Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 9241 of 2019

Gujarat Urja Vikas Nigam Limited .... Appellant

Versus

Mr. Amit Gupta & Ors. .... Respondents

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

This judgment has been divided into sections to facilitate analysis. They are:

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A The appeal

1 By its judgment dated 29 August 2019, the National Company Law Tribunal[1] stayed the termination by the appellant of its Power Purchase Agreement[2] with Astonfield Solar (Gujarat) Private Limited[3]. The order of the NCLT was passed in applications[4] moved by the Resolution Professional of the Corporate Debtor[5] and Exim Bank[6] under Section 60(5) of the Insolvency and Bankruptcy Code, 2016[7]. On 15 October 2019, the NCLAT dismissed the appeal by the appellant[8] under Section 61 of the IBC. The decision by the NCLAT is called into question.

2 The appellant assails the order dated 15 October 2019 of the NCLAT on, *inter alia*, two broad grounds: first, that the NCLT and NCLAT do not possess jurisdiction under the IBC to adjudicate on a contractual dispute between the appellant and the Corporate Debtor; and second, in any event, the termination of the PPA was validly made under Article 9.2.1(e) and Article 9.3.1 of the PPA.

[1] "**NCLT**" or "**Adjudicating Authority"**
[2] "**PPA**"
[3] "**third respondent**" or "**Corporate Debtor**"
[4] CA No. 701/2019 (first respondent); CA No. 700/2019 (second respondent)
[5] "**first respondent**" or "**RP"**
[6] "**second respondent**"
[7] "**IBC**"
[8] "**appellant**" or "**GUVNL**"

B The genesis of the PPA

3 The narrative of this case begins with the Government of Gujarat notifying the Solar Power Policy, 2009[9] on 6 January 2009, for development of Solar Power projects in the state. The appellant, a Government of Gujarat undertaking, is a successor to the Gujarat Electricity Board, and is also the holding company of all the State Power Utilities in Gujarat.

4 On 1 August 2009, the Government of Gujarat allocated a 25-megawatt capacity to the Corporate Debtor for developing and setting up a solar photovoltaic based power project in the State of Gujarat. The Corporate Debtor expressed its desire to setup a 'Solar Photovoltaic Grid Interactive Power Plant'[10] of 10-megawatt capacity and exercised its option for sale of the entire electrical energy produced from the plant to the appellant for commercial purposes.

5 In exercise of its powers under Sections 61(h), 62 and 86 of the Electricity Act, 2003[11], the Gujarat Electricity Regulatory Commission[12] published a draft tariff order for purchase of solar energy, inviting comments and suggestions from members of the public and stakeholders. Public hearings were held by the State Commission on the price at which power could be procured.

6 After the process of public hearings and consultations, a Tariff Order dated 29 January 2010[13] was issued by the State Commission for procurement of power by the appellant from power producers, under Section 86(1)(a) of

[9] "**Policy**"
[10] "**Plant**"
[11] "**Electricity Act**"
[12] "**State Commission**" or "**GERC**"
[13] "**First Tariff Order**"

Electricity Act. The tariff was determined on the basis of the then prevailing capital and financing costs, and debt equity ratio. It was envisaged that the PPA will be for 25 years, with higher tariffs in the first 12-15 years, and a scaled-down tariff for the remaining years. The tariff was to be applicable to solar projects commissioned within the control period of the First Tariff Order, *i.e.*, from 29 January 2010 to 28 January 2012.

7 The appellant filed a petition before the State Commission on 28 May 2013, seeking initiation of proceedings for re-determination of the capital cost and tariff fixed under the First Tariff Order. This petition was filed on the basis that subsequent incentives given to power producers on 27 February 2010 had brought down their cost of capital and, as a consequence, the tariff fixed under the First Tariff Order should be revised. This petition was dismissed by the State Commission on 8 August 2013. An appeal against the order was dismissed by the Appellate Tribunal for Electricity[14] on 22 August 2014. An appeal[15] against APTEL's decision is pending before this Court, with notice having been issued on 28 November 2014.

8 The appellant and the Corporate Debtor entered into a PPA on 30 April 2010, in accordance with which the appellant has to purchase all the power generated by the Corporate Debtor. The PPA was amended by two Supplementary Agreements dated 7 August 2010 and 13 April 2011, due to an increase in the capacity of the Plant and a change in its location.

[14] "**APTEL**"
[15] Civil Appeal No. 10301 of 2014

9 Article 9.1 of the PPA provides that it would remain in force for 25 years, from the 'Commercial Operation Date' which, in accordance with Article 1.1 is "the date on which the Solar Photovoltaic Grid Interactive power plant is available for commercial operation (certified by GEDA) and such date as specified in a written notice given at least ten days in advance by the [Corporate Debtor] to GUVNL".

10 Article 5.2 of the PPA stipulates that in case the commissioning of the Plant is delayed beyond 31 December 2011, the appellant shall pay the tariff as determined by the State Commission for Solar Projects effective on the date of commissioning of the Plant or the tariff provided under the clause, whichever is lower. Article 5.2 provides that Rs 15 per unit is payable for the first 12 years and Rs 5 per unit is payable from the 13th to the 25th year.

11 While the Corporate Debtor was in the process of commissioning the Plant, the State Commission, in exercise of its powers under Sections 62 and 86 of the Electricity Act, issued the Tariff Order dated 27 January 2012[16] for procurement of power from solar energy developers by distribution licensees in the State of Gujarat. The tariff was to be applicable to solar projects commissioned within the control period of the Tariff Order, *i.e.*, from 29 January 2012 to 31 March 2015.

12 Having signed the financing documents and attained financial closure with the second respondent and Power Finance Corporation in terms of the PPA, and established the Plant as defined in it, the Corporate Debtor commissioned 1.296

[16] "**Second Tariff Order**"

MW on 11 December 2012 and 10.212 MW on 20 December 2012. Accordingly, the PPA was to remain in force until December 2037.

13 Since it was commissioned within the applicable period of the Second Tariff Order, the tariff applicable was Rs 9.98 per unit for first 12 years and Rs 7 per unit for next 13 years.

C Initiation of CIRP

14 The initial years of the operationalization of the PPA appear to have been relatively calm. The first major issue arose between July to December 2015. During this period, there was heavy rainfall and floods in the State of Gujarat, due to which the Plant was shut down for two months. The Plant was severely damaged due to the floods, and the generation of electricity was temporarily paused. By December 2015, normalcy was restored in the generation of electricity and the Plant was generating electricity at 70% of its total generating capacity.

15 During June and July 2017, Gujarat was again affected by floods due to heavy rainfall. The Plant was severely damaged due to the floods. Resultantly, it was only able to operate at 10-15% of its original capacity.

16 Due to the financial stress caused by the disruptions and damage, for which insurance claims remained pending, the Corporate Debtor was unable to fully service its debt to the Financing Parties (the second respondent and Power Finance Corporation), who proposed to declare the Corporate Debtor a non-performing asset ("**NPA**").

17 On 15 February 2018, in accordance with Article 8.1 of the PPA, the Corporate Debtor intimated the appellant regarding the impact of the rainfall and floods on the Plant, and the measures adopted by it in this regard. The Corporate Debtor requested the appellant to treat the letter as a formal communication regarding cause for failure in the performance of the Corporate Debtor's obligations under the PPA, and to confirm that this event may be treated as a 'Force Majeure Event' in accordance with Article 8.1.

18 On 4 May 2018, the second respondent declared the Corporate Debtor to be an NPA. On 20 November 2018, the NCLT admitted a petition[17] filed by the Corporate Debtor under Section 10 of the IBC. NCLT commenced the Corporate Insolvency Resolution Process[18] in respect of the Corporate Debtor, issued an order of moratorium and the first respondent was appointed as the Interim Resolution Professional[19].

19 The second respondent and Power Finance Corporation Limited, filed an appeal[20] challenging the order dated 20 November 2018. The appeal was dismissed by the NCLAT on 4 December 2018, holding that the right of the Corporate Debtor's shareholders to vote on the initiation of the CIRP under Section 10 of the IBC was not curtailed by the Deed of Pledge of Securities dated 28 March 2013 entered into between the Corporate Debtor, the second respondent and Power Finance Corporation Limited. The first respondent was confirmed as the RP by the NCLT on 1 February 2019.

[17] CIRP petition, C.P. (I.B.) No. 940(ND)/2018
[18] "**CIRP**"
[19] "**IRP**"
[20] Company Appeal (Insolvency) No. 754 of 2018

D Termination of the PPA

20 The appellant issued two notices of default to the Corporate Debtor on 1 May 2019, which were received by the first respondent on 8 May 2019:

(i) The basis of the **First Notice** is that under Article 9.2.1(e) of the PPA, the Corporate Debtor undergoing CIRP under the IBC amounts to an 'event of default'. The appellant called upon the Corporate Debtor to remedy this default within 30 days from the date of receipt of the said notice, failing which the appellant stated that it shall terminate the PPA by issuing a termination notice; and

(ii) The basis of the **Second Notice** is that under Article 9.2.1(a) of the PPA, there was a default in the operation and maintenance of the Plant. Once again, the appellant called upon the Corporate Debtor to remedy the O&M default within 90 days from the receipt of the notice, failing which the appellant stated that it shall terminate the PPA by issuing a termination notice.

21 The first respondent issued his replies to both the notices on 10 May 2019. The replies are summarized below:

(i) The reply to the First Notice states that the Corporate Debtor's PPA with the appellant is its only PPA, and hence they are heavily dependent on it for reaching a resolution under the IBC. In case the appellant terminates the PPA, prospective resolution applicants[21] who had submitted their

[21] "**PRAs**"

expression of interest for the Corporate Debtor might not submit a resolution plan, which would eventually lead to liquidation of the Corporate Debtor, defeating the main object of the IBC; and

(ii) The reply to the Second Notice states that since the Corporate Debtor is undergoing CIRP under the IBC, the operations at the Plant were severely affected due to *force majeure* events in terms of the PPA. Thus, the conditions of the PPA could not be said to have been breached.

22 On 21 May 2019, a meeting was scheduled between the first respondent and the General Manager (IPP) of the appellant. During this meeting, the first respondent emphasized that if the PPA was to be terminated, revival of the Corporate Debtor will be at stake, since prospective resolution applicants may not submit resolution plans or may withdraw the resolution plans, if submitted, citing termination of the PPA. Declining to accede to this position, the appellant made it clear that in accordance with a legal opinion obtained by them, they will be terminating the PPA under Articles 9.2.1(e) and 9.3.1 under the First Notice, since the Corporate Debtor is under CIRP. However, the appellant confirmed that the O&M default stood cured, and hence it would not act upon the Second Notice. It may also be noted at this stage that the appellant has not pressed the issue of the O&M default either before this Court or before the NCLAT/NCLT.

E Proceedings before NCLT and NCLAT

23 In May 2019, the first and second respondents filed applications under Section 60(5) of the IBC before the NCLT in regard to the Notices issued by the appellant to the Corporate Debtor, and sought an injunction restraining the appellant from terminating the PPA. By an interim order dated 31 May 2019, NCLT restrained the appellant from terminating the PPA till the next date of hearing.

24 While the interim order was in operation, the appellant wrote to the first respondent on 7 June 2019, stating that the notice period for curing the default had expired. The appellant claimed that Corporate Debtor had failed to cure the default, as a result of which the appellant was entitled to issue the final termination notice under Article 9.3.1 of the PPA. However, since the NCLT had provided an interim protection to the Corporate Debtor till the next date of hearing (12 June 2019), the appellant stated that it was not issuing the final termination notice at the present.

25 On 29 August 2019, the NCLT issued its final order through which it allowed the applications filed by the first and second respondents, thereby restraining the appellant from terminating the PPA and setting aside the First Notice. The NCLT's reasoning is premised on the following:

(i) The clauses of the PPA cannot be placed on a higher pedestal than the provisions of the IBC, in the context of drawing a timeline for completion of the CIRP. The fact that the CIRP has not concluded within 30 days from

the receipt of the notice of default cannot be construed as an event of default since the time limit for the CIRP under the IBC is 330 days; and

(ii) The PPA is an 'instrument' within the meaning of Section 238 of the IBC. The clauses of the PPA are inconsistent with the provisions of the IBC, and stand overridden.

However, in paragraph 35 of its order, the NCLT held that the appellant could terminate the PPA, in the event that liquidation proceedings are initiated against the Corporate Debtor. Paragraph 35 reads thus:

> "35. It is however, made clear that if due to any reason, the Corporate Debtor goes into liquidation, the Respondent Company will be at liberty to terminate the Power Purchase Agreement."

26 The NCLAT by its judgment dated 15 October 2019 dismissed the appeal against the NCLT's order. The NCLAT noted that the appellant attempted to terminate the PPA on the sole ground that the CIRP has been initiated for the Corporate Debtor. It observed that during the CIRP, the first respondent has to maintain the Corporate Debtor as a 'going concern' and the termination of its sole PPA, under which it supplied electricity only to the appellant, would render the Corporate Debtor defunct. Hence, the NCLAT held that the appellant could not terminate the PPA solely on the ground of the initiation of CIRP of the Corporate Debtor, which was supplying power to the appellant during the period of the CIRP. Further, it restrained the appellant from terminating the PPA even in the event that the Corporate Debtor underwent liquidation, by setting aside the

observations made by the NCLT in paragraph 35 of the order dated 29 August 2019.

27 The NCLAT thereafter directed the appellant to pay the dues for power supplied by the Corporate Debtor during the CIRP period. On 12 June 2020, the appellant, as an interim measure but without prejudice to its rights, agreed to release an ad-hoc payment of Rs 50 lakhs to the Corporate Debtor. However, the appellant informed the first respondent that this payment to the Corporate Debtor is conditional, and the Corporate Debtor must submit an undertaking on stamp paper stating that the amount released by the appellant will be refunded to them with interest, in case this Court allows the present appeal. The first respondent furnished the undertaking sought on 18 June 2020, following which the appellant released an ad-hoc payment of Rs 50 lakhs to the Corporate Debtor on 1 July 2020. Since then, the appellant has paid a further amount of Rs 1.07 crores to the Corporate Debtor, against a similar written undertaking given by first respondent dated 27 January 2021.

F Proceedings by the Successful Resolution Applicant

28 During the course of these hearings, the court has been informed of parallel proceedings initiated against the respondents by M/s Kundan Care Products Limited[22], whose Resolution Plan in relation to the Corporate Debtor was approved by 99.28% of voting shares of the Committee of Creditors[23].

[22] "**Successful Resolution Applicant**"
[23] "**CoC**"

29 An application[24] under Section 31 of the IBC was filed by the first respondent on 15 November 2019 before the NCLT seeking approval of the Resolution Plan approved by the CoC. This application is currently pending adjudication before the NCLT, due to the present appeal filed by the appellant before this Court.

30 However, on 20 December 2019, the Successful Resolution Applicant filed an application[25] under Section 60(5) of the IBC before the NCLT, seeking withdrawal of their Resolution Plan submitted for the Corporate Debtor. Further, on 16 January 2020, the Successful Resolution Applicant filed an interlocutory application[26] before this Court in the present appeal, seeking certain reliefs from this Court or, in the alternative, seeking permission of this Court to allow them to withdraw their Resolution Plan dated 12 November 2019. This Court allowed the Successful Resolution Applicant to withdraw the interlocutory application filed in the present appeal on 20 July 2020.

31 The NCLT by an order dated 3 July 2020, dismissed the application filed by the Successful Resolution Applicant, thereby refusing to grant them permission to withdraw the Resolution Plan. Thereafter, the NCLAT by a judgment dated 30 September 2020, dismissed the appeal filed by the Successful Resolution Applicant against NCLT's order dated 3 July 2020.

[24] C.A. No. 1526 of 2019
[25] C.A. 1679 of 2019
[26] I.A. No. 9682 of 2020

32 The Successful Resolution Applicant has since filed an appeal[27] before this Court challenging NCLAT's judgment dated 30 September 2020. By an order dated 16 November 2020, this Court granted a stay against the NCLAT's judgment dated 30 September 2020.

G Submissions of counsel

G.1 Submissions on behalf of the appellant

33 The case of the appellant has been presented initially in the articulate and carefully reasoned submissions made by Ms Ranjitha Ramachandran, learned counsel. Mr Shyam Diwan, learned senior counsel has then urged his submissions. The following submissions were urged in relation to the jurisdiction of the NCLT/NCLAT under section 60(5) of the IBC:

(i) Section 60(5) must be interpreted in the context of Section 25(2)(b) of the IBC, which provides that the RP has to "exercise the rights for the benefit of the corporate debtor in judicial, quasi judicial or arbitration proceedings." Hence, if NCLT is conferred with the exclusive jurisdiction in relation to the Corporate Debtor, this section would be rendered redundant. This Court in **Embassy Property Developments (Private) Limited** vs **State of Karnataka**[28] has held that the RP cannot sidestep the jurisdiction of other authorities and approach the NCLT for the enforcement of the Corporate Debtor's rights. Although this judgment was in the context of a renewal of a mining lease by a statutory authority, the interpretation of Section 60(5) would not be limited to statutory authorities particularly in the backdrop of

[27] Civil Appeal No. 3560 of 2020
[28] (2020) 13 SCC 308; hereinafter referred to as "**Embassy Property**"

Sections 18 (duties of interim resolution professional) and 25(2)(b). In the present case, Article 10.4 of the PPA has granted jurisdiction to the State Commission, the regulatory authority under the Electricity Act, to entertain disputes relating to the PPA. Article 10.4 provides:

> "In the event that such differences or disputes between the Parties are not settled through mutual negotiations within sixty (60) days, after such dispute arises, then it shall be adjudicated by the Commission in accordance with Law."

(ii) Section 86(1)(f) of the Electricity Act provides that the State Commission shall discharge the function of adjudicating "the disputes between the licensees, and generating companies and to refer any dispute for arbitration". Therefore, any issue in relation to the PPA must be raised before the State Commission, and not the NCLT. Further, the second respondent has no *locus* to file a petition before the NCLT in relation to the PPA;

(iii) The NCLT cannot preclude the appellant from exercising its contractual rights under the PPA read with the Electricity Act;

(iv) If Section 60(5) is given a broad interpretation to include contractual disputes, it would disrupt the streamlined and timebound process under the IBC. Although the NCLT, being conscious of its limitations, has not proceeded to adjudicate on whether the termination of the PPA was valid, or dwelt on the interpretation of the PPA, it has still erroneously set aside the termination of the PPA by the appellant without any basis under the IBC;

(v) Even if it is assumed that NCLT has jurisdiction over disputes relating to the PPA, the adjudication of such disputes should be in accordance with the PPA. The sanctity of the contracts must be upheld unless there is a statutory provision interdicting such contracts. There can be no exercise of any inherent or residual power by the NCLT to set aside the termination of a contract absent a statutory interdict. The Resolution Applicant or NCLT have no powers to modify the PPA through a resolution plan. The formation, novation or alteration of the contract must be in accordance with Section 30(2)(e) of the IBC, which provides that the Resolution Plan cannot contravene any provision of law which is in force. The provisions of the Indian Contract Act, 1872 ("**Contract Act**"), require mutual agreement of the parties for such a modification;

(vi) The submission of the respondents that 'property' under Section 3(27) of the IBC includes an actionable claim and hence the dispute falls under the jurisdiction of the NCLT is erroneous in view of the judgement in **Embassy Property** (supra);

(vii) The contention of the respondents that there is a direct connection between the termination of the PPA by the appellant and the insolvency resolution process should be rejected because the issue in the present case is not of interpretation of the insolvency resolution process but of the PPA, and only the State Commission has the jurisdiction to interpret the PPA; and

(viii) The respondents have relied on judgments under other statutes like the Companies Act, 1956[29], Banking Regulation Act, 1949[30] and Provincial Insolvency Act, 1920[31] with provisions corresponding to Section 60(5). However, these statutes do not contain any provisions equivalent to Sections 18 and 25 (2) (b) of IBC. The interplay between these provisions and Section 60(5) must be considered for the purpose of determining NCLT's jurisdiction. Further, the facts of these judgements are also distinguishable from the present case.

