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Addressing Uncertainties in IBC:

Recommendations for Government/IBBI's Action

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Introduction

In the wake of the Supreme Court's decision to scrap JSW Steel Limited's ("***JSW Steel***") Rs.19,700 crores acquisition of corporate debtor, Bhushan Power & Steel Ltd. ("***BPSL***"), the Government of India has begun reviewing key rules under the Insolvency and Bankruptcy Code, 2016 ("***Code***"). As reported by *The Economic Times* on May 06, 2025, the Ministry of Corporate Affairs and the Insolvency and Bankruptcy Board of India ("***IBBI***") are examining gaps in procedural compliance, timelines, and stakeholder accountability. Meanwhile, *Moneycontrol* in its issue dated May 07, 2025, reports that the Government of India also has identified certain factual inconsistencies in the Court's judgment.

As you may be aware that in *Kalyani Transco v. Bhushan Power & Steel Ltd.*, the Supreme Court on May 02, 2025, ordered liquidation of BPSL, after rejecting the resolution plan, which was previously approved under the corporate insolvency and resolution process ("***Order***"). The Order highlights serious compliance lapses including delayed implementation of the approved resolution plan, an incomplete Form H, absence of exclusion or extension orders from the National Company Law Tribunal ("***NCLT***") and failure to identify preferential, undervalued, fraudulent, and extortionate transactions ("***PUFE***") etc. These lapses were deemed to have substantially undermined the integrity of the resolution process.

In this Note, we are not specifically delving into the procedural lapses identified by the Supreme Court, concerning the actions of the Resolution Professional and the Committee of Creditors ("***CoC***"), as highlighted in the Court's Order. While we concur that the Government of India/IBBI should establish and enforce stringent norms for Resolution Professionals and CoC to prevent procedural lapses in future, however, without prejudice to aforesaid lapses, we recognise that the Supreme Court's decision also raises certain critical, debatable and unresolved issues, which going forward, warrant appropriate guidance, clarification, or legislative amendment to the Code and other relevant applicable laws.

We trust that the Government of India/IBBI will consider the following suggestions/recommendations so that resolution applicant(s), who are in the process of acquiring corporate debtor(s) and/or who have already acquired corporate debtor(s) under the Code, would not have to face such uncertainties going forward and the same, we believe would be in larger interest of debt resolutions under the Code:

Enforcement Actions under PMLA Post-Approval (Section 32A and Section 60(5) of the Code)

Issue: In the aforesaid Order, the apex Court has held that NCLT and National Company Law Appellate Tribunal ("***NCLAT***") are constituted under the provisions of the Companies Act, 2013. Consequently, even if a resolution plan is approved, NCLT and NCLAT are precluded from intervening in asset attachments under the Prevention of Money Laundering Act ("***PMLA***") – a statute which is designed to govern laws under money laundering and orders passed therein comes '*within the realm of public law*'.

The resulting effect is that genuine resolution applicants, who have acquired corporate debtor through corporate insolvency resolution process ("***CIRP***") and have paid or shall pay adequate consideration to creditors of corporate debtor, will be restricted from accessing the key assets of corporate debtor. They will now be compelled to seek relief against asset attachments under the PMLA, through separate litigation, rather than through the NCLT, either under Section 32A or Section 60(5) of Code.

Our Recommendation: An amendment to the Code is sought from the IBBI and/or the Government of India to ensure the provisions of Section 32A read with, Section 60(5) of the Code are properly aligned and harmonized with the authority of the Enforcement Directorate under the PMLA. The proposed amendment may stipulate that any actions taken under the PMLA should be subject to the protections outlined in Section 32A of the Code, provided that (a) the new promoters/ successful resolution applicant ("***SRA***") have no direct or indirect connection, relationship, or conflict of interest with the erstwhile promoters of the corporate debtor, (b) the corporate debtor is acquired through the provisions of the Code, and (c) the SRA has made or will make adequate consideration to the stakeholders for such alleged assets under the approved resolution plan.

A caveat can be included to clarify that adverse actions, if imposed, may still be pursued against the ex-promoters of the corporate debtor or any third parties involved in the allegations under the PMLA. Section 32A should be specifically amended to offer protection against such PMLA actions, ensuring that the new acquirer (i.e., SRA) is not unduly impacted.

