

Team Code: 118

INSOLVENCY AND BANKRUPTCY MOOT COURT COMPETITION
2019

IN THE MATTER OF
ISPL, CORPORATE DEBTOR

WRITTEN SUBMISSIONS ON BEHALF OF THE CONCERNED PARTIES

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TABLE OF ABBREVIATIONS

ABBREVIATION	EXPANSION
&	And
§	Section
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AIR	All India Reporter
Anr.	Another
AT	Appellate Tribunal
BoD	Board of Directors
CA	Company Appeal
CP	Company Petition
CIRP	Corporate Insolvency Resolution Process
CoC	Committee of Creditors
IBBI	Insolvency and Bankruptcy Board of India
IBC/Code	Insolvency and Bankruptcy Code
IRP	Insolvency Resolution Professional
JV	Joint Venture
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
Ors.	Others
Regn.	Regulation
RP	Resolution Professional

INSOLVENCY AND BANKRUPTCY MOOT COURT COMPETITION, 2019

SC	Supreme Court
Ld.	Learned
FC	Financial Creditors
OC	Operational Creditors
Pvt.	Private
ICA	Indian Contract Act
COMI	Centre of Main Proceeding

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STATEMENT OF FACTS

-IMPERIUM STEEL AND POWER LIMITED-

M/s. Imperium Steel and Power Limited (“ISPL”) is an Indian steel manufacturing company with the Registered Office in Delhi. Mr. Rajiv Kumar was the Chief Executive Officer of the company and Ms. Anjali Kumar was the Chief Financial Officer as she managed the finances of the company. The company began its operations with a small portfolio of steel fabrication and slowly and steadily expanded its operations steel manufacturing.

-IEL’S POWER PURCHASE AGREEMENT WITH VSCL-

M/s. Imperium Energy Limited (IEL), subsidiary of ISPL, formed for power generation. IEL entered into a medium-term Power Purchase Agreement with M/s. Vivek Shopping City Ltd (“VSCL”) which had an arbitration clause in it.

-CREDIT FACILITY AND PERSONAL GUARANTEES BY THE PROMOTERS-

The steel industry is highly capital intensive and the role played by banks in the success of ISPL cannot be overstated. Relying on the performance of the company, the banks were never hesitant to grant loans. Over the years, in addition to the mortgage of all its immovable properties, the banks demanded personal guarantees from the promoters.

-INTERNATIONAL JOINT VENTURES-

In 2014, ISPL entered into a joint venture with an industrial manufacturing company in the Netherlands. ISPL acquired a 66% stake in Africa Smelters Limited (“ASL”) and for financing & working capital, loans were taken by ASL from African Bank in Uganda. In the year 2015, ISPL entered into another Joint Venture, namely, Imperium Dutch N.V. (“IDN”) with Dutch Alloys Company, (“DAC”), a Netherlands based corporate group. IDN secured credit facilities from Deutsche Bank in the Netherlands in the year 2015 to the tune of USD 25,000,000.

-A Brief Timeline of Major Events-

Date	Major Events
2018 September	Owing to trade war between developed nations ISPL defaulted for first time in servicing debts and defaulted on salaries of the workers

2018	IDN defaulted on loan obligations Insolvency process in Netherlands commenced against IDN
2018 December	Application by Mr. Heinrich Dexter before Adjudicating Authority for notifying cross border insolvency claims, sought recognition of stay order and any other relief
2018 December	ASL defaulted to African Bank in Uganda. African Bank applied to take control of ASL
2019 January	ISPL application u/s 10 admitted, Rosemary Joseph as RP. RP applied to Uganda Court to seek administration over estate of ASL
2019	Applications by FDL, COC, Promoters, Operational Creditors and Resolution Professional

-INSOLVENCY PROCEEDINGS AND RESOLUTION PLANS-

After initiation of insolvency proceeding on corporate debtor's application, two resolution plans shortlisted. One was submitted by Ferrro Dynamics Ltd (FDL) and other by Durga Ispat and Power Ltd (DIPL). The approved plan was challenged by FDL to which AA passed an interim order directing changes in the plan. DIPL and COC sought revocation of this order.

-INVOCATION OF PERSONAL GUARANTEE-

During the pendency of the application for the revocation of interim order by AA, the financial creditors of ISPL served a notice Mr Rajiv and Ms. Anjali invoking the personal guarantee executed by them, claiming an amount of 520 Crores. Mr Rajiv and Anjali objected to this notice through a reply. Despite these objections banks still proceeded to file applications before AA. As a result of this Rajiv and Anjali filed an application against approved resolution plan and also moved separately to initiate insolvency resolution process due impossibility of fulfilling the personal guarantees.

*-The Adjudicating Authority listed applications arising in all the aforementioned matters
for hearing on 11th November 2019-*

ISSUES RAISED

ISSUES ON BEHALF OF CORPORATE DEBTOR/PROMOTERS

1. Whether the Adjudicating Authority shall allow the application filed by the promoters challenging the validity of clause 15 of the approved resolution plan?
2. Whether the applications to invoke personal guarantees are not maintainable?
3. Whether the applications filed by Mr. Rajiv Kumar and Ms. Anjali Kumar for initiating bankruptcy are liable to be admitted?

ISSUES ON BEHALF OF FINANCIAL CREDITORS OR COMMITTEE OF CREDITORS

4. Whether Adjudicating Authority has no power to direct changes to a successful resolution plan?
5. Whether the approved resolution plan is valid in law?
6. Whether the guarantee invoked is valid in law?
7. Whether the applications under § 94 is maintainable?

ISSUES ON BEHALF OF OPERATIONAL CREDITORS

8. Whether the plan proposed by DIPL is discriminatory in nature?
9. Whether Adjudicating Authority has the power to direct changes in the resolution plan approved by COC?

ISSUES ON BEHALF OF RESOLUTION PROFESSIONAL

10. Whether it was permissible for RP to reject the claim of VSCL?
11. Whether the order by Adjudicating Authority is liable to be recognised in Uganda and control over assets of ASL should be granted?
12. Whether the place of main proceeding is India?
13. Whether the application by Mr. Heinrich Dexter and the relief by Adjudicatory Authority in India should be accepted?

ISSUES ON BEHALF OF OTHER PARTIES

On behalf of VSCL

14. Whether it was permissible for RP to reject the claim of VSCL?

On behalf of FDL

15. Whether the Adjudicating Authority shall allow the application of FDL?

On behalf of DIPL

16. Whether the approved resolution plan is discriminatory in nature?

17. Whether the Adjudicating Authority shall allow the application of FDL on the ground that the plan proposed by FDL is superior to that of DIPL?

