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**TREATMENT OF DISPUTED CLAIMS IN CORPORATE INSOLVENCY:
EVOLVING JURISPRUDENCE**

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ABSTRACT

The introduction of the Insolvency and Bankruptcy Code, 2016 (IBC) in India as a consolidation of insolvency and bankruptcy laws has come with its challenges that have found resolution through judicial pronouncement, regulatory clarification or legislative intervention. One of the key issues in relation to process of corporate insolvency resolution has been in relation to claims against a corporate debtor and when such claims should be made – timing, validity and admission. Here, the role of the debtor, creditor and the insolvency administrator (the insolvency professional) become a subject matter of immediate discussion. In this paper, the authors seek to address the questions surrounding treatment of claims in insolvency resolution and offer next steps while tracing the jurisprudential development related to claims made in corporate insolvency under the IBC.

Keywords: claims, verification of claims, disputed claims, consolidation of claims, resolution professional, powers of a resolution professional, insolvency professional, claims in corporate insolvency, interim resolution professional, submission of claims

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I. INTRODUCTION

In insolvency, creditors play a major role and are the primary beneficiaries in insolvency proceedings.¹ The role of creditors and treatment of various types of creditors varies from country to country. The structuring of the corporate insolvency regime under the Insolvency and Bankruptcy Code, 2016 (IBC) is where a committee of creditors (CoC) is the decisionmaker and an insolvency professional (IP) is appointed to manage the insolvency resolution process (CIRP).

In CIRP, the IP plays a three-tier role in insolvency resolution. At the initial stage as an interim resolution professional (IRP) where the duties² involve: **(i)** collating all claims filed by creditors, **(ii)** taking control and management of the corporate debtor (CD) against whom the proceedings are initiated, and **(iii)** constitution of a CoC. Once a CoC is duly constituted by the IRP, a meeting is to be conducted within seven (7) days of reporting the constitution to the adjudicating authority (in CIRP the National Company Law Tribunal (NCLT)) chaired by the IRP.³ In the first meeting, the CoC appoints a Resolution Professional (RP). The CoC may choose to confirm the IRP as an RP or replace the RP from the list of IPs certified and registered with the Indian regulator – the Insolvency and Bankruptcy Board of India (IBBI).⁴ If resolution plan of a CD is not approved during the resolution timeframe of 330 days,⁵ then the RP is appointed as a liquidator to complete the insolvency process through liquidation – the third role of IP as a liquidator.⁶ Thus, the role of the IP also demarcates the insolvency process under the IBC which is resolution allowing for reorganization and restructuring of a CD or liquidation.⁷ Now, both these processes (insolvency resolution – CIRP or liquidation), typically require a consolidation and verification of claims which have a direct nexus to determining the financial stability and viability of the CD. This consolidation and verification of claims also determines the type of resolution that the CD will undergo and how the CoC will vote on the resolution plan.⁸

In addition to a CIRP, the IBC envisages insolvency resolution for corporate persons⁹ through various processes such as prepackaged insolvency resolution process,¹⁰ fasttrack insolvency¹¹ and voluntary liquidation¹². The CIRP was the first to come into force and has been the most used and the issues surrounding claims and their treatment have been central to the implementation of the IBC. In this

¹ It is pertinent to clarify here that the structuring of the Insolvency and Bankruptcy Code, 2016 refers to proceedings against corporate persons such as companies and limited liability partnerships as insolvency proceedings and proceedings against individuals and unregistered partnership firms as bankruptcy proceedings. *See* Part I, II and III of the Insolvency and Bankruptcy Code, 2016.

² *See* Duties of an IRP, Section 18, Insolvency and Bankruptcy Code, 2016

³ *See* Regulation 17, IBBI (Resolution Process for Corporate Persons), Rules 2016

⁴ *See* Section 15, Insolvency and Bankruptcy Code, 2016.

⁵ *See* Section 12, Insolvency and Bankruptcy Code, 2016.

⁶ *See* Section 24, Insolvency and Bankruptcy Code, 2016

⁷ Section 12A, Insolvency Bankruptcy Code 2016 also allows for a withdrawal of the insolvency process by the corporate debtor and creditors at different stages. Owing to this an additional option of settlement or mediation for insolvency resolution has also been built in. The IP has a procedural and limited to role to play if this resolution option is being exercised. Thus, this process is out of the scope of this paper.

⁸ *See* Section 30 and 31, Insolvency and Bankruptcy Code, 2016

⁹ *See* Section 3(7), Insolvency and Bankruptcy Code, 2016

¹⁰ *See* Part II, Chapter III, Insolvency and Bankruptcy Code, 2016.

¹¹ *See* Insolvency and Bankruptcy (Amendment) Ordinance, 2021.

¹² *See* Section 59, Insolvency and Bankruptcy Code, 2016.

paper, the authors combine narrative and theory to focus on the definition, admission, treatment, contentions on and of ‘claims’ in CIRP.

