Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

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ArcelorMittal Steals Essar From Ruias!

May 2020

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concierge@nishithdesai.com

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Our reputation is well regarded for handling complex high value transactions and cross border litigation; that prestige extends to engaging and mentoring the start-up community that we passionately support and encourage. We also enjoy global recognition for our research with an ability to anticipate and address challenges from a strategic, legal and tax perspective in an integrated way. In fact, the framework and standards for the Asset Management industry within India was pioneered by us in the early 1990s, and we continue to remain respected industry experts.

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- **Legal500:** Tier 1 for Tax, Investment Funds, Labour & Employment, TMT and Corporate M&A *2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013, 2012*
- **Chambers and Partners Asia Pacific:** Band 1 for Employment, Lifesciences, Tax and TMT *2020, 2019, 2018, 2017, 2016, 2015*
- **IFLR1000:** Tier 1 for Private Equity and Project Development: Telecommunications Networks. *2020, 2019, 2018, 2017, 2014*
- **AsiaLaw Asia-Pacific Guide 2020:** Tier 1 (Outstanding) for TMT, Labour & Employment, Private Equity, Regulatory and Tax
- **FT Innovative Lawyers Asia Pacific 2019 Awards:** NDA ranked 2nd in the Most Innovative Law Firm category (Asia-Pacific Headquartered)
- **RSG-Financial Times:** India's Most Innovative Law Firm *2019, 2017, 2016, 2015, 2014*
- **Benchmark Litigation Asia-Pacific:** Tier 1 for Government & Regulatory and Tax *2019, 2018*
- **Who's Who Legal 2019:**
  Nishith Desai, Corporate Tax and Private Funds – Thought Leader
  Vikram Shroff, HR and Employment Law- Global Thought Leader
  Vaibhav Parikh, Data Practices - Thought Leader (India)
  Dr. Milind Antani, Pharma & Healthcare – only Indian Lawyer to be recognized for 'Life sciences-Regulatory,' for 5 years consecutively
- **Merger Market 2018:** Fastest growing M&A Law Firm in India
- **Asia Mena Counsel's In-House Community Firms Survey 2018:** The only Indian Firm recognized for Life Sciences
- **IDEX Legal Awards 2015:** Nishith Desai Associates won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm"

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1. Introduction

While the world's largest steel manufacturer, ArcelorMittal has spread wide and far globally, and is known for turning around distressed companies, its absence from the Indian steel market has been noteworthy and puzzling. While attempts to foray into the Indian market over the years have not borne the results it would have desired, ArcelorMittal decided to bid for one of the largest steel manufacturers in India, Essar Steel India Limited (**"Essar Steel"**) under the corporate insolvency resolution process (**"CIRP"**) pursuant to the provisions of the then newly introduced Indian insolvency code. The potential acquisition has gone through multiple legal hoops and hurdles, with the initiation of the CIRP, the eligibility of the bidders under the Insolvency and Bankruptcy Code, 2016 (**"IBC"**), the jurisdiction of the relevant tribunals, distinction between classes of creditors and supremacy of the committee of creditors all being determined in the process for ArcelorMittal's acquisition of Essar Steel.

The Reserve Bank of India (**"RBI"**) in June 2017 notified certain companies for which it required the banks to initiate a corporate insolvency resolution process under the IBC. Essar Steel was one of the companies notified by the RBI in 2017. Essar Steel was in the process of negotiating a restructuring plan with its lenders at the time when the RBI notification was released, and hence challenged RBI's notification for initiation of CIRP for Essar Steel. Once upheld, there were challenges to ArcelorMittal's eligibility under S. 29 of IBC. Once the eligibility concerns were dealt with, the contents of ArcelorMittal's proposed resolution plan were challenged, including the powers of the committee of creditors to approve the resolution plan, and the jurisdiction of the NCLT and NCLAT was also questioned. After multiple legal proceedings, ending up at India's apex court, the Supreme Court of India, the matters were determined in favour of ArcelorMittal.

The final determination of the matter in its favour, paved the way for ArcelorMittal's acquisition of Essar Steel in December 2019.

The IBC is an insolvency code introduced in 2016, and the law and practice around IBC has been evolving on an ongoing basis, with 4 (four) amendments already. The jurisdiction and interpretation of the law has also been evolving, including under the Essar Steel case itself. In this lab, we attempt to dissect the acquisition of Essar Steel from a legal, commercial, financing and tax perspective, while evaluating the interpretation taken by various courts to clarify certain ambiguities under IBC.

2. Glossary of terms

Abbreviation	Meaning
2017 Ordinance	Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017
2017 IBC Amendment	Insolvency and Bankruptcy Code (Amendment) Act, 2017
2019 IBC Amendment	Insolvency and Bankruptcy Code (Amendment) Act, 2019
Adjudicating Authority	National Company Law Tribunal
AEL	Aurora Enterprises Limited
AMNS Luxembourg	AMNS Luxembourg Holding S.A.
AOA	Articles of association
Appellate Authority	National Company Law Appellate Tribunal
ArcelorMittal	ArcelorMittal S.A.
ArcelorMittal Belval	ArcelorMittal Belval & Differdange S.A.
ArcelorMittal India	ArcelorMittal India Private Limited
CCI	Competition Commission of India
CIRP	Corporate Insolvency Resolution Process under the IBC
COC	Committee of creditors, as formed under the provisions of IBC
Essar Steel	Essar Steel India Limited, the corporate debtor undergoing CIRP under IBC
First SC Judgement	Order of the Supreme Court in *ArcelorMittal India Private Limited v Satish Kumar Gupta & Ors.*[1]
Guj HC	Gujarat High Court
Guj HC Ruling	Order of the Guj HC in *Essar Steel India Limited v Reserve Bank of India*[2]
IBC	Insolvency and Bankruptcy Code, 2016
IT Act	Income Tax Act, 1961
June 2017 Press Release	RBI's press note identifying Essar Steel as one of the companies for which the CIRP had to be initiated
JV Agreement	Joint venture agreement dated December 9, 2019 entered into between ArcelorMittal, ArcelorMittal India, ArcelorMittal Belval, AMNS Luxembourg, Oakey and Nippon Steel
KSS Petron	KSS Petron Private Limited
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
Nippon Steel	Nippon Steel Corporation (earlier known as Nippon Steel & Sumitomo Metal Corporation)

1. Civil Appeal No. 9402-05 OF 2018
2. Special Civil Application No. 12434 OF 2017

Numetal	Numetal Limited
Oakey	Oakey Holding B.V.
RBI	Reserve Bank of India
RP	Resolution Professional, appointed in accordance with the provisions of IBC
SARFAESI	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
SBI	State Bank of India, one of the financial creditors of Essar Steel
SC	Supreme Court of India
SCB	Standard Chartered Bank, one of the financial creditors of Essar Steel
Second SC Judgement	Order of the Supreme Court in *Committee of Creditors of Essar Steel India Limited through Authorised Signatory v Satish Kumar Gupta &Ors.*[3]
Takeover Code	SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
Uttam Galva	Uttam Galva Steels Limited

3. Civil Appeal No. 8766-67 OF 2019

3. Details of the transaction

I. Parties to the deal

A. Essar Steel

Essar Steel India Limited was a public unlisted company incorporated on June 1, 1976. Essar Steel was registered with the Registrar of Companies, Ahmedabad. Essar Steel was an integrated steel producer with an annual production capacity of approximately 10 million tonnes, making it one of the top 5 steel producers in India.[4] Essar Steel's manufacturing facility comprised of an ore beneficiation, pellet making, iron making, steel making, and downstream facilities including cold rolling mill, galvanising, pre-coated facility, steel processing facility, extra wide plate mill and a pipe mill.

Essar Steel was majority held by promoters (i.e. approximately 97.5%) as on March 31, 2018. Majority of the shareholding was held by Essar Steel Asia Holdings (72.08%), Aegis Tech Limited (18.90%).[5]

Essar Steel conducted its operations through six locations i.e., Hazira (Gujarat), Vishakamatnam (Andhra Pradesh), Bailadila in Kirundal (Chattisgarh), Paradeep (Odisha), Dabuna (Odisha) and Pune (Maharashtra).[6] Essar Steel provided employment to approximately 3,806 persons as of March 31, 2018.[7]

Essar Steel had an admitted debt of over INR 545 billion outstanding at the time the CIRP was initiated by SBI and SCB in 2017.[8] The financial indebtedness of Essar Steel as of March 31, 2018 as per its annual report stood at over INR 600 billion.[9]

4. Citation needed
5. https://www.essar.com/wp-content/uploads/2018/12/EssarSteel_AR_2017_18.pdf
6. http://www.essarsteel.com/section_level2.aspx?cont_id=eLiVfqUiZks=&path=Operations_%3E_India_%3E_Bailadilla:_Beneficiation_plant
7. https://www.essar.com/wp-content/uploads/2018/12/EssarSteel_AR_2017_18.pdf
8. http://www.essarsteel.com/upload/pdf/list_of_creditors17.pdf
9. https://www.essar.com/wp-content/uploads/2018/12/EssarSteel_AR_2017_18.pdf

B. ArcelorMittal group

i. ArcelorMittal S.A.

The ArcelorMittal group is the world's largest steel producer. ArcelorMittal is the flagship holding company of the group and is headquartered in Luxembourg, and is listed on the stock exchanges of New York, Amsterdam, Paris, Luxembourg and on the Spanish stock exchanges of Barcelona, Bilbao, Madrid and Valencia.[10]

ii. ArcelorMittal Belval

Wholly owned subsidiary of ArcelorMittal, and immediate parent of AMNS Luxembourg.

iii. AMNS Luxembourg

The joint venture company of ArcelorMittal and Nippon Steel based in Luxembourg.

iv. Oakey Holding B.V.

Luxembourg based wholly owned subsidiary of AMNS Luxembourg, which was the 100% shareholder of ArcelorMittal India.

v. ArcelorMittal India

ArcelorMittal India is an Indian private company incorporated in 2006. ArcelorMittal India had filed the resolution plan under the CIRP for Essar Steel. ArcelorMittal India was 100% held by Oakey.

