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Articles

Supreme Court ruling in *ArcelorMittal* case – An analysis

By **Mitali Daryani**

The Supreme Court on 4-10-2018 allowed yet another opportunity to mining major ArcelorMittal and Russia's VTB Capital-backed NuMetal to bid for Essar Steel provided they clear their Non-Performing Asset (NPA) dues in two weeks. The bench comprising Justice R. F. Nariman and Justice Indu Malhotra, has also taken this opportunity to interpret and clarify Section 29A of the Insolvency and Bankruptcy Code, 2016. However, the Essar saga is far from over.

The insolvency of Essar Steel has garnered sufficient attention, from both the law makers and stake holders alike. Dotted with multiple litigation, the battle for Essar's assets can be held accountable for the coming of age of the nascent law with the Supreme Court going into some depth as to the scope of Section 29A of the Insolvency and Bankruptcy Code.

Brief Facts of the Case:

Essar was one of the first 12 cases which the RBI referred to insolvency under the Banking Regulation (Amendment) Ordinance of 2017. After an unsuccessful attempt at challenging the RBI Circular, the corporate insolvency resolution process (CIRP) for Essar commenced on 2-8-2017.

During the course of the CIRP, Section 29A, as it stands today, was brought in. Since the very beginning, many applied as Resolution Applicants. Of the many applicants, ArcelorMittal India Private Limited (AMIPL) and Numetal submitted their resolution plans for the debt stricken Essar Steel. Initially, both applicants were held to be ineligible by the Resolution Professional. As per the resolution professional, both Resolution Applicants were persons connected to NPAs and hence, under Section 29A, were disqualified. More specifically, the origins of Numetal, which is essentially an SPV created for the sole purposes of bidding for Essar Steel, could be traced back to the promoters of Essar. Numetal's complex corporate structure effectively gave control of Numetal to Mr. Rewant Ruia, son of the promoter of Essar Steel – Mr. Ravi Ruia.

In the case of AMIPL, the Resolution Professional noted that Mr. Laxmi Mittal, who is the promoter of AMIPL indirectly held control over two companies namely Uttam Galva Steels and KSS Petron. Both Uttam Galva steels and KSS Petron had been declared NPAs.

Interestingly, Numetal apprehending that the Resolution Professional would recommend that it be declared ineligible, had already moved an application before the NCLT seeking a declaration as an eligible resolution applicant.

Predictably, the decision of the Resolution Professional to disqualify Numetal and AMIPL was challenged before the NCLT. The NCLT based on facts pertaining to the two applicants, upheld the view of the Resolution Professional. However, the NCLT also recognized that the apparent deficiency impacting their eligibility as resolution applicants was curable. To that end, the Tribunal granted both Numetal and AMIPL time to cure ineligibility. The decision of the NCLT was appealed before the Appellate Tribunal. While the matter was pending before the NCLAT, Numetal was quick to act, and submitted a

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revised Resolution Plan and completely dropped Mr. Ruia from the Numetal structure.

The NCLAT, taking note of the revised Resolution plan submitted by Numetal held that Numetal was now eligible. However, the troubles from AMIPL did not end there. The NCLAT also noted the association of AMIPL with the Uttam Galva Steels and KSS Petrons and ordered that AMIPL pay their dues, even for companies from which it had divested shareholdings. Resultantly, AMIPL stood eliminated from the bidding war for Essar Steel.

It is at this stage, AMIPL appealed before the Supreme Court, leading to the present judgment.

Supreme Court on eligibility of Numetal and AMIPL

The questions before the Supreme Court revolved around the eligibility / ineligibility of AMIPL and Numetal, and the application of Section 29A of the Code.

To begin with, the Court observed that the eligibility of a Resolution Applicant has to be tested on the date when the Resolution Plan is submitted and not on the date when the Resolution Plan is accepted.

The Court noted the evolution of Section 29A, from the stage of its introduction by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 to its final structure, as it presently stands. Giving a purposive interpretation to Section 29A, the Court held that it is not only permissible but also imperative for the competent authority to lift the corporate veil especially when it comes to a corporate vehicle that is set up for the purpose of submission of a resolution plan.