On behalf of Mr. Heinrich Dexter

18. Whether the insolvency proceedings against IDN should be recognized

ANALYSIS OF ISSUES

ON BEHALF OF THE CORPORATE DEBTOR/PROMOTERS

1. THAT THE APPROVED RESOLUTION PLAN IS LIABLE TO BE REJECTED

[¶1.] It is humbly submitted before the Hon’ble AA that the plan approved by the Committee of Creditors [Hereinafter ‘COC’] is liable to be dismissed. The present argument stands on the following grounds –

1.1 THAT THE APPROVED RESOLUTION PLAN IS AGAINST THE OBJECT OF THE IB CODE.

[¶2.] By incorporating Clause 15 CoC has used the resolution plan for recovery of proceeds in future. It is submitted, that the object of IBC is not recovery¹, but to ensure revival & continuation.² Once resolution plan is submitted, all claims are deemed to be settled³ & binding on all parties, including creditors. “*Balancing the interests of all stakeholders*”, is held to be a sacrosanct objective of IBC.⁴ Clause 15 restricts action of individuals on a future claim, which is in violation of the proviso to Section 60(6) of the IBC.⁵

1.2 THAT THE RESOLUTION PLAN IS IN VIOLATION OF PROVISIONS OF LAW

[¶3.] In accordance with the provisions of the Indian Contracts Act, 1872 [Hereinafter ‘ICA’], any variation in terms of contract, any act which discharges the Principal Debtor of its liability & any action which impairs eventual remedy discharges the surety.⁶ The ‘decision’ made by the COC in a resolution plan is a conscious ‘act’ by all creditors collectively.⁷ Since approval of a Resolution Plan effects in satisfaction of all debts of the debtor⁸, the surety is discharged subsequently, in accordance with the law laid down in the ICA. The creditors thus

¹ Prowess International (P.) Ltd.v. Parker Hannifin India, Company Appeal (AT) (Insolvency) No. 89 of 2017.

² Swiss Ribbons (P.) Ltd. v. Union of India, [2019] 152 SCL 365.

³ Regal Trading v. R. Venkatakrishnan [2019] 104 taxmann.com 137 (NCLT- Chennai).

⁴ State Bank of India v. Alok Industries Ltd. [2019] 104 taxmann.com 182 (NCLT - Ahd.).

⁵ M/s. Prasad Gempex v. Star Agro Marine Exports, Company Appeal (AT) (Insolvency) No. 469 of 2019.

⁶ Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872, §133, §134, §139.

⁷ K. Sashidhar v. Indian Overseas Bank, AIR 2019 SC 1329.

⁸ Lalit Mishra & Ors. V. Sharon BioMedicine Ltd., Company Appeal (AT) (Insolvency) No. 164 of 2018.

invoke an ineffective guarantee.⁹ Further, Clause 15 takes away the Right of Subrogation, under S.140 ICA, taking away surety's eventual remedy. The NCLT has held that "*A resolution plan cannot terminate legally binding agreements without adhering to the due process of termination*".¹⁰ This clause, renders the plan to be in contravention of provisions of law in force i.e. the ICA, hence liable to be dismissed.¹¹

2. THAT THE APPLICATIONS TO INVOKE GUARANTEES ARE NOT MAINTAINABLE

[¶4.] The debt of 320 crores in the demand notice, is also inclusive of the debt owed to the operational creditors, to whom the guarantee did not extend. The latter debt of 200 crores, is a '*future contingent liability*' created by the resolution plan & hence is liable to be rejected.¹² Pending approval of the plan, the debt is neither crystallised as payable, nor is the guarantor bound by such speculative claims.¹³

[¶5.] The demand notice to be submitted requires the amount of 'default' to be delineated for the purpose of an application to the AA.¹⁴ It has been held by the NCLT that, a 'default' does not occur, so long as the debt is not due.¹⁵ The Apex Court has ruled that a debt is not due if it is not payable in law or in fact.¹⁶ Since the claims for guarantees are doubtful in fact¹⁷, & ingenuine in law.¹⁸ Thus, such actions are liable to be dismissed.

3. IN ARGUENDO, THE APPLICATIONS FILED BY MR RAJIV & MS. ANJALI MUST BE ADMITTED.

⁹ Standard Chartered Bank v. Satish Kumar Gupta [2019] 107 taxmann.com 110 (NCL-AT).

¹⁰ IMICL Dighi Maritime Ltd. v. Dighi Port Ltd. [2019] 107 taxmann.com 431 (NCLT - Mum.).

¹¹ Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, §30(2), §31(1).

¹² *id.*

¹³ Sanjeev Shriya v State Bank of India & Ors. [2017] 87 taxmann.com 309 (Allahabad HC).

¹⁴ Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2018, Rule 6 [Draft]; Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2018, Regulation 27[Draft]; Working Group on Individual Insolvency Report, October 2018.

¹⁵ Axis Bank Ltd.v. Lotus Three Developments Ltd. [2018] 97 taxmann.com 96 (NCL-AT).

¹⁶ Innoventive Industries Ltd. v. ICICI Bank (2018)1 SCC 407.

¹⁷ M/s. VDS Plastics Pvt. Ltd. v. M/s. PM Electronics Pvt. Ltd., CP No. (IB)-37(ND)/2017 (NCLT - New Delhi).

¹⁸ M/s. One Coat Plaster In Re: One Coat Plaster and Ors, [2017] 138 CLA 104 (NCLT - Principal Bench).

[¶6.] If the Adjudicating Authority is of the opinion that there still exists default, the applications filed under S.94 r/w S.60(2) must be admitted, to grant the debtors an ‘*earned start*’.¹⁹ The same has been affirmed by the Hon’ble NCLAT.²⁰ Providing relief to ‘*Honest but Unfortunate*’ debtors is one of the primary purposes of the code.²¹ Further, S.60 is only a clarificatory clause²², the application for any action of personal insolvency can only be filed as a main petition, under Part III[S.78-187], & not as a Miscellaneous Application u/s 60.²³

ON BEHALF OF FINANCIAL CREDITORS/COMMITTEE OF CREDITORS

1. THAT THE APPROVED RESOLUTION PLAN IS VALID IN LAW

[¶7.] It is submitted before the Hon’ble AA that the plan approved by the Committee of Creditors is valid. The present argument stands on the following grounds –

1.1 THAT COC HAS POWER TO TAKE ALL COMMERCIAL DECISIONS

[¶8.] It has been held by the Hon’ble NCLAT, that the COC has the power to deal with all the commercial aspects of a ‘Resolution Plan’.²⁴ The said business/collective decisions of the COC are not subject to review.²⁵ An *Ejusdem Generis* interpretation of Regulation 39[3]²⁶ explicitly gives the right to COC to modify resolution plan “*as it deems fit*”. Only the COC can determine how the debt is to be restructured²⁷ as they get control of the entire company.²⁸

1.2 THAT THE RESOLUTION PLAN COMPLIED WITH ALL PROVISIONS OF LAW

¹⁹ Bankruptcy Law Reforms Committee Report, Ministry of Finance, Government of India Volume 1 (November 2015).

²⁰ Punjab National Bank vs. Carnation Auto India Pvt. Ltd.& Ors, Company Appeal (AT) (Insolvency) No. 139 of 2019.

