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APPROVAL FROM COMPETITION COMMISSION OF INDIA UNDER THE COMPETITION ACT, 2002 VIS-À-VIS INSOLVENCY BANKRUPTCY CODE, 2016: A CRITICAL ANALYSIS

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1. ABSTRACT:

In India, when a debtor is unable to meet its debt obligations, creditors have various statutory measures in the form of various legislations to recover their dues. One of the most important and the latest being- "the Insolvency & Bankruptcy Code, 2016" ("IBC"). "Financial creditors"[1], "operational creditors" and workmen[2] are eligible under the provisions of "IBC" to claim their dues from the debtor called the "Corporate Debtor". The Corporate Debtor, itself, also is eligible under the Code to voluntary undergo the resolution process[3] called the "Corporate Insolvency Resolution Process (CIRP)". The process of CIRP enables the Committee of Creditors to rehabilitate or turnaround the affairs of the Corporate Debtor instead of meagre recovery as IBC is a statute which aims for maximization of value to all stakeholders. It is only when there is no possibility of turnaround of the corporate debtor within the period stipulated for CIRP then the corporate debtor goes into liquidation post approval of Committee of Creditors (CoC) followed by an 'order of approval' from 'the Adjudicating Authority'- the National Company Law Tribunal (NCLT), under whose jurisdiction an application for initiation of CIRP is filed.

[1] The Insolvency and Bankruptcy Code 2016 s 7.

[2] *Id*., Section 9.

[3] *Id.*, Section 10.

A peculiar situation crops up when a Resolution Plan is submitted before the CoC involving combinations as stipulated under "the Competition Act, 2002" since combinations exceeding certain thresholds are required to be approved by the Competition Commission of India (CCI). The research highlights such peculiar situations and the ambiguity in law as well as practice which exists based on certain amendments and industry practice with real data.

2. KEYWORDS:

Insolvency & Bankruptcy, Corporate Debtor, Committee of Creditors, Turnaround, Competition Law, Combinations.

3. RESEARCH OBJECTIVES:

This research seeks to fulfill the following objectives:

- To examine the interplay of "the Competition Act, 2002" and the newly enacted "the Insolvency Bankruptcy Code, 2016".
- To highlight the practical problems involved in the Corporate Insolvency Resolution Process with respect to Resolution Plans involving Combinations pursuant to the Competition Act.
- To suggest measures to minimize the friction considering recent amendments, case laws and industry practices.

4. INTRODUCTION:

It is a very interesting scenario to note that within a period of 5 years since the enactment of IBC, there have been over 4,708 cases under the Code (as of September 30, 2021) out of which includes over 421 cases of successful resolution and 1,149 cases of liquidation. Though the Code is around for five years, it already has an interplay with the Competition Act, 2002 ("Competition Act"), especially for combinations. Combinations refer to the acquisitions of enterprises by other enterprises, acquiring of control or mergers of amalgamations[4]. All cases of combinations which exceed certain thresholds[5] as

[4] The Competition Act 2002 s 5.

stipulated under "the Competition Act" are to be intimated to the Competition Commission of India (CCI) for its' approval to ensure that such a transaction of combination doesn't cause an appreciable adverse effect on competition in a relevant market.

A critical issue that arises in the ecosystem of CIRP when there is a combination involving any 'acquisition, acquiring of control or merger and amalgamation' (pursuant to Section 5 of the Competition Act) arising out of any resolution plan[6] for submitted by a Resolution Applicant. Now, it may be noted that prior enactment of "the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018", ('2018 IBC Amendment), there was an ambiguity as to at "what stage of the CIRP, the notice of such a combination is to be submitted before the CCI for its' approval." This situation is crucial since in CIRP multiple resolution plans are submitted to the CoC by Resolution Applicants. In a situation, where the CoC selects the successful H1 bidder (successful resolution applicant) and sends it to the CCI for approval, for some reason, if the CCI rejects the combination or asks for modification, the entire resolution plan goes back to the CoC for fresh consideration, thereby causing delays in CIRP. Alternatively, the resolution plans involving combinations should be sent by the Resolution Applicants to the CCI prior submission to the CoC.