These observations, proved fatal for Numetal. Since Numetal was incorporated for the sole purpose of bidding for Essar, with no financial or experience credentials of its own, their eligibility required the Court to base their assessment entirely on the credentials of each of its constituent shareholders. As part of this assessment, about Rs. 500 crores that has been deposited towards submission of earnest money was yet again traceable back to Mr. Rewant Ruia even after submission of the second resolution plan.

The Court further continued and assessed the eligibility of AMIPL. With respect to the case of AMIPL, the Court looked into the manner in which the shareholdings in Uttam Galva and KSS Petron were divested. Shares in Uttam Galva were sold far below market value, at ‘distress’ prices to overcome the 29A hurdle. In the case of KSS Petron, the sale of shares along with the resignation of directors was done with the sole objective of avoiding 29A ineligibility.

Resultantly, both Numetal and AMIPL, were held ineligible as Resolution Applicants.

Supreme Court on Section 29A:

The Court, taking this opportunity to clarify the law on Section 29A, delved into the meaning of the terms ‘management’, ‘control’ and ‘promoter’ while referring to the Companies Act to define the scope of Section 29A. The Court found that the expression ‘management’, would refer to the *de jure* management of a corporate debtor and that the *de jure* management of a corporate debtor, would ordinarily vest in a Board of Directors, and would include, “manager”, “managing director” and “officer” as defined under the Companies Act, 2013. The Court also explored the scope of ‘control’, holding that as long as a person or persons acting in concert, directly or indirectly, are in a position to positively influence, in any manner, management or policy decisions, they could be said to be “in control”. Thus, the expression ‘control’, in Section 29A(c) of the Code, denotes only positive control, which means that the mere power to block special

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resolutions (negative control) of a company cannot amount to control under the Code.

As for 'promoter', the Court found that it was a mix of *de jure* and *de facto* depending on which sub-section of Section 29A was being referred to. The Court however particularly held in relation to dealing with NPAs, it refers to a *de jure* position, namely, where a person is expressly named in a prospectus or identified by the company in an annual return as a promoter. The Court then crystallised its understanding of Section 29A(c) ineligibility which are described best in the following words,

"Any person who wishes to submit a resolution plan, if he or it does so acting jointly, or in concert with other persons, which person or other persons happen to either manage or control or be promoters of a corporate debtor, who is classified as a non-performing asset and whose debts have not been paid off for a period of at least one year before commencement of the corporate insolvency resolution process, becomes ineligible to submit a resolution plan."

Right of appeal for resolution applicants:

The Court categorically held that a resolution applicant has no right to appeal a rejection of its resolution plan by the Resolution Professional. To that end, the Court noted that a resolution applicant, as such, has no vested right that his resolution plan be considered. Therefore, no challenge can be preferred to the NCLT at that stage. The appropriate stage for a Resolution Applicant to raise a concern is after the Committee of Creditors has reviewed the Resolution Plans submitted to it by the Resolution Professional and passed a resolution thereafter. The Court further held that even a writ petition under Article 226 filed before a High Court is also liable to be turned down on the ground that no right, much less a fundamental right, is affected at this stage. The intention behind this is to prevent the CIRP from getting hampered due to multiple litigations.

Powers exercisable by Resolution Professional:

The Court noted that the Resolution Professional is to confirm that a resolution plan does not contravene any of the provisions of law for the time-being in force. The Court held that this would also include Section 29A of the Code. To this end, the resolution professional is to present his prima facie opinion before the Committee of Creditors conveying that the resolution plan contravenes a law. The Court also held that Section 30(2)(e), however, does not empower the Resolution Professional to adjudicate whether the resolution plan does or does not contravene the provisions of law.

The Court further opined that while it is not a mandate under the law that the Resolution Professional must give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if a due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law.

The Court, excluded the time taken in litigation from the timeline of 270 days and while exercising its powers under Article 142 of the Constitution, granted another 2 weeks for both resolution applicants to pay off their debts. While ArcelorMittal may do so, the interesting development will be if the debts of Essar Steel are cleared. If so, all that has happened in the last one year would be futile. And while the next two weeks will tell us what happens with Numetal and Mittal, a third resolution applicant, Vedanta, may prefer that the two weeks turn out to be too

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short a period for AMIPL and Numetal to cure their defects. If that happens, the field will be once again wide open in favour of Vedanta and new applicants!

