

INSOLVENCY AND BANKRUPTCY MOOT COMPETITION

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MOOT PROPOSITION

M/s. ImperiumSteel and Power Limited (“**ISPL**”) is an Indian steel manufacturing company promoted by the brother-sister duo of Mr. Rajiv Kumar and Ms. Anjali Kumar. ISPL was incorporated in the year 1994 under the Companies Act, 1956 with the Registered Office in Delhi. The company began its operations with a small portfolio of steel fabrication works mostly in and around the National Capital Region. Prior to its incorporation, the company was run as a sole proprietorship of Mr. Rajiv Kumar. Under his able stewardship, the entity had soon started turning profits. Ms. AnjaliKumar, on the other hand, is an expert in project finance. Owing to her stint as a project finance consultant, she had developed a reliable network of top bankers in the country.

Upon witnessing the success of the sole proprietorship, the brother-sister duo incorporated the proprietorship concern into a company. Whereas Mr. Rajiv Kumar was anointed the Chief Executive Officer as he took charge of the operations of the company, Ms. Anjali Kumar was anointed the Chief Financial Officer as she managed the finances of the company. ISPL showed good potential in the beginning. Aided by the generous credit facilities extended by its lenders, the company slowly and steadily expanded its operations from steel fabrications to steel manufacturing. In the 20 years since its incorporation, the company managed to set up several manufacturing facilities in Odisha and Chhattisgarh which

deployed cutting edge technology in the manufacturing of steel. In order to address the unreliable and often costly power supply, the company set up captive thermal plants in their facilities. In the year 2014-15, the company had an installed production capacity of 15 MTPA, while operating at about 95% capacity utilization, even exporting a quarter of their output.

Though, originally, captive thermal plants were set up to aid the manufacturing of steel, with a regular supply of coal from nearby mines, the plants were able to generate power throughout the year. With the potential for surplus power generation, the company decided to incorporate a subsidiary, M/s. Imperium Energy Limited (“**IEL**”), to run the power plants. Since the power supply from local discoms was unreliable, various establishments approached IEL for their power needs. IEL entered into a medium-term Power Purchase Agreement with M/s. Vivek Shopping City Ltd (“**VSCL**”), which runs a shopping complex in Raipur. Since IEL was a mere shell company incorporated to formalize the power trading of the captive plants, VSCL insisted on a guarantee from ISPL for the obligations of IEL under the PPA. The PPA between IEL and VSCL was signed, endorsed and guaranteed by ISPL. Notably, the PPA contained an arbitration clause. IEL had no assets other than the thermal power plants and it was reliant entirely on the manpower provided by ISPL for its operations.

Upon the success of the company, the top management, including the promoters, were handsomely rewarded with hikes in salaries, bonuses, company stock options, etc, though the average worker in the company only saw a 0.5% increase in her salary. As of 31.03.2017, Mr. Rajiv Kumar had a net worth of INR 90 Crores, whereas Ms. Anjali Kumar had a net worth of INR 100 Crores.

The shares of ISPL are listed on all major stock exchanges of India. Having a face value of INR 10 each, the shares of ISPL are traded favourably indicating the sound financials of the company as well as the investor-confidence in the company.

In 2014, ISPL ventured to expand its business beyond India by way of acquiring interest in a steel smelter plant in Uganda and entering into a joint venture with an industrial manufacturing company in the Netherlands. ISPL acquired a 66% stake in Africa Smelters Limited (“ASL”) to take-over control and manage the Uganda smelter plant. For financing & working capital, loans were taken by ASL from African Bank in Uganda in the year 2014 to the tune of USD 15,000,000 at the rate of 9% interest per annum.

In the year 2015, ISPL entered into another Joint Venture, namely, Imperium Dutch N.V. (“IDN”) with Dutch Alloys Company, (“DAC”), a Netherlands based corporate group having interests in manufacturing steel, alloys, automotive and Industrial Technology and Consumer Goods. In IDN, 60% share was held by ISPL and 40% by DAC. For financing and working capital, IDN secured credit facilities from Deutsche Bank in the Netherlands in the year 2015 to the tune of USD 25,000,000 at the rate of 7% interest per annum.

In September 2016, ISPL transferred 10% shareholding in ASL to RA Inc., whose market value, at the time of transfer, was around Rs. 25 crores. The shares were transferred in lieu of services and consultancy provided by RA Inc. RA Inc. was a registered in Mauritius as a consultancy company, 95% of its shares were with Mr. Rajiv Kumar and Ms. Anjali Kumar.