I.1 ‘Claims’: Meaning and Process

At the outset, we must understand ‘*what is a claim*’, ‘*what is its treatment*’ and ‘*who can make a claim*’ in a CIRP under the IBC. A ‘claim’ under the IBC is defined to mean:¹³

amongst others a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. It also means right to remedy for breach of contract, if such breach gives rise to a right to payment.

The definition of claim must be read with the definition of ‘debt’, ‘creditor’ and ‘default’ that together determine the applicability of the IBC in CIRP. Further, the definition of debt has a claim as prerequisite and is defined to mean,¹⁴ “*a liability or obligation in respect of a claim which is due from any person and includes a financial debt and an operational debt*”. The definition of debt amongst others, classifies two kinds of debt and the type of creditor is determined based on the nature of the debt, thus qualifying the creditor as a secured creditor, unsecured creditor, operational or financial creditor and decree holder – encompassed in the definition of a creditor.¹⁵ The classification is extended to entitlements when the CD is undergoing insolvency resolution on one hand and whether the creditor has the right to initiate insolvency proceedings against the CD.

While the past regimes were typical in recognizing an array of debt arrangements, there were limited rights that were available to persons in business arrangements relating to operations extending credit such as the lessor of a business rental space or wholesale vendor,¹⁶ which is operational debt furnished by an operational creditor (OC). While initiation of an insolvency proceedings requires a claim evidencing a debt on which there is a default by a financial creditor or an OC, for OCs the claim should not be the subject matter of a pre-existing dispute on the same debt, i.e., an arbitration or other proceedings. Moreover, OCs are required to make a demand prior to the admission of a CIRP. Thus, the proof of a claim for initiating insolvency is higher for an OC.¹⁷ Once the insolvency petition is admitted, which is also known as the insolvency commencement date, a moratorium (also known as a calm period) is imposed on the institution of fresh suits or continuation of pending suits or parallel proceedings against the CD including the execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority. Claims of creditors filed with RP are frozen (at a standstill) on the insolvency commencement date.¹⁸ Accordingly, any ongoing

¹³ See Section 3(6), Insolvency and Bankruptcy Code, 2016.

¹⁴ See Section 3(11), Insolvency and Bankruptcy Code, 2016.

¹⁵ See Section 3(10), Insolvency and Bankruptcy Code, 2016.

¹⁶ See Report of the Bankruptcy Law Reforms Committee, Volume 1, November 2015, ¶5.2.1, accessible [here](#)

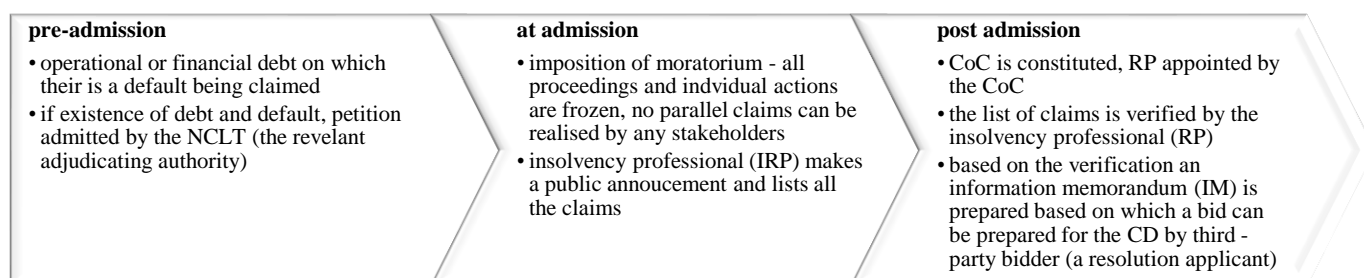
¹⁷ See Section 8, Insolvency and Bankruptcy Code, 2016. For the purpose of this paper, the authors are not questioning why the criterion for operational creditors is stricter. For more information, see Report of the Bankruptcy Law Reforms Committee, Volume 1, November 2015, ¶4.3.4, 5.2.1, accessible [here](#)

¹⁸ See Section 14, Insolvency and Bankruptcy Code, 2016

proceedings in respect of disputes for or against CD for adjudication of claims attracts moratorium.

Once the moratorium is imposed, insolvency resolution commences and the IRP makes a public announcement of CIRP commencement and invites claims from creditors.¹⁹ The RP collates all these claims which forms part of the information memorandum (IM).²⁰ The IM is a document based on which a resolution plan is submitted by a third party bidder (also known as the resolution applicant)²¹ and the CoC is informed of the claims against a CD in number and value.²² The RP verifies all the claims against the CD and creates an updated list of claims at this stage. A summary of claims and stages is depicted in *Figure 1* below.