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Data Principal and Data Fiduciary in the Personal Data Protection Bill, 2018

By **Ahalya Chalasani**

The Chilean Constitution was amended on 16th June, 2018 to establish that protection of personal data is a constitutional right. Prior to this, other Latin American countries like Colombia, Mexico and Ecuador have already included the right to protection of personal data in their respective constitutions. Similarly, the French Constitutional Council upheld the validity of GDPR when it was challenged by the Senators recently. These instances reinstate the importance of personal data protection in this modern, tech-savvy age.

In India, the committee of experts headed by Justice B.N. Sri Krishna submitted a draft of Personal Data Protection Bill, 2018 ("Bill") to the Ministry of Electronics and Information Technology on July 27, 2018. The terms data principal and data fiduciary have been used in the Bill. This article examines the rationale for such usage and the obligations imposed upon the data fiduciary under the Bill.

Data Protection in India has so far been achieved through regulations under various laws. In August 2017, the Hon'ble Supreme Court of India held in *Justice K S Puttuswamy v. Union of India*[1] that right to privacy is a fundamental right. Through this judgment, right of an individual to exercise control over his/her personal data was also recognised. The Court opined that the ability of a person to control his own life would also encompass his right to control his existence on the internet.

Apart from constitutional protection as stated above, personal data also enjoys protection under Information Technology Act, 2000 ("IT Act") and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Rules), 2011 ("Sensitive Personal Data Rules"). Under Section 43A of the IT Act, if an entity dealing with sensitive personal data or information is found negligent in implementing and maintaining reasonable security practices resulting in wrongful loss or wrongful gain to any person, then such entity may be held liable to pay damages to the person so affected. There is no upper limit specified for the compensation that can be claimed by the affected party in such circumstances.

Similarly, under Section 72A of the IT Act, a service provider who has secured access to any material containing personal information about a person, discloses such information without the consent of the person concerned, or in breach of a lawful contract, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain, shall be punished with imprisonment for a term may extend to three years, or with a fine which may extend to five lakh rupees, or with both. Sensitive Personal Data Rules also provide for protection of personal information by imposing certain obligations on the entities that collect information, similar to the Bill.

[1] *K S Puttuswamy v. Union of India*, (2017) 10 SCC 1.

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Data fiduciary has been defined in the Bill to include any entity that alone or together with others determines the purpose and means of processing of personal data. Processing involves collecting, organising, storing, structuring, use etc. Data principal has been defined as the natural person to whom the personal data relates to.

There is an element of trust that the data principal places on various companies/ data fiduciaries while sharing his personal information. He trusts the data fiduciaries to use the information only to the extent necessary to provide services and not to use it for any other purpose. The report submitted by the committee of experts in relation to the Bill also adapts this approach. It states that the relationship between the person and the organisation with which the person shares his personal data is based on a basic presumption of trust. Irrespective of any existing contractual relationship, every person expects that his personal data will be used fairly, in a manner that fulfils his interest and is reasonably foreseeable. This is the essential feature of a fiduciary relationship.

In law, a fiduciary is a person or business with an obligation to act in a trustworthy manner in the interest of another. A few examples of fiduciary include professionals like lawyers, doctors, directors to a company etc. One might argue that personal information is owned by the users who share it, connoting that one's personal information is one's property. If personal information is accepted as property, it can be sold, purchased, licensed or alienated. However, one's personal information cannot be alienated. It remains associated with a person throughout his life and thereafter too. For example, the name of a person cannot be alienated from him even if he decides to sell his personal data to a data fiduciary. In this sense, right in personal data is not similar to the rights exercised by a person in relation to physical property. Further, a right in physical property also includes the right of exclusion. However, when a user shares his personal data with an entity, it cannot be excluded to be used solely by that entity because it may not be commercially feasible.

