

Insolvency Process of Jubilant Energy Kharsang Pvt Limited (JEKPL)

There were no employees, no directors and no promoters/shareholder representatives from Dec'17 to Sept'20 therefore status of Corporate Debtor was marked as "Active Non-Compliant" at website of the Ministry of Corporate Affairs (MCA), Government of India. One of the major hurdles faced during the CIRP of the Corporate Debtor was this classification of the Corporate Debtor as an Active Non-Compliant company and structuring the manner in which the new management of the Corporate Debtor shall take over the management of the Corporate Debtor.

Furthermore, where all directors of the company have resigned of their office under Section 167 of Companies Act, the promoters or Central Govt shall appoint the required number of directors. Accordingly, RP requested promoter company, JE Energy B.V (holding company which holds 100% share of Corporate Debtor) to appoint directors in JEKPL as per statutory requirement however since the JE Energy B.V itself is into liquidation under Netherland Laws, the Bankruptcy trustee of promoter company expressed its inability to appoint any director/s on the board of Corporate Debtor. Besides, almost every stakeholder filed petitions in various courts of law from NCLT to NCLAT to the Supreme Court. Some of which were dismissed on the grounds that the petitioner had 'no locus' in the case.

*Finally, the Resolution Plan of H-1 was voted by the COC after H-2 failed to outbid the H-1. But the implementation of the Resolution Plan had its own set of challenges. **Read on to know more...***



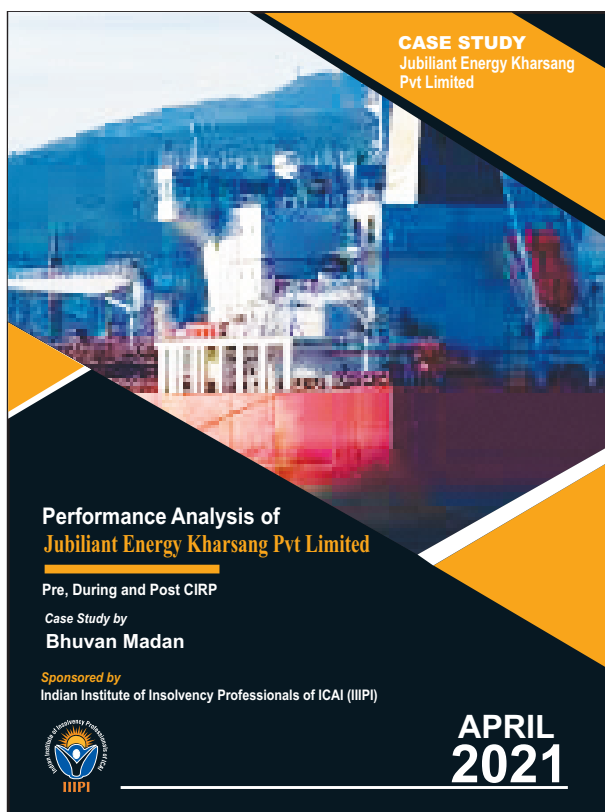
Bhuvan Madan

The author is a professional member of IIPI.
He can be reached at madan.bhuvan@gmail.com

1. Introduction

The resolution of JEKPL involves several aspects of insolvency such as guarantors obligation for payment of debts, legal loopholes, multiple litigations, plan implementation hurdles, locus standi of unsuccessful resolution applicant and role of MA to facilitate implementation of plan. However, for the sake of presentation, the entire case study has been divided into three main stages i.e. CIRP – Phase 1, CIRP-Phase 2, and Implementation of the Resolution Plan. Each stage brought its own set of challenges.

The main reason for financial stress was declining production and oil prices of produce from Kharsang oil field and problem further aggravated due to governmental policies and regulations pertaining to licenses. This led to severe financial crunch and has delay in debt servicing. Consequently, account of Corporate Debtor (CD) was classified as NPA. After attempts of revival could not materialise, the CD filed an application with NCLT for



initiation of Corporate Insolvency Resolution Process (CIRP) against itself under section 10 of the Insolvency and Bankruptcy Code (IBC or Code), 2016.

The NCLT vide order dated 17 March 2017 ordered commencement of CIRP and appointed an Insolvency Professional (IP) as Interim Resolution Professional (IRP) for the Corporate Debtor. However, the IRP was replaced with another RP (RP-1) by the Committee of Creditors (COC). Subsequently, Bhuvan Madan, IP was appointed as the Resolution Professional (RP-2) by the Committee of Creditors (CoC) of the Corporate Debtor and the same was confirmed by the NCLT vide order dated 8 March 2019. It was due to pre-existing legal disputes the RP-2 could not take over the process after a gap of about 15 months from the RP-1 demitting the office. Wading through a several litigations filed by various stakeholders, the RP-2 not only completed the CIRP of the CD but also successfully discharged the responsibilities as MA for implementation of the Resolution Plan.

2. Company Profile

2.1. About the Kharsang Project

Kharsang field covering an area of 9.94 sq. km is located in a reserve forest in Changlang district in the state of Arunachal Pradesh (North East India), about 50 km east of Digboi Refinery. The Kharsang field was discovered in 1976 by Oil India Ltd. (OIL). A total of 36 wells were drilled by OIL in the Kharsang field by 1995. It has oil producing wells (high wax and low wax) with API ranging from 16 to 36 deg. Kharsang field aggregates to 70 wells comprising of 36 wells of legacy Oil India and 34 wells of PSC consortium.

The Government of India (GoI) desired that petroleum resources be exploited with utmost expedition in the overall interest of India in accordance with good international petroleum industry practice and invited bids from interested person having requisite credentials to undertake exploration and development of the petroleum resources. In the exercise of its powers, the GoI granted mining lease for such oil contract area and entered a

contract with certain Parties with respect to the petroleum operations in the contract area and pursuant to the production sharing contract (Production Sharing Contract or PSC).