To facilitate the overall implementation of the resolution plan, it is also essential to expand the powers and jurisdiction of the NCLT in Section 60(5) of the Code, whereby NCLT can also adjudicate any question of law or facts relating to issues arising out of implementation of approved resolution plan under Section 31(1) of the Code or acquired under liquidation process to adjudicate cases involving asset attachments or any adverse actions or decisions taken by any statutory authority, including those under the PMLA. Consequently, to give effect to aforesaid suggestions, certain clarification/amendment would also be required to be made by the Government in provisions of PMLA.

Broad and open-ended concept of 'associate' and 'related party' as eligibility criteria of resolution applicants (Section 29A of the Code)

Issue: Based on the Supreme Court's finding, it is apparent that Resolution Professional has failed to ensure compliances, as required under applicable laws including, conducting adequate diligence on the eligibility of JSW Steel (i.e., SRA) under Section 29A of the Code.

Without going to the merits of the case and based on limited information available, it appears that JSW Steel and BPSL, the corporate debtor were joint venture partners in '*Rohne Coal Company Private Limited',* with JSW Steel holding 49% stake and BPSL holding 24.09% stake, apart from the other joint venture partners. According to NCLAT order dated February 17, 2020, in the same matter, it was held that, "*while 'Rohne Coal Company Private Limited' is an 'associate company' of the 'Corporate Debtor' as well as of the 'JSW Steel Limited', <u>but by virtue of both having investment in such downstream joint venture company i.e. 'Rohne Coal Company Private Limited', the 'JSW Steel Limited' and the 'Corporate Debtor' do not</u>*

become related parties of each other some joint venture" (Paragraph 60 of NCLAT order). The NCLAT further *inter-alia* held that, "*If a person becomes ineligible because of his own act, such person is not eligible to submit a 'Resolution Plan' individually or jointly or in concert with*." (Paragraph 69 of NCLAT order).

The Supreme Court has not conclusively addressed the conclusions drawn by the NCLAT regarding the eligibility of JSW Steel Limited under Section 29A of the Code. Instead, the Supreme Court highlighted that the Resolution Professional failed to adequately examine JSW Steel's eligibility under Section 29A of the Code. Additionally, it was noted that JSW Steel did not disclose this eligibility issue before the NCLT; and that the NCLAT subsequently addressed this matter directly (Paragraph 23 of Court Order).

That being said, the Supreme Court's Order does not extensively address the eligibility criteria for prospective resolution applicants in the context of a common joint venture entity. The Supreme Court quoted, *"Since, the issue of 'Related Party' was not pressed into service by the learned advocates appearing for the Appellants, during the course of hearing of these Appeals, we are not stretching the issue of "related party" any further.*" (Paragraph 18 of Supreme Court Order).

Impact: It is common for multiple entities to come together to form a joint venture arrangement ("***JV Entity***") with a shared objective. A key issue arises when one or more partners of the JV Entity or any of its connected persons become insolvent ("***Defaulting JV Partner(s***)"), while the other joint venture partner(s) and its connected persons remain solvent ("***Non-Defaulting JV Partner(s)***"). The situation becomes more complex when both the Defaulting JV Partner(s) and Non-Defaulting JV Partners hold more than 20% of the paid-up capital in the JV Entity (*and thereby coming under the ambit of an "associate company" under Section 2(6) of Companies Act, 2013*) in such JV Entity.

A question arises: If the Non-Defaulting (JV) Partners, their connected persons, and the JV Entity itself, have not defaulted on any dues or are not undergoing any CIRP proceedings, yet the Defaulting JV Partner and/or its connected persons have defaulted or are under CIRP, then does the Non-Defaulting JV Partner becomes ineligible to acquire the Defaulting JV Partner, or any of its connected persons, or any other non-related third-party entity under the Code? This, despite the Non-Defaulting JV Partner holding more than a 20% stake in the JV Entity, alongside the Defaulting JV Partner, thereby classifying them as associate companies under Section 2(6) of the Companies Act, 2013.

This issue becomes particularly critical when there is no direct or indirect connection and no potential conflict of interest between the joint venture partners in relation to the acquisition of the stressed corporate asset, apart from connection due to their respective stake in the JV Entity.