This ambiguity was cleared with the enactment of the 2018 IBC Amendment which inserted a proviso to Section 31 (4) of IBC. Section 31 (4) of IBC read with "Regulation 37 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016" ("CIRP Regulations") provides for obtaining of necessary approvals under relevant laws and authorities by the entity submitting the resolution plan, i.e., the Resolution Applicant "within a period of one year from date of approval of resolution plan by the Adjudicating Authority". It may be noted that the NCLT must be satisfied that "the final resolution plan submitted by the Resolution Applicant is approved by the

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[5] Id., Section 6.

[6] The Insolvency and Bankruptcy Code 2016 s 5 (26).

Committee of Creditors (CoC) in totality" and should mandatorily have provisions for "effective implementation" of the same.

However, generally speaking, the IBC provides for obtaining of approval from applicable laws by the Resolution Applicant "within a period of one year from the date of approval by the NCLT", the proviso to Section 31(4) of IBC provides that in cases of "Combinations" under "the Competition Act, 2002", the Resolution Applicant must obtain the prior sanction of "the Competition Commission of India" (CCI) before the "approval of the Resolution Plan" by CoC.

5. "RELEVANT STATUTORY PROVISIONS"- EXPLAINED:

- **Insolvency & Bankruptcy Code:**

Before dealing with the relevant provision dealing with the theme of the paper, a general process is explained here. As mentioned above, any of the creditors, may file a reference before the NCLT having jurisdiction to take up the matter. Post filing, the NCLT looks at the merit of the case and the various objections parties to the suit and then 'admits' the case and an order to that effect is passed. Further, the order "confirms the appointment of the proposed Interim Resolution Professional" (IRP), and this marks the beginning of the CIRP. The IRP further moves on with the process by causing a public announcement inviting claims from different class of creditors and initiates the process of formation of CoC. The CoC formed either confirms the "appointment of IRP as the Resolution Professional (RP)" or appoints a "new person" as RP in its' first CoC meeting to be held within 7 days of formation of CoC[7].

[7] The Insolvency and Bankruptcy Code 2016 s 22.

As the CIRP moves further, the RP invites prospective resolution applicants to submit resolution plans[8] for the resolution/rehabilitation of the Corporate Debtor as a going concern[9]. The resolution applicants submit their resolution plan based on the information memorandum prepared by the RP. Upon submission of resolution plan, the RP examines it by looking at certain parameters as prescribed before presenting the same before the CoC[10]. The CoC evaluate the qualified resolution plans and proceed with voting of the plan which is commercially viable and fulfills the interests of all stakeholders. The approved resolution plan is submitted before the Adjudicating Authority for final approval. It may be noted that the NCLT (the Adjudicating Authority) must be satisfied that "the resolution plan submitted by the Resolution Applicant is duly approved by the CoC" and as part of the plan submitted has "provisions for effective implementation of the same".

As mentioned above the proviso to Section 31(4) of IBC read with Section 6(2) of the Competition Act provides that in cases of Resolution Plan involving combinations under the Competition Act, 2002, the Resolution Applicant must prior to the approval of the same from the Committee should obtain the requisite sanction of CCI.

- **Competition Act:**

Combinations have been defined under Section 5 of the Competition Act, 2002 and refers to the acquisitions of enterprises by other enterprises, acquiring of control or mergers of amalgamations. The regulation of these combinations under Section 5 is provided under Section 6 of the Competition Act. Any "such combination" which causes or is likely to cause an "appreciable adverse effect on competition" with a relevant market in India shall be void.

[8] *Id.*, Section 25(2) (h).

[9] *Id.*, Section 5(26).

[10] *Id.*, Section 30.

