Mobilox Innovations Private Ltd vs Kirusa Software Private Ltd on 21 September, 2017

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Bench: Sanjay Kishan Kaul, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9405 OF 2017

Mobilox Innovations Private Limited … Appellant

Versus

Kirusa Software Private Limited … Respondent

JUDGMENT

R.F. Nariman, J.

1. The present appeal raises questions as to the triggering of the Insolvency and Bankruptcy Code, 2016 when it comes to operational debts owed to operational creditors. The appellant was engaged by Star TV for conducting tele-voting for the “Nach Baliye” program on Star TV. The appellant in turn sub-

contracted the work to the respondent and issued purchase orders between October and December, 2013 in favour of the respondent. In the “Nach Baliye” program, the successful dancer was to be selected on various bases, including viewers’ votes. For this purpose, the respondent was to provide toll free telephone numbers across India, through which the viewers of the program could cast their votes in favour of one or more participants. For this purpose, a software was customized by the

respondent, who then coordinated the results and provided them to the appellant. Since the respondent obtained toll free numbers from telephone operators in terms of the purchase orders, the appellant was liable to make payment of rentals for the toll free numbers, as well as primary rate interface rental to the telecom operators. The respondent provided the requisite services and raised monthly invoices between December, 2013 and November, 2014 – the invoices were payable within 30 days from the date on which they were received. The respondent followed up with the appellant for payment of pending invoices through e-mails sent between April and October, 2014. It is also important to note that a non-disclosure agreement (hereinafter referred to as the NDA) was executed between the parties on 26th December, 2014 with effect from 1st November, 2013.

2. More than a month after execution of the aforesaid agreement, the appellant, on 30th January, 2015, wrote to the respondent that they were withholding payments against invoices raised by the respondent, as the respondent had disclosed on their webpage that they had worked for the "Nach Baliye" program run by Star TV, and had thus breached the NDA. The correspondence between the parties finally culminated in a notice dated 12th December, 2016 sent under Section 271 of the Companies Act, 2013. Presumably because winding up on the ground of being unable to pay one's debts was no longer a ground to wind up a company under the said Act, a demand notice dated 23rd December, 2016 was sent for a total of Rs.20,08,202.55 under Section 8 of the new Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code). By an e-mail dated 27th December, 2016, the appellant responded to the aforesaid notice stating that there exists serious and bona fide disputes between the parties, that the notice issued was a pressure tactic, and that nothing was payable inasmuch as the respondent had been told way back on 30th January, 2015 that no amount will be paid to the respondent since it had breached the NDA.

3. An application was then filed on 30th December, 2016 before the National Company Law Tribunal under Sections 8 and 9 of the new Code stating that an operational debt of Rs.20,08,202.55 was owed to the respondent.

4. On 19th January, 2017, the respondent was orally intimated to remove a defect in the application, in that it did not contain the appellant's notice of dispute. This was rectified by an affidavit in compliance dated 24th January, 2017, by which various other documents were also supplied by the respondent to the Tribunal. On 27th January, 2017, the Tribunal dismissed the aforesaid application in the following terms:

> "On perusal of this notice dated 27.12.2016 disputing the debt allegedly owed to the petitioner, this Bench, looking at the Corporate Debtor disputing the claim raised by the Petitioner in this CP, hereby holds that the default payment being disputed by the Corporate Debtor, for the petitioner has admitted that the notice of dispute dated 27th December 2016 has been received by the operational creditor, the claim made by the Petitioner is hit by Section (9)(5)(ii)(d) of The Insolvency and Bankruptcy Code, hence this Petition is hereby rejected."

5. An appeal was then filed before the National Company Law Appellate Tribunal which was decided on 24th May, 2017.

This appeal was allowed in the following terms:

> "39. In the present case the adjudicating authority has acted mechanically and rejected the application under sub-section (5)(ii)(d) of Section 9 without examining and discussing the aforesaid issue. If the adjudicating authority would have noticed the provisions as discussed above and what constitutes 'dispute' in relation to services provided by operational creditors then it would have come to a conclusion that condition of demand notice under sub-section (2) of Section 8 has not been fulfilled by the corporate debtor and the defence claiming dispute was not only vague, got up and motivated to evade the liability.
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> 40. For the reasons aforesaid we set aside the impugned order dated 27.1.2017 passed by adjudicating authority in CP No.01/I &BP/NCLT/MAH/2017 and remit the case to adjudicating authority for consideration of the application of the appellant for admission if the application is otherwise complete.
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> 41. The appeal is allowed with the aforesaid observations. However, in the facts and circumstances there shall be no order as to cost."

6. Shri Mohta, learned counsel on behalf of the appellant, raised various contentions before us. According to learned counsel, the application should have been dismissed on the ground that the operational creditor did not furnish a copy of the certificate from a financial institution, viz. IDBI in the present case, that maintained accounts of the operational creditor, which confirmed that there is no payment of any unpaid operational debt by the corporate debtor under Section 9(3)(c) of the Code. This being so, the application ought to have been dismissed at the very threshold. Apart from this, the learned counsel took us through various committee reports and the provisions of the Code and argued that under Section 8 of the Code, the moment a corporate debtor, within 10 days of the receipt of a demand notice or copy of invoice, brings to the notice of the operational creditor the existence of a dispute between the parties, the Tribunal is obliged to dismiss the application. According to him, under Section (8)(2)(a), the expression "existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed ..." must be read as existence of a dispute "or" record of the pendency of the suit or arbitration proceedings filed, i.e. disjunctively.

According to the learned counsel, the definition of "dispute" under Section 5(6) of the Code is an inclusive one and the original draft bill not only had the word "means" instead of the word "includes", but also the word "bona fide" before the words "suit or arbitral proceedings", which is missing in the present Code. Therefore, learned counsel argued that the moment there is existence of a dispute, meaning thereby that there is a real dispute to be tried, and not a sham, frivolous or vexatious dispute, the Tribunal is bound to dismiss the application.

Learned counsel went on to argue that there is a fundamental difference between applications filed by financial creditors and operational creditors. A financial creditor's application is dealt with under Section 7 of the Code, in which the adjudicating authority has to ascertain the existence of a default on the basis of the records of an information utility or other evidence furnished by the financial

creditor. In contrast to this scheme, all that a corporate debtor needs to do is to file a reply within a period of 10 days of the receipt of demand notice or copy of invoice from an operational creditor, showing the existence of a dispute, which then does not need to be "ascertained" by the adjudicating authority. He was at pains to point out that the application itself must contain all the documents that are required by the statute and that the timelines indicated in the statute are mandatory. For this purpose, he referred us to Sections 61, 62 and 64 in addition to Sections 7 to 9 of the Code. Finally, on facts, according to learned counsel, the Tribunal was wholly incorrect in remanding the matter on both counts – first, to find out whether the application is otherwise complete and, second, because the Tribunal found that the dispute in the present case was vague, got up and motivated to evade the liability, which, according to learned counsel, was a perverse conclusion reached on the facts of this case.

7. Shri Jawaharlal, learned counsel appearing on behalf of the respondent, has argued in reply that the only notice given to rectify the defects by the Tribunal was an oral notice of 19th January, 2017 and that too only to supply the notice of dispute by the appellant. This was done within time and the Tribunal, therefore, dismissed the application only on non-fulfillment of the conditions laid down in Section 9. No plea was ever taken before the Tribunal that the IDBI certificate was not furnished.

This plea was taken for the first time only in appeal, and since the Tribunal did not think it fit to dismiss the application on a technical ground, this ground does not avail the appellants. The counsel then submitted that the expression "dispute" under Section 5(6) covers only three things, namely, existence of the amount of debt, quality of goods or services or breach of a representation or warranty and since what was sought to be brought as a defense was that the NDA was breached, it would not come within the definition of "dispute" under Section 5(6).

He further went on to state that, at best, the breach of the NDA is a claim for unliquidated damages which does not become crystallized until legal proceedings are filed, and none have been filed so far. Therefore, there is no real dispute on the facts of the present case and the Tribunal was correct in its finding that the dispute was a sham one.

