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INSOLVENCY AND BANKRUPTCY MOOT COURT COMPETITION 2019

IN THE MATTER OF
IMPERIAL STEEL AND POWER LIMITED, CORPORATE DEBTOR

WRITTEN SUBMISSIONS ON BEHALF OF THE CONCERNED PARTIES

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LIST OF ABBREVIATIONS

ABBREVIATION	*EXPANSION*
AA	Adjudicating Authority
ASL	Africa Smelters Limited
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CIRP	Corporate Insolvency Resolution Proceedings
CoC	Committee of Creditors
COMI	Centre of Main Interests
DIPL	Durga Ispat and Power Ltd
FC	Financial Creditors
FDL	Ferro Dynamics Ltd
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code, 2016
ICA	Indian Contract Act, 1872
IDN	Imperium Dutch N.V.
ISPL	Imperium Steel and Power Limited
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
OC	Operational Creditors
RP	Resolution Professional

STATEMENT OF FACTS

Background

Imperium Steel and Power Limited ("ISPL") incorporated in the year 1994 is an Indian steel manufacturing company. It was promoted by a sister- brother duo of Mr. Rajiv Kumar and Ms. Anjali Kumar. The company was very successful in the first 20 years and set up various manufacturing power plants. In order to satisfy its energy requirements, the company set up thermal power plants. ISPL incorporated a subsidiary, Imperium Energy Limited ("IEL") to run these power plants. IEL entered into a Power Purchase Agreement with Vivek Shopping City Ltd ("VSCL") that contained an arbitration clause. ISPL guaranteed the performance of the contract. IEL had no assets or manpower of its own and the entire operation was handled by ISPL.

The steel industry is a capital-intensive industry and ISPL relied on loans to service its financial requirements. The promoters executed personal guarantees in favour of the lenders in reference to the loans taken by ISPL. As of 31.07.2017 the total loan amount stood at INR 1500 crores.

Foreign Ventures

In 2014, given its success in India, ISPL decided to expand its business beyond India. It acquired a 66% stake in Africa Smelter Limited ("ASL") that was situated in Uganda. ASL took loans worth USD 15,000,000 from African Banks for financing and working capital.

Subsequently in 2015, ISPL entered in a joint venture with a Dutch company, Dutch Alloys Company ("DAC"). The joint venture called Imperium Dutch N.V ("IDN") was incorporated in Netherlands with ISPL holding 60% and DAC holding 40% of the shares. IDN took a loan amounting to USD 25,000,000 from Deutsche Bank for its financial requirements.

Financial Troubles and Initiation of Insolvency

In 2017, the domestic steel manufacturing industry faced a slowdown owing to various factors, and the same adversely affected the business of ISPL. In September 2018, ISPL failed to service its debts. The company also defaulted in payment of its workers' salary at their Odisha plant. ISPL tried to negotiate with the consortium of lenders to restructure its debts and raise capital for its operational costs. However, the negotiations failed. Unable to raise working capital and with bleak prospects of revival of steel industry, ISPL filed for insolvency under Section 10 of the Insolvency and Bankruptcy Code, 2016 ("the Code"). The Adjudication Authority ("AA") admitted the application and appointed the Resolution Professional ("RP"). All the creditors, including VSCL, submitted their claim. The RP rejected the claim of VSCL on the grounds that it arose out of liquidated damages claimed for breach of PPA. The RP asked

VSCL to approach an arbitration tribunal and obtain an order of a crystallised amount for a valid claim. Aggrieved, VSCL approached the AA with a plea to admit its claim.

At the same time, IDN's business also started failing because of increased costs of production and inability of ISPL to devote sufficient focus. In July 2018, it defaulted on its loan payments. The lenders-initiated insolvency proceeding against IDN. The assets of IDN were deemed to be insufficient to service the entire debt. Hence, the Dutch court appointed administrator of IDN, Mr. Heinrich Dexter, filed an insolvency application, seeking recognition of the Dutch proceedings and reliefs under the Model Law. Meanwhile, the Indian RP of ISPL applied to the AA seeking control over assets of ISL in Uganda. The AA granted the said order. However, the Uganda authorities refused to accept it.

In the insolvency proceedings of ISPL, two resolution plans were proposed – one by a U.S. based company called Ferro Dynamics Ltd ("FDL"), and the other by an Indian company called Durga Ispat and Power Ltd ("DIPL"). The CoC approved the plan submitted by DIPL. The plan contained a clause that allowed lenders to invoke guarantee for the unrealised amount and abolished the right to subrogation of the guarantors. Additionally, among the Operational Creditors ("OC"), the plan proposed to pay the employees their full claim, raw materials suppliers 90% of their claim while the rest of the OCs were paid only the liquidation value.

FDL challenged the approved resolution plan in front of the AA claiming that their plan was superior to the approved plan. Secondly, certain other OCs challenged it on the grounds of being discriminatory. The AA passed an interim order making changes to the resolution plan with regards to payment made to operation creditors.

While the AA was deciding upon the above application, the financial creditors of ISPL invoked the personal guarantees executed by the promoters for the amount that was extinguished under the approved resolution plan. The promoters objected to this, but the creditors filed application for recovery against the promoters. In response, the promoters filed an application challenging clause 15 of the resolution plan and the invocation of the personal guarantee. The promoters also filed for insolvency under Section 94 of the Code as they didn't possess the assets to fulfil the personal guarantees. The banks opposed the same.