34 However, assuming but not conceding that the NCLT could have had jurisdiction over the dispute, the appellants argue that there is no embargo under the IBC on exercise of contractual rights by the appellant, which does not include this termination:

(i) Except for the moratorium stipulated under Section 14 of IBC, there is no other bar in the scheme of the IBC to intervene in contractual arrangements that the Corporate Debtor has entered with a third party. In the present case, the NCLT/NCLAT did not hold that the termination of the PPA was prohibited under Sections 14(1) and (2) of IBC. Sections 14(2) and (2A) deal with supply of essential/critical goods and services to the Corporate Debtor, and do not mandate the third party to purchase any goods and services from the Corporate Debtor. Section 14(2) provides for continued supply of essential goods and services to the Corporate Debtor. However, there is no bar on termination of other agreements. Section

[29] "**CA 1956**"
[30] "**BRA**"
[31] "**PIA**"

14(2A) was introduced after the issuance of the default notice by the appellant and, in any event, it does not prohibit the termination of the PPA. Parliament has chosen not to include any provision to this effect despite the multiple amendments that have been made to the IBC;

(ii) The Explanation to Section 14(1) of the IBC, which was introduced by an amendment in December 2019, covers licenses or approvals granted by a government authority. However, no reference has been made there to contracts such as PPAs;

(iii) The respondents are attempting to resurrect the regime under Section 22(3) of the Sick Industrial Companies (Special Provisions) Act, 1985[32], which empowered the Board to suspend the operation of all or any of the contracts to which the sick industrial company was a party. In **Swiss Ribbons Private Limited** vs **Union of India**[33], this Court held that the IBC was introduced because the regime under SICA and Board for Industrial and Financial Reconstruction[34] had failed. Under the IBC, there is no such power to suspend contracts. Hence, when the legislature has wilfully omitted something or in a situation of a *casus omissus*, this Court cannot introduce what has been omitted by way of interpretation, analogy or implication;

(iv) The termination of the PPA cannot be set aside based on the objective of the IBC to ensure that the Corporate Debtor remains a 'going concern', in

[32] "SICA"
[33] (2019) 4 SCC 17; hereinafter referred to as "**Swiss Ribbons**"
[34] "**BIFR**"

the absence of a specific provision under the IBC. The objective of the IBC cannot be understood to mean that the vested rights of parties can be interfered with or extinguished except to the extent contemplated under Section 14 of the IBC. While in the United States there are specific provisions providing for non-enforcement of *ipso facto* clauses such as Article 9.2.1(e) of the PPA, no such provisions exist under the IBC. Hence, such a bar cannot be read into the legislation by reference to the object of the IBC or duties of the RP. The parties cannot wish away a contractual right because it is not suitable to them by way of a narrow understanding of "public interest". The public interest lies in preserving the sanctity of contracts and for the contractual bargains to play out;

(v) The duty of the RP to preserve the Corporate Debtor as a going concern and the definition of resolution plan do not bind third parties to act in favour of the Corporate Debtor. The NCLAT has stressed that the Corporate Debtor would become defunct if the PPA is terminated because it supplies power exclusively to the appellant. However, the Corporate Debtor chose to supply power solely to the appellant. The Corporate Debtor was empowered under Sections 7 and 10 of the Electricity Act to sell electricity to any licensee or consumer. The power producing company can convey electricity to any part of the country using the transmission network under Sections 2(4), 38(2)(d), 39(2)(d), 40(c) and 42(2) of the Electricity Act. Hence, the Corporate Debtor is free to supply power to any other licensee or consumer after the termination of the PPA. The only difference would be

that the Resolution Applicant would have to supply electricity at a lower cost;

(vi) The second respondent and Power Finance Corporation Limited were aware that the appellant can terminate the PPA under Article 9.2.1(e). They are vested with the right to assign the rights and obligations under the PPA to a third party, in the event of a default committed by the Corporate Debtor, under the financing documents under Article 12.9 of the PPA. Hence, the second respondent could have exercised its power to assign prior to the initiation of the CIRP on 20 November 2018. Instead, it declared the account of Corporate Debtor as an NPA. Then, when the Corporate Debtor applied for the initiation of the CIRP under Section 10 of the IBC, which was admitted by the NCLT through its order dated 20 November 2018, it challenged the order before in an appeal, which was dismissed by the NCLAT on 4 December 2019. Therefore, the appellant has the right to terminate the PPA under Article 9.2.1(e), irrespective of whether any assignment has taken place under Article 12.9;

(vii) The first respondent cannot rely on the resolution plan to prevent termination of the PPA since the resolution plan or process does not modify the terms of the contract of the Corporate Debtor with third parties. Each party took a calculated risk to enter into the contract with the knowledge that the appellant is entitled to terminate the PPA;

(viii) The PPA is not an instrument under Section 238 of IBC, since the phrase used in the section - “instrument having effect by virtue of any such law” -

does not cover commercial bilateral agreements between a corporate debtor and a third party laying down the terms of an executory contract entered between them. It only applies to a statutory contract or an instrument entered into by operation of law that is inconsistent with the IBC;

(ix) No provision of the PPA is inconsistent with the IBC. Article 9.3.1 which specifies a period of 30 days for the Corporate Debtor to remedy a default, and gives the appellant the right to terminate the contract in case of a failure to do so, is not inconsistent with the time limit provided in section 12 of the IBC to complete the insolvency resolution process. Article 9.3.1 obliges the Corporate Debtor to ensure that the proceedings initiated against it come to an end within 30 days by an act of the Corporate Debtor and does not govern the resolution process undertaken under the IBC;

(x) The right to terminate the PPA in accordance with Article 9.3.1 has accrued to the appellant, since an event of default has occurred within the meaning of Article 9.2.1(e):

(a) Article 9.2.1(e) of the PPA provides that if the Corporate Debtor "becomes voluntarily or involuntarily, the subject of a proceeding in any bankruptcy or insolvency laws", it would be considered as an event of default. Article 9.2.1(e) also lists other events of default like dissolution, liquidation and the appointment of a receiver. Each of these eventualities is independent. The clause may have referred to the legislation which preceded the IBC since the PPA was entered into in 2010. However, each of these laws related to

companies that were bankrupt/insolvent. The exception under Article 9.2.1(e) covers voluntary reconstruction and merger undertaken under the Companies Act, 2013[35], leading to a dissolution of the company without liquidation or winding up. The exception is limited to dissolution undertaken for the above purposes and does not contemplate a dissolution in relation to an insolvency or bankruptcy proceeding. There is no dissolution in the present case. Respondents have contended that the third "or" under the Article 9.2.1(e) should be changed into "and" or other situations should be read into the exception which is only for dissolution. The interpretation of "or" as "and" would mean that initiation of proceedings under any bankruptcy or insolvency laws would constitute an event of default only if the company goes into liquidation. The usage of words "or" and "and" are deliberate. The interpretation proposed by the respondents would exclude liquidation taking place for reasons other than insolvency/bankruptcy, which could not have been the intent of the parties. In absence of any ambiguity or uncertainty in the clause, the court cannot imply any term or interpret the clause contrary to its plain meaning;

(b) Clauses such as Article 9.2.1(e) are standard clauses in agreements of this nature. Even after the notification of the IBC, similar provisions continue in PPA formats notified by the Government of India as part of the Standard Bid Documents for Tariff Based Competitive Bid Process under Section 63 of the Electricity Act for conventional power. Similar provisions

[35] "**CA 2013**"

are found in the PPAs being drafted as per Guidelines for Tariff Based Competitive Bidding Process for renewable energy sources; and

(c) The bargain between the parties was fair and not one sided. The same default clause has been provided under the appellant's defaults in Article 9.2.2(c), and a corresponding right to terminate has been provided under Article 9.3.2. Similar clauses are provided under the standard PPAs issued by the Government of India for competitive bidding under Section 63 of the Electricity Act. Therefore, the clauses cannot be said to be unreasonable or unconscionable.

35 In summing up their submissions, the appellants have raised two more arguments:

(i) The NCLAT's observations in relation to the termination of the PPA if the Corporate Debtor goes into liquidation were incorrect:

(a) In the appeal filed by the appellant against the order of the NCLT dated 29 August 2019, the appellant had not challenged the determination of the NCLT that the PPA can be terminated in the event of the initiation of a liquidation proceeding against the Corporate Debtor. It is a settled principle of law that the courts cannot go beyond the pleadings or the prayer put forth by the parties; and

(b) NCLAT erroneously proceeded on the basis that there is no difference between the liquidation and resolution process. On the commencement of liquidation proceedings, the corporate debtor is no longer a going concern. The assets of the corporate debtor are sold for recovery of money.

However, agreements with third parties are not assets. The appellant cannot be compelled to continue the agreement with a new person or entity for the benefit of the creditors of the Corporate Debtor.

(ii) NCLAT's direction to the appellant to pay for the electricity injected by the Corporate Debtor was flawed:

(a) The appellant was entitled to terminate the PPA from 7 June 2019, and cannot be compelled to procure and pay for power to preserve the value of the Corporate Debtor. The injection of electricity from 7 June 2019 is due to the orders of the court and not under the PPA. Under the principle of "*actus curiae neminem gravabit*", the act of the court cannot prejudice any party. The court is under an obligation to undo the wrong caused to a party due to its actions. The appellant cannot be made to suffer on account of the erroneous injunctions granted by NCLT/NCLAT when it could have procured electricity at a lower cost from other solar power projects;

(b) The appellant has paid the Corporate Debtor an amount of Rs 50 lakhs and Rs 1.07 crores pending the present appeal and against the undertaking that the amount would be returned with interest if the appeal is decided in its favour. Additionally, under Article 9.3.1 of the PPA, the compensation for termination of the PPA is Rs 55.80 crores; and

(c) The issues relating to tariff determination and replacement of solar panels raised by the respondents were not considered by the NCLT/NCLAT, and are not relevant for the interpretation of the PPA and provisions of the IBC.

G.2 Submissions on behalf of the respondents

36 Mr C U Singh and Mr Nakul Dewan, learned Senior counsel appearing on behalf of the first respondent, have argued that NCLT had the jurisdiction to consider the validity of the termination of the PPA by the appellant on the sole ground of the initiation of the insolvency proceedings of the Corporate Debtor and that the jurisdiction was rightly exercised by the NCLT, in the present case. Mr C U Singh has made the following submissions on the jurisdiction of the NCLT:

(i) The application for staying the termination of the PPA was filed by the first respondent before the NCLT under Section 60(5) of the IBC. Section 60(5)(c) confers upon the NCLT complete jurisdiction to decide any application by or against the Corporate Debtor on any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution of the Corporate Debtor, notwithstanding any other law for the time being in force. Hence, notwithstanding the provisions of the Electricity Act, the NCLT has jurisdiction to consider an application filed by the RP which may not specifically relate to a particular section of the IBC (such as Section 14), provided the application involves any question of law or facts, arising out of or in relation to the insolvency resolution of the third respondent;

(ii) Relatedly, since the jurisdiction vested in the NCLT under Section 60(5)(c) is of a residuary character, even where a question of law or fact is not specifically covered under Section 14, the NCLT would have the jurisdiction to consider such a question of law or fact, provided it arises out

or is in relation to the insolvency resolution process of the corporate debtor. Any other interpretation of Section 60(5) would render it otiose;

(iii) A narrow interpretation of Section 60(5) is neither warranted from the language of the section, nor is it in line with judicial precedents which have interpreted similar provisions in other insolvency laws. Provisions similar to Section 60(5)(c) have been read in an expansive way. In this regard, reliance is placed on the interpretation of Section 446(2) of the CA 1956, Section 4(1) of the PIA and Section 45-B of the BRA;

(iv) The expressions used in Section 60(5)(c), *i.e.*, 'relating to' and 'arising out of' have been interpreted as words of the widest amplitude. The expression 'relating to' has been held to be equivalent to or synonymous with 'as to,' 'concerning with,' and 'pertaining to'. In view of the broad scope of these terms, an interpretation divesting the NCLT of the power to injunct the termination of the PPA should not be countenanced in this case;

(v) The first respondent is not advocating for the adoption of an absolute rule about what falls within and beyond the NCLT's jurisdiction under Section 60(5)(c). Rather, it submits that this determination must be made on the facts of each case;

(vi) The termination of the PPA in the present case is sought solely on the ground of insolvency. The cause of action for termination is therefore alleged to be the insolvency of the Corporate Debtor and the contention that the Corporate Debtor is no longer 'reliable' on account of the insolvency resolution process. There would be no termination of the PPA

but for the initiation of the CIRP against the Corporate Debtor. Hence, the cause of action arises out of and is in relation to the insolvency resolution of the Corporate Debtor. This case is materially different from cases in which termination of the PPA is sought for reasons independent of the insolvency of the Corporate Debtor (for instance where termination is sought for non-supply of electricity);

(vii) The fact that Sections 20(2)(e) and 25 of the IBC are couched in terms of a duty, does not necessarily mean that the NCLT does not have jurisdiction to decide matters that arise from the duty of the RP to preserve the assets or maintain the Corporate Debtor as a 'going concern'. On the contrary, NCLT is the only forum which has the jurisdiction to oversee the resolution process of the Corporate Debtor which necessarily includes the continuation of the Corporate Debtor as a going concern and its successful resolution;

(viii) The facts of this case are different from those of **Embassy Property** (supra) and **Municipal Corporation** vs **Abhilash Lal**[36]. Unlike **Abhilash Lal** (supra), the property in this case (long term contractual right under the PPA) is the property of the Corporate Debtor and not the property of a statutory authority. Further, there was no violation of law when NCLT injuncted the appellant from terminating the PPA on the ground of the initiation of the CIRP of the Corporate Debtor. In addition, the facts in **Abhilash Lal** (supra) dealt with the public duty of Municipal Corporation in

[36] (2020) 13 SCC 234; hereinafter referred to as "**Abhilash Lal**"

respect of the construction of a hospital. Further, there were existing defaults and a show cause-notice was issued in this regard prior to the commencement of the CIRP of the company. As opposed to this, in the present case, termination by the appellant is not on grounds of default but solely on the ground of the initiation of the insolvency resolution process of the Corporate Debtor and, that too, nearly six months after the admission of the application under Section 10 of the IBC; and

(ix) In **Embassy Property** (supra), what was at issue in was whether the NCLT has jurisdiction over a matter which is in the realm of public law. In the present case, the decision of the appellant to terminate the PPA is not a decision taken by the Government or by a statutory authority in relation to a matter which is in the realm of public law. The decision of the appellant to terminate the PPA is only because the Corporate Debtor is undergoing insolvency resolution. The Corporate Debtor has not defaulted in supplying solar power to the appellant and is otherwise not in breach of its obligations under the PPA.

37 Assuming that the NCLT has jurisdiction, the following submissions were made by Mr C U Singh in relation to the interpretation of the PPA:

(i) Article 9.2.1 of the PPA, read with Article 9.3.1, which allows the appellant to terminate the PPA if the third respondent commits an event of default, must be read with other provisions of the PPA. In this regard, our attention was drawn to:

(a) The recitals to the PPA state that the Power Producer will include its successors and assignees;

(b) Article 4.1(iii) of the PPA provides that the Corporate Debtor shall sell the power produced by it to the appellant on first priority basis and is not allowed to sell to any third party;

(c) Article 4.1(x) of the PPA provides for the eventuality of an equity dilution of the power producer;

(d) Article 9.1 of the PPA provides for the term of the agreement, *i.e.*, 25 years from the commercial operation date;

(e) Article 9.3.1 of the PPA provides that in case of a default of the Corporate Debtor, it shall have the liability to make payments towards compensation to the appellant which is equivalent to three years billing based on the first-year tariff considered on normative PLF while determining the tariff by GERC, within 30 days from the termination notice;

(f) Article 12.9 of the PPA specifically provides that the financing parties may cause the power producer to assign its interest, rights and obligations to a third party; and

(g) The PPA contemplates the financing of the project and that there could be financial defaults by the Corporate Debtor. Hence, the PPA specifically allowed financing parties to step in and change the identity of the power producer provided the successor was capable of and willing to assume the

obligations of the power producer under the PPA. Article 9.2.1(e) must be read in light of this background.

(ii) In relation to the interpretation of Article 9.2.1(e), it was submitted:

(a) When the PPA was entered into in 2010, the IBC was not in existence. The contract was a standard form contract. While the clause refers to insolvency or bankruptcy proceedings, the intent of Article 9.2.1(e) could only have been to cover liquidation proceedings as contemplated under the CA 1956. The CA 1956 did not contemplate ‘insolvency' or ‘bankruptcy' proceedings. Insolvency at the time of the drafting of the clause was understood to include individual insolvency. Hence, Article 9.2.1(e) could not have intended to cover ‘insolvency resolution' proceedings under the IBC as a trigger for an event of default;

(b) If the term ‘insolvency' proceedings in Article 9.2.1(e) of the PPA, which was entered into in 2010, is sought to be applied to the ‘insolvency resolution' proceedings contemplated under the IBC then the exception in the clause, in the form of ‘reorganization' will also necessarily need to be applied in light of the updated understanding. Read thus, the term must extend to any form of reorganization because of which the company does not go into liquidation or winding-up. Read in this manner, Article 9.2.1(e) must be interpreted to exclude the reorganization proceedings under the IBC; and

(c) Assuming, *arguendo*, that Article 9.2.1(e) of the PPA is ambiguous, it ought to be interpreted in favour of the power producer. The PPA is a

standard form contract. The third respondent and the appellant do not stand on a footing of equality. The application of the rule of *contra preferentum* is well settled and an interpretation of the contract which favours the party with lesser bargaining power is preferred. Applying that rule here, any ambiguity in the interpretation of Article 9.2.1(e) must be resolved in favour of the third respondent.

38 Submissions were also urged by Mr C U Singh in relation to Sections 14 and 238 of the IBC:

(i) In relation to the application of Section 238 of the IBC to the PPA, it was submitted that:

(a) Under Article 9.3.1 of the PPA, the third respondent is required to remedy the default (if any) within 30 days of service of the default notice. If read in this manner, on the receipt of a default notice during the pendency of the CIRP, the third respondent would be required to complete the reorganization process within 30 days so as to obviate the consequence of the PPA getting terminated. The IBC provides a period of 330 days for the completion of the CIRP. There is a dichotomy between the provisions of the PPA and the IBC. The timelines under the PPA for curing a default are inconsistent with those under the IBC for completing the CIRP with respect to the third respondent. In view of the non-obstante clause in Section 238, the provisions of the IBC would override those of the PPA;

(b) The argument that the PPA is not an "instrument" under the IBC is incorrect. Since the term "instrument" has not been defined in the IBC, it

may bear a meaning drawn from the definition in other statutes. The PPA is approved by the GERC and has the force of law under the Electricity Act. The PPA sets out the rights and liabilities of the parties and is an instrument for the purposes of Section 238. Being an "instrument", which is inconsistent with the provisions of the IBC, the latter would have overriding effect over the former, in view of Section 238 of the IBC. Therefore, the right to terminate would only arise in case the third respondent fails to cure the default, *i.e.*, resolve itself in accordance with the IBC; and

(c) In view of Section 238, the IBC overrides the provisions of the Electricity Act. Section 63 of the IBC provides that "No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under IBC." NCLT's jurisdiction excludes that of the GERC.

(ii) In relation to the legislative intent underlying Section 14 of the IBC, it was submitted that:

(a) The Notes on Clauses to the Insolvency and Bankruptcy Bill, 2015 and the Insolvency Law Committee Report dated 20 February 2020 suggest a clear legislative intent of Section 14 that, an *ipso facto* clause allowing a party to terminate the contract if the counterparty enters into some form of insolvency resolution process must either be declared void or be suitably read down in order to ensure that the objective of the IBC in keeping the company as a going concern is met. If in the facts of a given case, the

relevant authorities find that to preserve the assets of the Corporate Debtor and to keep it as a going concern, certain contracts need to be protected, they ought to be invalidated or read down; and

(b) The nature of the third respondent and its business renders the PPA a valuable asset, and its termination would have the effect of running the third respondent to the ground. Therefore, in view of the legislative intent, and reading the provisions of the PPA as a whole, Article 9.2.1 (e) must be read to exclude reorganization proceedings under the IBC as an event of default.

39 Supplementing these submissions, Mr Nakul Dewan, learned Senior Counsel made the following additional submissions:

(i) The Resolution Plan submitted by the Successful Resolution Applicant and approved by the CoC was dependent on the continuation of the PPA:

(a) The following aspects of the resolution plan need to be highlighted: (i) the significance of the PPA to the continued commercial viability of the corporate debtor; (ii) the reason for the initiation of the CIRP including the nature of the debts; (iii) the experience of the RP in reviving the Corporate Debtor including the revival plan; (iv) the summary of the resolution plan, including the 'haircut' being taken by the creditors in order to ensure that the Corporate Debtor is restructured; (v) the relevant rates pertaining to solar tariff; (vi) the business plan; (vii) the financial plan; and (viii) the potential risks and mitigation measures;

(b) The Corporate Debtor was put into financial difficulty on account of the force majeure events which transpired in 2015 and 2017. The first respondent had started putting the Corporate Debtor back on its track, and along with the Resolution Applicant had formulated a plan under which the Corporate Debtor would be revived. The resolution plan was dependent on the continuation of the PPA; and

(c) If the termination is permitted, the Corporate Debtor would not be able to revive in terms of the resolution plan which has been agreed upon by the lenders, even though it continues to be able to perform its obligations under the PPA.

(ii) In relation to the interpretation of Article 9.2.1(e):

(a) The term 'law', in Article 9.2.1(e) must be interpreted in a dynamic sense. The interpretation of Article 9.2.1(e) must be considered at the point of time it was sought to be invoked in order to ascertain whether there was an event of default. The exception under which "reorganization" is excluded as an event of default, would apply to the proceedings which were initiated under section 10 of the IBC for the sole purpose of the reorganization of the Corporate Debtor; and

(b) The invocation of Article 9.2.1(e) on the ground that proceedings under Section 10 of the IBC had been commenced was both erroneous and premature. It was erroneous because at the time of commencement of the proceedings, the Corporate Debtor was looking at the reorganization of its affairs. It squarely fell within the exception to Article 9.2.1(e). It was

premature because unless and until the appellant was sure that after a reorganization the resulting entity would not have the financial standing to perform its obligations or as to its lack of creditworthiness, it had no basis to terminate the PPA on the ground that it constituted an event of default under Article 9.2.1(e).