C. Nippon Steel Corporation[11]

Nippon Steel is Japan's largest steel manufacturer, and the world's third largest

10. ArcelorMittal's website, available at https://corporate.arcelormittal.com/
11. Nippon Steel Corporation was known as Nippon Steel & Sumitomo Metal Corporation, and changed its name to Nippon Steel Corporation from April 1, 2019. See https://www.nipponsteel.com/common/secure/en/news/20181004_100.pdf

steel manufacturer.[12] Nippon Steel is listed on the Tokyo, Nagoya, Sapporo and Fukuoka stock exchanges in Japan.[13]

D. Lenders

The lenders to Essar Steel as on the date of initiation of the CIRP. The total debt of Essar Steel admitted was approximately INR 545 billion, with the amount due specifically to financial creditors (as defined under the IBC) being INR 494 billion.[14] Out of these, State Bank of India, Canara Bank, Standard Chartered Bank and Punjab National Bank had the largest individual exposures.[15]

II. Chronology of events

A. Chronology of events vis-à-vis the acquisition process under the IBC

Date	Particulars
June 13, 2017	The RBI issued press note (**"June 2017 Press Release"**) identifying Essar Steel as one of the 12 accounts in respect of which CIRP under the IBC had to be initiated by banks
July 17, 2017	The Guj HC dismissed Essar Steel's challenge to the June 2017 Press Release, thereby permitting the lenders to proceed before the NCLT for CIRP of Essar Steel
August 2, 2017	NCLT by common order admitted the application filed by Standard Chartered Bank and State Bank of India, under Section 7 of the IBC to initiate CIRP against Essar Steel
September 4, 2017	The resolution professional is appointed and confirmed
October 6, 2017	The resolution professional invited expressions of interest from all interested resolution applicants to present resolution plans for rehabilitating Essar Steel
October 11, 2017	ArcelorMittal India submits its expression of interest for Essar Steel's CIRP
October 20, 2017	Numetal submits its expression of interest for Essar Steel's CIRP
November 23, 2017	Section 29A is introduced in the IBC by way of the 2017 Ordinance
December 24, 2017	Resolution professional published the 'Request for proposal' seeking for resolution plans from prospective bidders
January 19, 2018	The 2017 Amendment is published in the official gazette replacing the 2017 Ordinance, and is effective from November 23, 2017
February 12, 2018	Numetal and ArcelorMittal India submit bids and resolution plans as resolution applicants
March 20, 2018	Numetal files application before the NCLT seeking that it be declared a successful resolution applicant
March 23, 2018	Resolution professional declares Numetal and ArcelorMittal India both ineligible
March 26, 2018	ArcelorMittal India and Numetal both independently challenge the resolution professional's order dated March 23, 2018

12. https://www.reuters.com/article/us-nippon-steel-shutdown/nippon-steel-to-cut-10-of-steel-output-capacity-faces-record-loss-idUSKBN2010P7
13. https://www.nipponsteel.com/en/ir/faq/
14. http://www.essarsteel.com/upload/pdf/list_of_creditors17.pdf
15. http://www.essarsteel.com/upload/pdf/list_of_creditors17.pdf

April 2, 2018	Fresh bids along with the resolution plans submitted by ArcelorMittal India, Numetal and Vedanta Resources Limited
April 2, 2018	NCLT directs that pending the applications filed by Numetal and ArcelorMittal India on March 23, 2018, the fresh bids and resolution plans should not be opened
April 19, 2018	The NCLT upheld the findings of the resolution professional that Numetal and ArcelorMittal were ineligible, and remanded the matter back to the COC and the resolution professional
April 26, 2018	Numetal filed an appeal in the NCLAT against the order of the NCLT dated April 19, 2018 declaring it ineligible
April 27, 2018	ArcelorMittal India filed an appeal in the NCLAT against the order of the NCLT dated April 19, 2018 declaring it ineligible
May 8, 2018	Pending the NCLAT appeal, the COC held that both ArcelorMittal India and Numetal was ineligible under Section 29A of IBC
September 7, 2018	NCLAT held that while Numetal's revised resolution plan would be eligible, ArcelorMittal was ineligible under Section 29A of IBC
September 10, 2018	Standard Chartered Bank was classified as a secured financial creditor of Essar Steel by the resolution professional.
October 4, 2018	SC holds that both Numetal and ArcelorMittal are ineligible but gives them time to clear dues, in which case their resolution plans shall be considered, by way of the First SC Judgement
October 18, 2018	ArcelorMittal India informs the resolution professional and the COC that it had cleared dues as per the First SC Judgement
October 19, 2018	ArcelorMittal India resubmitted its resolution plan
October 25, 2018	The final negotiated resolution plan of ArcelorMittal India approved by the COC by a 92.24% majority
March 8, 2019	NCLT issues order upholding the resolution plan filed by ArcelorMittal India, but suggesting changes to be made to ensure operational creditors are treated at par with financial creditors. This order was appealed in the NCLAT.
March 20, 2019	In an interim order, NCLAT directs the COC to decide on certain suggestions that were made by NCLT
March 30, 2019	The COC decided to appeal the NCLAT's order, and approved an ex gratia payment of INR 10 billion to specific operational creditors
April 12, 2019	SC on appeal directed against non-implementation of the NCLT's order dated March 8, 2019 and speedy disposal of the appeal by the NCLAT
July 4, 2019	NCLAT issues its final order holding the handling of the resolution proceeds by the financial creditors as unfair.
November 15, 2019	On appeal against the order of the NCLAT dated July 4, 2019, the SC overturns the NCLAT's order, by way of the Second SC Judgement
December 16, 2019	ArcelorMittal and Nippon Steel jointly complete the acquisition of Essar Steel

B. Chronology of events vis-à-vis the acquisition process

Date	Particulars
February 12, 2018	ArcelorMittal India submit bids and resolution plans as resolution applicants
March 2, 2018	ArcelorMittal and Nippon Steel enter into a joint venture for the acquisition of Essar Steel
April 2, 2018	Fresh bids along with the resolution plans submitted by ArcelorMittal India
September 11, 2018	ArcelorMittal India submits revised proposal to the COC for the acquisition of Essar India
October 17, 2018	ArcelorMittal India pays the dues for Uttam Galva and KSS Petron
October 19, 2018	ArcelorMittal India declared the H1 resolution application (preferred bidder) by the COC
October 26, 2018	ArcelorMittal India declared the successful resolution applicant
November 15, 2019	The SC approves ArcellorMittal India's resolution plan for Essar Steel
December 16, 2019	ArcelorMittal and Nippon Steel jointly complete the acquisition of Essar Steel

4. Commercial considerations

I. Why did ArcelorMittal want to acquire Essar Steel?

ArcelorMittal was the largest steel producer in the world with steel manufacturing in 17 countries and customers in over 150 countries.[16]

ArcelorMittal has been formed over the course of last 4 decades by way of multiple brownfield acquisitions. Prior to the merger of Arcelor and Mittal, Mittal Steel (the erstwhile entity) had made acquisitions in South America, Europe, United States and Africa.[17] Since the formation of ArcelorMittal, the ArcelorMittal group has announced over 35 transactions globally, including the acquisitions of Ilva S.p.A. and ThyssenKrupp Steel USA.[18]

India, being the 2nd largest steel producer in the world (after China)[19] was a missing piece from ArcelorMittal's global footprint. ArcelorMittal has had multiple unsuccessful attempts to enter the Indian market, such as setting up a steel plant in Jharkhand in 2005, plants in Odisha and Karnataka and the joint venture with SAIL.[20]

Acquisition of Essar Steel would have provided ArcelorMittal the entry into the Indian markets, which Mr. L.N. Mittal himself acknowledged

"India has long been identified as an attractive market for our company and we have been looking at suitable opportunities to build a meaningful production presence in the country for over a decade."[21]

II. Why did Nippon Steel want to acquire Essar Steel?

Nippon Steel already had their presence in India by way of a joint venture with the Tata group for manufacture of automotive grade steel.[22] However, Nippon did not have presence in India for crude steel production. Accordingly, acquisition of Essar would have provided Nippon Steel entry into the 2nd largest steel manufacturer in India by way of the brownfield acquisition of Essar Steel. Further, as compared to the 80% market share in Japan, top 3 Indian steel manufacturers had only 40% of market share, thereby denoting a more fragmented market compared to the concentrated markets in Japan.[23] Further, relatively higher profitability levels for Indian steel manufacturers, coupled with the increasing push given by the Indian government for domestic production of steel made India a lucrative destination for Nippon Steel.[24]

III. Why did ArcelorMittal and Nippon Steel agree to partner for the said acquisition?

ArcelorMittal and Nippon Steel are both global steel producers. However, both ArcelorMittal and Nippon Steel have collaborated for multiple ventures in the past. The duo has collaborated in Indiana (I/N Kote and I/N Tek facilities) and

16. https://corporate.arcelormittal.com/about-us
17. https://rails.arcelormittal.com/about-us/history
18. https://corporate.arcelormittal.com/about-us/culture/history
19. https://economictimes.indiatimes.com/markets/commodities/news/india-is-second-largest-steel-producer-now/articleshow/67717521.cms?from=mdr
20. https://www.businesstoday.in/current/corporate/aditya-mittal-to-head-essar-steel-india-management-after-supreme-court-sc-clears-takeover-by-arcelormittal/story/390477.html
21. https://www.amns.in/media/1104/esil-closing-final-161219.pdf
22. https://www.nipponsteel.com/en/news/20140902_100.html
23. https://www.nipponsteel.com/common/secure/en/ir/library/pdf/20191216_500.pdf
24. https://www.nipponsteel.com/common/secure/en/ir/library/pdf/20191216_500.pdf

Alabama (Calvert). Additionally, the two have also collectively acquired ThyssenKrupp Steel, USA LLC. Accordingly, while both ArcelorMittal and Nippon Steel are both steel producers with presence globally, they have had multiple collaborated acquisitions / joint ventures in the past, which have been successful.

IV. Why did ArcelorMittal and Nippon Steel agree to acquire Essar Steel, and not any other steel manufacturer in India?

As mentioned above, both ArcelorMittal and Nippon Steel wanted a pie of the steel manufacturing sector in India. Essar Steel was an attractive target for multiple reasons.

Acquisition of Essar Steel would not only have provided it an entry into the market, but would have made them the 4th largest steel manufacturer in India, with an overall production capability of approximately 9.6 million tonnes.[25] While the production was approximately 7.5 million tonnes of crude steel, the partners envisaged increased this to 12 – 15 million tonnes over the course of the next 5 years by additional capital expenditure.[26]

Essar Steel had its facilities strategically located, with an integrated steel mill in western India and self-sufficient pellet production in eastern India.[27] The integrated steel mill in Hazira was the 3rd largest unit in India and had a diverse mix of products it was producing.[28]

Further, in Essar Steel, both ArcelorMittal and Nippon Steel saw expansion potential as well, as is evident from their statements to expand the production capacity of Essar Steel to 12 – 15 million tonnes by addition of new iron and steel making assets.[29]

The importance of Essar Steel to particularly, ArcelorMittal is evident from the fact that ArcelorMittal agreed to clear out dues of almost INR 70 billion due to the lenders of Uttam Galva and KSS Petron to be eligible to file a resolution plan.[30]