ISSUES RAISED

ON BEHALF OF COMMITTEE OF CREDITORS/FINANCIAL CREDITORS

Issue I. *Whether FDL's application challenging the CoC approved plan should be rejected?*

Issue II. *Whether Resolution Plan is discriminatory to the Operational Creditors?*

Issue III. *Whether Clause 15 of the Resolution Plan is valid?*

Issue IV. *Whether the Adjudicating Authority has the power to direct changes in the successful resolution plan without the approval of the CoC?*

Issue V. *Whether the personal guarantee provided by the promoters of ISPL can be legally enforced by the financial creditors?*

Issue VI. *Whether insolvency application filed by the promoters should be admitted?*

ON BEHALF OF PROMOTERS

Issue I. *Whether Clause 15 of the Resolution Plan is valid?*

Issue II. *Whether the personal guarantee provided by the promoters of ISPL can be legally enforced by the financial creditors?*

Issue III. *Whether insolvency application filed by the promoters should be admitted?*

ON BEHALF OF INDIAN RESOLUTION PROFESSIONAL

Issue I. *Whether VSCL's claim for unliquidated damages is admissible under the code?*

Issue II. *Whether the application by the Dutch Administrator is liable to be accepted, and reliefs under Model Law be recognized?*

Issue III. *Whether the NCLT order is liable to be recognised in Uganda?*

Issue IV. *What is the place of main proceedings?*

ON BEHALF OF DUTCH ADMINISTRATOR

Issue I. *What is place of main proceedings?*

Issue II. *Whether the application by the Dutch Administrator is liable to be accepted, and reliefs under Model Law be recognized?*

ON BEHALF OF UGANDAN AUTHORITIES

Issue I. *Whether the NCLT order is liable to be recognised in Uganda?*

Issue II. *What is the place of main proceedings?*

ON BEHALF OF FDL

Issue I. *Whether the FDL's plan should have been rejected?*

ON BEHALF OF VSCL

Issue I. *Whether VSCL's claim was rightfully rejected by the RP?*

ANALYSIS OF ISSUES

ON BEHALF OF THE FINANCIAL CREDITORS/COMMITTEE OF CREDITORS

I. FDL'S APPLICATION CHALLENGING THE COC APPROVED PLAN SHOULD BE REJECTED.

1. The application of FDL challenging the resolution plan approved by the CoC should not be admitted since ***(i)*** *there is no vested right to have its plan considered or approved while it is pending the approval of the AA,* and ***(ii)*** *FDL cannot challenge the commercial decision of the CoC to approve DIPL's plan*.

i) FDL has no vested or fundamental right to have its plan approved by the AA

2. A resolution applicant does not have any vested or fundamental right to have its plan considered or approved.[1] Till a resolution plan is approved by the AA under Section 31 of the Code, an applicant cannot challenge the decision of the CoC at any stage.[2] FDL has made the challenge prematurely since the application for approval of DIPL's plan is still pending before the AA. There has been no decision by the AA yet, and therefore, FDL has no right in having its plan considered at this stage.

ii) The commercial decision of CoC to approve DIPL's resolution plan cannot be challenged

3. The AA has no jurisdiction to evaluate the commercial decision of the CoC to approve or reject a proposed resolution plan as the creditors have complete autonomy regarding their commercial decision or wisdom.[3] The AA cannot sit in judgment over why the CoC has rejected a certain plan.[4] The grounds for challenge under Sections 30(2) are with respect to testing the validity of the approved plan by the CoC, not for approving a plan rejected by the CoC in exercise of its business decision.[5] There is no provision in the Code[6] that allows the AA to judge whether the plan approved by the CoC is inferior or superior to the other proposed plans. The CoC has the technical expertise to judge the viability and feasibility of a plan.[7] As long as the plan satisfies Section 30(2) of the Code and Regulation 38 of the IBBI (Insolvency Resolution

[1] *ArcelorMittal India Private Limited v Satish Kumar Gupta & Ors* (2019) 2 SCC 1.

[2] *Tata Steel Limited v Liberty House Group Pte Ltd and Ors* CA(AT)(Insolvency) 198-2018**.**

[3] *K Sashidhar v Indian Overseas Bank* AIR 2019 SC 1329.

[4] *Innoventive Industries Ltd v ICICI Bank & Anr* AIR 2017 SC 4084.

[5] *Sashidhar* (n 3).

[6] *State Bank of India v Bhushan Steel Ltd* [2018] 93 taxmann.com 307 (NCLT New Delhi); *M/s Bhaskara Agro Agencies v M/s Super Agri Seeds Pvt Ltd* CA(AT)(Insolvency) No 380 of 2018.

[7] *Bhaskara Agro Agencies* (n 6).

Process for Corporate Persons) Regulations 2016 ("IBBI Regulations"),[8] and adheres to the objects of the Code, [9] the AA cannot reject a plan approved by the CoC.

4. In the present case, the AA cannot sit in judgment over why FDL's plan was rejected by the CoC as it is based on the latter's commercial wisdom. It can simply ensure that the approved plan conforms to the objects of the Code and the law in force. DIPL's plan adheres to the objects of the Code as it *treats the corporate debtor as a going concern* as against *an auction or sale* by making capital infusions and reviving the company's business; *maximizes the value of assets of the corporate debtor*; *promotes the availability of credit* by ensuring that all dues are satisfactorily repaid; and *balances the interest of all the stakeholders* by ensuring that all financial and operational creditors are paid and treated similarly. Moreover, the plan follows the waterfall mechanism under Section 53 of the Code by paying the workmen dues first, followed by the OCs and FCs. Therefore, DIPL's plan is viable and feasible, does not contravene any law in force, and adheres to the objects of the Code. The AA cannot make a further enquiry into the superiority of FDL's plan as it would result in questioning the commercial wisdom of the CoC, which is *ultra vires* its powers.

II. THE RESOLUTION PLAN IS NOT DISCRIMINATORY TO THE OCS.

5. The OC's application is inadmissible since there is no discriminatory treatment of the OCs in the approved resolution plan. Section 30(2)(b) mandates that OCs should be given at least the liquidation value or the amount that they would be entitled to receive upon liquidation under Section 53(1), ensuring that there is fair and equitable treatment[10] of the OCs. In the present case, the workmen and employees are proposed to be paid in full, followed by other OCs being paid their fair dues, thereby satisfying the order of priority under Section 53(1).

6. Further, OCs can be classified into distinct classes to ascertain the manner in which distribution of funds takes place amongst them.[11] There should be no discrimination between creditors who are similarly situated.[12] However, differential treatment of creditors based on cogent, commercial and intelligible criteria is permissible.[13] In the present resolution plan, since the

[8] *Bharati Defence and Infrastructure ltd v Edelweiss Asset Reconstruction Co* CA(AT)(Insolvency)292-2017

[9] *Binani Industries Limited v Bank of Baroda & Anr* CA(AT)(Insolvency) No 82 of 2018.

[10] *Swiss Ribbons Pvt Ltd & Anr v Union of India & Ors* Writ Petition (Civil) No 99 of 2018.

[11] *Standard Chartered Bank and Ors v Satish Kumar Gupta and Ors* CA(AT)(Ins) No 242 of 2019.

