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Insolvency Round Up

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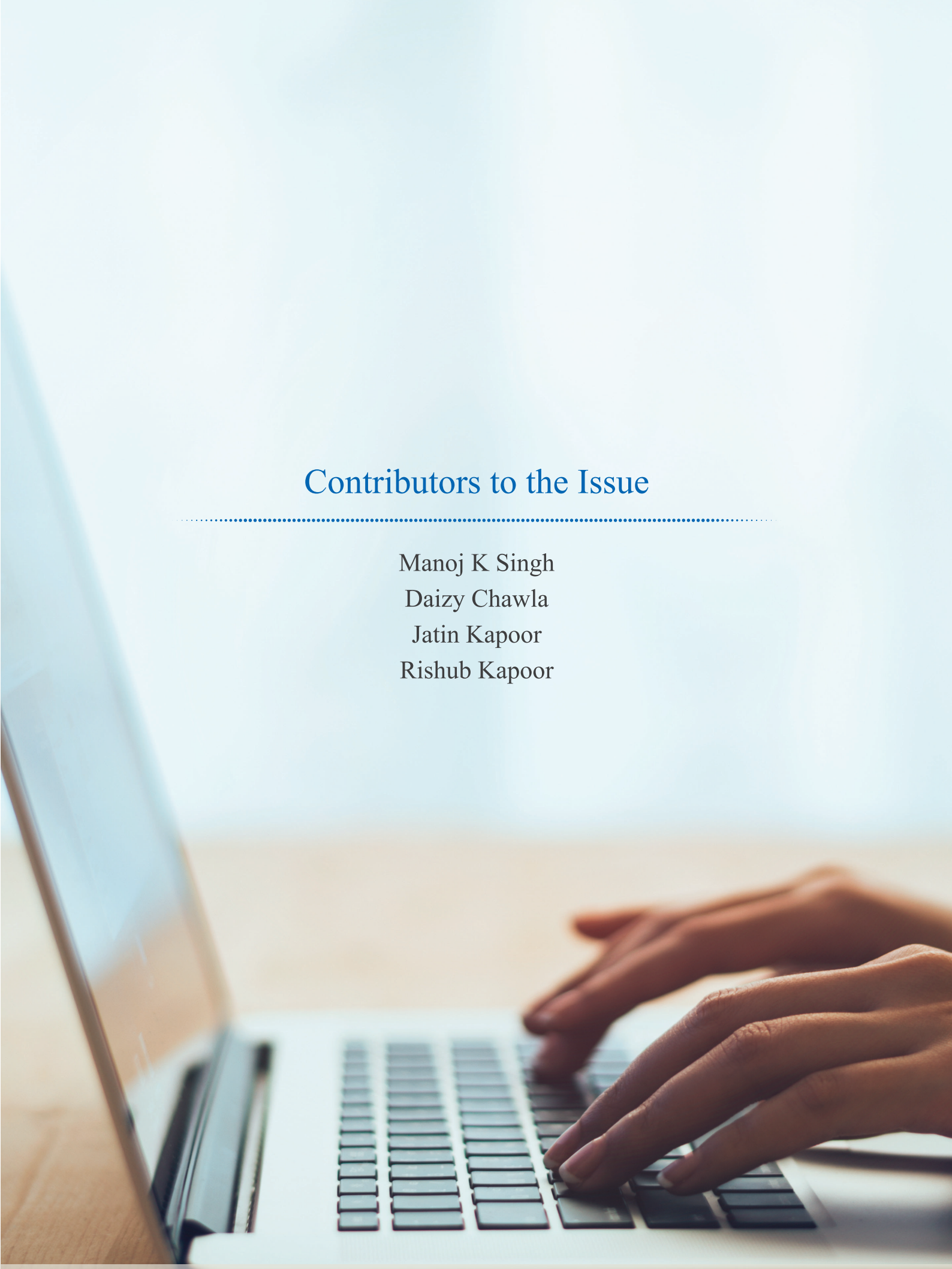

CIRP REGULATION AMENDMENTS

RESOLUTION APPLICANT(S) BE AWARE

The Insolvency and Bankruptcy Board of India (IBBI) vide its notification No. IBBI/2019-20/GN/REG040 introduced the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2019 which came into effect from 24.01.2019. The amendments have been introduced in the light of recent failure/non-seriousness of the successful Resolution Applicant(s) to meet the commitments proposed by them in the Resolution Plan approved by Committee of Creditor of Corporate Debtor as well as the Hon'ble Adjudicating Authority (National Company Law Tribunal) under Section 31 of the Insolvency and Bankruptcy Code, 2016 (Code). Due to failure of the commitments the time, energy and efforts put by all those who were involved in Corporate Insolvency Resolution Process of a Corporate Debtor go into vein. Further, it leads to a peculiar situation as liquidation also cannot be commenced as this type of situation is not even contemplated under Section 33(3) of the Code.

The changes proposed vide these amendments are:

1. Performance Security:

Sub regulation (4A) has been inserted after the sub regulation 4 in regulation 36B of IBBI (CIRP) Regulations, 2016.

Inserted sub-regulation (4A) read as follows:

"(4A) The request for resolution plan shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.

With the insertion of sub-regulation (4A), it has now become mandatory that in case a resolution plan is approved by the Committee of creditors, a performance security will mandatorily needs to be given by the successful Resolution Applicant. The nature of the security as well as value, duration and source, will be as may be approved by the Committee of Creditors, having regard to the nature of resolution plan and business of the Corporate Debtor.

2. Statement w.r.t previous Resolution plan submitted

Sub-regulation (1B) has been inserted after sub-regulation (1A) in regulation 38 of IBBI (CIRP) Regulations, 2016.

Inserted sub-regulation (1B) read as follows:

"(1B) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past".

As per the above insertion of sub-regulation (1B) in regulation 38, it has now made a pre-requisite that the resolution applicant while providing its resolution plan should also give a declaration in the form of statement whether the Resolution Applicant itself or any of its related parties have in past have failed to implement any Resolution Plan proposed by them in respect to any Corporate Debtor which was successfully approved by the CoC as well as Adjudicating Authority.

With the insertion of the sub-regulation (1B) in regulation 38 and sub regulation (4A) in regulation 39, there is a corresponding change in the paragraph 9 of the Form H.

3. Right to aggrieved Creditor w.r.t non-implementation of Resolution plan:

Sub-regulation (9) has been inserted after the sub-regulation (8) in regulation 39 of IBBI (CIRP) Regulations, 2016.

Inserted sub-regulation (9) read as follows:

"(9) A creditor, who is aggrieved by non-implementation of resolution plan approved under section (1) of section 31, may apply to the Adjudicating Authority for directions."

The new sub regulation now enables a creditor, who is aggrieved by non-implementation of a resolution plan approved by the Adjudicating Authority, to apply to the Adjudicating Authority for appropriate directions.

4. Substitution of the table in Paragraph 7 of Form H

The table in paragraph 7 in Form H (Compliance Certificate) is now substituted with new table. The said table deals with the amounts provided to the various stakeholders under the Resolution Plan. The earlier categories like Dissenting secured financial creditors/dissenting secured creditors/other secured financial creditors/other unsecured financial creditors have been removed.

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OTHER AMENDMENTS

1) IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 on 5th October, 2018

In August 2018, many new changes were introduced in the Code and to accommodate such changes on 5th October, 2018 amendment to the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016 ("Regulations") were notified.

Apart from the small changes in the Regulations, the following are the major changes that took place.

a) Dissenting Financial Creditors

Before the amendment, regulation 2 clause (f) defined the term dissenting financial creditors which means a financial creditor who voted against the resolution or abstained from voting for the resolution plan, approved by the committee.

However, under the amended regulations, regulation 2 clause (f) i.e. dissenting financial creditors has been omitted from the CIRP regulations.

b) Claims by other Creditors

A new Regulation 9A has been inserted which provides for the filling of claims by other creditors to the Interim Resolution Professional or Resolution professional as the case may be.