8. Before going into the contentions of fact and law argued by both counsel, it is a little important to trace the background of this path-breaking legislation viz. the Insolvency and Bankruptcy Code, 2016. The starting point is a Resolution of the UN General Assembly, Resolution No.59/40, passed on 2nd December, 2004, by which it was stated:

> "Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law The General Assembly, Recognizing the importance to all countries of strong, effective and efficient insolvency regimes as a means of encouraging economic development and investment, Noting the growing realization that reorganization regimes are critical to corporate and economic recovery, the development of entrepreneurial activity, the preservation of employment and the availability of finance in the capital market, Noting also the importance of social policy issues to the design of an insolvency regime, Noting with satisfaction the completion and adoption of the Legislative Guide on Insolvency Law of the United

> Nations Commission on International Trade Law by the Commission at its thirty-seventh session, on 25 June 2004, Believing that the Legislative Guide, which includes the text of the Model Law on Cross-Border Insolvency and Guide to Enactment recommended by the General Assembly in its resolution 52/158 of 15 December 1997, contributes significantly to the establishment of a harmonized legal framework for insolvency and will be useful both to States that do not have an effective and efficient insolvency regime and to States that are undertaking a process of review and modernization of their insolvency regimes, Recognizing the need for cooperation and coordination between international organizations active in the field of insolvency law reform to ensure consistency and alignment of that work and to facilitate the development of international standards, Noting that the preparation of the Legislative Guide was the subject of due deliberations and extensive consultations with Governments and international intergovernmental and non-

governmental organizations active in the field of insolvency law reform,

1. Expresses its appreciation to the United Nations Commission on International Trade Law for the completion and adoption of its Legislative Guide on Insolvency Law;

2. Requests the Secretary-General to publish the Legislative Guide and to make all efforts to ensure that it becomes generally known and available;

3. Recommends that all States give due consideration to the Legislative Guide when assessing the economic efficiency of their insolvency regimes and when revising or adopting legislation relevant to insolvency;

4. Recommends also that all States continue to consider implementation of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law."

9. The purpose of the Legislative Guide for various nations was stated as follows:

> "The purpose of the Legislative Guide on Insolvency Law is to assist the establishment of an efficient and effective legal framework to address the financial difficulty of debtors. It is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. The advice provided in the Guide aims at achieving a balance between the need to address the debtor's financial difficulty as quickly and efficiently as possible and the interests of the various parties directly concerned with that financial difficulty, principally creditors and other parties with a stake in the debtor's business, as well as with public policy concerns. The Guide discusses issues central to the design of an effective and efficient insolvency law, which, despite numerous differences in policy and legislative treatment, are recognized in many legal systems. It focuses on insolvency proceedings commenced under the insolvency law and conducted in accordance with that law, with an

emphasis on reorganization, against a debtor, whether a legal or natural person, that is engaged in economic activity. Issues specific to the insolvency of individuals not so engaged, such as consumers, are not addressed." In stating some of the key objectives of effective and efficient insolvency law, the Legislative Guide goes on to state:

"When a debtor is unable to pay its debts and other liabilities as they become due, most legal systems provide a legal mechanism to address the collective satisfaction of the outstanding claims from assets (whether tangible or intangible) of the debtor. A range of interests needs to be accommodated by that legal mechanism: those of the parties affected by the proceedings including the debtor, the owners and management of the debtor, the creditors who may be secured to varying degrees (including tax agencies and other government creditors), employees, guarantors of debt and suppliers of goods and services, as well as the legal, commercial and social institutions and practices that are relevant to the design of the insolvency law and required for its operation. Generally, the mechanism must strike a balance not only between the different interests of these stakeholders, but also between these interests and the relevant social, political and other policy considerations that have an impact on the economic and legal goals of insolvency proceedings.

xxx xxx xxx An insolvency law should be transparent and predictable. This will enable potential lenders and creditors to understand how insolvency proceedings operate and to assess the risk associated with their position as a creditor in the event of insolvency. This will promote stability in commercial relations and foster lending and investment at lower risk premiums. Transparency and predictability will also enable creditors to clarify priorities, prevent disputes by providing a backdrop against which relative rights and risks can be assessed and help define the limits of any discretion. Unpredictable application of the insolvency law has the potential to undermine not only the confidence of all participants in insolvency proceedings, but also their willingness to make credit and other investment decisions prior to insolvency. As far as possible, an insolvency law should clearly indicate all provisions of other laws that may affect the conduct of the insolvency proceedings (e.g. labour law; commercial and contract law; tax law; laws affecting foreign exchange, netting and set-off and debt for equity swaps; and even family and matrimonial law). An insolvency law should ensure that adequate information is available in respect of the debtor's situation, providing incentives to encourage the debtor to reveal its positions and, where appropriate, sanctions for failure to do so. The availability of this information will enable those responsible for administering and supervising insolvency proceedings (courts or administrative agencies, the insolvency representative) and creditors to assess the financial situation of the debtor and determine the most appropriate solution." While referring to the commencement of insolvency proceedings, the Legislative Guide states:

"The standard to be met for commencement of insolvency proceedings is central to the design of an insolvency law. As the basis upon which insolvency proceedings can

be commenced, this standard is instrumental to identifying the debtors that can be brought within the protective and disciplinary mechanisms of the insolvency law and determining who may make an application for commencement, whether the debtor, creditors or other parties.

As a general principle it is desirable that the commencement standard be transparent and certain, facilitating access to insolvency proceedings conveniently, cost-effectively and quickly to encourage financially distressed or insolvent businesses to voluntarily commence proceedings. It is also desirable that access be flexible in terms of the types of insolvency proceedings available (reorganization and liquidation), and the ease with which the proceedings most relevant to a particular debtor can be accessed, and that conversion between the different types of proceeding can be achieved. Restrictive access can deter both debtors and creditors from commencing proceedings, while the effects of delay can be harmful to the value of assets and the successful completion of insolvency proceedings, in particular in cases of reorganization. Ease of access needs to be balanced with proper and adequate safeguards to prevent improper use of proceedings. Examples of improper use may include application by a debtor that is not in financial difficulty in order to take advantage of the protections provided by the insolvency law, such as the automatic stay, or to avoid or delay payment to creditors and application by creditors who are competitors of the debtor, where the purpose of the application is to take advantage of insolvency proceedings to disrupt the debtor's business and thus gain a competitive edge."

10. On the fixation of time limits and denial of an application to commence proceedings, the Legislative Guide states:

"Where a court is required to make a decision as to commencement, it is desirable that that decision be made in a timely manner to ensure both certainty and predictability of the decision-making and the efficient conduct of the proceedings without delay. This will be particularly important in the case of reorganization to avoid further diminution of the value of assets and to improve the chances of a successful reorganization. Some insolvency laws prescribe set time periods after the application within which the decision to commence must be made. These laws often distinguish between applications by debtors and by creditors, with applications by debtors tending to be determined more quickly. Any additional period for creditor applications is designed to allow prompt notice to be given to the debtor and provide the debtor with an opportunity to respond to the application. Although the approach of fixing time limits may serve the objectives of providing certainty and transparency for both the debtor and creditors, the achievement of those objectives may need to be balanced against possible disadvantages. For example, a fixed time period may be insufficiently flexible to take account of the circumstances of the particular case. More generally, such time periods may be set without regard to the resources available to the body responsible for supervising insolvency proceedings or of the

> local priorities of that body (especially where insolvency is only one of the matters for which it has responsibility). It may also prove difficult to ensure that the decision-making body adheres to the established limit and to provide appropriate consequences where there is no compliance. The time period between application and the decision to commence proceedings should also reflect the type of proceeding applied for, the application procedure and the consequences of commencement in any particular regime. For example, the extent to which notification of parties in interest and information gathering must be completed prior to commencement will vary between regimes, requiring different periods of time. For these reasons, it is desirable that an insolvency law adopt a flexible approach that emphasizes the advantages of quick decision-making and provides guidance as to what is reasonable, but at the same time also recognizes local constraints and priorities.
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> (d) Denial of an application to commence proceedings The preceding paragraphs refer to a number of instances where it will be desirable, in those cases where the court is required to make the commencement decision, for the court to have the power to deny the application for commencement, either because of questions of improper use of the insolvency law or for technical reasons relating to satisfaction of the commencement standard. The cases referred to include examples of both debtor and creditor applications. Principal among the grounds for denial of the application for technical reasons might be those cases where the debtor is found not to satisfy the commencement standard;

where the debt is subject to a legitimate dispute or off-set in an amount equal to or greater than the amount of the debt; where the proceedings will serve no purpose because, for example, secured debt exceeds the value of assets; and where the debtor has insufficient assets to pay for the insolvency administration and the law makes no other provision for funding the administration of such estates.

Examples of improper use might include those cases where the debtor uses an application for insolvency as a means of prevaricating and unjustifiably depriving creditors of prompt payment of debts or of obtaining relief from onerous obligations, such as labour contracts. In the case of a creditor application, it might include those cases where a creditor uses insolvency as an inappropriate substitute for debt enforcement procedures (which may not be well developed); to attempt to force a viable business out of the market place; or to attempt to obtain preferential payments by coercing the debtor (where such preferential payments have been made and the debtor is insolvent, investigation would be a key function of insolvency proceedings).