Figure 1 CIRP: Claims and Stages



Since the insolvency commencement date (date on which the CIRP is admitted by the NCLT), a claim can be made to the IRP or RP till the ninetieth (90) day of the CIRP, to be included in the IM.²³ As may be observed from above, the role of the IP in admitting and verifying claims becomes crucial. The verification and consolidation of claims determines: **(i)** which creditors will be involved in decision-making during CIRP by voting based on the type and amount of creditor's claims, **(ii)** finalisation of a resolution plan (the bid for a CD in CIRP) by resolution applicant (the bidder) and **(iii)** the distribution of realizations to creditors for an approved resolution plan.

On point **(i)** above, the determination of claims leads to who are the financial creditors and who will be part of CoC. It also results in the nature and types of creditors as discussed above. On point **(ii)** above, the resolution applicants must submit their plans based on the details provided in the IM. Lastly, point **(iii)** provides for distribution of realizations to various creditors as proposed by resolution applicant and thereafter approved by CoC and NCLT for finalization. Claims and creditors which are not covered as a part of the IM do not find resolution or remedy through the IBC.

¹⁹ See Section 13 and 15, Insolvency and Bankruptcy Code, 2016.

²⁰ See Section 29, Insolvency and Bankruptcy Code, 2016

²¹ See Section 5(25), Insolvency and Bankruptcy Code, 2016.

²² See Section 29, Insolvency and Bankruptcy Code, 2016.

²³ See Section 12, Insolvency and Bankruptcy Code, 2016.

I.2 Criteria for Claims

At the time of the enactment of the IBC, there were no preset criteria for what claims should be admitted and those that should be rejected. Since the definitions of claim, creditor and debt have a very wide meaning and straddle across various laws, they also enable persons aggrieved with non-admission of claims to initiate litigations against RPs. Claims raised by such aggrieved persons are *disputed claims* in a CIRP.

It is important to note that the IBC was enacted with “*a view to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alteration in the order or priority of payment of government dues and to establish an Insolvency and Bankruptcy Board of India*”.²⁴

By virtue of the purpose of the law (the IBC), the timebound manner is of high priority to maximize value of a CD. It is also, at this stage, contentious claims become a subject matter of debate which delays the resolution process. Given the wide gamut of claims that are allowed, the question then becomes *what claims can be admitted*. A large part of the contentious claims come from OCs whose claims may not have crystallized.²⁵

During the five years since enactment of the Code, OCs have voiced fair treatment and low recovery concerns since insolvency resolutions involve high haircuts.²⁶ In fact, as per data released by IBBI for 324 resolutions,²⁷ OCs whose claims have been admitted have recoveries less than 15% and disputed OCs normally do not get paid and their claims are extinguished.²⁸ As jurisprudence on the verification and admission of claims which are disputed continues to evolve with the law, it is important to evaluate treatment of disputed claims, its fairness and the related impact on the efficiency (with time and value maximization as parameters) of a CIRP.

²⁴ Statement of Objects and Reasons, Insolvency and Bankruptcy Code, 2016.

²⁵ The IBC also creates exclusions for related parties and certain other categories on a CoC. Analysing other stakeholders are excluded from the scope of this paper.

²⁶ Casey and Zaveri, *Is IBC Unfair to operational creditors?*, Business Standard (August 07, 2019); Ghosh and Thomas, *Operational creditors at receiving end of IBC stall*, Live Mint (December 21, 2020); Kaul, *Why the IBC process is often falling short*, Live Mint (July 06, 2021).

²⁷ The data is extracted and analysed from the statistics published by the Insolvency and Bankruptcy Board of India. The primary data compilation is available with the authors.

²⁸ *Ibid.*

II. DISPUTED CLAIMS: PRINCIPLES AND CASE EVOLUTION

II.1 Determination of Claims and Role of an RP

We know from Part I above, that the RP consolidates and verifies claims, however, the powers of the RP, at time of enforcement of the IBC were unclear and was subsequently clarified in *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*²⁹ (*Swiss Ribbons*). In *Swiss Ribbons*, the Supreme Court of India held that the RP is only required to be a facilitator for purposes of the CIRP and does not have any adjudicatory powers.³⁰ It was further held that any ascertainment and determination of the amount due and payable by the CD to creditors or other stakeholders (such as employees, statutory authorities) in a CIRP is dependent upon the outcome of the pending disputes and the same cannot be decided by the RP as any such ascertainment would amount to adjudication of the claimed amount which is not within the powers of the RP.³¹

In the context of administrative roles to be performed by an RP, in the case of *DEEC (Monitoring Cell) v. Jyoti Structures Limited*,³² the issue of whether RP is dutybound to send a notice to creditors requiring them to file their claim was raised. The NCLT in this case held that it is the responsibility of the creditor in question to file a claim within the timeframe after the issue of public notice inviting claims is made in a CIRP and the RP is not required to send notice to creditors to file claims.