Under regulation 9A, a person claiming to be a creditor, other than those covered under regulations 7, 8, or 9, shall submit its claim with proof to the interim resolution professional or resolution professional in person, by post or by electronic means in Form F of the Schedule.

Further the existence of the claim of the creditor may be proved on the basis of:

a. the records available in an information utility, if any, or

b. other relevant documents sufficient to establish the claim, including any or all of the following:-

i. Documentary evidence demanding satisfaction of the claim;

ii. Bank statements of the creditor showing non-satisfaction of claim;

iii. An order of court or tribunal that has adjudicated upon non-satisfaction of claim, if any.

c) Contents of notice of Committee of Creditors Meeting

The Regulation 21 sub-regulation (3) was substituted with insertion of new sub-regulation (3). As per the substituted sub-regulation (3), the notice of the meeting shall contain (i) a list of the matters to be discussed at the meeting; (ii) A list of the issues to be voted upon at the meeting; and (iii) Copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting.

Clause (a) and clause (b) of prior Sub-regulation (3) have been omitted. Accordingly, notice of the meeting shall not specifically contain (i) agenda of the meeting; (ii) as well as a statement stating that a vote of the members of the Committee shall not be taken at the meeting unless all members are present at the meeting.

d) Minutes of the meeting to be circulated to creditors in class and voting in case of creditors in class

As per the substituted Regulation 25 sub-regulation (5), the resolution professional now needs to circulate the minutes of the meeting by electronic means to all members of the committee and the authorized representative, if any, within 48 hours of the conclusion of the meeting.

Further as per newly inserted sub-regulation (6), the authorized representative shall circulate the minutes of the CoC meeting received under sub-regulation (5) to creditors in a class and announce the voting window at least 24 hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

Furthermore, post amendment sub-regulation 1A under Regulation 26 has been inserted which clearly provides that the authorized representative shall exercise the votes either by electronic means or through electronic voting system as per the voting instructions received by him from the creditors in the class pursuant to sub-regulation (6) of regulation 25.

e) Contents of Resolution Plan

Amended Regulation 38 (1) provides that under the resolution plan the amount due to the operational creditors shall be given priority in payment over financial creditors. Further post the amendment sub-regulation (1A) has been inserted under regulation 38 which provides that a resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

f) Preservation of CIRP records

An Interim resolution professional or the resolution professional, as the case may be, shall preserve a physical as well as an electronic copy of the records relating to corporate insolvency resolution process of the corporate debtor as per the record retention schedule as may be communicated by the Board in consultation with Insolvency Professional Agencies.

2) Amendment in Liquidation Process Regulations

IBBI vide notification No. IBBI/2016-17/GN/REG005 amended the IBBI (Liquidation Process) Regulations, 2016 on 22nd October, 2018 to enable a liquidator to sell the business of the Corporate Debtor (CD) as a going concern subject to security interest on the assets of CD. These provide that where valuation has been conducted during CIRP, the liquidator shall consider such valuations. Otherwise, the liquidator shall within seven days of the liquidation commencement date, appoint two registered valuers to determine the realizable value of the assets or businesses of the CD.

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CIRCULARS ISSUED

a) Valuations under the Code

IBBI issued a circular on 17 October, 2018 directing that with effect from 1 February, 2019, no Insolvency Professional shall appoint a person other than a Registered Valuer to conduct any valuation under the Code or any of the regulations made thereunder.

IBBI also clarified that every valuation required under the Code or any of the regulations made thereunder shall be conducted by a Registered Valuer (RV), that is, a valuer registered with IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017.

b) Voting in the Committee of Creditors

IBBI issued a circular on 14th September, 2018 clarifying that in the meeting of Committee of Creditors (CoC), the voting power of the member in CoC is based on the amount of admitted claim in respect of the financial debt. Further the financial Creditor whose claim has not been admitted, is included in the CoC as member, as and when its claim is admitted.

It is also elucidated by the IBBI that the inclusion of financial creditor in the CoC as a member subsequent to constitution of the CoC does not affect the validity of any decision taken by the CoC prior to such inclusion.

Thus, a person, who is not a member of the CoC, does not have voting right in the CoC. A person, who is not a member of the CoC, cannot be regarded as one who has voted against a resolution plan or abstained from voting.

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AMENDMENT BY OTHER AUTHORITIES

i. End Use Restrictions to use the ECB proceeds is relaxed for Resolution Applicants under Corporate Insolvency Resolution Process.

The Reserve Bank of India vide its circular dated 07.02.2019 (A.P. (DIR Series) Circular No. 18) has relaxed the applicability of External Commercial Borrowing guidelines in respect to borrowing to be arranged by Resolution Applicants for the Corporate Debtor going through CIRP. Accordingly the end use restrictions which otherwise is applicable w.r.t ECB proceeds raised by eligible borrowers from recognized lenders except the branches/overseas subsidiaries of Indian Banks, for repayment of Rupee term loans of the target company under the approval route will not be applicable in case of Resolution Applicant providing resolution plan w.r.t Corporate Debtor. The Resolution Applicant can proceed with filing the proposal to receive the ECB through the AD Bank to RBI for approval.

ii. Securities Contracts (Regulation) (Amendment) Rules, 2018

Department of Economic affairs vide its notification dated 24.07.2018, have inserted new sub-rule (5) under Rule 19 A of the Securities Contracts (Regulation) Rules, 1957, wherein if the public shareholding in a listed company falls below twenty-five per cent, as a result of implementation of the resolution plan approved under section 31 of the Code, 2016, such company shall bring the public shareholding to twenty-five per cent within a maximum period of three years from the date of such fall.

Further provided that, if the public shareholding falls below ten per cent, the same shall be increased to at least ten per cent, within a maximum period of eighteen months from the date of such fall.

In both scenarios the shareholding will increase in the manner specified by the Securities and Exchange Board of India.

iii. SEBI (Appointment of Administrator) Regulations, 2018

SEBI issued the SEBI (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018 on 3rd October, 2018. These regulations are applicable to all or any of the following:

1. Appointment of Administrator pursuant to failure to comply with disgorgement or refund orders passed by SEBI;
2. Sale of properties attached by the Recovery Officer of SEBI under the SEBI Act, 1992;
3. Collection of claim documents and verification of claims of investors for the purpose of effecting refunds;
4. Refund of monies to the investors pursuant to disgorgement or refund orders passed by SEBI;
5. Recovery of disgorgement amounts directed by SEBI; and
6. Any act incidental or connected to the above.

These regulations apply mutatis mutandis in respect of the proceedings under the Securities Contracts (Regulation) Act, 1956 or the Depositories Act, 1996.

Under these regulations, SEBI shall, after attachment of the properties of the defaulter by the Recovery Officer, appoint an Administrator who is registered IP and empaneled by SEBI from time to time.

The Administrator shall undertake the process of sale of properties after conducting an independent valuation of such properties by a registered valuer referred to in the Companies (Registered Valuers and Valuation) Rules, 2017.

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ORDERS UNDER INSOLVENCY AND BANKRUPTCY CODE 2016 W.R.T CORPORATE PERSONS

1. Members of erstwhile Board of Directors of Corporate Debtor must be given a copy of Resolution Plan

The Division Bench of Supreme Court while hearing an appeal against the order of NCLAT in the matter of ***Vijay Kumar Jain versus Standard Chartered Bank & Ors., Civil Appeal NO.8430 OF 2018*** allowed the appeal of ex directors and set aside the order of Appellate Authority and Adjudicating Authority of rejecting the prayer of an appellant, the erstwhile directors of the Corporate Debtor for getting copy of the resolution plans from the resolution professional.

The appellant in the matter submitted before the Apex Court had argued for their right to access the resolution plan. It was submitted by the counsel for the appellants that as per Section 24(3) of the IBC, Resolution Professional has to give notice to the members of suspended Board of Directors for participating in the Committee of Creditors (CoC) meetings and as per Regulation 21 of CIRP Regulations 2016, the notice of these meetings shall not only contain an agenda of the meetings but shall also contain copies of all documents relevant to the matters to be discussed.