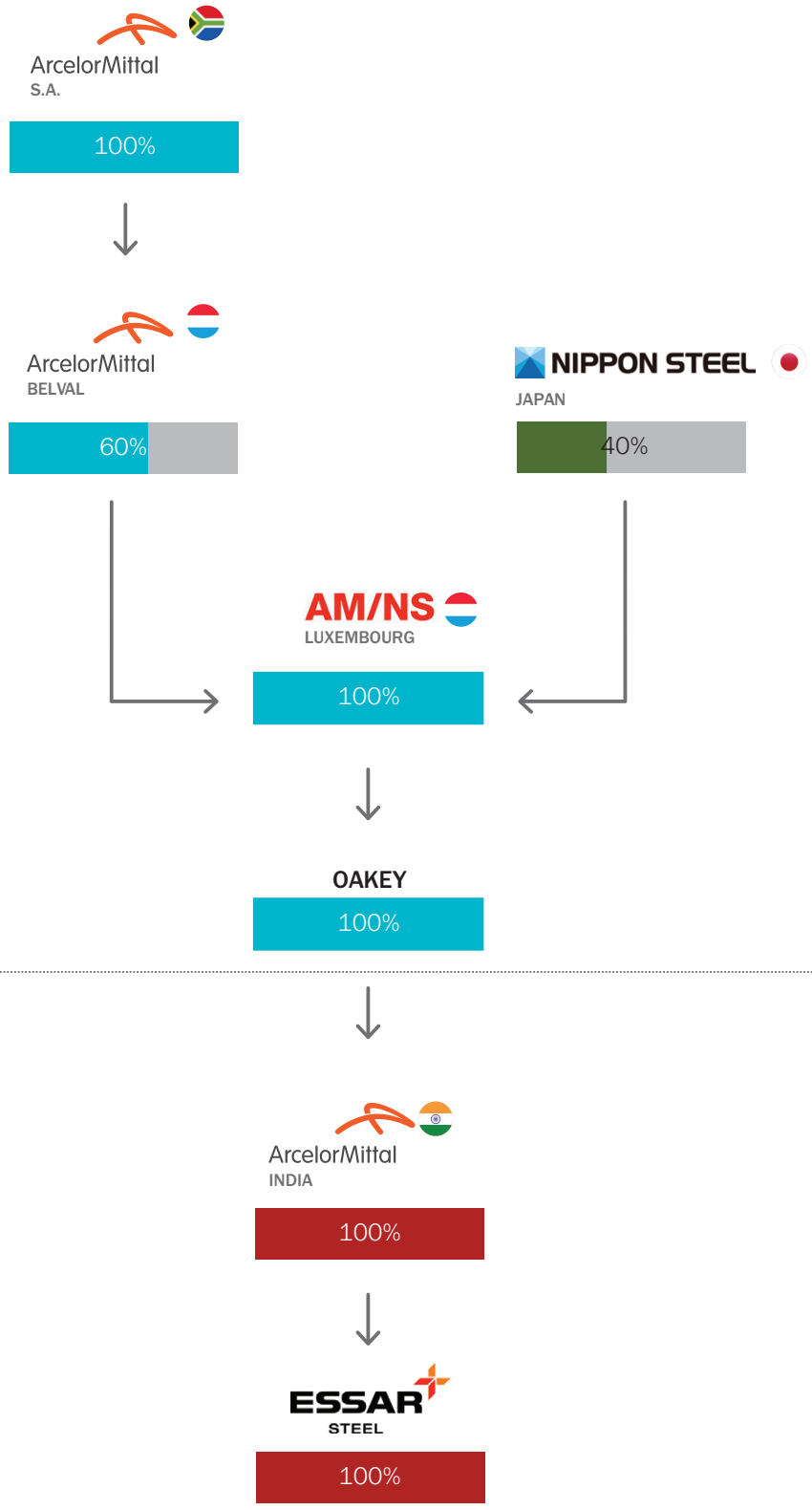
V. How was the acquisition of Essar Steel by ArcelorMittal and Nippon Steel structured?

The acquisition of ArcelorMittal and Nippon Steel was structured through a Luxembourg based joint venture company, AMNS Luxembourg Holding S.A. (**"AMNS Luxembourg"**), where ArcelorMittal (through ArcelorMittal Belval) funded 60% of the consideration, and Nippon Steel funding the balance 40%.

AMNS Luxembourg invested into ArcelorMittal India through an intermediate company based in Luxembourg, Oakey Holding B.V. (**"Oakey"**).[31] Oakey invested the acquisition amount into ArcelorMittal India, which used the funds for acquisition of Essar Steel. Accordingly, the group structure was as follows:

25. https://www.amns.in/media/1028/arcelormittal-submits-offer-for-essar-steel-final-120218.pdf
26. https://www.amns.in/media/1104/esil-closing-final-161219.pdf
27. https://www.nipponsteel.com/common/secure/en/ir/library/pdf/20191216_500.pdf
28. https://www.nipponsteel.com/common/secure/en/ir/library/pdf/20191216_500.pdf
29. https://corporate.arcelormittal.com/media/press-releases/arcelormittal-and-nippon-steel-complete-acquisition
30. https://www.amns.in/media/1030/arcelormittal-takes-required-step-to-ensure-its-offer-for-essar-steel-is-eligible-171018-final.pdf
31. https://www.icra.in/Rationale/ShowRationaleReport/?Id=67767

Exhibit - A



Disclaimer: *The logos of company used in diagram are the property of the respected company they represent.*

VI. How was the acquisition financed by ArcelorMittal and Nippon Steel?

The aggregate investment contemplated was approximately INR 500 billion, with ArcelorMittal investing INR 300 billion and Nippon Steel investing INR 200 billion.[32] The investment by both ArcelorMittal and Nippon Steel was to be structured by a mix of debt and equity. ArcelorMittal invested USD 1,362 million by way of equity, while Nippon Steel invested USD 991 million into equity.[33] Further USD 2,204 million and USD 1,475 million were the debt investments by ArcelorMittal and Nippon Steel respectively.

The debt investment into AMNS Luxembourg was arranged by ArcelorMittal through a bridge financing facility of up to USD 7 billion dollar availed by AMNS Luxembourg and guaranteed by ArcelorMittal's holding company.[34] Nippon Steel provided a shareholder loan / inter-corporate deposit to AMNS Luxembourg.[35]

VII. How are ArcelorMittal and Nippon Steel recognising Essar Steel from an accounting perspective?

ArcelorMittal has recognised Essar Steel as a joint venture, defined as companies over whose activities it has joint control, generally by way of a contractual arrangement.[36] For joint ventures, including their investment in Essar Steel, ArcelorMittal applies equity method, and accordingly, has recognised Essar Steel investment as a joint venture under the equity method.

Nippon Steel has also applied equity method accounting, and has recognised Essar Steel as an equity method affiliate.

VIII. Who made the payment for Uttam Galva and KSS Petron for ArcelorMittal to be eligible to bid for Essar Steel?

The payment of INR 74.69 billion (approximately USD 1 billion) was required to be paid to the financial creditors of Uttam Galva and KSS Petron for ArcelorMittal to be eligible to bid for Essar Steel (see Legal and Regulatory section below). While only ArcelorMittal was considered ineligible to bid for Essar Steel due to the outstanding payments to the financial creditors of Uttam Galva and KSS Petron, the payments were made by both ArcelorMittal and Nippon Steel. This was funded in the form of equity (USD 288 million) and debt (USD 597 million). ArcelorMittal's equity investment was approximately USD 83 million and debt investment (through the USD 7 billion bridge financing facility) was approximately USD 367 million. Nippon Steel funded the balance equity and debt (through shareholder loans).[37]

32. https://www.nipponsteel.com/common/secure/en/ir/library/pdf/20191216_500.pdf
33. https://corporate-media.arcelormittal.com/media/zoijlotf/annual-report-2019.pdf
34. https://corporate-media.arcelormittal.com/media/zoijlotf/annual-report-2019.pdf
35. https://www.nipponsteel.com/common/secure/en/ir/library/pdf/20191216_500.pdf
36. https://corporate-media.arcelormittal.com/media/zoijlotf/annual-report-2019.pdf
37. https://corporate-media.arcelormittal.com/media/zoijlotf/annual-report-2019.pdf

IX. How was the joint venture proposed to be managed by the two partners, ArcelorMittal and Nippon Steel? How was the governance of Essar Steel proposed to be controlled by ArcelorMittal and Nippon Steel?

As per the provisions of the JV Agreement, Essar Steel was proposed to be governed by a board of 6 directors, with 3 nominees of ArcelorMittal Belval and 3 nominees of Nippon Steel.[38]

To give effect to the above, the articles of association of ArcelorMittal India and Essar Steel were both amended post the acquisition, on December 20, 2019 and December 17, 2019 respectively.[39]

Pursuant to the AOA of both ArcelorMittal India and Essar Steel:

a. The board of directors of the respective companies was limited to a maximum of 8 directors, with equal representation of ArcelorMittal Belval and Nippon Steel. Both ArcelorMittal Belval and Nippon Steel were to have a minimum of 3 directors each.

b. The quorum for each board meeting was to have a nominee of ArcelorMittal Belval and Nippon Steel each.

c. No matter was to be placed on the agenda or put to vote at the board of the respective companies unless such matter was approved by the board of AMNS Luxembourg.

d. With respect to shareholders meeting, the AOA prohibits any matter to be placed before the shareholders for approval till (a) the board of AMNS Luxembourg shall have unanimously approved such matter; or (b) ArcelorMittal Belval and Nippon Steel both agree to such matter being placed before the shareholders.

In addition to the above governance provisions, the AOA of ArcelorMittal India and Essar Steel were amended to provide the following:

a. One of the directors appointed by ArcelorMittal Belval shall be appointed by the chairman of the board of the directors, who shall also act as the chairman of the shareholders meetings

b. The respective company shall appoint key managerial personnel on such terms as may be agreed between ArcelorMittal Belval and Nippon Steel.

X. What have the joint venture partners done since the acquisition of Essar Steel since the acquisition from a financial perspective?

On March 16, 2020, AMNS Luxembourg executed a loan agreement with Japan Bank for International Cooperation for USD 5.146 billion, which shall be extended by JBIC, along with MUFG Bank, Ltd., Sumitomo Mitsui Banking Corporation, Mizuho Bank Europe N.V. and Sumitomo Mitsui Trust Bank Limited.[40] The loans drawn down under this facility shall be used to repay the shareholder loans availed by AMNS Luxembourg from Nippon Steel, and the amounts drawn down by AMNS Luxembourg from the bridge financing facility (guaranteed by ArcelorMittal).[41]

38. https://corporate-media.arcelormittal.com/media/zoijlotf/annual-report-2019.pdf

39. Articles of association as available on MCA.

40. https://www.jbic.go.jp/en/information/press/press-2019/0317-013237.html

41. https://www.jbic.go.jp/en/information/press/press-2019/0317-013237.html and https://corporate.arcelormittal.com/media/press-releases/amns-luxembourg-holding-s-a-signs-loan-agreement

5. Legal and regulatory

We have divided this section in 4 sub-sections, namely (i) Till the First SC Judgement, (ii) From the First SC Judgment till the Second SC Judgement; and (iii) Post the Second SC Judgement; and (iv) General legal and regulatory aspects.

I. Till the First SC Judgement

A. How did ArcelorMittal and Nippon Steel intend to acquire Essar Steel?

ArcelorMittal intended to acquire Essar Steel through the CIRP under the IBC. As part of the CIRP process, the potential acquirers are required to submit a resolution plan, which is considered by the COC.

When ArcelorMittal submitted the first resolution plan, Nippon Steel was not a joint venture partner along with it.[42] However, immediately post the filing of the first resolution plan, ArcelorMittal and Nippon Steel announced that they would be partnering for the potential acquisition of Essar Steel.[43]

B. Why was Essar Steel referred to the NCLT for initiating the CIRP under IBC?

As mentioned above, Essar Steel had an admitted debt of over INR 545 billion outstanding in 2017.[44] Essar Steel was in the process of negotiating a restructuring package with its lenders considering the enormous debt outstanding, and the inability of Essar Steel to service and repay the debt due to a host of reasons.

