

L E X

# WITNESS

Volume 11 Issue 7 | February 2020

₹65 US \$6 UK £4

## ipr corner



**Nihit Nagpal**  
Sr. Associate,  
S.S Rana & Co.

P25



**Rupin Chopra**  
Associate,  
S.S Rana & Co.

## let's arbitrate



**S. Ravi Shankar**  
Sr. Partner,  
Law Senate

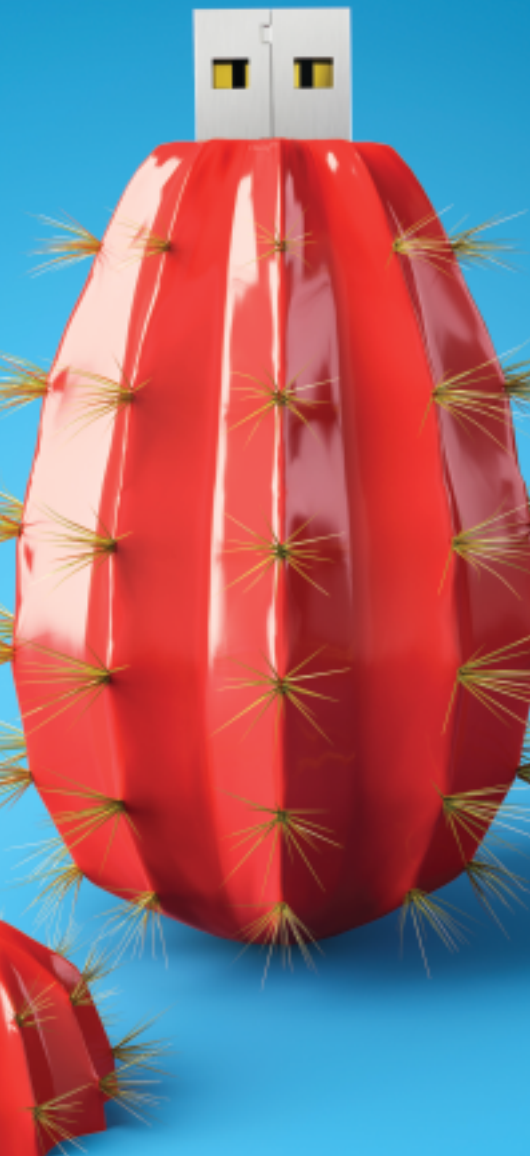
P56

## autograph



**Manish Tyagi**  
Partner - Legal & Regulatory,  
MHA Legal

P28



# The Great Indian Data Protection Drive -

## Bumpy Enough?

P08

## spotlight



**Jayashree Swaminathan**  
Chief Executive Officer,  
UnComplycate

P16



**Hemant Sahai**  
Founding Partner,  
HSA Advocates

## expert speak



**Soumen Ghosh**  
Associate Partner,  
S. Jalan & Co.  
**Debayan Ghosh**  
Principal Associate,  
S. Jalan & Co.

P30

## expert speak



**Siddhartha Karnani**  
Partner,  
King Stubb & Kasiva -  
Advocates & Attorneys

P36

## expert speak



**Sapna Chaurasia**  
Partner,  
TMT Law Practice

P34

## expert speak



**Varsha Banerjee**  
Partner,  
Dhir & Dhir Associates  
**Stuti Vatsa**  
Associate,  
Dhir & Dhir Associates

P18

# Essar Steel: Redefining The Roles and Responsibilities Under The Insolvency and Bankruptcy Code, 2016

■ **Varsha Banerjee & Stuti Vatsa**



he judgment can be accordingly termed as a “watershed moment” in the development of Insolvency and Bankruptcy Code, 2016 (Code). The Hon’ble Supreme Court with its judgment in the matter of Committee of Creditors of Essar Steel India Limited Through Authorised Signatory Versus Satish Kumar Gupta & Ors has while upholding the resolution plan as approved by the Committee of Creditors and handing over the Company, i.e. Essar Steel to Arcelor Mittal, has also extensively and exhaustively elaborated upon the role of various parties under the Code.

The Hon’ble Supreme Court has provided the much needed clarity and insight into the duties of the pillars which spearhead the entire process under the Code, i.e.