The Production Sharing Contract was executed on 16 June 1995 among following parties

Oil India Limited	40%
Geopetrol International Inc	25%
Enpro India Limited (now JEKPL Corporate Debtor)	25%
GeoEnpro Petroleum Limited	10%

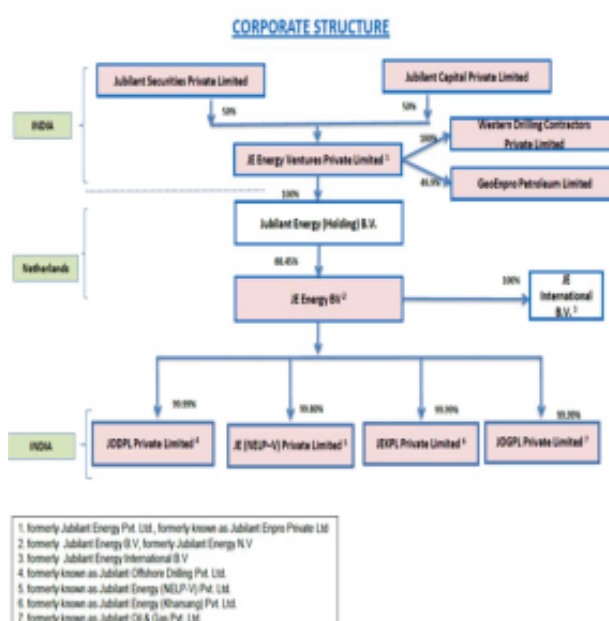
The PSC has a term of 25 years which can be extended for another 10 years.

In addition to the PSC, a Joint Operating Agreement (JOA) was also executed between the aforesaid parties.

2.2. JEKPL: The Corporate Debtor

The name of Enpro India Ltd was changed to Jubilent Enpro Ltd. Subsequently Jubilent Enpro assigned its entire 25% PI to its affiliate company Enpro Commercial Pvt Limited whose name changed to Jubilent Energy (Kharsang) Pvt. Limited and thereafter to JEKPL (Corporate Debtor).

Graph 1: Corporate Structure of the Corporate Debtor



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In addition, Corporate Debtor has participating interest in Manipur Blocks (Manipur I and Manipur II) which have been relinquished under force-majeure conditions. The PSCs were executed on June 30, 2010 and July 19, 2010 with GoI which were tendered under the New Exploration Licensing Policy, Eighth Round and the Petroleum Exploration License was issued by the State Government of Manipur on Nov 15, 2010. After completion of initial G&G activities, preparation for the next round of obligations, i.e., drilling of exploration wells was commenced. However, it was found that the roads were in a deplorable condition and major repair work on portions of the access roads and bridges was underway. Even after four and a half years, there was no sign from the government as to when the roads would become functional. Hence, DGH agreed to grant force majeure on

March 10, 2015 w.e.f. August 2, 2013 under the terms of the PSCs for both the blocks.

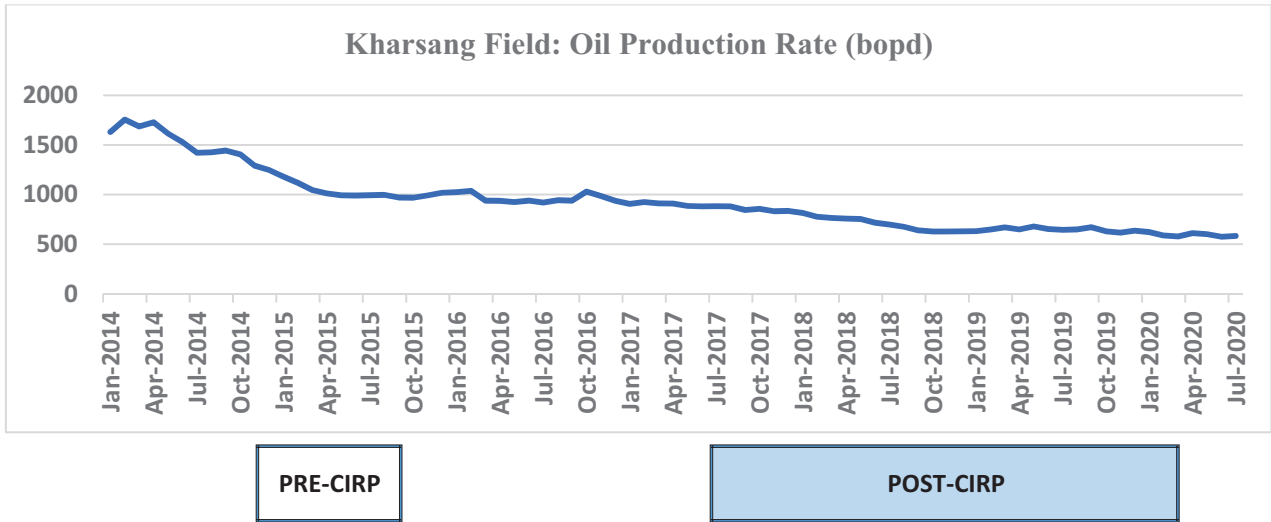
3. Pre-CIRP Performance

3.1. Production Capacity: Pre-CIRP Vs. Post-CIRP

Oil and gas reservoirs lose the pressure as oil and gas is produced from them. This results in decline in production over a period of time unless pressure management technology is implemented, or enhanced oil or gas recovery technology is implemented. In Kharsang, neither pressure management nor enhanced oil recovery technology is implemented to arrest the decline.

Further, it is understood that drilling of new wells has not been taken up due to lack of various regulatory approvals. This has resulted into decline in production level over period which has been tabulated as hereunder:

Chart 1: Oil Production Rate in Kharsang Field

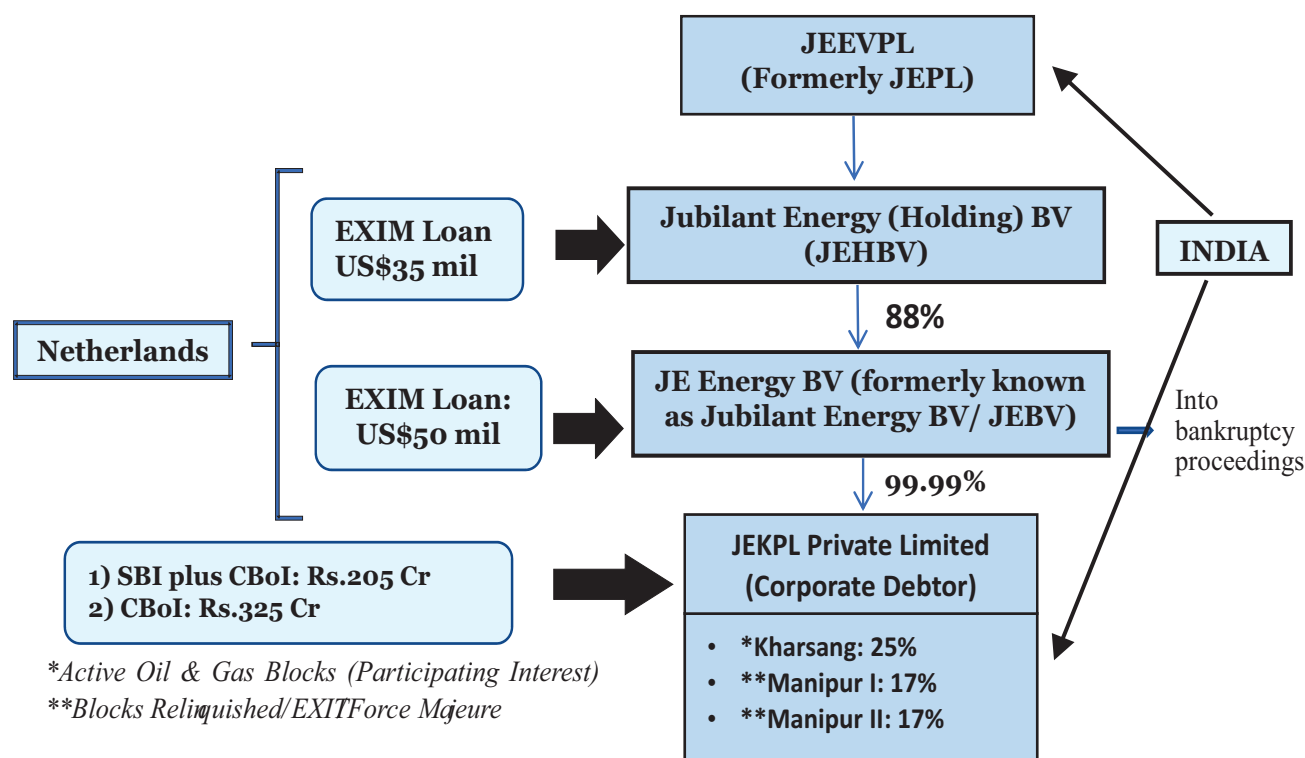


3.2. Financial facilities availed by JEKPL

a. Financing facilities of Corporate Debtor and corresponding security in Rupees

Name of Bank	Claims admitted (Rs. In Crores)	Secured by
State Bank of India	104	First charge on movable and immovable assets of Corporate Debtor Present and future receivables from Kharsang or any other field Mortgage of Corporate Debtor's PI in kharsang field Pledge of 51% shares of Corporate Debtor.
Central Bank of India	501	

Graph 2: Group Structure of the Corporate Debtor



b. Counter Corporate Guarantee provided by Corporate Debtor for Dollar Loan facilities availed in step-up holding companies:

EXIM bank sanctioned a Foreign Currency Term Loan of USD 50 Million during FY 2011-12 to Jubilant Energy N.V.(JENV) and USD 45 Million to Jubilant Energy (Holding) B.V.(JEHBV) formerly known as Jubilant Energy N.V, the Netherlands).

JEPL being the ultimate Indian holding company of the prime borrowers has offered the corporate guarantee for both above loans. In addition, Corporate Debtor being an Indian subsidiary of prime borrowers has offered counter corporate guarantee for the performance of above guarantee by JEPL to EXIM bank.

In March'16 above Loan facilities extended by EXIM Bank were classified as NPA

3.3. Reason for Financial stress

The performance of kharsang field has declined

considerably with both production and prices declined significantly which has been further aggravated due to governmental policies and license issues. The decline in production and lower crude prices have led to severe financial crunch and has led to delay in debt servicing. Consequently, account of Corporate debtor has been classified as NPA.

Corporate Debtor claimed that they made attempts to restructure its petroleum production in consultation with financial lenders, but it yielded not many results. Pursuant to continuation of such financial stress, Corporate Debtor filed an application under Section 10 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for initiation of Corporate Insolvency Resolution Process (CIRP) against itself. The NCLT approved¹ the commencement of CIRP vide order dated 17 March 2017 and appointed an Insolvency Professional (IP) as Interim Resolution Professional (IRP) for the Corporate Debtor. However, the IRP was replaced with another RP (RP-1) by the Committee of Creditors (COC). Subsequently, the RP-

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1 was also replaced by Mr. Bhuvan Madan (RP-2), who is the author of this case study.

3.4. Issues related to Management/Labour/Employees

Under Joint Operating Agreement (JOA) one of PI holder GeoEnpro Petroleum Limited was designated as Operator and entrusted with job of exploration, develop and operate the Contract Area in order to discover, develop and produce commercial accumulation of petroleum in accordance with policies, work programmes, budgets approved in accordance with Contract, and direction issued by Operating Committee and Management Committee.

4. Corporate Insolvency Resolution Process (CIRP)

Pursuant to approval of Resolution Plan by NCLT vide order dated 15 Dec 2017, erstwhile all directors of the Corporate Debtor resigned w.e.f 15th Dec 2017 by filing DIR-11 (However, entire process was severely marred by litigations at all forums and hence final resolution approved by NCLT in Feb 20 and plan got fully implemented in Sept 20 (explained in following paras). As all directors vacated office since 15 Dec'17, none of compliances with regard to e-filing of any form could be completed.

RP requested promoter company, JE Energy B., to appoint directors in the board of CD as per statutory requirement. However, since the JE Energy B.V itself undergoing liquidation under Netherland Laws the Bankruptcy trustee expressed inability to appoint any director.

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¹NCLT, Allahabad, CPNo. 24/ALD/2017, March 17, 2017.

Where all directors of the company have resigned of their office under sec 167 of companies Act, the promoters or Central Govt shall appoint the required number of directors. Accordingly, RP requested promoter company, JE Energy B.V (holding company which holds 100% share of Corporate Debtor) to appoint directors in JEKPL as per statutory requirement however since the JE Energy B.V itself is into liquidation under Netherlands laws therefore, the Bankruptcy trustee of promoter company expressed its inability to appoint any directors on the board of Corporate Debtor.

4.1. CIRP: Phase-1

The statutorily prescribed period of one-hundred and eighty (180) days from the insolvency commencement date was expiring on 17 September 2017, accordingly, upon an application filed by the erstwhile Resolution Professional (RP in CIRP-1 or RP-1) under Section 12 of the Code, the said period of the CIRP was extended by the Adjudicating Authority (AA) by another 90 days vide its order dated 3 August 2017. Accordingly, the CIRP of the Corporate Debtor was due to expire on 12 December 2017. Pursuant to the advertisement, the creditors - 'Financial Creditors' including EXIM Bank and 'Operational Creditors' filed their respective claims.

Pursuant to invitation for EOI for submission of resolution plans, 13 EOIs were received by the RP-1 out of which 5 EOI were found to be qualified, however final resolution plan were submitted by two potential Resolution Applicant's namely Atyant Capital India Fund -1 (“Atyant”) and Hindustan oil Exploration Company Limited (HOEC).