[12] *Binani Industries* (n 9)

[13] *Renaissance Steel India Pvt Ltd and Ors v Electrosteels Steel India Ltd. and Ors* CA(AT)(Insolvency) No 175 of 2018.

employees and raw material suppliers are essential for the continued business viability[14] of ISPL and for treating it as a going concern,[15] they are given a greater percentage of their dues than other OCs. The object of the plan is to revive the company and not to ensure recovery of creditors.[16] The decision to pay the former a higher amount is a deliberate commercial decision and therefore, does not amount to unfair and inequitable treatment of the other OCs.

III. CLAUSE 15 OF THE RESOLUTION PLAN IS VALID.

7. Clause 15 of DIPL's Plan allows the creditors of the corporate debtor to invoke the guarantees while also extinguishing the right of subrogation, which the guarantors have against the debtor. The said clause is valid since ***(i)*** *the liability of guarantor and debtor being co-extensive, the creditors can proceed against the assets of the guarantors to satisfy their debt*; ***(ii)*** *the discharge of the corporate debtor under the plan does not discharge the guarantor*; ***(iii)*** *CIRP is not a recovery proceeding, thereby disentitling the guarantors from exercising their right of subrogation under the ICA.*

i) Liability of the corporate debtor and the guarantor is co-extensive

8. The liability of the corporate debtor and the guarantor being co-extensive, joint and several,[17] the creditors can proceed against the guarantors without exhausting their remedy against the corporate debtor first.[18] This is the foundation of a guarantee contract,[19] and depriving the creditors of this right will defeat the purpose of the contract.[20] Since the Code does not specify any rights of the FCs qua the guarantors, the ICA will govern the inter-se rights, obligations and liabilities arising from the contract of guarantee.[21]

ii) Liability of the corporate debtor is discharged due to operation of law

[14] ibid.

[15] *Naveen Luthra and Ors v Bell Finvest (India) Ltd. and Ors* CA(AT)(Insolvency) No 336 of 2017.

[16] *Bharati Defence* (n 8).

[17] ICA 1872, s 128; *Chokalinga Chettiar v Dandayunthapani Chattiar* AIR 1928 Mad 1262.

[18] *State Bank of India v Indexport Registered* AIR 1992 SC 1740.

[19] *Industrial Investment Bank of India Ltd v Bishwanath Jhunjhunwala* (2009) 9 SCC 478.

[20] 'Report of the Insolvency Law Committee' (26 March 2018).

[21] *Ferro Alloys Corporation Ltd. v Rural Electrification Corporation Ltd* 2018 SCC OnLine NCLAT 71.

9. If the discharge of the principal debtor is due to operation of law, like a scheme approved by a tribunal or court of law,[22] then the guarantor is not discharged of its liability.[23] Upon the approval of a plan, the liability of the corporate debtor is discharged. However, under the Code, the plan becomes a statutory scheme post its approval by the NCLT, consequently becoming an act in operation of law. Therefore, the corporate debtor is not discharged at the instance of the creditors but by the operation of law, thereby failing to discharge the guarantor.

iii) The right of subrogation of the guarantors can be taken away by the Resolution Plan

10. The right of subrogation of the personal guarantors under a guarantee contract can be extinguished by a Resolution Plan as the proceedings under the Code are not recovery proceedings. [24] The object of CIRP is to maximize the asset value of the company and to revive it from loss by balancing the interest of all the creditors and making the company a viable entity again. Granting the guarantors the right to recover the amount from the corporate debtor's assets will initiate the same cycle of non-payment, default and recovery,[25] thereby putting stress on the assets of the company and defeating the purpose of the CIRP. No resolution applicant would be incentivized to make bids for the debtor if this right is upheld, since the liability to pay the guarantor would still exist. Allowing such a right of subrogation rewards the promoter guarantors at the expense of the creditors and undermines the CIRP.[26]

IV. THE AA HAS NO POWER TO DIRECT CHANGES TO A SUCCESSFUL RESOLUTION PLAN

11. AA had no power to direct changes in the successful plan since there is no discrimination against certain OCs. The Code nowhere authorizes the AA to sit in judgment over the CoC approved Resolution Plan. It only accords the power to ensure that it conforms to the requirements set out under S. 30(2).[27] As established above,[28] the plan is in consonance with the Code, thereby making the AA's intervention illegal and *ultra vires* its powers under the Code.

V. THE PERSONAL GUARANTEE OF THE PROMOTERS CAN BE LEGALLY ENFORCED BY FCS.

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[22] *Garner's Motor Ltd, In re* (1937) 1 Ch. 594, 598.

[23] *Maharastra State Electricity Board, Bombay v Official Liquidator, High Court of Ernakulam* AIR 1982 SC 1497; *Jagannath Ganeshram Aggarwala v Shivnarayan Bhagirath* AIR 1940 Bom 247

[24] *Lalit Mishra & Ors. v Sharon Bio Medicine Ltd. & Ors* CA(AT)(Insolvency) No 164 of 2018.

[25] *Davinder Ahluwalia and Ors v Sumit Aviation* IB No (IB)-229 (ND)/2017.

[26] *Lalit Mishra* (n 24).

[27] *Vijay Gupta v Steel Konnect (India) Pvt. Ltd. & Ors.* 2018 TaxPub (CL) 0220 (NCLAT-Ahd).

[28] Memorial, paras 5, 6.

12. The personal guarantee can be invoked by the FCs as (**i**) Moratorium u/s.14 of the Code is inapplicable, and (**ii**) the approval of resolution plan does not suspend the creditors' right to invoke guarantee.

i) Moratorium is not applicable to a guarantee contract

13. The Code clearly states that the moratorium with regards to the corporate debtor will not apply to the guarantor,[29] allowing creditors to proceed against the assets of the guarantors to the insolvent debtor. [30] The moratorium only affects the assets of the corporate debtor and does not extend to any third parties.[31] If the creditor is forced to delay its remedy against the guarantor, then it would hamper the right of the creditors under a creditor – guarantor relationship.[32] Thus, FCs can enforce the guarantee and initiate recovery proceedings against the guarantor before the AA where the insolvency proceeding of the principal debtor is taking place.[33]

ii) Approval of resolution plan does not affect personal guarantee.