The steel industry is highly capital intensive and the role played by banks in the success of ISPL cannot be overstated. When the company began its operations in steel manufacturing, the company had very few assets to mortgage. Over the years, in addition to the mortgage of all its immovable properties, the banks demanded personal guarantees from the promoters, namely, Mr. Rajiv Kumar and Ms. Anjali Kumar, to secure the loans granted to ISPL. Seeing that ISPL had strong revenue inflows, the promoters saw no reason to worry and without hesitation executed the personal guarantees in favour of the consortium lenders. ISPL was regular in servicing its financial debts, which as of 31.03.2017 stood at INR 1500 Crores.

In the year 2017, on account of various geo-political reasons, there emerged a trade-war between some of the developed nations. This dealt a disruptive blow to commerce all over the world, especially the developing nations. The steel industry in India also suffered as a result of this. Cheaper steel came to be imported to India from China, Korea and other countries which drove the price of domestically manufactured steel down to unsustainable levels. The steel industry was already struggling on account of issues relating to raw material supply, rising cost of power, etc. With the supply far exceeding the demand, many domestic steel manufacturing units suffered. ISPL was one such company that found itself in doldrums following these developments.

In September 2018, ISPL defaulted for the first time in servicing its debts to the consortium lenders. The capacity utilization in the manufacturing units of ISPL had also dropped to 60% by that time. On top of this, the company defaulted on salary payments to the workers at its manufacturing unit in Odisha for around six months. These workers were

assured employment at this unit based on a Rehabilitation and Resettlement Scheme under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. This led to a series of protests at the manufacturing unit in Odisha. Due to the sensitive nature of the protests, the local administration sided with the workers and demanded ISPL to make the payments immediately. For the next three months, ISPL made several attempts to restructure its loans with the consortium lenders and also to raise some working capital to meet its operational expenses. However, with bleak prospects of revival in the steel industry, the banks had no incentive to restructure the debts. The company also failed to raise working capital as all the assets of ISPL were already under some charge or the other. Driven to such dire straits, the company had no option but to declare insolvency.

ISPL moved an application under Section 10 of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) which was admitted vide Order dated 15.01.2019 by the Adjudicating Authority in Delhi. Vide the same Order, Ms. Rosemary Joseph was appointed as the Resolution Professional for ISPL. Pursuant to the public announcement, all the creditors submitted their claims before the Resolution Professional. Among other creditors, Vivek Shopping City Limited (“**VSCL**”), the company from Raipur filed a claim of INR 10 crores. Upon verification, Ms. Rosemary found that the claim of VSCL is arising out of unliquidated damages claimed, *inter alia*, for breach of contract and loss of business under the PPA. Admittedly, the PPA was not performed upon by IEL, but the PPA did not provide any stipulation for fixed compensation for breach of contract. The RP refused to admit the claim and directed VSCL to approach an arbitral tribunal and to subsequently file a claim for a crystallized amount as per the award of

the arbitral tribunal. Aggrieved by this, VSCL moved an application before the Adjudicating Authority for admission of their claims in entirety.

The list of creditors prepared by the Resolution Professional is as presented below:

| Particulars | Principal Amount (in INR crores) | Total Due Amount as at 15.04.2018, inclusive of interest. (in INR crores) |
|------------------------------|---|--|
| Financial Creditors | | |
| People's Bank | 668 | 700 |
| PSP Bank | 335 | 350 |
| SCB Bank | 136 | 150 |
| RST Bank | 287 | 300 |
| Operational Creditors | | |
| XYZ Security Agency | 3.5 | 4 |
| Raw Material Suppliers | 48 | 50 |
| Employees and Workmen | 5.2 | 6 |
| Other Operational Creditors | 58 | 60 |
| Total | 1540.7 | 1620 |

Towards the end of 2017, the business of IDN had started failing, mostly on account of the high cost of production, as similar products were being made available in market that were primarily manufactured in China and Vietnam. Apart from this, there were certain management issues as well, as ISPL, being primarily in control of IDN, was unable to devote the specialized focus required. In July 2018, IDN defaulted on its loan obligations secured from Deutsche bank. In October 2018, the lenders commenced legal proceedings against IDN in the Netherlands and were placed in administration of assets of IDN. The valuation of IDN was felt to be insufficient to satisfy the loan obligations, hence in December 2018, Mr. Heinrich Dexter, the court appointed administrator of IDN, filed an insolvency application before the Adjudicatory Authority in India notified for filing of cross-border insolvency claims. Mr. Heinrich Dexter also sought recognition of the Stay order, granted by the Dutch Bankruptcy court including the rights and relief available under the law.