The Resolution Plan of Atyant (Highest bidder) was recommended by RP-1 and COC voted in its favour except Exim bank. The same was approved by AA vide its order dated 15 Dec 2017. It is worthwhile to note that RP-1 had not recognized Exim Bank debt as “Financial Debt” and ignored to include the Exim Bank in the COC with voting share proportionate to its amount of claim.

4.2. Brief Background of Atyant Capital: The Resolution Applicant

Atyant Capital India Fund-1 ('Atyant Capital/Fund'), the Resolution Applicant, was incorporated in the Republic of Mauritius as a public company limited by shares in accordance with the Mauritius Companies Act, 2001 Republic of Mauritius. It has been granted a category - I global business licence by the Financial Services Commission and authorised as a collective investment scheme under the Securities Act, 2005. Atyant Capital Family of Funds have assets under management in excess of USD 500 million. Limited partners (LPs) to the Funds include university endowment funds, institutional investors, pension funds, and large family offices, all from North Americas. Further, the Fund has committed but unutilised capital of USD 500 million for investment. Typical to a Private Equity investor, the Fund's investment objectives are to achieve consistent absolute rate of return which exceed the emerging market indexes and long-term capital appreciation by investing in shares and securities – both private or listed equities in defined sectors like oil and gas, technology and health sciences.

4.3. Meanwhile, two appeals were filed before Hon'ble NCLT, details of which are as hereunder:

a. EXIM Bank challenged the NCLT order dated 15 Dec '17 as Claim of Exim bank as a financial Creditor rejected by Erstwhile Resolution Professional (RP-1)

The EXIM Bank declared the amount of loan advanced to Principal Borrower as NPA. Therefore, the EXIM Bank recalled the loan facilities advanced to JENV and JEHBV. Consequently, Exim Bank initiated recovery actions against the Prime Borrowers i.e JENV and JEHBV and invoked its 'Corporate Guarantee' as well as the 'Counter Corporate Guarantee' against the JEPL and Corporate Debtor.

According to EXIM Bank Principal Borrower having defaulted and the liability of Corporate Guarantee as 'Counter Corporate Guarantee' being joint and co-extensive with Principal Borrower, the EXIM Bank comes within the meaning of 'Financial Creditor' of Corporate

Debtor (Corporate Debtor), in terms of Section 5(7) r/w Section 5(8)(h) of I&B Code. However, Exim Bank's claim to treat it as a 'Financial Creditor' has not been accepted by the RP-1, which led to Exim Bank filing an application before AA challenging the said rejection of claim and the same finally resulted in an Order dated 27 November 2017 passed by this AA whereby the decision of the RP-1 rejecting the claim of Exim Bank as a financial creditor of the Corporate Debtor was upheld.

The aforesaid order was challenged by Exim Bank before the NCLAT and consequently, NCLAT pronounced order² on dated 8th Dec 2017 directing RP-1 to consider the claim of appellant and request the COC to notice the same and also bring to the notice of AA.

However, the said order dated 15 Dec 2017 passed by NCLT is subject to outcome of EXIM Bank's application before the NCLAT challenging the order of NCLT dated 27th Nov 2017 to consider them as financial creditor to the CIRP of Corporate Debtor.

Therefore, EXIM bank filed an appeal to NCLAT of setting aside 15th Dec'17 order of NCLT and also its order dated 27th Nov 17 and the decision dated 4th Aug'17 of the RP rejecting the claim of EXIM.

b. Challenging of NCLT order dated 15th Dec 2017 by HOEC ("Unsuccessful Resolution Applicant")

HOEC alleged that bidding process was not conducted by RP-1 and COC in accordance with defined process laid out in process documents. HOEC alleged despite that bids submitted by each resolution applicant being treated as final offer, suddenly the goal post was changed by RP-1 and COC from written binding bidding to verbal auctioning mode towards upward revision in price consideration with both potential resolution applicants. Atyant ("Successful Resolution Applicant") participated in verbal auctioning and submitted revised resolution plan on 6th Dec 2017. HOEC claimed that they being listed company couldn't participate in verbal auctioning however, submitted revised resolution plan on 6th Dec 2017. Post evaluation of resolution plans by RP-1 and COC, resolution plan of Atyant was approved by COC and rejected the resolution plan of HOEC on the ground -

² NCLT, Allahabad, CA.No.159/2017, November 27, 2017.

HOEC submitted conditional plan and HOEC opted out of bidding process on dated 4th Dec'17.

HOEC alleged that purported conditions under which HOEC's plan was rejected is illegal and motivated. Aggrieved by the order of NCLT dated 15 Dec 2017, HOEC filed an application before the NCLAT on 20th January 2018 to consider the resolution plan submitted by HOEC on dated 6th December 2017 which was higher than that of Atyant.

c. NCLAT passed stay order on 1st Feb 2018 and a final Order on 14th August 18

Pursuant to above two appeals NCLAT passed stay order on dated 1st Feb 2018 directing the AA NCLT Allahabad Bench not to give effect to the Resolution Plan which was passed during vide order dated 15 Dec 2017. Finally, the above issue was settled by judgment dated 14 August 2018 whereby the NCLAT recognised the status of Exim Bank as a "Financial Creditor". NCLAT also recognised that resolution plan has been approved by the COC which was not competent in the absence of Exim Bank and taking into consideration that the claim of one of the resolution applicants Viz HOEC was wrongly not been considered and hence order dated 15 Dec 2017 was set aside and directed to reconstitute the COC after including Exim Bank and further directed to reconsider of the resolution plans already submitted with respect to the Corporate Debtor. It was made clear by the NCLAT that COC cannot go in for "rebidding" on account of the resolution plans having already been opened.

d. NCLAT order dated 14th August 2018 was challenged by Atyant

Meanwhile, the decision of the NCLAT dated 14 August 2018 was challenged before the Supreme Court by Atyant as it is prejudicially affecting the rights and interest of the Appellant as a successful resolution applicant by setting aside approved Resolution Plan of Appellant which was approved by the NCLT vide its order dated 15 Dec 17.

The basic premises of appeal filed by Atyant was that although EXIM bank was participating in CIRP throughout and attended all COC meetings and never objected to the resolution plan submitted by Atyant. In addition, NCLT observed that Atyant's Plan is bonafide and beneficial to the interest of Corporate Debtor.

Therefore, Atyant prayed that NCLAT's dated 14 Aug'18 order for setting aside NCLT order dated 15 Dec 17 would alter the status of Atyant as successful Resolution Applicant, merely because EXIM Bank being declared as "Financial Creditor" although the rights of EXIM Bank are fully protected under the resolution plan of Appellant and EXIM Bank was always part of all COC meetings.