14. Even if it is assumed that the resolution plan passed by the CoC has legal effect, the right of FCs to invoke personal guarantees is not barred. Nothing in the Code prevents a creditor to proceed against the guarantor after passing of a plan for repayment of debt not recovered from debtor.[34] Creditors can proceed against the personal guarantor despite the acceptance of resolution plan.[35] They can move against the guarantor for the unrealised amount after the plan is passed.[36] Thus, the enforcement of personal guarantee against the promoters is admissible.

VI. THE INSOLVENCY APPLICATION FILED BY THE PROMOTERS SHOULD NOT BE ADMITTED.

15. If the insolvency application has been filed with fraudulent and malicious intention in order to defraud the creditors, then the application needs to be rejected.[37] The aim of individual

[29] IBC 2016 (amended in 2018), s 14.

[30] *State Bank of India v Ramakrishnan and Ors* 2018 17 SCC 394; *IDBI Bank Ltd v BCC Estate Pvt Ltd* 2017 SCC OnLine NCLT 11324.

[31] *M/s Schweitzer Systemtek India Pvt Ltd v Phoenix ARC Pvt Ltd* 2017 SCC Online NCLT 7532.

[32] *Lacchman Joharimal v Bapu Khandu and Tukaram Khandoji* (1869) 6 Bom HCR 241.

[33] IBC 2016, s 60(2); *L&T Infrastructure Finance Company Ltd v Mr Dineshchand Surana & Ors* MA/372/2018.

[34] Apoorv Sarvaria and Manas Shukla, 'Liability of Guarantors After Approval Of Resolution Plan Under The Insolvency And Bankruptcy Code, 2016' (Mondaq, 8 August 2019)

[35] *Rave Scans Pvt Ltd* IB No 01/2017.

[36] *GK Investments Limited v Vistra Itcl (India) Limited* 2018 SCC OnLine Cal 5138.

[37] ibid.

insolvency law is to protect "honest but unfortunate" debtors and to protect them from financial distress.[38] Insolvency application being used as a means to unjustifiably deny creditors of prompt repayment of debts would be considered an improper use of the law.[39]

16. An interim moratorium is imposed as soon as an insolvency application is filed.[40] "*'Moratorium' indeed is an effective tool, sometimes being used by the Corporate Debtor to thwart or frustrate the Recovery Proceedings."*[41] In the present case, if the promoters really wanted to protect themselves from financial hardship, they would have filed for insolvency as soon as the guarantee was invoked. However, the application was filed only subsequent to the recovery application that they were disputing at the time.[42] They could have filed insolvency post the disposal of the recovery proceeding but filing insolvency regarding a debt they are disputing, *prima facie* imputes a *mala fide* intent upon the promoters. It can, therefore, be inferred that the true motive behind filing insolvency was to thwart the recovery proceedings using the interim moratorium and unjustifiably deny the creditors prompt repayment.

ON BEHALF OF THE PROMOTERS OF ISPL

I. CLAUSE 15 OF THE RESOLUTION PLAN IS NOT VALID.

17. Clause 15 of DIPL's Plan is invalid since (**i**) the liability of the guarantors is discharged upon approval of the resolution plan; and (**ii**) right of subrogation is the essence of a guarantee contract and taking that statutory right away contravenes Section 30(2)(e) of the Code.

i) Approval of the resolution plan discharges the guarantors of their liability

18. There is an automatic discharge of the personal guarantor's liability once the principal debtor is discharged of the same.[43] A guarantee becomes ineffective in view of payment of debt by way of resolution to the lenders.[44] If the principal's debt is extinguished, then there cannot be any claim against the guarantors for payment of the debt.[45] Moreover, when a majority of

[38] 'Report of the Working Group on Individual Insolvency' (October 2018).

[39] 'UNCITRAL Legislative Guide on Insolvency Law' (United Nations, July 2012).

[40] IBC 2016, s 96.

[41] *Alpha & Omega Diagnostics (India) Ltd v Asset Reconstruction Company of India Ltd & Ors* CA(AT)(Insol) No 116 of 2017.

[42] Moot proposition, page 11.

[43] ICA 1872, s 134.

[44] *Standard Chartered Bank* (n 11).

[45] *Kurnool Chief Funds (P) Ltd v P Narasimha & Ors* AIR 2008 AP 38.

creditors approve a scheme that requires further statutory approval, but results in the discharge of the principal, it squarely falls within the ambit of Sections 134 and 135 of the ICA.[46] Only when the creditor takes no part in releasing the principal debtor from its liability and it is solely through operation of law, is the guarantor still liable for the debt under the contract.[47] Although the NCLT sanctions the resolution plan, this approval arises only subsequent to the approval by a majority of creditors. Since the creditors are involved in the resolution which discharges the principal of its liability, the guarantors' liability is also extinguished and there cannot be any claim against the guarantors' assets.

ii) The right of subrogation is an equitable right under contract law

19. The Code does not specify any rights of FCs qua the guarantors, the ICA will govern the inter-se rights, obligations and liabilities arising from the contract of guarantee.[48] A guarantor has an equitable right[49] to step into the shoes of the creditor and enjoy all the rights that the creditor had against the principal debtor, once it satisfies the debt. This right is not merely a statutory right,[50] but is also founded upon natural justice.[51] Extinguishing the debtor's liability implies that a guarantor cannot recover the guarantee amount from the debtor, thereby discharging the guarantor under the contract.[52] The guarantor's right of subrogation is, therefore, essential to the existence of a guarantee contract, and extinguishing such right would lead to unmerited loss for the guarantor.[53] Moreover, the guarantor cannot be deprived of its subrogation right by an agreement between the creditor and the debtor to that effect.[54] Therefore, the resolution plan agreed upon by the creditors to discharge the corporate debtor's liability cannot arbitrarily take away the right of subrogation. It amounts to contravention of Section 30(2)(e), since the plan violates the law in force.

II. THE PERSONAL GUARANTEE PROVIDED BY THE PROMOTERS CANNOT BE ENFORCED.

[46] *Shri Kundanmal Dabriwala v Haryana Financial Corporation and Anr* [2012]171CompCas94(P&H).

[47] *A.L.S.P.PL. Subramania Chettiar (decd.) and Anr v Moniam P. Narayanaswami Gounder* AIR 1951 Mad 48.

[48] *Ferro Alloys Corporation Ltd v Rural Electrification Corporation Ltd.* CA(AT)(Insolvency) No 92 of 2017.

[49] *Morgan v Seymore* (1638) 1 Rep Ch 120.

