP can only be made by the appropriate regulator, which is defined as the financial sector regulator that is notified by the Central Government under Section 227 of the IBC. In the case of NBFCs, this is the Reserve Bank of India (**RBI**).

- An interim moratorium comes into effect upon filing the application (rather than only upon admission as is the case with corporate debtors who are not FSPs.) The FSP Rules also bar the suspension or cancellation of the license or registration which authorises the FSP to engage in the business of providing financial services during the interim moratorium and the CIRP. During the liquidation process, the liquidator must be provided an opportunity to be heard before the license or registration is cancelled.

- Instead of a resolution professional, the FSP Rules require the NCLT to appoint an individual proposed by the appropriate regulator as the 'Administrator' who has the same duties as a resolution professional. If it deems necessary, the appropriate regulator may also appoint an advisory committee within 45 days of the insolvency commencement date to advise the Administrator on the operations of the FSP during the CIRP. The advisory committee is to consist of three or more members who are experienced in finance, economics, accounting, public policy, risk management, administration and supervision of the FSP.

- The resolution plan must include a statement as to how the resolution applicant proposes to comply with the requirements of a financial services business. Further, following approval of the resolution plan by the CoC, the administrator must seek a no-objection certificate from the appropriate regulator for the resolution plan. In granting a no-objection certificate, the regulator must consider whether the persons who will be in control of the FSP post resolution meet the "fit and proper criteria" applicable to the business of the FSP.

- In connection with liquidation of the FSP, the adjudicating authority must provide the appropriate regulator an opportunity of being heard before passing an order for the liquidation or dissolution of the FSP. In the event that the FSP

plans to initiate voluntary liquidation, it will need to obtain prior permission from the appropriate regulator.

Key takeaway: *Globally, a separate insolvency resolution framework is typically applicable to financial firms, primarily in light of their systemic importance, the implications of their insolvency to financial stability and to address consumer protection and coordination issues arising from having a large number of depositor creditors. To date, however, there has been no legal framework in India for the insolvency resolution and liquidation of financial firms. Since the notification of the FSP Rules in November, the RBI has already filed an application under the IBC, read with the FSP Rules, for the CIRP of Dewan Housing Finance Corporation Limited. This CIRP will be closely watched to assess whether the IBC, as modified by the FSP Rules, would be an appropriate framework for dealing with the insolvency of FSPs.*

3. Personal Guarantors

The Ministry of Corporate Affairs *vide* notification no. S.O. 4126(E) dated November 15, 2019 notified that the IBC shall, from December 1, 2019, be applicable to personal guarantors of corporate debtors. The provisions of the IBC for other classes of individuals and partnership firms are yet to be notified. In addition, also on November 15, 2019, the Government notified the Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019, and the IBBI promulgated The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019, and The Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 (collectively, **Personal Guarantor Rules and Regulations**).

Under the recently notified provisions of the IBC applicable to personal guarantors, read with the Personal Guarantor Rules and Regulations, both creditors and personal guarantors may file applications to initiate insolvency proceedings against personal guarantors. In situations where a CIRP has already been commenced against the corporate debtor associated with the personal guarantor, the application for the personal guarantor must be filed with the same bench of the NCLT where the corporate debtor's case is being considered. In other situations, insolvency applications for the personal guarantor must be filed before the relevant bench of the Debt Recovery Tribunal.

Key Takeaway*: Prior to these notifications, creditors could initiate CIRPs against corporate debtors and their corporate guarantors, but would have to pursue a separate remedy against personal guarantors of the corporate*

debtor. Notifying the provisions of the IBC relating to personal guarantors is intended to make the resolution process for corporate debt more holistic and procedurally efficient. While this is a welcome step, much remains to be clarified regarding the interplay between insolvency proceedings of corporate debtors and their personal guarantors. It is still unclear if the two proceedings are to be consolidated or will proceed in parallel and also whether an insolvency proceeding against a personal guarantor can be commenced following completion of the CIRP of the corporate debtor. Further, if a resolution plan for a corporate debtor has already been approved and creditors have taken a haircut on their dues, can creditors seek to recover their remaining dues from the personal guarantor? It would be important for these issues to be resolved in order for stakeholders to reap the benefits of personal guarantors being brought within the fold of the IBC.