However, while Essar Steel was admittedly in the process of renegotiating a restructuring package, the RBI issued the June 2017 Press Release identified Essar Steel as one of the 12 accounts in respect of which the CIRP had to be initiated. Accordingly, applications for initiation of CIRP were initiated against Essar Steel by its lenders in the Ahmedabad bench of the NCLT.

C. What were the initial challenges faced by the lenders of the Essar Steel in initiating the CIRP?

Once the lenders filed applications to initiate CIRP for Essar Steel, Essar Steel immediately approached the Guj HC to challenge (i) the validity of the June 2017 Press Release; (ii) the decision of its lenders to initiate action under the IBC; and (iii) the failure of the consortium of lenders to implement the restructuring plan which had been approved by the board of directors of Essar Steel. Evaluating the various arguments from various parties, including Essar Steel, the RBI and the lenders, Guj HC finally held that the lenders were empowered to proceed with the proposed CIRP of Essar Steel, and permitted the relevant proceedings to continue before the NCLT (**"Guj HC Ruling"**). Refer to a detailed analysis of the Guj HC Ruling here.[45]

D. Having the initiation of the CIRP blessed by the Guj HC, what was the next steps taken by the lenders, COC and/ or NCLT?

Upon the Guj HC Ruling being passed, the lenders of Essar Steel proceeded to file an application under Section 7 of IBC to initiate the CIRP. The NCLT admitted the petition filed by Standard Chartered Bank under Section 7 of the IBC. A moratorium was declared under

42. https://www.amns.in/media/1028/arcelormittal-submits-offer-for-essar-steel-final-120218.pdf
43. https://www.amns.in/media/1027/arcelormittal-nippon-jv-final.pdf
44. http://www.essarsteel.com/upload/pdf/list_of_creditors17.pdf
45. http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/dispute.html?no_cache=1&cHash=380cc5e06b3c72665b111b01bb9627c3

Section 14 of the IBC, which *inter alia* barred continuation or initiation of legal proceedings and enforcement of any security interest against Essar Steel. Further, as is required under IBC, an interim resolution professional was appointed to replace the board of Essar Steel and take over the management of the company, who was later confirmed as the resolution professional (**"RP"**) by the COC to oversee the entire CIRP. For a detailed analysis of the NCLT order admitting the petition post the Guj HC Ruling, refer here.[46]

During the course of the CIRP, the RP, had invited expressions of interest from all interested resolution applicants to present resolution plans for rehabilitating of the corporate debtor, i.e. Essar Steel.

E. Why were the potential bidders, ArcelorMittal India and Numetal held ineligible by the RP, and how did the Indian judiciary finally resolve the issue of their insolvency?

i. Why were ArcelorMittal India and Numetal held ineligible?

i. ArcelorMittal India was a step down subsidiary of ArcelorMittal, which was a shareholder in Uttam Galva, which had its loans classifies as NPAs for over a year. Further, the ultimate individual promoter in control of ArcelorMittal, and hence indirectly of ArcelorMittal India was also a promoter of KSS Global BV, which was the promoter of KSS Petron. KSS Petron also had defaulted on its loans, which were classified as NPAs for over a year. The (then) newly introduced Section 29A of the IBC considered persons 'connected' with certain persons as ineligible, and ArcelorMittal's bid was considered ineligible on such ground.For a detailed analysis of the 2017 Ordinance and 2017 IBC Amendment, please refer here[47] and here[48] respectively.

ii. Numetal was a company incorporated for the purpose of filing the bid and one of the shareholders was AEL, which was held by Mr. Rewant Ruia through companies and trusts. Mr. Rewant Ruia was a connected person with Mr. Ravi Ruia, the promoter of Essar Steel prior to the CIRP commencing. On this ground, Numetal was considered to be ineligible.

A diagrammatic representation of the reasons for ineligibility is provided in **Annexure A.**

> "The IBC was amended by way of an ordinance, which was later passed by the Parliament by way of an amendment act in 2018 (effective from the date of the ordinance itself), which imposed restrictions on who can bid under the CIRP. This amendment was introduced after the CIRP for Essar Steel was initiated but prior to the submission of the resolution plan and bids by potential bidders, being ArcelorMittal India and Numetal."

ii. How did ArcelorMittal and Numetal try to overcome their ineligibility?

Being held ineligible by the RP and the COC, while both ArcelorMittal and Numetal had challenged the respective ineligibilities, steps were taken by both ArcelorMittal and Numetal to try to ensure that they are eligible and not

46. http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/essar-steel-saga-nclt-takes-a-firm-stance-under-the-ibc-yet-again.html?no_cache=1&cHash=e2d4153e1e0837781 6e21d1f8692b69c

47. http://www.nishithdesai.com/information/news-storage/news-details/article/bankruptcy-code-ghost-of-retrospectivity-returns-to-haunt-1.html

48. http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/ibc-amendment-act-parliament-confirms-bidding-restrictions.html?no_cache=1&cHash=d32bad2cd633738c3d4c83dbe3a8fc47

held ineligible. ArcelorMittal and Numetal both had argued that Section 29A was not a see-through provision, i.e. the shareholders / owners of the bidders should not be considered. Irrespective of the same, they took the below mentioned steps.

i. ArcelorMittal decided to transfer the shares of Uttam Galva held by it (indirectly) to the other promoters of Uttam Galva. Further, ArcelorMittal also transferred its shareholding in KSS Global BV, and accordingly, indirectly its shareholding in KSS Petron. Based on the transfer of the shares of Uttam Galva and KSS Petron, ArcelorMittal argued that it no longer held shares in companies who had their loans categorised as NPAs.

ii. Numetal, on the other hand, changed its shareholding to remove AEL as a shareholder. While AEL held 25% of the shares of Numetal when the first resolution plan was submitted on February 12, 2018, however when the second resolution plan was submitted on April 2, 2018, AEL did not hold any shares of Numetal.

iii. Is 29A a see-through provision? How did the Supreme Court of India rule on this?

The eligibility criteria under Section 29A is applicable to a prospective resolution applicant and any person/entity acting jointly or in concert with such an applicant (collectively referred to as the **"Applicant"**). To determine the applicability of the section, one would need to look at the *"de facto"* and not the *"de jure"* position of the Applicant. Therefore, Section 29A must be treated as a *see-through provision.* It is a well settled principle that a shareholder and a company are separate legal entities. However, when a company has been specifically set up for submission of a resolution plan, one would need to analyse the constituent elements of such a company. If the company is controlled/ managed by an individual/entity which is ineligible under Section 29A, then application of Section 29A on a *"de facto"* basis would deem the company itself to be ineligible. Thus, the flow is that the nature of the language of the statute shows that it looks at de facto position and not de jure. This is because corporate veil can be lifted in certain circumstances. Those circumstances are fulfilled particularly considering the use of expressions *persons acting jointly or in* concert. The Supreme Court's interpretation of expression *persons acting jointly and in concert* is as follows:

- **Persons acting jointly:** The Court held that if from the facts of the case it can be plainly deduced that certain persons were acting jointly in the sense of acting together, then they will fall under the expression of 'persons acting jointly'. The Court further held that if this is proved from the facts, no super added element of *'joint venture'* would be necessary to prove joint applicants.

- **Persons acting in concert:** The expression *'persons acting in concert'* under Section 29A has not been specifically defined under the IBC. Section 3(37) of IBC states that, words and expressions which are not defined under the IBC but defined *inter alia* by the SEBI Act, 1992 and the Companies Act, 2013 shall have the same meaning assigned to them in those Acts. The expression *'persons acting in concert'* has been defined under Regulation 2(1)(q) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**"Takeover Code"**). The definition has a very wide ambit, whereby even if there is any informal understanding to indirectly cooperate to exercise control over a target company, still all such entities would be deemed to be acting in concert. The Court reaffirmed earlier decisions, wherein it was observed that *"the test is not whether they have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together"*. Therefore, if any such person falling within the definition of *'person acting in concert'* stands disqualified under the eligibility criteria, the same will render the resolution applicant disqualified to participate in the bidding process.

Further the Supreme Court stated that if *"(a) protection of public interest is of paramount importance; or (b) a statute itself mandates lifting of the corporate veil; or (c) a company has been formed to evade obligations imposed by law, then the court will disregard the corporate veil. This principle is applied even to a group of companies, which will enable a group to be viewed as a single economic entity."*[49] Therefore, to determine the eligibility of an Applicant, the competent authority must lift the corporate veil.

The March 2018 Insolvency Law Committee report stated that extending the *disqualification to a resolution application owing to infirmities in persons remotely related may have adverse consequences. Such interpretation of this provision may shrink the pool of resolution applicants.*[50] It further suggested the interpretation of the expression *'persons acting jointly or in concert'* be narrowed down, however, the legislature did not implement the suggestion and the position of law remains the same. The court upheld the said position of law by giving it a plain literal interpretation. However, the court stated that a *fortuitous relationship coming into existence by accident or chance obviously cannot amount to "persons acting in concert"*.[51] The literal interpretation of the Court can have an effect of casting a net wide enough to further narrow the shrinking pool of resolution applicants.

The Court has settled the position with respect to the interpretation of the terms *'management'* and *'control'* to the extent of the corporate applicant and in context of S. 29A (c) while deciding on who is in the actual control of the corporate debtor.

- **Management:** The term *management* refers to the *de jure* management of a corporate debtor, that is, the direct management of the corporate debtor. De jure management of a debtor would ordinarily vest with the board of directors, and will further include anyone who would fall under the definition of 'manager', 'managing director' and 'officer' as defined under the Companies Act, 2013.
- **Control:** The Court has narrowed down the interpretation of the term 'control' as mentioned under Section 2(27) of the Companies Act, 2013. The Court held that 'control' will only cover positive or proactive control and will not cover a negative or reactive control such as a mere power to block the special resolutions of a company.

> The Court has tried to reduce the ambiguity with respect to the interpretation of certain expressions and ineligibility criterion provided for under Section 29A. The Court has tried to provide a positive, practical and workable interpretation of certain terms and expressions such as *'persons acting jointly or in concert'*, *management* and *control* etc. This will make it easier for the RP, CoC and other competent authorities to interpret such terms in respect of Section 29A.

iv. Can the resolution applicants wriggle out of requirements under proviso to S. 29A(c) in any manner other than as contemplated under the IBC?

The Supreme Court has observed that an entity should not be allowed to wriggle out of the requirement to comply with the eligibility criteria. The proviso to sub-clause (c), requires the Applicant to repay all overdue amounts with interest thereon and charges relating to a non-performing asset before submission of a resolution plan. If the Applicant divests its stake from such an entity which holds the NPA before submitting the resolution plan, the same would not absolve the Applicant and still render it ineligible. The Court held that the credentials of an Applicant *as on the date of submission of the resolution plan* need to be considered to determine the Applicant's eligibility.

49. Paragraph 34 of the Judgment
50. Paragraph 14.3, Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India, March, 2018.
51. Paragraph 41 of the Judgment

However, the SC held that past facts which are reasonably proximate to the point of time of filing of the resolution plan should also be taken into consideration to determine whether a person, is in substance trying to avoid the applicability of S. 29A (c) before submitting a resolution plan.