Further the suspended Directors have a vital stake in the issue, and some of them may have offered personal guarantee for the corporate debtor, an approved resolution plan under Section 31(1) of IBC will be binding on the suspended Board of directors. Therefore, they claimed for the right to access resolution plans.

The Counsel for Respondents opposed the plea, contending that only the CoC was entitled to have resolution plans, as per Section 30(3) IBC read with Regulation 39(2) CIRP Regulations. Further on Relying on the Notes on Clauses to Section 24 of the Code, the respondents argued that the members of suspended Board of Directors are only permitted to participate in CoC meetings for the purpose of giving information regarding the financial status of the debtor.

The Apex Court after hearing the arguments observed that the statutory scheme of IBC and CIRP Regulations made it clear that *"though the erstwhile Board of Directors are not members of the committee of creditors, yet, they have a right to participate in each and every meeting held by the committee of creditors, and also have a right to discuss along with members of the committee of creditors all resolution plans that are presented at such meetings under Section 25(2) (i)".*

The Hon'ble Bench in its Judgment further held that, even assuming that the Notes on Clause 24 may be read as being a one-way street by which erstwhile members of the Board of Directors are only to provide information, we find that Section 31(1) of the Code would make it clear that such members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them.

On deliberating over the dispute whether a resolution plan falls under the definition of relevant document or not, the Supreme Court held that, *"Obviously, resolution plans are "matters to be discussed" at such meetings, and the erstwhile Board of Directors are "participants" who will discuss these issues. The expression "documents" is a wide expression which would certainly include resolution plans".*

The Hon'ble Court further observed that "Therefore, a combined reading of the Code as well as the Regulations leads to the conclusion that members of the erstwhile Board of Directors, being vitally interested in resolution plans that may be discussed at meetings of the committee of creditors, must be given a copy of such plans as part of "documents" that have to be furnished along with the notice of such meetings".

2. Supreme Court sustained the constitutional validity of the Code

The Division Bench of Supreme Court on 25th January, 2019 passed a landmark Judgment while hearing a multiple Civil Writ Petition in the matter of ***Swiss Ribbons Pvt. Ltd & Anr. v. UOI, SLP-28623 of 2018.*** The Apex Court in its decision not only discussed the perspective of the Insolvency & Bankruptcy Code, 2016 but also discussed the larger context of how the Tribunals are interpreting the economic legislation.

The Hon'ble Supreme Court in its judgement noted that legislation, particularly in economic matters is essentially factual and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. The constitutionality of economic legislation should therefore, be judged by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. The judgment also stands out for its noteworthy reliance on the Report of the Bankruptcy Law Reforms Committee (BLRC) to realize the need and basis for the provisions contained in the IBC.

Few of the significant challenges which were raised by the petitioners before the Hon'ble Supreme Court in multiple petitions and the manner in which the Court has dealt with them are discussed below:

i. Circuit Benches to be established

The significant challenge which was raised, was that, the National Company Law Appellate Tribunal substitutes the jurisdiction of the High Courts, the constitution of NCLAT bench only at Delhi and not at every jurisdiction where there was a High Court violates the law laid down by the Court in *Madras Bar Association v. UOI.*

The Hon'ble Court, while accepting the submission of the Union of India that the earlier decision in *Madras Bar Association* would be followed, has directed the Union of India to set up circuit benches of the NCLAT within a period of 6 months from the date of judgment and further the Administrative support of these Tribunals to come from the Ministry of Law and Justice.

ii. Classification between 'financial creditors' and 'operations creditors' under the IBC

It was argued before the Supreme Court that the classification between 'financial creditors' and 'operational creditors' under the IBC is arbitrary, discriminatory and violative of Article 14 of the Constitution of India and there is no intelligible differentia between the two types of Creditors. Even if it is assumed that valid distinction exists between the two, there is hostile discrimination against operational creditors since they have no voice on the creditors' committee.

The Apex Court held that as per Article 14, right to equality is a fundamental right and as per the settled legal position, equality can only be among equals. Therefore, if an intelligible differentia can be established between two classes, then a legislation does not violate Article 14. The Hon'ble Court after a detailed analysis of the provisions of the IBC and the Insolvency Law Committee Report, 2018 and other material concluded that key distinction between 'financial creditors' and 'operational creditors' other than involvement of large sum of money are that the Financial Creditors are generally secured as compared to the operational creditors which are unsecured. Further the Contracts with the financial Creditors are normally for finance, loans etc. where the Contracts with the Operational Creditors are for supply of goods or/and services. The Court further observed that the financial Creditors from the very beginning assess the viability of the corporate debtor. They are can engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial crisis, which the operational creditors do not and cannot do. Thus, stabilizing the corporate debtor as a going concern, while ensuring maximum salvage for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

iii. Voting Rights to Operational Creditor

The Hon'ble Supreme Court while deciding the issue of no voting right to operational creditor observed that under the code, the committee of creditors is entrusted with the primary responsibility of financial restructuring. They are required to assess the viability of a corporate debtor by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. Since the Financial Creditors are in the business of money lending, banks and financial institutions are best equipped to assess viability

and feasibility of the business of the Corporate Debtor. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services and are typically unable to assess viability and feasibility of business. Therefore, the position of the Operational Creditors enumerated in the code at present is no way violating any right under Article 14.

It was further held by Supreme Court that it is mandate of the Code, that unless a minimum payment is made to operational creditors, being not less than liquidation value, the resolution plan cannot be approved under section 31. So, the code takes due care of operational creditor.

iv. Tribunal can be approached under Section 12A even if Committee of Creditors is not constituted

The Supreme Court clarified that a party can approach the NCLT directly, in case the Committee of Creditors is not constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of Interim Resolution Professional). In such case the NCLT may in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of the each case.

v. Tribunal can set aside the rejection of settlement / no consent given by CoC

The Apex Court held that the Committee of Creditors do not have the last word on the subject of approving any settlement or withdrawal application. If the Committee of Creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code.

vi. Resolution Professional has no adjudicatory Powers

The Hon'ble Supreme Court observed that the Resolution Professional is given administrative as opposed to quasi-judicial powers. The Liquidator on the other hand has quasi juridical powers which can be appealed against to the adjudicating authority under Section 42 of the Code since liquidator determines the claims however the resolution professional only consolidate and verify the claims. Further, the resolution professional cannot act without the approval of Committee of Creditors in number of matters as compared to liquidator.

The Hon'ble Court further observed that Resolution Professional is really a facilitator of the resolution process, whose administrative functions are overseen by the Committee of Creditors and by the Adjudicating Authority.

vii. Constitutional Validity of Section 29A of the Code

While rejecting the challenge of the petitioners on the constitutional Validity of Section 29A of the code, the hon'ble court held that the Section 29A is not unconstitutional. Though it was clarified that the definition of relative/related person will mean persons who are connected with the business activity of a resolution applicant. In the absence of showing that such a person is connected with the business activity of the ineligible resolution applicant, such a person cannot possibly be disqualified under section 29A of the Code.

The Hon'ble Court pointed out that it is a settled law that a statute is not retrospective merely because it affects existing rights nor is it retrospective merely because a part of the requisites for its action is drawn from a times

antecedent to its passing.

Further the Apex Court also held that, the legislative policy is that a person who is unable to service its own debt beyond the grace period, is unfit to be eligible to become a resolution applicant. This policy cannot be found fault with.

vii. Constitutional Validity of Section 29A of the Code

Section 53, the operational creditors will not get anything as they rank below all other creditors, the Hon'ble Supreme Court observed that reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Code. It was observed that repayment of financial debts infuses capital into the economy in as much as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses.

3. The Hon'ble NCLAT while hearing an appeal filed during the pendency of the proceeding before Ld. Adjudicating authority in **IDBI Bank Vs Odisha Slurry Pipeline Infrastructure Limited, Company Appeal (AT) (Insolvency) No. 51 of 2019** held that Adjudicating Authority should not hear any third-party application at the time of hearing the application filed under Section 7 of the Code. NCLAT order is though restricted to the application filed under Section 7 by Financial Creditor and same is inspirit of the Code which provides that for admission "default" needs to be proved. Further the financial creditor uses the platform of I&B Code as a last resort when all other options are not of any help. Any hearing been given to third party in such case may delay the proceedings.