One might consider the relationship between the entities and users to be a contractual relationship. Even if the relationship is considered to be a contractual one, it is difficult to ascertain the amount of damage that could be caused due to sharing of personal data in breach of a contract. The reason for this is the unique nature of data on internet and various technologies. What is shared on internet is there forever! Further, most entities obtain consent from users, through one-sided clauses in their privacy policies and terms of service, to deal with personal information, in a manner that is not necessary for the purposes for which the information was shared. Therefore, the users wouldn't have much scope to claim damages for misuse of personal information shared with entities if they have consented to such use. Also, usually the users do not have any bargaining power in relation to such policies and terms and they are left with no choice but to accept such terms in order to avail the services.

Fiduciary obligations vis-à-vis obligations arising out of a contract

Fiduciary obligations may be created by a contract but they differ from contractual relationships for they can exist even without payment of consideration. In a fiduciary relationship, the principal emphasis is on trust, and reliance, the fiduciary's superior power and corresponding dependence of the beneficiary on the fiduciary. It requires a dominant position,

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integrity and responsibility of the fiduciary to act in good faith and for the benefit of and to protect the beneficiary and not oneself.[2] Contractual relationship may require that a party should not cause harm or damage the other side, but fiduciary relationship casts a positive obligation and demands that the fiduciary should protect the beneficiary and not promote personal self interest.[3]

The Hon'ble Supreme Court of India in *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi*[4] held that fiduciary refers to a person having duty to act for benefit of another, showing good faith and candour, where such other person reposes complete trust and special confidence in person owing or discharging duty, while fiduciary relationship refers to situation or transaction where one person places complete confidence in another person in regard to his affairs, business or transactions. While a data principal is sharing his information with a data fiduciary, he places complete trust and confidence in the data fiduciary to act in good faith and in the interest of the data fiduciary. Therefore, the relationship between a data fiduciary and a data principal is a fiduciary relationship.

The rationale behind recognising these companies with which users share their personal data as data fiduciaries lies in the vulnerability prevalent in the relationship between the user and the company. The companies have considerable expertise and knowledge while end-users usually don't and the users are dependent on the companies for obtaining services.

The need for imposing the obligations of fiduciary on these entities that collect personal data arises because of the following reasons[5]. Firstly, there is a significant gap between the knowledge and information possessed by the companies and the users. Secondly, it is difficult for the users to verify the claims of these entities about data collection, security, use and dissemination. Thirdly, it is complicated for the users to understand what the entities do with their data and how data analysis and use affects their interests. Fourthly, even if users understand these practices, it would be almost impossible for the users to monitor entities.

The committee of experts on the Bill observed that a balance must be struck between the interests of the individual with regard to his personal data and the interests of the entity who has access to this data. It observed that data fiduciaries must only be allowed to share and use personal data to fulfil the expectations of the data principal in a manner that furthers the common public good of a free and fair digital economy. The committee opined that such measures would ensure individual autonomy and make available the benefits of data flow to the economy.

The Bill imposes various obligations upon the data fiduciaries. Data fiduciary is responsible for complying with all the obligations under the Act, even when the processing is done by others on its behalf. Every data fiduciary processing personal data ought to process it in a fair and reasonable manner in such a way that it respects the privacy of the individual. The processing must be done only for clear, specific and lawful purposes and it must be restricted only to the specified purpose for which it was collected. Collection of personal data by data fiduciaries should only be to the extent that it is necessary for the purpose of processing. The personal data must be stored only for as long as is necessary.

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[2] *Union of India v. Central Information Commission and Shri P.D Khandelwal*, Writ Petition Civil No. 8396 of 2009

[3] *Ibid*

[4] *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi*, (2012) 13 SCC 1

[5] Jack M Balkin, Information Fiduciaries and the First Amendment, 49(4) UC Davis Law Review (2016) at pg. 1227.

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Further, the data fiduciary is also mandated to issue a notice to the data principal about the collection of data, prior to the collection. Such a notice must contain the purpose for which data is collected, categories of personal data which are collected, source of collection of data, the entities/individuals with whom the data will be shared, whether there will be cross border transfer of such data and the period for which personal data shall be retained.