As noted above, where there is evidence of improper use of the insolvency proceedings by either the debtor or creditors, the insolvency law may provide, in addition to denial of the application, that sanctions can be imposed on the party improperly using the proceedings or that that party should pay costs and possibly damages to the other party for any harm caused. Remedies may also be available under non-insolvency law. Where an application is denied, any provisional measures of relief ordered by the court after the time of the application for commencement should terminate (see chap. II, para. 53).” (Emphasis supplied) Ultimately, recommendation 19 of the Legislative

Guide reads as under:

> "Commencement on creditor application (paras.57 and 67)
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> 19. The law generally should specify that, where a creditor makes the application for commencement:
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> (a) Notice of the application promptly is given to the debtor;
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> (b) The debtor be given the opportunity to respond to the application, by contesting the application, consenting to the application or, where the application seeks liquidation, requesting the commencement of reorganization proceedings; and
>
> (c) The court will promptly determine its jurisdiction and whether the debtor is eligible and the commencement standard has been met and, if so, commence insolvency proceedings.1"

11. The legislative history of legislation relating to indebtedness goes back to the year 1964 when the 24th Law Commission recommended amendments to the Provincial Insolvency Act of 1920. This was followed by the Tiwari Committee of 1981, which introduced the Sick Industrial Companies Act, 1985. Following economic liberalization in the 1990s, two Narsimham Committee reports led to the Recovery of Debts and Bankruptcy Act, 1993 and the SARFAESI Act, 2002. Meanwhile, the Goswami Committee Report, submitted in 1993, condemned the liquidation procedure prescribed by the Companies Act, 1956 as unworkable and being beset with delays at all levels – delaying tactics employed by the management, delays at the level of the Courts, delays in A determination that the commencement standard has been met may involve consideration of whether the debt is subject to a legitimate dispute or offset in an amount equal to or greater than the amount of the debt. The existence of such a set-off may be a ground for dismissal of the application (see above, paras. 61-63).

making auction sales etc. This then led to the Eradi Committee Report of 1999, which proposed amendments to the Companies Act and proposed the repeal of SICA. This Committee echoed the findings of the Goswami Committee and recommended an overhaul of the liquidation procedure under the Companies Act.

12. It was for the first time, in 2001, that the L.N. Mitra Committee of the RBI proposed a comprehensive Bankruptcy Code. This was followed by the Irani Committee Report, also of the RBI in 2005, which noted that the liquidation procedure in India is costly, inordinately lengthy and results in almost complete erosion of asset value. The Committee also noted that the insolvency framework did not balance stakeholders' interests adequately. It proposed a number of changes including changes for increased protection of creditors' rights, maximization of asset value and better management of the company in liquidation. In 2008, the Raghuram Rajan Committee of the Planning Commission proposed improvement to the credit infrastructure in the country, and finally a Committee of Financial Sector Legislative Reforms in 2013 submitted a draft Indian Financial Code, which included a "resolution corporation" for resolving distressed financial firms.

13. All this then led to the Bankruptcy Law Reforms Committee, set up by the Department of Economic Affairs, Ministry of Finance, under the Chairmanship of Shri T.K. Viswanathan. This Committee submitted an interim report in February 2015 and a final report in November of the same year.

It was, as a result of the deliberations of this Committee, that the present Insolvency and Bankruptcy Code of 2016 was finally born.

14. The interim report went into the existing law on indebtedness in some detail and discussed the tests laid down in Madhusudan Gordhandas v. Madhu Woollen Industries Pvt. Ltd (1972) 2 SCR 201, by which a petition presented under the Companies Act on the ground that the company is "unable to pay its debts" can only be dismissed if the debt is bona fide disputed, i.e. that the defense of the debtor is genuine, substantial and is likely to succeed on a point of law.

The interim report also adverted to an amendment made in the Companies Act, 2003, by which the threshold requirement of Rs.500 was replaced by Rs.1 lakh.

15. The interim report found:

> "Once the petitioning creditor has proved the inability of the debtor company to pay debts, van Zwieten states that courts in India have recognised a wide discretion that enabled it to give time to the debtor to make payment or even dismiss the petition. This is in stark contrast with the position in the UK (from where the law was transplanted) where once the company's inability to pay debts has been proven, the petitioning creditor is ordinarily held to be entitled to a winding up order (although it should be noted that there is an alternative corporate rescue procedure, 'administration', which a debtor may be entitled to enter). The effect of these abovementioned judicial developments has been to add significant delays in the liquidation process under CA 1956 and to add uncertainty regarding the rights of the creditors in the event of the company's insolvency. Consequently, this has made creditor recourse to the liquidation procedure as a means of debt enforcement rather difficult, and secondly, rendered the liquidation procedure ineffective as a disciplinary mechanism for creditors against insolvent debtors." The interim report then recommended:
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> "Recommendations:
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> • In order to re-instate the debt enforcement function of the statutory demand test for winding up, if a company fails to pay an undisputed debt of a prescribed value as per Section 271(2) (a), the creditor should be entitled to a winding up order irrespective of whether it is insolvent (in commercial or balance sheet terms) or not. Further, the NCLT should have the discretion to refer the company for rehabilitation under Chapter XIX before making a winding up order on such ground, if the company appears to be prima facie viable. Further, in order to prevent abuse of the provision

> by creditors and ensure that it is not used to force debtor companies to settle disputed debts, the provision should specify the factors that the NCLT may take into account to determine whether the debt under consideration is disputed or not. As laid down by the courts, a petition may be dismissed if the debt in question is bona fide disputed, i.e., where the following conditions are satisfied: (i) the defence of the debtor company is genuine, substantial and in good faith;
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> (ii) the defence is likely to succeed on a point of law;

and (iii) the debtor company adduces prima facie proof of the facts on which the defence depends. Further, as with initiation of rescue proceedings, the NCLT should also have the power to impose sanctions/costs/damages on a petitioning creditor and disallow reapplications on the same grounds if it finds that a petition has been filed to abuse the process of law.

• The Government may also consider revising the present value for triggering the statutory demand test under Section 271 (2) (a) from 'one lakh rupees' to a higher amount or revise the provision to state 'one lakh rupees or such amount as may be prescribed'.

• 'Balance sheet insolvency' and 'commercial insolvency' should be identified as separate grounds indicating a company's 'inability to pay debt' in order to avoid conflicts/confusion with the statutory demand test (as is the case of the IA 1986 where the statutory demand test, the commercial insolvency test and the balance sheet insolvency test are alternate grounds for determining a company's inability to pay debts under Sections 123(1) (a),123 (1) (e) and 123(2), respectively)."

16. By the final report dated November 2015, the recommendation of the interim report was shelved. The Committee made a distinction between financial contracts and operational contracts. It stated:

> "4.3.3 Information about the liabilities of a solvent entity Operational contracts typically involve an exchange of goods and services for cash. For an enterprise, the latter includes payables for purchase of raw- materials, other inputs or services, taxation and statutory liabilities, and wages and benefits to employees.
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> xxx xxx xxx The Code specifies that if the Adjudicator is able to locate the record of the liability and of default with the registered IUs, a financial creditor needs no other proof to establish that a default has taken place.
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> xxx xxx xxx The second set of liabilities are operational liabilities, which are more difficult to centrally capture given that the counterparties are a wide and heterogeneous set. In the state of insolvency, the record of all liabilities in the IUs become critical to creditors in assessing the complexity of the resolution required. Various private players, including potential strategic acquirers or distressed asset funds, would constantly monitor entities that are facing stress, and prepare to make proposals to the committee of creditors in the event that an insolvency is triggered.

Easy access to this information is vital in ensuring that there is adequate interest by various kinds of financial firms in coming up to the committee of creditors with proposals. It is not easy to set up mandates for the holders of operational liabilities to file the records of their liabilities, unlike the case of financial creditors. However, their incentives to file liabilities are even stronger when the entity approaches insolvency. 4.3.4 Information about operational creditors Once the invoice or notice is served, the debtor should be given a certain period of time in which to respond either by disputing it in a court, or pay up the amount of the invoice or notice. The debtor will have the responsibility to file the information about the court case, or the repayment record in response to the invoice or notice within the specified amount of time. If the debtor does not file either response within the specified period, and the creditor files for insolvency resolution, the debtor may be charged a monetary penalty by the Adjudicator. However, if the debtor disputes the claim in court, until the outcome of this case is decided, the creditor may not be able to trigger insolvency on the entity. This process will act as a deterrent for frivolous claims from creditors, as well as act as a barrier for some types of creditors to initiate insolvency resolution." The Committee then went on to consider as to who can trigger the insolvency process. In paragraph 5.2.1 the Committee stated:

"Box 5.2 – Trigger for IRP

1. The IRP can be triggered by either the debtor or the creditors by submitting documentation specified in the Code to the adjudicating authority.

2. For the debtor to trigger the IRP, she must be able to submit all the documentation that is defined in the Code, and may be specified by the Regulator above this.