Supreme Court vide order dated 7 September 2018 (i.e. the next day after the direction to Exim Bank to call for a meeting of the Committee of Creditors), while issuing notice directed for maintenance of status quo as on the said date. Also, in the matter of HOEC's appeal, NCLAT passed an order on dated 28th Jan 2019 to follow the direction given in the NCLAT order dated 14th August 2018.

The aforesaid civil appeal was thereafter taken up and dismissed³ by the Supreme Court vide its order dated 23 January 2019.

4.4. CIRP Phase- 2: Re initiation of CIRP after gap of 15 months

Subsequently, Bhuvan Madan was appointed as the Resolution Professional (RP-2) by the Committee of Creditors of the Corporate Debtor and the same was confirmed by the NCLT vide order dated 8 March 2019.

Thereafter, RP-2, his authorised representatives and his legal advisor Shradhul Amarchand Mangaldas (SAM) reconstituted the COC, along with EXIM Bank and held a meeting on 29th March 2019 to discuss the future course of action and to evaluate/consider/reconsider the resolution plans already submitted by existing resolution applicants only in line with NCLAT order dated 14 August 2018. While the statutorily prescribed period for conducting the of the CIRP has already expired, the members of the Committee of Creditors inter alia authorized the RP-2 to file the following applications:

- a. Application before the NCLT seeking exclusion of time period consumed in litigation in calculating the total time period available for conducting the CIRP of the Corporate Debtor; and
- b. Application before the NCLAT seeking clarification of the Order dated 14 August 2018 with respect to

³ NCLAT, CA(AT)(Insolvency) No. 304/2017, December 08, 2017.

whether the existing resolution applicants could be asked to submit revised resolution plans to maximize the value of assets or if the CoC was bound to consider the original plans such resolution applicants had submitted.

Thereafter, on 10 April 2019, the RP-2 Invited to both the resolution applicants seeking confirmation on their interest to participate in the resolution process of the Corporate Debtor. In response, both resolution applicants reconfirmed their interest.

While NCLT granted requisite exclusion, the application filed before the NCLAT was disposed vide Order dated 14 May 2019 whereby the AA stated that there was no need for clarification and granted liberty to the CoC to negotiate with the resolution applicants in accordance with the Code to maximise the value of assets of the Corporate Debtor.

On 24 May 2019, the 18th COC meeting took place wherein the members of the COC decided the future course of action and unanimously agreed to issue a process document (Process Document) containing the detailed terms and conditions of the process to be conducted by the COC for negotiation with both the resolution applicants. Accordingly, on 1 June 2019 the RP-2, on behalf of the COC, circulated the Process Document and the due date for submission of revised resolution plan was decided as 10 June 2019. In terms of the Process Document, an out-bidding process had been envisaged where each resolution applicant had one chance to outbid the highest evaluated plan.

In pursuance of the above invitation, both the resolution applicants submitted their revised resolution plans and post evaluation, Atyant was declared as the H1 bidder and HOEC was declared as the H2 bidder.

Thereafter the H2 bidder was given the opportunity to outbid the H1 bidder, in accordance with the process for outbidding stipulated under the Process Document. However, the H2 bidder i.e. HOEC declined to outbid the H1 bidder and consequently, H1 bidder i.e. Atyant was

declared the highest evaluated Resolution Applicant (RA).

The members of CoC participated in the scheduled e-voting and the same resulted in approval of Final Resolution Plan submitted by Atyant by 100% voting in favour of approval of plan. NCLT found Resolution Plan of Atyant in conformity of section 30(2) of code and an approval in respect of the same was pronounced on 17th January 2020. However, RP-2 observed some error that had crept in the order and filed an application for modification order. Subsequently, NCLT passed order dated 4th Feb 20 and corrected/modified⁴ the order dated 17th Jan 20.

Upon NCLT's approval of the resolution plan, Atyant appointed the RP-2 as Monitoring Agency (MA) in terms of the approved resolution plan for effective monitoring and supervising the implementation of resolution plan approved by the NCLT.

5. Implementation of Resolution Plan

5.1. Hurdles in Implementing Resolution Plan

It appeared that all things ended happily and now RA is to implement the plan. However, many aspects unfolded one by one including Covid-19 Pandemic that kept delaying implementation of the Resolution Plan. Hurdles in implementation of the resolution plan by Successful Resolution Applicant, Atyant Capital India Fund-I ("RA") are as follows:

- a. The NCLT order dated 4th Feb'20 approving the resolution plan was challenged by Geopetrol International Inc ("GPI") (a wholly owned step-down subsidiary of HOEC) on account of an alleged Pre-emption Right.
- b. Geopetrol International Inc. (GPI) challenged the NCLT order dated 4th Feb'20 while claiming pre-emption rights on the Participating Interest ("PI") held by JEKPL Pvt. Ltd. in the Kharsang Field. GPI sought a recall of the corporate insolvency

⁴ NCLT, Allahabad, CA No. 223/ 2017 in CP No. 24/ALD/2017, December 15, 2017.

resolution process until a notice of pre-emption is issued in terms of Clause 12.3 of the Joint Operating Agreement for enabling parties to the JOA to exercise their pre-emptive rights. It was argued by GPI that the principal assets of the 'Corporate Debtor' was its 25% Participating Interest in kharsang oil field and any direct or indirect sale of the said participating interest to be strictly governed by the provisions of the Production Sharing Contract and the Joint Operating Agreement. Accordingly, GPI claimed a first charge over the participating interest of the 'Corporate Debtor' and pre-emptive right under Article 12.3 of the Agreement. However, the NCLAT was pleased to dismiss the appeals vide its order dated 13th March 2020 on account of the resolution plan having been approved and it being presently binding on all stakeholders under Section 31 of the Code.

- c. On account of the aforesaid appeal, Atyant changed its implementation strategy to wait and gauge the situation. This was also exacerbated by the outbreak of the pandemic. Atyant feared appeals to the NCLAT order and was apprehensive that GPI may raise an issue with respect to exercise of its alleged pre-emption rights. Therefore, keeping this in mind, Atyant issued a letter dated 14 March 2020 to the lenders as well as the MA seeking extension of 90 days extension for implementation of the resolution plan for the following reasons:
 - I. Possibility of filing of appeal by GPI before Supreme Court;
 - ii. Pandemic outbreak of COVID-19 which has been declared as force majeure event.
 - iii. the pandemic has caused a steep fall in oil and gas prices worldwide which is also the primary business of the Company thereby potentially affecting the cash flows of the Company.
- d. The letter was responded to the MA inter alia stating that in view of the unequivocal terms of the Approved Resolution Plan, the Atyant is stopped from taking any contrary position and delaying or seeking any extension for the implementation of the Approved Resolution Plan. Further, the MA also

objected to the RA's contention of occurrence of event of force majeure and emphasized that the COVID outbreak had absolutely no bearing whatsoever in respect of the requirement to implement an Approved Resolution Plan by payment of the consideration provided therein and secondly, the Approved Resolution Plan does not have any provision which provides the liberty or right to renege or delay in the implementation of the Approved Resolution Plan even upon the occurrence of a force majeure event.