After considering all the facts, if the competent authority is of the view that the Applicant has entered into an arrangement to avoid paying debts of the non-performing assets, it must be held ineligible for submitting a resolution plan.

Considering that the court has allowed a *"look back"* at the activities of the Applicant to determine the applicability of the eligibility criteria without any definitive time restriction on the period of *"look back"*, this might result in indiscriminate usage and prolonged litigation. Therefore, the only way for a resolution applicant holding an NPA to participate in the bidding process is to standardize such an account, before the date of submission of the resolution plan.

ArcelorMittal India put forth an argument that the expression *'before submission of resolution plan'* as mentioned in the proviso to Section 29A(c) should be read in a commercially feasible manner. They further stated that in commercial terms, no resolution applicant would pay off the debt owed by another entity without being certain that its resolution plan will be accepted. This would drastically narrow down the pool of the applicants defeating the ultimate intent and objective of the IBC. The SC rejected the argument, stating that they cannot disregard the plain language of the statute and provide an interpretation which would have an opposite effect of the intended consequence of the law.

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Adherence to this aspect of the First SC Judgment might prove to be commercial difficult for resolution applicants. One such issue is with respect to the strict interpretation of Section 29A(c) and the extension of the look-back period. This has brought a level of uncertainty amongst potential strategic investors in the stressed assets space, who might have direct or indirect exposure to NPAs and may now be held ineligible. With ambiguity on the ability to challenge the decision of the RP and COC, prospective resolution applicants would be compelled to completely repay their outstanding dues before submitting a resolution plan. It has been argued that the decision to exit a company has commercial ramifications and if an applicant is ready to sell its shareholding in a company which possesses NPAs, then that should be treated as a good enough sacrifice being made by a prospective resolution applicant to participate in the insolvency proceedings, in which there is no guarantee of success. Investors have been expressing interest in adopting the IBC route to buy assets instead of the direct purchase mechanism, however, the change in commercials might reduce this interest and narrow the pool. This defeats the main objective of the IBC which is maximisation of value of the assets of the corporate debtor.

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v. Considering both ArcelorMittal India and Numetal were declared ineligible, how did ArcelorMittal still manage to bid for Essar Steel?

As detailed above, the SC had declared that both the resolution plans submitted by ArcelorMittal India and Numetal are hit by Section 29A(c) of the IBC and the only manner in which they could participate in the bidding process was to repay the outstanding dues of their respective NPAs (i.e. Uttam Galva and KSS Petron for ArcelorMittal and Essar Steel for Numetal).

However, the counsel for the COC had requested to the SC to grant the bidders additional time

to clear the dues, post which the resolution applications could be considered. Taking cognisance of such request, both the bidders were given a period of two weeks by the SC from the date of its order to repay their outstanding debts.

ArcelorMittal proceeded to repay the dues of KSS Petron and Uttam Galva, amounting to INR 7,469 crores within the given timeline, i.e. on October 17, 2018.[52] On the other hand, Numetal did not repay the outstanding dues of Essar Steel.

Such dues being cleared by ArcelorMittal basis the order of the SC, ArcelorMittal was considered eligible under Section 29A(c) of the IBC.

F. What other aspects did the SC delve into in the First SC Judgement?

i. Filing of multiple proceedings during the CIRP

An important aspect of the First SC Judgement was an attempt to address the issue of multiple litigations initiated by resolution applicants at different stages of the CIRP which leads to inordinate delay in the completion of the insolvency resolution process. In this respect the Court held that resolution applicants have no *"vested right"* in respect of consideration of a resolution plan submitted by them. Therefore, a resolution applicant cannot challenge a decision of the RP or the COC before the Adjudicating Authority. Only when the Adjudicating Authority decides an application for approval of a resolution plan, can the same be challenged before the Appellate Authority by a resolution applicant. The SC also barred resolution applicants from filing writ petitions before any High Court under Article 226 of the Constitution of India in this respect.[53] This has reduced the scope of challenge by resolution applicants before any forum including the High Court till the time a resolution plan has been approved by the Adjudicating Authority.

The Court has also referred to the misuse of Section 60(5) of the IBC by resolution applicants, for filing of applications before the Adjudicating Authority.[54] The Court clarified that the non-obstinate clause in Section 60(5) has been laid down to ensure that no other forum other than the Adjudicating Authority has jurisdiction to entertain applications arising out of the provisions of IBC and the section should not be misused by resolution applicants. Therefore, the First SC Judgment held that the bar on filing of applications by resolution applicants extends to applications currently being filed under Section 60(5) of the IBC.

> "Considering that resolution applicants have no vested right for their resolution plans to be considered, they have been denied the right to challenge a decision of the RP and the COC. However, only one amongst many resolution plans is sent for approval of the adjudicatory authority. Does this imply that all those applicants whose plans were not considered because of statutory or commercial deficiencies will not have a right to file proceedings before the adjudicatory or appellate authority. This would entail that only if the adjudicatory

52. https://www.amns.in/media/1030/arcelormittal-takes-required-step-to-ensure-its-offer-for-essar-steel-is-eligible-171018-final.pdf

53. The High Courts in India (under Article 226 of the Constitution) and Supreme Court of India (under Article 32) can be approached by applicants for writ jurisdiction.

54. Section 60(5) of the IBC provides the NCLT residuary powers to hear any application in relation to the corporate debtor or the CIRP process of the corporate debtor. Section 60(5) reads as follows:

60. Adjudicating Authority for corporate persons. –

...

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

authority has refused to approve the resolution plan submitted for its consideration then the unsuccessful applicant will get a right to file an appeal challenging that decision of the adjudicatory authority. This can severely impact the fairness of the procedure of insolvency resolution. As evident from the decision of the NCLAT in the Binani Cement matter, where the decision of the COC of approving the resolution plan submitted by Dalmia and not considering a competing plan has been reversed. It is not explicitly clear from the Judgment whether the resolution applicant whose plan has not been considered by the RP or the COC or has been considered but rejected, have a right to approach the NCLT or NCLAT to address their grievances with the decision of the RP or the COC. However, if the resolution applicants or prospective resolution applicants are barred from approaching the NCLT or NCLAT for challenging the decisions of the RP and the COC, this may prove to be commercially unviable for many existing and prospective resolution applicants and may further discourage them from participating in the insolvency resolution process.

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ii. Role of the resolution professional in determining the eligibility

The SC also held that the duty of the RP is to examine all the resolution plans submitted and to check whether they are in conformity with the law. The RP is under an obligation to submit all the resolution plans received by it to the COC. The RP cannot take any decisions on the eligibility of any of the resolution plans, with the power to approve or disapprove a resolution plan being vested in the COC only as per Section 30 of the IBC. The RP can provide a prima facie opinion basis the diligence carried out in respect of each resolution plan.

iii. Timelines under the IBC vis-à-vis time taken under judicial proceedings

The Court further held that the time taken by the Adjudicating Authority and/ or the Appellate Authority in deciding a matter should not be considered in the prescribed time limit of 180 days (extendable by a further 90 days) for completion of the insolvency resolution process. The First SC Judgement however directed the Adjudicating Authority and the Appellate Authority to ensure that there are no unreasonable delays in deciding a matter and proper reasons are recorded in case of delay in passing a final order.

II. From the First SC Judgment till the Second SC Judgement

A. Once ArcelorMittal India had been adjudged an eligible bidder, the road for ArcelorMittal India's acquisition of Essar Steel should have been clear and smooth. What changed after the First SC Judgement?

After the First SC Judgement, ArcelorMittal re-submitted its resolution plan on September 10, 2018, and was adjudged by the COC as the preferred bidder, over the resolution plan proposed by Vedanta Resources. The resolution plan had proposed (a) an amount of INR 350 billion to be paid to the financial creditors of Essar Steel, (b) an amount of 5% of the outstanding amounts to the unsecured financial creditors, (c) small operational creditors (up to INR 10 million each) were to be paid in full; (d) other operational creditors were to be paid an amount of INR 1.96 billion (out of INR 33.39 billion), being the government and trade creditors; and (e) workmen and employees were to be paid INR 180 million against their claims in full. The resolution plan further empowered the COC to determine the manner of distribution of the proceeds among the secured

financial creditors. The resolution plan was negotiated between the COC and ArcelorMittal India, and a final resolution plan was approved by the COC on October 19, 2018.

The resolution plan was placed before the NCLT for its approval post the COC's decision. The NCLT considered the resolution plan along with a host of other applications filed by operational and financial creditors of Essar Steel. In its judgment on March 8, 2019,[55] the NCLT considered that the resolution plan was unfair to the operational creditors, and hence determined that the treatment meted to the operational creditors should be at least similar to what has been provided to the financial creditors. The NCLT suggested all financial creditors should be provided 85% of the amount offered under the resolution plan, with the operational creditors being provided the balance 15%.

The COC of Essar Steel decided to appeal against the decision of the NCLT in the NCLAT. The NCLAT, by an interim order dated March 20, 2019 directed the COC to take a call on the suggestions made by the NCLT.[56]

- The NCLAT has through a series of judgments, culminating in the judgment passed in the CIRP of Essar Steel, stated that financial creditors form a homogeneous group, wherein no differentiation can be made between secured, unsecured, assenting and dissenting financial creditors. Therefore, all financial creditors are to be paid in proportion to the percentage of their debt to the total claims made by the financial creditors of the corporate debtor. Further, it also held that the existence, nature, value and priority of security cannot be the basis for differential payments being offered to different financial creditors.
- The NCLAT had initially held in certain judgments that operating creditors should be provided a similar treatment as compared to financial creditors. Thereafter, in the Essar Steel order, the NCLAT held that operating creditors and financial creditors should be paid the same amount, percentage wise, for a resolution plan to be considered as fair and equitable.
- The NCLAT went to on to hold that the COC does not have the power to determine the manner in which the resolution proceeds has to be distributed amongst various categories of creditors. NCLAT held that operational creditors and financial creditors should be paid the same amount, percentage wise, for a resolution plan to be considered as fair and equitable.
- There were certain claims which has not been admitted by the RP of Essar Steel, either because these claims were subject to adjudication before various forums or had been submitted after the approval of the resolution plan. The NCLAT had directed the RP to admit some of these claims stating that the RP was not an adjudicatory authority and hence could not have rejected admission of these claims. In certain other cases where the claims had not been crystallized, the NCLAT allowed such claimants to initiate appropriate legal proceedings before the relevant adjudicatory forum post completion of the insolvency resolution process.
- In respect of the personal guarantee provided by the promoters of the corporate debtors, the NCLAT has stated that the guarantor would stand discharged of his obligation towards the creditors of the corporate debtors as the principal borrower's dues are being extinguished as a part of the resolution plan.

The COC on March 30, 2019 decided to vote against the decision of the NCLAT in the SC.