Conclusion:

The data fiduciary is mandated to protect the interest of the data principal and he cannot act to promote his self interest. Therefore, the Bill has aptly used the word data fiduciary and imposed several obligations on the data fiduciary to protect the interests of the data principal.

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Cross Border Insolvency – An analysis of the draft chapter

By **Roshni Menon**

Introduction

In the last few years, India's banking sector has been fraught with an alarming number of non-performing assets. To this end, the Insolvency and Bankruptcy Code of 2016 (Code) strives to resolve the problem by allowing creditors to recover their dues and appropriately deal with loan defaulters. Akin to insolvency, its cross-border variant is one where the insolvent debtor has assets in more than one jurisdiction. The Code however lacks an extra-territorial application and the same is heralded as its biggest drawback. Insolvency proceedings spilling over several jurisdictions leads to a heap of issues such as multiplicity of laws, overlapping interests, etc. Since its inception, several Indian origin multinational corporations undergoing insolvency proceedings under the Code have foreign assets and stake in subsidiaries in foreign jurisdictions, however, these remain untouched during the insolvency process. This begs the question: How are such assets outside India to be treated under the Code? Can foreign creditors access the domestic insolvency proceedings? To what extent can foreign creditors enforce their debt? While the business world may have quickly embraced globalisation, the legislature is still attempting to answer these questions and stay on top of things in terms of its regulatory reach.

In times of bad financial climate, the law must provide for an uncomplicated insolvency process and consider the interest of all stakeholders. The foremost step in addressing such a scenario is to have an effective cross-border insolvency legislation. Apart from removing financial difficulty, having a cross-border insolvency law is an economic fundamental. The incumbent government is keen on improving India's rank on the '*Ease of Doing Business'* index; and having an effective cross-border insolvency law will help in this regard as it improves the credit recovery rate and reduces the delay in information exchange. Moreover, Government programmes like '*Make In India'* are tailor-made to tap more foreign investment into the country and in order to increase foreign investment levels, providing exemptions and tax breaks alone will not suffice. Foreign investors are more likely to invest in a country that has a system in place they can rely on in the event of financial distress, such as insolvency.

Presently, Section 234 and 235 of the Insolvency and Bankruptcy Code remotely deals

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with the subject of cross-border insolvency by enabling the Government to enter into reciprocal agreements with foreign States. Where the insolvent debtor has assets in a foreign jurisdiction, the relevant court or tribunal can merely only send a Letter of Request to a foreign court or tribunal and seek its assistance with respect to said foreign assets. Moreover, entering into separate reciprocal agreements with individual foreign States is time consuming, costly and can contain varying terms. Thus, the current legal framework is limited in its scope and must be replaced by a comprehensive law. Recognising the urgency to plug the gaps in our legal system, the Eradi Committee Report in 2000 and the IBC Joint Committee Report in 2015 recommended the adoption of the UNCITRAL Model Law on Cross Border Insolvency (Model Law) but this did not materialise. The Model Law is widely recognised and applied in as many as 44 States including United Kingdom, United States of America and Singapore. Nonetheless, India has recently witnessed lot of deliberations and the Insolvency Law Committee Report of 2018 branded Sections 234 and 235 as an incomprehensive framework to deal with this subject.

Taking note of these inputs, the Government put forth a positive measure through the Ministry of Corporate Affairs and released a Draft Chapter on Cross Border Insolvency (**Draft law**) on June 20, 2018 and opened it for comments. The Draft law is based on the Model Law but is modified to the extent necessary to meet the needs of an Indian setting. The Model Law aims to bring uniformity in legal proceedings, at the least amongst States that have adopted it. If the Draft law is adopted, it will help India coordinate better with nations that recognise the Model Law.

Overview of Draft Chapter[1]

The draft cross-border insolvency law will apply to a corporate debtor where: (i) in relation to foreign insolvency proceedings, the foreign courts or foreign representatives seeks assistance in India; or (ii) in relation to Indian insolvency proceedings, assistance is sought in the foreign State; or (iii) concurrent proceedings are underway in the foreign State and in India, in respect to the same insolvent corporate debtor; or (iv) creditor(s) in a foreign State have an interest in requesting the commencement / participation in Indian insolvency proceedings. The scope of the legislation being widely worded allows it to apply to all plausible cross-border insolvency scenarios.