(iii) In relation to the jurisdiction of the NCLT, it was submitted that:

(a) The NCLT's jurisdiction with respect to Section 60(5) was invoked to seek quashing of the default notice issued by "taking insolvency proceedings as Event of Default." Therefore, the application filed before the NCLT was within the realm of its jurisdiction under Section 60(5) of the IBC;

(b) The appellant's submission about GERC having jurisdiction should not be accepted. Instead, this Court should adopt the position that, should the commencement of proceedings under the IBC be used as a ground to terminate a contract, then the matter ought to be determinable by the NCLT. This is further bolstered by the exclusion of the jurisdiction of civil courts under Section 231 of the IBC; and

(c) IBC, being a special law, enacted after the Electricity Act, the NCLT and NCLAT have exclusive jurisdiction to govern all questions of fact and law relating to the insolvency process of the corporate debtor.

40 Mr V Giri, learned senior counsel on behalf of the second respondent, made the following submissions in support of the arguments made by the first respondent:

(i) Once an application under sections 7, 9 or 10 of the IBC is admitted by the NCLT, it is conferred with the jurisdiction to deal with matters relating to the insolvency of the corporate debtor;

(ii) Both the Electricity Act and the IBC are special legislations, which have been enacted to deal with electricity related issues and insolvency, respectively. In **Ashoka Marketing** vs **PNB**[37] this court held that a harmonious construction of two special laws containing non-obstante clauses can be undertaken by looking at the purpose of both the laws. This Court was also mindful of the principle that a special law enacted at a later date prevails over the earlier special law. In this regard, the non-obstante clause under Section 174 of the Electricity Act would be overridden by Section 238 of IBC in case of a conflict of jurisdiction to resolve a dispute;

(iii) The NCLT can exercise its jurisdiction under Section 60(5) of the IBC to ensure that the Corporate Debtor survives as a 'going concern'. It would not be possible to enter into another PPA with the same terms and conditions as the current PPA;

(iv) The second respondent as a lender bank may not be able to initiate a dispute resolution process under Section 86(f) of the Electricity Act since it contemplates the resolution of disputes between a generator and a trading licensee;

(v) Section 60(5)(c) of the IBC provides that the NCLT can entertain or dispose of any event or action arising out of, in relation to, effecting or

[37] 1990 (4) SCC 406

hampering the insolvency resolution process. NCLT has the jurisdiction to intervene to the extent of removing any obstacle in the CIRP process for it to reach its logical end, which is approval of the resolution plan or liquidation. The contours of Section 14 of the IBC must be determined under such an understanding of Section 60(5)(c);

(vi) The moratorium under Section 14 of IBC is not exhaustive because:

(a) The object of section 14 is protection of the Corporate Debtor during the CIRP;

(b) The preamble of the IBC provides for preserving the maximum value of the assets of the Corporate Debtor; and

(c) Section 14(3) only excludes certain kinds of agreements and transactions from moratorium under Section 14(1), as notified by the Central Government in consultation with the financial regulator or any other authority. The NCLT has the power to impose moratorium or status quo in the interest of protecting the corporate debtor and the CIRP in addition to the protections enumerated in Section 14(1);

(vii) Maintaining the Corporate Debtor as a 'going concern' is the soul of the CIRP. Section 14(2A) provides that a supply of goods or services which an IRP or RP considers critical for protecting and preserving the value of the Corporate Debtor, and managing its operation as a going concern cannot be terminated, suspended or interrupted. Section 20(1) imposes a duty on the IRP to protect and preserve the value of the Corporate Debtor and manage the operations as a 'going concern'. The 'Resolution Plan' has

been defined under Section 5(26) of the IBC as a plan proposed by the resolution applicant for insolvency resolution of the Corporate Debtor as a 'going concern'. The termination of the PPA would push the Corporate Debtor towards a corporate death, namely, liquidation;

(viii) The Explanation to Section 14(1) clarifies that, *inter alia*, "a similar grant of right given by the Central government, State government, local authority, sectoral regulator or any other authority shall not be terminated on the ground of insolvency". This indicates the intent of the legislature that no right conferred on the Corporate Debtor can be taken away due to the initiation of the CIRP;

(ix) Article 9.2.1(e) must be read with Article 12.9 of the PPA, which provides that if a default is committed under the financing documents, lenders have a right to assign the rights and obligations of the Corporate Debtor under the PPA to a third party. Hence, the PPA contemplates a situation where the Corporate Debtor may go through a reorganization. The present proceedings under the IBC are in the nature of a reorganization. Hence, the CIRP cannot be construed as event of default under the PPA;

(x) The lenders extended the loan based on the: (a) right of assignment granted under Article 12.9 of the PPA; (b) purchase of electricity as a fixed tariff; and (c) term of the PPA for a period of 25 years. The financial projections on the loan and its repayment were made on the above terms. The default notice is in violation of the terms of the PPA and the understanding reached between the parties;

(xi) Article 9.3.1 of the PPA is inconsistent with the IBC, since the PPA grants a time of 30 days to remedy the insolvency whereas the IBC provides a timeline of 180 days, which is extendable up to 330 days. Section 238 of IBC ensures that the IBC will prevail over the PPA. The phrase "instrument" in Section 238 can be interpreted in light of Section 2(14) of the Indian Stamp Act, 1899 and Section 2(b) of the Notaries Act, 1952 which provide that an "instrument", "includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded." Hence the PPA qualifies as an instrument;

(xii) Section 14(1)(d) provides for protection of the property of the Corporate Debtor. The expression "property" would include the PPA in terms of its definition in Section 3(27) of the IBC. Paras 8.1 to 8.3 of the Third Insolvency Committee Report dated 20 February 2020 indicate that the intent of the IBC is to ensure that the Corporate Debtor remains a going concern and contracts cannot be terminated by way of *ipso facto* clauses relating to insolvency; and

(xiii) The appellant terminated the PPA not due to the default *per se* but due to a commercial decision to negotiate and reduce the purchase price of electricity under tariff. It is not the intent of the IBC to allow an entity to take the benefit of the CIRP to negotiate a better price for a contract and in effect reduce the value of the Corporate Debtor.

H Issues arising from the dispute

41 The following two issues arise for determination:

(i) Whether the NCLT/NCLAT can exercise jurisdiction under the IBC over disputes arising from contracts such as the PPA; and

(ii) Whether the appellant's right to terminate the PPA in terms of Article 9.2.1(e) read with 9.3.1 is regulated by the IBC.

I Jurisdiction of the NCLT/NCLAT over contractual disputes

42 The primary issue upon which the outcome of this appeal would turn is the nature of the jurisdiction which is exercised by the NCLT under Section 60(5) of the IBC. The provision reads thus:

> "(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."

43 Sub-section (1) of Section 60 provides the NCLT with territorial jurisdiction over the place where the registered office of the corporate person is located. NCLT shall be the adjudicating authority "in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors". The NCLT has been constituted under Section 408 of the CA 2013 "to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force"[38].

44 NCLT owes its existence to statute. The powers and functions which it exercises are those which are conferred upon it by law, in this case, the IBC.

[38] "**Section 408**. *The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.*"

45 The NCLT in its decision dated 29 August 2019 did not specifically examine the issue of its jurisdiction under Section 60(5)(c) of the IBC. It prohibited the termination of the PPA on the ground that it is an "instrument" under Section 238; Articles 9.2.1(e) read with 9.3.1 of the PPA are inconsistent with the provisions of the IBC; and the latter overrides an instrument having effect by virtue of law. One of the considerations which weighed with the NCLT while coming to its determination was that termination of the PPA would prejudice the status of the Corporate Debtor as a ''going concern', and lead to the failure of the CIRP. The NCLT observed:

> "30. …the CIR process in the instant case was triggered on 20.11.2018, which was further extended by 90 days on 16.05.2019 and the default notices were issued by the Respondent Company on 01.05.2019. That termination of PPA at this stage may have adverse consequences on the status of the Corporate Debtor as "going concern" and eventually, may jeopardise the entire CIR Process. While elaborating on the objectives of IBC as enshrined in the Preamble, the Hon'ble Supreme Court, had held in the matter of **Swiss Ribbons Pvt. Ltd. v Union of India, 2019 SCC Online SC 73**:
>
> *" ..... What is interesting to note is that Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plan submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern"."*

46 In appeal, the NCLAT by its order dated 15 October 2019, upheld the exercise of jurisdiction by the NCLT. The NCLAT held:

> "Taking into consideration the nature of the case, we are of the view that to keep the 'Corporate Debtor' a going concern, which is generating electricity and supplying only to 'Gujarat Urja Vikas Nigam Ltd.', the Adjudicating Authority rightly asked 'Gujarat Urja Vikas Nigam Ltd.' not to terminate the 'Power Purchase Agreement' dated 30th April, 2010.

> We may make it clear that the 'Gujarat Urja Vikas Nigam Limited', being purchaser of the electricity cannot terminate the 'Power Purchase Agreement' solely on the ground that the 'Corporate Insolvency Resolution Process' has been initiated against 'Astonfield Solar (Gujrat) Pvt. Ltd.' (Corporate Debtor) which is generating electricity and supplying it and there is no default in supplying electricity and during the 'Corporate Insolvency Resolution Process'...”

However, like the NCLT, the NCLAT did not give any specific finding on whether it or the NCLT can exercise its jurisdiction under section 60(5)(c) over a dispute arising out of the termination of the PPA. In this regard, the task falls on this Court to enumerate the contours of the jurisdiction that can be exercised under Section 60(5)(c) of the IBC.

I.1 Section 60(5)(c) : “arising out of” and “in relation to”

47 It has been submitted before us on behalf of the appellant that the NCLT does not have any inherent powers, and its exercise of jurisdiction is circumscribed by the provisions of the IBC. As such, it does not have the jurisdiction to entertain all disputes or all issues related to the Corporate Debtor. On the other hand, the respondents have made a limited submission that while the NCLT may not have jurisdiction to adjudicate upon contractual disputes that arise independent of the insolvency of the Corporate Debtor, it has the sole jurisdiction to decide a dispute that arises from or relates to the insolvency of the Corporate Debtor or where the property of the Corporate Debtor (in this case its rights under the PPA) is sought to be taken away on the ground of insolvency. For their argument, the respondents have relied on Section 60(5)(c) to submit

that NCLT is vested with a wide jurisdiction to consider questions of law or fact "arising out of" or "in relation to" insolvency resolution proceedings.

48 In varying contexts, this Court has expansively construed the expressions "relating to" and "arising out of" in its previous decisions. The respondents have relied on some of these judgments to buttress their submissions in regard to the width of Section 60(5)(c). In **Renusagar Power Co. Ltd.** vs **General Electric Company**[39], a two judge Bench while interpreting the words "arising out of" or "related to" in an arbitration clause held as follows, speaking through Justice V.D. Tulzapurkar

> "25…(2) Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content.."

49 In **Mansukhlal Dhanraj Jain** vs **Eknath Vithal Ogale**[40], another two judge Bench of this Court emphasized the comprehensive nature and wide sweep of the term "relating to" in the context of the Small Causes Courts Act, 1887. Justice S B Majumdar held:

> "16. It is, therefore obvious that the phrase "relating to recovery of possession" as found in Section 41(1) of the Small Cause Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase. Consequently in the light of the averments in plaints under consideration and the prayers sought for therein, on the clear

[39] (1984) 4 SCC 679
[40] (1995) 2 SCC 665

> language of Section 41(1), the conclusion is inevitable that these suits could lie within the exclusive jurisdiction of Small Cause Court, Bombay and City Civil Court would have no jurisdiction to entertain such suits."

50 In **Doypack System (P) Ltd.** vs **Union of India**[41], a two judge Bench held that the expression "in relation to" is broad and is equivalent to the expressions "concerning with" and "pertaining to", with the latter also being expansive in ambit. Justice Sabyasachi Mukharji (as the learned Chief Justice of India then was) observed:

> "50. The expression "in relation to" (so also "pertaining to"), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both direct significance as well as indirect significance depending on the context [internal citation omitted]. Assuming that the investments in shares and in lands do not form part of the undertaking but are different subject matters, even then these would be brought within the purview of the vesting by reason of the above expressions. **In this connection reference may be made to 76 Corpus Juris Secundum at pages 620 and 621 where it is stated that the term "relate" is also defined as meaning to bring into association or connection with. It has been clearly mentioned that "relating to" has been held to be equivalent to or synonymous with as to "concerning with" and "pertaining to". The expression "pertaining to" is an expression of expansion and not of contraction."**
>
> **(emphasis supplied)**

51 While the phrases "arising out of"" and "relating to" have been given an expansive interpretation in the above cases, words can have different meanings depending on the subject or context. Words are after all, a vehicle for communicating ideas, thoughts and concepts. A one-size-fits-all analogy may not

[41] (1988) 2 SCC 299

always hold good when we construe similar words in entirely distinct settings. Justice G.P. Singh in his authoritative commentary on the interpretation of statutes, *Principles of Statutory Interpretation*, has noted that the same words used in different sections of the same statute or used at different places in the same clause or section can have different meanings[42]. Therefore, it is necessary to bear in mind the context in which the phrases have been used. Justice G.P. Singh has stated in his commentary that[43]:

> "When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy."

52 Bearing in mind the above caution, it may be of relevance to discuss the interpretation of similar provisions in other insolvency laws. Textually, the provisions of Section 60(5) bear a flavor of resemblance to the provisions which were contained in sub-Section 2 of Section 446[44] of the CA 1956, which correspond now to Section 280[45] of CA 2013.

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[42] G.P. Singh, *Principles of Statutory Interpretation* (1st edn., Lexis Nexis 2015)
[43] Ibid.
[44] Sub-section 2 of section 446 provides as follows:
"*(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of- (a) any suit or proceeding by or against the company; (b) any claim made by or against the company (including claims by or against any of its branches in India); (c) any application made under section 391 by or in respect of the company; (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company; whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.*"
[45] Section 280 of the CA 2013 provides as follows:
"***280. Jurisdiction of Tribunal.—*** *The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of,— (a) any suit or proceeding by or against the company; (b) any claim made by or against the company, including claims by or against any of its branches in India; (c) any application made under section 233; (d) any scheme submitted under section 262; (e) any question of priorities or any other question whatsoever, whether of law or facts, including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter*

53 A textual comparison of the provisions of Section 60(5) of the IBC with Section 446(2) of CA 1956 would reveal some similarities of expression, with textual variations. For the purposes of the present proceedings, it suffices to note that clause (c) of Section 60(5) confers jurisdiction on the NCLT to entertain or dispose of "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 the Code". Section 446(2)(d) of CA 1956 and section 280(d) of CA 2013 use the expression any question of priorities or any other question whatsoever whether of law or fact. These words bear a striking resemblance to the provisions of section 60(5) (c) of the IBC. But textually similar language in different enactments has to be construed in the context and scheme of the statue in which the words appear. The meaning and content attributed to statutory language in one enactment cannot in all circumstances be transplanted into a distinct, if not, alien soil. For, it is trite law that the words of a statute have to be construed in a manner which would give them a sensible meaning which accords with the overall scheme of the statute, the context in which the words are used and the purpose of the underlying provision. Therefore, while construing of section 60(5), a starting point for the analysis must be to decipher Parliamentary intent based on the object underlying the enactment of the IBC. The Statement of Objects and Reasons leading up to the enactment to the IBC conveys a strong sense of the intent of the legislature. According to it:

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arising out of, or in relation to winding up of the company, whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted, before or after the order for the winding up of the company is made."

"There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.

2. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

3. The Code seeks to provide for designating the NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code.

> Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code."

54 The salient aspects which emerge from the state of the law prior to the enactment to the IBC can be formulated thus:

(i) There was a multiplicity of legislation dealing with insolvency and bankruptcy;

(ii) Multiplicity of statutes led to the creation of multiplicity of fora;

(iii) Provisions relating to insolvency and bankruptcy of companies were embodied in the SICA, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993[46], the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002[47] and the CA 2013;

(iv) The above statutes provided for the establishment of multiplicity of adjudicating bodies including the BIFR, Debt Recovery Tribunal[48], NCLT and the Appellate Tribunal;

(v) While the liquidation of companies was adjudicated upon by the High Courts exercising company jurisdiction, individual insolvency was governed by the Presidency-Towns Insolvency Act, 1909 and the PIA;

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[46] "**RDDB**"
[47] "**SARFAESI**"
[48] "**DRT**"

(vi) The multiplicity of statute and fora in the regime prior to the IBC led to a framework for insolvency and bankruptcy which was inadequate and ineffective, and resulted in undue delay;

(vii) The underlying purpose and object of enacting the IBC was to ensure a timely resolution of insolvency and bankruptcy which would:

(a) Maximize of the value of assets;

(b) Promote entrepreneurship;

(c) Facilitate the availability of credit;

(d) Support the development of credit markets; and

(e) Balance interests of all stake-holders.

(viii) Bearing the above aspects in mind, the IBC, which is a consolidating and amending statute, came to be enacted; and

(ix) The IBC, in a clear departure from the past, separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects.

55 In the decision of this Court in **Swiss Ribbons** (supra), where the challenge was to the constitutional validity of some provisions of the IBC, the judgment by Justice RF Nariman contains a section titled "**Prologue: the pre-existing state of the law**". The problems which arise from multiplicities of statutes and fora in the erstwhile regime were noticed in the report of the Bankruptcy Law Reforms Committee (2015) (**"BLRC"**):

> "14. …The current state of the bankruptcy process for firms is a highly fragmented framework. Powers of the creditor and the debtor under insolvency are provided for under different Acts…
>
> It is problematic that these different laws are implemented in different judicial fora. Cases that are decided at the tribunal/BIFR often come for review to the High Courts. This gives rise to two types of problems in implementation of the resolution framework. The first is the lack of clarity of jurisdiction. In a situation where one forum decides on matters relating to the rights of the creditor, while another decides on those relating to the rights of the debtor, the decisions are readily appealed against and either stayed or overturned in a higher court. Ideally, if economic value is indeed to be preserved, there must be a single forum that hears both sides of the case and makes a judgment based on both. A second problem exacerbates the problems of multiple judicial fora. The fora entrusted with adjudicating on matters relating to insolvency and bankruptcy may not have the business or financial expertise, information or bandwidth to decide on such matters. This leads to delays and extensions in arriving at an outcome, and increases the vulnerability to appeals of the outcome…a matrix of fragmented and contrary outcomes,…"

A "debtor and creditor led process of corporate insolvency" had resulted in a matrix of fragmented and contrary outcomes rather than "coherent and consistent.… precedents".

56 The BLRC noted that speed is of the essence for the working of a bankruptcy code. From the point of the view of creditors, a good realization can be obtained when a firm is sold as a going concern. The decisions of this Court in **Madras Petrochem**[49], **Innoventive Industries**[50] and **Arcelor Mittal (India) (Private) Limited**[51] emphatically advert to the failure of the statutory resolution

[49] **Madras Petrochem Limitted.** vs **BIFR** : (2016) 4 SCC 1
[50] **Innoventive Industries** vs **ICICI Bank** : (2018) 1 SCC 407; hereinafter referred to as "**Innoventive Industries**"
[51] **Arcelor Mittal (India) (Private) Limited.** vs **Satish Kumar Gupta** : (2019) 2 SCC 1; hereinafter referred to as "**Arcelor Mittal**"

machinery in the regime prior to the IBC. It was in this backdrop that the IBC was enacted to provide for a timely resolution of the CIRP. The primary focus of the IBC is to ensure the revival and continuation of the corporate debtor. The interests of the corporate debtor have been bifurcated and separated from the interests of persons in management. The timelines which are prescribed in the IBC are intended to ensure the resuscitation of the corporate debtor.

57 The enactment of the IBC is in significant senses a break from the past. While interpreting the provisions of the IBC, care must be taken to ensure that the regime which Parliament found deficient and which was the basic reason for the enactment of the new legislation is not brought in through the backdoor by a process of disingenuous legal interpretation. However, this is not to say that the interpretation given to the statutory provisions that existed prior to the enactment IBC is to be rejected *in toto.* The interpretation given to such statutory provisions that are textually similar to Section 60(5)(c) may be relevant, provided that such interpretation is in tandem with the objective of enacting the IBC, that is, *inter alia*, avoidance of multiplicity of fora and a timely resolution of the insolvency process.