In the context of the above decisions, it is pertinent to distinguish the role of an IP as an RP and that of as a liquidator, which was held in *Swiss Ribbons*. The Supreme Court in *Swiss Ribbons* while emphasizing that the RP has a merely administrative role in insolvency resolution (the CIRP), also held that the determination of claim by a liquidator is quasi-judicial in nature.³³ Thus, the court recognized that while in theory restricting the RP in insolvency resolution to a non-adjudicatory function is possible, in practice it has presented challenges. The court in *Swiss Ribbons* further held that the admission and rejection of creditors' claims is not always a binary function and therefore various creditors (especially operational creditors) challenge the treatment of their claims which delays the insolvency proceedings.³⁴ The Insolvency Law Committee³⁵ constituted to take note of certain issues, stated that in relation to dates of submissions of claims and what should be the last date, the decision-making power for streamlining is that of the IBBI. Concrete and definitive clarity on this issue is yet to be decided on. However, as a matter of practice, claims are being accepted by the RP till the approval of resolution plan by a CoC. Thus, also in certain cases impacting timelines.

²⁹ *Swiss Ribbons v. Union of India*, W.P (Civil) No.99 of 2018 (Supreme Court), ¶¶ 58 – 63

³⁰ *Ibid.*

³¹ *Ibid.* ¶

³² *DEEC (Monitoring Cell) v. Jyoti Structures Limited*, IA 1218/MB/2020 in CP (IB) 1137/MB/2017, NCLT (Mumbai Bench) ¶9

³³ Refer to Section 41, Insolvency and Bankruptcy Code, 2016.

³⁴ See *Swiss Ribbons v. Union of India*, W.P (Civil) No.99 of 2018 (Supreme Court), ¶¶ 58 – 63

³⁵ Report of the Insolvency Law Committee, March 2018 ¶6.1, accessible [here](#)

While the powers of the RP are limited, as a consequence of the ruling in Swiss Ribbons, the challenging issue of treatment of these disputed claims during CIRP continues. It is presently the responsibility of the NCLTs to determine whether a claim with dispute should be admitted or not which further delays the CIRP.

II.2 Filing of Claims and Timelines

As highlighted in Part II.1, timelines are extended as a result of having no clear criteria in place for admission and verification of claims. Moreover, as highlighted in Part I, the definition of claim and debt under the IBC is broad and in relation to OCs, in particular, subject to wider interpretation on account of debt related to operations. A larger question is then related to whether the debt has crystallized or not to be admitted as part of the CIRP. In addition to debt and claim, IBC defines a ‘dispute’ to include “*a suit or arbitration proceedings relating to the existence of the amount of debt; the quality of goods or services; or the breach of a representation or warranty*”.³⁶ In the context of operational debt which is broadly defined as “*a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force payable to the central government, any state government or any local authority*”, where majority disputes are frozen at moratorium, the open-endedness of what is a debt and a valid claim becomes an issue. Moreover, since the role of the RP is non adjudicatory, the RP faces a challenging task of how to treat these claims so that these creditors can participate in CIRP. The RP in a CIRP also has a dual challenge of in the first instance admission of such claims and if admitted, in the second instance, the amount to be admitted. More importantly, disclosure of such claims become important so that the relevant creditors can be a part of a CIRP, and the resolution applicant can take into account such liabilities.

A remedy to the above issues may lie in international principles contained in the UNCITRAL Legislative Guide on Insolvency (1997).³⁷ As a solution to the issue of delayed crystallization of claims, where the amount of claim cannot be or has not been, determined at the time when the claim is to be submitted, many insolvency laws allow a claim to be admitted provisionally, at a notional value.³⁸ This option is significant where claims are disputed in the insolvency proceedings or mechanics for quick resolution of the dispute is essential to ensure efficient and orderly progress of the proceedings.³⁹ Based on the international best practice, provisional admission of such a claim pending resolution of the dispute, may minimize disruption to the proceedings and the claims procedure.⁴⁰

The admission of claims at a notional value is a practice followed in other common law jurisdictions in cases where it is difficult to estimate the value of the claims. To cite examples

³⁶ Section 5(6), Insolvency and Bankruptcy Code, 2016

³⁷ Refer to UNCITRAL Legislative Guide on Insolvency Law (1997), Part I and II, accessible [here](#).