[50] ICA 1872, s 140.

[51] *Amrit Lai Goverdhan Lalan v State Bank of Travancore* AIR 1968 SC 1432.

[52] *Kundanmal Dabriwala* (n 46).

[53] *Subramania Chettiar* (n 47).

[54] *Steel v Dixon* (1881) 17 Ch D 825.

20. Unless the liability of the corporate debtor is crystallized, a creditor cannot proceed against the guarantor for recovery.[55] Once CIRP begins, the liability of the corporate debtor is subject to change depending on the resolution plan arrived at by the COC which would subsequently affect the liability of the guarantor. As established above,[56] the liability of the guarantor will stand extinguished upon approval of the plan. Even if the plan is not passed, the result of CIRP is not certain, thus the liability of debtor and guarantor cannot be crystallised during the pendency of the CIRP. Any enforcement of guarantee during the pendency of the CIRP would be uncertain and can be deemed illegal depending on the result of the CIRP. Hence, the present enforcement of guarantee is premature and unmaintainable under the law and if allowed, it would be detrimental to guarantors. Although the creditors are protected against undue delays in repayment by proceeding against the guarantor,[57] CIRP generally lasts for 6-9 months, and such a delay is not detrimental to the interests of the creditors.[58]

III. THE INSOLVENCY APPLICATION FILED BY THE PROMOTERS MUST BE ADMITTED.

i) The requirements of Section 94 are satisfied

21. A valid voluntary insolvency application needs to prove that i) the debt is due and ii) there is a default.[59] Under a guarantee contract, the guarantor's liability arises when the principal debtor defaults in repayment.[60] ISPL has defaulted on its loan payments for which the promoters had given personal guarantee.[61] Hence, the creditors have a valid claim against the promoters and the debt is due. There has been a default as the creditors served a demand notice on the promoters and they failed to repay them.[62] The promoters' contradictory plea regarding the non-existence of debt and default, in response to the recovery application, cannot be taken as a

[55] *Oshi Foods Limited and Ors v State Bank of India* 1997 (2) MPLJ 643.

[56] Memorial, paras 18, 19.

[57] 'Bankruptcy Law Reforms Committee (BLRC) Report' (March 2018).

[58] Akaant Kumar Mittal, 'Issues Under the Insolvency and Bankruptcy Code Post Admission of Insolvency Application' (2018) 8 SCC J.

[59] *M/s Unigreen Global Private Limited v Punjab National Bank and Ors* 2017 SCC Online NCLAT 566; IBC 2016, ss 94 and 2(12).

[60] *ICICI Bank v Era Infrastructure (India) Ltd* IB 1151(PB)/2018.

[61] Moot proposition, page 4.

[62] Moot proposition, page 10.

valid ground to reject their insolvency application.[63] The creditors themselves have brought a plea of default, thereby establishing default as a fact.[64]

ii) The pendency of recovery proceedings doesn't affect the insolvency application

22. The Code allows a person to apply for insolvency despite recovery proceedings.[65] Any suit or recovery proceedings pending before an AA cannot be considered as a valid ground for rejecting an insolvency application.[66] One cannot impute fraudulent intention upon the promoters merely because they initiated insolvency;[67] they are simply utilising their right under the Code. The stay on recovery due to the moratorium is a legal consequence of the same.

ON BEHALF OF OTHER OPERATIONAL CREDITORS

I. DIPL'S RESOLUTION PLAN IS DISCRIMINATORY

23. The resolution plan submitted by DIPL is discriminatory and should not be approved by the AA. There should be no discriminatory or inequitable treatment of OCs that are similarly situated under a plan.[68] Although the OCs can be classified into different categories for ease in distribution of funds, similarly situated OCs cannot be treated differently.[69] The aim of the Code is to promote availability of credit and balance the interest of all stakeholders,[70] which will be subverted if some OCs are discriminated against. It will discourage them from providing goods and services on credit.[71] In the present case, while OCs consisting of employees and workmen were proposed to be paid 100%, and raw material suppliers 90% of their claim amounts, the remaining OCs were paid only the liquidation value indicating obvious discrimination against these creditors without any intelligible reason. The latter category of OCs is equally important for the business' continued viability and feasibility as the former.

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[63] *Jayramrao Chandravadan Marathe Director Diamond Power Transformers v Indian Overseas Bank & Ors* 2017 SCC Online NCLT 2108.

[64] ibid.

[65] IBC 2016, s 94.

[66] *Antrix Diamond Exports Pvt Ltd v Bank of India and Ors* 2018 SCC Online NCLAT 33.

[67] *In the matter of Brilliant Alloys Private Limited* 2017 SCC OnLine NCLT 11223.

[68] IBC 2016, s 30(2)(b); *Swiss Ribbons* (n 10).

[69] *Binani Industries* (n 9).

[70] Insolvency and Bankruptcy Board of India, *Discussion Paper on Corporate Liquidation Process along with Draft Regulations* (27 April 2019).

[71] *Binani Industries* (n 9).

Therefore, the differential treatment among OC's under the Plan, when all of them are situated similarly and are equally important for the functioning of the business, is discriminatory.

II. THE AA CAN DIRECT CHANGES TO THE RESOLUTION PLAN.

24. AA can direct changes to the plan since it discriminates against certain OCs. Although the AA is not authorized to question the commercial decision of the CoC, AA is mandated to look into whether the plan approved by the CoC satisfies the requirements of Section 30(2) of the Code, ensuring that the plan is viable and feasible enough to be implemented by the resolution applicant.[72] Before the AA approves a plan, it must comply with certain principles which include, inter alia, maximization of value of the assets of the corporate debtor, balancing the interests of all stakeholders, compliance with the requirements of Section 30(2) of the Code and ensuring fair and equitable treatment of all creditors.[73] Hence, the AA has the ultimate authority to ensure that a plan approved by CoC adheres to the object of the Code. In the present case, since there is blatant discrimination against certain OCs without any cogent commercial reason for the classification,[74] the AA assumes the authority to direct changes to the plan and make it more equitable for the OCs.