- e. Finally, the MA along with the financial creditors of the Company called upon the Atyant to immediately implement the terms of the approved Resolution Plan without any further delay by making the payment of the total consideration to the financial creditors.
- f. By this time, the Atyant had already filed an application before the NCLT Allahabad Bench seeking directions for extension of 90 days' time period for implementation of the resolution plan stating the lockdown imposed by the government of India as one of the reasons for the same.
- g. Atyant deliberated with the MA and lenders on finally on 22 April 2020 it was agreed that Atyant would be permitted an extension of 90 days to implement the approved resolution plan subject to the following terms and conditions:
 - i. INR 10 crores should be infused by Atyant in JEKPL by way of issuance of demand draft immediately, to display their commitment towards implementation of plan;
 - ii. Application/Affidavit to be filed with Adjudicating Authority to seek necessary direction for extension of time as requested by the RA, along with the withdrawal of application filed by RA;
 - iii. The balance resolution amount to be paid to the financial creditors within 90 days from lifting of lockdown issued by Central Government.

Finally, Atyant agreed to implement the resolution plan in line with the extension granted and fulfil the conditions. Furthermore, Atyant clarified that the reason for seeking

90 days is to gauge the situation vis-à-vis GPI and any challenges that it may raise with respect to the resolution plan and exercise of its pre-emption rights. Atyant further clarified that in case the anticipated litigation filed by HOEC/GPI before the Supreme Court of India⁵ is disposed-off sooner thereby attaining finality on the issue of pre-emption right, they shall make the payment even before the completion of 90 days.

5.2. Fresh operational issues raised by Atyant

Subsequently, Atyant raised another two operational issues on account of which they expressed their apprehension towards their implementation of the Resolution Plan now stating that the same had material bearing on the business and financial affairs of JEKPL: -

- a. Demand notice dated 04.06.2020 issued by MoPNG, Government of India seeking payment of USD 24.8million.
- b. Letter dated 08.06.2020 issued by MoPNG, giving three months period for continuing petroleum operations (instead of 10 years extension, consistent with the Government's Extension Policy 2016, to the PSC tenure).

5.3. Invocation of Performance Bank Guarantee by lenders

This is last thing which any Resolution Professional would like to avoid but there was no option but to scrap the entire resolution process.

Lenders expressed their discomfort over the observations made by the Atyant and apprehension that the Atyant may not be willing to file the application in accordance with the decision taken in meeting dated 22 April 2020. Unhappy with the issue raised by the Atyant and attempt by Atyant to delay the implementation, the lenders invoked the performance bank guarantee submitted by Atyant.

5.4. Authorisation to MA

By this time Lenders had made up their mind Atyant was just buying time and delaying the plan implementation. There was a deadlock between the resolution applicant and the lenders, and it almost seemed as if liquidation

would be the only option left in respect of the Corporate Debtor. In fact, the possibility of liquidation was also contemplated by the lenders. Pursuant to such deadlock, the MA was authorised to negotiate with the resolution applicants.

Accordingly, the MA and his legal counsel were able to act as a bridge between the lenders and the resolution applicant by nurturing trust and faith between the parties and mediating the deadlock to explore all possibilities of implementation of plan and develop an implementation model, which can be mutually acceptable. This mature and professional endeavour was in line to the objectives underlying the IBC, namely that of revival of the corporate debtor and avoid liquidation. This is also indicative of the importance of sensible and practical negotiations in salvaging situations that may be detrimental to all parties involved in a transaction. It was crucial to create an ambience of faith and confidence among all the stakeholders and mediate for effective closure.

5.5. Finally, after a lot of deliberation and back and forth between the Atyant and the lenders, the following decisions were taken in the meeting held on 30 July 2020:

- a. The RA shall provide the demand draft for INR 5.77 crores to the MA by August 5, 2020 and
- b. simultaneously, lenders shall withdraw notice of invocation of PBG and the unconditional discharge of the PBG which was earlier submitted.
- c. RA shall mandatorily and unconditionally implement the approved Resolution Plan on or before 30 September 2020.
- d. Reversal of entire implementation of Plan in the event GPI/HOEC challenges the resolution plan in view of pre-emptive rights in respect of PI of JEKPL and the Supreme Court decides in favour of GPI/HOEC. In this event, money paid by RA shall be returned back by lenders within 30 days.
- e. Filing of joint application to Adjudicating Authority on the decision taken by the erstwhile COC/lenders with regard to extension of timelines and seek direction from them.

⁵ NCLAT, CA(AT) (Insolvency) No. 304/2017, February 01, 2018.

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A joint application was filed by the MA (post authorisation from lenders) and Atyant seeking directions on the extended timeline for implementation of the Resolution Plan and fresh agreed position, specifically confirming for implementation of Resolution Plan unconditionally by 30th Sept'20. Such application filed with a confirmation that receipt of consolidated demand drafts of INR 15.77 crores by the MA.

Vide order dated 9th Sept 2020, NCLT⁶ while declining to accede to the prayer for reversal of money to the Successful Resolution Applicant in the event of dismissal of order from Supreme Court (being speculative), directed the implementation of the approved Resolution Plan on revised commercial agreement between lenders and Atyant by 30 September 2020.

Table 1: Sequence of events since approval of resolution plan by NCLT

Date	Event
04.02.2020	NCLT approved resolution plan of Atyant Capital India Fund-I (RA) to be implemented within 30 days.
06.02.2020	Geopetrol International Inc. ("GPI") issued notice claiming pre-emption rights on participating interest held by JEKPL Pvt. Ltd. in the Kharsang Field
03.03.2020	MA responded to GPI's notice objecting to their right.
13.03.2020	GPI approached the Hon'ble ("NCLAT") challenging the NCLT order dated 4 February 2020 approving the resolution plan. The Hon'ble NCLAT was pleased to dismiss the appeal.
14.03.2020	Atyant issued letter to monitoring agency seeking 90 days extension on account of outbreak of COVID-19 and possibility of GPI filing an appeal before SC.
16.03.2020	A meeting was held with the Atyant to deliberate on the issues raised by the Atyant in his letter dated 14.03.2020
17.03.2020	Atyant issued another letter requesting for extension of 90 days, seeking to file a joint application before the Hon'ble NCLT for the same.
18.3.2020	Ayant filed application before NCLT seeking extension of 90 days for implementation of resolution plan.
19.03.2020	The MA responded to both the letters of the Atyant dated 14.3 and 17.3 inter alia stating that in view of the unequivocal terms of the Approved Resolution Plan, the RA is estopped from taking any contrary position and delaying or seeking any extension for the implementation of the Approved Resolution Plan
19.3.2020	Atyant responded to MA's letter stating their willingness to implement the plan within 90 days.
17.4.2020	Discussion with Atyant on implementation of plan and requesting them for renewal of PBG which was expired
22.4.2020	Meeting between Atyant, lenders and MA regarding implementation of plan where - by extension of timeline for implementation was approved by lenders.
20.6.2020	Atyant issued another letter to the MA and the lenders requesting for a meeting to deliberate on certain operational matters

⁶ Ibid, 5.