3. The Code differentiates two categories of creditors: financial creditors where the liability to the debtor arises from a solely financial transaction, and operational creditors where the liability to the debtor arises in the form of future payments in exchange for goods or services already delivered. In cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity, the creditor will be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt is more than half the full liability it has with the debtor.

4. The Code will require different documentation for a debtor, a financial creditor, and an operational creditor to trigger the IRP. These are listed in Box 5.3 under what the Adjudicator will accept as requirements to trigger the IRP.

5.2.1 Who can trigger the IRP?

Here, the Code differentiates between financial creditors and operational creditors. Financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or a

debt security. Operational creditors are those whose liability from the entity comes from a transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by the car mechanic and who gets paid only after the spark plugs are sold is an operational creditor. Similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease. The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt.

5.2.2 How can the IRP be triggered?

An application from a creditor must have a record of the liability and evidence of the entity having defaulted on payments. The Committee recommends different documentation requirements depending upon the type of creditor, either financial or operational. A financial creditor must submit a record of default by the entity as recorded in a registered Information Utility (referred to as the IU) as described in Section 4.3 (or on the basis of other evidence). The default can be to any financial creditor to the entity, and not restricted to the creditor who triggers the IRP. The Code requires that the financial creditor propose a registered Insolvency Professional to manage the IRP. Operational creditors must present an "undisputed bill" which may be filed at a registered information utility as requirement to trigger the IRP. The Code does not require the operational creditor to propose a registered Insolvency Professional to manage the IRP. If a professional is not proposed by the operational creditor, and the IRP is successfully triggered, the Code requires the Adjudicator to approach the Regulator for a registered Insolvency Professional for the case.

When the Adjudicator receives the application, she confirms the validity of the documents before the case can be registered by confirming the documentation in the information utility if applicable. In case the debtor triggers the IRP, the list of documentation provided by the debtor is checked against the required list. The proposal for the RP is forwarded to the Regulator for validation. If both the documentation and the proposed RP checks out as required within the time specified in regulations, the Adjudicator registers the IRP.

In case the financial creditor triggers the IRP, the Adjudicator verifies the default from the information utility (if the default has been filed with an information utility, it shall be incontrovertible evidence of the existence of a default) or otherwise confirms the existence of default through the additional evidence adduced by the financial creditor, and puts forward the proposal for the RP to the Regulator for validation. In case the operational creditor triggers the IRP, the Adjudicator verifies the documentation. Simultaneously, the Adjudicator requests the Regulator for an RP. If either step cannot be verified, or the process verification exceeds the specified amount of time, then the Adjudicator rejects the application, with a reasoned order for the rejection. The order rejecting the application cannot be appealed against. Instead, application has to be made afresh. Once the documents are verified within a specified amount of time, the Adjudicator will trigger the IRP and register the IRP by issuing an order. The order will contain a unique ID that will be issued for the case by which all reports and records that are generated during the IRP will be stored, and accessed."

17. Annexed to this Committee Report is the Insolvency and Bankruptcy Bill, 2015. Interestingly, Section 5(4) defined "dispute" as:

> "5. Definitions In this Part, unless the context otherwise requires- (4) "dispute" means a bona fide suit or arbitration proceeding regarding (a) the existence or the amount of a debt; (b) the quality of a good or service; or (c) the breach of a representation or warranty;" Sections 8 and 9 in the said Bill read as under:
>
> "8. Insolvency resolution by operational creditor. (1) An operational creditor shall, on the occurrence of a default, deliver a demand notice or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form as may be prescribed, through an information utility, wherever applicable, or by registered post or courier or by any electronic communication.
>
> (2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor –
>
> (a) the existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed at least sixty days prior to the receipt of such invoice or notice in relation to such dispute through an information utility or by registered post or courier or by any electronic communication;
>
> (b) the repayment of unpaid operational debt- (i) by sending an attested copy of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or (ii) by sending an attested copy of proof that the operational creditor having encashed a cheque issued by the corporate debtor.

Explanation. – For the purpose of this section a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the debt in respect of which the default has occurred.

9. Application for initiation of corporate insolvency resolution process by operational creditor.

> (1) After the expiry of the period of ten days from the date of delivery of the invoice or notice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application with the Adjudicating Authority in the prescribed form for initiating a corporate insolvency resolution process. (2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.
>
> (3) The operational creditor shall, along with the application furnish-

(a) the invoice demanding payment or notice delivered by the operational creditor to the corporate debtor;

(b) affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a confirmation from the financial institutions maintaining accounts of the operational creditor that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information or as may be specified.

(4) The Adjudicating Authority shall, within two days of the receipt of the application under sub-section (2), admit the application and communicate such decision to the operational creditor and the corporate debtor if, -

(a) the application is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor; and

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility.

(5) The Adjudicating Authority shall reject the application and communicate such decision to the operational creditor and the corporate debtor if –

(a) the application made under this section is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor; and

(d) notice of dispute has been received by the operational creditor and there is no record of dispute in the information utility.

(6) Without prejudice to the conditions mentioned in sub-section (3), an operational creditor initiating a corporate insolvency resolution process under this section, may also propose a resolution professional to act as an interim resolution professional. (7) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section."

18. Meanwhile, the Insolvency and Bankruptcy Bill that was annexed to the Bankruptcy Law Reforms Committee Report underwent a further change before it was submitted to a Joint Committee of the Lok Sabha. In this Bill, the definition of "dispute" now read as follows:

"5. Definitions.

In this Part unless the context otherwise requires,- (6) "dispute" includes a suit or arbitration proceedings relating to—

(a) the existence or the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty;" Sections 8 and 9 read as follows:

"8. Insolvency resolution by operational creditor. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form as may be prescribed, through an information utility, wherever applicable, or by registered post or courier or by such electronic mode of communication, as may be specified.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor—

(a) the existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed prior to the receipt of such notice or invoice in relation to such dispute through an information utility or by registered post or courier or by such electronic mode of communication as may be specified;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.— For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

9. Application for initiation of corporate insolvency resolution process by operational creditor.

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed. (3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information or as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional. (5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-

section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, prior to rejecting an application under sub-clause (a) of clause (ii) of this sub-

section, shall give a notice to the applicant to rectify the defect in his application within three days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5)."

19. The notes on clauses annexed to the Bill are extremely important and read as follows:

"Notes on Clauses Clause 6 provides that where a corporate debtor has defaulted in paying a debt that has become due and payable but not repaid, the corporate insolvency resolution process under Part II may be initiated in respect of such corporate debtor by a financial creditor, an operational creditor or the corporate debtor itself.

Early recognition of financial distress is very important for timely resolution of insolvency. A default based test for entry into the insolvency resolution process permits early intervention such that insolvency resolution proceedings can be initiated at an early stage when the corporate debtor shows early signs of financial distress rather than at the point where it would be difficult to revive it effectively. It also provides a simple test to initiate resolution process.

This clause permits any financial creditor to initiate the corporate insolvency resolution process where the corporate debtor has defaulted in paying a debt that has become due and payable but not repaid. Financial creditors are those creditors to whom a financial debt (i.e., a debt where the creditor is compensated for the time value of the money lent) is owed.

Further, the Code also permits the corporate debtor itself to initiate the insolvency resolution process once it has defaulted on a debt. Additionally, operational creditors (i.e., creditors to whom a sum of money is owed for the provision of goods or services or the Central/State Government or local authorities in respect of payments due to them) are also permitted to initiate the insolvency resolution process. This will bring the law in line with international practices, which permit unsecured creditors (including employees, suppliers etc. who fall under the definition of operational creditors) to file for the initiation of insolvency resolution proceedings.

Clause 7 lays down the procedure for the initiation of the corporate insolvency resolution process by a financial creditor or two or more financial creditors jointly. The financial creditor can file an application before the National Company Law Tribunal along with proof of default and the name of a resolution professional proposed to act as the interim resolution professional in respect of the corporate debtor. The requirement to provide proof of default ensures that financial creditors do not file frivolous applications or applications which prematurely put the corporate debtor into insolvency resolution proceedings for extraneous considerations. The adjudicating authority/ Tribunal can, within fourteen days from the date of receipt of the application, ascertain the existence of a default from the records of a regulated information utility. A default may also be proved in such manner as may be specified by the Insolvency and Bankruptcy Board of India. Once the adjudicating authority/Tribunal is satisfied as to the existence of the default and has ensured that the application is complete and no disciplinary proceedings are pending against the proposed resolution professional, it shall admit the application. The adjudicating authority/Tribunal is not required to look into any other criteria for admission of the application. It is important that parties are not allowed to abuse the legal process by using delaying tactics at the admissions stage. Clause 8 lays down the procedure for the initiation of the corporate insolvency resolution process by an operational creditor. This procedure differs from the procedure applicable to financial creditors as operational debts (such as trade debts, salary or wage claims) tend to be small amounts (in comparison to financial debts) or are recurring in nature and may not be accurately reflected on the records of information utilities at all times. The possibility of disputed debts in relation to operational creditors is also higher in comparison to financial creditors such as banks and financial institutions. Accordingly, the process for initiation of the insolvency resolution process differs for an operational creditor.