ON BEHALF OF THE INDIAN RESOLUTION PROFESSIONAL

I. VSCL'S CLAIM FOR UNLIQUIDATED DAMAGES IS INADMISSIBLE UNDER THE CODE

25. Unliquidated damages are damages that the party who suffers from the breach of contract is entitled to receive.[75] These damages must have naturally arisen in the usual course of things, or which the parties knew were likely to arise from a result of such breach and does not include remote or indirect losses.[76] Consequential or incidental losses are those that are incurred after gaining knowledge of breach of contract.[77] A claim for such damages does not become an operational debt until the liability is adjudicated upon and the damages are assessed by a competent legal authority.[78] In case the claimant is seeking consequential damages such as for

[72] *ArcelorMittal* (n 1).

[73] *Binani Industries* (n 9).

[74] Memorial, para 23.

[75] ICA 1872, s 73.

[76] *Hadley v Baxendale* [1854] EWCH J70.

[77] *McDermott International Inc v Burn Standard Co Ltd* (2006) 11 SCC 181.

[78] *TATA Chemicals Limited v Raj Process Equipment's and Systems Private Limited* CP 21/I&BP/NCLT/MAH/2018 (NCLT-Mum); *E-City Media Private Limited v Sadhrta Retail Limited* 2009 SCC OnLine Bom 1813; *Union of India v Raman Iron Foundry* 1974 AIR 1265.

loss of production, the same cannot be relied upon nor does it become an operational debt in absence of adjudication.[79] In the present case, the claims of VSCL for Rs. 10 Crores were consequential damages that had not been adjudicated upon, and hence, could not be admitted. The RP is authorized to receive and collate all the claims submitted to it.[80] Regulation 13(1) of CIRP Regulations mandate the RP to verify every claim before it. In discharging these duties, the RP acts as an agent of the adjudicator[81]. Thus, delegating the power to enforce Court's mandate to the RP allows '*better utilization of judicial time."*[82] As established above, the claim itself being inadmissible, the RP's rejection of the claim ensures that the AA does not have to subsequently expend valuable time on the same, causing further delay in the CIRP.

II. THAT THE APPLICATION BY THE DUTCH ADMINISTRATOR CANNOT BE ACCEPTED, AND RELIEFS UNDER MODEL LAW CANNOT BE RECOGNIZED

26. Model Law is applicable to every member of an enterprise group as a distinct legal entity,[83] and there is no scope for addressing cross-border insolvency of the entire enterprise group.[84] IDN and ISPL being distinct legal entities, the Dutch appointed administrator cannot rely on Model Law. Hence, the claim is *ultra vires* and inadmissible.

27. The personal assets of the shareholders are safeguarded in case the company fails to discharge its obligations.[85] The creditors bear the burden of risks "*inherent in dealing with limited liability companies*."[86] ISPL being a shareholder of IDN, cannot be held liable for IDN's debts. Mere difficulty in collecting a debt from subsidiary does not satisfy the standard for piercing the veil.[87] Further, Court will not order consolidation simply because the group is connected or

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[80] IBC 2016, s 18(b).

[81] *BLRC Report* (n 57), page 64.

[82] ibid.

[83] *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (United Nations, New York 2014), para 68.

[84] *UNCITRAL Legislative Guide* (n 39).

[85] Hansmann H and Kraakman R, 'The Essential Role of Organizational Law' (2000) 110 Yale Law Journal 387, 393.

[86] Gonzalo Puig, 'A Two-Edged Sword: Salomon and the Separate Legal Entity Doctrine' 7(3)(2000) MurUEJL 19.

[87] *Walnut Packaging Private Limited v The Sirpur Paper Mills Limited and another* (2009) 148 Comp Cas 330 paras 29, 30; *Punjab State Industrial Development Corporation Ltd v PNFC Karamchari Sangh* (2006) 4 SCC 367; *Diamond Corp v Superior Court* 83 Cal.App.4th 539 (2000).

controlled by common management.[88] Therefore, the proceedings cannot be consolidated simply because ISPL is the holding company and key controllers of both are same.

28. For granting the reliefs, the AA must recognize the proceeding as either foreign main or non-main proceeding.[89] A proceeding can only be recognized as foreign main or non-main proceeding if it involves insolvency of the same debtor.[90] The two debtors being distinct from each other, the Dutch proceeding cannot be considered either main or non-main proceeding. Even if it is assumed that the debtor is the same, the reliefs under Article 20 cannot be recognized. In case of concurrent proceedings, Article 20 reliefs cannot be granted due to application of Article 29(a)(ii). Therefore, even if ISPL and IDN are assumed to be the same entity, Article 20 reliefs cannot be granted because insolvency proceedings are happening concurrently in India and Netherlands.

III. THE NCLT ORDER IS LIABLE TO BE RECOGNIZED IN UGANDA

29. When the affairs of the individual entities of the group are inextricably interlinked, the assets and liabilities are consolidated to facilitate insolvency proceedings, prevent conflicting orders and ensure maximization of asset value.[91] In some cases, dealing with assets separately may be prejudicial to the interest of all creditors, defying the object of the Code.[92] The relevant factors for consolidating the proceedings include, common control, interdependence, singleness of economic unit,[93] and the profitability of consolidation at a single location.[94] The decisive factor is whether the consolidation would be equitable to all stakeholders.[95] ISPL in effect has 66% shares in ASL.[96] ISPL acquired this significant majority shareholding so as to *take over control* and *manage* the Uganda smelter plant.[97] Therefore, there exists clear and sufficient nexus

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[88] *State Bank of India v Videocon Industries Limited* MA 1306/2018, MA 1416/2018 & Ors (2019), para 82.

[89] UNCITRAL Model Law on Cross-Border Insolvency (adopted 30 May 1997), arts 20, 21.

[90] Ibid, art 2(a).

[91] *Videocon* (n 88).

[92] ibid.

[93] ibid.

[94] *In re Vecco Const. Industries, Inc* 4 BR 407 (1980).

[95] *In re Food Fair Inc, Debtor* 10 BR 123 (1981); *Videocon* (n 88) 41; *Auto-Train Corporation Inc Florida Corporation* 810 F.2nd 271(DC Cir 1987).

[96] Moot proposition, page 4.

[97] ibid.

between ISPL and ASL, and the African entity is dependent on the parent company. The AA's decision, granting leave to RP to take control of the assets of ISPL's subsidiary, was in accordance with the principles of insolvency law. This is equitable because it enhances the value of corporate debtor and is beneficial to both Indian creditors and the Ugandan Bank.