1.7.2020	MA sent email to Atyant informing that the request for meeting to discuss operational matters rejected by lenders who rather insist on compliance of decisions taken in 22 April meeting and submission of INR 10 crore DD.
4.7.2020	In response to this, Atyant again requested lenders to hold a meeting.
9.7.2020	PBG submitted by Atyant invoked by SBI
13.7.2020, 16.7.2020	The lenders had a meeting with MA to deliberate on the way forward on account of non-implementation of the plan by RA.
17.7.2020	Atyant finally handed over the fresh DD for INR 10crore to the MA which was to expire on 15 Aug 2020.
22.7.2020, 27.7.2020	Another meeting happened with RA to discuss the next steps towards implementation of plan.
30.7.2020	Final meeting with RA whereby it was agreed to implement resolution plan latest by 30 September 2020.
13.8.2020	The notice for invocation of PBG withdrawn by SBI upon submission of DD aggregating to INR 15.77 crores in total.
25.8.2020	Joint application on behalf of RA and lenders filed seeking extension of period for implementing the resolution plan.
9.9.2020	The NCLT allowed the application for extension of timeline for implementation of resolution plan up to 30 Sep 2020.

5.6. Final Implementation of Resolution Plan

Following the extended timeline for implementation of the resolution plan, Atyant implemented the resolution plan in its entirety. The money payable to the financial creditors was infused in the Corporate Debtor and accordingly, the following resolutions were passed in the board meeting conducted by the "Reconstituted Board" for the purpose of effective change of management pursuant to approved resolution plan:

1. To take a note of NCLT order dated Feb 4, 2020 approving the resolution plan and to take on record the appointment of reconstituted board in terms of NCLT order (along with the general disclosure as received under sec 164(2) and sec 184 (1) of Companies Act.
2. To take a note of cessation of the erstwhile directors of the company.
3. Authorising the reconstituted board to file E- Form INC-28 for submission of NCLT order approving the plan.
4. On the same day, the infusion of funds required to make payment to the financial creditors was infused in the Company and thereafter, these sums were distributed to all financial creditors.

5.7. HOEC challenged NCLT order dated 9th September 2020 in NCLAT

HOEC filed application, before NCLT Allahabad Bench against NCLT order dated 9th Sept 2020, under Section 33(3) and 74(3) of the Code sought initiation of the liquidation process on account of purported failure on part of Atyant to implement the resolution plan within the stipulated timeline.

Strangely, while appeal is pending in NCLT Allahabad Bench, Later, HOEC filed another appeal to NCLAT against the order of the NCLT dated 9th September 2020 allowing delayed implementation of the resolution plan on the ground that the erstwhile Committee of Creditors, in connivance with the Successful Resolution Applicant, accepted a re-negotiated fresh Resolution Plan and the application of the Committee of Creditors under Section 60(5) of the Code was not maintainable and shouldn't have been entertained by the Adjudicating Authority.

MA and Atyant, both pleaded that Applicant herein is in no manner impacted by the implementation of the Resolution Plan by the Successful Resolution Applicant. The Applicant, during the CIR Process of

the Corporate Debtor, was given a fair opportunity of participation and it is ultimately the commercial decision of the members of the COC which is paramount. The members of the erstwhile COC had, in exercise of their commercial wisdom, approved the Resolution Plan of Atyant and the same thereafter received a stamp of approval from NCLT as well in terms of Section 31 of the Code. The NCLAT vide its order⁷ dated 17th Nov'20 held that HOEC had no locus to maintain that the change in terms of the approved Resolution Plan in regard to the extension of time for induction of upfront amount as also the implementation of the Resolution Plan jeopardized its legal rights qua consideration of its Resolution Plan which had been rejected. It was also held that an unsuccessful resolution applicant has no vested rights and upon finding no merit in the present appeal; it was dismissed.

Evidently, the NCLAT has rightly recognised the established position of law that once a particular resolution applicant is declared unsuccessful and is out of the resolution process, it has no right to then challenge any decisions taken by any stakeholder and/or implementation of the resolution plan by the successful resolution applicant. Keeping in light of aforesaid NCLAT order, later NCLT Allahabad bench also dismissed application.

5.8. HOEC challenged NCLAT Order in the Supreme Court

HOEC aggrieved with the order NCLAT filed appeal in Supreme Court under section 61 of Code. Counsel for HOEC submitted that they are aggrieved by the extension granted to the successful resolution application for plan implementation. He submitted there was a 30-day time period stipulated for plan implementation, however a period of 8 months have been granted by the committee of creditors for plan implementation, despite the fact that the committee of creditors had become functus officio. He also submitted that the entire resolution plan, as approved by the NCLT has been changed and the Corporate Debtor is now handed over to some third party.

The Supreme Court after hearing the submissions passed an order⁸ dismissing the captioned appeal at the outset.

5.9. Recovery of Financial Creditors/ Operational Creditors

There were no operational creditors and resolution plan has been fully implemented in accordance with approved resolution plan. Recovery for financial creditors is around 10% of admitted claim which was fully paid by Atyant and distributed among the financial creditors in proportionate to admitted claim.

5.10. Avoidance Proceedings

Sections 43, 45, 49, 50 and 66 of the Code mandate the RP and the Liquidator to file applications with the Adjudicating Authority (AA) seeking appropriate reliefs and directions permissible under the Code where the RP and Liquidator comes across any transactions that can be classified in the said provisions. Erstwhile RP didn't observe any such transactions which may be classified in the said provisions and hence didn't file any application with the Adjudicating Authority.