The order of NCLAT have not given any observation w.r.t such restriction on Application filed under Section 9 (by operational creditor) or Section 10 (by corporate debtor) may be for the reason to avoid the abuse of the Code by the Applicant for their ulterior motive and to protect the rights of genuine financial creditors or third party.

4. Adjudicating Authority has no jurisdiction to decide any issue after passing of Order under section 31 of the Code and Appeal once the Resolution Plan is approved and Resolution Applicant has taken charge cannot be filed ex director of Corporate Debtor

The Hon'ble National Company Law Appellate Tribunal (NCLAT) dismissed an appeal filed against the order of the National Company Law Tribunal, ('NCLT – Guwahati') Bench in the matter of **Assam Company India Ltd. Vs Numazar Dorab Mehta & ors. (Company Appeal (AT) (Insolvency) No. 82 of 2019)** wherein the Hon'ble Appellant Authority (NCLAT) observed that an order under section 31 of the Code was passed, and Corporate Debtor is now under the control of Resolution Applicant, thus an appeal filed Appellant through its Director is not maintainable. Further the Hon'ble NCLAT held that as no decision was taken by the Adjudicating Authority, nor any finding given with regard to the issues placed before them since Adjudicating Authority have no further jurisdiction to decide any issue after passing of an order under section 31 of the Code.

5. The exercise of the option leads to a transaction of sale and purchase of goods. The non-exercise of such option would lead to creation of a Financial Debt

The Hon'ble National Company Law Appellate Tribunal (NCLAT) dismissed an appeal filed by the promoters *'MCX Stock Exchange Limited' (MCX-SX)'* against an order of the Adjudicating Authority ***('NCLT – Mumbai')*** in the matter of **Pushpa Shah & Anr. Vs IL&FS Financial Services Limited & Anr. (Company Appeal (AT) (Insolvency) No. 521 of 2018)** wherein the Ld' Adjudicating Authority held that reading of the agreement Share Purchase Agreement and Letter of Undertaking executed between the Respondent and Corporate Debtor, it is clear that the terms of transactions involved not only the purchase of shares but it shows the date by which the amount of transaction was to be repaid by the 'Corporate Debtor' for such purchase of shares. Further there exists an element of 'time value of money', particularly, when one of the conditions related to 'internal rate of return of 15%' on the transaction, and the Corporate Debtor had agreed to reverse the transaction by purchasing the shares within a specified time along with the payment of 15% accrual. Therefore, the amount invested by the Respondent initially will be considered as Financial Debt and the Respondent as Financial Creditor. The Hon'ble Appellate Authority observed that the Financial Creditor (respondent in Appeal) has disbursed the amount and Corporate Debtor has raised the amount with an object of having economic gain and if the clauses of two principal documents are read together, it clearly provides the date by which the debt was to be repaid by the Corporate Debtor.

6. The CIRP cannot be initiated against two Corporate Guarantors simultaneously for the same set of debt and default – NCLAT-(1)

The Appellate Authority in the matter of ***Dr. Vishnu Kumar Aggarwal vs. M/s. Piramal Enterprises Limited (Company Appeal (AT) (Insolvency) No. 347 of 2018*** held that Section 7 Application against the Corporate Guarantor is not maintainable in cases where the CIRP has already been admitted against the other Corporate Guarantor for the same very claim and default.

The Appellate Authority in its judgement held that *"There is no bar in the 'I&B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no application can be filed by the 'Financial Creditor' against two or more 'Corporate Debtors' on the ground of joint liability ('Principal Borrower' and one Corporate Guarantor', or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown that the 'Corporate Debtors' combinedly are joint venture company."*

7. CIRP against the Corporate Guarantor can be initiated before initiating the CIRP against the Principal Borrower

The Appellate Authority in the matter of ***Dr. Vishnu Kumar Aggarwal vs. M/s. Piramal Enterprises Limited (Company Appeal (AT) (Insolvency) No. 347 of 2018*** held that it is not necessary to initiate 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' before initiating 'Corporate Insolvency Resolution Process' against the 'Corporate Guarantors'.

Appellate Authority further held that even without initiating any 'Corporate Insolvency Resolution Process' against the 'Principal Borrower', it is always open to the 'Financial Creditor' to initiate 'Corporate Insolvency Resolution Process' under Section 7 against the 'Corporate Guarantors', as the creditor is also the 'Financial Creditor' qua 'Corporate Guarantor'.

The NCALT relied on several Supreme Court judgements holding that the liability of the Corporate Guarantor is co-extensive with the liability of principal borrower.

Hence, the financial creditor can proceed against corporate guarantor even before proceeding against corporate debtor.

8. Regulation 30A has to be read in spirit of the main provision Sec. 12A. Invitation of Expression of Interest is no bar to proceed with Withdrawal Application under Section 12A.

The Hon'ble Supreme Court in the matter of ***Brilliant Alloys Private Limited Vs. Mr. S. Rajagopal & Ors. Special Leave to Appeal (C) No(s). 31557/2018*** held that Regulation 30A of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 has to be read with the main provision Section 12A of the Insolvency & bankruptcy Code, 2016 and if in Section 12A there is no requirement that the withdrawal application cannot be proceeded if expression of interest is published then there is no bar to allow the withdrawal application filed if otherwise is in compliance with all provisions including the consent of 90% of the members of Committee of Creditors.

In the case in hand the withdrawal of the application was not allowed though agreed to by the Corporate Debtor as well as the Financial Creditor-State Bank of India and the Operation Creditor, because Regulation 30A states that withdrawal cannot be permitted after issue of invitation for Expression of Interest.

The Hon'ble Apex Court in its judgment held that "though the regulation 30A has to be read along with the main provisions of section 12A. But this stipulation can only be construed as directory depending on the facts of each case."

9. Merger and Amalgamation of the Companies can be proposed as part of the Resolution Plan

The Appellate Tribunal while rejecting the appeal filed against the Resolution Plan approved by Adjudicating Authority in ***Edelweiss Asset Reconstruction Company Limited Vs Synergies Dooray Automotive Limited & Ors. (CA (AT) (Insolvency) No. 169 to 173 of 2017)*** held that Resolution Plan approved under Section 30 of the Code cannot be considered as violative of the provisions Section 30(2)(e) being contradictory to

provisions of Section 230 to 232 of the Companies Act, 2013 since Section 238 provides over riding effect of it over the provisions of the other Acts, if any of the provisions of an Act is in conflict with the provisions of the 'I&B Code'.

The Hon'ble Appellate Tribunal further observed that Section 230 of the Companies Act, 2013 relates to 'power to compromise or make arrangements with creditors and members' whereas Section 232 relates to 'merger and amalgamation of companies'. The question of filing an application before the National Company Law Tribunal under Sections 230-232, does not arise at the stage of filing of the 'Resolution Plan' as it is not known as to which of the 'Resolution Plan' will be approved. Once a plan is approved, one may argue that in terms of the provisions of the Companies Act, a formal order of amalgamation is required. No such argument can be advanced at the time of approval of the 'Resolution Plan' which merely proposes merger. Further, regulation 37(1)(c) of Corporate Person regulations, 2016 provides that a resolution plan shall provide measures for maximization of value of assets of Corporate Debtor including the substantial acquisition of shares of the Corporate Debtor, or the merger or consolidation of the corporate debtor with one or more persons.

10. Deed of Pledge of Securities does not take away the rights of Shareholders to vote

The National Company Law Appellate Tribunal while rejecting the appeal filed against the order of Adjudicating Authority admitting the application filed under Section 10 of the Code by Corporate Debtor in **Export Import Bank of India & Anr. Vs Astonfield Solar (Gujarat) Private Limited & Anr. (CA(AT)(Insolvency)No. 754 of 2018)** held that in case of 'Deed of Pledge' while we find that in case of default, the voting rights of the shareholders who executed the Deed of Pledge in favour of the Financial Creditor shall cease to exist upon the occurrence of an event of default however it will not deprive such shareholder to continue to be a shareholder and their shares do not stand transferred to the 'Financial Creditor' and thereby the shareholder, in terms of the 'Deed of Pledge' dated 28th March, 2013 may lose their right to vote but they continue to be shareholder even thereafter. Further, the shareholder still hold the right to decide whether approving or disapproving the decision be proceeded with the corporate insolvency resolution process under Section 10 of the I&B Code. Such right does not stand curtailed by Deed of Pledge.