4. Questions Answered (and Unanswered) in the Supreme Court's Decision in Essar Steel:

The Supreme Court's decision on November 15, 2019 with respect to the CIRP of Essar Steel Limited, set aside most aspects of the NCLAT's much criticized judgment, in holding that the resolution was to take place in accordance with the resolution plan submitted by Arcelor Mittal, dated 23 October 2018, as amended and accepted by the Committee of Creditors on March 27, 2019. While the Supreme Court overruling the NCLAT's order is not one that breaks new legal ground (the path-breaking judgments rendered in *K. Sashidhar* *v.* *Indian Overseas Bank* and *Swiss Ribbons Pvt. Ltd. & Anr.* *v.* *Union of India & Ors*. had already dealt with the issues that were brought forth for adjudication in the Essar Steel case), the judgment clarified several questions of law that have arisen in the context of CIRPs and resolution plans, though some questions still remain unanswered.

What are the powers and responsibilities of resolution professionals and the CoC? Can the CoC decide on the manner of distribution between creditors?

The Supreme Court clearly stated that the role of the resolution professional is administrative and not adjudicatory in nature, reiterating the position in prior Supreme Court judgments, including *Swiss Ribbons,* that the resolution professional plays the role of a facilitator and cannot make major decisions without the consent of the CoC.

The IBC leaves it to the commercial wisdom of the CoC to decide whether or not to approve a resolution plan, after considering its feasibility and viability, with the only restriction being that the plan must comply with the IBC and the regulations thereunder. Part of considering the feasibility of a resolution plan is the manner of distribution of funds to different classes of creditors and it is, therefore, open to the CoC to negotiate with the resolution applicant for a

modification in the proposed distribution of payments under a resolution plan. In this regard, the Supreme Court's judgment also states in unequivocal terms that the CoC owes no fiduciary duty to any particular class or group of creditors or stakeholders and that its role is to exercise a business decision *"based on ground realities by a majority, which then binds all stakeholders, including dissentient creditors."*

Can the CoC appoint subcommittees?

The CoC cannot delegate its decision making power under the IBC to any other person, including a sub-committee. However, sub-committees can be formed for purposes of negotiating with resolution applicants or for other ministerial or administrative acts as long as all decisions taken by such a sub-committee are approved by the CoC.

What is the scope of review of the adjudicating authority when approving a resolution plan approved by the CoC?

Following on from the commercial discretion that the CoC has with regard to resolution plans, the adjudicating authority's power to review a resolution plan is very limited. The NCLT or the NCLAT may not question the commercial decisions of the CoC, but may review a resolution plan to ensure that it complies with the IBC. While this clearly restricts the scope of review of the adjudicating authority, the decision does provide a limited amount of wiggle room for the adjudicating authority to require the CoC to reconsider a resolution plan: *"the limited judicial review available is to see that the Committee of Creditors 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. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters."*

Do all creditors have to be treated equally?

In stark contrast to the NCLAT's stance that secured and unsecured creditors as well as operational creditors must all recover the same percentage share of their claims, the Supreme Court held that the equality principle only mandates equal treatment of similarly situated creditors and not equal treatment of creditors across different classes. Citing various principles of international jurisprudence as well as the UNCITRAL legislative guide on insolvency law regarding secured creditors, the Supreme Court also points out that if secured creditors were to be treated on par with unsecured creditors, they would have no incentive to vote for a resolution plan as liquidation would provide them with a more advantageous priority of payments in the distribution waterfall.

Similarly, the Report of the Bankruptcy Law Reform Committee provides significant reasons for distinguishing between financial and operational creditors, which principles were upheld as a reasonable basis for classification in prior Supreme Court judgments, including *Swiss Ribbons*. Thus, the equality principle only requires that *"Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational."* The Court also pointed out that the fact that the IBC and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (**CIRP Regulations**) require operational creditors "to be paid in priority" over financial creditors and that a resolution plan must balance the interests of all stakeholders, did not imply that operational creditors must have the same recovery percentage as financial creditors.

Where does this leave operational creditors?

Under the IBC and CIRP Regulations, the only protections operational creditors have are (a) that the resolution plan must provide them with at least liquidation value of their claim (which in many cases might be close to 0), (b) the resolution plan must state how it balances the interests of all stakeholders and (c) operational creditors must be paid on priority to financial creditors. In light of these limited protections, operational creditors have, until date, primarily relied on the adjudicating authority to modify resolution plans to provide them with a greater share in the recovery. The Supreme Court's judgment, in explicitly holding that the CoC has the power to decide on the manner of distribution and that the CoC has no fiduciary duty to stakeholders, now significantly limits the extent to which operational creditors can rely on the NCLT or NCLAT to provide them with a greater share of the pie. Considering that a CIRP could significantly decrease the likelihood of an operational creditor being able to recover any portion of its claim, it remains to be seen if operational creditors will change their behaviour and adjust the terms of their credit in light of this judgment.

