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**SUMMARY OF NCLAT ORDER IN  
ESSAR STEEL UNDER SECTION 29A  
OF THE IBC**

*September 8, 2018*

On September 7, 2018, the National Company Law Appellate Tribunal, New Delhi (“**NCLAT**”) pronounced the order in the Essar Steel case (“**Order**”). The appeal before the NCLAT was separately filed by both Numetal Limited (“**Numetal**”) and Arcelor Mittal India Private Limited (“**Arcelor**”) who were held to be ineligible to bid for Essar Steel India Limited (“**ESL**”) by the National Company Law Tribunal (“**NCLT**”), Ahmedabad by its order dated April 19, 2018.

## Background

Pursuant to applications filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) by the Standard Chartered Bank and the State Bank of India, the corporate insolvency resolution process was initiated against ESL. In response to the advertisements made under the IBC, Numetal and Arcelor (Numetal and Arcelor are hereinafter collectively referred to as the “**Resolution Applicants**”) submitted their expression of interest (“**EOI**”) to submit the resolution plan for ESL to the resolution professional (“**RP**”).

Subsequent to submission of the EOI by Arcelor and Numetal on October 11, 2017 and October 20, 2017, respectively, section 29A was inserted in the IBC by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, followed by the Insolvency and Bankruptcy Code (Amendment) Act, 2017. The RP held both the Resolution Applicants to be ineligible in view of section 29A<sup>1</sup> of the IBC which resulted in both the Resolution Applicants filing necessary applications before the NCLT challenging the decision of the RP.

<sup>1</sup> Please see Annexure A.

Subsequently, albeit the NCLT also held that both the Resolution Applicants were ineligible under section 29A, it observed that the committee of creditors (“**COC**”) had not followed the procedure prescribed under section 30(4)<sup>2</sup> of the IBC and partly allowed the applications directing the RP and the COC to revisit and reconsider their decision in light of the proviso to section 29A(c) read with the second proviso to section 30(4) which allows otherwise ineligible bidders who are promoters of accounts which are declared as non-performing assets (“**NPA**”) to cure such disability. Section 29A(c) allows the promoter of an

<sup>2</sup> Section 30(4) of the IBC is as follows:

*“(4) The committee of creditors may approve a resolution plan by a vote of not less than **sixty-six** per cent. of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:*

*Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:*

*Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:*

*Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section]:*

*Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.”*

NPA account to submit a resolution plan after paying all dues. The second proviso to section 30(4) is similar to 29A(c) for persons who would be otherwise disqualified but had submitted the resolution plan before the insertion of section 29(A).

Both the parties preferred an appeal to the NCLAT from the order of NCLT. The NCLAT held that Numetal was not hit by the ineligibility criterion under section 29A of the IBC and in fact is an eligible bidder.

With respect to Arcelor, it held that, though ineligible, Arcelor may cure the ineligibility by making payment of all overdue amount with interest thereon and charges relating to the NPA accounts of both Uttam Galva Steels Limited ("**Uttam Galva**") and KSS Petron Private Limited ("**KSS Petron**"), both companies of which Arcelor was held to be a promoter, within 3 (three) days i.e. by September 11, 2018.

### Expression of Interest

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The discussion on the term 'expression of interest' perhaps may very well be the fulcrum of the Order. Before we proceed to discuss the issues specific to Numetal and Arcelor it is important to deliberate on the NCLAT's view on 'expression of interest'.

EOI is a part of standard procedure for almost all competitive bidding process across all sectors and jurisdictions. It is the first level of evaluating and short-listing potential bidders. The submission of EOI does not in any manner bind the parties to the transaction. Post submission of the EOI and necessary due diligence, does a bidder submit the final binding bid pursuant to which the successful bidders are chosen. The process in this case

as well as most of the other IBC matters is similar. The RP in consonance with acceptable procedures issued an advertisement on October 6, 2017 seeking EOI. The advertisement, *inter alia*, states that "*any potential Resolution Applicant who is desirous of submitting a Resolution Plan as above is requested to submit Expression of Interest (EOI) along with relevant documents to satisfy the eligibility criteria...*"

Pursuant to the advertisement both Arcelor and Numetal submitted their EOI on October 11, 2017 and October 20, 2017 respectively, which was prior to November 23, 2017 i.e. the date on which section 29A was inserted, by Insolvency and Bankruptcy Code (Amendment) Ordinance 2017, in the IBC.