The Competition Act has specified the threshold limits based on assets and turnover of the enterprises involved in the combination. In case of an acquisition or acquiring of control or merger-amalgamation (M & A), the acquirer and the target company should cross the threshold limit of "INR 2000 crores in terms of assets or INR 6000 crores in terms of turnover in India". Alternatively, the enterprises should have assets in and outside India worth USD 1 billion including "INR 1000 crores in India or turnover exceeding USD 3 billion with INR 3000 crores" made in India/India operations. In case of the entire group, the assets should exceed INR 8000 crores or INR 24,000 crores in India or assets in India or outside India aggregating to USD 4 billion with the Indian share exceeding INR 1000 crores. In case of turnover, the group should have a consolidated turnover of USD 12 billion worldwide with the Indian exposure of at least INR 3000 crores in India.

In cases of any combination exceeding the threshold limits as mentioned above, the parties to the transaction proposing the combination shall give a 30-day notice[11] to CCI under Form II of "the CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011" which should briefly mention the summary, purpose and details of combination. It should also mention the products/services, information about the size of the combination along with required documents. It may be noted that though this is the first formal step of updating the CCI about the proposed combination, in practice, the parties to the transaction approach the CCI for a pre-filing consultation for doubts and queries. However, the advice given is non-binding. The aforesaid mentioned 30 days is calculated from thirty days of:

- Assent of the combination proposal by "the board of directors" of the company.
- "Execution of the document/agreement" involving acquisition/acquiring of control of enterprises involved.[12]

[11] The Competition Act 2002 s 6(2).

[12] Id., Section 6(2).

6. INTERPLAY OF IBC & COMPETITION ACT:

The CCI observes a 'suspensory regime', where a combination cannot be implemented unless CCI has granted an approval. The maximum period stipulated for approval by CCI under Competition Act is 210 days[13]. This time period is definitely not in consonance with the timelines of CIRP. This was a major issue prior to the 2018 IBC amendment where it was unclear as to the stage where the approval from CCI is to be sought.

However, despite the amendment, the judicial pronouncements have frequently held the prior approval of CCI to be 'discretionary' in nature. In *ArcelorMittal India Pvt. Ltd. v. Abhijeet Guhathakurta*[14], the National Company Law Appellate Tribunal (NCLAT) very rightfully held that "it is open to the CoC which looks into viability, feasibility and commercial aspect" of a resolution plan" and therefore, the unsuccessful Resolution Applicant had no fundamental right to challenge the plan approved by CoC. However, the NCLAT made a remark that the requirement of approval from CCI as per "the proviso to Section 31 (4) of the IBC being directory and not mandatory" sparks some controversy. The successful Resolution Applicant whose Resolution Plan was approved by the CoC and further ratified by the Adjudicating Authority did not have a CCI approval as on the date of approval by the CoC which is a clear violation of the proviso to Section 31 (4) of IBC.

In the CIRP of Dighi Port Limited (Corporate Debtor)[15], Vishal Kalantri, the erstwhile promoter of the corporate debtor had preferred an appeal before the NCLAT challenging the order passed by NCLT,

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[13] Id., Section 31.

[14] *ArcelorMittal India Pvt. Ltd. v. Abhijeet Guhathakurta* [2019] 524. Company Appeal (AT) ; Company Appeal (AT) (Insolvency) No. 524/2019.

[15] *Vishal Vijay Kalantri vs Shailen Shah* [2020] 466. Company Appeal (AT); Company Appeal (AT) (Insolvency) No. 466 of 2020.

Mumbai Bench for approving the Resolution Plan submitted by Adani Ports Special Economic Zone Ltd. as no permission from CCI has been received by the Resolution Applicant prior to the approval of the plan by the CoC. There were other contentions with respect to the commercial viability in evaluation of the Resolution Plan which obviously cannot be reassessed by NCLAT. With respect to the non-approval of the resolution plan which involved combination by the CCI, the NCLAT held that though the bare reading of the provision makes the requirement of approval of CCI mandatory but "treating such requirement as mandatory is fraught with serious consequences". NCLAT relied on the its' own decision in Arcelor Mittal India Pvt. Ltd. to dilute the mandatory requirement of the approval from CCI. NCLAT also observed that under Section 31(4) of IBC, though all necessary approval required to be taken by the Resolution Applicant can be obtained "within a period of one year from the approval by the Adjudicating Authority". In cases of combination 'under the ambit of the Competition Act, 2002', the IBC mandates taking prior approval from CCI and therefore, treats it as a "class apart". This was yet another judicial decision which interpreted the mandatory requirement of CCI approval as discretionary in nature.