58 In **Sudharshan Chits (I) Ltd.** vs **O Sukumaran Pillar**[52], a three judge Bench of this Court held that the object of Section 446(2) of CA 1956 was to enlarge the jurisdiction of the Company Court to avoid a multiplicity of proceedings, delay and expensive litigation. The Court was speaking through Justice D.A Desai held:

> "8..Sub-Section (2) was introduced to enlarge the jurisdiction of the court winding up the company so as to facilitate the

[52] (1984) 4 SCC 657

> disposal of winding-up proceedings…To save the Company which is ordered to be wound up from this prolix and expensive litigation and to accelerate the disposal of winding-up proceedings, the Parliament devised a cheap and summary remedy conferring jurisdiction on the court winding up the company to entertain petitions in respect of claims for and against the company. This was the object behind enacting Section 446(2) and therefore, it must receive such construction at the hands of the court as would advance the object and at any rate not thwart it"

59 Section 4(1) of the PIA used similar words in relation to the jurisdiction of the insolvency court as Section 60(5) of the IBC. Section 4(1) of the PIA provided:

> "**Section 4 - Power of Court to decide all questions arising in insolvency**
>
> (1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, **which may arise in any case of insolvency coming within the cognizance of the Court**, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."
>
> **(emphasis supplied)**

60 Another three judge Bench of this Court, in **Thampanoor Ravi** vs **Charupara Ravi**[53], held that a High Court does not have the jurisdiction to determine whether a person is an undischarged insolvent in an election petition filed under the Representation of People Act, 1951, in view of the exclusive jurisdiction conferred upon an insolvency court constituted under the PIA. Justice S. Rajendra Babu, held:

[53] (1999) 8 SCC 74

> "11…..The Insolvency Act is a complete code and determination of all questions regarding insolvency including a question as to whether (1) a person is an insolvent or not, or (2) an insolvent be discharged or not and subject to what conditions, can be decided by the court constituted under that Act alone…..
>
> 13. In the present case, as we have explained earlier the scheme of the provisions of the Insolvency Act, the exclusive jurisdiction to deal with any question relating to insolvency could be adjudicated upon only by the court constituted under that Act. In such a situation, it would not be possible to hold that the High Court had, while dealing with an election petition, jurisdiction to decide a question as to whether a person is an undischarged insolvent or not. Admittedly, in this case, there is no such adjudication. Hence the High Court could not declare the appellant to be an 'undischarged insolvent'."

61 Section 45-B of the BRA uses language similar to Section 60(5) of the IBC. Section 45-B of the BRA provides:

> "**Section 45B - Power of High Court to decide all claims in respect of banking companies**
>
> The High Court shall, save as otherwise expressly provided in section 45C, have exclusive jurisdiction to entertain and decide any claim made by or against a banking company which is being wound up (including claims by or against any of its branches in India) or any application made under section 39 of the Companies Act, 1956 by or in respect of a banking company or any question of priorities or any other question whatsoever, whether of law or fad [sic fact] **which may relate to or arise in the course of the winding up of a banking company**, whether such claim or question has arisen or arises or such application has been made or is made before or after the date of the order for the winding up of the banking company or before or after the commencement of the Banking Companies (Amendment) Act, 1953 (52 of 1953)."
>
> **(emphasis supplied)**

62 In **Dhirendra Chandra Pal** vs **Associated Bank of Tripura Ltd.**[54], a four judge Bench of this Court examined the scope of Section 45-B. Justice B. Jagannadhas observed:

> "4. It is to be remembered that section 45-B is not confined to claims for recovery of money or recovery of property, movable or immovable, but comprehends all sorts of claims which relate to or arise in the course of winding up."

63 The above judgements were undoubtedly in relation to the jurisdiction of courts in relation to winding up and insolvency proceedings under distinct statutes. But considerations such as avoiding multiplicity of fora, speedy disposal and litigation costs would also be germane to the establishment of an exclusive body under the IBC to adjudicate matters arising from or in relation to the insolvency resolution process.

64 In this context, it would be useful to trace the history of the NCLT and NCLAT, which are empowered to deal with all issues relating to insolvency, specifically with the aim of avoiding a multiplicity of fora. The Justice Eradi Committee was constituted by the Department of Company Affairs to make recommendations on reforming the existing law on winding up of companies to increase transparency and reduce delays in the liquidation of companies. The Report of the High Level Committee on Law relating to Insolvency and Winding Up of Companies (2000) stated that:

> "…there is a need for establishing a National Tribunal as a specialized agency to deal with matters relating to rehabilitation, revival and winding up of companies. **With a**

[54] AIR 1955 SC 213

> **view to avoiding multiplicity of fora**, **the National Tribunal. should be conferred with jurisdiction and powers to deal with matters under Companies Act, 1956 presently exercised by the Company Law Board; jurisdiction, power and authority relating to winding up of companies vested with High Courts and power to consider rehabilitation and revival of companies presently vested in the BIFR.** This suggestion of the Committee will involve amending the provisions of Part VU of Companies Act, 1956 besides repeal of Sick Industrial Companies (Special Provisions) Act, 1985 and amending section 10E of the Companies Act relating to the present Company Law Board. All the existing cases pending with the High Courts and the Company Law Board may be transferred to the Tribunal and the pending references before BIFR/ AAFIR shall abate."
>
> **(emphasis supplied)**

65 The above report was discussed in the decision of this Court in **Union of India** vs **R. Gandhi, President, Madras Bar Association**[55]. A Constitution Bench noted that the recommendations of the Committee were accepted by the Government, which established the NCLT and NCLAT to transfer the functions being performed by High Courts, Company Law Board, BIFR and Appellate Authority for Industrial and Financial Reconstruction to a single forum to avoid long drawn litigation before multiple fora. Justice R.V. Raveendran observed:

> "3. (…) **The Committee found that multiplicity of court proceedings is the main reason for the abnormal delay in dissolution of companies. It also found that different agencies dealt with different areas relating to companies, that Board for Industrial & Financial Reconstruction (BIFR) and Appellate Authority for Industrial & Financial Reconstruction (AAIFR) dealt with references relating to rehabilitation and revival of companies, High Courts dealt with winding-up of companies and Company Law Board (CLB) dealt with matters relating to prevention of oppression and mismanagement etc.** Considering the laws on corporate insolvency prevailing in industrially advanced

[55] (2010) 11 SCC 1

countries, the Committee recommended various amendments in regard to the provisions of Companies Act, 1956 for setting-up of a National Company Law Tribunal which will combine the powers of the CLB under the Companies Act, 1956, BIFR and AAIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 as also the jurisdiction and powers relating to winding-up presently vested in the High Courts.

4. It is stated that the recommendations of the Eradi Committee were accepted by the Government and Company (Second Amendment) Act, 2002 was passed providing for establishment of NCLT and NCLAT to take-over the functions which are being performed by CLB, BIFR, AAIFR and the High Courts. It is submitted that the establishment of NCLT and NCLAT will have the following beneficial effects: (i) reduce the pendency of cases and reduce the period of winding-up process from 20 to 25 years to about two years; (ii) avoid multiplicity of litigation before various fora (High Courts and quasi-judicial Authorities like CLB, BIFR and AAIFR) as all can be heard and decided by NCLT; (iii) the appeals will be streamlined with an appeal provided against the order of the NCLT to an appellate Tribunal (NCLAT) exclusively dedicated to matters arising from NCLT, with a further appeal to the Supreme Court only on points of law, thereby reducing the delay in appeals; and (iv) with the pending cases before the Company Law Board and all winding-up cases pending before the High Courts being transferred to NCLT, the burden on High Courts will be reduced and BIFR and AAIFR could be abolished."

(emphasis supplied)

66 The IBC was a reform which was distilled through many committee reports, most importantly the Report of the BLRC, which recommended that the earlier institutional framework relating to the winding up and liquidation of the companies should continue under the IBC. The Report stated:

"**4.2.2 Territorial jurisdiction**

…

Further, following from current law, once a liquidation or bankruptcy order has been made, leave of the NCLT or DRT would be necessary to proceed with any pending suit or proceeding or to file any fresh suit or proceeding by or against

> the debtor firm or individual. This will ensure the sanctity of the liquidation or bankruptcy process. **The NCLT or DRT should also have jurisdiction to entertain and dispose of any pending or fresh suit or legal proceeding by or against the debtor company or individual; question of priorities or any other question, whether of law or facts, in relation to the liquidation or bankruptcy. By bringing all litigations that may have a monetary impact on the economic value of debtor firm or individual's assets within the jurisdiction of the NCLT, the liquidation or bankruptcy process will be made streamlined and efficient**…
>
> **4.21 Tribunals Jurisdiction on firm insolvency and liquidation**
>
> Under Companies Act, 2013, the National Company Law Tribunal (NCLT) has jurisdiction over the winding up and liquidation of companies. NCLAT has been vested with the appellate jurisdiction over NCLT. Similarly, the Limited Liability Partnership Act, 2008 also confers jurisdiction to NCLT for dissolution and winding up of limited liability partnerships, while appellate jurisdiction is vested with NCLAT. **The Committee recommends continuing with this existing institutional arrangement. NCLT should have jurisdiction over adjudications arising out of firm insolvency and liquidation, while NCLAT will have appellate jurisdiction on the same**."
>
> **(emphasis supplied)**

67 The institutional framework under the IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple fora. In the absence of a court exercising exclusive jurisdiction over matters relating to insolvency, the corporate debtor would have to file and/or defend multiple proceedings in different fora. These proceedings may cause undue delay in the insolvency resolution process due to multiple proceedings in trial courts and courts of appeal. A delay in completion of the insolvency proceedings would diminish the value of the debtor's assets and hamper the

prospects of a successful reorganization or liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner. Pursuing this theme in **Innoventive** (supra) this court observed that "one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process". The principle was reiterated in **Arcelor Mittal (**supra) where this court held that "the non-obstante Clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings". Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, in doing do, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. The nexus with the insolvency of the Corporate Debtor must exist.

68 It is appropriate to refer to the observations in the Report of the BLRC, wherein it noted the role of the NCLT, as the Adjudicating Authority for the CIRP, in the following terms:

> "**An adjudicating authority ensures adherence to the process**

> At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the insolvency professional to take appropriate action against the directors and management of the entity, with recommendations from the creditors committee. All material actions and events during the process are recorded at the adjudicating authority. The adjudicating authority can assess and penalise frivolous applications. The adjudicator hears allegations of violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behaviour of the insolvency professional are directed to the Regulator/Adjudicator."

As such, it is important to remember that the NCLT's jurisdiction shall always be circumscribed by the supervisory role envisaged for it under the IBC, which sought to make the process driven by trained resolution professionals.

69 In the present case, the PPA was terminated solely on the ground of insolvency, since the event of default contemplated under Article 9.2.1(e) was the commencement of insolvency proceedings against the Corporate Debtor. In the absence of the insolvency of the Corporate Debtor, there would be no ground to terminate the PPA. The termination is not on a ground independent of the insolvency. The present dispute solely arises out of and relates to the insolvency of the Corporate Debtor.

70 Ms Ramachandran and Mr Diwan have contended that CA 1956, PIA and BRA do not contain any provisions equivalent to Sections 25(2)(b) and 18(f)(vi) of the IBC which empower the RP to exercise rights for the benefit of the Corporate Debtor in certain adjudicatory proceedings. They submit that Section 60(5)(c) of the IBC must be read in consonance with Sections 25(2)(b) and 18(f)(iv), which would be rendered nugatory if NCLT becomes the exclusive forum for the

enforcement of all the Corporate Debtor's rights. Section 25(2)(b) of the IBC provides:

> "**Section 25 - Duties of resolution professional**
>
> (2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:--
>
> ….
>
> (b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;"

Section 18(f)(vi) provides:

> "**Section 18 - Duties of interim resolution professional**
>
> The interim resolution professional shall perform the following duties, namely:-
>
> ……
>
> (f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—
>
> …….
>
> (vi) assets subject to the determination of ownership by a court or authority;"

71 We are inclined to agree with the submission made by Mr Singh that merely because a duty has been imposed on the IRP or the RP, it does not mean that the jurisdiction of the NCLT is circumscribed under section 60(5)(c) of the IBC. In **Embassy Property** (supra), it was argued that the term "property" under Section 3(27) of the IBC includes a mining lease granted by government and the lRP is duty bound under Section 20(1) of the IBC to preserve the value of the

property of the Corporate Debtor. Hence, the submission was that the RP can invoke the jurisdiction of the NCLT to adjudicate upon a dispute relating to non-extension of the lease. However, Justice V. Ramasubramanian, speaking for this Court, observed that "the said argument cannot be sustained for the simple reason that the duties of a resolution professional are entirely different from the jurisdiction and powers of NCLT"[56].

72 Therefore, we hold that the RP can approach the NCLT for adjudication of disputes that are related to the insolvency resolution process. However, for adjudication of disputes that arise *dehors* the insolvency of the Corporate Debtor, the RP must approach the relevant competent authority. For instance, if the dispute in the present matter related to the non-supply of electricity, the RP would not have been entitled to invoke the jurisdiction of the NCLT under the IBC. However, since the dispute in the present case has arisen solely on the ground of the insolvency of the Corporate Debtor, NCLT is empowered to adjudicate this dispute under Section 60(5)(c) of the IBC.

I.2 Jurisdiction of NCLT and GERC

73 It has been urged on behalf of the appellant that in terms of Article 10.4 of the PPA, GERC is entitled to entertain the disputes relating to the PPA.

74 Our attention has also been drawn to Section 86(1)(f) of the Electricity Act, which provides that GERC shall discharge the function of adjudicating "the disputes between the licensees, and generating companies and to refer any

[56] **Embassy Property** (supra), para 39.

dispute for arbitration". It has been submitted that, therefore, any issue in relation to the PPA must be raised before the GERC and not the NCLT.

75 Reliance has also been placed on the judgement of this Court in **Embassy Property** (supra), where this Court held that the NCLT and NCLAT did not have jurisdiction over a dispute arising under the Mines and Minerals (Development and Regulation) Act, 1957, in relation to the refusal of the State of Karnataka to extend a mining lease. The primary consideration which weighed with this Court while coming to its decision was that NCLT cannot have jurisdiction on matters of public law. This Court held:

> "37….Clause (c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of Sub-section (5)..."

In the present case the decision to terminate the PPA has not been taken by any governmental or statutory authority acting within the domain of its public law functions. The decision has been simply taken by a contracting party solely on account of the initiation of insolvency proceedings against the Corporate Debtor in terms of an agreement between the parties.

76 Ms Ramachandran and Mr Diwan have also relied on the judgment of this Court in **Abhilash Lal** (supra), which concerned taking the approval of the Municipal Corporation of Greater Mumbai ("**MCGM**") for implementing a resolution plan. The Corporate Debtor in that case had committed defaults prior

to the initiation of the CIRP, in relation to its obligation to construct a hospital on a land owned by the MCGM, subsequent to which a lease deed was to be executed. It had also apparently failed to pay annual lease rentals. In this context, Justice S. Ravindra Bhat, speaking for this Court held that:

> "47….. Section 238 cannot be read as overriding the MCGM's right – indeed its public duty to control and regulate how its properties are to be dealt with." Further, this Hon'ble Court held that "in the absence of approval in terms of Section 92 and 92A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands….Nevertheless, the authorities under the Code could not have precluded the control that MCGM undoubtedly has, under law, to deal with properties and land in question, which undeniably are public properties. The resolution plan, therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM)"

In other words, the statutory powers entrusted to the Municipal Corporation to exercise control over its own properties are not overridden by Section 238 of the IBC. Once again, the present situation is distinguishable. The contract in question in **Abhilash Lal** (supra) was terminated due to defaults unrelated to the insolvency of the corporate debtor. In the present case, the sole default attributed by the appellant to the Corporate Debtor was that it was undergoing an insolvency resolution process, which makes the present dispute amenable to the jurisdiction of the NCLT under Section 60(5)(c) of the IBC.

77 Section 238 of the IBC stipulates that IBC would override other laws, including an instrument having effect by virtue of any such law. The NCLT in its decision dated 29 August 2019 gave detailed findings on the issue of whether the

PPA is an instrument within the meaning of section 238 of the IBC. Section 238 of the IBC provides:

> "**Section 238 - Provisions of this Code to override other laws**
>
> The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

The findings of the NCLT are extracted below:

> "19. That from the plain reading of Section 238, it is evident that the aforesaid Section is applicable to an 'instrument' too. However, we find that the term 'instrument' has not been defined anywhere under IBC 2016.
>
> 20. To know, whether the Power Purchase Agreement (PPA) is an 'instrument' or not, we referred to the provisions of Section 3 (37) of the Code, which is reproduced as below:
>
> "Section 3(37) : Words and expressions used but not defined in this Code but defined in the Indian Contract Act, 1872, the Indian Partnership Act, 1932, the Securities Contract (Regulation) Act, 1956, the Securities Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013, shall have the meanings respectively assigned to them in those Acts."
>
> 21. However, in the definition clauses of all these enactments and of General Clause Act 1897, we failed to find a definition of the term 'instrument'.
>
> 22. For interpretation of the term 'instrument', we, therefore, thought it proper to check how the Legislature has defined the term 'instrument' in other enactments.
>
> 23 . Finding that the PPA has been executed on a Stamp Paper, we referred to the Section 2(14) of the Indian Stamp Act, 1899, which reads as follows:
>
> "Section 2(14): "Instrument" - "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded".

> 24. That near similar definition of the term 'instrument' is provided under Section 2(b) of Notaries Act, 1952 :
>
> "Section 2(b): "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded;"
>
> 25. Further, the Bombay Stamp Act, 1958 defines the term 'instrument' in Section 2(1) as follows :
>
> "Section 2(1): instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt;"
>
> 26. That the Merriam-Webster Dictionary defines the word 'instrument', inter alia, as:
>
> "a formal legal document (such as a deed, bond or agreement)"
>
> 27. Since, the rights and liabilities of parties have been created in the Power Purchase Agreement and such an agreement is enforceable by law and the word 'instrument' inter alia, includes an 'agreement', we are of the view, that the Power Purchase Agreement i.e., PPA is an 'Instrument' for the purpose of Section 238 of IBC 2016."

78 It has been urged on behalf of the appellant that Section 238 does not apply to a bilateral commercial contract between a Corporate Debtor and a third party and only applies to statutory contracts or instruments entered into by operation of law. The basis of this submission is that the word "instrument" should be given a meaning *ejusdem generis* to the provision "contained in any other law". We do not find force in this argument. Section 238 does not state that the "instrument" must be entered into by operation of law; rather it states that the instrument has effect by virtue of any such law. In other words, the instrument need not be a creation of a statute; it becomes enforceable by virtue of a law.

Therefore, we are inclined to agree with the view taken by the NCLT. Section 238 is prefaced by a non-obstante clause. NCLT's jurisdiction could be invoked in the present case because the termination of the PPA was sought solely on the ground that the Corporate Debtor had become subject to an insolvency resolution process under the IBC.

79 Section 63 of the IBC provides that "no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code".

I.3 Residuary jurisdiction of the NCLT under section 60(5)(c)

80 The respondents have relied upon the decision of this Court in **Committee of Creditors of Essar Steel India Limited** vs **Satish Kumar Gupta**[57], where this Court held that section 60(5)(c) of the IBC "is in the nature of residuary jurisdiction vested in the NCLT so that NCLT may decide all questions of law or fact arising out of or in relation to insolvency or liquidation under the Code"[58].

81 At this stage we may visit some of the precedents emanating from this court where a statutory conferment of residuary powers has been analyzed. A two-judge Bench of this Court discussed the contours of the residuary power in **Remdeo Chauhan** vs **Bani Kant Das**[59], while interpreting sub-Section (j) of Section 12 of the National Human Rights Commission Act, 1993 which confers

[57] (2020) 8 SCC 531; hereinafter referred to as "**Satish Kumar Gupta**"
[58] Ibid, para 69
[59] (2010) 14 SCC 209

NHRC with "such other functions as it may consider necessary for the promotion of human rights". While construing the provision, this Court held that:

> "45….It is not necessary that each and every case relating to the violation of human rights will fit squarely within the four corners of Section 12 of the 1993 Act for invoking the jurisdiction of the NHRC. One must accept that human rights are not edicts inscribed on a rock. They are made and unmade on the crucible of experience and through reversible process of human struggle for freedom. They admit of a certain degree of fluidity. Categories of human rights, being of infinite variety, are never really closed. **That is why the residuary clause in Sub-section (j) has been so widely worded to take care of situations not covered by Sub-sections (a) to (i) of Section 12 of the 1993 Act.**
>
> 46. The jurisdiction of NHRC thus stands enlarged by Section 12(j) of the 1993 Act, to take necessary action for the protection of human rights. Such action would include inquiring into cases where a party has been denied the protection of any law to which he is entitled, whether by a private party, a public institution, the government or even the Courts of law. We are of the opinion that if a person is entitled to benefit under a particular law, and benefits under that law have been denied to him, it will amount to a violation of his human rights."
>
> **(emphasis supplied)**

82 In **D.R. Kohli** vs **Atul Products Ltd.**[60], a three judge Bench of this Court differentiated between the power of Central Excise authorities for recovery of monies due to the Government under two provisions, one of them being a residuary provision:

> "14. The next question relates to the appropriate provision of law under which action could have been taken in this case by the Central Excise authorities. This question was not decided by the High Court in view of its finding on the liability of the respondent to pay excise duty on the products manufactured by

[60] (1985) 2 SCC 77

it. Since we have not agreed with the decision of the High Court on this point, it has become necessary for us to decide this question in this appeal. While the Department asserts that it was open to it to proceed under Rule 10-A of the Rules, the respondent contends that even if there was any short levy, the proper Rule applicable to its case was Rule 10 and not Rule 10-A. Rule 10 and Rule 10-A of the Rules during the relevant period ran as follows :

10. *Recovery of duties or charges short-levied, or erroneously refunded*: When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of such goods on the part of the owner, or when any such duty or charge, after having been levied/has been owing to any such cause, erroneously refunded, the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or pay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within three months from the date, on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

10-A. *Residuary powers for recovery of sums due to Government*:

Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall, on a written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify.