While deciding the issue of eligibility of the bid submitted by Arcelor, the NCLAT held that the date of submission of EOI should be treated to be the date of submission of the resolution plan and pursuant thereto applied the provisions of section 29A and second proviso to section 30(4) of the IBC which allows the bidder, who is the promoter of an NPA company, to cure the default. The stated reason for such interpretation was to allow the parties to take the benefit of the second proviso of section 30(4) to cure the ineligibility by paying off the entire outstanding amount on account of the NPAs of which they were promoters. In the words of the NCLAT "*if the aforesaid proposition is not accepted, it will deprive the 'Resolution Applicants' from deriving advantage of second proviso to sub-section (4) of section 30 inserted on 23rd November, 2017, even though they acted to submit the 'Resolution Plan' by submitting the 'Expression of Interest' of 'Resolution Plan'.*"

It may be noted that though the NCLAT mentioned that applying the aforesaid principle would allow the Resolution Applicants (who would have been otherwise ineligible under section 29A) to cure the disability, went further and held that Numetal is in fact eligible, basis the second bid of Numetal on March 29, 2018 and did not apply the date of the submission of the EOI, as the date of submission of the resolution plan for Numetal. In fact, for Numetal, the NCLAT held the second bid date i.e. March 29, 2018 is to be considered as the date of submission of resolution plan and ruled that since there was no shareholding of Ruia family in Numetal on the second bid date, Numetal was not disqualified.

## The Numetal Issue

At the time of submission of the EOI, Numetal was owned 100% (one hundred percent) by Mr. Rewant Ruia (son of Mr. Ravi Ruia, the promoter of ESL) through various holding companies. Subsequent to the introduction of Section 29A in the IBC, Mr. Rewant Ruia transferred the shares in such a manner that Mr. Rewant Ruia (through a holding company Aurora Enterprise Limited (“**AEL**”)) only controlled 25% (twenty five percent) of Numetal. The remaining shares of Numetal were transferred to Crinium Bay, a wholly owned subsidiary of VTB Bank of Russia (“**VTB Bank**”), JSC Vo Tyazhpromexport (“**TPE**”) a wholly owned subsidiary of a Russian state owned corporation called Rostec and Indo International Trading FZCO (“**IITF**”), a steel trading company based out of Dubai (the Order does not discuss the ownership structure of IITF). Pursuant to such transfer by Rewant Ruia, the shareholding of Numetal (“**Second Shareholding Structure**”) was as under:

Shareholder	Holding percentage
AEL (Rewant Ruia)	25%
Crinium Bay (VTB Bank)	40%
TPE	9.9%
IITF	25.1%
<b>Total</b>	<b>100%</b>

Basis the Second Shareholding Structure when Numetal submitted its first resolution plan on February 12, 2018, the same was rejected by the RP on the basis of being ineligible under section 29A of the IBC.

Since even the bid submitted by Arcelor was rejected under section 29A, the COC decided to “*extend the due date for submission of ‘Resolution Plans’ (as defined in the request for proposals) and permit all the potential ‘Resolution Applicants’ (as defined in the request for proposal, along with its new addendum) to submit their new ‘Resolution Plans’ in respect of the ‘Corporate Debtor’*”.

Pursuant to the above decision of the COC, Numetal submitted a second resolution plan (“**Numetal Second Submission**”) of Rs. 37,000 crores but further changed its shareholding structure (“**Third Shareholding Structure**”) prior to the submission of the second resolution plan in a manner that Rewant Ruia/ AEL completely exited from Numetal. The Third Shareholding Structure of Numetal on the date of the submission of the second resolution plan i.e. March 29, 2018 was as follows:

Shareholder	Holding percentage
Crinium Bay (VTB Bank)	40%
TPE	25.9%
IITF	34.1%
<b>Total</b>	<b>100%</b>

Further, the NCLAT held that since at the time of the Numetal Second Submission none of the Ruias were shareholders in Numetal, Numetal does not get disqualified under section 29A of the IBC.