6. Learning/ Jurisprudence

- a. At first place excluding decision by RP-1 to exclude EXIM Bank as financial creditor with voting share was not correct. In accordance with executed guarantee deed by JEPL and counter guarantee deed executed by JEKPL for the financial facilities extended by EXIM Bank to JENV, Netherland, both entities are liable jointly and severally as "Principal Debtor". Corporate Counter Guarantee in respect of due performance and discharge of obligations and liabilities of JEPL to EXIM Bank, essentially comes within ambit of Supplementary/Additional guarantee. There is admitted payment default by the Principal Borrower i.e JENV, Netherland. EXIM Bank has declared account of JENV as NPA in May '2016. Such Counter guarantee given by JEKPL has been acknowledged by JEPL in the financial accounts. Therefore, for all purpose Counter Corporate Guarantee given by JEKPL amounts to Guarantee and entitled to be covered under Financial Debt.
- b. Secondly, 'Unsuccessful Resolution Applicant' whose Resolution Plan was rejected by the Committee of Creditors has no locus to question the implementation of the approved Resolution Plan of the Successful Resolution Applicant. Once the Unsuccessful Resolution Applicant is out of the fray,

it has neither locus to call in question any action of any of the stakeholders qua implementation of the approved Resolution Plan nor can it claim any prejudice on the pretext that any of the actions post approval of the Resolution Plan of Successful Resolution Applicant in regard to its implementation has affected its prospects of being a Successful Resolution Applicant. If the terms of the approved Resolution Plan of Successful Resolution Applicant have been varied or time extended to facilitate its implementation and the creditors have not claimed any prejudice on that count and the Committee of Creditors comprising of the creditors as stakeholders has not objected to same rather been privy to it on account of hardship due to prevailing circumstances, the Unsuccessful Resolution Applicant cannot be permitted to cry foul.

Both above matters have been duly given acknowledged and approved by NCLAT.

7. Success mantra-engagement/negotiation etc

“When learning is purposeful, creativity blossoms. When creativity blossoms, thinking emanates. When thinking emanates, knowledge is fully lit. When knowledge is lit, economy flourishes.” ~Dr. A.P.J. Abdul Kalam, *Indomitable Spirit*. The learnings from the successful resolution of JEKPL could be summarised as follows:

- a. Insolvency Professional should be thorough professional and have meticulous approach. In my view, ability of quick grasping of the ongoing business, operational and regulatory issues along with handling CIRP process, litigations arising of CIRP must go hand in hand. There is no fit for all formula for dealing with a business in this situation; a careful commercial judgement must be made in each case. The IP has no time to develop any understanding about the CDs business but is expected to make meaningful decisions to keep the business operational. The RP should demonstrate deep understanding of industry operations, banking credit knowledge, commercial expertise and legal clarity from commercial perspective to enable an IP to take over the company's reins, reverse its decline and bring the company back on track and continue trading to

increase returns to creditors; or, in cases where the company is extremely weak and cannot survive, close it down.

In aforesaid case history, resolution of JEKPL has truly lived up to expectation and to large extent matched up to the challenge of reinvigorating the insolvency regime in India.

- b. Pro-activeness of RP: While CIRP regulations provide timelines for RP but generally it is often observed that there is considerable delay in RP's response thereby leading to initiation of multiple suits. Therefore, RPs need to ensure timely decisions and actions, effective communication with all stakeholders.

While CIRP regulations provide timelines for RP but it is often observed that there is considerable delay in RP's response thereby leading to multiple suits. Therefore, RPs need to ensure timely decisions and actions, effective communication with all stakeholders.

- c. Ability to handle conflicts among creditors. Creditors need to show more maturity in changing their mindset and viewing IBC as an avenue for resolution rather than merely for recovery. The very object of the Code is to revive a company under the CIRP and not to liquidate it.
- d. Even after approval from resolution plan, Resolution Applicant might face many hurdles and challenges while doing implementation (in JEKPL apart from pandemic, multiple issues cropped up as explained above). RP (who presume the role of Monitoring Agency “MA” till implementation of plan) should have ability to resolve all implementation issues. RP/MA should attempt to resolve the conflict by identifying a solution that is partially satisfactory to Resolution Applicant and Lenders but completely satisfactory to neither. RP/MA should cooperate with the RA to understand their concerns in an effort to find a mutually satisfying solution. This requires considerable freedom from lenders to RP/MA and trust and reliance placed upon him and fortunately all lenders of JEKPL supported fully.

⁷ NCLAT, CA(AT) (Insolvency) No. 304/2017, August 14, 2018.

⁸ Supreme Court, CA No. 9090-9091/2018, January 23, 2019.

CASE STUDY

e. **Timeliness still a major issue under IBC regime:**

To do justice to this landmark legislation, it is critical that it does not go the way of cases in Indian courts, mired in delays. Because a reform like IBC, no matter how revolutionary it is, is only as good as its implementation allows it to be. Equally important is increasing the number of NCLT benches initially to ensure there are no capacity limitations towards resolutions.

f. **Continued support from judiciary in settling the law:**

Given that the insolvency jurisprudence in India is constantly evolving, it is imperative that Courts continue to be pro-active in settling debated legal positions and its associated interpretational issues. For instance, the uncertainty looming over the assets of the Corporate Debtor on account of unwarranted litigation initiated by Geopetrol and possibility of an appeal getting filed in the Supreme Court against the order dated 13 March 2020 passed by the NCLAT. In addition,

8. Conclusion

Rescuing a viable firm is far more important than failing to liquidate an unviable company in the current COVID-19 pandemic crisis. The only issue that needs to be addressed is the change in mindset that accepts the reality and allows the market forces to play out and accepts the market outcome. All the stakeholders -

creditors, RPs, Resolution Applicants, AA need to act fully in conformity with spirit of the Code. This may result huge haircut but, certainly, bonus as compared to liquidation value.

All the stakeholders - creditors, RPs, Resolution Applicants, AA need to act fully in conformity with spirit of the Code. This may result huge haircut but, certainly, bonus as compared to liquidation value.

Having stated the above, the IBC has certainly matched up to the challenge of reinvigorating the insolvency regime in India. Not only has it been able to tackle the menace of non-performing assets, but it also has been effective in contributing to the economy in various indirect ways such as improving credit discipline in the market owing to the fear instilled in the minds of promoters of losing their control in the companies, creating foreign investment opportunities in light of increased confidence on account of the structured and time bound approach and saving jobs by preventing companies from going into liquidation.

दुर्लभान्यपि कार्याणि सिद्ध्यन्ति प्रोद्यमेन हि ।

शिलापि तनुतां याति प्रपातेनार्णसो मुहुः ।।

The Impossible things can be accomplished with efforts. Like a hard rock gets thinner with repeated fall of water