- **Conclusive Document in IBC vis-à-vis. Competition Act:**

As part of CIRP, various Resolution Plans are submitted by prospective resolution applicants after the RP has caused publication inviting interested and eligible potential resolution applicants for submission of "resolution plan for resolution of the Corporate Debtor" as a going concern under the aegis of IBC.[16]

The resolution plan is not a conclusive or a "binding" document unless it is scrutinized by the RP, followed by approval from CoC and the Adjudicating Authority.[17] "In *Rahul Jain v. Rave Scans (P)*

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[16] The Insolvency and Bankruptcy Code 2016 s 25(2)(h).

[17] *Id.*, Section 31.

Ltd.,[18] the honorable Supreme Court of India allowed the appeal filed by the Resolution Applicant challenging the order passed by NCLAT modifying the Resolution Plan, approved by the CoC and the Adjudicating Authority". In this case, one of the financial creditors-Hero Fincorp Ltd. ("Hero") had challenged the Resolution Plan on account of differential treatment accorded to Hero as it was a dissenting creditor before NCLAT. The NCLAT relied on various legal provisions and precedents and ultimately directed for modification of the Resolution Plan. The Resolution Applicant approached the Supreme Court challenging the impugned order of NCLAT. The Supreme Court held that "once the resolution plan is accepted by CoC and the Adjudicating Authority, the concerned Resolution Plan attains finality and is binding on all stakeholders in the CIRP".

In case of the Competition Act, meaning of a final, "conclusive or binding document" is different. The concept of binding document is not expressly defined under the Indian Competition Law. As mentioned earlier, in cases of Resolution Plans involving "Combinations", the Resolution Applicant must take "prior approval of the CCI before approval by the CoC and the Adjudicating Authority". A combination involving a proposition for Merger/Amalgamation having been "approved by the Board of Directors"[19] of the enterprises or "execution of any agreement" or "other document" involving acquisition or acquisition of control[20]. These situations are called "trigger events". "Other document" refers to "any binding document, by whatever name called, conveying an agreement or decision to acquire control shares, voting rights or assets".[21] In light of the growing complexities in the business world, "the Draft

[18] *Rahul Jain v. Rave Scans (P) Ltd* [2019] 7940 Civil Appeal (SC).

[19] The Competition Act 2002 s 6(2)(a).

[20] Id., Section 6(2)(b).

[21] The Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations 2011 Reg. 8.

Competition (Amendment) Bill, 2020" inserts the same exact words of Regulation 8 of the Combination regulations, 2011.

7. IMPORTANCE OF AMENDMENT OF 2018 IN THE IBC AND IMPACT ON COMPETITION LAW:

The situation before the amendment of 2018 was that the requirement of approval from CCI was kept under the general category of authorities from whim the Resolution Applicant shall obtain necessary statutory approvals. With the 2018 IBC amendment, a mandatory stipulation was made to obtain approval of CCI for securing sanction for Combinations involved in a resolution plan at a certain stage.

- **Scenario pre amendment:**

As mentioned above, "prior to the 2018 IBC amendment", the necessity of obtaining approval from CCI was given under "Regulation 37 (1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016" under a "general category". Further, there was no stipulated time limit within which approvals are required to be secured.

In "the Insolvency Law Committee Report of March, 2018" ('2018 Insolvency Report'), it was pondered and deliberated that sanction of CCI may be dealt under specific regulations for ensuring accelerated approvals from CCI. Post consultations with CCI, it was decided that "CCI will have a time frame of 30 working days" from the notice of combination filed before the CCI to ascertain whether such combination would cause an appreciable adverse effect on competition in that relevant market. And in exceptional cases, the period may be extended for another 30 days.

The 2018 Insolvency Report treats approval from CCI as a distinct/separate class from the other general category. This is apparent from the discussions and deliberations made by the Committee specifically with respect to securing approval from CCI and also developing a fast-track mechanism for obtaining approval.