It may be noted that for the purpose of Numetal, the principles laid down under paragraphs 109-111 of the Order, that the date of submission of the EOI should be held to be the date of the submission of the resolution plan, was not applied. The nuanced difference in the two approaches is possibly because in the case of Numetal the promoter exited the bid, whereas in the case of Arcelor the promoter exited the NPA accounts to participate in the bid.

Another issue with respect to VTB Bank was also raised by Arcelor. It was stated that pursuant to Articles 5 and 13 of European Union Regulations dated July 31, 2014, VTB Bank was prohibited by the Council of European Union from dealing in securities or other money market instruments of maturity exceeding 90 (ninety) days. Arcelor argued that sub-sections (f) and (i) of Section 29A of the IBC squarely gets hit which made Numetal ineligible. Section 29A(f) of the IBC prohibits a person from bidding, if such a person is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities market. Section 29A(i) extends the prohibition to any bidder or connected person who is subject to any disability

corresponding to clause (a) to (h) under any law in any jurisdiction outside India. However, NCLAT rejected the contention of Arcelor. It observed that Arcelor has failed to bring on record any penal order passed by any court of law relating to disability, if any, which is corresponding to any of the disabilities enumerated in clauses (a) to (h) of section 29A of the IBC.

## The Arcelor Issue

The eligibility of Arcelor was tested on facts relating to 2 (two) instances pertaining to (i) Uttam Galva; and (ii) KSS Petron.

### Uttam Galva

Arcelor Mittal Netherlands BV ("**AM Netherlands**"), a connected person of Arcelor, had executed a co-promotion agreement with the Indian promoters of Uttam Galva, pursuant to which AM Netherlands had the right to appoint 50% (fifty percent) of the non-independent directors and jointly nominate the independent directors on the board of Uttam Galva.<sup>3</sup> The 32<sup>nd</sup> annual report of Uttam Galva dated March 31, 2017 reflects the name of 'AM Netherlands' as a promoter holding 29% (twenty nine percent) shares.

According to Arcelor, whilst at the time of Uttam Galva becoming an NPA i.e. March 31, 2016, AM Netherlands was the promoter of Uttam Galva, by the time the resolution plan was

<sup>3</sup> Under section 149(6) of the Companies Act, 2013 an independent director is a director other than a managing director or a whole-time director or a nominee director. However, for the purpose of this note this issue is not being deliberated.

submitted i.e. February 12, 2018, AM Netherlands had transferred its entire shareholding of 29.05% (twenty nine point zero five percent) to one Sainath Trading Private Limited<sup>4</sup> ("**Sainath**"). Arcelor argued that as a consequence of the above, AM Netherlands' status as 'promoter' of 'Uttam Galva', de- facto and de-jure, ceased to exist well prior to date of submission of plan. The mere fact that 'NSE' and 'BSE' allowed the request of declassification on March 21, 2018 and March 23, 2018 respectively could not, and in fact did not, change the position that 'AM Netherlands' had ceased to be a 'promoter' of 'Uttam Galva' since February 7, 2018 itself (the date of the transfer of shares by AM Netherlands to Sainath).

### **KSS Petron**

KSS Petron, which has also been classified as an NPA and against whom corporate insolvency resolution process has been initiated, is a wholly owned subsidiary of 'KazStroy Service Global BV Netherlands' ("**KSS Global BV**"). KSS Petron has a subsidiary company called 'Petron Engineering & Construction Limited' ("**Petron Engineering**"). Pursuant to a share purchase agreement dated March 3, 2011, one 'Fraseli Investments Sari' ("**Fraseli**"), a company owned and controlled by a company called by 'Mittal Investments Sr' ("**Mittal Investments**") being a part of the LN Mittal group and consequently connected to Arcelor, acquired about one-third of the share capital of KSS Global BV.

The Order also states that 'pursuant to the public announcement for the acquisition (Petron Engineering is a listed company) Fraseli had the right to appoint directors on the

*board of KSS Global BV and had affirmative voting rights on decisions regarding various matters at the board and shareholder level in respect of KSS Global BV and all companies controlled by KSS Global BV. Such right of Fraseli to appoint directors on the board of KSS Global BV and the right to exercise affirmative voting rights in respect of KSS Global BV and its subsidiaries (including KSS Petron) is also recorded in the Articles of Association of KSS Global BV.'*

Arcelor argued that apart from the fact that Fraseli held only a minority share in KSS Global BV, the affirmative rights and director nomination were merely minority protection rights and cannot impute control. Arcelor further stated that in any event prior to the submission of the resolution plan, Fraseli had transferred its entire shareholding in KSS Global BV. Arcelor also submitted that the RP had not disqualified Arcelor on account of KSS Petron.