11. Section 7 Application can be jointly filed against two Corporate Debtors

The Hon'ble NCLAT while admitting an appeal filed against the order of the Adjudicating Authority remitted the matter to Adjudicating Authority for admission on merits of the case if record is complete the application under Section 7 filed against two Corporate Debtors The Appeal in case of ***Mrs. Mamtha Vs. AMB Infrabuild Private Limited & Ors (CA (AT) (Insolvency) No. 155 of 2018)*** was against the order of Adjudicating Authority wherein an application filed under Section 7 as financial creditor by the Appellant against two Corporate Debtors was rejected on the ground that there is no provision under the Code where a petition for Insolvency Resolution Process can be initiated against two Corporate Debtors who have collaborated for a Joint Venture. Further, the payment is alleged to be made to Corporate Debtor No.2 while Insolvency Resolution Process is sought to initiated against Corporate Debtor No.1 and 2.

The Hon'ble NCLAT after hearing the facts held that in case two "Corporate Debtors" have collaborated and formed an independent corporate entity for developing the land and allotting the premises, the application under Section 7 will be maintainable against both them jointly and not individually against one and other. In

such case, both the "Developer" and the "Land Owner", if they are corporate should be jointly treated to be one for the purpose of initiation of "CIRP" against them".

12. CIRP is not a litigation and its initiation are not decided by any court of law

The Hon'ble Appellate Authority i.e. National Company Law Appellate Tribunal (NCLAT) had held that a Section 7 application under the Insolvency and Bankruptcy Code, 2016 ("'I&B Code") cannot be rejected on the ground of "usurious and extortionate penal interest" governed by provisions Usurious Loans Act, 1918.

In ***Sh. Naveen Luthra v. Bell Finvest (India) Ltd. & Anr.*** (Company Appeal (AT) (Insolvency) No. 336 of 2017), the Hon'ble Appellate Tribunal while admitting an appeal filed against the order of the Ld.' Adjudicating Authority (AA), National Company Law Tribunal (NCLT), Mumbai Bench held that a Corporate Insolvency Resolution Process is not a litigation and is not decided by a court of law.

The Ld' NCLT while its order dated November 15, 2017 had allowed the application filed under Section 7 by Bell Finvest (India) Limited against M/s. Luthra Water Systems Private Limited (corporate debtor). The said order of the NCLT, was challenged by Mr. Naveen Luthra, one of the shareholders of the corporate debtor, on the ground that a Section 7 application is not maintainable in view of *"usurious and extortionate penal interest"*, governed by section 3 of Usurious Loans Act, 1918. According to the learned counsel for the Appellant, the 'time value of money' in the instant case stood paid on the date of disbursal of the loan amount and the 'usurious and extortionate penal interest' does not give rise to a 'financial debt' as defined under Section 5(8) of the 'I&B Code' as adjudicated by Adjudicating Authority, Mumbai Bench.

The Hon'ble Appellate Tribunal held that the Adjudicating Authority cannot exercise powers under the Usurious Loans Act, 1918, Further, the Adjudicating Authority is not deciding any money claim or suit, it cannot exercise any of the power vested under Sections 3 or 4 of the 'Usurious Loans Act, 1918'." The provisions of sections 3 and 4 of Usurious Loans Act, 1918 are not applicable to any of proceeding under section 7 or Section 9 of Insolvency and Bankruptcy Code.

13. Raising of dispute in regard to quality of goods being inferior/substandard for the first time in reply to demand notice would not constitute a prior dispute

The Hon'ble NCLAT in the matter of Rajeev K Aggarwal vs. Panipat Texo Fabs Pvt. Ltd Company Appeal (AT) (Insolvency) No. 715 of 2018] while dismissing the Appeal filed against the order of Hon'ble Adjudicating Authority wherein the Adjudicating Authority admitted an application filed under section 9 of the Code. The Appellant urged before Appellant authority as well as had argued before the Adjudicating Authority that the goods in contention to the debt were defective and inferior quality, but Corporate Debtor was unable to bring any substantive document on record to showcase whether the goods supplied were of inferior quality. It was held by the Adjudicating Authority that raising of dispute in regard to quality of goods being inferior/ substandard or defective for the first time in reply to demand notice or in response to notice served by the Adjudicating Authority would not constitute a prior and pre-existing dispute contemplated under law as a defense to the initiation of Corporate Insolvency Resolution Process. The Hon'ble NCLAT upheld the order of Adjudicating Authority and also taken the same view that the Corporate Debtor failed to demonstrate that there was a pre-existing dispute in regard to quality and standard of goods supplied by the Operational Creditor and raising of such dispute at the time of responding the Demand Notice issued under Section 8 is not acceptable.

14. Where workmen/employees are Operational Creditors, the application may be made either by an Operational Creditor in an individual capacity or as a joint capacity by one of them who is duly authorized for such purpose

In the matter of ***Mr. Suresh Narayan Singh vs. Tayo Rolls Ltd (Company Appeal (AT) (Insolvency) No. 112 of 2018),*** the National Company Law Appellate Tribunal (NCLAT) while hearing the appeal of Mr. Suresh Narayan set aside the order of NCLT, Kolkata Bench and remanded back the matter to the Adjudicating Authority to consider the same. The Hon'ble Appellate Tribunal held that Section 5(20) read with Section 5(21) of the 'I&B Code' makes it clear that the workmen of a Company come within the meaning of *'Operational Creditor'*. If Sections 8 & 9 are read with Form-5, it will be clear that the person authorized to act on behalf of the *'Operational Creditor'* is entitled to file an application under Section 9. Therefore, where workmen/employees are *'Operational Creditors'*, the application may be made either by an *'Operational Creditor'* in an individual capacity or as a joint capacity by one of them who is duly authorized for such purpose.

If the application is maintainable by one of the workmen, in that capacity, it should have been treated to be an application of 'Operational Creditor' and others could have been asked to file their respective claim before the 'Resolution Professional'. Even in a demand notice under Section 8(1), the details of operational debt of each 'Operational Creditor' can be shown by the authorized person. Only if in an individual claim of 'Operational Creditor' the amount of debt is less than one lakh rupees, it can be rejected being not maintainable

15. Resolution Plan not to discriminate against one or other 'Financial Creditor'

The Hon'ble Appellant Authority while deciding the appeal filed against the order of Adjudicating Authority, Kolkata in ***Binani Industries Limited V. Bank of Baroda & Anr Company Appeal (AT) (Insolvency) No. 82 of 2018*** observed the following:

a) all the resolution plan which meets the requirements of section 30(2) of the IBC 2016 were required to be placed before the CoC and the resolution professional can review such resolution plans and the CoC is entitled to negotiate and get modified with consent of the resolution applicant.

b) The 'I&B Code' aims at promoting availability of credit. Credit comes from the 'Financial Creditors' and the 'Operational Creditors'. Either creditor is not enough for business. Both kinds of credits need to be on a level playing field. 'Operational Creditors' need to provide goods and services. If they are not treated well or discriminated, they will not provide goods and services on credit. The objective of promoting availability of credit will be defeated.

c) The 'I&B Code' is for reorganisation and insolvency resolution of corporate persons, for maximisation of value of assets of such persons to balance interests of all stakeholders. It is possible to balance interests of all stakeholders if the resolution maximises the value of assets of the 'Corporate Debtor'. One cannot balance interest of all 14 stakeholders, if resolution maximises the value for a or a set of stakeholder such as 'Financial Creditors'. One or a set of stakeholders cannot benefit unduly stakeholder at the cost of another.

d) It is necessary to balance the Financial Creditors and Operational Creditors. If any Resolution Plan found to be discriminatory against one or other financial creditors or the operational creditors, such plan can be

held to be against the provisions of Code.

e) The liabilities of all creditors (including Operational Creditor) even though not part of CoC should be considered. The financial creditors can modify the terms of existing liabilities, with other creditors cannot take risk of position of payment for better future prospectus. The Financial Creditor can take haircut and can take their dues in future, while Operational Creditors need to be paid immediately.