²¹ Working Group on Individual Insolvency Report, August 2017.

²² State of Bank of India v. Ramakrishnan & Anr., Company Appeal (AT) (Insolvency) No. 213 of 2018.

²³ L & T Infrastructure Finance Co. Ltd. v. Dineshchand Surana [2018] 100 taxmann.com 87 (NCLT-Chennai).

²⁴ Darshak Enterprise Private Limited v. Chhaparia Industries Pvt. Ltd, Company Appeal (AT) (Insolvency.) No. 327 of 2017.

²⁵ K Sashidhar v. Indian Overseas Bank & Ors, AIR 2019 SC 1329.

²⁶ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Gazette of India, Part III, §.4 (India).

²⁷ Bankruptcy Law Reforms Committee Report, Ministry of Finance, Government of India, Volume 1 (November 2015).

²⁸ Innoventive Industries Ltd. v. ICICI Bank, (2018)1 SCC 407.

¶9.] It is submitted that Clause 15 as a commercial decision is valid in law as a resolution plan may include provisions as to payments to be made by guarantors.²⁹ The debt is extinguished by a 'statutory scheme'³⁰, & not by mere forbearance. Thus, u/s 137 ICA the surety remains undischarged even after approval of a resolution plan & can be held liable.³¹ A Resolution Plan can take away the right of subrogation.³² The IBC shall prevail over all laws in force.³³ A contract can be altered, if consent of parties is taken.³⁴ The consent of the Guarantors, in their capacity of directors is already deemed to be given, during the approval of resolution plan.³⁵

2. THAT THE GUARANTEES INVOKED WERE VALID.

¶10.] The creditors need not exhaust remedies against borrowers, to proceed against surety.³⁶ A CIRP does not dissolve the claim of the Creditors with regards to Existing Promoters Guarantees.³⁷ A Resolution Plan can scale down the debt of the principal debtor, leaving guarantors exposed for the remaining part of the debt.³⁸ The Hon'ble NCLAT has held, that a personal guarantors' assets can be disposed of in order to satiate the debt.³⁹ A creditor cannot be made to postpone his remedy against the Surety⁴⁰, as the principal debtor & the surety are liable towards the creditors, at the same time.⁴¹ Thus the creditors have rightly proceeded.⁴²

²⁹ State of Bank of India v. Ramakrishnan & Anr., Company Appeal (AT) (Insolvency) No. 213 of 2018.

³⁰ Insolvency & Bankruptcy Code, 2016 §31; Garner's Motor Ltd, In re, (1937) 1 Ch. 594, 598.

³¹ Maharashtra State Electricity Board v. Official Liquidator, Ernakulam, AIR1982 SC1497.

³² Lalit Mishra and Ors. v. Sharon Bio medicine Ltd., Company Appeal (AT) (Insolvency) No. 164 of 2018.

³³ Principal Commissioner of Income Tax v. Monnet Ispat and Energy Ltd., (2018) 304 CTR(SC) 233.

³⁴ M/S. Ratna Commercial v. Vasu Tech Ltd. & Ors.,(2009) CS (OS) No. 850/2007.

³⁵ General Circular No. IBC/01/2017, Ministry of Corporate Affairs, Government of India (25.10.17).

³⁶ Bank of Bihar Ltd. v. Damodar Prasad & Anr.,(1969) 1 SCR 620.

³⁷ State Bank of India v. Alok Industries Ltd.,[2019] 104 taxmann.com 182 (NCLT - Ahd.).

³⁸ Vijay Kumar Jain v. Standard Chartered Bank, AIR 2019 SC 2477.

³⁹ Alpha & Omega Diagnostics Ltd. v. ARCI Ltd. & Ors.,Company Appeal (AT) (Insolvency) No. 116 of 2017.

⁴⁰ Industrial Investment Bank of India Ltd. v. Biswanath Jhunjhunwala, (2009) 9 SCC 478.

⁴¹ Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath & Ors., AIR 1940 Bom 247.

⁴² State Bank of India v. D.S. Rajendra Kumar, Company Appeal (AT) (Insolvency) No. 87 of 2018.

3. THAT THE APPLICATIONS BY MR. RAJIV & MS. ANJALI ARE NOT MAINTAINABLE

[¶11.] Both individuals are ‘Personal Guarantors’ to corporate debtor ISPL. The intention of the legislature indicates ‘Personal Guarantors’ are distinct from ‘Individuals’ under Section 2(e) & (g) of the IBC. Since the Insolvency proceedings against the Corporate Debtor are pending⁴³, an application shall consider S.60.⁴⁴ Thus the applications are liable to be dismissed for procedural non-compliance.⁴⁵

4. THAT THE AA HAS NO POWER TO DIRECT CHANGES IN THE SUCCESSFUL RESOLUTION PLAN.

[¶12.] It is humbly submitted that the Adjudicating Authority has no power to direct or modify successful resolution plan approved by the CoC. The present argument stands on the following grounds: -

4.1 THAT THE NCLT CANNOT EXAMINE THE COMMERCIAL AND TECHNICAL DECISION OF THE CoC.

[¶13.] It was with the objective of reducing burden of the code that the CoC was framed to take all commercial decisions.⁴⁶ Hence, NCLT cannot examine the commercial and technical decisions of Committee of Creditors such as the evaluation of resolution plans including its viability and feasibility.⁴⁷ The same fall within the domain of the Committee of Creditors.⁴⁸ The August, 2019 Amendment Act provides an explicit and express authority to the Committee of Creditors of the loan defaulting company over the distribution of proceeds in the resolution process.⁴⁹

[¶14.] The Apex Court in *K Sashidhar*⁵⁰ held that the legislature has consciously made ‘commercial wisdom’ of the CoC non-justiciable. What the NCLT/NCLAT can examine is the

⁴³ Sanjeev Shriya v. State Bank of India, [2017] 87 taxmann.com 309 (Allahabad HC); Moot Proposition, ¶25.

⁴⁴ Schweitzer Systemtek India v Phoenix ARC Pvt. Ltd., (2018) 91 taxmann.com 139 (NCL-AT).

⁴⁵ Tehri Iron and Steel Casting Ltd. v. PNB, CP No. (IB)-192 (ND)/2017 (NCLT - New Delhi).

⁴⁶ SUMANT BATRA, CORPORATE INSOLVENCY: LAW AND PRACTICE 432 (EBC 1st ed. 2017).

⁴⁷ M/s. Bhaskara Agro Agencies v. M/s. Super Agri Seeds Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 380 of 2018; State Bank of India v. Orissa Manganese and Minerals Ltd., Company Appeal (Insolvency) No. 371,398, 402, 470 of 2018.

⁴⁸ SUMANT BATRA, CORPORATE INSOLVENCY: LAW AND PRACTICE 415 (EBC 1st ed. 2017).