Whilst the issue of whether negative control amounts to control was not deliberated or discussed at length in the order, however, the same was necessarily implied as the NCLAT held that Arcelor exercised control over KSS Petron.

The NCLAT held that Arcelor had control over Uttam Galva and KSS Petron and was consequently ineligible under section 29A of the IBC. It also held that Arcelor should be given an opportunity to cure the default and allowed them time until September 11, 2018 to pay all the dues of Uttam Galva and KSS Petron.

<sup>4</sup> The order does not discuss any further on the ownership structure of Sainath.

## Conclusion

This Order is probably the first order from NCLAT on the issue of section 29A of the IBC. Arcelor has already preferred an appeal to the Supreme Court and the Supreme Court may well finally decide on the same. *De Hors* the issue on whether EOI should be the date of the submission of the resolution plan, the principle question which comes to fore is that 'Can a person who would have otherwise not been eligible under section 29A(c) (is an NPA or promoter of an NPA), become eligible by merely selling all shares of the NPA account just prior to the submission of the resolution plan'.

Section 29A was first introduced by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 in November 23, 2017. The said sub- section originally read as under:

*"29. A person shall not be eligible to submit a resolution plan, if such person or any other person acting jointly or in concert with such person – (c) has an account or an account of a corporate debtor under the management or control of such person or of whom such person **is** a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949..."*

Pursuant to a subsequent amendment and with effect from February 6, 2018 the first words 'has an account' of sub-clause (c) was substituted by 'at the time of submission of the resolution plan has an account, '. Thus, very evidently the legislative intent is that the ineligibility parameter apropos being the promoter of

an NPA account will only be applicable at the time of submission of the resolution plan. However, this is an interpretation which seems to have been applied by the NCLAT to Numetal but not to Arcelor ostensibly because in the case of Arcelor, it merely sold shares of Uttam Galva and KSS Petron to become eligible. It is thus possible to comply with the letter of section 29A(c) but not the spirit. The principles of purposive interpretation have been applied several times to the IBC. The IBC ecosystem shall patiently wait for the outcome of the Supreme Court decision on these issues.

**Annexure A**

**Section 29A of the Insolvency and Bankruptcy Code, 2016 - Persons not eligible to be resolution applicant<sup>5</sup>**

A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

- (a) is an undischarged insolvent;
- (b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;
- (c) ‘at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 <sup>7</sup>[or the guidelines of a financial sector regulator issued under any other law for the time being in force,] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor: Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan:

<sup>5</sup> Amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2018 (with retrospective effect from November 23, 2017).

<sup>6</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

<sup>7</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

<sup>8</sup>[Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.- For the purposes of this proviso, the expression ‘related party’ shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

Explanation II.— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;]

<sup>9</sup>[(d) has been convicted for any offence punishable with imprisonment –

- (i) for two years or more under any Act specified under the Twelfth Schedule; or
- (ii) for seven years or more under any law for the time being in force:

<sup>8</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

<sup>9</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(e) is disqualified to act as a director under the Companies Act, 2013:

<sup>10</sup>[Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

<sup>11</sup>[Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;]

<sup>10</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

<sup>11</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

(h) has executed <sup>12</sup>[a guarantee] in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code <sup>13</sup>[and such guarantee has been invoked by the creditor and remains unpaid in full or part];

(i) <sup>14</sup>[is] subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i). Explanation <sup>15</sup>[I]. — For the purposes of this clause, the expression 'connected person' means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

<sup>16</sup>[Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression 'related party' shall not include a financial entity, regulated by a financial sector

<sup>12</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

<sup>13</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

<sup>14</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

<sup>15</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

<sup>16</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;]

<sup>17</sup>[Explanation II—For the purposes of this section, ‘financial entity’ shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:

- (a) a scheduled bank;
- (b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;
- (c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999;
- (d) an asset reconstruction company register with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (e) an Alternate Investment Fund registered with Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government.]

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<sup>17</sup> Amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 6, 2018).

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