³⁸ See [UNCITRAL Legislative Guide on Insolvency Law \(1997\)](#), Part II.V, pp. 259 - 266

³⁹ See [UNCITRAL Legislative Guide on Insolvency Law \(1997\)](#), Part II.V, pp. 259 - 261

⁴⁰ *Ibid.*

from Australia and the United Kingdom, in the case of *Kirwan v. Cresvale Far East Ltd. (In Liqd.) and Ors.*⁴¹, before the Supreme Court of New South Wales, Young CJ while dealing with a question of voting rights in case of contingent (future and undetermined) claims was of the view that “*where it is almost impossible to ascribe a value to the claim, then it should be valued at a dollar...*”. In the United Kingdom, under the Insolvency (England and Wales) Rules 2016,⁴² the proof of debt claimed is to be valued/quantified as on the date of administration/ liquidation/ bankruptcy. However, where a contingent or future debt crystallizes at some point after the onset of insolvency, the creditor is allowed to prove for the full amount under the “hindsight principle”.⁴³ However, in the CIRP moratorium, any proceedings against CD attract moratorium thereby resulting in non-adjudication or non-crystallization of any disputed dues or claims.

At this point, it is relevant to consider the judgement in *The CoC of Essar Steel India Limited v. Satish Kumar Gupta and Others* (Essar Steel)⁴⁴ which provided for distinctions in a CIRP for treatment and admission of claims under the following categories: (i) claims in dispute during the verification, consolidation and invitation of expressions of interests stage (when the IM is used to invite resolution applicants (third party bidders) to reorganize or restructure through a resolution plan (bid)), (ii) treatment of claims filed after a resolution plan is approved and (iii) treatment of claims against the CD that are not covered by the resolution plan (also referred to as the clean slate theory).

On point (i) in the judgment of Essar Steel, various disputed claims filed by operational creditors (amounting to INR 14,000 crores (USD 2593 million (approx)) were asked to be registered by the NCLT but not admitted. Accordingly, the IRP in this case listed the claims in the list of creditors. However, these specific disputed claims were fully admitted by the appellate authority (in this case the National Company Law Appellate Tribunal (NCLAT)).⁴⁵ The RP in this case had admitted the case based on international principles on a notional value. Deviating from the NCLAT, the Supreme Court upheld the decision of the RP to admit such claims at a notional value of Rs. 1 (one rupee) due to the pendency of disputes relating to the disputed claims thereby setting precedent for practice.

On point (ii) above, as per the judgment of Essar Steel claims after the approval of a resolution plan should be rejected.⁴⁶ However, once a resolution plan is approved and the period of

⁴¹ See *Kirwan v. Cresvale Far East Ltd. (In Liqd.) and Ors* (2002) 44 ASCR 21¶¶78, 154-155

⁴² See Part 14: Rule 14.2 – 14.11, *Insolvency (England and Wales) Rules 2016*

⁴³ See Part 14: Rule 14.2 – 14.25, *Insolvency (England and Wales) Rules 2016*. See also *Lehman Brothers International (Europe) in administration v CRC Credit Fund Ltd & Ors* [2009] EWHC 3228 (Ch); *Re Global Trader Europe Ltd (In Liquidation)* [2009] EWHC 602 (Ch).

⁴⁴ *The Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta*, Civil Appeal No. 8766-67 of 2019 (Supreme Court), ¶¶6-19

⁴⁵ See *Standard Chartered Bank v. Satish Kumar Gupta & Ors*, Company Appeal (AT) (Ins.) No. 242 of 2019 (NCLAT Delhi), ¶¶212 – 222. For reference, please note that the appellate structure under the IBC is the National Company Law Tribunal (the adjudicating authority) – the National Company Law Appellate Tribunal (the appellate authority) – the Supreme Court (the final appeal).

⁴⁶ See *The Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta*, Civil Appeal No. 8766-67 of 2019 (Supreme Court), ¶¶ 21

moratorium ends, in the case of *Prasad Gempex v Star Agro Marine Exports Pvt. Ltd.*,⁴⁷ (Gempex) the NCLAT has held that *it is open to a person to file a suit or an application against the 'corporate debtor' after completion of the period of moratorium, with regard to the disputed amount.* Moreover, proceedings on disputed claims can continue once the moratorium period is no longer in force, which creates a loophole.⁴⁸ In another case, while deliberating on a similar point the NCLAT has also held that *"it is not necessary that all the claims ...submitted by the Creditor should be a claim matured on the date of initiation of resolution process/admission, even in respect of debt, which is due in future on its maturity, the 'financial creditor' or 'operational creditor' or 'secured creditor' or 'unsecured creditor' can file such claim".*⁴⁹ Thus, clarifying the concern in relation to crystallisation of debts. While a case-to-case assessment of courts on this matter continues, on treatment of disputed claims specific to OCs in Essar Steel,⁵⁰ the successful resolution applicant had proposed that amount allocated for OCs would be kept in a designated escrow account. The resolution applicant also argued that OCs with disputed claims can avail remedy under Section 60(6)⁵¹ of the IBC and over a period of time as the figure of these claims becomes final and stands reduced (by final rejection of disputed claims by RP), the final distribution of proceeds will be made when finality is reached on all disputed claims. As a consequence of this method, the final figure of the adjudicated claim is therefore available with the resolution applicant. However, the above argument at the NCLAT was negated by the Supreme Court which held as follows:⁵²