⁴⁹ The Insolvency and Bankruptcy Code (Amendment) Act, 2019, No. 26 of 2019.

⁵⁰ K Sashidhar v. Indian Overseas Bank & Ors., AIR 2019 SC 1329.

standard of fairness followed and applied in the whole process.⁵¹

4.2 THAT IN THE ABSENCE OF ANY DISCRIMINATION OR PERVERSE DECISION THE AA CANNOT MODIFY THE PLAN.

[¶15.] *In Arguendo*, in absence of any discrimination or perverse decision, it is not open to the Adjudicating Authority or this Appellate Tribunal to modify the plan.⁵² The AA cannot sit over the Judgment on the Resolution of CoC in rejecting the Resolution Plan.⁵³ The Code, through Section 31 gives the authority to the Adjudicating Authority to approve the plan when approved by CoC and can reject if it does not conform to the requirements referred under Section 30 (2) but not to sit over Judgment on the Resolution Plan approved by the CoC in rejecting the Resolution Plan.⁵⁴

ON BEHALF OF THE OPERATIONAL CREDITORS

1. THAT THE PLAN PROPOSED BY DIPL WAS DISCRIMINATORY IN NATURE.

[¶16.] It is humbly submitted before the Hon'ble AA that the plan proposed by DIPL is discriminatory in nature. The present argument stands on the following grounds.

1.1 THAT THE APPROVED RESOLUTION PLAN IS AGAINST THE OBJECT OF THE IB CODE.

[¶17.] In the instant matter, discrimination has been made in the plan between two same sets of creditors as well as between different classes of creditors. XYZ Security Agency and other operational creditors in terms of payments made. The Purpose of Resolution is for maximisation of value of assets of the 'Corporate Debtor' and thereby for all creditors.⁵⁵ It is not maximisation of value for a 'stakeholder' or 'a set of stakeholders' such as Creditors.⁵⁶

⁵¹ Prateek Gattani, 'Rejected Resolution Plan: NCLT Jurisdiction', (2018) Taxmann; Small Industries Development Bank of India v. Tirupati Jute Industries Ltd., CP (IB) NO.508 (KB) of 2018.

⁵² Darshak Enterprise Pvt. Ltd. v. Chhaparia Industries Pvt. Ltd. & Ors., Company Appeal (AT) (Insolvency) No. 327 of 2017; Venkatesan Sankaranarayanan v. Tecpro Systems Ltd., CP (IB) No.197(PB) of 2017.

⁵³ Manoj Kumar Agarwal, In re, C.P (IB) No.1686 (MB) 2017.

⁵⁴ ArcelorMittal India (P.) Ltd. v. Abhijit Guhathakurta, CP No.1832/IBC/NCLT/MB/MAH/2017.

⁵⁵ Binani Industries Limited and Ors. v. Bank of Baroda and Ors., Company Appeal (AT) (Insolvency) No. 82 of 2018; Central Bank of India v. Resolution Professional of Sirpur Paper Mills (P.) Ltd., Company Appeal (AT) (Insolvency) No. 526 of 2018.

⁵⁶ Naveen Luthra and Ors. v. Bell Finvest (India) Ltd. and Ors., Company Appeal (AT) (Insolvency) No. 336 of 2017.

1.2 THAT THE RESOLUTION PLAN CANNOT DISCRIMINATE BETWEEN SIMILARLY SITUATED CREDITORS.

[¶18.] The NCLAT in *Binani Industries Ltd and ors*⁵⁷ gave importance to operational creditors.⁵⁸ Furthermore, the CoC cannot discriminate amongst the same class of creditors.⁵⁹ XYZ Security Agency being situated in the similar class as the raw materials suppliers have been discriminated by only receiving the liquidation value in the plan.

2. THAT THE ADJUDICATORY AUTHORITY HAS THE POWER TO DIRECT CHANGES IN THE RESOLUTION PLAN WITHOUT THE APPROVAL OF CoC.

[¶19.] It is submitted that the interim order passed by the AA directing changes in the resolution plan approved by the CoC is *ex facie* valid and within its competence. The argument for the contention stands on the following grounds.

2.1 THAT THERE SHOULD BE SOME JUDICIAL AUTHORITY THAT SEES WHETHER THE EXERCISE OF POWER BY THE CoC IS REASONABLE OR NOT.

[¶20.] It is submitted that § 31 gives power to AA to either reject or approve the plan as approved by the CoC. The provision has to be given liberal interpretation and some scope for judicial review of the plan has to be given to the AA so that the approved plan remains in conformity with the object of the code.⁶⁰ The term '*satisfied*' as used in § 31 includes subjective satisfaction of the AA which depends on the logical analysis of the financial data supplied.⁶¹ Furthermore, Rule 11 of the NCLT Rules, 2016⁶² provides for inherent powers of the AA to pass any order for meeting the ends of justice or to prevent abuse of process of the tribunal.

2.2 THAT THERE ARE INSTANCES WHEN THE AA HAS MODIFIED THE RESOLUTION PLAN AS APPROVED BY THE CoC.

[¶21.] It is humbly submitted that the AA will have power to modify the resolution plan if the

⁵⁷ *Binani Industries Limited and Ors. v. Bank of Baroda and Ors.*, Company Appeal (AT) (Insolvency) No. 82 of 2018.

⁵⁸ *Neha Himatsingka & Ors. v. Himatsingka Resorts Private Limited & Ors.*, Company Appeal (AT) (Insolvency) No. 201 & 205 of 2018; *Mecamidi HPP India (P.) Ltd. v. Rishi Ganga Power Corporation Ltd.*, Company Appeal (AT) (Insolvency) No. 773 of 2018.

⁵⁹ *Jagmeet Singh Sabharwal v. Rubber Products Ltd.*, Company Appeal (AT) (Insolvency) No. 405 of 2019.

⁶⁰ *Tata Cellular v. Union of India*, (1996) 6 SCC 651; *Union of India & Anr. v. Cynamide India Ltd. & Anr.*, (1987) 2 SCC 720.

⁶¹ *Pratik Ramesh Chirania v. Trinity auto Components Ltd.*, CP No.1032/IB/MB/MAH/2017.

⁶² National Company Law Tribunal Rules 2016, Gazette of India, Part II §3(i).

same is discriminatory in nature.⁶³ In *Standard Chartered Bank v. Satish Kumar Gupta*⁶⁴, the NCLAT modified the resolution plan to safeguard rights of OC. The AA has all powers to modify a Resolution Plan to bring it in consonance with the code.⁶⁵ If the resolution applicant was not satisfied with amendment made in resolution plan, liberty to withdraw the same & proceed with liquidation is given.⁶⁶

ON BEHALF OF OTHER PARTIES

ON BEHALF OF DIPL

1. THAT THE APPROVED RESOLUTION PLAN IS NOT DISCRIMINATORY IN NATURE.

[¶22.] It is humbly submitted before the AA that the approved resolution plan is not discriminatory nature. The argument stands on the following grounds: -

1.1 THAT THERE EXISTS AN INTELLIGIBLE DIFFERENTIA IN THE DISTINCTION MADE AMONGST THE OPERATIONAL CREDITORS.

[¶23.] It is submitted that Differential treatment does not amount to discrimination as there exists a rational nexus between these classes of creditors. In *Jagmeet Singh Sabharwal*⁶⁷, the Appellate Tribunal held that “operational creditors who were supplying goods or rendering services, including employees, were working for keeping company operational and, therefore, they were class in themselves.” The aforesaid classification is thus rational and correct as there existed an intelligible differentia.