Meanwhile, the RP, Ms. Rosemary Joseph, had applied to the Adjudicatory Authority to grant suitable order for taking control of the ISL in Uganda and including its valuation for the purpose of Resolution Plan. ISL had defaulted to African Bank in Uganda, and in December 2018, the African Bank had applied to the Uganda Court to seek administration over the estate of ISL. The Adjudicating Authority had passed a suitable order in favour of the RP, however, the Uganda authorities refused to recognize the order passed by the Adjudicating Authority/NCLT.

Upon issuance of invitation for resolution plans, several companies came forward to submit resolution plans, primarily because of the cutting-edge technology deployed at the manufacturing units of ISPL and the high production capacity at these units. After the initial round of bidding, two

resolution plans were shortlisted for the final round of negotiations. The first of these plans was submitted by Ferro Dynamics Ltd (“**FDL**”), a U.S.-based company. The second was submitted by Durga Ispat and Power Ltd (“**DIPL**”), an Indian company.

The plan submitted by FDL proposed an upfront cash payment of INR 1200 crores. A further debt of INR 100 crores was proposed to be repaid over a period of 10 years in equal installment of quarterly payments. Their plan also promised a capital infusion of INR 200 crores, but the source of this capital infusion was shown to be a credit facility to be availed from a financier. The terms of this credit facility was not made clear at the time, but FDL showed a commitment letter from the concerned financier for the amount of INR 200 crores. The remaining due amount, i.e., INR 320 crores was proposed to be written down to nil. Out of the upfront cash payment of INR 1200 crores, INR 65 crores was set aside for payment to all operational creditors on a proportional basis.

The plan submitted by DIPL proposed an upfront cash payment of INR 1000 Crores. A further debt of INR 300 crores was proposed to be converted into equity in the form of Compulsorily Convertible Preference Shares (“**CCPS**”) that are redeemable at the option of the holders after a period of 3 years. During the negotiations, the DIPL stated that on optimal business conditions, the lenders will be able to recover the entirety of INR 300 Crores, if not more, upon redemption of the CCPSs after a period of 5 years. The plan also proposed a capital infusion of INR 100 Crores immediately on approval of the plan by the Adjudicating Authority in order to kick-start the company into operation. The remaining debt of INR 320 crores was proposed to be written down to nil. The disbursements as well as the haircut in favour of the financial creditors proposed under the

resolution plan were in proportion to the respective debts of the financial creditors. Out of the proposed upfront cash payment of INR 1000 crores, only 60 crores were set aside for payment to operational creditors. Amongst the operational creditors, the plan proposed to pay the Employees and Workmen their full claim amount, i.e., INR 6 crores, whereas the raw material suppliers were promised a payment of 90% of their claim amounts, i.e., INR 45 crores. At the same time, all other operational creditors were paid only the liquidation value. DIPL reasoned that employees and workmen as well as the raw material suppliers were proposed to be paid more in view of the fact their continued cooperation is crucial for the revival of the corporate debtor.

After much deliberation, the Committee of Creditors (“**CoC**”) finalized the resolution plan submitted by DIPL. Before approval of this plan, upon the request of the members of the CoC a specific clause, i.e., Clause 15 was included in the resolution plan. Clause 15 stipulated that the resolution plan does not extinguish the rights of lenders to invoke any guarantees executed to secure the debts of the corporate debtor. The said clause also stipulated that upon approval of the resolution plan any rights, including the rights of subrogation that the guarantors may have against the corporate debtor, shall be extinguished.

Finally, the Committee of Creditors (“**CoC**”) approved the resolution plan submitted by DIPL. Subsequent to the approval by CoC, the plan was placed before the Adjudicating Authority for approval. At this stage, FDL approached the Adjudicating Authority challenging the approval of the plan submitted by DIPL. FDL alleged that the resolution plan proposed by FDL was far superior to the plan submitted by DIPL and sought a direction to the CoC to re-examine the plan. Certain operational creditors, who were

being paid only the liquidation value, had also approached the Adjudicating Authority challenging the approval of the resolution plan on the ground that the plan submitted by DIPL is discriminatory in nature. DIPL as well as the CoC opposed these challenges. During the course of the hearing, the Adjudicating Authority passed an interim order directing some changes in the approved resolution plan especially on the payments to be made to the operational creditors. DIPL and the CoC sought the revocation of this interim order on the ground that the Adjudicating Authority does not have the power to change the terms of the resolution plan as only the CoC has the power to negotiate the terms of a resolution plan.