It also may be noted that the concept of mandatory or binding document for the purpose of CCI is the resolution plan involving combinations submitted before the Resolution Professional. CCI would investigate and evaluate the combination vis-à-vis the resolution plan and if it is determined that the combination would cause an appreciable adverse effect on the relevant market, the CCI may hold the combination to be void.

Further, prior to "the Insolvency and Bankruptcy Code (Amendment) Act, 2019", ('2019 IBC Amendment'), in the event "if the specific resolution plan is not approved by the CoC and the Adjudicating Authority within the stipulated 180 days plus 90 days[22] from the date of commencement of CIRP, the corporate debtor would compulsorily go into liquidation". In a situation, where CCI rejects or modifies any combination emerging out of a resolution plan, pursuant to the powers of CCI, the resolution applicant would need to "submit a fresh new resolution plan" before the CoC for thought. Such a scenario would defeat the very object of the IBC to adhere to strict timelines to ensure the preservation of the "corporate debtor as a going concern". As a result of this, many approvals were sought from CCI both before and after approval of CoC which brings in ambiguity.[23] For instance, in the CIRP of Electrosteel Steels Ltd. (ESL), the CoC had approved the Resolution Plan submitted by Vedanta Ltd. (H1 bidder) which was in turn sent to the Adjudicating Authority, i.e., the NCLT, Kolkata for final approval. However, the Resolution Plan was approved at a stage by the Adjudicating Authority when CCI's approval/review was pending. Now, this can lead to serious consequences. Imagine a situation where CCI

[22] The Insolvency and Bankruptcy Code 2016 s 12.

[23] ' Second-amendment-to-insolvency-and-bankruptcy-code- 2016- addressing- the-conundrum-around-cci-clearance ' (SCC Online) < https://www.scconline.com/blog/post/2019/06/04/ second-amendment-to-insolvency-and-bankruptcy-code- 2016- addressing- the-conundrum-around-cci-clearance /> accessed 15 December 2022.

rejects the plan submitted by the H1 bidder-Vedanta Ltd., it would lead to compulsory liquidation of ESL since the CIRP period as stipulated in the IBC was over. This could lead to 'gun-jumping'.[24] Furthermore, gun-jumping has severe consequences under "Section 43A of the Competition Act, 2002" which stipulates "a penalty which may go up to 1% of the total turnover or assets, whichever is higher."[25] Further, as per Section 42 (2) of the Competition Act, upon failure to comply with orders or directions of the CCI without reasonable cause there shall be "punishment with fine which may extend to INR 1 Lakh for each day during continuance of non-compliance upto INR 10 Crores. Further, non-compliance may amount to a punishment with imprisonment for a period upto 3 years or fine which may extend to INR 25 Crores or both. This would also disqualify the Resolution Applicant to submit Resolution Plans pursuant to Section 29A of IBC".

All this uncertainty necessitated the requirement of the 2018 amendment which would not only talk about approval of CCI but also as to the stage when the approval is required to be obtained.

- **Scenario post amendment:**

All the above ambiguities were addressed with the 2018 IBC amendment by insertion of Section 31 (4) of IBC which states that "the resolution applicant shall mandatorily" be required to obtain the approvals from all relevant laws and bodies, pursuant to "the approval of resolution plan under Section 31(1), within a time frame of one year from the date of the approval by the Adjudicating Authority or within such time as stipulated in such law, whichever is later". The

[24] 'Gun jumping' is by-passing of statutory requirements of competition law legislation in a relevant jurisdiction. In India, if the combination exceeds the prescribed thresholds, clear approval from CCI is required. If such transactions are undertaken without disclosing to the CCI, it would amount to gun jumping. See Jame R. Modreali & Stefhano Ciulilo, ' Gun- Jumping and EU Merger Control' [2003] E.C.L.R. 424.

[25] The Competition Act, 2002 s 43A.

"proviso to Sub-section 4 of Section 3 of IBC", specifically deals approval of combinations from CCI. It provides that where a resolution plan involves combination as stipulated under the Competition Act, "the resolution applicant shall be required to be equipped with the prior approval of the CCI before the approval of the resolution plan by the CoC."