55. Order of the NCLT available online here. <<Hyperlink-https://ibbi.gov.in//webadmin/pdf/order/2019/Mar/In%20the%20matter%20of%20Standard%20Chartered%20Bank%20and%20State%20Bank%20of%20India%20Vs%20Essar%20Steel%20India%20Limited%20CP%20(IB)%20No.%2039%20-40%20-2017%201_2019-03-13%2022:02:42.pdf>>

56. Order of the NCLAT available online here. <<Hyperlink https://ibbi.gov.in//webadmin/pdf/order/2019/Mar/20th%20Mar%202019%20in%20the%20matter%20of%20Standard%20Chartered%20Bank%20Vs.%20Satish%20Kumar%20Gupta,%20R.P.%20of%20Essar%20Steel%20Ltd.%20&%20Ors.%20IA%20No.%201007-2019%20In%20CA%20(AT)(Insolvency)%20No.%20242-2019_2019-03-25%2017:00:53.pdf>>

B. What were the main issues which were up for determination of the SC in the Second SC Judgement? Why were these issues critical?

The main issues that the SC delved upon in the Second SC Judgement were (a) supremacy of the COC, especially vis-à-vis the NCLT and the NCLAT; (b) the distinction between secured and unsecured financial creditors; (c) parity among operational creditors and financial creditors; and (d) extinguishment of personal guarantees and undecided claims.

The issues were critical since these would determine not only the CIRP of Essar Steel, but also determine the overall application of the IBC. From an Essar Steel CIRP perspective, the issues were of paramount importance, because the resolution plan that had been approved by the COC was under challenge, and an adverse ruling by the SC would have further delayed the proceedings. In addition, an adverse ruling would have imposed substantial fetters on the powers of the COC, thereby impacting future CIRPs as well.

C. How did the SC deal with the issues mentioned in (B) above in the Second SC Judgement?

i. Financial creditors as a homogenous group and the distinction between secured and unsecured financial creditors

The IBC does not specifically distinguish between various kinds of financial creditors at the CIRP stage. All categories of financial creditors have equal participation and voting rights in the COC. Therefore, it is possible for unsecured financial creditors to either pass or block a resolution at the COC, depending upon their share in the voting percentage.

However, there is a difference between secured and unsecured creditors, as well as dissenting and approving creditors. Therefore, each of these categories being different from the other, could be provided a differential payment from the resolution proceeds.

Secured financial creditors get the first payment in liquidation proceedings, as per the distribution waterfall under Section 53 of the IBC. Further, secured financial creditors also have the right to stay outside the liquidation proceedings and individually enforce their security interest. Therefore, to ensure that secured financial creditors (a) allow insolvency resolution of the corporate debtor instead of sending the corporate debtor into liquidation; and (b) do not take independent action to enforce their security interest; appropriate incentives can be provided to such financial creditors. *Such an incentive can be a higher or priority pay out to secured financial creditors as compared to other financial creditors like unsecured or dissenting financial creditors.*

The SC has stated that the COC has to use its commercial wisdom in deciding the categorization of creditors basis the existence, nature, value and priority of security interest held by such creditors. However, one of the parameters that can be kept in mind by the COC, is the ability of a creditor to monetize its security outside the IBC process. A creditor should not be allowed to get a better advantage under the IBC process than what it would get in the ordinary course of enforcement of its security interest. *Therefore, a distinction can be made amongst secured financial creditors as well basis the type of the security held by the financial creditors. A secured financial creditor having security over non-project assets can be provided a lower pay out than secured financial creditor having security over project assets.*

Therefore, the Supreme Court has clarified that all financial creditors are not the same, whereby the *"equality principle"* will not be applicable to all kinds of financial creditors. The existence, nature, value and priority of security can be used by a COC to differentiate between financial creditors and allocate different amounts to each category of financial creditors using its commercial wisdom. Such a decision by a majority of the COC would be binding on all stakeholders including the dissenting members of the COC.

Dissenting creditors: As per the 2019 IBC Amendment, dissenting financial creditors are to be paid at the minimum, the liquidation value payable to them under Section 53 of the IBC. A dissenting creditor whether secured or unsecured, votes against the approval of the successful resolution plan. Therefore, such a creditor prefers liquidation rather than the plan under deliberation. *As per the 2019 IBC Amendment, the minimum guaranteed payment to be received by such a dissenting creditor would be the same as it would receive if the corporate debtor was to go into liquidation.* This guaranteed payment could be more than what a COC would have provided for such dissenting creditors, therefore, such a minimum threshold for payments to dissenting creditors has been held to constitutionally valid.

ii. Position of operational creditors under the IBC

The nature and characteristics of operational creditors and financial creditors are such that there is a distinction between both the categories of creditors. Further, the IBC itself has in various places created a distinction between both the categories of creditors. Also, equitable treatment should be provided only for similarly situated creditors and not between financial creditors and operational creditors. There is a difference in payment of the debts of financial creditors and operational creditors under the IBC; the operational creditors receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. *Therefore, the IBC does not mandate that the financial creditors and operational creditors must be paid the same amount, percentage wise, under a resolution plan.*

The COC has the ultimate discretion to use its commercial wisdom and take a decision on the appropriate amount that is to be paid to operational creditors subject to the provisions of the IBC. The IBC states that the COC has to ensure that the approved resolution plan is (a) maximising the value of the assets of the corporate debtor; (b) adequately balancing the interests of all stakeholders including operational creditors; and (c) ensuring that the corporate debtor is maintained as a going concern (**"Parameters"**). It is pertinent to note that the SC has observed the importance of operational creditors in running the business of a corporate debtor as a going concern. *It has also stated that the liquidation value payable to operational creditors is generally NIL after satisfying the dues of secured creditors. However, if the COC is to allocate a NIL amount towards payment of operational creditors, then appropriate reasoning has to be provided by the COC, which would justify how such an allocation would still result in balancing the interest of all stakeholders, including the operational creditors.*

The SC also referred to the UNCITRAL Legislative Guide,[57] wherein it is stated that *"rather than specifying a wide range of detailed information to be included in a plan, it may be desirable for the insolvency law to identify the minimum content of a plan, focusing upon the key objectives of the plan and procedures for implementation."* Taking this into account, the SC has not provided a straight-jacket formula for paying operational creditors and provided flexibility to the COC to determine an adequate amount on a case to case basis. While simultaneously providing a caveat about the COC's duty to adhere to the Parameters, which might not be achieved by paying nil amount to operational creditors.

The 2019 IBC Amendment states that operational creditors must be paid a minimum of either (i) the amount payable under the resolution plan if the same was to be distributed as per the distribution waterfall applicable in liquidation proceedings (as per Section 53 of the Code) or (ii) the amount payable if the liquidation value was to be distributed in liquidation proceedings (as per Section 53 of the Code), whichever is higher. Further, the 2019 IBC Amendment also states that such a minimum payment would be fair and equitable. The SC has held this amendment to be constitutionally valid as the operational

57. Legislative Guide on Insolvency Law, available online at https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf

creditors are being offered a higher minimum payment as compared to what they were entitled to prior to the amendment.

Therefore, the Supreme Court has clarified that operational creditors need not be treated on par with financial creditors, whereby they can be paid a differential amount, which should not be lesser than the value payable to them as per Section 30(2)(b) of the IBC. The Court has also stated that although the COC does not have any fiduciary duty towards operational creditors, they would still need to ensure that their commercial decision of allocating an amount towards operational creditors can be justified as being in the interest of all stakeholders of the corporate debtor.
While the SC has given supremacy to the decision of the COC, it has clarified that the COC needs to satisfy certain subjective criteria while taking their commercial decision of allocating a certain amount in favour of operational creditors, and approving the resolution plan. Further, by determining that the commercial wisdom of the NCLT and the NCLAT cannot override the commercial wisdom of the COC, it is to be seen how this plays out, since any questions raised on the COC's fulfilling the criteria would be questioning the commercial wisdom of the COC.

iii. Jurisdiction of the NCLT and NCLAT vis-à-vis the COC with respect to a resolution plan

The Supreme Court has held that the NCLT/ NCLAT does not have any residual equity jurisdiction to interfere with any decision taken by the COC, in their commercial wisdom. The NCLT/NCLAT has the power of a limited judicial review under which it can check whether the decision of the COC has (a) complied with the Parameters and (b) does not contravene any provisions of law including the IBC.

If the NCLT/ NCLAT come to the conclusion that the Parameters have not been complied with by the COC, then such a resolution plan can be sent back to the COC for compliance with the Parameters and/ or provisions of the IBC. The COC would thereafter have to re-submit a modified resolution plan after satisfying the Parameters. If the modified resolution plan satisfies the Parameters, then the same would have to be approved by the NCLT/NCLAT.

The SC also held that the residuary powers of the NCLT and the NCLAT under the IBC override the jurisdiction of any other law, to ensure that all proceedings with respect to the corporate debtor are dealt with under the IBC, in supremacy over other regulations. However, the residuary provisions do not override the provisions of the IBC itself.

Therefore, if the decision of distributing resolution proceeds amongst various categories of creditors has been taken by the COC in their commercial wisdom, as per the Parameters and the provisions of the IBC, then such a decision cannot be interfered with by the NCLT/ NCLAT.

iv. Undecided claims

The SC held that the resolution applicant while taking over the corporate debtor would intend to have a fresh start on a clean slate. Therefore, all claims against the corporate debtor would have to be filed, compiled and included in the information provided to a resolution applicant, so that a prospective resolution applicant knows exactly what is required to be paid so that it may then take over and run the business of the corporate debtor. Once, a resolution plan has been approved as per the provisions of the IBC, the same becomes binding on all stakeholders of the corporate debtor, including guarantors and potential creditors.

Post approval of a resolution plan at any point of time a successful resolution applicant cannot suddenly be faced with "undecided" claims, as this would amount to a "hydra head popping up" which would throw into uncertainty amounts payable by the successful resolution applicant to the creditors of the corporate debtor.

While making the aforesaid observations, the Supreme Court has also barred claimants whose claims have not been admitted by the resolution professional and therefore are not being paid under the resolution plan, from initiating legal proceedings before any adjudicatory forum to

claim these amounts, post completion of the insolvency resolution process under the IBC.

The Supreme Court has also upheld the decision of the resolution professional in attributing a nominal value of Re 1. to uncrystallised claims which had not matured when the claims were being collated by the resolution professional.

D. What does the determination of the above issues in the manner provided above mean for the CIRP of Essar Steel?

The resolution of the issues in favor of Essar Steel's COC meant that ArcelorMittal India's resolution plan, as approved by the COC was approved, and ArcelorMittal India could proceed to acquire Essar Steel.

III. Post the Second SC Judgement

A. What happened post the Second SC Judgement?

Post the Second SC Judgement, the decks were all cleared for ArcelorMittal India to acquire Essar Steel. ArcelorMittal India quickly proceeded to raise the funds to acquire Essar Steel.

B. How was the acquisition of Essar Steel completed?

ArcelorMittal India was funded by AMNS Luxembourg (through Oakey), which used the funds to invest into the share capital of Essar Steel. All shares of Essar Steel existing / outstanding prior to the investment by ArcelorMittal India were cancelled by way of the approval of the resolution plan itself.[58]

Accordingly, ArcelorMittal India holds 99.99% shares of Essar Steel, with the balance shares being held by other shareholders as nominees of ArcelorMittal India.

C. What did ArcelorMittal India do immediately upon the acquisition of Essar Steel?

Since the acquisition of Essar Steel on December 16, 2019, ArcelorMittal India has renamed Essar Steel and the entity is now called ArcelorMittal Nippon Steel India Limited, or 'AM/NS India' on December 27, 2019. Further, the AOA of AM/NS India (earlier Essar Steel) has been amended to incorporate the provisions mentioned above.