Creditors in a Foreign State

Presently, under Section 10 of the Insolvency and Bankruptcy Code, foreign creditors and Indian creditors are placed on an equal footing. The Draft law, however, goes a step further with an express statement to that effect; albeit such equal rights only pertain to commencement of, and participation in, an insolvency proceeding.

Further at the time of liquidation, the payment to creditors is subject to a hierarchical waterfall mechanism i.e. the order of priority of claims in distribution of assets and accordingly, the Draft law states that the claim of foreign creditors shall not be ranked lower than the class of 'Remaining debts and dues'. This provides assurance to foreign creditors that their claims will be appropriately considered and won't go overlooked. Then again, this does not apply where the claim is concerning tax and social security obligations.

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[1]. The cross-border insolvency provisions presently only pertain to corporate debtors. Based on the experience, similar provisions for personal insolvency will be formulated in due course of time.

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Furthermore, in all circumstances where creditors in India are sent notifications in relation to the proceedings, the same shall also be sent to known creditors who don't have an address in India. Hence, foreign creditors have a right to stay informed about the proceedings.

Rights of Foreign Representatives

Under Section 7 of the Draft law, representatives of the foreign proceedings have the right to apply to the Adjudicating Authority in India (National Company Law Tribunal or NCLT) and gain direct access to the Court. Foreign representatives are defined in the Draft law as persons who act on behalf of the foreign proceedings or who administers the liquidation of the corporate debtor's assets. Firstly, by knocking on the door of the NCLT, the representative can exercise the powers and functions available to him under the Code. Secondly, foreign representatives are also entitled to commence proceedings under the Code if the corporate debtor has assets in India or the representative has an interest in obtaining relief. Thus, Section 8 introduces a new category of persons to whom the right to commence applies. Previously this right was limited to creditors (both financial and operational), debtors, authorised members, person in charge of managing the operations and in control and supervision of the debtor. While making an application, either for accessing the authority or for commencing a proceeding, the prescribed format shall be followed.

Recognition of Foreign Proceedings and Relief

The Draft law bestows upon the tribunal the power to give recognition to foreign proceedings and requires the qualifying foreign proceeding to be described as either a main proceeding (where the debtor had its centre of main interests) or a non-main proceeding (where the debtor has an establishment). Further in Section 17, the Draft law accords recognition to the orders issued by foreign courts commencing qualifying foreign main proceedings and appointing the foreign representative of those proceedings; by submitting certifiable evidence of the same. Once it has been recognised, the foreign representative is entitled to participate in any proceeding concerning the corporate debtor under the IBC. After giving recognition, the Court shall provide relief by passing an order declaring moratorium (automatic stay). It may also give other reliefs such as permitting examination of witnesses, taking/delivering information about the debtor's assets, rights, liabilities, etc. However, the doubt persists whether the declaration of moratorium under Section 17 is applicable to only foreign main proceedings as the section is silent about foreign non-main proceedings. If requested, Section 18 even allows representatives to be entrusted with the task of realising and distributing the assets located in India, in certain circumstances.

It is important to note that, giving recognition to foreign proceedings or declaring moratorium does not affect the right to request commencement of proceedings under Code. Creditors and other entities will continue to enjoy their right to file an insolvency petition under the Code against the corporate debtor.

Concurrent Proceedings

In some circumstances, there may be concurrent proceedings against the same corporate debtor in both Indian and foreign jurisdictions. Albeit simultaneous proceedings are underway in different jurisdictions, they shall progress parallelly and shall not subsume into each other. Even in situations where joint hearings are necessarily to be conducted to avoid multiplicity, the proceedings in India and the foreign jurisdiction shall remain independent of each other. In other words, consequences of

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the Indian law will not be exported into the foreign State and vice-versa. Nevertheless, in times of concurrent cases, it is paramount that all Courts directly communicate and cooperate with each other. This will help the concerned Courts to amicably achieve the best outcomes.

Section 24 mandates that to commence any proceeding under IBC after giving recognition to a foreign main proceeding, the assets of the corporate debtor must mandatorily be located in India.