Do personal guarantees that remain undecided during the CIRP get extinguished on approval of a resolution plan?

The interplay between liabilities under personal/corporate guarantees and the approval of a resolution plan for the corporate debtor raises two relevant questions. First, can financial creditors pursue claims under personal/ corporate guarantees for the portion of their claim that is not paid under the resolution plan? Second, following approval of the resolution plan, can a personal/corporate guarantor rely on principles of subrogation to make a claim against the corporate debtor? The Supreme Court does not answer the first question in light of the fact that the banks in Essar Steel Limited were pursuing independent actions against the personal guarantors. The second question is

answered in the negative in reliance on Section 31 of the IBC (which provides that the resolution plan is binding on all stakeholders, including guarantors) as well as the Supreme Court's judgment in *State Bank of India v. V. Ramakrishnan*. The Supreme Court points out that the goal of a resolution process is to give the resolution applicant a fresh start and, accordingly, a guarantor's claim under subrogation gets extinguished once a resolution plan is approved.

Is the 330 day time period for completion of the CIRP mandatory?

The third amendment to the IBC extended the timeline for completion of the CIRP to 330 days, but stated that the timeline was mandatory and would include any periods during which a litigation or proceeding relating to the corporate debtor or other parties was pending. The Supreme Court upheld the constitutionality of this amendment, with one minor change – the word "mandatory" has been deleted. The Court stated that there may be situations in which the CoC, the resolution professional or even the NCLT might believe that a successful resolution plan is in sight which may warrant a short extension to the 330 day period. This change is intended to prevent the corporate debtor from automatically going into liquidation in situations where the parties are close to agreement on a resolution plan. However, given the track record of the adjudicating authorities in sticking to timelines so far, there is a concern that the Supreme Court's decision to strike down the word "mandatory" might provide more wiggle room for all stakeholders to further extend an already extended time period.

5. Scope of Moratorium:

Proceedings during the CIRP:

While Section 14 of the IBC prohibits the "institution or continuation of pending suits or proceedings" during the CIRP, judicial decisions have made various carve outs to this rule. In the 2017 case of *Canara Bank v. Deccan Chronicle Holdings Limited*, the NCLAT held that the moratorium does not have any effect on the writ jurisdiction of the High Court or the Supreme Court under Articles 32 or 226 of the Constitution, which cannot be curtailed by any provision of law or a court. More recently, in *Tayal Cotton Pvt. Ltd. v. The State of Maharashtra and Ors.*, the Bombay High Court, in the context of deciding whether a proceeding under Section 138 of the Negotiable Instruments Act could continue during the moratorium period, ruled that the moratorium did not apply to criminal proceedings.

On the other hand, the Supreme Court stayed an Enforcement Directorate move to provisionally attach all assets of Bhushan Power and Steel Ltd during its CIRP, in connection with money laundering charges, and issued a notice to the Enforcement Directorate to explain whether its money laundering charges

would trump the insolvency proceedings by February 2020. The CoC petition claimed that a resolution plan for taking over the ailing company had already been approved by the CoC and the NCLT, but the same had been stayed by the NCLAT on October 14 due to the Enforcement Directorate's order.

When it comes to arbitral proceedings, the Supreme Court in *Alchemist Asset Reconstruction Company Ltd. v. Hotel Gaudavan Pvt. Ltd. and Ors* has held that arbitral proceedings are subject to the moratorium under Section 14 and could not continue during the CIRP. However, subsequent to the Supreme Court's judgment, high courts and the NCLAT have carved out certain exceptions to this rule. In *Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd. (Corporate Debtor) & Anr.,* the corporate debtor was the claimant in arbitral proceedings against whom a counter claim had been filed by the appellant. Under these circumstances, the NCLAT held that as the determination of the claim and counter claim that were the subject of the arbitral proceeding would have a significant bearing on the CIRP of the corporate debtor, the arbitral proceedings should be permitted to continue. However, the NCLAT clarified that if the corporate debtor was found to be liable to pay a certain amount pursuant to the arbitral proceeding, recovery could not be made during the period of the moratorium. In other words, the NCLAT distinguished between the arbitral proceeding being allowed to continue for purposes of determining the claim amount from permitting recovery from the corporate debtor during the moratorium.