The Hon'ble Supreme Court of India had upheld the order of National Company Law Appellate Tribunal (NCLAT) vide its order dated November 19, 2018.

16. Whether recourse to IBC is maintainable if existence of debt is disputed

The Hon'ble Supreme Court of India in its order dated October 23, 2018 set aside order passed by the Hon'ble Appellate Tribunal (NCLAT) in the matter of **Transmission Corporation of Andhra Pradesh Ltd. v. Equipment Conductors and Cables Limited (Civil Appeal No. 9597 OF 2018).** The issue before the Hon'ble Apex Court was whether recourse to Insolvency Bankruptcy Code was maintainable if existence of debt is disputed.

In the said matter respondent approached the Hon'ble Adjudicating Authority (NCLT) Hyderabad bench and a section 9 application was filed by the respondent. The original Company petition was dismissed by NCLT, to which an appeal was made by the respondent before the Hon'ble Appellate Authority. NCLAT observed that a prima facie case has been made out by the Respondent and was an order wherein gave a last opportunity to the Respondent and Appellate to settle the matter. The Appellate Tribunal observed that *"therefore by way of last chance an opportunity to respondent to settle the claim with the Appellant, failing which this Appellate Tribunal may pass appropriate order on merit"*. Aggrieved by the order of t NCLAT, the Appellant approached the Honorable Apex Court.

The Hon'ble Apex Court observed that NCLAT has not appreciated the merits of the case, and has also not stated how exactly the amount is payable to the Respondent. The Apex Court held that IBC is not to be used for recovery of monies of any kind but rather only particularly mentioned debts and whenever there is existence of real dispute thus the existence of an undisputed debt is sine qua non of initiating CIRP, the IBC provisions cannot be invoked.

17. There is no obligation on part of an Individual bank to join consortium of banks

The Adjudicating Authority Principal Bench, New Delhi in **Indian Overseas Bank. v. Pearl Vision (P.) Ltd. [Company Petition (IB) NO. 419 (PB) OF 2018]**, held that Section 7(1) of the Code provides that a financial creditor either by itself or jointly with other financial creditors may file an application for initiating Corporate Insolvency Resolution Process against a corporate debtor when a default has occurred. Therefore, there is no obligation on the part of applicant bank to join the consortium of banks. Inter-se agreement between the financial creditors cannot override the express provisions of the Code nor can take away the right of any creditor to file application under section 7 of the code. Accordingly, applicant bank individually has a clear right to file application under the Code in order to recover its dues. Besides in view of the overriding effect given to the provisions of section 238 of the Code, anything inconsistent therewith contained in any instrument cannot take away the right of the applicant bank as financial creditor to file application alone under section 7 of the Code.

18. The Adjudicating Authority is only required to be satisfied that there is a debt & default has occurred

The Hon'ble Supreme Court dismissed the appeal filed in the matter of ***V.R. Hemantraj versus Stanbic Bank Ghana Limited Civil Appeal No. 9980 OF 2018*** and held that there is no reason to interfere with the order of the NCLAT.

The Appellate Authority in its order dated 29.08.2018 held that Application under Section 7 or 9 or 10 of I&B Code being not money claim or suit and not being an adversarial litigation, the Adjudicating Authority is not required to write a detailed decision as to which are the evidence relied upon for its satisfaction. The Adjudicating Authority is only required to be satisfied that there is a debt and default has occurred. Further the Adjudicating Authority under the Code does not have the powers of a Civil Court.

19. Article 137 of the Limitation Act applicable on the Applications under section 7 & 9 of the Insolvency and Bankruptcy Code, 2016: Supreme Court

The Division bench of Hon'ble Supreme Court of India in the matter of ***B.K. Educational Services Private Limited vs. Parag Gupta and Associates, (in Civil Appeal No. 23988 of 2017) (AIR 2018 SC 5601)*** on 11.10.2018 held that the limitation Act, 1963 will spread over the applications made under section 7 and 9 of the Insolvency and Bankruptcy Code, 2016 which became effective from 01.12.2016. The Division bench also made clear that the object of the code from very beginning is not to allow the decayed claims to be revived.

The case of B.K. *Educational Services Private Limited vs. Parag Gupta and Associates* ascended from the batch of the matters in which the Appellate Tribunal held that the Limitation Act will not apply to the applications made under section 7 and 9 of the Code from the date on the IBC came into effect i.e. 01.12.2016 till the date on which IBC was amended to incorporate section 238A, i.e. 06.06.2018.

S. 238A, IBC which was introduced vide amendment dated 06.06.2018 reads as follows:

"238-A. Limitation: The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Appellate Tribunal, as the case may be."

The Apex Court in *B.K. Educational Services Private Limited v Parag Gupta And Associates* has held as follows:

1. An application for initiation of CIRP under section 7 and 9 of the Code after the IBC came into force in 2016 cannot resuscitate a debt which is no longer due as it is time- barred.

2. The amendment of Section 238A would not aid its object unless it is construed as being retrospective. Otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation.

3. It is clear from a reference to the Insolvency Law Committee Report of March, 2018, that the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of IBC.

4. Section 433 of the Companies Act, 2013 which makes the provisions of Limitation Act applicable to proceedings or appeals before the NCLT or NCLAT, was applicable from the very inception of IBC.

5. The expression "debt due" in the definition sections of IBC has already been interpreted by the Hon'ble Supreme Court to mean debts that are "due and payable" in law, i.e., the debts that are not time-barred. In this regard, the Hon'ble Supreme Court has referred to its judgment in *Innoventive Industries Ltd. v. ICICI Bank & Anr., (2018) 1 SCC 407* wherein it had held that "a debt may not be due if it is not payable in law or in fact".

6. Since the Limitation Act is applicable to applications filed under Sections 7 and 9 of IBC from the inception of IBC, Article 137 of the Limitation Act gets attracted. Article 137 of the Limitation Act provides the period of limitation in case of "any other application for which no period of limitation is provided elsewhere" as **three years** from the time when the right to apply accrues. "The right to sue", therefore, accrues when a default occurs.

7. If the default has occurred over three years prior to the date of filing of application under IBC, the application would be barred under Article 137 of the Limitation Act, except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.

20. Regulation 36A Ultra- Vires The Code

The Hon'ble adjudicating authority NCLT, New Delhi in the matter of **State Bank of India v. Su Kam Power Systems Ltd. [CP(IB) – 540 (PB)/ 2017]** held Regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as ultra- vires of Section 240(1) of the Code.

In the case in hand post the acceptance of section 7 application against the Corporate Debtor, Resolution Professional appointed filed an application under section 12(2) of the Code before the Hon'ble Tribunal for extending the time period of CIRP in respect of the Corporate Debtor. The reason for extension quoted by the Resolution Applicant in the Application for extension was that the 'Expression of Interest' as per Regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 was floated w.r.t Corporate Debtor on 04.06.2018 for inviting interest in the assets of the Corporate Debtor, but no Resolution plan was received in response to the ***'Expression of Interest'***.

The Hon'ble Tribunal allowed the said application for extension with a remark that an effective legal framework is necessary for CIRP. The Adjudicating Authority observed that section 25(2)(h) of the Code added on 23.11.2017 by way of amendment does not envisage on floating of any Expression of Interest and section 240(1) of the Code in categorical terms provides that the IBBI may by notification make regulations consistent with the Insolvency and Bankruptcy Code 2016. It has been repeatedly accentuated that speed is the essence of CIRP and inviting 'Expression of Interest' would impede to the speed. Emphasis was also placed on the judgment passed by the Hon'ble Apex Court in Innoventive Industries Ltd. vs ICICI Bank Ltd. (2018) 1 SCC 407 where it was held "that speed is the salient feature of IBC, 2016 and by use of the terms 'Expression of Interest' speed is retracted and time is wasted".