Once a default has occurred, the operational creditor has to deliver a demand notice or a copy of an invoice demanding payment of the debt in default to the corporate

debtor. The corporate debtor has a period of ten days from the receipt of the demand notice or invoice to inform the operational creditor of the existence of a dispute regarding the debt claim or of the repayment of the debt. This ensures that operational creditors, whose debt claims are usually smaller, are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It may also facilitate informal negotiations between such creditors and the corporate debtor, which may result in a restructuring of the debt outside the formal proceedings.

Clause 9 On the expiry of the period of ten days from the date of receipt of the invoice or demand notice under Clause 8, if the operational creditor does not receive either the payment of the debt or a notice of existence of dispute in relation to the debt claim from the corporate debtor, he can file an application with the adjudicating authority for initiating the insolvency resolution process in respect of such debtor. He also has to furnish proof of default and proof of non-payment of the debt along with an affidavit verifying that there has been no notice regarding the existence of a dispute in relation to the debt claim. Within fourteen days from the receipt of the application, if the adjudicating authority/Tribunal is satisfied as to (a) the existence of a default, and (b) the other criteria laid down in clause 9(5) being met, it shall admit the application. The adjudicating authority/Tribunal is not required to look into any other criteria for admission of the application. It is important that parties are not allowed to abuse the legal process by using delaying tactics at the admissions stage." (Emphasis supplied)

20. The Joint Committee in April, 2016 made certain small changes in the said Bill, by which the Committee stated:

"17. Mode of delivery of demand notice of unpaid operational debt – Clause 8 The Committee find that clause 8(1) of the Code provides that an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form as may be prescribed, through an information utility, wherever applicable, or by registered post or courier or by such electronic mode of communication, as may be specified. The Committee are of the view that the details of the mode of delivery of demand notice can be provided in the rules. The Committee, therefore, decide to substitute words "in such form as may be prescribed, through an information utility, wherever applicable, or by registered post or courier or by such electronic mode of communication, as may be specified" as appearing in clause 8(1) with the words "in such form and manner, as may be prescribed". Besides as a consequential amendment words "through an information utility or by registered post or courier or by such electronic mode of communication as may be specified" as appearing in clause 8(2) may also be omitted." The Committee also revised the time limits set out in various sections of the Code from 2, 3 and 5 days to a longer uniform period of 7 days.

21. The stage is now set for setting out the relevant provisions of the Code insofar as operational creditors and their corporate debtors are concerned.

"3. Definitions.

In this Code, unless the context otherwise requires,— xxx xxx xxx (12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;

5. Definitions.

In this Part, unless the context otherwise requires,— (6) "dispute" includes a suit or arbitration proceedings relating to—

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty; xxx xxx xxx (20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

8. Insolvency resolution by operational creditor. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

9. Application for initiation of corporate insolvency resolution process by operational creditor.

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-

section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

22. Together with Section 8(1), the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, speak of demand notices by the operational creditor and applications by the operational creditor in the following terms:

> "5. Demand notice by operational creditor.
>
> (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely.-
>
> (a) a demand notice in Form 3; or
>
> (b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

6. Application by operational creditor.

(1) An operational creditor, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 9 of the Code in Form 5, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) The applicant under sub-rule (1) shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

FORM 3 (See clause (a) of sub-rule (1) of rule 5) FORM OF DEMAND NOTICE / INVOICE DEMANDING PAYMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (Under rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) [Date] To, [Name and address of the registered office of the corporate debtor] From, [Name and address of the registered office of the operational creditor] Subject: Demand notice/invoice demanding payment in respect of unpaid operational debt due from [corporate debtor] under the Code.

Madam/Sir,

1. This letter is a demand notice/invoice demanding payment of an unpaid operational debt due from [name of corporate debtor].

2. Please find particulars of the unpaid operational debt below:

	PARTICULARS OF OPERATIONAL DEBT
1.	TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF DEFAULT IN TABULAR FORM)
3.	PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)
4.	DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS
5.	RECORD OF DEFAULT WITH THE INFORMATION UTILITY (IF ANY)
6.	PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH DEBT HAS BECOME DUE
7.	LIST OF DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT

3. If you dispute the existence or amount of unpaid operational debt (in default) please provide the undersigned, within ten days of the receipt of this letter, of the pendency of the suit or arbitration proceedings in relation to such dispute filed before the receipt of this letter/notice.

4. If you believe that the debt has been repaid before the receipt of this letter, please demonstrate such repayment by sending to us, within ten days of receipt of this letter, the following:

(a) an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(b) an attested copy of any record that [name of the operational creditor] has received the payment.

5. The undersigned, hereby, attaches a certificate from an information utility confirming that no record of a dispute raised in relation to the relevant operational debt has been filed by any person at any information utility, (if applicable)

6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [c].

Yours sincerely, Signature of person authorised to act on behalf of the operational creditor Name in block letters Position with or in relation to the operational creditor Address of person signing Instructions

1. Please serve a copy of this form on the corporate debtor, ten days in advance of filing an application under section 9 of the Code.

2. Please append a copy of such served notice to the application made by the operational creditor to the Adjudicating Authority.

Form 4 (See clause (b) of sub-rule (1) of rule 5) FORM OF NOTICE WITH WHICH INVOICE DEMANDING PAYMENT IS TO BE ATTACHED (Under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) [Date] To, [Name and address of registered office of the corporate debtor] From, [Name and address of the operational creditor] Subject: Notice attached to invoice demanding payment Madam/Sir, [Name of operational creditor], hereby provides notice for repayment of the unpaid amount of INR [insert amount] that is in default as reflected in the invoice attached to this notice.

In the event you do not repay the debt due to us within ten days of receipt of this notice, we may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process under section 9 of the Code.

Yours sincerely, Signature of person authorised to act on behalf of the operational creditor Name in block letters Position with or in relation to the operational creditor Address of person signing Form 5 (See sub-rule (1) of rule 6) APPLICATION BY OPERATIONAL CREDITOR TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE CODE.

(Under rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) [Date] To, The National Company Law Tribunal [Address] From, [Name and address for correspondence of the operational creditor] In the matter of [name of the corporate debtor] Subject: Application to initiate corporate insolvency resolution process in respect of [name of the corporate debtor] under the Insolvency and Bankruptcy Code, 2016.

Madam/Sir, [Name of the operational creditor], hereby submits this application to initiate a corporate insolvency resolution process in the case of [name of corporate debtor]. The details for the purpose of this application are set out below:

Part – I PARTICULARS OF APPLICANT

1. NAME OF OPERATIONAL CREDITOR

2. IDENTIFICATION NUMBER OF OPERATIONAL CREDITOR (IF ANY)

3. ADDRESS FOR CORRESPONDENCE OF THE OPERATIONAL CREDITOR Part - II PARTICULARS OF CORPORATE DEBTOR

1. NAME OF THE CORPORATE DEBTOR

2. IDENTIFICATION NUMBER OF CORPORATE DEBTOR

3. DATE OF INCORPORATION OF CORPORATE DEBTOR

4. NOMINAL SHARE CAPITAL AND THE PAID-UP SHARE CAPITAL OF THE CORPORATE DEBTOR AND/OR DETAILS OF GUARANTEE CLAUSE AS PER MEMORANDUM OF ASSOCIATION (AS APPLICABLE)

5. ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR

6. NAME, ADDRESS AND AUTHORITY OF PERSON SUBMITTING APPLICATION ON BEHALF OF OPERATIONAL CREDITOR (ENCLOSE AUTHORISATION)

7. NAME AND ADDRESS OF PERSON RESIDENT IN INDIA AUTHORISED TO ACCEPT THE SERVICE OF PROCESS ON ITS BEHALF (ENCLOSE AUTHORISATION) Part-III PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL [IF PROPOSED]

1. NAME, ADDRESS, EMAIL ADDRESS AND THE REGISTRATION NUMBER OF THE PROPOSED INSOLVENCY PROFESSIONAL Part-IV PARTICULARS OF OPERATIONAL DEBT

1. TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE

2. AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DATES OF DEFAULT IN TABULAR FORM) Part-V PARTICULARS OF OPERATIONAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]

1. PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR.

ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)

2. DETAILS OF RESERVATION / RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS

3. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)

4. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)

5. DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)

6. PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH OPERATIONAL DEBT HAS BECOME DUE

7. A STATEMENT OF BANK ACCOUNT WHERE DEPOSITS ARE MADE OR CREDITS RECEIVED NORMALLY BY THE OPERATIONAL CREDITOR IN RESPECT OF THE DEBT OF THE CORPORATE DEBTOR (ATTACH A COPY)

8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT I, [Name of the operational creditor / person authorised to act on behalf of the operational creditor] hereby certify that, to the best of my knowledge, [name of proposed insolvency professional], is fully qualified and permitted to act as an insolvency professional in accordance with the Code and the rules and regulations made thereunder. [WHERE APPLICABLE] [Name of the operational creditor] has paid the requisite fee for this application through [state means of payment] on [date].