(a) If an application for recognition of foreign proceeding is made at a time when a proceeding under the Code is taking place, then the reliefs granted must be consistent with the Indian proceeding.

(b) Alternatively, if the Indian proceeding commences only after applying for recognition, then the reliefs under Section 18 and moratorium under Section 17 shall be modified or terminated if inconsistent with the proceeding under the Code.

Also, for commencing a proceeding under IBC, the recognition of a foreign main proceeding is proof that the corporate debtor is insolvent. This however does not affect the burden to prove the existence of a debt in relation to the corporate debtor.

It is also noteworthy that in concurrent proceedings (during corporate insolvency resolution process or liquidation), creditors who have received part payment towards their claims in the foreign proceedings may not receive payment for the same claim from the Indian proceedings. However, this is subject to whether the payment to other creditors of same class, is proportionately less than the payment already received from the foreign proceedings.

Conclusion

Incorporating a cross-border insolvency framework into the existent Insolvency and Bankruptcy Code will strengthen the legislation by heightening its impact as a one-stop-shop legislation for all insolvency related matters. Adopting the Draft law will be a crucial factor in reinstating the creditors' confidence in retrieving their dues successfully and thereby, changing the landscape of domestic lending. By enacting the cross-border insolvency provisions, the Indian insolvency framework stands to gain global acceptance and recognition as businesses increasingly become transnational. Having in place a law based on the UNCITRAL Model Law reassures overseas investors' interests in India, as factors such as unfamiliarity and unpredictability of the law are done away with and as a result, foreign lending will increase as the law provides for certainty and uniformity.

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Notifications and Circulars

Companies Act - Sections 66 to 70 of Companies (Amendment) Act, 2017 come into force from September 12, 2018: The Central Government has notified Section 66 to 70 of the Companies (Amendment) Act, 2017 ("Amendment Act") on September 12, 2018 *vide* Notification No. S.O. 4823(E), dated September 12, 2018 ("Notification"). Section 66 to 70 of the Amendment Act amended the provisions relating to the appointment and remuneration of directors

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as provided under Sections 196, 197, 198 and 200 of the Companies Act, 2013 ("Act") in following manner:

(i) Appointment of a person as a managing director, whole time director or manager who has attained the age of seventy years- Prior to the amendment, Section 196(3) of the Companies Act provided that a person who has attained the age of seventy years can be appointed as managing director, whole times director, or manager by passing a special resolution. The Notification notified a proviso to Section 196(3), which provides that in case where no such aforesaid special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the board of directors, that such appointment is most beneficial to the company, then the appointment of the person who has attained the age of seventy years may be made.

(ii) Section 197 provides for the overall maximum managerial remuneration to be paid in absence of or inadequacy of profits. The Notification notified a proviso to Section 197 which obliges the company to obtain a prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, in case where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor. The Notification further notified a new subsection i.e. Section 197 (16) which provides that the auditor is required to make a statement in his report under Section 143, as to whether the remuneration paid by the company to its directors is in accordance with the provisions of Section 197 or whether the remuneration paid to any director is in excess of the limit laid down under Section 197.

(iii) The Amendment Act removed the role of Central Government under Section 200 of the Act, in fixing the limits on remuneration to be paid under Section 197 of the Act, where the company has inadequate or no profits and also, with regard to appointments made under Section 196 of the Act. The Notification deleted the phrase, 'Central Government' from the Section.

The Ministry of Corporate Affairs vide notification, 'S.O. 4907(E) dated September 19, 2018', notified Section 37 of the Amendment Act which made effective amendments in Section 135 of the Companies Act. Section 135 of the Act deals with the 'corporate social responsibility'. The notification has notified the proviso to Section 135(1) that now provides that in cases where a company is not required to appoint an independent director under sub-section (4) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors.

Limited Liability Partnership – Incorporation to be processed online: The Central Government vide Notification No. 896 (E) dated September 18, 2018 has amended the Limited Liability Partnership Rules, 2009. The Notification notified that from October 02, 2018, the incorporation of LLPs will be processed by Central Registration Centre (CRC) instead of Ministry of Corporate Affairs (MCA). Further, to ease the process of incorporation of Limited Liability Partnership (LLP's) firms, the Notification notified:

- A new web-based form 'RUN-LLP' for incorporation and reservation of names of LLP's, through which names of the LLP's can be reserved without digital signature

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and Designated Partner Identification Number (“DPIN”).