D. What have the joint venture partners done from an operational perspective since taking over Essar Steel (now AM/NS India)?

Since the completion of the CIRP and change of control, AM/NS India has acquired Bhander Power Plant, a natural gas based thermal power plant with installed capacity of 500 MW in Hazira, Gujarat. The power plant was acquired from Edelweiss Asset Reconstruction Company under the provisions of SARFAESI. The plant is strategically located for AM/NS India, and shall be used as a captive supplier to the steel manufacturing operations of AM/NS India (earlier Essar Steel) at Hazira.

Further, pursuant to the commitment of ArcelorMittal India to invest a further INR 80 billion as part of the resolution plan towards capital expenditure for expansion, AMNS Luxembourg has already invested an amount of USD 840 million into AM/NS India on February 13, 2020.[59]

58. http://www.essarsteel.com/section_level1.aspx?cont_id=21vxqwHGkoo=&path=Investors_%3E_Investor-related_contact_information_for_Essar_Steel

59. https://corporate-media.arcelormittal.com/media/zoijlotf/annual-report-2019.pdf#page=114&zoom=100,0,0

IV. General legal and regulatory aspects

A. Except for the approvals under IBC, were approvals from any other regulators required?

Except for the approval of the COC and the NCLT under the IBC, the approval of the Indian anti-trust regulator, the Competition Commission of India (**"CCI"**) was also required.

ArcelorMittal India filed for approval of the CCI on August 13, 2018. This was further supplemented by another letter dated September 10, 2018 when the CCI was informed that the acquisition of Essar Steel by ArcelorMittal India would be an indirect acquisition by ArcelorMittal and Nippon Steel. Accordingly, ArcelorMittal and Nippon Steel were both to be considered as acquirers under the provisions of the IBC.

The CCI delved into the various verticals of steel manufacturing, and finally held that the combined market share of ArcelorMittal, Nippon Steel and Essar Steel in India would not be more than 20%, with the resulting increase being between 0 – 5%, and hence granted approval, by way of its order dated September 18, 2018.[60]

B. As has been noted above, AM/NS India has acquired the Bhander Power Plant under SARFAESI. Why did ArcelorMittal acquire Essar Steel under IBC and not SARFAESI?

SARFAESI is an enactment pursuant to which secured lenders are entitled to enforce their security interest without intervention of the courts. However, the practical experience has suggested that enforcement of security interests under SARFAESI has been marred by litigations, resulting in the enactment being inefficient to a substantial extent. This has also been acknowledged by the SC in the Second SC Judgement.

IBC was introduced as a response to the slow resolution progress under SARFAESI. IBC provides significant advantages as opposed to SARFAESI.

- The NCLT has been empowered under the IBC to approve resolution plans which deal with the entire company and provides a single window for the potential acquirer to acquire the corporate debtor as a going concern.
- Under the CIRP, all lenders collectively determine upon a sale of the corporate debtor to the resolution applicant, thereby eliminating the requirement of the bidder / potential acquirer to negotiate with multiple sellers / lenders. Accordingly, ArcelorMittal India could negotiate its resolution plan with the COC, instead of individual lenders. This also ensured that any dissenting minority lender could not hold out or have a substantially disproportionate negotiating power.
- The CIRP process provides the potential acquirer grandfathering / comfort that all claims in relation to the target have been dealt with and there are no further unknown liabilities that it would need to deal with. This has further been supplemented by the amendment to the IBC in 2020 to introduce Section 32A, which states that the successful resolution applicant shall not be liable for any offences committed prior to the or during the CIRP.
- The NCLT has been empowered to approve various actions under its order, including for capital reduction and delisting (where the corporate debtor is listed). ArcelorMittal used this for ensuring that a capital reduction was undertaken to cancel the shares of Essar Steel.

60. https://www.cci.gov.in/sites/default/files/Notice_order_document/Order_593.pdf

6. Tax considerations

I. What are the tax consequences for ArcelorMittal India for the investment into Essar Steel?

The investment by ArcelorMittal into Essar Steel (now AM/NS India) was by way of subscription to equity shares of Essar Steel. For primary investment, the subscribing entity is not subject to any tax under the IT Act. On the other hand, the investee company (Essar Steel in this case) may be taxed if the shares are issued at a premium.[61] However, for the investee company to be liable to tax, (a) the subscribing entity must be a resident of India; and (b) the price at which the investment is made must be in excess of fair market value of the shares of the investee company, as determined in accordance with the IT Act, and the rules thereunder.[62] Considering that the investment into the equity shares was made at face value (balance investment being by way of debt investment), there would be no tax implication on ArcelorMittal India for the investment into Essar Steel.

II. What are the tax consequences for Oakey's investment into ArcelorMittal India for funding the said acquisition?

There is no implication on the subscribing shareholder, i.e. Oakey for its investment into ArcelorMittal India. ArcelorMittal India may be taxed if the conditions mentioned above, i.e. (a) the subscribing entity must be a resident of India; and (b) the price at which the investment is made must be in excess of fair market value of the shares of the investee company, as determined in accordance with the IT Act, and the rules thereunder,[63] are satisfied. Considering that Oakey is a Luxembourg based company, and not a resident in India, there would be no tax on the said investment.

III. What would be the tax consequence of the transaction on Essar Steel?

From a taxation standpoint, Essar Steel would not be significantly impacted. On the contrary, the benefit of carry forward and set off of losses should be permitted to Essar Steel.

Section 79 of the IT Act restricts the ability of a closely held company to carry forward its losses for set off against income earned in future, where there is a substantial change in its shareholding. Under Section 79 of the IT Act shareholders of the company at the end of the FY in which the loss was incurred must own at least 51% of the shares in that company in the year that the carried forward loss is claimed as a deduction; otherwise, the company loses the ability to carry forward the loss.

However, effective April 1, 2018, companies undergoing insolvency resolution under the IBC have been exempted from the applicability of Section 79 of the IT Act, in respect of carry forward and set off of accumulated losses in the books of the company.

Accordingly, Essar Steel would be permitted to carry forward and set off losses against future income.

61. See Section 56(2)(viib)

62. Please refer to Rule 11UA of the Income Tax Rules, 1962

63. Please refer to Rule 11UA of the Income Tax Rules, 1962

7. Epilogue

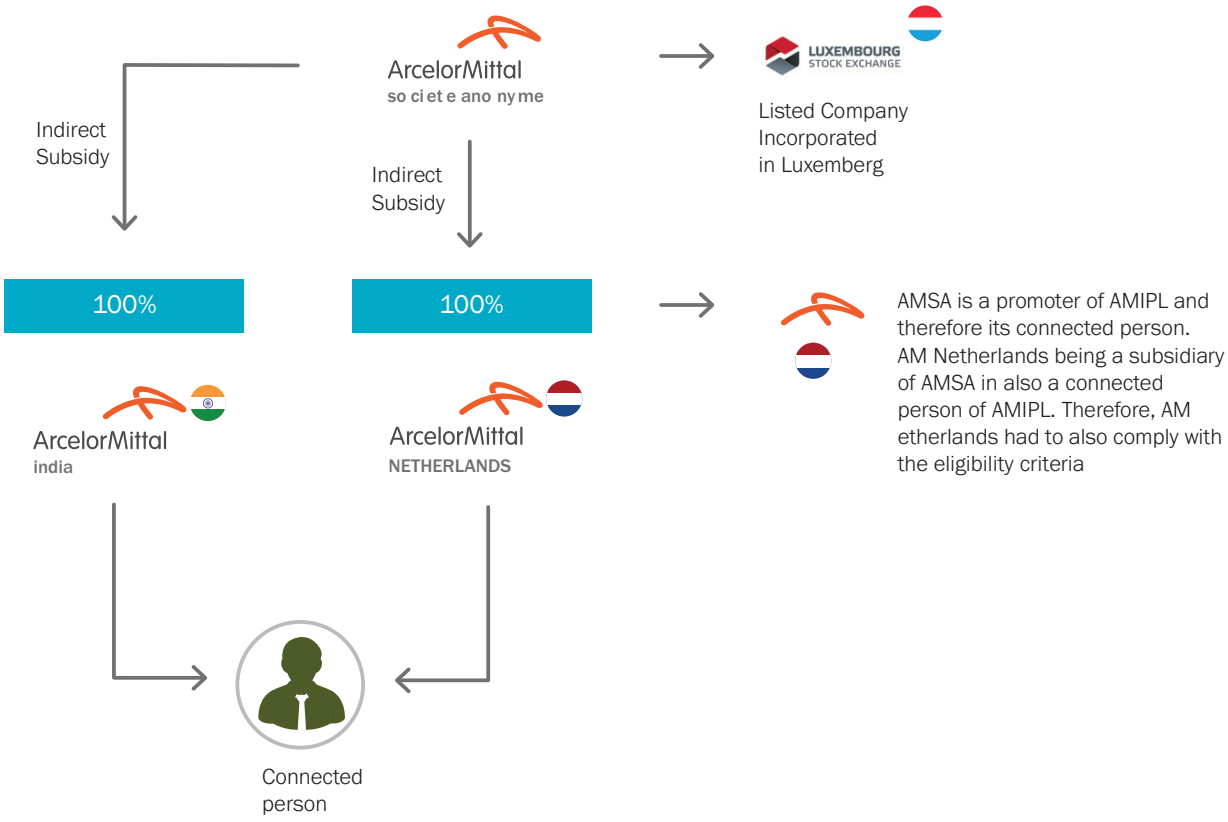
The entire saga of ArcelorMittal acquiring Essar Steel has gone on for long. But it is expected that the judicial fora has laid down substantial jurisprudence on various aspects removing extreme ambiguities in the interpretation of the IBC.

The Indian steel sector has attracted significant interest under the IBC space from both strategic buyers (such as JSW and Tata Steel) and financial investors (such as AION). It is expected that the acquisition of Essar Steel by ArcelorMittal and Nippon, and correspondingly, their entry into the Indian steel market will substantially facilitate increased competition in the sector. However, time will tell whether ArcelorMittal and Nippon Steel have hit their Indian jackpot with acquisition of Essar Steel.