Yours sincerely, Signature of person authorised to act on behalf of the operational creditor Name in block letters Position with or in relation to the operational creditor Address of person signing Instructions -

Please attach the following to this application:

Annex I Copy of the invoice / demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the corporate debtor.

Annex II Copies of all documents referred to in this application.

Annex III Copy of the relevant accounts from the banks/financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the relevant unpaid operational debt by the operational debtor, if available.

Annex IV Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Annex V Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. [WHERE APPLICABLE] Annex VI Proof that the specified application fee has been paid.

Note: Where workmen/employees are operational creditors, the application may be made either in an individual capacity or in a joint capacity by one of them who is duly authorised for the purpose.

Regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is also relevant and reads as under:

"7. Claims by operational creditors.-

(1) A person claiming to be an operational creditor, other than workman or employee of the corporate debtor, shall submit proof of claim to the interim resolution professional in person, by post or by electronic means in Form B of the Schedule:

Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(2) The existence of debt due to the operational creditor under this Regulation may be proved on the basis of-

(a) the records available with an information utility, if any; or

(b) other relevant documents, including –

(i) a contract for the supply of goods and services with corporate debtor;

(ii) an invoice demanding payment for the goods and services supplied to the corporate debtor;

(iii) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; or

(iv) financial accounts.

FORM B PROOF OF CLAIM BY OPERATIONAL CREDITORS EXCEPT WORKMEN AND EMPLOYEES [Under Regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016] [Date] To The Interim Resolution Professional / Resolution Professional [Name of the Insolvency Resolution Professional / Resolution Professional] [Address as set out in public announcement] From [Name and address of the operational creditor] Subject: Submission of proof of claim.

Madam/Sir, [Name of the operational creditor], hereby submits this proof of claim in respect of the corporate insolvency resolution process in the case of [name of corporate debtor]. The details for the same are set out below:

PARTICULARS

1. NAME OF OPERATIONAL CREDITOR

2. IDENTIFICATION NUMBER OF OPERATIONAL CREDITOR (IF AN INCORPORATED BODY PROVIDE IDENTIFICATION NUMBER AND PROOF OF INCORPORATION. IF A PARTNERSHIP OR INDIVIDUAL PROVIDE IDENTIFICATION RECORDS* OF ALL THE PARTNERS OR THE INDIVIDUAL)

3. ADDRESS AND EMAIL ADDRESS OF OPERATIONAL CREDITOR FOR CORRESPONDENCE

4. TOTAL AMOUNT OF CLAIM (INCLUDING ANY INTEREST AS AT THE INSOLVENCY COMMENCEMENT DATE)

5. DETAILS OF DOCUMENTS BY REFERENCE TO WHICH THE DEBT CAN BE SUBSTANTIATED.

6. DETAILS OF ANY DISPUTE AS WELL AS THE RECORD OF PENDENCY OR ORDER OF SUIT OR ARBITRATION PROCEEDINGS

7. DETAILS OF HOW AND WHEN DEBT INCURRED

8. DETAILS OF ANY MUTUAL CREDIT, MUTUAL DEBTS, OR OTHER MUTUAL DEALINGS BETWEEN THE CORPORATE DEBTOR AND THE CREDITOR WHICH MAY BE SET-OFF AGAINST THE CLAIM

9. DETAILS OF ANY RETENTION OF TITLE ARRANGEMENTS IN RESPECT OF GOODS OR PROPERTIES TO WHICH THE CLAIM REFERS

10. DETAILS OF THE BANK ACCOUNT TO WHICH THE AMOUNT OF THE CLAIM OR ANY PART THEREOF CAN BE TRANSFERRED PURSUANT TO A RESOLUTION PLAN

11. LIST OF DOCUMENTS ATTACHED TO THIS PROOF OF CLAIM IN ORDER TO PROVE THE EXISTENCE AND NONPAYMENT OF CLAIM DUE TO THE OPERATIONAL CREDITOR Signature of operational creditor or person authorised to act on his behalf [Please enclose the authority if this is being submitted on behalf of an operational creditor] Name in BLOCK LETTERS Position with or in relation to creditor Address of person signing *PAN number, passport, AADHAAR Card or the identity card issued by the Election Commission of India." (Emphasis supplied)

23. In the passage of the Bills which ultimately became the Code, various important changes have taken place. The original definition of "dispute" has now become an inclusive definition, the word "bona fide" before "suit or arbitration proceedings" being deleted. In Section 8(1), the words "through an information utility, wherever applicable, or by registered post or courier or by any electronic communication" have been deleted. Likewise, in Section 8(2), the period of "at least 60 days ... through an information utility or by registered post or courier or by any electronic communication" has also been deleted. In Section 9(5), the absence of a proviso similar to the proviso occurring in Section 7(5) was also rectified. Further, the time periods of 2 and 3 days were uniformly substituted, as has been seen above, by 7 days, so that a sufficiently long period is given to do the needful.

24. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is

important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor (Section 8(2)(b)). It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section 5, may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice (Section 9(5)(i)(b)) or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor (Section 9(5)(i)(c)), or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility (Section 9(5)(i)(d)), or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor (Section 9(5)(i)(e)), it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7 days granted by the proviso (Section 9(5)(ii)(a)). It may also reject the application where there has been repayment of the operational debt (Section 9(5)(ii)(b)), or the creditor has not delivered the invoice or notice for payment to the corporate debtor (Section 9(5)(ii)(c)). It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information

utility (Section 9(5)(ii)(d)). Section 9(5)(ii)(d) refers to the notice of an existing dispute that has so been received, as it must be read with Section 8(2)(a). Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected (Section 9(5)(ii)(e)).

25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

26. Another thing of importance is the timelines within which the insolvency resolution process is to be triggered. The corporate debtor is given 10 days from the date of receipt of demand notice or copy of invoice to either point out that a dispute exists between the parties or that he has since repaid the unpaid operational debt. If neither exists, then an application once filed has to be disposed of by the adjudicating authority within 14 days of its receipt, either by admitting it or rejecting it. An appeal can then be filed to the Appellate Tribunal under Section 61 of the Act within 30 days of the order of the Adjudicating Authority with an extension of 15 further days and no more.

27. Section 64 of the Code mandates that where these timelines are not adhered to, either by the Tribunal or by the Appellate Tribunal, they shall record reasons for not doing so within the period so specified and extend the period so specified for another period not exceeding 10 days. Even in appeals to the Supreme Court from the Appellate Tribunal under Section 62, 45 days time is given from the date of receipt of the order of the Appellate Tribunal in which an appeal to the Supreme Court is to be made, with a further grace period not exceeding 15 days. The strict adherence of these timelines is of essence to both the triggering process and the insolvency resolution process. As we have seen, one of the principal reasons why the Code was enacted was because liquidation proceedings went on interminably, thereby damaging the interests of all stakeholders, except a recalcitrant management which would continue to hold on to the company without paying its debts. Both the Tribunal and the Appellate Tribunal will do well to keep in mind this principal objective sought to be achieved by the Code and will strictly adhere to the time frame within which they are to

decide matters under the Code.

28. It is now important to construe Section 8 of the Code.

The operational creditors are those creditors to whom an operational debt is owed, and an operational debt, in turn, means a claim in respect of the provision of goods or services, including employment, or a debt in respect of repayment of dues arising under any law for the time being in force and payable to the Government or to a local authority. This has to be contrasted with financial debts that may be owed to financial creditors, which was the subject matter of the judgment delivered by this Court on 31.8.2017 in Innoventive Industries Ltd. v. ICICI Bank & Anr. (Civil Appeal Nos.8337-8338 of 2017). In this judgment, we had held that the adjudicating authority under Section 7 of the Code has to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor within 14 days. The corporate debtor is entitled to point out to the adjudicating authority that a default has not occurred; in the sense that a debt, which may also include a disputed claim, is not due i.e. it is not payable in law or in fact. This Court then went on to state:

> "29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre- existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.
>
> 30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

29. It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the

legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.