"For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by Adjudication Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a successful resolution applicant who successfully takes over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been

⁴⁷ See *Prasad Gempex v Star Agro Marine Exports Pvt. Ltd.*, Company Appeal (AT) (Insolvency) No. 291 of 2018 (NCLAT Delhi), ¶7

⁴⁸ See *The Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta*, Civil Appeal No. 8766-67 of 2019 (Supreme Court), 90-100

⁴⁹ *Andhra Bank v. F.M. Hamerele Textile Ltd.*, Company Appeal (AT) (Insolvency) No. 61 of 2018, ¶9

⁵⁰ See *The Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta*, Civil Appeal No. 8766-67 of 2019 (Supreme Court), ¶182

⁵¹ Section 60. Adjudicating Authority for corporate persons. - (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of a corporate person is located. (6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

⁵² *Ibid.*, ¶67

pointed out by us hereinabove. For these reasons, the NCLAT judgment must be set aside on this ground.”

The principle of extinguishment of liability, where the clean slate theory discussed in Part II.3 is the next point of contention as a response to the above and has to a large extent clarified the position of the courts for claims against a CD in CIRP with a resolution plan – which point (iii) discussed below.

II.3 Extinguishment of Past Liabilities and Doctrine of Clean Slate

On point (iii) on the issue of allowing claims apart from those covered in a resolution plan to survive after the approval of a resolution, the Supreme Court in *Essar Steel* clarified that the successful resolution applicant should be given an opportunity to takeover and run the business of the CD on a clean slate. Accordingly, a resolution applicant should not be suddenly faced with ‘undecided’ claims which would throw into uncertainty the amounts payable by a resolution applicant to take over the business of the CD. In this context, the principle of extinguishment of past liability, applying the doctrine of clean state was established by the Supreme Court in relation to approved resolution plans.⁵³

The judgment in *Essar Steel* provided certainty that all claims against CD would stand extinguished once a resolution plan is passed, however, there are certain issues which were subsequently raised. Post *Essar Steel*, two similar type of creditors were heard by separate high courts in the cases of *Ultra Tech Nathdwara Cement v. Union of India*⁵⁴ (*UltraTech*) and *Electrosteel Steels Ltd. v. The State of Jharkhand*⁵⁵ (*Electrosteel*). Both courts had different opinions on the clean slate that emerges after the completion of CIRP with an approved resolution plan.

In *UltraTech*, *Binani Cements Ltd. (BCL)*, the CD had gone through CIRP with a duly constituted CoC that approved the resolution plan submitted by *Ultra Tech Cement* – the resolution applicant. Despite the completion of the CIRP, the tax authorities issued fresh demand notices to BCL. BCL filed an application to quash the demand notices and sought to restrain the tax authorities from raising further demands. On a review of the demands and statutory recoveries by the tax authorities, the High Court of Rajasthan held that the resolution of BCL would be better suited for tax authorities as well based on the resolution applicant since in liquidation the realization for tax authorities would be nil.⁵⁶ It was further held that no new demands of any claims can be raised by any creditor after the acceptance of the resolution plan, which is the date the resolution applicant successfully takes over the company.⁵⁷

⁵³ See Section 31, Insolvency and Bankruptcy Code, 2016

⁵⁴ *Ultra Tech Nathdwara Cement v. Union of India*, D.B. Civil Writ Petition No. 9480 of 2019 (Rajasthan High Court (Jodhpur Bench)), pp. 17-25

⁵⁵ *Electrosteel Steels Ltd. v. The State of Jharkhand*, W.P. (T.) No. 6324 – 6327 of 2019 (Jharkhand High Court (Ranchi Bench)), ¶28-30

⁵⁶ Refer to Section 53, Insolvency and Bankruptcy Code, 2016 on distribution of proceeds and priority of claims.

⁵⁷ *Ultra Tech Nathdwara Cement v. Union of India*, D.B. Civil Writ Petition No. 9480 of 2019 (Rajasthan High Court (Jodhpur Bench)), pp. 17-25