15. The points of difference between the above two Rules were that (i) whereas Rule 10 applied to cases of short levy through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of the excisable goods-on the part of the owner **Rule 10-A which was a residuary clause applied to those cases which were not covered by Rule 10** and that (ii) whereas under Rule 10, the deficit amount could not be collected after the expiry of three months from the date on which the duty or charge was paid or adjusted in the owners account-current or from the date of making the refund, Rule 10-A did not contain any such period of limitation."

(emphasis supplied)

83 Hence, the residuary jurisdiction conferred by statute may extend to matters which are not specifically enumerated under a legislation. While a residuary jurisdiction of a court confers it wide powers, its jurisdiction cannot be in contravention of the provisions of the concerned statute. In **A. Deivendran** vs **State of T.N.**[61], a two judge Bench of this Court, while determining the limitations of the residuary jurisdiction under Section 465 of the Code of Criminal Procedure, 1973[62], held that a residuary jurisdiction cannot be invoked when there is a patent defect of jurisdiction or an order is passed in contravention of any mandatory provision of the CrPC. Speaking through Justice G.B. Pattanaik, this Court observed that a competent court is vested with the power to exercise residuary jurisdiction under section 465 of the CrPC in the following terms:

> "15. We may notice also the arguments advanced by Mr Mohan, learned counsel appearing for the State, that the conviction and sentence against the appellants should not be interfered with in view of the provisions of Section 465 of the Code, inasmuch as there has been no failure of justice. We are unable to accept this contention. Section 465 of the Code is the residuary section intended to cure any error, omission or irregularity committed by a Court of competent jurisdiction in course of trial through accident or inadvertence, or even an illegality consisting in the infraction of any provisions of law. The sole object of the Section is to secure justice by preventing the invalidation of a trial already held, on the ground of technical breaches of any provisions in the Code causing no prejudice to the accused. **But by no stretch of imagination the aforesaid provisions can be attracted to a situation where a Court having no jurisdiction under the Code does something or passes an order in contravention of the mandatory provisions of the Code.** In view of our interpretation already made, that after a criminal proceeding is committed to a Court of Sessions it is only the Court of Sessions which has the jurisdiction to tender pardon to an accused and the Chief Judicial Magistrate does

[61] (1997) 11 SCC 720

[62] "**CrPC**"

> not possess any such jurisdiction, it would be impossible to hold that such tender of pardon by the Chief Judicial Magistrate can be accepted and the evidence of the approver thereafter can be considered by attracting the provisions of Section 465 of the Code. **The aforesaid provision cannot be applied to a patent defect of jurisdiction.** Then again it is not a case of reversing the sentence or order passed by a Court of competent jurisdiction but is a case where only a particular item of evidence has been taken out of consideration as that evidence of the so-called approver has been held by us to be not a legal evidence since pardon had been tendered by a Court of incompetent jurisdiction. In our opinion, to such a situation the provisions of Section 465 cannot be attracted at all. It is true, that procedures are intended to subserve the ends of justice and undue emphasis on mere technicalities which are not vital or important may frustrate the ends of justice. The Courts, therefore, are required to consider the gravity of irregularity and whether the same has caused a failure of justice. To tender pardon by a Chief Judicial Magistrate cannot be held to be a mere case of irregularity nor can it be said that there has been no failure of justice**. It is a case of total lack of jurisdiction, and consequently the follow up action on account of such an order of a Magistrate without jurisdiction cannot be taken into consideration at all.** In this view of the matter the contention of Mr Mohan, learned Counsel appearing for the State in this regard has to be rejected."
>
> **(emphasis supplied)**

84 In **Johri Lal Soni** vs **Bhanwari Bai**[63] ("**Johri Lal Soni**"), a two judge Bench of this Court had to determine whether an insolvency court can scrutinize the validity of a transfer made seven years before the transferor was adjudged as insolvent, when Section 53 of the PIA classified only those transfers as voidable against the receiver, where the transferor was adjudged insolvent on a petition presented within two years after the date of transfer. This Court, in view of the wide discretion granted in terms of Section 4, held that the insolvency court will have the jurisdiction to determine the validity of void transfers undertaken at any

[63] (1977) 4 SCC 59 : hereinafter, referred to as "**Johri Lal Soni**"

point of time. While Section 53 was applicable only to voidable transactions, this Court was of the view that Section 4 provides a discretion to an insolvency court to decide all questions which arise in a case of insolvency and an interpretation which allowed the court to examine void transfers undertaken at any point of time would be in consonance with the object of the provision. The Court held:

> "4. We now proceed to interpret the provisions of s. 4 itself, the relevant part of which may be extracted thus:
>
> 4. (1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary
>
> to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.
>
> 5. It would be seen that the section has been couched in the widest possible terms and confers complete and full powers on the Insolvency Court to decide all questions of title or priority, or of any nature whatsoever, which may arise in any case of insolvency. **The only restriction which is contained in Section 4 is that these powers are subject to the other provisions of the Act.** In other words, the position is that where any other section of the Act contains a provision which either runs counter to Section 4 or expressly excludes the application of Section 4, to that extent Section 4 would become inapplicable. Counsel for the respondent strongly relied on the provisions of Section 53 which runs thus:
>
> 53. Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court."
>
> **(emphasis supplied)**

It is relevant to note that unlike Section 4 of the PIA, Section 60(5)(c) of the IBC is not subject to other provisions of the statute. Hence, Section 60(5)(c) of the IBC has been worded more expansively than Section 4 of the PIA.

85 In respect of the interplay between Sections 53 and 4 of the PIA, in **Johri Lal Soni** (supra), this Court further held:

> "**6. It was submitted that the effect of Section 53 of the Act clearly is that it bars the jurisdiction of the Insolvency Court to determine the validity of any transfer made beyond two years of the transferor being adjudged insolvent. It is no doubt true that the words "within two years after the date of the transfer" being voidable as against the receiver does fix a time-limit within which the transfer could be annulled by the Court. But a plain construction of Section 53 would manifestly/indicate that the words "within two years after the date, be voidable as against the receiver and shall be annulled by the Court" clearly connote that only those transfers are excepted from the jurisdiction of the Court which are voidable. The section has, therefore, made a clear distinction between void and voidable transfers-a distinction which is well-known to law. A void transfer is no transfer at all and is completely destitute of any legal effect: it is a nullity and does not pass any title at all.** For instance, where a transfer is nominal, sham or fictitious, the title remains with the transferor and so does the possession and nothing passes to the transferee. It is manifest, therefore, that such a transfer is no transfer in the eye of the law. **Such transfers, therefore, clearly fall beyond the purview of Section 53 of the Act which refers only to transfers which are voidable.** It is well settled that a voidable transfer is otherwise a valid transaction and continues to be good until it is avoided by the party aggrieved. For instance, transfers executed by the transferor to delay or defraud his creditors may be avoided under Section 53 of the Transfer of Property Act. Similarly transfers made under coercion, fraud or undue influence may be avoided by the party defrauded. It is only such transfers which, if they take place beyond two years of the date of transfer, cannot be enquired into by the Court by virtue of Section 53 of the Act. **This appears to us to be the plain and simple interpretation of the combined reading of Sections 4 and 53 of the Act. Indeed, if a different interpretation is given, it will render the entire object of the section [4] nugatory, because the Court would be**

> **powerless to set at naught transfers which are patently void, merely because they had been made at a particular point of time.**"
>
> **(emphasis supplied)**

86 The decision in **Johri Lal Soni** (supra) gave an expansive interpretation to the powers of an insolvency court under Section 4 of the PIA, which is similar to Section 60(5)(c) of the IBC. This Court held that an insolvency court was empowered to consider the validity of void transfers under Section 4 of the PIA, which did not explicitly fall under Section 53 of the PIA. However, this Court's decision was premised on the finding that Section 53 of the PIA only dealt with voidable transfers. This Court noted that the jurisdiction of an insolvency court will be restricted in matters where a voidable transfer has taken place beyond the time-limit stipulated under Section 53 within which the transfer could be annulled by the court. Hence, in the name of exercising a residuary jurisdiction, a court cannot cloak itself with jurisdiction which is contrary to the provisions of a statute. However, at the same time, as held by this Court in **Johri Lal Soni** (supra), an interpretation which renders the objective of a residuary jurisdiction nugatory cannot be upheld by this Court. A fine line has to be drawn between ensuring that a residuary jurisdiction is not rendered otiose due to an excessively restrictive interpretation, as well as, guarding against usurpation of power by a court or a tribunal not vested in it.

87 The residuary jurisdiction of the NCLT under Section 60(5)(c) of the IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of the NCLT

were to be confined to actions prohibited by Section 14 of the IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of the IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be the exhaustive of the grounds of judicial intervention contemplated under the IBC in matters of preserving the value of the corporate debtor and its status as a 'going concern'. We hasten to add that our finding on the validity of the exercise of residuary power by the NCLT is premised on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by the NCLT. However, it is pertinent to mention that the NCLT cannot exercise its jurisdiction over matters *dehors* the insolvency proceedings since such matters would fall outside the realm of IBC. Any other interpretation of Section 60(5)(c) would be in contradiction of the holding of this Court in **Satish Kumar Gupta** (supra).

J Validity of *ipso facto c*lauses

88 Before we proceed to analyze the validity of the termination of the PPA by the appellant under Articles 9.2.1(e) and 9.3.1 in the present case, it is important to contextualize it within the larger debate on this issue. Globally, *ipso facto* clauses arise in a variety of contracts. Ipso facto clauses are contractual provisions which allow a party ("**terminating party**") to terminate the contract with its counterparty ("**debtor**") due to the occurrence of an 'event of default'. In the context of insolvency law, in some of these *ipso facto* clauses, the 'event of default' includes applying for insolvency, commencement of insolvency proceedings, appointment of insolvency representative, et al. The United Nations

Commission on International Trade Law[64] released its *Legislative Guide on Insolvency Law* in 2004[65]. This guide defines *ipso facto* clauses in the following terms:

> "114. Many contracts include a clause that defines events of default giving the counterparty an unconditional right, for example, of termination or acceleration of the contract (sometimes referred to as "ipso facto" clauses). These events of default commonly include the making of an application for commencement, or commencement, of insolvency proceedings; the appointment of an insolvency representative; the fact that the debtor satisfies the criteria for commencement of insolvency proceedings; and even indications that the debtor is in a weakened financial position…"

The validity of such *ipso facto* clauses has been considered in a global perspective by international organizations and in the domestic jurisdictions of nation-states in their national insolvency laws. In order for us to assess their validity in India, we must first understand the global trends in contemporary jurisprudence. We can attempt to extrapolate our experiential learning from comparative law. As India develops into a responsive member of the international community, our laws cannot afford to be inward-looking.

J.1 Position of international and multilateral organizations

89 The UNCITRAL Guide notes that insolvency laws across various jurisdictions either uphold *ipso facto* clauses or invalidate them. It notes the arguments of both sides thus:

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[64] "**UNCITRAL**"

[65] "**UNCITRAL Guide**"; Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> accessed 18 February 2021. The UNITRAL Guide was created with the intent that it would be used "as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations"

> "115. The approach of upholding these types of clauses may be supported by a number of factors, including the desirability of respecting commercial bargains; the need to prevent the debtor from selectively performing contracts that are profitable and rejecting others (an advantage that is not available to the counterparty); the effect on financial contract netting of not upholding an automatic termination provision; the belief that, since an insolvent business will generally be unable to pay, delaying the termination of contracts potentially only increases existing levels of debt; the need for creators of intellectual property to be able to control the use of that property; and the effect on the counterparty's business of termination of a contract, especially one with respect to an intangible.
>
> 116. Under a different approach, the insolvency law overrides those clauses, making them unenforceable. Where the clause provides, for example, for termination on the occurrence of the defined event, the contract can be continued over the objection of the counterparty. Although the approach of overriding such clauses can be regarded as interfering with general principles of contract law, such interference may be crucial to the success of the proceedings. In reorganization, for example, where the contract is a critical lease or involves the use of intellectual property embedded in a key product, continued performance of the contract may enhance the earnings potential of the business; reduce the bargaining power of an essential supplier; capture the value of the debtor's contracts for the benefit of all creditors; and assist in locking all creditors into a reorganization."

90 In finding a pragmatic solution to a vexed issue such as the validity of ipso facto clauses, the law acknowledges the inherent tension between the primary arguments on both sides of the debate. One the one hand there is a need of ensuring that the debtor remains as a 'going concern' throughout the insolvency process. On the other hand, the law has to respect the freedom to enter upon contracts and the sanctity of enforcing contractual remedies. Controlling the ambit of ipso facto clauses does give rise to arguments of infringing upon the parties' freedom to enter into and enforce their contracts. The UNCITRAL Guide offers guidance to national authorities by concluding that it is desirable that their

national insolvency laws override such *ipso facto* clauses, subject to limited exceptions, since the continued performance of the terminated contracts is often crucial to the success of the insolvency process. The UNCITRAL Guide states this in the following terms:

> "118. Although some insolvency laws do permit these types of clause to be overridden if insolvency proceedings are commenced, this approach has not yet become a general feature of insolvency laws. There is an inherent tension between promoting the debtor's survival, which may require the preservation of contracts, and injecting unpredictability and extra cost into commercial dealings by creating a variety of exceptions to general contract rules. **While this issue is clearly one that may require a careful weighing of the advantages and disadvantages, there are, nevertheless, circumstances where the ability of the insolvency representative to ensure that a contract continues to be performed will be crucial to the success of reorganization and also, but perhaps to a lesser extent, liquidation where the business is to be sold as a going concern. For these reasons, it is desirable that an insolvency law permit such clauses to be overridden.** Any negative impact of a policy of overriding these types of clauses can be balanced by providing compensation to creditors who can demonstrate that they have suffered damage or loss as a result of the contract continuing to be performed after commencement of insolvency proceedings, or including exceptions to a general override of these clauses for certain types of contracts, such as contracts to lend money and, in particular, financial contracts (see below, paras. 208-215)."
>
> **(emphasis supplied)**

91 The World Bank, in its *Principles for Effective Insolvency and Creditor/Debtor Regimes* published in 2016[66], notes that *ipso facto* clauses should be overridden, subject to limited exceptions. It states thus:

> "C10 Treatment of Contractual Obligations

[66] Available at <http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 18 February 2021.

…

C10.2 To gain the benefit of contracts that have value, the insolvency representative should have the option of performing and assuming the obligations under those contracts. Contract provisions that provide for termination of a contract upon either an application for commencement or the commencement of insolvency proceedings should be unenforceable subject to special exceptions."

92 While assessing the position adopted by supranational organizations, we note that the European Parliament issued Directive (EU) 2019/1023 on 20 June 2019[67] in relation to the restructuring and insolvency framework in the European Union, thereby amending the previous Directive. The EU Directive notes in its Recitals the issues which can arise for a Corporate Debtor undergoing restructuring when its suppliers terminate contracts based on *ipso facto* clauses. The Recitals state as follows:

"(40) When a debtor enters an insolvency procedure, some suppliers can have contractual rights, provided for in so called ipso facto clauses, entitling them to terminate the supply contract solely on account of the insolvency, even if the debtor has duly met its obligations. Ipso facto clauses could also be triggered when a debtor applies for preventive restructuring measures. **Where such clauses are invoked when the debtor is merely negotiating a restructuring plan or requesting a stay of individual enforcement actions or invoked in connection with any event connected with the stay, early termination can have a negative impact on the debtor's business and the successful rescue of the business. Therefore, in such cases, it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay.**

(41) **Early termination can endanger the ability of a business to continue operating during restructuring negotiations, especially when contracts for essential**

[67] "**EU Directive**"

> **supplies such as gas, electricity, water, telecommunication and card payment services are concerned.** Member States should provide that creditors to which a stay of individual enforcement actions applies, and whose claims came into existence prior to the stay and have not been paid by a debtor, are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential executory contracts during the stay period, provided that the debtor complies with its obligations under such contracts which fall due during the stay. Executory contracts are, for example, lease and licence agreements, long term supply contracts and franchise agreements."
>
> **(emphasis supplied)**

93 Thereafter, the EU Directive recommends that the member States of the European Union shall ensure that creditors are not allowed to terminate contracts based on *ipso facto* clauses when the 'event of default' is a Corporate Debtor undergoing restructuring. Article 7 of the Directive states as follows:

> "Article 7
>
> Consequences of the stay of individual enforcement actions
>
> …
>
> 5. Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of:
>
> (a) a request for the opening of preventive restructuring proceedings;
>
> (b) a request for a stay of individual enforcement actions;
>
> (c) the opening of preventive restructuring proceedings; or
>
> (d) the granting of a stay of individual enforcement actions as such."

J.2 National jurisdictions

94 As we begin assessing the positions of national jurisdictions, it is apposite that we begin by analyzing the contradictory positions adopted by the United States and the United Kingdom before looking at European and other nations with civil law traditions, and thereafter at nations with common law roots.

J.2.1 United States

95 In the US, Section 365(e) of the United States Bankruptcy Code, 1979 ("**US Bankruptcy Code**") renders *ipso facto* clauses unenforceable when they are present in an executory contract or an unexpired lease. Section 365(e) stipulates:

> "(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on-
>
> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title; or
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement"

96 A related provision, Section 541(c)(1)(B) of the US Bankruptcy Code provides that "an interest of the debtor in property becomes property of the estate" in spite of any "agreement, transfer instrument, or applicable non-bankruptcy law" which "gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property". However, even so, the US

Bankruptcy Code does allow *ipso facto* clauses in certain contracts (swap agreements, securities, forwarding, et al) to be enforceable.

97 Further, there have been instances where District Bankruptcy Courts in United States have invalidated *ipso facto* clauses in contracts other than executory contracts or unexpired leases based on broad considerations relating to the purpose of the US Bankruptcy Code. The *ipso facto* provisions in such contracts may not be *per se* invalid, but they may be set aside where "any such default would deprive the debtor of the advantages of the Code's liquidation procedures"[68]. For instance, the District Court for the District of Delaware has noted "the general trend of the federal courts that the prohibition against *ipso facto* clauses is not limited to actions [involving executory contracts or unexpired leases]", while invalidating an *ipso facto* clause premised on bankruptcy filing[69]. Similarly, in another case, an *ipso facto* clause in a non-executory contract was held to be invalid because "it would defeat the purposes of the [US] Bankruptcy Code" and "cannot be enforced by a court of equity"[70]. The Bankruptcy Court reasoned that:

> "Under the Bankruptcy Code, there is no statutory mandate that bankruptcy-default clauses are valid and enforceable. The only Congressional statement is clear that in most, if not all, instances, such clauses are not enforceable. Also, cf. Sections 363(l) and 541(c)(1)(B) of the Bankruptcy Code, where bankruptcy-default clauses are not given effect. Thus, there is simply no reason to assume that Congress intended to make these clauses enforceable only in non-executory contracts. Such an assumption would be directly contrary to the spirit and purposes of the

[68] Riggs National Bank of Washington, D.C. v. John Gillis Perry, Jr., in Re John Gillis Perry, Jr., Debtor, 729 F.2d 982 (4th Cir. 1984)n(Court of Appeals for the Fourth Circuit).
[69] In re W.R. Grace & Co., 475 B.R. 34, 154 (D. Del. 2012).
[70] In the Matter of James Margaret Rose Jr., Debtors 21 B.R. 272 (Bankr. D.N.J. 1982) (United States Bankruptcy Court, D. New Jersey).

> Bankruptcy Code. One of the objectives of bankruptcy laws is to enable debtors to make a fresh start."[71]

However, it is important to note that District Court of New York has taken a contrary position, holding that the text of Section 365(e) of the US Bankruptcy Code is clear and limits its prohibition only to executory contracts and unexpired leases[72]. Hence, the position in relation to this issue seems to be unsettled even in the US.

J.2.2 United Kingdom

98 Coming to the position of law in the UK, we must first acknowledge that the insolvency regime there is governed not just by legislation but also through common law doctrine. The important common law doctrine is the 'anti-deprivation rule', which seeks to prevent the improper removal of an asset from the debtor's estate, which would reduce the debtor's overall net asset value, which would in turn reduce the size of the pie. Hence, the rule seeks to prevent the debtor's assets from being reduced before they can become subject to the insolvency process. As such, it has been argued that *ipso facto* clauses could be in violation of the anti-deprivation rule since they allow a party to terminate a contract upon commencement on insolvency, which then takes away the debtor's valuable asset (*i.e.*, the contract).