1.2 THAT THE CODE ITSELF CLASSIFIES THE OPERATIONAL CREDITORS UNDER SECTION 5(21).

[¶24.] In *Standard Chartered Bank v. Satish Kumar Gupta*, it was held that from the definition of ‘Operational Debt’, the following classification has been made by the Parliament: (i) Those who have ‘supplied goods’ and ‘rendered services’ and thereby entitled for payment. (ii) The

⁶³ *Swiss Ribbons (P.) Ltd. v. Union of India*, [2019] 152 SCL 365 (SC); *Darshak Enterprise Pvt. Ltd. v. Chhaparia Industries Pvt. Ltd. & Ors.*, Company Appeal (AT) (Insolvency) No. 327 of 2017.

⁶⁴ *Standard Chartered Bank v. Satish Kumar Gupta & Ors.*, Company Appeal (AT) (Ins.) No. 242 of 2019.

⁶⁵ *Padmanabhan Venkatesh v. Venkatachalam*, Company Appeal (AT) (Insolvency) No. 128, 220 & 247 of 2019; *Standard Chartered Bank v. Satish Kumar Gupta & Ors.*, Company Appeal (AT) (Insolvency) No. 242 of 2019; *Edelweiss Asset Reconstruction Company Ltd. v. Synergies Dooray Automotive Ltd.*, CP (IB) No. 01/HDB/2017.

⁶⁶ *Tarini Steel Co. (P.) Ltd. v. Trinity Auto Components Ltd.*, Company Appeal (AT) (Insolvency) No. 75 of 2018; *Mecamidi HPP India (P.) Ltd. v. Rishi Ganga Power Corporation Ltd.*, Company Appeals (AT) (Insolvency) No. 773 of 2018.

⁶⁷ *Jagmeet Singh Sabharwal v. Rubber Products Ltd.*, Company Appeal (AT) (Insolvency) No. 405 of 2019.

employees for their services. (iii) Statutory dues.⁶⁸ The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests.⁶⁹

1.3 THAT APPLICANTS HAVE BEEN ALLOCATED MINIMUM AMOUNT AS REQUIRED BY THE CODE.

[¶25.] §30(2)(b) of the code prescribes that the resolution plan should allocate at least the liquidation value to the operational creditors. The IBC has nowhere mandated that the operational creditors must be treated equally as far as the rate of recovery (in relative or absolute terms) is concerned.⁷⁰ There exists intelligible differentia between FC & OC. Therefore, operational creditors can be distinguished from financial creditors as they both belong to different classes and the same can be done *inter se* the operational creditors.

2. THAT THE AA SHOULD APPROVE THE RESOLUTION PLAN SUBMITTED BY DIPL.

[¶26.] The CoC approved the resolution plan submitted by DIPL by the required majority. It is humbly submitted before the Hon'ble tribunal that the AA has no power to interfere with the commercial wisdom of the CoC.⁷¹ Moreover, it is submitted that the approved resolution plan is superior to that of FDL's plan. The approved plan converts debt into equity and thus sees the CD's identity as a going concern. On the contrary, FDL's plan fails as it seeks to increase debt of an already debt-ridden company. Where resolution plan submitted by successful resolution applicant was superior than the resolution plan submitted by appellant, decision of COC could not be interfered.⁷²

ON BEHALF OF FDL

3. THAT THE AA CAN DIRECT THE COC TO RE-EXAMINE THE RESOLUTION PLAN SUBMITTED BY FDL.

[¶27.] It is humbly submitted that the plan proposed by FDL is much more viable and reasonable when compared to DIPL's plan. The present argument stands on the following

⁶⁸ Standard Chartered Bank v. Satish Kumar Gupta, R.P. of Essar Steel Ltd. & Ors., Company Appeal (AT) (Insolvency) No. 242 of 2019

⁶⁹ United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law ["UNCITRAL Guidelines"].

⁷⁰ Deepak Joshi, 'Ultratech-Dalmia IBC Saga – A Missed Opportunity', (2019) Taxmann.

⁷¹ Liberty House Group v. R. Venkatakrishnan,[2019] 104 taxmann.com 274 (NCLT- Chennai).

⁷² Sunil Jain v. Punjab National Bank, Company Appeal (AT) (Insolvency) No. 156, 180 & 481 of 2018.

grounds: -

3.1 THAT THE AA HAS THE POWER TO DIRECT RE-EXAMINATION OF THE PLAN.

[¶28.] The tribunal can direct the CoC to re-examine the plan proposed by the applicant when it was clear that the CoC has not followed the due process and the applicant's plan was much more viable, feasible and aimed at maximisation of assets of the CD when compared to the approved resolution plan.⁷³ The NCLAT in *Binani Industries*⁷⁴, observing that the approved resolution plan being discriminatory and against the object of the I&B Code, directed the CoC to consider the plan of the alternate applicant.

3.2 THAT THE PLAN PROPOSED BY FDL IS SUPERIOR AND A MUCH FINER PLAN WHEN COMPARED TO DIPL'S PLAN.

[¶29.] Regulation 39(3) of the Insolvency Resolution Process for corporate persons Regulations, 2016⁷⁵ provide that the “committee shall evaluate the resolution strictly on the basis of the evaluation matrix.” In the present case, the plan proposed by DIPL should fail on the following shortcomings when compared to FDL's plan: a) That the upfront amount proposed by the applicant is more than Rs. 200 Cr.; b) That the plan seeks to achieve the object of sale of the CD as a going concern while the other plan is uncertain as to continuance of the CD; c) That the applicant's plan is not discriminatory in nature and offers greater amount for the OC; d) That the plan is superior in terms of infusion of capital in the company; e) That the plan meets the qualitative aspect of eventuality of honouring its proposed commitment; f) That the plan proposed by FDL is not violative of any law for the time being in force.

ON BEHALF OF VSCL

4. THAT IT WAS PERMISSIBLE FOR THE RESOLUTION PROFESSIONAL TO REJECT THE CLAIM OF VSCL

[¶30.] It is submitted before the Hon'ble AA that it was not permissible for RP to reject the claim of VSCL. He acted beyond the scope of his power. This can be established on the following grounds.

