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Insolvency and Bankruptcy Code, 2016 –
Guidelines for Determining "Existence of Dispute"

The enactment of the Insolvency and Bankruptcy Code, 2016 (**IBC**) has led to the emergence of a flurry of insolvency proceedings filed by the creditors of various corporate debtors. These proceedings have been primarily filed by operational creditors of such debtors under Sections 8 and 9 of the IBC, which provide for issuance of demand notice by the operational creditor to the debtor for payment of operational debt.

'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. *'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. The scheme of IBC is to ensure that in case of a default by the Debtor in making payments, in the sense that the debt becomes due and is not paid, the respective creditors have the recourse to commence insolvency resolution process against such debtor.

One of the essential elements of all such proceedings under the IBC is that the operational debt should be an amount due and payable by the corporate debtor to the creditor, payment whereof is undisputedly outstanding and there is no existence of dispute with respect to the payment thereof. However, the parameters of the term "*existence of dispute*" are left to be adjudicated by the Adjudicating Authority formed under the IBC, viz. the National Company Law Tribunal (**NCLT**) and the National Company Law Appellate Tribunal (**NCLAT**).

In this regard, the following two issues were recently considered and discussed by the NCLAT in **M/s Annapurna Infrastructure Pvt. Ltd. &Anr. vs. M/s. SORIL Infra Resources Ltd.**- (i) whether there is an "existence of a dispute" as contemplated under section 8 (2) (a) of the IBC in cases where an arbitral award has been affirmed by the court under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**); (ii) whether pendency of proceedings for execution of an arbitral award can defeat Section 9 application of an operational creditor under IBC. The NCLAT observed that from clause (a) of sub-section (2) of Sec. 8, we find that pendency of an arbitration proceeding is termed as an 'existence of dispute' and not the pendency of an application under Sec. 34 or Sec. 37 of the Arbitration Act.Accordingly,the NCLAT held that pendency of the appeal by SORIL under Section 37 of the Arbitration Act would not constitute "existence of a dispute" between Annapurna and SORIL.

The issue of "existence of a dispute"was further discussed in **M/s Innoventive Industries Ltd. vs. ICICI Bank & Another**, where an appeal was filed before the Hon'ble Supreme Court challenging an order passed by the NCLAT.In this appeal, the Hon'ble Supreme Court held that 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 IBC.

Subsequently, on 21st September 2017, the Hon'ble Supreme Court, in the matter of **Mobilox Innovations Private Ltd v/s Kirusa Software Private Ltd.**, has observed that once the operational creditor has filed an application which is otherwise complete, the Adjudicating Authority must reject the application under Section 9(5)(ii)(d) of the IBC, if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. 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. However, in doing so, it does not need to be satisfied that the defence is likely to succeed. It 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.

Accordingly, what constitutes a *bona fide* 'dispute', is yet to be determined by the Adjudicating Authorities on a case to case basis. However, the observations made by the authorities in the above matters,would serve as definite guidelines/tests in determiningthe same, going forward.

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