[71] Ibid
[72] In Re General Growth Properties, Inc., 451 B.R. 323 (Bankr. S.D.N.Y. 2011) (United States Bankruptcy Court, S.D. New York).

99 The scope of the anti-deprivation rule was clarified by the UK Supreme Court[73] in the case of **Belmont Park Investments Pty Ltd and others** vs **BNY Corporate Trustee Services Ltd and another (Revenue and Customs Comrs and another intervening)**[74]. The facts of this case have been succinctly summarized in an article by Adrienne Ho in the McGill Law Journal: the reproduction below is from the footnoted article [75]:

(i) Lehman Brothers set up special purpose vehicles ("**Issuer**"), which in turn issued Notes to investors ("**Noteholders**"), including the respondents. The Issuer used the Notes' proceeds to purchase secure investments ("**Collateral**") while simultaneously entering into credit default swap agreements ("**Agreements**") with Lehman Brothers Special Financing ("**LBSF**"). LBSF agreed to pay the Issuer premiums in exchange for the latter's credit protection on loans owned by Lehman Brothers. The premiums the Issuer received from LBSF were then paid to the Noteholders. The Agreement was governed by English law;

(ii) On the basis that Lehman Brothers' and LBSF's Chapter 11 filings (*i.e.*, for bankruptcy in the US) in 2008 were 'Events of Default' as outlined in the Agreements, the Noteholders directed the Trustee to terminate the Agreements. The Collateral, which was held by the Trustee, provided security for the Issuer's obligations to the Noteholders and LBSF. Although the latter had priority to the Collateral, the Agreements contained a

[73] "**UKSC**"
[74] [2011] 3 W.L.R. 521; hereinafter referred to as "**Belmont Park**"
[75] As noted in Adrienne Ho, The Treatment of Ipso Facto Clauses in Canada, (2015) 61:1 McGill LJ 139.

provision ("**flip clause**") that would reverse the priorities in favour of the Noteholders if an Event of Default occurred; and

(iii) LBSF argued the flip clause was invalid for two reasons: first, it deprived LBSF of property that it would have been otherwise entitled to in its bankruptcy; and second, the clause offended the anti-deprivation rule by reversing LBSF's and the Noteholders' respective priorities on the basis of LBSF's bankruptcy.

100 The UKSC in this case was considering the contours of the anti-deprivation rule, which protects against the dilution of the debtor's value. This is quite distinct from a situation where the effect of the concerned clause would be the failure of the insolvency resolution process in its entirety. Writing the majority opinion, Lord Collins upheld the flip clause on the basis that it was "a complex commercial transaction entered into in good faith" and that the provisions were not used deliberately to evade the application of insolvency law, which was a key requirement for the application of the anti-deprivation rule. The learned judge held thus:

> "102 It would go well beyond the proper province of the judicial function to discard 200 years of authority, and to attempt to re-write the case law in the light of modern statutory developments. **The anti-deprivation rule is too well-established to be discarded despite the detailed provisions set out in modern insolvency legislation, all of which must be taken to have been enacted against the background of the rule.**
>
> 103 As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly relevant factors in the application of the anti-deprivation rule. Despite statutory inroads, party autonomy is at the heart of English commercial law. Plainly there are limits to party autonomy in the field with which this appeal is concerned, not least

because the interests of third party creditors will be involved. **But, as Lord Neuberger stressed [2010] Ch 347, para 58, it is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed. And there is a particularly strong case for autonomy in cases of complex financial instruments such as those involved in this appeal.**

104 **No doubt that is why, except in the case of a blatant attempt to deprive a party of property in the event of liquidation** (Folgate London Market Ltd v Chaucer Insurance plc [2011] EWCA Civ 328; The Times, 13 April 2011), **the modern tendency has been to uphold commercially justifiable contractual provisions which have been said to offend the anti-deprivation rule:** Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd [2002] 1 WLR 1150; Lomas v JFB Firth Rixson Inc [2011] 2 BCLC 120; and the judgments of Sir Andrew Morritt C and the Court of Appeal in these proceedings. The policy behind the anti-deprivation rule is clear, that the parties cannot, on bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors. **It is possible to give that policy a common sense application which prevents its application to bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy.**"

(emphasis supplied)

101 Lord Mance in his concurring opinion, expressed a similar view:

"177 However, Mr Snowden advanced propositions which would mean that any provision for termination on bankruptcy, which would deprive the trustee or liquidator of the opportunity of continuing the contract and so the bankrupt estate of future potential advantage, would infringe the principle. There is in my opinion no basis for any such rule. **Where a contract provides for the performance in the future of reciprocal obligations, the performance of each of which is the quid pro quo of the other, I see nothing objectionable or evasive about a provision entitling one party to terminate if the other becomes bankrupt.**"

(emphasis supplied)

As such, it was understood that *bona fide* commercial contracts entered into by parties which contained *ipso facto* clauses would not violate the anti-deprivation rule.

102 Lord Mance also discussed the parallel proceedings in the US and the legislative invalidation of *ipso facto* clauses there. Noting the difference between the position in the UK and the US, he concluded by holding that a similar invalidation of *ipso facto* clauses in the UK should be done legislatively, and not through a common law development. He held thus:

> "173 It is relevant to note that the American bankruptcy rule invalidating ipso facto termination clauses is a product of legislation: section 365(e) of the Bankruptcy Code 1978…
>
> 174 **The anti-deprivation principle recognised in English case law finds a parallel in section 541. But the English case law has to date focused on deprivation of property, and has not recognised any equivalent principle to that enacted in section 365(e).** Further, section 365(e) is itself qualified by the "safe harbour" provisions of section 560, which specifically protect a non-defaulting swap participant's contractual rights to liquidate, terminate or accelerate a swap agreement because of a condition of the kind specified in section 365(e)(1), that is the insolvency or financial condition of the debtor and the commencement of a bankruptcy case... **What it does suggest is that any general rule invalidating ipso facto termination clauses ought to be a matter for legislative attention, rather than novel common law development.**"
>
> **(emphasis supplied)**

103 The decision in **Belmont Park** (supra) has been followed by the Chancery Division in **Fibria Celulose S/A v Pan Ocean Co Ltd** vs **Fibria Celulose S/A Chancery Division**, dated 30 June 2014[76]. Morgan J held thus:

> "12 In some jurisdictions, a clause which allows a party to a contract to terminate the contract by reason of the insolvency of the counterparty is called an ipso facto clause. In certain jurisdictions in the United States of America such clauses are automatically invalid. In Canada, the court has power to stay the exercise of rights under such clauses. Later in this judgment, I will consider how such clauses are treated under Korean insolvency law.
>
> 13 **There was no dispute before me as to the efficacy in English law of the provisions in clause 28.1 of the contract which allow termination by reason of an insolvency event. It was accepted that those provisions are valid in English law. In particular, it was accepted that the rule of insolvency law, known as the anti-deprivation rule, does not strike down those provisions.**
>
> 14 Although there was no argument as to the approach of an English court to the insolvency provisions in clause 28.1 of the contract, it is helpful for present purposes to understand why those provisions do not infringe the anti-deprivation rule or any other rule of English insolvency law. The scope of the anti-deprivation rule has been considered recently by the Supreme Court in Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd (Revenue and Customs Comrs intervening) [2011] Bus LR 1266; [2012] 1 AC 383…"
>
> **(emphasis supplied)**

104 In his treatise, *Principles of Corporate Insolvency Law*[77], Professor Roy Goode has discussed the effect of the decision in **Belmont Park** (supra) on the validity of *ipso facto* clauses. Professor Goode does so in the following terms:

> "As explained above, **the validity of provisions for the termination of contracts by reason of one party's entry into insolvency proceedings has long been assumed,**

[76] [2014] Bus. L.R. 1041; hereinafter referred to as "**Pan Ocean Co Ltd**"
[77] 5th ed (London: Sweet & Maxwell, 2018), paras 7-24 and 7-29

> **and appears to have been accepted by Lord Mance in Belmont. Such provisions do not escape the rule because they effect no deprivation of property (in substance, they do), but because they are commercially sensible or (in Lord Mance's language) have a legitimate commercial basis.**
>
> …
>
> The statute law of some jurisdictions prohibits counterparties from relying on clauses in contracts that permit termination on another party's entry into insolvency proceedings (so-called ipso facto clauses). Absent statutory control, such clauses allow a counterparty to terminate even in circumstances where the debtor is ready, willing and able to perform their part of the bargain so that creditors can enjoy the benefit of performance by the counterparty. Such clauses can also be wielded as leverage to extract concessions from the debtor, as where the counterparty agrees to keep the contract on foot on the proviso that any outstanding debts owing by the company to it are discharged.
>
> **English law has traditionally taken a generous approach to such clauses. The common law anti-deprivation rule does not invalidate termination clauses, there being "nothing objectionable or evasive about a provision entitling one party to terminate it [a bilateral contract] if the other becomes bankrupt".** As David Richards J explained in the Football Creditors case:
>
> "In the absence of specific statutory provision, insolvency law does not compel a party to continue to deal with a company in administration or liquidation, nor does it prohibit a party from stipulating that all future dealings shall be on terms that not only future debts but also existing debts are paid in full. It is then for the administrator or liquidator to decide whether to accept these terms.""
>
> **(emphasis supplied)**

105 On the legislative side, the insolvency regime in the UK is governed by the Insolvency Act, 1986[78], which does not invalidate *ipso facto* clauses. However, the UK Act was recently amended by the Corporate Insolvency and Governance

[78] "**UK Act**"

Act 2020[79], which came into force on 26 June 2020. Amongst other changes, it introduced Section 233B into the UK Act. Section 233B reads thus:

> "Protection of supplies of goods and services
>
> (1)This section applies where a company becomes subject to a relevant insolvency procedure.
>
> (2) …
>
> **(3)A provision of a contract for the supply of goods or services to the company ceases to have effect when the company becomes subject to the relevant insolvency procedure if and to the extent that, under the provision—**
>
> **(a)the contract or the supply would terminate, or any other thing would take place, because the company becomes subject to the relevant insolvency procedure, or**
>
> **(b)the supplier would be entitled to terminate the contract or the supply, or to do any other thing, because the company becomes subject to the relevant insolvency procedure.**
>
> **(4)Where—**
>
> **(a)under a provision of a contract for the supply of goods or services to the company the supplier is entitled to terminate the contract or the supply because of an event occurring before the start of the insolvency period, and**
>
> **(b)the entitlement arises before the start of that period, the entitlement may not be exercised during that period.**
>
> **(5)Where a provision of a contract ceases to have effect under subsection (3) or an entitlement under a provision of a contract is not exercisable under subsection (4), the supplier may terminate the contract if—**
>
> (a)in a case where the company has become subject to a relevant insolvency procedure as specified in subsection (2)(b), (c), (e) or (f), the office-holder consents to the termination of the contract,
>
> (b)in any other case, the company consents to the termination of the contract, or

[79] "**CIGA**"

> **(c)the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for the termination of the contract.**
>
> **(6)Where a provision of a contract ceases to have effect under subsection (3) and the company becomes subject to a further relevant insolvency procedure, the supplier may terminate the contract in accordance with subsection (5)(a) to (c).**
>
> (7)The supplier shall not make it a condition of any supply of goods and services after the time when the company becomes subject to the relevant insolvency procedure, or do anything which has the effect of making it a condition of such a supply, that any outstanding charges in respect of a supply made to the company before that time are paid.
>
> (8) …
>
> (9) …
>
> (10) …"
>
> **(emphasis supplied)**

106 The Legislative Comment to the introduction of Section 233B reads as follows:

> "Ipso facto (termination) clauses
>
> A permanent change to the use of termination clauses in supply contracts is introduced by the Bill. **In circumstances where a company has entered an insolvency or restructuring procedure, or obtains a moratorium, the company's suppliers will not be able to rely on contractual terms to stop supplying the company or vary the contract terms (e.g. by increasing the price of supplies).**
>
> **The customer is required to pay for any supplies made once the company is in the insolvency process, but is not required to pay outstanding amounts due for past supplies while it is arranging its rescue plan. Safeguards are contained in the Bill to ensure that suppliers can be relieved of the requirement to supply if it causes hardship to their business, and a temporary exemption will operate for small companies during the Coronavirus emergency**."
>
> **(emphasis supplied)**

107 We can therefore conclude that while Section 233B invalidates *ipso facto* clauses, it does so only in relation to contracts where the terminating party is supplying goods and services to the Corporate Debtor, and does not cover those contracts where the Corporate Debtor was supplying to the terminating party. Further, Section 233B(5)(c) allows an exception even in relation to supplier contracts when it causes "financial hardship" to the terminating party, and Section 233B(6) allows a termination if once after the terminating party is prevented from terminating, the Corporate Debtor goes through another insolvency proceeding. It has also been noted by certain commentators that, given the narrow scope of Section 233B, the decision in **Belmont Park** (supra) would still have been decided in the same way even under this new regime[80]. Finally, discussing the legislative process behind CIGA, Felicity Toube QC and Joanne Rumley have noted that the UK Parliament did not intend to use CIGA to bring UK in line with the US position on broad invalidation of *ipso facto* clauses, but rather their focus was on ensuring that the Corporate Debtor retains its supply of goods during the insolvency process[81].

J.2.3 Austria

108 A position similar to the US has been adopted in Austria where, after the insolvency regime reform which came into force on 1 July 2010, *ipso facto* clauses are broadly considered invalid in accordance with Section 25b(2) of the

[80] 'Corporate Insolvency and Governance Act: Ipso Facto (Termination) Clauses' (Ashurst, 26 June 2020) <https://www.ashurst.com/en/news-and-insights/legal-updates/ciga---ipso-facto-termination-clauses/> accessed 18 February 2021.
[81] Felicity Toube QC, Joanne Rumley 'A brave new world? Should the UK ban ipso facto clauses in non-executory contracts?' Insolvency Intelligence 2018

Austrian Insolvency Code[82]. This law renders unenforceable all such provisions in contracts which provide a party with termination rights, due to the opening of insolvency proceedings against the debtor. However, this is only so when the terminating party's interests are not unreasonably affected, *i.e.*, when a terminating party can show a good cause for termination, the termination shall not be rendered unenforceable. Further, contractual terminations due to other events of defaults mentioned in contracts remain valid[83].

J.2.4 France

109 This is also the position in France which, since its 2014 reform, in accordance with Articles L622-13[84], L631-14(I)[85] and L641-11[86] of the Commercial Code, categorically states that *ipso facto* clauses in executory contracts are invalid[87]. However, termination rights referring to breaches of executory contract, other than *ipso facto* clauses, remain valid due to events of default occurring both pre- and post-commencement of insolvency proceedings. Further, the insolvency administrator does not have to treat pre-insolvency claims arising out of an executory contract preferentially to continue the contract;

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[82] "*Invalid Agreements. Section 25b. - (2) A contractual provision rescinding or terminating a contract in the event of the opening of insolvency proceedings shall be unenforceable, except for contracts pursuant to Section 20(4).*" English Translation available at <https://www.rautner.com/wp-content/uploads/2016/05/3645187_Austrian_Insolvency-Code_ENG.pdf> accessed 24 February 2021.

[83] Jan Felix Hoffmann, 'Executory Contracts, Ipso Facto Clauses and Licensing Agreements in Cross-Border Insolvencies' (2018) 27 Int'l Insolvency Rev 300, 304; 'International Comparative Legal Guides' (International Comparative Legal Guides International Business Reports) <https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/austria> accessed 18 February 2021.

[84] "…*Notwithstanding any legal rule or contractual term to the contrary, the indivisibility, termination or rescission of the contract may not result from the commencement of safeguard proceedings alone*…" English Translation available at <https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf> accessed 24 February 2021.

[85] "*I - Articles L622-2 to L622-9 and L622-13 to L622-33 shall apply to reorganization proceedings.*" English Translation available at <https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf> accessed 24 February 2021.

[86] "*The supervisory judge shall perform the duties entrusted to him by Articles L621-9, L623-2 and L631-11, the first paragraph of Article L622-13 and the fourth paragraph of Article L622-16.*" English Translation available at <https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf> accessed 24 February 2021.

[87] 'International Comparative Legal Guides' (International Comparative Legal Guides International Business Reports) <https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/france> accessed 18 February 2021.

however, she has to comply with the contract in the future to prevent termination[88].

J.2.5 Germany

110 The German insolvency regime is governed by Insolvency Statute, 1999 (Insolvenzordnung)[89]. However, a change is forthcoming, since on 17 December 2020, the German Parliament passed the Act on the Further Development of Restructuring and Insolvency Law[90], which is expected to lead to a fundamental modification of the restructuring landscape in Germany. The SanInsFoG primarily serves to implement the EU Directive discussed above, and aims at introducing a comprehensive legal framework for out-of-court restructurings. The centerpiece of the SanInsFoG is the Act on the Stabilization and Restructuring Framework for Companies[91], which partially entered into force on 1 January 2021. In accordance with Section 46 of the StaRUG, during the moratorium period, the contracting parties of the debtor cannot terminate their contract with the debtor based on *ipso facto* clauses in a pending restructuring matter.

111 However, before the StaRUG came into effect, the validity of *ipso facto* clauses had been previously considered by German Courts. On 15 November 2012, the 9th Senate of the Federal Supreme Court of Germany issued a decision which overruled the lower courts' decisions and held that *ipso facto* clauses in contracts regarding the continuous delivery of goods or energy should be invalid if such termination is either triggered by a request for the opening of

[88] *Ibid* at 305.
[89] "**InsO**"
[90] "**SanInsFoG**"
[91] "**StaRUG**"

insolvency proceedings or the opening of insolvency proceedings over the assets of the other contractual party. The Federal Supreme Court also held that for such invalidation, it was irrelevant whether the trigger was institution of insolvency proceedings or filing of an insolvency petition. Briefly, the facts of the case were that a utility provider had entered into a long-term contract for providing electricity. The energy contract had an *ipso facto* clause which allowed for automatic termination if bankruptcy proceedings were instituted over the utility provider's customer or if the customer filed a petition for bankruptcy. The *ipso facto* clause was then given effect to by the terminating party.

112 The Federal Supreme Court based its decision on the purpose of the insolvency administrator's right to opt for the performance/non-performance of contracts, which protects the assets of the insolvent company and increases such assets in the interest of a settlement of creditor claims *pari passu*. Particularly, it was noted that the insolvency administrator has the right to choose which contracts of the insolvent debtor she will perform in accordance with Section 103 of the InsO. Hence, any contractual provision excluding or limiting this right is invalid in accordance with Section 119 of the InsO. Therefore, this would be obstructed if the contractual partner of the insolvent debtor, just because of its insolvency, could terminate a contract which is in the interest and to the benefit of the insolvent debtor. Further, the Federal Supreme Court noted that the stay on termination based on *ipso facto* clauses did not lead to any disadvantage to the

terminating party since they will then receive payment for their deliveries in full as so-called preferred estate liability[92].

113 However, to the extent the statutory law itself already provides for an *ipso facto* termination right, such termination rights have been held to be valid and enforceable. Accordingly, the *ipso facto* termination of a partnership contract has in the past been upheld by the Federal Supreme Court[93]. Further, in a 2016 decision, the 7th Senate of the Federal Supreme Court upheld an *ipso facto* clause contained in a construction contract, in favour of the terminating party. It held that such clauses are valid when the contracting party has a reasonable right to terminate the contract in insolvency, and the estate's interests are not unreasonably affected. Thus, the position of German law on the validity of such clauses was never entirely settled judicially[94].

J.2.6 Greece

114 Article 32 of the Bankruptcy Code (Law 3588/2007) states that there would be "no prejudice to the counter contracting party's rights to rescind the contract, based on a clause that allows the rescission in case of insolvency of the other party or subjection to collective execution proceedings"[95]. Hence, *ipso facto* clauses are legislatively provided validity in Greece.

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[92] 'Potential Invalidity of Insolvency-Related Termination Clauses under German Insolvency Rules' (Global Restructuring Watch, 17 September 2014) <https://www.globalrestructuringwatch.com/2014/09/potential-invalidity-of-insolvency-related-termination-clauses-under-german-insolvency-rules/> accessed 18 February 2021.

[93] Volker Gattringer, 'German Supreme Court renders ipso facto clauses invalid and unenforceable – Roma locuta, causa finita?' (K&L Gates, 27.02.2013).

[94] Jan Felix Hoffmann, 'Executory Contracts, Ipso Facto Clauses and Licensing Agreements in Cross-Border Insolvencies' (2018) 27 Int'l Insolvency Rev 300, 305.

[95] Christoph G Paulus and Stathis Potamitis and Alexandros Rokas and Ignacio Tirado, 'Insolvency Law as a Main Pillar of Market Economy - A Critical Assessment of the Greek Insolvency Law' (2015) 24 Int'l Insolvency Rev 1, 18.