30. It is settled law that the expression "and" may be read as "or" in order to further the object of the statute and/or to avoid an anomalous situation. Thus, in Samee Khan v. Bindu Khan (1998) 7 SCC 59 at 64, this Court held:

> "14. Since the word "also" can have meanings such as "as well" or "likewise", cannot those meanings be used for understanding the scope of the trio words "and may also"? Those words cannot altogether be detached from the other words in the sub-rule. Here again the word "and" need not necessarily be understood as denoting a conjunctive sense. In Stroud's Judicial Dictionary, it is stated that the word "and" has generally a cumulative sense, but sometimes it is by force of a context read as "or". Maxwell on Interpretation of Statutes has recognised the above use to carry out the interpretation of the legislature. This has been approved by this Court in Ishwar Singh Bindra v. State of U.P. [AIR 1968 SC 1450 : 1969 Cri LJ 19]. The principle of noscitur a sociis can profitably be used to construct the words "and may also" in the sub-rule."

31. In Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.

(2008) 4 SCC 755 at 765, this Court held:

> "26. It may be noted that Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word "and" in Section 86(1)(f) between the words "generating companies" and "to refer any dispute for arbitration" means "or". It is well settled that sometimes "and" can mean "or" and sometimes "or" can mean "and" (vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 404).

> 27. In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word "and" between the words "generating companies" and the words "refer any dispute" means "or", otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some arbitrator. Hence the word "and" in Section 86(1)(f) means "or"."

32. In a recent judgment in Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P. (2013) 15 SCC 677 at 718, this Court held:

> "93. Besides the above two decisions, which discuss about the methodology of interpretation of a statute, we also refer to the following decisions rendered by this Court in Ishwar Singh Bindra [Ishwar Singh Bindra v. State of U.P., AIR 1968 SC 1450 : 1969 Cri LJ 19], wherein in para 11 it has been held as under: (AIR p. 1454) "11. ... It would be much more appropriate in the context to read it disconjunctively. In Stroud's Judicial Dictionary, 3rd Edn., it is stated at p.
>
> 135 that 'and' has generally a cumulative sense, requiring the fulfilment of all the conditions that it joins together, and herein it is the antithesis of or. Sometimes, however, even in such a connection, it is, by force of a context, read as 'or'. Similarly in Maxwell on Interpretation of Statutes, 11th Edn., it has been accepted that 'to carry out the intention of the legislature it is occasionally found necessary to read the conjunctions "or" and "and" one for the other'."
>
> 94. We may also refer to para 4 of the decision rendered by this Court in Director of Mines Safety v. Tandur and Nayandgi Stone Quarries (P) Ltd. [(1987) 3 SCC 208] : (SCC p. 211, para 4) "4. According to the plain meaning, the exclusionary clause in sub-section (1) of Section 3 of the Act read with the two provisos beneath clauses (a) and (b), the word 'and' at the end of para (b) of sub-clause (ii) of the proviso to clause
>
> (a) of Section 3(1) must in the context in which it appears, be construed as 'or';

and if so construed, the existence of any one of the three conditions stipulated in paras (a), (b) and (c) would at once attract the proviso to clauses (a) and (b) of sub-section (1) of Section 3 and thereby make the mine subject to the provisions of the Act. The High Court overlooked the fact that the use of the negative language in each of the three clauses implied that the word 'and' used at the end of clause (b) had to be read disjunctively. That construction of ours is in keeping with the legislative intent manifested by the scheme of the Act which is primarily meant for ensuring the safety of workmen employed in the mines."

33. This being the case, is it not open to the adjudicating authority to then go into whether a dispute does or does not exist?

34. It is important to notice that Section 255 read with the Eleventh Schedule of the Code has amended Section 271 of the Companies Act, 2013 so that a company being unable to pay its debts is

no longer a ground for winding up a company.

The old law contained in Madhusudan (supra) has, therefore, disappeared with the disappearance of this ground in Section 271 of the Companies Act.

35. We have already noticed that in the first Insolvency and Bankruptcy Bill, 2015 that was annexed to the Bankruptcy Law Reforms Committee Report, Section 5(4) defined "dispute" as meaning a "bona fide suit or arbitration proceedings...". In its present avatar, Section 5(6) excludes the expression "bona fide" which is of significance. Therefore, it is difficult to import the expression "bona fide" into Section 8(2)(a) in order to judge whether a dispute exists or not.

36. The expression "existence" has been understood as follows:

> "The Shorter Oxford English Dictionary gives the following meaning of the word "existence":
>
> a) Reality, as opp to appearance.
> b) The fact or state of existing; actual possession
>
> of being. Continued being as a living creature, life, esp. under adverse conditions.
>
> Something that exists; an entity, a being. All that exists. (Page 894 – Oxford English Dictionary)"

37. Two extremely instructive judgments, one of the Australian High Court, and the other of the Chancery Division in the UK, throw a great deal of light on the expression "existence of a dispute" contained in Section 8(2)(a) of the Code. The Australian judgment is reported as Spencer Constructions Pty Ltd v. G & M Aldridge Pty Ltd. [1997] FCA

681. The Australian High Court had to construe Section 459H of the Corporations Law, which read as under:

> "(1) .....
>
> (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
>
> (b) ..... " The expression "genuine dispute" was then held to mean the following:
>
> Finn J was content to adopt the explanation of "genuine dispute" given by McLelland CJ in Eq in Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785 at 787 where his Honour said:
>
> "In my opinion [the] expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the 'serious

question to be tried' criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit 'however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently and probable in itself, it may be not having 'sufficient prima facie plausibility to merit further investigation as to [its] truth' (cf Eng Mee Yong v Letchumanan [1980] AC 331 at 341), or 'a patently feeble legal argument or an assertion of facts unsupported by evidence': cf South Australia v Wall (1980) 24 SASR 189 at 194." His Honour also referred to the judgment of Lindgren J in Rohala Pharmaceutical Pty Ltd (supra) where, at 353, his Honour said:

"The provisions [of s 459H(1) and (5)] assume that the dispute and offsetting claim have an 'objective' existence the genuineness of which is capable of being assessed. The word 'genuine' is included [in 'genuine dispute'] to sound a note of warning that the propounding of serious disputes and claims is to be expected but must be excluded from consideration".

There have been numerous decisions of single judges in this Court and in State Supreme Courts which have analysed, in different ways, the approach a court should take in determining whether there is "a genuine dispute" for the purposes of s 459H of the Corporations Law. What is clear is that in considering applications to set aside a statutory demand, a court will not determine contested issues of fact or law which have a significant or substantial basis. One finds formulations such as:

"... at least in most cases, it is not expected that the court will embark upon any extended enquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute".

See Mibor Investments Pty Ltd v Commonwealth Bank of Australia (1993) 11 ACSR 362 at 366- 7, followed by Ryan J in Moyall Investments Services Pty Ltd v White (1993) 12 ACSR 320 at 324.

Another formulation has been expressed as follows: "It is clear that what is required in all cases is something between mere assertion and the proof that would be necessary in a court of law. Something more than mere assertion is required because if that were not so then anyone could merely say it did not owe a debt ..." See John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd (1994) 12 ACLC 716 at 718, followed by Northrop J in Aquatown Pty Ltd v Holder Stroud Pty Ltd (Federal Court of Australia, 25 June 1996, unreported).

In Re Morris Catering (Australia) Pty Ltd (1993) 11 ACSR 601 at 605, Thomas J said:

"There is little doubt that Div 3 is intended to be a complete code which prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the court will examine the merits or settle the dispute. The specified limits of the court's examination are the ascertainment of whether there is a 'genuine dispute' and whether there is a 'genuine claim'.

It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it) the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.

The essential task is relatively simple - to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it)." In Scanhill Pty Ltd v Century 21 Australasia Pty Ltd (1993) 12 ACSR 341 at 357 Beazley J said:

"... the test to be applied for the purposes of s 459H is whether the court is satisfied that there is a serious question to be tried that the applicant has an offsetting claim".

In Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd (1994) 13 ACSR 37 at 39, Lockhart J said:

"... what appears clearly enough from all the judgments is that a standard of satisfaction which a court requires is not a particularly high one. I am for present purposes content to adopt any of the standards that are referred to in the cases ... The highest of the thresholds is probably the test enunciated by Beazley J, though for myself I discern no inconsistency between that test and the statements in the other cases to which I have referred. However, the application of Beazley J's test will vary according to the circumstances of the case.

Certainly the court will not examine the merits of the dispute other than to see if there is in fact a genuine dispute. The notion of a 'genuine dispute' in this context suggests to me that the court must be satisfied that there is a dispute that is not plainly vexatious or frivolous. It must be satisfied that there is a claim that may have some substance". In Greenwood Manor Pty Ltd v Woodlock (1994) 48 FCR 229 Northrop J referred to the formulations of Thomas J in Re Morris Catering (Australia) Pty Ltd (1993) 11 ACLC 919, 922 and Hayne J in Mibor Investments Pty Ltd v Commonwealth Bank of Australia (supra), where he noted the dictionary definition of "genuine" as being in this context "not spurious ... real or true" and concluded (at 234): "Although it is true that the Court, on an application under ss 459G and 459H is not entitled to decide a question as to whether a claim will succeed

or not, it must be satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt. If it can be shown that the argument in support of the existence of a genuine dispute can have no possible basis whatsoever, in my view, it cannot be said that there is a genuine dispute. This does not involve, in itself, a determination of whether the claim will succeed or not, but it does go to the reality of the dispute, to show that it is real or true and not merely spurious". In our view a "genuine" dispute requires that: • the dispute be bona fide and truly exist in fact; • the grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived.