- i. Adjudicating Authority(AA)
- ii. Insolvency Resolution Process/Resolution Process (IRP/RP),
- iii. Committee Of Creditors (COC)
- iv. Resolution Applicant

A bare perusal of the duties of the aforesaid pillars will make it abundantly clear that

their roles and responsibilities are interlinked at each stage and one cannot function or discharge its duties without receiving any co-operation or support from the others, as they will not be able to complete the Corporate Insolvency Resolution Process (CIRP) in a smooth manner. The insight as regards the duties endowed upon each of the vital pillars constituting the Code, without which the entire mechanism may collapse, as streamlined by the judgment of the Hon’ble Supreme Court are as follows:.

## **SCOPE OF JUDICIAL REVIEW OF THE ADJUDICATING AUTHORITY (AA) AND THE APPELATE TRIBUNAL**

The Resolution Plan approved by the requisite majority of the COC has to attain finality from the AA under Section 31 of the Code. However, where the AA or the NCLAT does not agree to the approved Resolution Plan, the limited scope of judicial review as available has been laid down by the Hon’ble Supreme Court. The scope of Judicial Review is as follow:

- When COC exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor or distribution of amount to each class or subclass of creditors,



D-55, Defence Colony,  
New Delhi-110 024.  
Tel: 91(11) 42410000,  
Fax: 91 (11) 42410091  
E:expertspeak@dhirassociates.com



the discretion rest solely with the COC and no other Judicial Authority can interfere with the decision making power.

- Non-obstante clause of Section 60(5) of the Code is in the nature of a residuary jurisdiction which does not in any manner impact Section 30(2) of the Code which circumscribes the jurisdiction of the AA when it comes to the confirmation of a resolution plan.

- The AA has to ensure that the COC has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process and it needs to maximise the value of its assets and balance the interests of all stakeholders.

- Where, if the aforesaid parameters have not been satisfied, the AA may send a resolution plan back to the COC to re-submit such plan after satisfying the aforesaid parameters.

However, the question which still arises for consideration is as to how many times a resolution plan can be send back for re-consideration by the Judicial Authority and where the COC does not modify or agree for re-consideration of the Resolution Plan, then what are the legal remedies available.

### **ROLE OF INTERIM RESOLUTION PROFESSIONAL/RESOLUTION PROFESSIONAL (IRP/RP)**

The IRP/RP is another basic pillar of the Code. Once an admission order is passed by the AA under Section 7, 9 or 10 of the Code, the IRP steps in, whose foremost duty is to protect and preserve the value of the property of the Corporate Debtor and manage its operations as a going concern. The AA appoints the IRP, who carries out the public announcement and invites claim from the stakeholders. The duties and responsibilities to be carried out by the IRP/RP are as follows:

- IRP/RP has to receive and collate claims submitted by the stakeholders and constitute COC within 7 days of the appointment of the IRP, wherein the COC must appoint the IRP as a RP or replace the IRP by another RP.

- RP is to give notice of meetings to the members of the COC, suspended board of directors and the operational creditors (not less than 10% of the entire debt).

- Under Section 29(1) of the Code, the RP must prepare an Information Memorandum (IM) containing all relevant information for formulation of the resolution plan. The resolutions plans received has to be presented to the COC by the RP for its approval and such resolution plans must conform to the conditions referred to in Section 30 of the Code. Therefore, if the resolution plan is approved by the requisite majority of the COC, it is then the duty of the RP to

submit the resolution plan to the Adjudicating Authority.

- The provisions of the Code laying down the duty of the IRP/RP have also been reproduced in Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 (Regulation). As per Regulation 13, the RP has to verify each claim and maintain an updated list of creditors.

- “Fair value” and “liquidation value” as submitted to the RP will have to be provided to the members of the COC pursuant to the receipt of the resolution plans.

- As per Regulation 36-A, RP has to publish brief particulars of the invitation for EOI in Form G of the Schedule. The RP, on receiving a proposed resolution plan must conduct due diligence to ensure that the prospective RA complies with Section 25(2)(h) of the Code, provisions of Section 29-A and any other requirements as may be specified in the invitation for expression of interest in accordance with Regulation 36-A(8).

- The RP has to then issue a provisional list of eligible prospective RA to the COC and thereafter the final list of prospective resolution applicants to the COC (Regulation 36-A (10) to (12)). Under Regulation 36-B, the RP has to issue the information memorandum, evaluation matrix and request for resolution plan within the time stated.

A bare perusal of the duties conjoined upon the RP makes it abundantly clear that the RP is engaged in carrying out its duties, which are administrative in nature and not adjudicatory. It can be

envisaged that the IRP/RP is engaged in carrying out the vital task. The RP, who acts as an administrator, has to ensure that it always keeps all the concerned parties in the loop in order to complete the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor in a smooth manner.