⁷³ *ANG Industries Ltd. v. Shah Brothers Ispat (P.) Ltd., Company Appeal (AT) (Insolvency) No. 109 of 2018; Nitrex Chemicals India Ltd. v. Ravindra Beleyur, CP (IB) No. 689/CB/2017.*

⁷⁴ *Binani Industries Limited and Ors. v. Bank of Baroda and Ors., Company Appeal (AT) (Insolvency) No. 82 of 2018*

⁷⁵ *Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Gazette of India, Part III, §.4 (India).*

4.1 RP IS VESTED WITH ADMINISTRATIVE POWER AND NOT ADJUDICATORY POWER.

[¶31.] RP is vested with administrative power as opposed to judicial power which are overseen by the CoC and by the Adjudicating Authority.⁷⁶ RP has no jurisdiction to decide and/or reject the claim and is only required to collate the same⁷⁷ and has no power to determine it.⁷⁸ In the instant case RP, Rosemary acted beyond the scope of her power by rejecting VSCL's claim and directing it to go to arbitral court.

[¶32.] Furthermore her direction to approach the arbitral court was inconsistent with § 14 of the Code which provides for restriction over any arbitral proceedings during an ongoing of resolution process, the execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority is also prohibited by law.⁷⁹ This would leave VSCL without any remedy.

4.2 CRYSTALLISATION OF DAMAGES IS NOT NECESSARY PRECONDITION FOR A CLAIM.

[¶33.] The Hon'ble SC in *Pioneer Urban Land & Infrastructure Ltd v. Union of India*⁸⁰ held that claim can be made whether or not such right to payment is reduced to judgment and expression 'payment' is elastic enough to include "recompense" u/s 73 of Indian Contract Act. As per CIRP Regulation 14 RP has to make the best estimate of the amount of the claim if it is not precise, which she failed to perform.

4.3 CORPORATE GUARANTEE CAN BE INVOKED AGAINST ISPL.

[¶34.] ISPL was the corporate guarantor in the PPA between IEL and VSCL. It was held by the NCLAT that a creditor can directly invoke the guarantee against the guarantor without exhausting this right against the principal borrower.⁸¹ Furthermore, NCLAT has held that

⁷⁶ Swiss Robbins (P) Ltd. v. Union of India, (2019) 4 SCC 17.

⁷⁷ M/s. Roma Enterprises v. Mr. Martin S.K. Golla Resolution Professional, Company Appeal (AT) (Insolvency) No. 232 of 2018.

⁷⁸ PTC India Financial Services Ltd.v. Venkateswarlu Kari, Company Appeal (AT) (Insolvency) NO. 450 of 2018.

⁷⁹ Alchemist Asset Reconstruction Company Ltd. v. Dugal Projects Development Company (P.) Ltd. [2019] 106 taxmann.com 201 (NCLT - Mum.).

⁸⁰ Pioneer Urban Land & Infrastructure Ltd. v. Union of India, AIR 2019 SC 1071.

⁸¹ Ferro Alloys Corp. Ltd. v Rural Electrification Corporation Ltd., Company Appeal (AT) (Insolvency) No. 92 of 2017.

maturity, or default of claim or invocation of guarantee for claiming the amount has no nexus for collating the claim under Section 18(1)(b).⁸²

4.4 VSCL IS AN OPERATIONAL CREDITOR.

[¶35.] RP has not been conferred with *adjudicatory powers* to accept or reject a claim coming under a particular class/category.⁸³ RP is further, supposed to submit the same for its consideration to COC before taking a final stand on admission of claim.⁸⁴ By virtue of the PPA, VSCL is an operational creditor⁸⁵, & hence any decision in respect of its claim would not have affected the composition of the CoC, in any way.

[¶36.] Furthermore, as decided in *Edewiless*⁸⁶, relief will not be granted at a belated stage for RP's actions. Thus, challenging RP's decision u/s 60(5) which empowers the AA to decide upon any claims against the corporate debtor's subsidiary arising in relation to insolvency resolution⁸⁷ at the existing stage is imperative to seek appropriate relief.

ARGUMENTS ON BEHALF OF RESOLUTION PROFESSIONAL

1. THAT THE RP HAS THE POWER TO REJECT THE CLAIM OF VSCL.

[¶37.] It is submitted before this Hon'ble adjudicating authority that the resolution professional is well within the bounds its power while rejecting the claim of VSCL. As per §18 of the code read with CIRP regulation 13, RP is versed with the power to collate and verify the claims.

1.1 THAT THE CLAIM FOR DAMAGES REQUIRES ADJUDICATION.

[¶38.] It is humbly submitted that the claim of VSCL as verified by the RP Ms. Rosemary is arising out of unliquidated damages claimed for breach of contract and loss of business. As recognized by NCLAT in regard to a claim for damages (unliquidated), there is no 'existing obligation' to pay any amount until adjudicated by the competent court.⁸⁸ Adjudication of

⁸² Axis Bank v. Edu Smart Services Ltd., [2017] 87 taxmann.com 99 (NCLT - New Delhi).

⁸³ GAIL v. Ajay Joshi, [2019] 104 taxmann.com 102 (NCLT -Ahd.).

⁸⁴ Reliance Industries v. Satish Kumar Gupta, [2019] 103 taxmann.com 371 (NCLT - Ahd.).

⁸⁵ Col Vinod Awasthy v AMR Infrastructures Ltd., [2017] 80 taxmann.com 268 (NCLT - New Delhi).

⁸⁶ Edelweiss Asset Reconstruction Co. Ltd. v. Orissa Manganese and Minerals Ltd & Ors., Company Appeal (AT) (Insolvency) No. 437 of 2018.

⁸⁷ Dynepro (P.) Ltd. v. V. Nagarajan, Company Appeal (AT) (Insolvency) No. 229 & 262 of 2018.

⁸⁸ Parmod Yadav v. Divine Infracon (P.) Ltd., Company Appeal (AT) (Insolvency) No. 251 of 2017.

damages is a matter of civil suit.⁸⁹ Further claim does not become crystallized until legal proceedings are filed⁹⁰ and becomes a 'debt due' only when a competent Court assesses the liability and quantum of loss and awards damages.⁹¹ Damages are awarded on fiat of the court and not on account of quantifications by the person alleging breach.⁹²

1.2 THAT DECIDING UPON A QUESTION OF FACT IS BEYOND THE SCOPE OF POWERS OF RP AND ADJUDICATING AUTHORITY.

[¶39.] It is humbly submitted that the instant case involves a determination of extent and quantum of pecuniary liability which entails a question of fact. As held by the NCLAT that RP and AA cannot decide a disputed question of fact.⁹³

[¶40.] *In Arguendo*, corporate guarantee cannot be invoked during the subsistence of moratorium. It is humbly submitted that in the instant case RP never disputed the nature of the claim rather he refused to accept the same for the want of quantification by a competent authority. Furthermore, even if in the instant case the corporate guarantee was claimed, the same lacked invocation as on the initiation of CIRP.⁹⁴ A claim for corporate guarantee during moratorium period is bad in law and cannot be invoked while CIRP is in ongoing.⁹⁵

CROSS BORDER INSOLVENCY

ON BEHALF OF RP

1. THAT THE CENTRE OF MAIN PROCEEDING LIES IN INDIA

[¶41.] It is submitted that the Centre of Main Proceeding of all the group companies of the Corporate Debtor, including IDN and ASL, shall be in India and not in Netherland and Uganda. It is to be noted, main factors for determination of COMI include, the place where central

⁸⁹ Gujarat Urja Vikas Nigam Ltd.v. Nitash Co-Generation (P.) Ltd., [2019] 107 taxmann.com 371.