J.2.7 Republic of Korea

115 The Republic of Korea follows the civil law tradition. Under Article 119(1) of the Debtor Rehabilitation and Bankruptcy Act of Korea[96], the custodian of a company undergoing rehabilitation may choose to cancel or terminate an unperformed bilateral contract. Article 119 appears to allow the custodian to require the other party to fulfil its obligations under such a contract. While some commentators have noted that this is believed to essentially be in the nature of a restriction on an *ipso facto* clause, others state that this position has not been adopted uniformly by all courts[97]. In fact, the International Monetary Fund issued a technical note in September 2020 on "Insolvency and Creditor Rights" while conducting a "Financial Sector Assessment Program" of Republic of Korea, in which they also noted this lack of clarity and recommended legislative guidance[98].

116 A lack of this clarity is shown by a case where the predecessor of Article 119 was considered by the Korean Supreme Court in its decision dated 6 September 2007 in the case of **Allied Domecq (Holdings) plc** vs **The trustee of Jinro Co Ltd**[99]. This was noted in the decision of **Pan Ocean Co Ltd** (supra)[100],

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[96] "*Article 119 (Options when Both Parties Fail to Fulfill Bilateral Contract) - (1) When the debtor and the other party to a bilateral contract have yet to complete performance of the contract at the time rehabilitation procedures commence, any custodian may cancel or terminate such bilateral contract and request the debtor to meet his/her obligations and require the other party to fulfill his/her obligations: Provided, That the custodian shall not cancel or terminate the bilateral contract after the assembly of related persons held to deliberate on a rehabilitation proposal or a decision is made to pass a written resolution on any case pursuant to the provisions of Article 240.*"

[97] June Young Chung and Sy Nae Kim, "Korean Corporate Rehabilitation Proceedings and Cross-Border Insolvency - From the Perspective of the Hanjin Shipping Bankruptcy Case" <https://nysba.org/NYSBA/Sections/International/Events/2018/Seoul%20Regional%20Meeting/Course%20Materials/4_Korean%20Corporate%20Rehabilitation%20Proceedings%20and%20Cross-border%20Insolvency_....pdf> accessed 24 February 2021.

[98] Footnote 26 at Page 16, available at <https://www.imf.org/~/media/Files/Publications/CR/2020/English/1KOREA2020003.ashx> accessed 24 February 2021.

[99] "**Allied Domecq**"

[100] Para 49.

discussed above, where the Chancery Division was considering the *ipso facto* clause in a contract governed by English law, but where the party was undergoing insolvency proceedings in Republic of Korea. The Korean Supreme Court held in **Allied Domecq** (supra) that, in a case not governed by Article 119, an insolvency termination clause would be valid. It then considered the types of contract which came within Article 119, and referred to the nature of the obligations under the particular unperformed bilateral contract in that case. Ultimately, it held that the contract in that case was not governed by Article 119.

117 Further, **Pan Ocean Co Ltd** (supra) also discussed[101] a later decision of a Korean Court dated 24 January 2014 in **Trustee of Tongyang Networks Co Ltd** vs **Standard Chartered Bank Ltd**, which concerned a contract under which the debtor company was to provide services to the bank. The contract contained an insolvency termination clause and the bank gave, or purported to give, notice to terminate pursuant to that clause. The trustee of the debtor company argued that the bank's right to terminate should be considered null and void by reason of Article 119 or, alternatively, the bank should refrain from terminating the contract at least during the period of the rehabilitation. The court considered the earlier decision in **Allied Domecq** (supra) and held that to achieve a proper balance between the purpose of rehabilitation and the principle of freedom of contract and the counterparty's need to be able to trust the debtor company, it was necessary to look at all the circumstances, such as the nature of the contract, the necessity to protect the debtor and the counterparty and allied relevant factors. The Court

[101] Para 52.

then conducted a detailed examination of what it regarded as the relevant factors, and held that Article 119 did not render the insolvency termination clause null and void. However, the Chancery Division in **Pan Ocean Co Ltd** (supra) did note that this decision may have been appeal in Republic of Korea.

J.2.8 Canada

118 Legislatively, in Canada, Sections 65.1[102], 66.34[103] and 84.2[104] of the Bankruptcy & Insolvency Act[105] and provisions of the Companies' Creditors Arrangement Act[106] invalidate *ipso facto* clauses in both commercial and consumer restructurings, and are intended to protect consumer debtors from the deleterious consequences of provisions that trigger upon bankruptcy. These provisions also clarify that any contractual clause that, in substance, is contrary to

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[102] "Certain rights limited
65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that:
(a) the insolvent person is insolvent; or
(b) a notice of intention or a proposal has been filed in respect of the insolvent person.
…
Provisions of section override agreement
(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect."

[103] "Certain rights limited
66.34 (1) If a consumer proposal has been filed in respect of a consumer debtor, no person may terminate or amend any agreement, including a security agreement, with the consumer debtor, or claim an accelerated payment, or the forfeiture of the term, under any agreement, including a security agreement, with the consumer debtor, by reason only that:
(a) the consumer debtor is insolvent, or
(b) a consumer proposal has been filed in respect of the consumer debtor until the consumer proposal has been withdrawn, refused by the creditors or the court, annulled or deemed annulled.
…
Provisions of section override agreement
(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect."

[104] "Certain rights limited
84.2 (1) No person may terminate or amend — or claim an accelerated payment or forfeiture of the term under — any agreement, including a security agreement, with a bankrupt individual by reason only of the individual's bankruptcy or insolvency.
…
Provisions of section override agreement
(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect."

[105] "**BIA**"

[106] "**CCAA**"

the provisions as a whole is of no force or effect. However, their prohibition on *ipso facto* clauses does not apply to agreements such as commodities and forward contracts. Further, the terminating party, including utilities, can apply for a court order that these provisions do not apply, or only apply to an extent determined by the court, if they can demonstrate that the operation of these provisions will cause it significant hardship[107].

119 On the other hand, judicially, in a split decision on 2 October 2020, the Supreme Court of Canada[108] upheld the Alberta Court of Appeal's majority decision in **Chandos Construction Ltd.** vs **Deloitte Restructuring Inc.**[109] in its capacity as Trustee in Bankruptcy of Capital Steel Inc., a bankrupt (Chandos). Briefly, the facts of the case were that:

(i) Chandos had subcontracted a project's steel work to Capital Steel. The subcontract included a term under which Capital Steel agreed to forfeit ten percent of the contract price if it became insolvent "as a fee for the inconvenience of [Chandos] completing the work using alternate means and/or for monitoring the work" ("**Insolvency Clause**"); and

(ii) Capital Steel completed most of its work under its subcontract with Chandos before making an assignment in bankruptcy. Deloitte was appointed as trustee of the estate of Capital Steel and Capital Steel ceased operations at that time. As a result, Chandos had to complete the steel work at its own cost. Even after costs of completion were accounted

[107] *See* Adrienne Ho, The Treatment of Ipso Facto Clauses in Canada, (2015) 61:1 McGill LJ 139.
[108] "**SCC**"
[109] 2020 SCC 25

for, Chandos owed a balance to the estate of Capital Steel based on the remaining unpaid contract price. However, Chandos took the position that it could rely on the Insolvency Clause to deduct 10% of the contract price (almost $140,000) as an 'inconvenience fee' and that, once deducted, Chandos owed nothing to Capital Steel. The trustee brought an application seeking a judicial determination of whether the Insolvency Clause was enforceable.

120 The majority opinion of the SCC held that the present clause violated the common law doctrine grounded in the 'anti-deprivation rule', which invalidates provisions that are "engaged by a debtor's insolvency and remove value from the debtor's estate to the prejudice of creditors". Further, it reasoned that the anti-deprivation rule continues to exist at common law; that it was part of Canadian law, and was neither judicially nor legislatively excluded. It further continued to exist even though it was not fully codified in the BIA. Since this rule voids contractual terms that prevent property from passing to the bankruptcy trustee, the non-application of this rule would also go against the purpose of section 71 of the BIA. The majority opinion ultimately relied on the 'effects-based' test for understanding the anti-deprivation rule, noting it was in consonance with the BIA, thereby holding that any clause which had the 'effect' of removing a debtor's estate would be invalid as being against the anti-deprivation rule. On the contrary, the dissenting opinion relied on the 'bona fide commercial transaction test' as enunciated by the UKSC in **Belmont Park** (supra), and noted that the codification of the invalidity of *ipso facto* clauses in BIA was unrelated to the

principles behind anti-deprivation rule since "*ipso facto* provisions are aimed at protecting debtors; the anti-deprivation rule, by contrast, protects creditors"[110].

121 Some commentators note that the practical effect of this decision is that if a contracting party enters insolvency proceedings, certain contractual clauses that are triggered by insolvency and remove value from the debtor's estate are void and will not be given effect by Canadian courts. Further, they believe that the SCC rejected the UK Supreme Court's more lenient view of the anti-deprivation rule and aligned more closely to the policy underlying the anti-*ipso facto* clause provisions in the US Bankruptcy Code[111].

J.2.9 Australia

122 Recently in Australia, the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act, 2017[112] amended the Corporations Act, 2001, which governs the insolvency regime. Under this new regime, during the period of a specified restructuring or insolvency procedure, a right in a contract, agreement or arrangement will not be enforceable, and 'self-executing provisions' will not apply, by reason only of "[t]he company entering the specified procedure; the company's financial position; a prescribed reason; or a reason that is in substance contrary to the above".

[110] Para 118.
[111] 'Chandos Upheld by Supreme Court of Canada: The Anti-Deprivation Rule in Canada' (Norton Rose Fulbright, January 2021) <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/db4bb7a6/chandos-upheld-by-supreme-court-of-canada> accessed 18 February 2021.
[112] "**Amending Act**"

123 Before this amendment, termination of contracts based on *ipso facto* clauses was permitted[113]. The new regime also applies to contracts entered into on or after 1 July 2018, *i.e.*, its application is prospective only. However, certain contracts and contractual rights have been excluded from the operation of the stay under this new regime. Critically, in respect of financing arrangements, the *ipso facto* reforms will not apply to (amongst other things) syndicated loans, securities, bonds, promissory notes, financial products, derivatives, and certain contracts involving special purpose vehicles. The excluded contractual rights do not depend on the type of contracts in which they are embodied.

124 However, according to the Explanatory Memorandum to the Amending Act, the stay is not intended to restrict a counterparty from enforcing a right (or disapply self-executing provisions) for any other reason, such as a breach involving non-payment or non-performance. Further, the *ipso facto* provisions also allow the relevant insolvency administrator to apply for an order expanding the stay to prohibit the exercise of rights (for example, a right to terminate for convenience), even where the right does not expressly operate on the basis of one of the prohibited reasons set out above, if the court is satisfied that a counterparty is likely to exercise those rights for a prohibited reason[114].

[113] 'The Impact of Insolvency on Licence Agreements' (2015) 254 Managing Intell Prop 31, 32.
[114] 'Australia's New Ipso Facto Regime Is Now Live: Are Your Contractual Rights Affected?' (Herbert Smith Freehills | 2 July 2018) <https://www.herbertsmithfreehills.com/latest-thinking/australia%E2%80%99s-new-ipso-facto-regime-is-now-live-are-your-contractual-rights-affected> accessed 18 February 2021.

J.2.10 Singapore

125 In Singapore, *ipso facto* clauses are prohibited in accordance with Section 440[115] of the Insolvency, Restructuring and Dissolution Act, 2018 ("**IRDA**"), which came into force on 30 July 2020. This provision limits the exercise of *ipso facto* clauses which are triggered by reason only of the insolvency of a contracting party or the commencement of corporate rescue proceedings, namely proceedings for judicial management and schemes of arrangement[116]. However, this provision may not restrict a contracting party from terminating the contract if there are other events of default, for instance: (a) failure to pay outstanding sums; (b) appointment of a receiver; or (c) passing of a resolution for the winding up of the debtor. Further, section 440 does not apply retroactively, and only applies to contracts entered into after 30 July 2020[117].

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[115] "Certain contractual rights limited
440.—(1) No person may, at any time after the commencement, and before the conclusion, of any proceedings by a company —
(a) terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement (including a security agreement) with the company; or
(b) terminate or modify any right or obligation under any agreement (including a security agreement) with the company,
by reason only that the proceedings are commenced or that the company is insolvent.
(2) …
(3) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.
(4) On an application by a party to an agreement, the Court may declare that this section does not apply, or applies only to the extent declared by the Court, if the applicant satisfies the Court that the operation of this section would likely cause the applicant significant financial hardship.
(5) Subsection (1) does not apply in respect of any legal right under —
(a) any eligible financial contract as may be prescribed;
(b) any contract that is a licence, permit or approval issued by the Government or a statutory body;
(c) any contract that is likely to affect the national interest, or economic interest, of Singapore, as may be prescribed;
(d) any commercial charter of a ship;
(e) any agreement within the meaning of the Convention as defined in section 2(1) of the International Interests in Aircraft Equipment Act (Cap. 144B); or
(f) any agreement that is the subject of a treaty to which Singapore is party, as may be prescribed.
(6) …"

[116] 'Singapore - Restructuring: Ipso Facto Clauses, Distressed Debt Market Update And DIP/Rescue Finance | Conventus Law' <https://www.conventuslaw.com/report/singapore-restructuring-ipso-facto-clauses/> accessed 18 February 2021.

[117] 'Ipso Facto Clauses under the New Insolvency, Resolution & Dissolution Act' (Rajah Tann & Asia, July 2020) <https://eoasis.rajahtann.com/eoasis/lu/pdf/2020-07_Ipso-Facto-Clauses.pdf> accessed 18 February 2021.

126 In addition, two legislative safeguards have been built into the IRDA to balance the contractual interests of stakeholders:

(i) Certain types of contracts are exempted from these restrictions. These are the following: (a) derivatives contracts, margin lending agreements or securities contracts; (b) master netting agreements, securities/commodities lending or repurchase agreements, or spot contracts, that contain a netting or set-off arrangement; (c) covered bond or connected agreements; (d) debentures or connected agreements; (e) any agreement to clear or settle transactions relating to a derivatives contract; and (f) business rules of an approved exchange, a licensed trade repository, an approved or recognized clearing house or a recognized market operator; and

(ii) Exclusion from this provision can also be sought, in accordance with section 440(4), if the injunction of the ipso facto clause would "likely cause the applicant significant financial hardship"[118].

127 It is also important to note the background to this legislative reform. In 2013, Singapore's Insolvency Law Committee recommended against the adoption of such restrictions on *ipso facto* clauses. It noted the benefits in favour of restricting such clauses, which included: (a) keeping key contracts alive; and (b) protecting the interests of different contract holders and incentivizing the management to bring the defaulting company back on track. Further, it also noted

[118] 'Ipso facto clauses under the Insolvency, Restructuring and Dissolution Act' (White and Case LLP | 20 August 2020) <https://www.whitecase.com/publications/alert/ipso-facto-clauses-under-insolvency-restructuring-and-dissolution-act> accessed on 18 February 2021.

the disadvantages of such restrictions, which included: (A) existing counterparties would be locked-in to unfavourable contracts, and compelled to perform their contractual obligations even where there may be no hope of being paid; and (B) a legislative provision would be too static for the dynamic character of modern-day commercial transactions in this domain. It therefore advised against legislative intervention to restrict such clauses. However, having taken note of these criticisms, Singapore nevertheless followed the examples of Australia and the UK in legislating such restrictions on *ipso facto* clauses[119].

J.2.11 Analysis

128 On the basis of our discussion of the above-mentioned jurisdictions, the following conclusions emerge:

(i) Many jurisdictions follow the US model of legislatively invalidating *ipso facto* clauses. Interestingly, this shift has been far more prominent in the last decade even though the US Bankruptcy Code has had this position since 1979;

(ii) Some of the recent jurisdictions to follow the US model, such as Australia and Singapore, invalidate *ipso facto* clauses prospectively, *i.e.*, *ipso facto* clauses contained in the contracts entered into before the laws came into effect will not be invalidated;

(iii) The UK, through the CIGA, only invalidates *ipso facto* clauses in supplier contracts, which is similar to the effect of Section 14(2) of the IBC. Further,

[119] 'Singapore's Restrictions on Ipso Facto Clauses: What Comes next? | Lexology' <https://www.lexology.com/library/detail.aspx?g=4d40d932-2ac4-45dd-abf4-76853aa7331a> accessed 18 February 2021.

other *ipso facto* clauses are understood to be valid, based on the UKSC's decision in **Belmont Park** (supra). However, as noted previously, the UKSC decision was given in the context of the application of the anti-deprivation rule, which protects against the dilution of the value of the company in debt and does not necessarily affect the status of the company as a 'going concern';

(iv) Greece is one of the few countries which legislatively upholds *ipso facto* clauses;

(v) The position of law in the Republic of Korea is unclear due to contradictory judicial decisions, which has prompted demands for legislative clarity. This highlights the growing commercial importance of legislative clarity in this area;

(vi) Generally, even where *ipso facto* clauses are invalidated, it does not have effect on the termination rights of the terminating party based on other events of default in the contract;

(vii) Some nations which invalidate *ipso facto* clauses, such as Austria, Canada, Singapore and UK (limited to supplier contracts), provide for an exception based on "hardship" being caused to the terminating party. This "hardship" is to be determined by the courts; and

(viii) Even in nations which legislatively invalidate *ipso facto* clauses, there are often contrasting judicial decisions in relation to the scope of their invalidation. There are certain judicial decisions which go beyond the legislative text to invalidate *ipso facto* clause on broad considerations of

the object and purpose of the relevant insolvency regimes. On the other hand, there are judicial precedents, which follow a more conservative approach and strictly construe the legislative mandate.

J.3 Position in India

129 Before we consider the extent to which the lessons of other jurisdictions should be applied to India, it is important to advert to the discussion on the invalidation of *ipso facto* clauses in India.

130 In 2005, the Report of the Expert Committee on Company Law headed by J.J. Irani[120] noted the requirement of reforms in the Indian insolvency regime, specifically citing the lessons from the recently published UNCITRAL Guide. In relation to the moratorium period, it made the following observations:

> "Moratorium and suspension of proceedings
>
> 13.1 A limited standstill period is essential to provide an opportunity to genuine business to explore re-structuring.
>
> …
>
> **13.4 The law should provide for treatment of unperformed contracts. Where the contracts provide for automatic termination on filing of insolvency, its enforcement should be stayed on commencement of insolvency.**
>
> 13.5 There should be enabling provisions to interfere with the contractual obligations which are not fulfilled completely. Such interference or overriding powers would assist in achieving the objectives of the insolvency process. The power is necessary to facilitate taking appropriate business and other decisions including those directed at containing rise in liabilities and enhancing value of assets.

[120] Available at <https://ibbi.gov.in/uploads/resources/May%202005,%20J.%20J.%20Irani%20Report%20of%20the%20Expert%20Committee%20on%20Company%20Law.pdf> accessed 24 February 2021.

> 13.6 Exceptions of such powers are also essential to be insured in the law where there is a compelling, commercial, public or social interest in upholding the contractual rights of the counter party to the contract."
>
> **(emphasis supplied)**

131 The Committee noted the need to invalidate *ipso facto* clauses so as to prevent the value of a Corporate Debtor's assets from becoming diluted during the insolvency process. However, this invalidation was to be subject to exceptions, keeping in mind the "compelling, commercial, public or social interest in upholding the contractual rights of the counter party to the contract".

132 However, as is evident, this recommendation was never directly embodied legislatively since the current IBC contains no clear-cut provision which invalidates *ipso facto* clauses. In fact, the issue of the invalidation of *ipso facto* clauses was noted in a December 2018 report titled 'Insolvency and Bankruptcy Code: The journey so far and the road ahead' issued by Vidhi Centre for Legal Policy[121]. The report notes that the IBC "does not per se prohibit the operation of ipso facto clauses during insolvency proceedings. However, Section 14 provides for a limited exception prohibiting the termination, suspension or interruption of specified "essential goods or services" (i.e. water, electricity, telecommunication services and information technology services to the extent they are not direct inputs to the output produced or supplied by the corporate debtor), and also provides relief to the corporate debtor from the recovery of any property by an owner or lessor during the moratorium". As a solution, the report recommends a

[121]Pages 34-35, available at <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/IBC_Thejourneysofarandtheroadahead_Dec18.pdf> accessed on 18 February 2021.

conditional stay on the operation of *ipso facto* clauses, beginning from the insolvency commencement date, since "a complete stay on the operation of ipso facto clauses would constitute a serious restraint on the freedom of contract and would effectively compel suppliers to perform contracts even when such an action is against their commercial interests". In relation to the implementation of this solution, the report suggests the insertion of a new provision to the IBC.

133 More recently, however, the IBC was amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2020 which, *inter alia*, introduced an Explanation to Section 14(1). The Explanation to Section 14(1) reads thus:

> "14. Moratorium.—
>
> …
>
> Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period."