Accordingly, the Hon'ble Tribunal declared that Regulation 36A is ultra- vires of section 240(1) of the Code

and further directed IBBI to frame Regulations according to its competence and in harmony to the Code.

IBBI's appeal against NCLT order

It is pertinent to mention that post such directions from NCLT, IBBI filed a writ petition before the Hon'ble Delhi High Court (Court) W.P.(C) 10189/2018, where aforesaid directions of NCLT were challenged by IBBI, The Hon'ble High Court as per order dated 26.09.2018 was of the opinion that the Court is not inclined to interfere with the impugned NCLT order. Further it was directed that the impugned order dated 05.09.2018 passed by NCLT in the matter of State Bank of India vs. Su Kam Power Systems Ltd (IB)-540(PB)/2017 shall not come in the way of the matters where "Expression of Interest" has already been issued.

In the Letter Patent Appeal preferred by IBBI before the Hon'ble Delhi High Court (Court), LPA 566/2018, the Court had granted stay on the impugned NCLT order dated 05.09.2018 to the extent of declaring the Regulation 36A as ultra vires.

21. Supreme Court allows Resolution Applicants to pay off past debts (in order to remove disqualification) to be eligible for bidding

The Hon'ble Supreme Court in the matter of ***Arcelormittal India (P.) Ltd. v. Satish Kumar Gupta Civil Appeal Nos. 9402-9405 & 9582 of 2018*** exercised its' extraordinary power under Article 142 of the Constitution of India and allow the Resolution Applicants one final opportunity to clear any outstanding dues regarding their NPA accounts in accordance with the proviso to section 29A(c) of the Code. It was also held that only reasonable construction of the Code is the balance to be maintained between timely completion of the CIRP, and the Corporate Debtor otherwise being put into liquidation. Thus the Apex Court instructed Resolution Applicants to pay off debts of company on creditor's request.

22. Non-disbursement of working capital under restructuring Agreement couldn't be ground to interdict IBC proceedings

The Hon'ble Delhi High Court ('Court') in the matter of ***Lakshmi Energy & Foods Ltd. v. Reserve Bank of India W.P. (C) NO. 5555 OF 2018*** had held that in circumstances when Petitioner failed in its repayment obligations, to the Respondent-Banks, the Respondent-banks were entitled to seek remedies under IBC and non-disbursement of additional working capital by Respondent-bank in violation of Joint Lenders Restructuring Agreement (JLRA) could not be ground to interdict proceeding under IBC.

It was the contention of the Petitioner that the additional working capital as sanctioned was not released by the lenders. The Hon'ble High Court held that the sanction of additional working capital is the sole discretion of the lenders and it is not disputed that the petitioner-company owes substantial amount to the respondent-banks and as financial creditors they are entitled to seek remedies under the IBC.

23. Corporate Resolution Process couldn't be initiated against Non-Banking Financial Company

The NCLAT held that financial service providers are outside the purview of Insolvency and Bankruptcy Code 2016 ('I&B Code 2016'). The Hon'ble Appellate Tribunal in ***Randhiraj Thakur, Director, Mayfair Capital Private Ltd vs. Jindal Saxena Financial Services and Mayfair Capital Private Ltd. Company Appeal (AT) (Insolvency) Nos. 32 & 50 of 2018*** while deciding an appeal challenging an order of Adjudicating Authority (Mumbai Bench) held that Corporate Debtor been a Non-Banking Financial Company (NBFC) will fall under exclusion provided in definition of Corporate Person (U/s 3(7)) and accordingly the Corporate Insolvency Resolution Process cannot be initiated against a Financial Service Provider.

Section 3(7) of I&B Code 2016 reads as "Corporate person" means a company as defined in clause (20) of Section 2 of Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force **but shall not include any financial service provider.**

Further, Sections 3(16), 3(17) and 3(18) of the Code, provides for the definitions of *Financial Service, Financial Service Provider and Financial Service Regulator.*

24. Adjudicating Authority can pass the order of seeking prior permission before leaving the country

The Hon'ble Appellate Tribunal, approving the interim direction passed by Adjudicating Authority dismissed the appeal filed in **Amandeep Singh Bhatia & Ors Vs Vitol S.A. & Anr, CA (AT) (Insolvency) No. 502 of 2018.** The appeal was filed on the ground that the Adjudicating Authority has no power to pass direction to the directors of the Corporate Debtor regarding not to leave the country without the prior permission of the Bench (Adjudicating Authority) is against the Article 21 of the Constitution and such power only vest with Hon'ble Supreme Court of India under Article 142.

The Appellate Tribunal after hearing the parties had held that it cannot be stated that the Adjudicating Authority is not empowered to direct the ex-Directors not to leave the country without prior permission of the Adjudicating Authority as the direction passed by the Adjudicating Authority is seek permission and not violative of Article 21 as it has not stayed the movement of the Appellants.

25. PF dues to be paid prior to distribution of proceeds from liquidation estate of Corporate Debtor

The Hon'ble Adjudicating Authority - Mumbai Bench ('NCLT') bench in the matter of ***Precision Fasteners Ltd. v. Employees Provident Fund Organization C.P. (IB) NO. 1339(MB) OF 2017*** safeguarded the interests of employees of insolvent companies, the Tribunal rejected the application of the Liquidator to declare the attachment as null and void on moveable and immovable properties of the Corporate Debtor done by custodians of Provident Fund, Pension Fund of the employees of Corporate Debtor. While deciding an application, the Hon'ble Tribunal observed that as per Section 36(4) of the Code, Provident Fund dues will not become part of

the liquidation estate. Further, the tribunal also rejected the argument of the liquidator that when the Code itself exclude the Provident Fund from where is the question of looking at whether the provident authority filed such claim before the liquidator. Under Section 36(4), it is a mandate upon the liquidator to treat provident fund dues as an asset lying with the corporate debtor and pay off the said dues before comprising the liquidation estate.

The Tribunal also held that, the overriding effect of section 238 of the Code will not have any bearing over the asset of the workmen lying in the possession of the corporate debtor because that asset will not be considered as part of the liquidation estate.

26. There is no bar for a sole proprietorship firm to file an application for initiation Corporate debtor for an operational debt under IBC

In the matter of ***Shruti Impex v. Jeevan Polymers (P.) Ltd. CP(IB) NO. 123/9/HDB/2018*** the Hon'ble NCLT (Hyderabad Bench) adjudicated that claim in respect of goods supplied to Corporate Debtor is an operational debt as per the provisions of section 9 of the Code even though the Operational Creditor is a Proprietorship Concern. The Hon'ble Adjudicating Authority held that the Petitioner i.e. Operational Creditor is an entity established under a Statute and comes within the definition of person and falls under the definition of Section 3(23)(g) of the Code which reads as person includes "any other entity established under a statute".

27. Insolvency and Bankruptcy Code would prevail over provisions of Electricity Act

In the matter of ***Raman Ispat (P.) Ltd. v. Executive Engineer (Paschimanchal Vidyut Vitran Nigam Ltd.) CP (IB) NO. 23/ALD/2017*** the Hon'ble NCLT (Allahabad Bench) held that Insolvency and Bankruptcy Code 2016 ('IBC 2016') would override the provisions of Electricity Act, 2003 as both are special statutes but IBC, 2016 being a later statute with a non-obstante clause would prevail.

In the Instant case corporate debtor had entered into an agreement with respondent **electric company, the terms of agreement provided that outstanding dues would create** a charge on the assets of company. It is pertinent to mention dues were outstanding towards supply of electricity to corporate debtor and property owned by corporate debtor was attached by District Collector. As the corporate debtor went under liquidation proceedings, attached property of corporate debtor became part of liquidation process which was available for benefit of all creditors as per provisions of section 36(2) of the Code. Further the Hon'ble tribunal directed District Magistrate to release attached property in favour of liquidator and instructed proceeds from the sale of property would be distributed in accordance with relevant provisions of Code, 2016.