⁹⁰ Mobilox Innovations (P) Ltd. v Kirusa Software (P) Ltd., (2018) 1 SCC 353.

⁹¹ Union of India v. Raman Iron Foundry, (1974) 2 SCC 231.

⁹² Greenhills Exports (Pvt) Ltd. Mangalore and Ors. v. Coffee Board, (2001) 34 SCL 717.

⁹³ M/s. Roma Enterprises v. Mr. Martin S.K. Golla Resolution Professional, Company Appeal (AT) (Insolvency) No. 232 of 2018.

⁹⁴ Edelweiss Asset Reconstruction Co. Ltd. v. Orissa Manganese and Minerals Ltd & Ors., Company Appeal (AT) (Insolvency) No. 437 of 2018.

⁹⁵ Axis Bank Ltd. v Edu Smart Services (P) Ltd., Company Appeal (AT) (Insolvency) No. 302 of 2017.

administration of Debtor takes place ascertainable by third parties.⁹⁶ Herein, the term central administration means the place from where the Company relevant organ i.e. Director, takes decisions which are essential for the operations of Company.⁹⁷ The place from which the affairs are managed and operationally controlled reflects most suitably the heart and core of the company, its centre, and meeting point.⁹⁸ In the instant case, majority stake in IDN(60%), is being controlled by M/S. Imperium Steel and Power Limited (ISPL) which has its registered office in Delhi, India.

1.1 THAT APPLICATION TO RECOGNIZE NETHERLAND'S PROCEEDING SHOULD BE REJECTED

[¶42.] It is submitted that Mr. Heinrich Dexter, has claimed that the insolvency proceeding against IDN, in Netherland be considered as Centre of Main Interest (COMI).⁹⁹ Such claims are baseless and cannot affect the proceeding initiated against the Corporate Debtor before the Ld. Tribunal on the following grounds:

1.1.1. THAT IDN FALLS WITHIN THE DE FACTO GROUP OF THE DEBTOR.

[¶43.] It is submitted that IDN is a *de facto* group of Company of Corporate Debtor. “*De facto groups*” refer to those where one company exercises, either directly or indirectly, a dominant influence over another company.¹⁰⁰ IDN is the group company of the Corporate Debtor, having common management, by virtue of shareholding of ISPL.

[¶44.] It is submitted that foreign main proceeding means a foreign proceeding taking place in the state where the debtor has the Centre of its main interests.¹⁰¹ Thus, the proceedings pending before the Ld. Tribunal shall be regarded as foreign main proceedings. Further, granting stay in present proceedings shall be inexpedient & defeat the purpose of IBC of time-bound resolution process.¹⁰² Therefore, the application filed by Mr. Heinrich Dexter should be rejected.

⁹⁶ Case C-341/04 Re Eurofood IFC Ltd [2006] ECR I-3813; Council Regulation (EC) 1346/2000 of 20 May 2000 on Insolvency Proceeding [2000] OJ L160/1, recital 13; Re Massachusetts Elephant & Castle Group Inc (2011) 81CBR (5th)102 [30]-[31]; Re Angiotech Pharmaceuticals Ltd (2011) 76 CBR (5th) 317 [7].

⁹⁷ Young v Anglo American South Africa Ltd & Ors. [2014] EWCA Civ 1130, [2014] 2 CLC 143 (CA) 157 [45].

⁹⁸ Re Sphinx Ltd, 371 B.R. 10 (Bankr. SDNY 2007).

⁹⁹ Moot Proposition p. 7 ¶ 2.

¹⁰⁰ 3 UNCITRAL Legislative Guide on Insolvency Laws 18 (2010).

¹⁰¹ Article 2(b), UNCITRAL Model Law on Cross-Border Insolvency, 1997.

¹⁰² J.K. Jute Mills Co. Ltd. v. Surendra Trading Company Ltd., Company Appeal (AT) No. 9 of 2017.

1.2 THAT APPLICATION TO RECOGNIZE INDIA'S PROCEEDING SHOULD BE ACCEPTED AND CONTROL OVER THE ASSET OF ASL SHOULD BE GRANTED

[¶45.] It is submitted that Ms. Rosemary Joseph, the court appointed administrator of M/S. Imperium Steel and Power Limited (ISPL), has claimed that the insolvency proceeding against ISPL, in India be considered as Centre of Main Interest (COMI).¹⁰³ An application has been filed by Ms. Rosemary Joseph under §235 r/w §239 and §241 Uganda Insolvency act, 2011¹⁰⁴ requesting the Ld. Tribunal to recognize the India's proceeding as foreign main proceedings on the following grounds.

1.1.2. HEADQUARTERS' FUNCTION IS BEING DISCHARGED FROM INDIA

[¶46.] In determining the COMI, in the context of a group of companies, the concept of head-office functions should be used to determine the location of the company's COMI¹⁰⁵. The court has considered that several facts and circumstances proved that the COMI of the various companies lies at a place where headquarter is located including: (i) strategic and operative management of the group of companies (ii) management of finances and accounting; (iii) the majority of the activities, employees, and assets.¹⁰⁶

ON BEHALF OF HENRICH DEXTER

2. THAT FOREIGN PROCEEDINGS MUST BE RECOGNISED

[¶47.] It is submitted that an application has been filed by Mr. Dexter under Art. 15, UNCITRAL Model Law¹⁰⁷ requesting the Ld. Tribunal to recognize the Netherland proceeding as foreign main proceedings on the following grounds.

2.1 THAT IDN IS OPERATING INDEPENDENTLY FROM THE PARENT COMPANY.

[¶48.] Though IDN is a subsidiary company of Corporate Debtor, however, it is operating independently from its parent company and managing its business operations from Netherland.

¹⁰³ Moot Proposition p. 7 ¶ 2.

¹⁰⁴ Uganda Insolvency Act, 2011.

¹⁰⁵ Commercial Court Nanterre 15 February 2005 (EMTEC), D. 2006, A.J., p. 651, note A. Lienhard; D. 2006, p. 793, note Jean-Luc Vallens;

¹⁰⁶ Tribunal de Commerce Paris, D. 2006, Jur., p. 2329. The judgment was confirmed by Commercial Court Paris on January 15, 2007, D. 2007, A.J., p. 313.