30. Even in the absence of Model Law, Uganda has a good faith duty to recognize the foreign order. The legal corpus within Uganda itself obliges the courts to recognise foreign orders even without reciprocal arrangements.[98] The obligation arises from the international principles of *comity* and *obligation* recognized by the Ugandan domestic law.[99]

IV. PLACE OF MAIN PROCEEDINGS IS INDIA

31. Place of main proceedings is a foreign proceeding undergoing in the State *where the debtor has the COMI*.[100] A presumption exists that the debtor's registered office forms the debtor's COMI.[101] The registered office of ISPL being in India,[102] a presumption arises in favor of COMI being located in India. Once a presumption in favour of COMI has arisen, burden of proof is on the person who intends to rebut the same.[103]

32. The principal factors to rebut the presumption include *the location where the central administration of the debtor takes place,* and *the place which is readily ascertainable by creditors as COMI.*[104] Other factors include *the location where financing was organized or authorized,* and *the location of employees*.[105] Application of the above factors clearly establishes that the presumption cannot be rebutted. The central administration takes place in India; the key managerial personnel (CEO and CFO) are in India.[106] It is listed on stock

[98] High Court Civil Suit No 91 of 2011: *Christopher and Carol Sales v Attorney General* (1 February 2013).

[99] ibid.

[100] *Model Law* (n 89), art 2.

[101] ibid, art 16(3).

[102] Moot proposition, page 1.

[103] *In re Bear Stearns High-Grade Structured Credit Strategies* 389 BR 325 (SDNY 2008).

[104] *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (United Nations, 2014), para 145.

[105] ibid, para 147.

[106] Moot proposition, pages 1, 2,

exchanges in India.[107] Its manufacturing plants and captive thermal power plants[108] and employees are all situated in India.[109] The location of actual managers of the debtor 'which, conceivably could be the headquarters of a holding company' is an important factor.[110] ISPL being the holding company which effectively manages ASL, India becomes the place of main proceedings.

ON BEHALF OF THE DUTCH ADMINISTRATOR

I. THE NETHERLANDS IS THE PLACE OF MAIN PROCEEDINGS

33. A proceeding in a jurisdiction is liable to be recognised as the foreign main proceeding if the COMI of a debtor lies in that foreign jurisdiction.[111] The COMI of the debtor is in Netherlands, and therefore, Indian authorities must recognise Dutch proceedings as foreign main proceedings. The registered office of IDN being situated in Netherlands, a presumption arises that the COMI is in Netherlands. The burden to rebut is on the party making the contrary claim. Nevertheless, there is nothing to the contrary to rebut this presumption. The key factors are *place where central administration takes place* and *the place that is readily ascertainable by creditors.*[112] IDN is a joint venture situated in Netherlands, and its assets are located therein. Further, the main creditor is also situated there and has filed the claim before the Dutch Bankruptcy Court, indicating that Netherlands is readily ascertainable as IDN's centre of main interests.

II. STAY ORDER BY DUTCH COURT AND RELIEFS UNDER MODEL LAW ARE LIABLE TO BE RECOGNIZED BY THE INDIAN AA.

34. The aim of Model Law is to ensure cooperation and coordination, and "*to foster decisions that would best achieve the objectives of both proceedings*".[113] In concurrent proceedings, the Court must seek cooperation and coordination under Articles 25, 26 and 27.[114] The law obliges Indian

[107] ibid, page 3.

[108] ibid, pages 1, 2.

[109] ibid, page 4.

[110] *In re SPhinX Ltd.* 351 BR 103, 117 (Bankr SDNY 2006).

[111] ibid, art 2(b).

[112] *Guide to Enactment* (n 104), para 145.

[113] ibid, para 42.

[114] *Model Law* (n 89), art 29.

courts to cooperate to the maximum extent possible. In pursuance of this obligation, the Court must recognise the order passed by the Dutch Bankruptcy Court.

35. Even if there are concurrent proceedings ongoing in India prior to foreign main proceedings, the remedies and reliefs under Article 21 are liable to be recognised once it is established that the proceedings are foreign main proceedings.[115] The only requirement is that the reliefs should be consistent with those under domestic proceedings.[116] Recognising the stay order, consolidating the proceedings and allowing Deutsche Bank to satisfy debts from ISPL, do not lead to any inconsistency, considering the present gamut of facts.

36. While Model Law treats individual entities as distinct, the principle of separate legal entity is not absolute.[117] It includes the possibility that subsidiary's behaviour may be attributed to parent company.[118] With significant nexus between the holding company and subsidiary, the assets of the former can be implicated for satisfying the debts of the latter.[119] Insolvency courts have the equitable powers "*to disregard separate corporate entities, to pierce the corporate veil in order to reach assets for the satisfaction of debts of a related corporation*".[120]

37. While Model Law may not address insolvency of group entity, the Court has the inherent power to order consolidation for satisfaction of claims of related party and ensure protection of substantive rights.[121] The burden is on the stakeholder that objects to the substantive consolidation to prove that the same would cause prejudice.[122] Various factors to evaluate whether the group entities should be consolidated include, *inter alia*, common control and interdependence.[123] Where separation of accounts or separation of corporate entities result in injustice to creditors, the interconnected entities must be consolidated.[124] In the present case,

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[115] ibid.

[116] ibid.

[117] *LIC v Escorts* (1986) 1 SCC 264, para 90. See also *ArcelorMittal* (n 1), paras 35-37.

[118] *Hackbridge-Hewittic & Easun v GEC Distribution Transformers* [1992] 74 Comp Cas 543 (Mad).

[119] *Chitra Sharma & Others v Union of India & Others* (2018) 18 SCC 611, para 8.4.

[120] *Videocon* (n 88); *Continental Vending Machine Corp vs Irving L Wharton* 517F, Docket 74-2233.

[121] *In re Vecco* (n 94).

[122] *Videocon* (n 88), para 83.

[123] ibid, para 80.

[124] ibid, page 42.

ISPL owns 60% stake in IDN and is *primarily in control* of IDN[125] (*common control*). Further, IDN relied upon *specialised focus* from ISPL *(interdependence)*.[126] Owing to these factors, the two proceedings must be consolidated, and the claim of the creditors of IDN, be admitted.