In the judgment of *Electrosteel* on a similar proposition, OCs had raised a dispute after the resolution plan was approved in favour of Vedanta Limited who had taken over the management of *Electrosteel Limited* (the CD). In this case, the tax authorities had asked the bank with assets of the CD to transfer them to the state exchequer towards the fulfillment of unpaid tax dues, which was challenged by *Electrosteel*. In relation to the resolution plan, it is imperative to discuss the binding nature of the plan *vis a vis* tax and other statutory dues. At the time of the enactment of the IBC, resolution plans were made binding on the CD, its employees, members, creditors, guarantors and other stakeholders, the plan was not specifically binding on central and state governments or any local authorities. With the Insolvency and Bankruptcy (Second Amendment) Act, 2019, Section 31(1) was amended to introduce “*the central government, any state government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force such as authorities to whom statutory dues are owed*” was introduced.⁵⁸ The tax authorities argued the prospective nature of this amendment which came into force on August 16, 2019 and stated that since the resolution plan was approved on April 17, 2018, the resolution plan was not binding on the tax authorities. In this context, the High Court of Jharkhand took note of the public announcement made by the RP during CIRP and since the state tax authorities were not paid the tax dues by the CD, the court proceeded to distinguish between the direct debt of the debtor and those collected on behalf of the government from the customers and observed that the latter could not qualify as operational debt under Section 5(20) of the IBC. *Electrosteel* based on the *UltraTech* reasoning argued the extinguishment of claims which were not raised during the resolution period. The High Court of Jharkhand while stating that tax authorities are OCs and are owed an operational debt by virtue of Sections 5(20) and 5(21) of the IBC, took the view of classifying direct and indirect dues and held that in the present instance the resolution plan was not binding on the state government and tax authorities since it had not participated in the proceedings. *Electrosteel* challenged the ruling before the Supreme Court which put rest to issues relating to claims post the approval of a resolution plan in the case of *Ghanashyam Mishra & Ors. v. Edelweiss Asset Reconstruction Company Limited through the Director & Ors.*⁵⁹ (*Ghanashyam Mishra*). *Ghanashyam Mishra inter alia* dealt with a number of similar issues and deliberated on the following questions to determine whether claims could be agitated before other forums after the approval of a resolution plan in a CIRP:

- a. *Whether any creditor, including the central government, state government or any local authority is bound by the resolution plan once it is approved under Section 31(1)?*

The court held that once CoC and thereafter the NCLT approves a plan in compliance with the requirements of payments to operational creditors and costs of CIRP under Section 30(2), the plan is binding on all stakeholders of a CD. This reasoning is in line with the purpose of the IBC, which is the revival and reorganization of a CD, a reason

⁵⁸ Section 31(1), Insolvency and Bankruptcy Code, 2016.

⁵⁹ *Ghanashyam Mishra & Ors. v. Edelweiss Asset Reconstruction Company Limited through the Director & Ors.*, Civil Appeal No. 8129 of 2019 with WP (Civil) No. 1177 of 2020 and Civil Appeals No. 1550-1554 of 2021 (Supreme Court), ¶54, 58-62

why the CD is run as a going concern during a CIRP. Moreover, since a resolution applicant is aware of the liabilities that it may have to face, the legislative intent of Section 31 is to ensure that there are no surprise or undecided claims. In cases where the resolution applicant is satisfied of all the liabilities, a fresh (clean) slate should be provided to the CD once the resolution plan is approved. It was further reasoned by the courts that the purpose of the moratorium is to allow for precise calculations that would make a resolution plan workable, in the absence of the remedy of freezing individual actions, the purpose of the CIRP would be frustrated. In light of the above, all resolution plans approved by the CoC and thereafter by the NCLT will be binding on the CD, the resolution applicant, its' employees, members, creditors, the central government, any state government or any local authority, guarantors and other stakeholders involved in a CIRP of a particular CD.

- b. *Whether after the approval of a resolution plan by the NCLT, a creditor (including tax authorities) can initiate any proceedings for recovery of dues from the CD that are not a part of the approved resolution plan?*

In Gempex, the NCLAT had allowed for proceedings on disputed debts to continue post moratorium, however, Ghansyam Mishra categorically emphasized the position of extinguishment of proceedings stating that once a resolution plan is approved by the NCLT, no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan. Moreover, all statutory dues that are not a part of the resolution plan shall stand extinguished – the date of such dues should be prior to the date of approval of the resolution plan by the NCLT.

The court in Ghansyam Mishra further held that the amendment to Section 31(1) was declaratory and clarificatory in nature. It would therefore be binding on all resolution plans since the date of enforcement of the IBC on December 01, 2016. Thus, Ghansyam Mishra clarified both positions on future disputes and claims and held that:⁶⁰ (i) after the approval of a resolution plan no disputes can be agitated for claims that were not raised during the resolution plan, and (ii) persons are not entitled to recover any claim or claim any debts owed to them from the CD accruing prior to the transfer to resolution applicant.