In *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.*, the corporate debtor had the benefit of an arbitral award in its favour, which had been challenged under section 34 of the Arbitration and Conciliation Act, 1996. The section 34 proceeding was then stayed as a result of the commencement of the CIRP against the corporate debtor. The resolution professional represented that a stay on the Section 34 proceeding was not warranted as such a stay would be to the detriment rather than to the benefit of the corporate debtor as the corporate debtor could not enforce the arbitral award until the objections to the award under Section 34 were determined. The Delhi High Court, in holding that the Section 34 proceedings could continue, provided a purposive interpretation of Section 14, stating that: "*I conclude the present proceeding would not be hit by the embargo of Section 14(1)(a) viz., (a) 'proceedings' do not mean 'all proceedings';(b) moratorium under section 14(1)(a) of the code is intended to prohibit debt recovery actions against the assets of corporate debtor; (c) continuation of proceedings under section 34 of the Arbitration Act which do not result in endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor are not prohibited under section 14(1)(a) of the code.*"

SSMP Industries Ltd. v. Perkan Food Processors Pvt. Ltd involved a situation where the corporate debtor had filed a suit against a third party, which had in

turn filed a counter claim. The third party appellant pointed out that since neither the claim nor counter claim had been adjudicated finally and one claim could be set off against the other, both the suit and the counter claim ought to be adjudicated together instead of the appellant being forced to approach the resolution professional for recovery of its claims. Given this special factual matrix, the Delhi High Court held that: "*However, the counter claim raised in the present case against the corporate debtor i.e., the Plaintiff, is integral to the recovery sought by the Plaintiff and is related to the same transaction. Section 14 has created a piquant situation i.e., that the corporate debtor undergoing insolvency proceedings can continue to pursue its claims but the counter claim would be barred under Section 14(1)(a). When such situations arise, the Court has to see whether the purpose and intent behind the imposition of moratorium is being satisfied or defeated. A blinkered approach cannot be followed and the Court cannot blindly stay the counter claim and refer the defendant to the NCLT/RP for filing its claims."* The High Court further pointed out that the nature of the counter claims was such that a trial needed to be conducted, which was outside the scope of the resolution professional's role and the proceedings before the NCLT which are "summary in nature".

These cases demonstrate that the scope of the Section 14 moratorium is fluid and is likely to continue to evolve with further jurisprudence. In addition to not affecting writ petitions or criminal proceedings, High Courts and the NCLAT have also taken up a purposive interpretation of Section 14 and allowed proceedings to continue in situations where such continuation is either to the benefit of the corporate debtor or is necessary for determining inter-se claims among parties. At the same time, the courts have been clear that no party is permitted to seek recovery of claims determined against the corporate debtor during the CIRP.

Status of Undecided Claims Post CIRP:

Another issue that arises is the status of claims once the moratorium period has come to an end. In the *Essar Steel Judgement*, the Supreme Court held that claims that were disputed or remained undecided during the CIRP, cannot resurface following approval of the resolution plan. This ruling set aside the NCLAT's judgment which said that *"undecided claims could be decided on their merits at an appropriate forum following approval of a resolution plan."* The Court pointed out that the purpose of the CIRP and the resolution plan was to provide some degree of certainty to a prospective resolution applicant on the assets and liabilities of the corporate debtor that it would be assuming. By contrast, if the resolution applicant were to be flooded with claims arising from past activities of the corporate debtor, this would be a significant additional burden for it and may also serve as a disincentive for parties to come forward as resolution applicants.

The Supreme Court's ruling on extinguishment of claims throws light on an important question that has arisen in several CIRPs on whether a resolution plan can bind third parties who are not party to the plan. At the same time, much remains unanswered on this point. A variety of potential claims could resurface following a resolution plan, including claims and disputes that the NCLT was unable to decide on the merits. In this regard, it is worth noting that, in such situations, various prior judgments of the NCLAT have permitted litigants to file suits with the appropriate authority after the period of moratorium is completed, as per the provision of section 60(6) of the IBC. In *M/s. Roma Enterprises v. Mr. Martin S.K. Golla, Resolution Professional*, the NCLAT pointed out that the resolution professional did not have jurisdiction to decide the claims of parties and also held that even the NCLT and NCLAT did not have powers to finally adjudicate on certain claims and disputes on the merits. In such cases, the litigants must raise their claims at an appropriate stage. The Supreme Court's ruling in Essar Steel on the extinguishment of claims would suggest that these NCLAT decisions are no longer good in law. However, it remains to be seen if courts and tribunals will carve out fact specific exceptions to this rule.