We consider that the various formulations referred to above can be helpful in determining whether there is a genuine dispute in a particular case, so long as the formulation used does not become a substitute for the words of the statute."

38. To similar effect is the judgment of the Chancery Division in Hayes v. Hayes (2014) EWHC 2694 (Ch) under the U.K. Insolvency Rules. The Chancery Division held:

"I do not think it necessary, for the purposes of this appeal, to embark on a survey of the authorities as to precisely what is involved in a genuine and substantial cross-claim. It is clear that on the one hand, the court does not need to be satisfied that there is a good claim or even that it is a claim which is prima facie likely to succeed. In In re Bayoil SA [1999] 1 WLR 147 itself, Nourse LJ referred, at p 153, to what Harman LJ had said in In re LHF Wools Ltd [1970] Ch 27, 36 where Harman LJ, having referred to a previous case, said:

"The majority decided in that case that, shadowy as the cross-claim was and improbable as the events said to support it seemed to be, there was just enough to make the principle work, namely, that it was right to have the matter tried out before the axe fell." On the other hand, the court should be alert to detect wholly spurious claims merely being put forward by an unwilling debtor to raise what has been called "a cloud of objections" as I referred to earlier."

39. Interestingly enough in In Re: Portman Provincial Cinemas Ltd. (1999) 1 WLR 157, a sharply divided Court of Appeal had to decide whether a winding up petition should be dismissed on the ground that a cross-claim had to be tried.

Lord Denning, the minority Judge put it thus:

"It comes to this: Mr. Hymanson has put forward a most astonishing claim for an indemnity against losses in perpetuity—based on an oral agreement eight years ago—in a railway carriage or a solicitor's office—with nothing to support it at all: against a man now dead. If there was substance in it fit for the court to consider, he should have condescended to a great deal more particularity. At all events, he should

have done so if he wished to convince me. I do not think this cross-claim has any substance at all. I would reject it as an answer to this creditor's debt and I would allow the appeal accordingly." On the other hand, Justice Harman in agreeing with the Chancery Division judgment, held:

"I do not think that on this proceeding we are entitled to adjudicate upon that matter. I do not think we ought to reject out of hand statements on oath by Mr. Hymanson and Mr. Waller which, unsatisfactory as they may be, do yet set up affirmatively this story. There is nobody, of course, to contradict them. I think we must take it that there is at least a chance that the judge will believe that story and will agree that there was such a bargain made, and, moreover, that it was an inherent part of the sale agreement.

xxx xxx xxx Therefore, I have had grave doubts about this matter but I have come to the conclusion on the whole that it cannot be said that the story was so vague and the likelihood of success so slight that we can say there was no substance in the cross-claim. I think the judge was right to say that the matter ought to go to trial, and therefore according to the modern practice the petition should be dismissed, and I would so hold." Similarly, Russell L.J. held:

"Lord Denning M.R. has taken the view that the deponents of the company really have made up this story, so strong are the circumstances which seem to point in the opposite direction. As I have said, I agree it is a most extraordinary story, but I am not prepared, merely on the basis of affidavits and circumstances appearing in the Companies Court, to hold that really not only is their story strange, but palpably untrue."

40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

41. Coming to the facts of the present case, it is clear that the argument of Shri Mohta that the requisite certificate by IDBI was not given in time will have to be rejected, inasmuch as neither the appellant nor the Tribunal raised any objection to the application on this score. The confirmation from a financial institution that there is no payment of an unpaid operational debt by the corporate debtor is an important piece of information that needs to be placed before the adjudicating authority, under Section 9 of the Code, but given the fact that the adjudicating authority has not dismissed the application on this ground and that the appellant has raised this ground only at the appellate stage, we are of the view that the application cannot be dismissed at the threshold for want of this certificate alone.

42. On the other hand, Shri Mohta is on firmer ground when he argues that a dispute certainly exists on the facts of the present case and that, therefore, the application ought to have been dismissed on this ground.

43. According to learned counsel for the respondent, the definition of "dispute" would indicate that since the NDA does not fall within any of the three sub-clauses of Section 5(6), no "dispute" is there on the facts of this case. We are afraid that we cannot accede to such a contention. First and foremost, the definition is an inclusive one, and we have seen that the word "includes" substituted the word "means" which occurred in the first Insolvency and Bankruptcy Bill. Secondly, the present is not a case of a suit or arbitration proceeding filed before receipt of notice – Section 5(6) only deals with suits or arbitration proceedings which must "relate to" one of the three sub-

clauses, either directly or indirectly. We have seen that a "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6). The correspondence between the parties would show that on 30th January, 2015, the appellant clearly informed the respondent that they had displayed the appellant's confidential client information and client campaign information on a public platform which constituted a breach of trust and a breach of the NDA between the parties. They were further told that all amounts that were due to them were withheld till the time the matter is resolved.

On 10th February, 2015, the respondent referred to the NDA of 26th December, 2014 and denied that there was a breach of the NDA. The respondent went on to state that the appellant's claim is unfounded and untenable, and that the appellant is trying to avoid its financial obligations, and that a sum of Rs.19,08,202.57 should be paid within one week, failing which the respondent would be forced to explore legal options and initiate legal process for recovery of the said amount. This e-

mail was refuted by the appellant by an e-mail dated 26th February, 2015 and the appellant went on to state that it had lost business from various clients as a result of the respondent's breaches. Curiously, after this date, the respondent remained silent, and thereafter, by an e-mail dated 20th June, 2016, the respondent wished to revive business relations and stated that it would like to follow up for payments which are long stuck up. This was followed by an e-mail dated 25th June, 2016 to

finalize the time and place for a meeting. On 28th June, 2016, the appellant wrote to the respondent again to finalize the time and place. Apparently, nothing came of the aforesaid e-mails and the appellant then fired the last shot on 19th September, 2016, reiterating that no payments are due as the NDA was breached.

44. The demand notice sent by the respondent was disputed in detail by the appellant in its reply dated 27th December, 2016, which set out the e-mail of 30th January, 2015. The appellant then went on to state:

> "Sometime during June and September 2016, an officer of your Client, one Mr. Jasmeet Singh wrote to our Client that he wanted to meet and revive business relationship and exploring common interest points to work together. In fact, in his email, he admits that there should be resolution to the impending payments thereby implying that there was (a) a dispute (as defined under the Code) and
>
> (b) there was a breach of the NDA which needed to be resolved. Mr. Singh's emails to our client were sent after 1 year and 6 months had elapsed from the date of our Client's email of 30 January 2015. This clearly shows that your Client was silent during this period and had not bothered to answer the questions raised by our Client. Hence, once again in September, our Client called upon your Client to explain its breach of the NDA. Your Client instead of explaining its breach of the NDA remained silent for about 3 months and thereafter chooses to issue the Notice as a form of pressure tactic and extort monies from our Client for your Client's breach of the NDA. All the conduct of your Client explicitly shows laches on its part.

Your Clients should note that under the NDA, it has agreed that a breach of the NDA will cause irreparable damage to our Client and our Client is entitled to all remedies under law or equity against your Client for the enforcement of the NDA. Accordingly, given the severity of the breaches of the NDA committed by your Client, the delay and laches committed by your Client and the conduct of your Client, our Client is not liable to make payments to your Client against the breaches of the NDA and the delay and laches committed by your Client. In fact, at this stage, our Client is contemplating initiating necessary legal actions against your Client and its parent company for the breach of the NDA to seek further compensations and damages and other legal and equitable remedies against your Client and its parent company."

45. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability.

46. Learned counsel for the respondent, however, argued that the breach of the NDA is a claim for unliquidated damages which does not become crystallized until legal proceedings are filed, and none

have been filed so far. The period of limitation for filing such proceedings has admittedly not yet elapsed.

Further, the appellant has withheld amounts that were due to the respondent under the NDA till the matter is resolved.

Admittedly, the matter has never been resolved. Also, the respondent itself has not commenced any legal proceedings after the e-mail dated 30th January, 2015 except for the present insolvency application, which was filed almost 2 years after the said e-mail. All these circumstances go to show that it is right to have the matter tried out in the present case before the axe falls.

47. We, therefore, allow the present appeal and set aside the judgment of the Appellate Tribunal. There shall, however, be no order as to costs.

.....J. (R.F. Nariman) .....J. (Sanjay Kishan Kaul) New Delhi;

September 21, 2017.