28. Insolvency plea admitted against debtor being co-obligator on failure to fulfil payment obligation

In ***State Bank of India v. Evans Fraser & Co. Ltd. CP NO. 508/I & BP/NCLT/MAH/2018*** the Financial Creditor filed a section 7 application against Corporate Debtor (who was the group company of the defaulter company) w.r.t default of group company in making payment of INR 456.90 crores under the Rupee Term Loan Agreements. The Hon'ble Adjudicating Authority, Mumbai Bench held that Rupee Term Loan agreement entered between bank and group companies obliged that each company would be jointly and severally liable to repay debt taken by all or any one of them as if each one of them was principal borrower to loan granted, on

default, petition for initiating CIRP against co-obligor was to be admitted.

29. Triggering of insolvency process couldn't be defeated by taking resort to pendency of internal disputes

The NCLAT in the matter of ***Jagmohan Bajaj v. Shivam Fragnances (P.) Ltd*** **[CA (AT) (INSOLVENCY) NO. 428 OF 2018]** held that Inter-se dispute between the directors as regards transfer of shareholding and allegations of oppression and mismanagement stated to be pending adjudication before the Tribunal may or may not be a fixed match to jeopardize the legitimate interests of Investor/Financial Creditor. But the fact remains that there being no dispute in regard to raising of loan by the Corporate Debtor in the nature of a financial debt which was due and payable and there being default on the part of corporate debtor, who failed to transfer the immovable asset in terms of the arbitral award to discharge the obligation arising out of financial debt, the financial creditor was within its rights to initiate Corporate Insolvency Resolution Process.

An internal dispute of directors of Corporate Debtor and pendency of application under sections 241 and 242 of the Companies Act, 2013 for adjudication does not construed a valid defense to triggering of Insolvency Resolution Process. Bankruptcy is a special law having an overriding effect on any other law as mandated under section 238. Triggering of Insolvency Resolution Process cannot be defeated by taking resort to pendency of internal dispute between Directors of Corporate Debtor on allegations of oppression and mismanagement. The statutory right of a financial creditor satisfying the requirements of section 7 to trigger Insolvency Resolution Process cannot be made subservient to adjudication of an application under sections 241 and 242 of the Companies Act, 2013. Bankruptcy is supreme so far as triggering of Insolvency Resolution Process is concerned and same cannot be eclipsed by taking resort to remedies available under ordinary law of the land.

In the present appeal before the Hon'ble Appellate Tribunal was from one of the Director of the Corporate Debtor against the order of Adjudicating Authority admitting the Section 7 Application filed by the Financial Creditor.

30. Appeal filed under the Code cannot be treated as continued suit or proceedings pending before the Court of law

In ***AVON Capital v. Tattva & Mittal Lifespaces (P.) Ltd Company Appeal (AT) (Insolvency) No. 256 of 2017*** the Hon'ble National Company Law Appellate Tribunal ('NCLAT') while deciding an appeal on an argument made by the Respondent regarding 'no new facts have been brought to the notice of this Appellate Tribunal by the appellant' observed such submission cannot be accepted as the appeal under Section 61 of the Code cannot be treated to be continued suit or proceeding pending before the Court of law, as no decision on merit is required to be passed by the Adjudicating Authority for admitting or rejecting an application under Section 7 or 9 or 10 of the I&B Code. It is also settled law that initiation of a 'Corporate Insolvency Resolution Process' is not an adversary litigation nor is a money claim. If the application is complete and the Adjudicating Authority is satisfied that there is a 'debt' and 'default' on the part of the 'Corporate Debtor', the application is to be admitted. On the other hand, if the application is incomplete, the applicant should be asked to remove the defects failing which the application under Section 7 or 9 or 10 can be rejected.

31. Disadvantage of related party would go to promoter of Corporate Debtor as well in whose favour debt was assigned

The Hon'ble Appellate Tribunal while dismissing an appeal filed against the order of the National Company Law Tribunal, Mumbai ('NCLT – Mumbai') in the matter of ***Pankaj Yadav v. State Bank of India (Company Appeal (AT) (Insolvency) No. 28 of 2018)*** observed that the assignor' is a director of the Corporate Debtor, therefore, he was a related party **under Section 5(24) of the Code** and when an *'assignor'* assigns its debt in favor of *'assignee'* and *'assignee'* steps in shoes of *'assignor'*, rights of said *'assignee'* are no better than those of 'assignor' and, in scenarios where promoter of corporate debtor, being a related party, assigned his debt in favor of appellant, said disadvantage of 'related party' would go to appellant as well.

In the aforesaid matter directors of corporate debtor executed a personal guarantee in favor of financial creditor. Thereafter the company filed an application under Section 10 of the Insolvency and Bankruptcy Code, 2016 which was duly admitted. Subsequently, the director of the company assigned his debt in favour of the appellant. Further the appellant was inducted as member of the Committee of Creditors ('CoC') by the Resolution Professional. Financial creditor challenged said action of the Resolution Professional on ground that appellant was a 'related party'. The NCLT upheld the objection of the financial creditor. Aggrieved by the said order, the appellant filed the instant appeal.

32. Income-tax department cannot claim priority in payment from liquidation estate

The Andhra Pradesh and Telangana High Court ("Court") in ***Leo Edibles & Fats Limited vs. Tax Recovery Officer Writ Petition No. 8560 of 2018*** held that Income Tax Authorities cannot claim priority for recovery of Income Tax arrears on the grounds that order for attachment of property passed by it was prior to commencement of proceedings under Section 33 (Liquidation) of the IBC.

Further the Hon'ble High Court also rejected the submission made by the department that the moratorium under the Code would not have any effect on the attachment order passed under Income Tax Act 1961 and denied the claims of the Income tax Department over the liquidator's right to sell the assets of the Corporate Debtor as per section 33 of the Insolvency & Bankruptcy Code, 2016 ("IBC").

The Hon'ble High Court held that 'liquidation Estate' within section 36 of the IBC includes encumbered assets. Consequently, an attachment order which causes encumbrance on such asset would still be considered void under section 36 of IBC.

The Court also dealt with section 247 of the IBC which deals with 'Amendments to the Income Tax Act 1961' in the manner specified in the Third Schedule. Considering liquidation of a Company as per the Code, section 178 of Income Tax Act 1961 stands excluded by virtue of amendment to section 178(6) with effect from 1st November 2016.

On the other submission made by the Department regarding considering them at par with Secured Creditor, the Hon'ble High Court held that the claim of Income Tax Authority at par with 'secured creditor' and can only submit their claim before the liquidator, who will take recourse to distribution of the liquidation assets as per section 53(1) of the IBC.

33. Moratorium does not apply to Criminal Proceedings

The Hon'ble Appellate Tribunal while setting aside the order passed by Adjudicating Authority held in case of ***Shah Brothers Ispat Pvt Limited Vs P. Mohanraj & Ors, (Company Appeal (AT)(Insolvency) No. 306 of 2018*** held that Moratorium does not apply in case of Criminal Proceedings including Section 138 proceedings which was the issue in the Appeal. The Hon'ble Appellate Tribunal observed that as Section 138 is a penal provision, which empowers the court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be proceeding or any judgment or decree of money claim. Imposition of fine cannot held to be a money claim or recovery against the Corporate Debtor nor order of imprisonment, if passed by the court of competent jurisdiction on the Directors. The Hon'ble Appellate Tribunal further observed that infact no criminal proceedings is covered under Section 14 of the Code.

Present Status: The Appeal against the order of Appellate Tribunal is pending before Hon'ble Supreme Court however there is a stay on the proceedings under Section 138 against which the appeal was filed before the Appellate Tribunal.

34. Resolution Professional can be removed if adjudicating authority is not satisfied with his functioning:

The Appellate Tribunal in the matter of ***Devendra Padamchand Jain v State Bank of India*** **(Company Appeal (AT) (Insolvency) No. 177 of 2017)** held that apart from the Committee of Creditors, the Adjudicating Authority is also empowered to remove the Resolution Professional (RP), but it should be for the reasons and in the manner provided under the relevant section.

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