¹⁰⁷ UNCITRAL Model law on Cross-Border Insolvency, 1997.

High Reliance is placed on principle settled in *Eurofood IFSC Ltd. Case*¹⁰⁸,

“Where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.”

[¶49.] Thus, it is pleaded that the insolvency proceedings initiated against IDN be recognized as foreign main proceedings as IDN has centre of main proceedings in Netherland and not in India.¹⁰⁹

[¶50.] Moreover, if insolvency proceedings are opened against a company that is in some way related to another company, the former company is considered to be a separate debtor as every legal person is a single debtor under the application of the Insolvency Regulation.¹¹⁰

2.2 THAT THE CENTRE OF MAIN INTEREST LIES IN NETHERLAND

[¶51.] It is a settled principle of corporate law that Company is a separate legal entity even though the relation between the two are of parent & subsidiary.¹¹¹ Presently, both ISPL & IDN should be treated as separate entities & their COMI should be determined separately.¹¹²

[¶52.] The Court may place reliance on a variety of factors and these factors include the “*place where Debtor was incorporated, location of Debtor primary bank, the law governing the Company, the location of the main creditors.*”¹¹³ In conclusion, mere fact that decision of the company is taken from some place other than its registered office is not enough to rebut the presumption¹¹⁴ as there is no reason why a third party would have any knowledge of the location from where the director manage the Company affairs. Reliance must be placed on *Re*

¹⁰⁸ *Re, Eurofood IFSC Ltd.*, (2006) All ER (EC) 1078.

¹⁰⁹ Article 2(b), UNCITRAL Model Law on Cross-Border Insolvency, 1997.

¹¹⁰ International Cooperation in Bankruptcy and Insolvency Matters, Bob Wessels, Bruce A. Markell, Jason J. Kilborn, Oxford University Press, 2009, P. 122.

¹¹¹ *Vodafone International holding BV v Union of India* [2012] 17 taxmann.com 202 (SC); *Salomon v A Salomon Co Ltd* (1897) AC 22 (HL); *Catherine Lee v Lee's Air Farming Ltd* [1960] UKPC 33; *Ban Hashem v Ali Shayif* (2008) EWHC 2380.

¹¹² *Re Lightsquared LP* (2012) ONSC 2994 [29]; *Case C-341/04 Re Eurofood IFSC Ltd* [2006] ECR I-3813, 37.

¹¹³ UNCITRAL Model Law with Guide to Enactment and Interpretation, [144], [147]; *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 389 BR 325 (Bankr. SDNY 2008); *Re Probe Resources Ltd* (2011) 79 CBR (5th) 148 [28].

¹¹⁴ *Re Eurofood IFSC Ltd* (n 110).

*Sphinx Ltd*¹¹⁵ where the Court regarded registered office as place of COMI, even though decision of management were taken from some other place.¹¹⁶

2.3 THAT ASSETS OF CORPORATE DEBTOR BE SUBJECTED TO THE RESULT OF NETHERLAND PROCEEDINGS.

[¶53.] It is pleaded that the Ld. Tribunal be obliged to grant the relief mentioned under provisions of UNCITRAL Model Law, subsequent to the recognition of foreign proceedings initiated against the corporate debtor. These reliefs are listed hereunder: a) Execution against debtor's assets be stayed under Article 20 b of Model Law and the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended under 20 c.; b) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities under Article 21(1)(a); c) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court.

ON BEHALF OF AFRICAN BANK

3. **THAT THE CENTRE OF MAIN PROCEEDING DOES NOT LIE IN INDIA.**

[¶54.] It is submitted that the Centre of Main Proceeding of ASL, shall be in Uganda and not in India. It is to be noted, main factors for determination of COMI is in addition to being the place of the Company's registered office, "*the place where the Company's staff and trading premises are located, where its customer and creditor relationships are established, where it administers relations... on a day-to-day basis using those premises and local staff and where its main assets are located*".¹¹⁷ Though ASL is a subsidiary of corporate debtor however it is operating independently from its parent company and managing its business operation from Uganda high reliance is placed on principle settled in *Eurofood IFSC Ltd. Case*¹¹⁸

“Where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.”

¹¹⁵ Re *Sphinx Ltd.* 351 BR 103 (Bankr, SDNY 2006) 117.

¹¹⁶ Neil Hannan, *Cross Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer Nature Singapore 2017) 119.

¹¹⁷ *Videology Ltd.* [2018] EWHC 2186 (Ch).

¹¹⁸ *Re, Eurofood IFSC Ltd.*, (2006) All ER (EC) 1078.

[¶55.] In the instant case, ASL had borrowed money in form of loans and working capital from African Bank. Besides that the company's staff, trading premises and main assets are located in Uganda, even after the acquisition by ISPL. Hence it satisfies the condition precedent for COMI that it lies in Uganda and not in India. Hence, the RP does not meet the requirements mentioned under § 236 r/w 237 of Uganda Insolvency Act, 2011 for recognition of foreign proceeding. Thus, application put forth by the Indian administrator is liable to be rejected.

PRAYER

Wherefore in lights of issues raised, arguments advanced and authorities cited this Hon'ble Tribunal may be pleased to adjudge, hold and declare:

ON BEHALF OF CORPORATE DEBTOR/PROMOTER

Imperium Steel and Power Limited

That the application filed by the promoters challenging the validity of clause 15 of the approved resolution plan should be allowed.

Mr. Rajiv Kumar & Ms. Anjali Kumar

That the application to invoke personal guarantee is not maintainable.

That the applications filed by Mr. Rajiv Kumar and Ms. Anjali Kumar for initiating bankruptcy are liable to be admitted.

ON BEHALF OF FINANCIAL CREDITOR OR COMMITTEE OF CREDITORS

That the Adjudicating Authority has no power to direct changes to a successful resolution plan.

That the approved plan is valid in law.

That the guarantee invoked is valid in law.

That the application by Mr. Rajiv and Ms. Anjali u/s 94 is not maintainable.

ON BEHALF OF OPERATIONAL CREDITOR

That plan proposed by DIPL is discriminatory in nature towards operational creditors.

That the AA has the power to direct changes in a successful resolution plan.

ON BEHALF OF RESOLUTION PROFESSIONAL

That it was permissible for RP to reject the claim of VSCL.

That the order by AA is liable to be recognised in Uganda and control over assets of ASL should be granted.

That the place of main proceeding is India.

That the application by Mr. Heinrich Dexter and the relief by Adjudicatory Authority in India should be accepted.

ON BEHALF OF OTHER PARTIES

On behalf of VSCL

That it was not permissible for RP to reject VSCL's claim.

On behalf of FDL

That AA should allow FDL's application.

On behalf of DIPL

That the approved resolution plan is not discriminatory in nature.

That the application of FDL on the ground that the plan proposed by FDL is superior to that of DIPL is should not accepted.

On behalf of Mr. Heinrich Dexter

That he insolvency proceedings against IDN should be recognized.