Annexure A

Exhibit - B

Reasoning for Rejection of AMIPL



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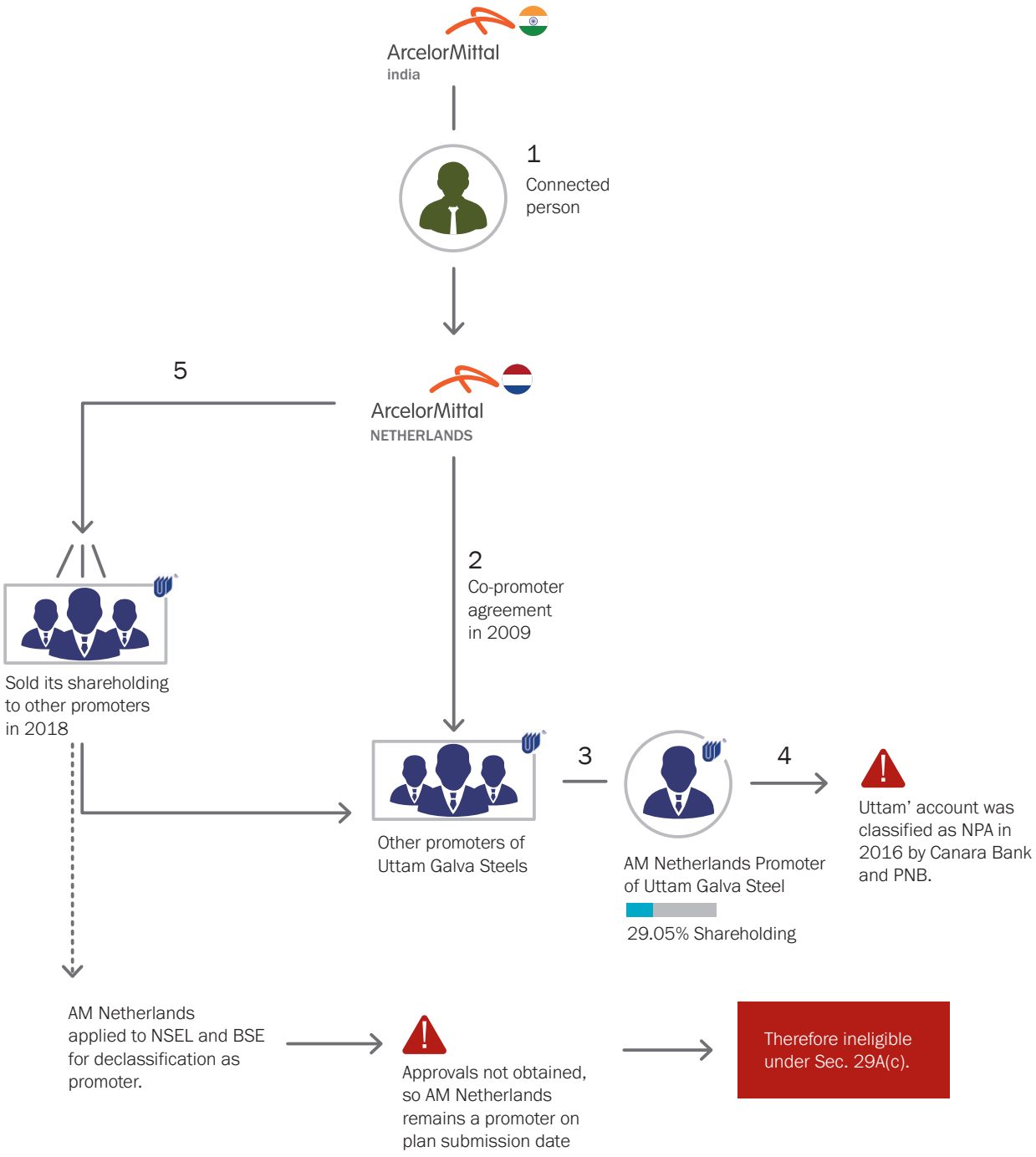
Resolution Professional rejected AMIPL



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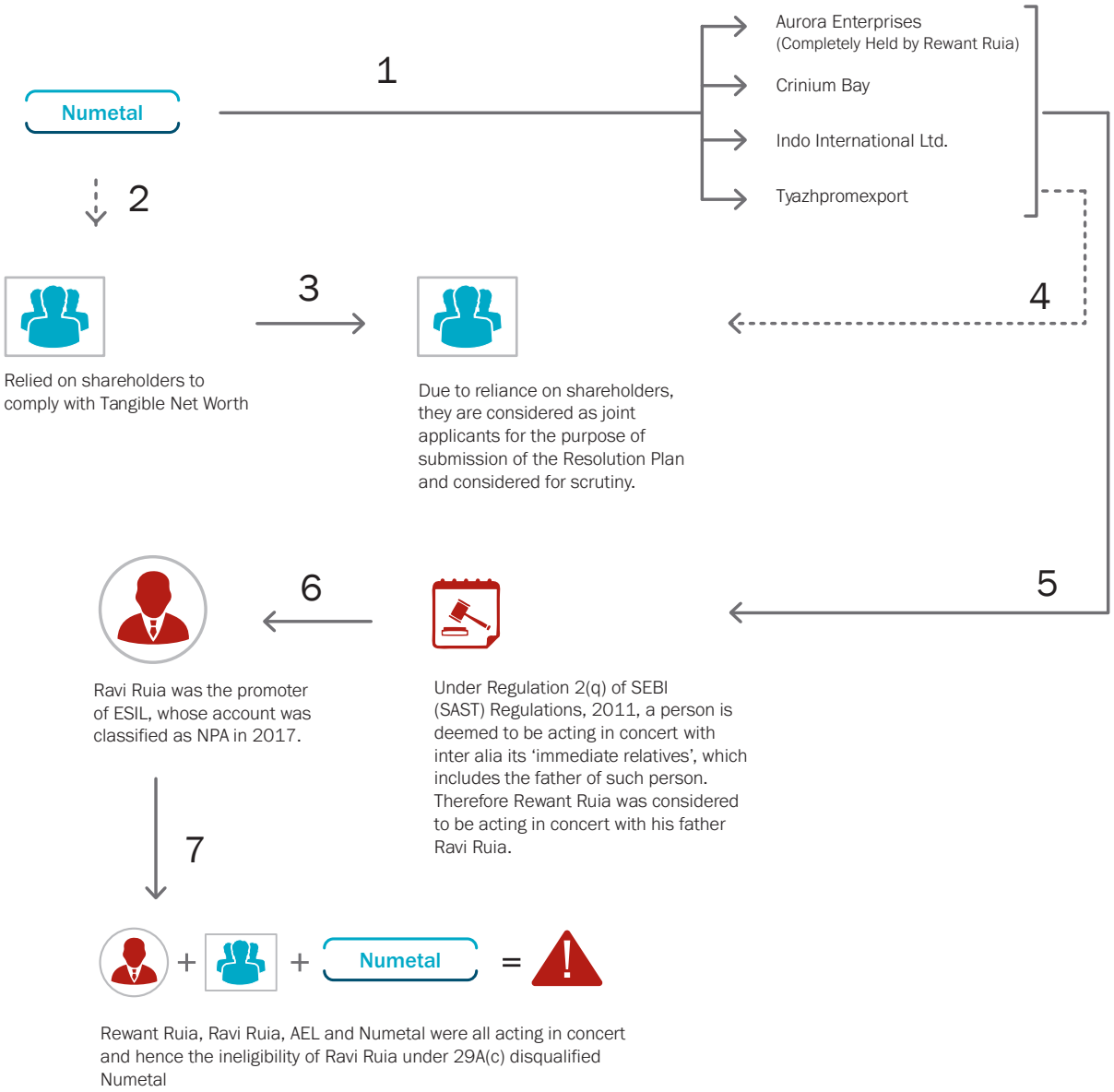
Reasoning for Rejection of Numetal



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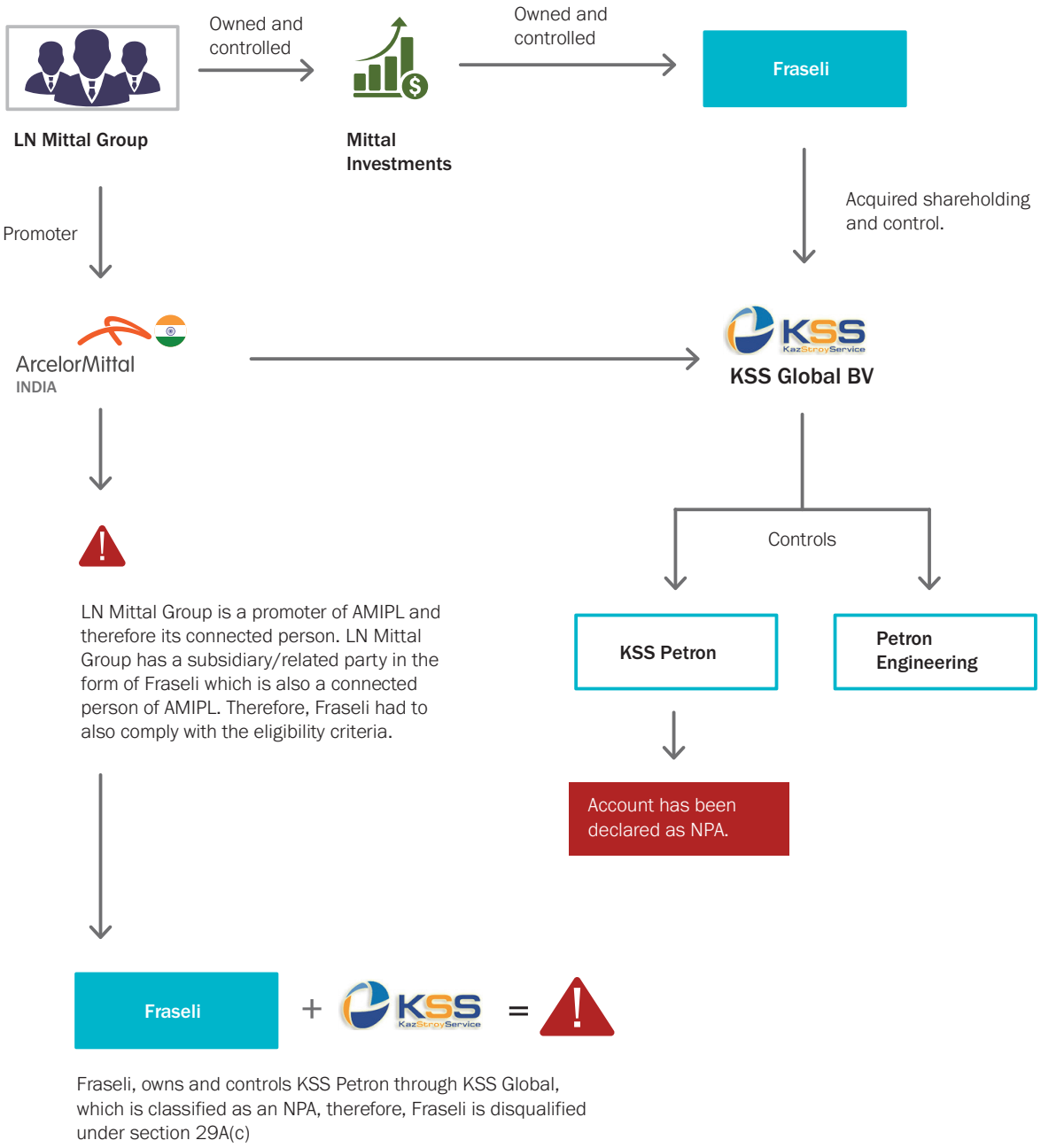

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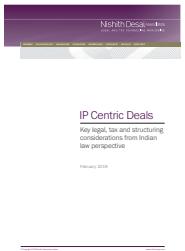

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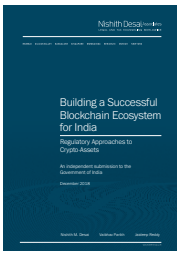

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TITLE	TYPE	DATE
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