ON BEHALF OF THE UGANDAN AUTHORITIES

I. NCLT ORDER CANNOT BE RECOGNIZED IN UGANDA

38. The NCLT order granting leave to Ms. Rosemary Joseph to take control assets of ASL cannot be recognized because **(i)** NCLT has no jurisdiction to make such an order; and **(ii)** the order is in flagrant violation of principles of corporate law.

i) NCLT has no jurisdiction to permit Indian RP to take control of ASL's assets in Uganda

39. Under the principle of sovereignty, States have the legislative, executive and judicial jurisdiction over the affairs in their territory and the right to exclude other States from intervention.[127] Various countries exercise strict caution while applying foreign insolvency orders.[128] ASL is a separate legal personality registered in Uganda. Its primary asset, African Smelter Plant, is situated within the territory of Uganda. The order of NCLT, granting Ms. Rosemary Joseph the right to take control of assets of ASL, interferes with the territorial sovereignty of Uganda. Uganda has not adopted the Model Law,[129] and therefore, the principles incorporated therein do not bind Uganda.

ii) The order is in flagrant violation of principles of corporate law

40. India has affirmed the principle of separate legal entity, and the corporate veil is lifted only in exceptional circumstances.[130] Lifting of corporate veil affects the Corporate Debtor significantly.[131] The assets of the subsidiary, whether foreign or Indian, cannot be used to satisfy the debts of the holding company.[132] Insolvency proceedings of a subsidiary is distinct from that of the holding company.[133]

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[125] Moot proposition, page 7.

[126] ibid, page 7.

[127] UN Charter (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS X, arts 2(4), 2(7).

[128] *Joint Administrators of African Minerals Ltd (in administration) v Madison Pacific Trust Ltd & Shandong Steel Hong Kong Zengli Ltd* [2015] HKEC 608.

[129] Response to Clarifications, 7.

[130] *LIC v Escorts* (1986) 1 SCC 264, para 90

[131] *Videocon* (n 88), para 76.

[132] IBC 2016, ss 18 and 36(4)(c).

[133] *Ashok B Jiwrajka, Director of Alok Infrastructure Ltd v Axis Bank Ltd* CA(AT)(Insolvency) No 683 of 2018

41. ISPL and ASL are distinct legal entities. In the absence of exceptional circumstances, AA's order granting control to the RP of the holding entity over the assets of the subsidiary is in violation of this basic principle. Substantive consolidation of group entities can only take place if their affairs are inextricably linked and interdependent.[134] The presence of consolidated financial statements, inter-mingled assets, shared liabilities indicate the same.[135] These are not present in the instant case.

II. UGANDA IS THE PLACE OF MAIN PROCEEDINGS

42. Model Law does not envisage insolvency of the entire group entity. The insolvency of ASL must be dealt with separately from that of ISPL. An analysis of the relevant factors establishes that ASL's COMI is in Uganda, consequently making Uganda the place of main proceedings for ASL. ASL's principle asset (Uganda smelter plant) is located in Uganda, the employees are situated therein, and the major financing was also organized in Uganda.[136]

ON BEHALF OF FDL

I. DIPL'S PLAN DOES NOT CONFORM WITH SECTION 30(2) OF THE CODE.

43. As established above,[137] AA is mandated to ensure that the plan conforms to the requirements of Section 30(2). However, DIPL's plan extinguished the right of subrogation of the personal guarantors in violation of Section 140 of the ICA, thereby contravening Section 30(2)(e) of the Code.[138] The plan further provides for payment of 90% of the dues of the raw material suppliers of ISPL while paying the other OCs only the liquidation value. It blatantly discriminates[139] between the OCs by giving preference to employees and raw material suppliers over the other OCs, thereby failing to balance the interest of all stakeholders and violating the basic object of the Code. Therefore, AA should reject DIPL's plan and direct the CoC to reconsider FDL's plan.

ON BEHALF OF VSCL

I. VSCL'S CLAIM WAS WRONGFULLY REJECTED BY THE RP

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[134] *Videocon* (n 88) para 80.

[135] ibid.

[136] Moot proposition, page 3.

[137] Memorial, para 24.

[138] Memorial, para 19.

[139] Memorial, paras 5, 6.

44. VSCL's claim against breach of contract was wrongfully rejected by the RP because, **[i]** the claims satisfied the criteria set out under the Code, and **[ii]** the initiation of the CIRP results in a moratorium.

[i] The claims satisfied the criteria set out under the Code

45. A claim includes any right to remedy for breach of contract giving rise to a right of payment, irrespective of whether such a right is 'reduced to judgment', fixed, disputed or undisputed.[140] RP's only role under the Code is to receive and collate all claims submitted to it by creditors,[141] and subsequently, to maintain an updated list of claims.[142] The Code does not vest the RP with any power to evaluate and accept or reject claims.[143] In case of indeterminacy of the precise amount of the claim, Regulation 14 of IBBI Regulations mandates that RP is required to determine the precise claim amount based on the information available. ISPL breached the PPA, giving rise to unliquidated damages. Although the amount for the same was undetermined and is thereby 'disputed', it still amounts to a claim under the Code. Therefore, RP had no jurisdiction to reject the claim.

[ii] The initiation of CIRP results in a moratorium.

46. S. 14(1)(a) of the Code bars institution as well as continuance of any arbitration proceedings against the corporate debtor. The moment the insolvency petition is admitted, the moratorium comes into effect.[144] The Code has an overriding effect[145] over the Arbitration and Conciliation Act, 1966. Once the CIRP has been initiated, all creditors, including those with pending arbitration proceedings, are permitted to file their claims before the RP pursuant to the declaration of the moratorium.[146] Since ISPL's application for CIRP had already been admitted, the moratorium was already in effect when VSCL submitted its claims to the RP.[147] Therefore, VSCL was barred by the Code itself from instituting arbitration proceedings. The RP, in effect, directed VSCL to violate the Code, and therefore, the decision is *prima facie* unlawful.

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[140] IBC 2016, s 3(6)(b).

[141] ibid, s 18(b); *Standard Chartered Bank* (n 11).

[142] IBC 2016, s 25(2)(e).

[143] *Standard Chartered Bank* (n 11).

[144] *Alchemist Asset Reconstruction Company Ltd v Hotel Gaudavan Pvt Ltd* AIR 2017 SC 5124.

[145] IBC 2016, s 238.

[146] *KS Oils Ltd v The State Trade Corporation of India Ltd & Ors* [2018] 146 SCL 588.

[147] Moot proposition, page 5.