The requirement for this 2018 amendment was also on account of the observations in the First Insolvency Law Committee Report (FICLR) especially fast tracking of the approval process from CCI involving combinations in the resolution plan. The observation made it apparent that approval of CCI was treated as a separate class.[26] Though the FICLR did not provide for the timeline or stage when the approval needs to be obtained, the 2018 IBC amendment did go a long way to address the issue by making a specific exception for combinations out of resolution plans. The specific exception made emphasises the importance of the approval from CCI and the stage has to be 'prior' to CoC's approval. The benefit of this would be for the CIRP as the CoC would be provided with the approved resolution plans from CCI (involving combinations) for consideration and would reduce the chances of the CIRP going into liquidation.

8. APPROVAL OF CCI- JUDICIAL INTERPRETATIONS:

Despite the legislation's intent and enactment of proviso to Section 31 (4) of IBC with regard to the requirement of taking approval from CCI, the judicial trend has treated the provision to be directory in nature. In *Arcelormittal India Pvt. Ltd v. Abhijit Guhathakurta*[27], "notice of the combination involving resolution plan" was referred to the CCI after approval by CoC. The Appellate Authority (NCLAT) observed that the requirement of the prior approval of CCI before the approval from the CoC is discretionary in nature and it is upto the CoC to look at "the viability, feasibility, and commercial aspect"

[26] The Insolvency Law Committee Report, March 2018.

[27] *Arcelormittal India Pvt. Ltd v. Abhijit Guhathakurta* [2019] (NCLAT).

of a "resolution plan subject to approval of CCI which '*may'* be obtained prior to the approval of the resolution plan by the NCLT under IBC." The word 'may' indicates that the judicial has diluted the mandatory requirement of approval of the CC.

In *Vishal Vijay Kalantri v. Shailen Shah*[28], no approval from CCI was sought since the combinations in the resolution plan did not exceed the threshold limits stipulated in the Competition Act, 2002. The NCLAT made a similar observation stating that even though it is clear that resolution plan involving combinations have been treated as a separate class apart from the requirement of other approvals under Section 31(4) of IBC which requires approval of CCI before the approval of the resolution plan by the CoC. However, considering this to be a mandatory condition can have serious consequences.

Similar view was also taken in "*Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta*"[29] ('CIRP of Essar Steel') whereby the Honorable Supreme Court struck down the word 'mandatorily' for being arbitrary "for delays not attributed to the Corporate Debtor". The Apex Court also held the provision to be unreasonable as it interferes the right of the Corporate Debtor to "carry on trade or occupation" under "Article 19 (1)(g) of the Constitution of India".

It is interesting to note that despite the legislature's intent to consider the approval from CCI a "separate class apart" from those of other approvals under Section 31(4) of IBC, the judiciary has treated this requirement to be in the same class. The legislature expressly stated that not only the approval of CCI is to be treated as a separate class but also mentioned "the exact stage at which when the approval needs to be taken, i.e., prior to the CoC's voting on the resolution plan". In simple words, when the Resolution Plan will be kept for voting before the CoC, it would be equipped with the requisite article from CCI.

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[28] *Vishal Vijay Kalantrii v. Shailen Shah* [2020] (NCLAT).

[29] *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta* [2020] 8. SCC 531 (SC).

However, as per the law of the land as on today- "approvals from CCI may be taken even after the CoC has casted its vote on the resolution plan. If CCI raises any objection or grants a conditional sanction, CoC won't have the discretion to evaluate other resolution plans". Also, if the CCI were to reject the resolution plan involving combination outrightly, "fresh resolution plans" must be submitted before the CoC which would defeat the prime objective of IBC to adhere to strict timelines and ensuring value maximization.

Therefore, the most sensible way of approach is "sending the notice of combination to CCI" just "at the point of the trigger event" which is right before the "*submission of the Resolution Plan*" to the CoC (since onus is on the Resolution Applicant). This process has been observed from various industry practices as well as certainty to the Resolution Applicant as well as other stakeholders in the CIRP.