During the pendency of the above applications before the Adjudicating Authority, the Financial Creditors of ISPL served a notice on Mr. Rajiv Kumar and Ms. Anjali Kumar invoking the personal guarantees executed by them to secure the debts of ISPL. The said notice mentioned an amount of INR 520 crores, which was inclusive of INR 320 crores that was written down to nil under the resolution plan. Upon thorough valuations and diligence, the Financial Creditors estimated that the CCPSs, upon redemption, are likely to yield only around 100 crores and as such, the remaining 200 crores is liable to be recovered from the guarantors. Mr. Rajiv Kumar and Ms. Anjali Kumar objected to this notice in their reply, stating that once the resolution plan is approved, all the liabilities of the Corporate Debtor are deemed to be extinguished. They contended that the personal guarantees were executed prior to the initiation of the resolution process of the corporate debtor and they were executed in their capacity as promoters of the company. It was contended that since the control and management of the corporate debtor has been handed over to a new entity,

the personal guarantees could not validly be invoked, especially when the consequent right of subrogation has been taken away.

Despite these objections, the banks proceeded to file applications against Mr. Rajiv Kumar and Ms. Anjali Kumar under before the Adjudicatory Authority. Aggrieved by this, Mr. Rajiv Kumar and Ms. Anjali Kumar moved an application before the Adjudicating Authority challenging the approved resolution plan. They contended that upon approval of the resolution plan, their liabilities as guarantors have been extinguished. They also challenged the validity of clause 15 of the approved resolution plan. Apart from the above, both Mr. Rajiv Kumar and Ms. Anjali Kumar filed separate individual applications under section 94 of the Insolvency and Bankruptcy Code to initiate insolvency resolution process for themselves before the Adjudicating Authority on the ground that they cannot possibly fulfill the personal guarantees executed by them to secure the debts of the corporate debtor. The banks have opposed these applications.

Financial position of Mr. Rajiv Kumar and Ms. Anjali Kumar is as follows:

| Particulars | Mr. Rajiv Kumar | Ms. Anjali Kumar |
|--------------------------------------|-----------------|------------------|
| Residential Property in Delhi | 15 | 10 |
| Farmhouse at Mumbai | 20 | 20 |
| Commercial Properties | 25 | 25 |
| Gold & Diamond ornaments | 10 | 25 |
| Gold & silver coins, diamond jewelry | 10 | 10 |

| | | |
|--|-----------|------------|
| pertaining to religious deity figurines & objects of worship | | |
| FDs, Bonds | 8 | 8 |
| Life Insurance Policy | 2 | 2 |
| | | |
| Housing Loan | 10 | 10 |
| | | |
| Total | 90 crores | 100 crores |

The Adjudicating Authority has fixed the date of 11th November 2019, for hearing all the issues arising in this company petition.

Issues:

On the above facts, the following issues arise for consideration before the Adjudicating Authority:

1. Whether it was permissible for the Resolution Professional to reject the claim of VSCL?
2. Whether the Adjudicating Authority shall approve the resolution plan submitted by DIPL?
 - a. Whether the Adjudicating Authority shall allow the application of FDL on the ground that the plan proposed by FDL is superior to that of DIPL?

- b. Whether the Adjudicating Authority shall allow the application of certain Operational Creditors on the ground that the plan proposed by DIPL is discriminatory in nature?
 - c. Whether the Adjudicating Authority shall allow the application filed by the promoters challenging the validity of clause 15 of the approved resolution plan?
3. Whether the Adjudicating Authority has the power to direct changes in the successful resolution plan without the approval of the CoC?
4. Whether the Applications filed by Mr. Rajiv Kumar and Ms. Anjali Kumar for initiating bankruptcy are liable to be admitted?
5. Issues on cross border insolvency: -
 - a. Recognition of application by Mr. Heinrich Dexter and the relief by Adjudicatory Authority in India
 - b. Recognition of the NCLT order in Uganda
 - c. Place of Main proceedings

Apart from the issues delineated above, participants are free to agitate any other issues, including those on maintainability and jurisdiction.

N.B.: The Memorandum should contain a narration of the issues along with authorities. This need not be from any particular side. Details in a separate document. In the prelim rounds, the teams will likely plead from all the possible scenarios. Prelim round 1 is likely to be based solely upon issues related to cross-border insolvency.