The position in Ghansyam Mishra has been welcome change and in parallel upholds the commercial wisdom and the purpose of the CIRP in the context of insolvency resolution. Here, it can be stated that the CoC and the resolution applicant are free to negotiate on contingent claims and therefore settle such debt as a part of the resolution plan. The above reasoning has been followed in cases in particular *GGs Infrastructure Pvt. Ltd v. Commissioner of CGST & & Central Excise*⁶¹ where the High Court of Bombay held that once a resolution plan is approved by the CoC and is sanctioned by the NCLT, it will be binding on all the stakeholders including the OCs. This was a particular case of settlement of certain local tax dues, specifically service tax dues which were yet to be crystallized as

⁶⁰ *Ibid.* ¶69

⁶¹ *See GGS Infrastructure Pvt. Ltd v. Commissioner of CGST & & Central Excise*, WP-LD-VC-No.268 of 2020 (Bombay High Court) ¶¶38.2 - 41

a part of the resolution plan. The resolution plan provided for settlement of service tax dues at 5% of amount of principal dues that would crystallize upon adjudication post-approval of resolution plan. The High Court of Bombay further held that the tax authorities could retain the amounts up to 5% and the remaining surplus amount deposited were to be refunded to the CD, in line with the resolution plan. It is further to be noted that the court used the word settlement post adjudication and not adjustment of dues as a part of settlement to the tax authorities, which was in line with the resolution plan as sought by resolution applicant. The rationale in GSS Infrastructure is very important since in a plethora of disputes, the CD is required to make deposits before making appeals or obtaining a stay on proceedings and a resolution applicant can get such deposits refunded after adjusting dues to be paid as per resolution plan.

In the above background, in terms of extinguishment of liability, the IBC, also introduced Section 32A⁶² to specifically extinguish criminal liabilities against a CD in the event a resolution plan is approved. While the interpretation and implementation of Section 32A is still an ongoing process, the position of the courts and jurisprudence in this area seems to clear. The interplay of the IBC with several statutes such as the Prevention of Money Laundering Act, 2002⁶³ and the Negotiable Instruments Act, 1881⁶⁴ have been clarified by the Supreme Court in the context of overriding powers,⁶⁵ moratorium and Section 32A. Courts have further adjudicated that proceedings that continue post approval of the NCLT can continue against the erstwhile management of the CD.⁶⁶ While the positioning of the courts may be viewed as progressive, the IBC as a legislation is in its sixth year of enactment and has spent one year in suspension for fresh insolvency petitions (with riders) which was done away with on March 25, 2021. As a trajectory, there seems to be continuous movement, change and evolution in the law and its implementation in relation to treatment of disputed claims and rights of related creditors.

III. THE WAY FORWARD

In view of above, there have been significant evolution of jurisprudence on disputed claims in the last five years with key factors such as the role of the RP, admission of OC claims, distribution, treatment of disputed claims, claims not filed before RP during CIRP period and the extinguishment of past liabilities. Such evolved jurisprudence in such a short time shows the maturity of insolvency regime in India. Moreover, under the Indian jurisprudence the doctrine of clean slate provides unique distinction to the resolution process (in specific the CIRP) under IBC internationally. As the NCLT jurisdiction can be invoked only for disputes that arise out of or related to insolvency resolution

⁶² See Report of the Reconstituted Insolvency Law Committee, March 2020, ¶17 accessible [here](#).

⁶³ See *Directorate of Enforcement v. Manoj Kumar Agarwal & Ors.*, CA-AT (Ins) No. 575 of 2019 (NCLAT New Delhi), ¶¶39-41, where the court held that in the event of criminal proceedings and attachment of properties under the anti-money laundering legislations the objects of the insolvency legislation would prevail.

⁶⁴ See *P. Mohanraj & Ors v. Shah Brothers Ispat Pvt. Ltd.*, Civil Appeal No. 10355 of 2018 (Supreme Court), pp.117-118, where the court held that no criminal proceeding with respect to dishonor of negotiable instruments would lie against CD thereby further strengthening clean slate principle.

⁶⁵ See Section(s) 238 read with Section 14, Insolvency and Bankruptcy Code, 2016.

⁶⁶ See *Manish Kumar vs. Union of India*, Writ Petition (Civil) No. 26 of 2020 (Supreme Court) ¶¶252-259

process of the CD⁶⁷ and further under moratorium,⁶⁸ institution of suits and proceedings is prohibited during insolvency period, creditors with disputed claims against a CD are left without remedy. As disputed claims may be treated at notional values with Essar Steel as the frontrunner, realizations for such creditors have been uncertain and doubtful and are mostly extinguished in the resolution plan. Thus, with the present jurisprudence, so far for disputed claims where such claims are largely extinguished as per resolution plans, it becomes imperative for such creditors to evaluate their options available with CD. In cases where the financial position of CD is uncertain and there is likelihood of CD admitting into insolvency proceedings, such creditors face question of benefit of protracted proceedings or litigation in various forums. Given that the issue of disputed claims is being addressed through judicial pronouncements on a case to case basis and is left with the IBBI for clarity, the next step on treatment of disputed claims would require a combination effort and is awaited.

⁶⁷ See Gujarat Urja Vikas Nigam Limited v. Amit Gupta & Ors Civil Appeal No. 9241 of 2019 (Supreme Court), ¶¶78,80; See also M/s Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors Civil Appeal No. 9171-9172 of 2019 (Supreme Court), ¶¶44-45

⁶⁸ Refer to Section 14(1)(a), Insolvency and Bankruptcy Code, 2016

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