- A new form named FiLLiP (Form for Incorporation of Limited Liability Partnership), through which an individual who is required to be appointed as designated partner and is not having DPIN or DIN can now make an application for allotment of DPIN in the aforesaid FiLLiP form. However, only 2 (two) individuals can make application for allotment of DPIN in form FiLLiP.

SEBI - New ICDR Regulations are effective from September 27, 2018: Security and Exchange Board of India (“SEBI”) vide its Notification No. SEBI/LAD-NRO/GN/2018/31 dated September 11, 2018 has enacted new Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 (“ICDR Regulations”). These regulations are effective from September 27, 2018. SEBI approved the new ICDR Regulations, after taking into consideration the recommendations made by the Primary Market Advisory Committee (“PMAC”). Under the newly enacted ICDR Regulation, the SEBI aims to enforce various reforms and amendments like appointing a monitoring agency for every initial public offer (IPO).

SEBI LODR Regulations amended: Security and Exchange Board of India *vide* its Notification No. SEBI/LAD-NRO/GN/2018/30 dated September 6, 2018 amended the Listing Obligations and Disclosure Requirements (“LODR”). The Notification inserted a new chapter, Chapter VIII A in the LODR. This newly incorporated chapter provides for the ‘obligations of listed entity which has listed its security receipts’ and notified new Regulations 87A to 87E in the LODR. The regulations under this Chapter is applicable only on issuer of security receipts which has listed its security receipts and the issuer. The aforesaid regulations are effective from September 6, 2018.

Ratio Decidendi

Allottees of apartment in real estate project will fall within category of ‘financial creditors’ under Section 7 of IBC

Facts:

The present case was an appeal against the order of NCLT dated March 05, 2018. The Appellant in the present case was an allottee of an apartment in the real estate project. The Appellant filed an application under Section 7 of the IBC before the NCLT for initating corporate insolvency resolution process against the Respondent. The NCLT vide its order date March 5, 2018 dismissed the application filed by the Appellant on the ground that disbursement made by the Appellant does not fall within the meaning of 'financial debt' and subsequently the instant appeal was filed.

Contentions:

The main contention taken by the Respondent before the Tribunal was in view of the arbitration clause. The Respondent contented that the matter should have been referred to arbitration and therefore the application filled under Section 7of IBC by the Appellant was not maintainable. On the other hand, the Appellant relied on the terms and conditions forming part of the application for the provisional allotment of a residential apartment in the real estate project.

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The Appellant also placed on record the receipts given by the Respondent which indicates the allotment of unit under the real estate project.

Court's Observation:

The Appellate Tribunal, in this case relied on its order passed in the *Nikhil Mehta & Sons v. AMR Infrastructure Ltd* [Company Appeal (AT) (Insolvency) No. 07 of 2017] dated July 21, 2017 and held the allottees of residential units as 'Financial Creditors'. The Appellate Tribunal observed that *vide* the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, an explanation has been inserted in Section 5(8)(f) of IBC, according to which any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing. Thereby, subsequent to the amendment of the IBC, the allottees of real estate project will be treated as 'Financial Creditors'. Therefore, the Appellate Tribunal held that the NCLT should have admitted the application in absence of any defect and further it set aside the order of the NCLT.

Analysis:

The Appellate Tribunal relying on its own order passed in the case of *Nikhil Mehta & Sons v. AMR Infrastructure Ltd.* and in view of the amendment ordinance, concluded that subsequent to the amendment brought in Section 5(8)(f) of IBC, the allottees of real estate project will be treated as financial creditors and therefore are eligible to move an application under Section 7 of the IBC. [*Rajendra Kumar Saxena* v. *Earth Gracia Buildcon Pvt. Ltd.* - Company Appeal (AT) (Insolvency) No. 187 of 2018, decided on 11-9-2018, NCLAT]

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