## **ROLE OF COMMITTEE OF CREDITORS (COC)**

It is the COC whose commercial wisdom plays a pivotal role in decision making process concerning the interest, welfare of the Corporate Debtor, balancing the interest of all stakeholders and accepting or rejecting the prospective resolution plans. The provisions of the Code and the Regulations have in a detailed manner granted importance towards setting up of such Committee and leaving decisions to be made by the requisite majority of the members. The role of the COC has been laid down under:

- Voting in the decisions to be taken in the COC is in accordance with the voting share assigned to each financial creditor, which is on the basis of the financial debts owed.

- Under Section 30(4), the COC needs to approve a resolution plan by a vote of not less than 66% of the voting share of the financial creditors which would be after considering feasibility and viability.

- Regulation 18 to 26 of the 2016 Regulations deal with meetings to be conducted by the COC. The Regulation makes it clear that it is the commercial wisdom of the COC which operates to approve the best resolution plan, which is finally accepted after negotiation of its terms by such Committee with prospective resolution applicants.

- The members of the COC must determine as to how and in what manner the corporate resolution process is to take place.

- Therefore, it is submitted that the COC, since the inception of the Insolvency proceedings, aims to ensure that the Corporate Debtor remains as a “going concern” and within the time period laid down, aids in achieving the resolution of the Corporate Debtor. It is the duty of the members of the COC, who exercises its commercial decision at each stage to ensure that any decision taken is in the vital interest of the Corporate Debtor and all the stakeholders.

## **ROLE OF RESOLUTION APPLICANT (RA)**

The RA constitutes an important pillar under the Code as it grants fresh lease of life to the Corporate Debtor. The prospective RA has a right to receive complete information concerning the Corporate Debtor, which includes the debts owed by it, its activities as a going concern and several other aspects. The responsibilities of the RA has been endowed upon as follows:

- The resolution plan submitted must provide necessary measure for the insolvency resolution of the corporate debtor, satisfaction/modification of any security interest of a secured creditor and reduction in the amount payable to different classes of creditors.

- Amount due to the operational creditors be given priority in payment over financial creditors and provisions be included to deal with the interests of all stakeholders. The RA should provide for the term of the plan, management and control of the business of the corporate



debtor during such term and its implementation.

- The Resolution Plan should also address the cause of default, feasibility, viability and provisions for its effective implementation.

Thus, the Hon'ble Supreme Court in an elaborate and exhaustive manner has redefined the roles and responsibilities of all the pillars under the Code, who will continue to and will always play a vital role in achieving the objective and goal of the Code, i.e. time bound resolution of the Corporate Debtor. It is amply clear that the duties of all the vial pillars are to be exercised harmoniously, without which the resolution as envisaged under the insolvency proceedings will fail and will be rendered futile. The Hon'ble Supreme Court vide the judgment in the matter of Essar has while upholding the constitutional validity of the latest amendment of the Code brought in force, w.e.f 06.08.2019, has struck down the

word "mandatory" from Section 12(3) of the Insolvency and Bankruptcy Amendment Act, 2019 in lieu of the fact that it is as being manifestly arbitrary under Article 14 of the Constitution of India and being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The Hon'ble Court while upholding that 330 days will continue to remain as an outer limit, however held that if on a given set of facts and circumstances, it can be proved that the delay caused is not on the part of the litigant, the Adjudicating Authority stands bounds to extend the time period. The judgment puts at rest various issues as well as the scope of jurisdiction to be exercised by the AA and the Appellate Tribunal, which were clogging and delaying the process on many cases. With the judgment, it now appears that the process under the Code will gain further momentum and result in timely resolution, which is the object of the Code.<sup>W</sup>



**Varsha Banerjee** is a Partner and has been in practice for the last 10 years. Her areas of practice include corporate restructuring and insolvency, mergers and acquisitions, banking & finance, securitization, and general corporate and commercial transactions. She focuses her litigation practice on corporate restructuring and insolvency matters with expertise in the restructuring of distressed entities, issues pertaining to recovery of debt, securitization-related matters, and commercial disputes. She represents corporate entities, institutional creditors, shareholders, etc. and handles commercial disputes, civil litigation including arbitration.



**Stuti Vatsa** is an Associate, having an experience of two years. She is a graduate of National University of Study and Research in Law, Ranchi. Her practice includes Corporate Restructuring and Commercial Disputes. She is a part of various litigation matters before the Supreme Court of India, High Court and various other Courts/Authorities.