6. When can Financial Creditors be Offered Minimum Liquidation Value?

Prior to being amended in October 2018, Regulation 38(1)(c) of the CIRP Regulations stated that a resolution plan must provide for at least liquidation value to dissenting financial creditors. Following an NCLT decision that struck down this provision on the grounds that a resolution plan cannot discriminate between assenting and dissenting financial creditors, Regulation 38 was amended with effect from October 5, 2018, to delete this provision. The Supreme Court on November 08, 2019 in the case of *Rahul Jain v. Rave Scans Pvt. Ltd. & Ors*. clarified that in situations where the CIRP had commenced prior to the amendments to Regulation 38 coming into effect, it is permissible for a resolution plan to provide for liquidation value to dissenting financial creditors. In that particular case, the CIRP had commenced in January 2017 and the dissenting financial creditor was to be paid 35% of its claim amount as opposed to 45% of their respective claim amounts for assenting financial creditors.

It is worth noting that the third amendment to the IBC amended Section 30 of the IBC to provide that dissenting financial creditors may be paid in such manner as specified by the IBBI and paid not less than the liquidation value. Regulation 38 of the CIRP Regulations was also amended with effect on November 27, 2019, to provide that both operational creditors and dissenting financial creditors are to be paid in priority over financial creditors who voted for the resolution plan. It remains to be seen whether resolution plans would, in practice, provide liquidation value to dissenting financial creditors or would pay out the same percentage to avoid any further challenges or scrutiny.

7. When can the High Court use its writ jurisdiction to interfere with an order passed by the NCLT?

While as a statutory matter, appeals over orders of the NCLT lie with the NCLAT, there have been numerous cases of parties approaching the High Courts under writ jurisdiction to challenge NCLT orders. In the case of *Embassy Property Developments Pvt. Ltd. v. Government of Karnataka & Ors.*, the Supreme Court held that the High Court could entertain such writ petitions in situations which involved matters of public law, over which the NCLT did not have jurisdiction in the first place. The corporate debtor had a mining lease with the Government of Karnataka, which rejected the resolution professional's request for a deemed extension of the lease in accordance with the Mines & Minerals (Development and Regulation) Act, 1957 (**MMDRA**). The Chennai Bench of the NCLT set aside the order of the Government of Karnataka as being contrary to the moratorium under the IBC and ordered the Government to execute supplemental lease deeds to extend the lease. The Government of Karnataka then filed a writ petition before the Karnataka High Court, which granted a stay on the order of the NCLT. The appeals filed to the Supreme Court challenged the stay granted by the High Court of Karnataka and stated that the High Court should not have entertained the writ petition when an alternative statutory remedy of appeal to the NCLAT under Section 61 of the IBC was available.

The Supreme Court distinguished between situations where the NCLT had wrongfully exercised its jurisdiction from those where the NCLT had incorrectly decided a case over which it had jurisdiction, (which it terms "incorrect exercise of available jurisdiction"). The Supreme Court held that the deemed extension of the lease under the MMDRA was a question of public law and it was beyond the scope of the NCLT's jurisdiction to review the Government's decision on this matter. By extension, as the NCLT had wrongfully exercised its jurisdiction in setting aside the Government's order, the High Court of Karnataka was justified in entertaining the writ petition.

8. Can the NCLT decide on matters of fraud?

In *Embassy Property Developments*, the Supreme Court also ruled on whether the NCLT had jurisdiction to look into questions of fraud. The Court held that as per sections 65, 66 and 69 of the IBC, the NCLT was vested with the power to inquire into (i) fraudulent initiation of CIRP proceedings as well as (ii) fraudulent transactions. Therefore, the NCLT had jurisdiction to enquire into allegations of fraud and, as a corollary, the NCLAT also had such jurisdiction. It followed from this that the fraudulent initiation of CIRP could not be a ground to bypass the alternative remedy of appeal provided in Section 61 of the IBC and approach the High Court instead.

Looking Forward:

2019 was an eventful year for the IBC and we expect the IBC landscape to continue to change rapidly in 2020 as well. While attempts have been made to resolve some of the practical issues and bottlenecks experienced during CIRPs, the amendments and new regulations also leave some issues unanswered. This year is likely to see an evolving jurisprudence around insolvency proceedings of corporate debtors and their personal guarantors as well as the issues that arise when financial firms are subjected to the CIRP. In addition to the constant tinkering of regulations, amendments may be contemplated to provide a framework for the insolvency of group enterprises and cross border insolvencies.

This is an update for general information purposes only and does not constitute legal advice. Please contact us if you require further clarifications on this subject.

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