A similar issue cropped up, a few years ago in the *ArcelorMittal–Essar Steel judgement (2018*), where ArcelorMittal was required to pay Rs.8,000 crores(approx.) to clear the dues of its 'associate' entity, *Uttam Galva*, in order to become eligible to submit a resolution plan for Essar Steel.

This, along with similar challenges faced by JSW Steel, highlights how the broad interpretation of '*associate company*' and '*connected person'* has led to disqualification of bidders, with even distant associations, thereby creating legal uncertainty, discouraging potential applicants, and limiting recovery prospects for creditors. This consistent uncertainty could deter genuine bidders from participating in CIRP, reducing competition and weakening creditor recovery prospects, ultimately undermining the insolvency resolution process.

Recommendation: In the broader interest of facilitating wider investor participation and in true letter and spirit of the interpretation of eligibility criteria under Section 29A of the Code, the Government of India/IBBI should soon consider inserting an exception to the existing Section 29A thereby, providing that a non-defaulting joint venture partner and its/his connected persons should be treated as eligible to participate in the CIRP of defaulting joint venture partner(s) and/or its connected person(s) or any entirely unrelated third party entity altogether, as the case may be, subject to the following conditions: (a) the joint venture entity itself (where two partners are holding common ownership) is not in default of any debt to banks/financial institutions or not undergoing insolvency or liquidation, as the case may be; and (b) the non-defaulting partner does not own direct ownership in, and/or exercise control/management over the defaulting joint venture partner or any of its connected entities.

A caveat may be added to clarify that if the joint venture entity itself has defaulted, all partners shall be deemed ineligible for that specific joint venture entity.

Expansion of CoC's power - post the plan approval

The Supreme Court's decision has clarified that the CoC, as a juristic body, becomes *functus officio,* once the resolution plan is approved by NCLT. As such, the CoC lacks the authority to modify the resolution plan to accommodate the SRA, or to extend the timeline of performance under the approved resolution plan. This direction aligns with the *EBIX judgment (2021),* which held that an approved resolution plan is binding and cannot be modified or withdrawn by the SRA. The essence of such orders is that SRA should implement the resolution plan in the manner approved by the NCLT and cannot be modified.

However, there may be certain extraordinary circumstances where the resolution plan may not be possible to be implemented, in the manner as envisaged by the CoC and SRA, due to circumstances occurring after the approval of plan by the NCLT, and which are beyond the control of CoC or SRA and are not attributable to any default by the SRA.

Recommendation: We believe that CoC should not be rendered *functus officio,* solely upon the approval of resolution plan by NCLT. It is proposed that CoC be permitted to convene regular meetings (*with or without the Resolution Professional*, as the case may be), to oversee the functioning of the monitoring committees which is responsible checking the implementation of the resolution plan. In exceptional circumstances, arising from the approval of resolution plan (*for instance – where the corporate debtor loses ownership or possession of substantial assets of the Corporate Debtor for* *which SRA had submitted its resolution plan*) and provided that there is no default on part of the SRA, the CoC and SRA should be allowed to renegotiate (including extend) the terms of approved resolution plan. Such modifications, however, must be subject to the approval of the NCLT.

In resolution plans, it is common for the SRA to stipulate that the CoC shall receive benefits arising from PUFE transactions. However, practical challenges arise, when the CoC wishes to alter the strategy regarding the PUFE transactions, withdraw from, or settle with any respondents involved in such transactions. In such scenarios, the CoC's ability to negotiate may be hindered, if it is considered *functus officio,* merely because the resolution plan has been sanctioned by the NCLT. Therefore, it is imperative to reassess the powers of the CoC to take actions post-approval of the resolution plan.

Conclusion

We request Government of India /IBBI to consider the aforesaid recommendations favourably. The concerns highlighted in this write-up reflect persistent and growing challenges that require urgent clarification and reform by the IBBI. Addressing these issues proactively—independent of the Order’s outcome—is essential to reduce judicial uncertainty, close regulatory gaps, and restore the investor confidence. Without such measures, the credibility and effectiveness of the CIRP framework may be compromised, potentially deterring strategic investment and undermining the strength of India’s insolvency regime.

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