134 The legislative intent behind this amendment was discussed in the Report of the Insolvency Law Committee dated 20 February 2020. The Report noted the importance of keeping the Corporate Debtor as a 'going concern' during the moratorium period imposed under Section 14, and how it was being affected by the termination of certain Government licenses, permits, et al, based on *ipso*

facto clauses which allowed termination upon commencement of insolvency. Noting that the legislative intent underlying Section 14 would be to invalidate such terminations, the Report recommended the addition of the Explanation to Section 14(1) of the IBC. The relevant portion, in relation to the Explanation to Section 14(1), reads thus[122]:

> "Prohibition on Termination on Grounds of Insolvency
>
> …
>
> 8.3. It was brought to the Committee that in some cases government authorities that have granted licenses, permits and quotas, concessions, registrations, or other rights (collectively referred to as "**grants**") to the corporate debtor attempt to terminate or suspend them even during the CIRP period. This could be attempted in two ways: one, by relying on ipso facto clauses, by virtue of which these grants may be terminated on the advent of insolvency proceedings themselves, and second, by initiating termination on account of non-payment of dues.
>
> 8.4. The Committee discussed that by and large, the grants that the corporate debtor enjoys form the substratum of its business. Without these, the business of the corporate debtor would lose its value and it would not be possible to keep the corporate debtor running as a going concern during the CIRP period, or to resolve the corporate debtor as a going concern. **Consequently, their termination during the CIRP by relying on ipso facto clauses or on non-payment of dues would be contrary to the purpose of introducing the provision for moratorium itself. Thus, the Committee concluded that the legislative intent behind introducing the provision for moratorium was to bar such termination.**
>
> 8.5. In this regard, the Committee noted that depending on the nature of rights conferred by them, these grants may constitute the "property" of the corporate debtor. Section 3(27) of the Code provides an inclusive definition of property which includes "*money, goods, actionable claims, land and every description of property situated in India or outside India and <u>every description of interest</u> including present or future or vested or contingent interest <u>arising out of, or incidental to</u>,*

[122] Available at <https://ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf> accessed on 18 February 2021.

> *property.*" This definition is substantially the same as the definition of "property" under Section 436 of the Insolvency Act, 1986 (UK), which has been considered the widest possible definition of property. In India too, it is accepted that certain licenses and concessions can convey permission to use property, or may embody a lease, permit, etc. granting rights in the property. Thus, their termination in certain circumstances, could have been considered contrary to an order of moratorium barring actions under Section 14(1)(d) or preventing alienation of property by any person.
>
> 8.6. Similarly, in many circumstances, termination or suspension of grants, particularly registrations, would be through proceedings that follow due process of law. Such proceedings may be a form of enforcement that would deprive the corporate debtor of its assets. In this regard, The Committee noted that the Section 14(1)(a) prevents "*the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority.*" (Emphasis supplied). This provision has been given an expansive reading by the Appellate Authority and the Adjudicating Authority, that had passed orders preventing recovery by stock exchanges and regulators, as well as the de-registration of aircrafts.
>
> 8.7. **Relying on this, the Committee was of the view that termination or suspension of such grants during the moratorium period would be prevented by Section 14. However, to avoid any scope for ambiguity and in exercise of abundant caution, the Committee recommended that the legislative intent may be made explicit by introducing an Explanation by way of an amendment to Section 14(1)**."

135 The position of law in India today invalidates *ipso facto* clauses in:

(i) Government licenses, permits, registrations, quotas, concessions, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, in accordance with the Explanation to Section 14(1); and

(ii) Contracts where the counter-party supplies essential/critical goods and services to the Corporate Debtor, within the meaning of Sections 14(2) and 14(2A).

However, no clear position emerges in relation to the validity of *ipso facto* clauses in other contracts, from the bare text of the IBC. Hence, this task is now left to this Court in the present case.

136 In order to fully appreciate the weight of this task upon us, it is important to understand that one of the key principles enshrined within our Constitution is separation of powers between our three main organs: the legislature, the executive and the judiciary. In **Rai Sahib Ram Jawaya Kapur** vs **State of Punjab**[123], speaking for a Constitution Bench, Chief Justice Bijan Kumar Mukherjea, spoke about the 'separation of powers' doctrine in the following terms:

> "12…The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another…"

137 In **Kesavananda Bharati** vs **State of Kerala**[124], Chief Justice S.M. Sikri noted that the 'separation of powers' doctrine is part of the basic structure of the Constitution:

[123] (1955) 2 SCR 225
[124] (1973) 4 SCC 225

> "292. The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. **The basic structure may be said to consist of the following features:**
>
> (1) Supremacy of the Constitution;
>
> (2) Republican and Democratic form of Government;
>
> (3) Secular character of the Constitution;
>
> **(4) Separation of powers between the legislature, the executive and the judiciary;**
>
> (5) Federal character of the Constitution."
>
> **(emphasis supplied)**

138 In performing our duties as members of the judicial branch in this case, we must tread a fine line between providing a just decision while not entering into the domain of the legislature.

139 We have already noted above in our analysis of the laws of various other national jurisdictions that the invalidation of *ipso facto* clauses seems to have occurred through legislative intervention. Although, in certain jurisdictions, there have been a few judicial decisions which have given an expansive interpretation to the legislative text, in order to invalidate *ipso facto* clauses (and their variations) which have not been explicitly barred by the legislature, these decisions have often been issued in order to give effect to legislative policy, intent and purpose of the insolvency regime. In countries like the Republic of Korea, where it is yet to happen legislatively, it is recommended. In others like the UK,

Lord Mance in his concurring opinion in **Belmont Park** (supra) has noted that it should happen only legislatively, and not through the intervention of the court.

140 Further, we also acknowledge the myriad complex questions which will arise while deciding on the issue of the validity/invalidity of *ipso facto* clauses, such as:

(i) The extent of invalidation of *ipso facto* clauses, *i.e.*, termination solely based on an 'insolvency event' (filing of an application for commencement of CIRP, commencement of CIRP, appointment of RP, et al) within the IBC will be invalid;

(ii) Whether the invalidation is absolute or conditional during the insolvency process;

(iii) What kinds of contracts should be exempt from this invalidation;

(iv) What should be the nature of the exceptions to the invalidation of ipso facto clauses to preserve the interests of the terminating party;

(v) Whether the invalidation should happen prospectively or retrospectively; and

(vi) What safeguard will be required to ensure that parties do not circumvent the invalidation.

141 The issues which we have delineated above are not exhaustive. The enumeration only seeks to highlight the complexity of the task at hand, which will require consideration of a variety of principles, which have to be balanced. The

tension between the rights of a corporate debtor during the insolvency process as against the contractual rights of a terminating party, which is central to the task at hand, is one which has been acknowledged even by the UNCITRAL in its UNCITRAL Guide. There is a public interest underlying each of these balancing considerations. The law confronts the judge with the greatest challenges of adjudication when a balance has to made between what is right and what is right.

142 There are limitations of the judicial process in providing absolute answers to these questions. Judgments are rendered in cases involving specific fact situations. While they immediately bind the parties before the court, the impact of the pronouncement of principle will have a bearing on others whose contracts may contain similar provisions. In **Northern Securities Company** vs **United States**[125], Justice Oliver Wendell Holmes Jr. acknowledged a similar judicial conundrum in the following terms in his dissenting opinion:

> "356. Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment…"

143 Consequently, we hold that question of the validity/invalidity of *ipso facto* clauses is one which the court ought not to resolve exhaustively in the present case. Rather, what we can do is appeal in earnest to the legislature to provide concrete guidance on this issue, since the lack of a legislative voice on the issue will lead to confusion and reduced commercial clarity.

[125] 1904 SCC OnLine US SC 63 : 24 S.Ct. 436

K Appellant's right to terminate the PPA in the present case

K.1 Analysis of the PPA

144 We now turn to a consideration of the text, structure and salient features of the PPA. As the PPA records in its recitals:

> "[T]he Government of Gujarat through letter dated 1st August 2009 has allocated 25 MW capacity to power producer for developing and setting up Solar Photovoltaic based power project in the State of Gujarat. The power Producer desires to set up a Solar Photovoltaic Grid Interactive Power Plant of 10 MW capacity at village Loria, Taluka-Bhuj, District Kutchh using new Solar Photovoltaic Grid Interactive power plants to produce the Electric Energy."

145 The preambular portion of the PPA also clarifies that the Power Producer (the Corporate Debtor) includes its respective successors and permitted assignees. Article 1, containing the definitions, clarifies that the term 'Commission' refers to the GERC.

146 The PPA defines the term 'law' in the following terms:

> "Law" means any valid legislation, statute, rule, regulation, notification, directive or order, issued or promulgated by any Governmental Instrumentality."

147 Article 4.1(iii) provides that the Corporate Debtor shall sell the power produced by it to the appellant on first priority basis and is not allowed to sell to any third party. Article 4.1(x) states that the Corporate Debtor shall continue to hold at least 51% equity stake for the first two years after the Commercial Operation Date and at least 26% for 3 years thereafter. Article 5.2 of the PPA, as we have noted previously, clarifies that, in case the commissioning of the Plant is

delayed beyond 31 December 2011, the appellant shall pay the tariff as determined by the GERC for Solar Projects effective on the date of commissioning of the plant or the tariff provided under the clause, whichever is lower.

148 Article 9.1 of the PPA clarifies that the PPA shall become effective upon the execution and delivery thereof by the parties and shall remain in operation for a period of 25 years. Article 9.2.1 enumerates the Events of Default by the Corporate Debtor, within which Article 9.2.1(e) states that the Corporate Debtor becoming voluntarily or involuntarily, the subject of a proceeding in any bankruptcy or insolvency laws, constitutes an Event of Default. The exception to this clause is triggered where dissolution of the Corporate Debtor is for the purpose of a merger, consolidation or reorganization and where the resulting entity has the financial standing to perform its obligations under PPA and creditworthiness. Article 9.2.1(e) of the PPA is quoted below:

> "9.2. 1 Power Producer's Default: The occurrence of any of the following events at any time during the Tariff [sic term] of
> this Agreement shall constitute an Event of Default by Power Producer:
>
> xxx
>
> e. If the Power Producer becomes voluntarily or involuntarily the subject of proceeding under any bankruptcy or insolvency laws or goes into liquidation of [sic or] dissolution or has a receiver appointed over it or liquidator is appointed, pursuant to law, except where such dissolution of the Power producer is for the purpose of a merger, consolidated [sic consolidation] or reorganization and where the resulting entity has the financial standing to perform its obligations under this Agreement and creditworthiness similar to the Power Producer and expressly assumes all

> obligations under this agreement and is in a position to perform them."

149 In accordance with Article 9.3.1, the appellant, on the occurrence of an Event of Default under Article 9.2.1, can issue a Default Notice which shall specify in reasonable detail the Event of Default giving rise to the default notice, and call upon the Corporate Debtor to remedy it. At the expiry of 30 days from such notice, unless otherwise agreed, if the default has not been remedied, the appellant can terminate the PPA. Further, the Corporate Debtor shall have the liability to make payments towards compensation to the appellant which is equivalent to three years' billing based on the first-year tariff considered on normative PLF while determining the tariff by GERC, within 30 days from the termination notice. In accordance with Article 10.4, when differences or disputes between the parties are not settled through mutual negotiation within 60 days of the dispute arising, it shall be adjudicated by the State Commission, in accordance with Law.

150 In accordance with Article 12.9, assignment of the Corporate Debtor's rights under the PPA is permissible, with the prior written consent of the other party. The proviso to this Article makes it clear that any assignee shall expressly assume the Corporate Debtor's obligations thereafter arising under the PPA, on the furnishing of satisfactory documentation.

151 At this juncture, it is important, at the risk of repetition, to note the concurrent findings of fact returned by the NCLT and the NCLAT as to the PPA

being the sole basis for the Corporate Debtor's existence. In its judgment dated 29 August 2019, the NCLT held as follows:

> "6. That the Corporate Debtor is reportedly a Special Purpose Vehicle (SPV) set up only for generation of solar power in the State of Gujarat. The Respondent is the only purchaser of power generated by the Corporate Debtor's Plant, therefore, the PPA is very critical to the "going concern" status of the Corporate Debtor.
>
> …
>
> 30... That termination of PPA at this stage may have adverse consequences on the status of the Corporate Debtor as "going concern" and eventually, may jeopardise the entire CIR Process."

In the impugned judgment, the NCLAT held as follows:

> "'Gujarat Urja Vikas Nigam Ltd.' is the only purchaser of electricity generated by 'Astonfield Solar (Gujrat) Pvt. Ltd.' (Corporate Debtor). [T]he electricity line have been given only to the 'Gujarat Urja Vikas Nigam Ltd.' and in terms of an agreement, they are supposed to supply electricity to 'Gujarat Urja Vikas Nigam Ltd.'"

152 As the above excerpts indicate, but for the subsistence of the PPA, the Corporate Debtor would no longer remain as a 'going concern'. Differently stated, by virtue of the PPA with the appellant being the sheet-anchor of the Corporate Debtor's business and consequently of the CIRP, its continuation assumes enormous significance for the successful completion of the CIRP. The termination of the PPA will have the consequence of cutting the legs out from under the CIRP.

K.2 Validity of the termination of PPA

153 As discussed in Section "**J.3**" of this judgement, the broader question of the validity of *ipso facto* clauses has been the subject matter of sustained legislative intervention in many jurisdictions. This is an intricate policy determination, for it raises a series of questions about striking the appropriate balance between contractual freedom on the one hand and corporate rescue on the other. We are cognizant that any rule that we might craft, howsoever narrow, could have a series of unintended second order effects, in terms of opening the floodgates for intervention from the NCLT that might impinge upon contractual freedom of the terminating party. Further, the comparative experience also teaches us that, given that the invalidation of *ipso facto* clauses can unsettle the interests that contractual relationships are founded upon, some jurisdictions that have invalidated such clauses have done so in a cautious, prospective fashion. This ensures that while the policy of the insolvency law is brought into tandem with the global regimes, it does not affect the contractual rights of those parties who could not have reasonably accounted for this change in position while negotiating their contractual terms. Such an approach is an evidence and recognition of the harmful effects on commercial stability that such encroachment into contractual freedom can generate, even when done legislatively after careful deliberation.

154 The question of the validity/invalidity of *ipso facto* clauses has been discussed in a variety of documents over the years, such as: (a) UNCITRAL Guide of 2004; (b) J.J. Irani Committee Report of 2005; (c) Vidhi's Report of

2018 critiquing the IBC; and (d) IBBI's Report of 2020, which acknowledges the issue of *ipso facto* clauses in relation to government grants. All these materials were available to the members of the various committees which discussed the IBC. Further, suspension of contracts during insolvency was specifically allowed under Section 22(3) of SICA, which was the **erstwhile** statutory regime. Section 22 of the SICA provided for the suspension of legal proceedings and contracts, of which sub-Section (3) was in the following terms:

> "(3) Where an inquiry under section 16 is pending or any scheme referred to in section 17 is under preparation or during the period] of consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board:
>
> Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate."

Parliament would have been conscious of the provision which was adopted in the SICA. Yet, no concrete position has been adopted in relation to the termination of *ipso* facto clauses by the legislature under the IBC. In the absence of an express prohibition by the legislature, it can be argued that there is no general embargo

on the operation of such clauses if they are part of a valid contract under the Contract Act.

155 At the same time, we cannot lose sight of the fact that this Court is apprised with a novel situation where the 'going concern' status of a corporate debtor will be negated by a termination of its sole contract, on the basis of an *ipso facto* clause. It is pertinent to note that the IBC has been in effect from 5 August 2016, and has also been amended multiple times. Hence, if the 'going concern' status of corporate debtors was being affected on a regular basis due to *ipso facto* clauses (which are in vogue even in the present contracts similar to the current PPA), then the legislature may, if it considered necessary, have proceeded to legislate on an explicit position with regard to the operation of *ipso facto* clauses. However, this Court in the present case is not required to resolve the broad question of whether the invalidation/stay of *ipso facto* clauses in India, generally, is legally permissible. This is a matter which raises complex issues of legal policy and a balancing between distinct and conflicting values. Reform will have to take place through the legislative process. The stages through which legislative reform must take place -absolute or incremental – is a matter for legislative change. Our task is limited to the issue of deciding whether the NCLT correctly exercised the jurisdiction vested in it, in the facts of this case, to stay the termination of the PPA. In the absence of an explicit stand taken by the legislature, this Court's intervention in this matter would be guided by ascertaining the legislative intention from the provisions of the IBC.

156 Section 14 of the IBC reads as follows:

"Moratorium.--(1) Subject to provisions of Sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely--

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.--For the purposes of this Sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2-A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

> (3) The provisions of Sub-section (1) shall not apply to--
>
> (a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
>
> (b) a surety in a contract of guarantee to a corporate debtor.
>
> (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:
>
> Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan Under Sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor Under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

157 Section 14 of the IBC lists the conditions under which a moratorium can be imposed by the NCLT in terms of sub-sections (a) to (d). It further clarifies that a license, permit, quota, concession, grant or right given by a government cannot be suspended or terminated on the grounds of insolvency, subject to certain exceptions. This clarification was added by way of an Explanation to Section 14(1) with effect from 28 December 2019. The Report of the Insolvency Law Committee dated 20 February 2020, as discussed above, noted that without such government grants "the business of the corporate debtor would lose its value and it would not be possible to keep the corporate debtor running as a going concern during the CIRP period, or to resolve the corporate debtor as a going concern"[126]. The Report further stated that the termination of such grants during CIRP on account of *ipso facto* clauses or non-payment of dues is in contravention of the purpose behind imposition of moratorium itself.

[126] Para 8.4

158 While recommending the inclusion of an explanation, the Report of the Insolvency Law Committee stated that while it was of the view that termination or suspension of such grants is prevented by Section 14, it recommended adding the Explanation "to avoid any scope for ambiguity and in exercise of abundant caution"[127], and to ensure that the legislative intent should be made explicit by introduction of the explanation by way of an amendment to Section 14(1). The Insolvency Law Committee (in its discussion in the February 2020 Report) took the position that Section 14 even in its unamended form, contained an interdict on the invalidation of government grants, though the language of Section 14 did not make this position explicit.

159 In contrast, this Court's judgment in **Embassy Property** (supra), concluded that the non-renewal of a mining lease was not within the ambit of Section 14. The Explanation to Section 14(1) was added by Parliament to make the position clear, on whether the moratorium under Section 14 included government licenses, grants, permits, quotas and concessions.

160 Section 14(2) provides that supply of essential goods or services, as may be specified, cannot be terminated, suspended or interrupted during the moratorium. Section 14(2A) was added with effect from 28 December 2019. It provides that, where the IRP or RP considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage its operations as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium,

[127] Para 8.7

except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified. The order of moratorium has effect till the culmination of insolvency resolution process.

161 The inclusion of the Explanation to Section 14(1) and Section 14(2A) indicates that Parliament has been amending the IBC to ensure that the status of a corporate debtor as a 'going concern' is not hampered on account of varied situations, which may not have been in contemplation at the time of enacting the IBC. It will be relevant to note that in a recent three judge Bench decision of this Court in **P Mohanraj** vs **Shah Brothers Ispat Pvt. Ltd**.[128], Justice Rohinton Fali Nariman, speaking for the Court, expounded upon the object of Section 14 in the following terms:

> "...the object of a moratorium provision such as Section 14 is to see that there is no depletion of a corporate debtor's assets during the insolvency resolution process so that **it can be kept running as a going concern** during this time, thus maximising value for all stakeholders. The idea is that it facilitates the continued operation of the business of the corporate debtor to allow it breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders, which would include workmen of the corporate debtor."
>
> **(emphasis supplied)**

162 Further, the scheme of the IBC, *inter alia*, in terms of Sections 20(2)(e), 25(1) and definition of resolution plan shows that it aims to preserve the

[128] Civil Appeal No. 10355 of 2018 decided on 1 March 2021

corporate debtor as a 'going concern'. The relevant portion of Section 20 is extracted below:

> "20. Management of operations of corporate debtor as a going concern
>
> (1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.
>
> (2) For the purposes of sub-section (1), the interim resolution professional shall have the authority—
>
> …….
>
> to take all such actions as are necessary to keep the corporate debtor as a going concern."

It is also relevant to note that Section 25(1) provides:

> "Section 25 - Duties of resolution professional
>
> (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor."

Resolution plan is defined under Section 5(26) of the IBC as follows:

> "(26) "resolution plan" means a plan proposed by 3[resolution applicant] for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;
>
> Explanation.--For the removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger;"

163 Although various provisions of the IBC indicate that the objective of the statute is to ensure that the corporate debtor remains a 'going concern', there must be a specific textual hook for the NCLT to exercise its jurisdiction. The

NCLT cannot derive its powers from the 'spirit' or 'object' of the IBC. Section 60(5)(c) of the IBC vests the NCLT with wide powers since it can entertain and dispose of any question of fact or law arising out or in relation to the insolvency resolution process. We hasten to add, however, that the NCLT's residuary jurisdiction, though wide, is nonetheless defined by the text of the IBC. Specifically, the NCLT cannot do what the IBC consciously did not provide it the power to do.

164 In this case, the PPA has been terminated solely on the ground of insolvency, which gives the NCLT jurisdiction under Section 60(5)(c) to adjudicate this matter and invalidate the termination of the PPA as it is the forum vested with the responsibility of ensuring the continuation of the insolvency resolution process, which requires preservation of the Corporate Debtor as a going concern. In view of the centrality of the PPA to the CIRP in the unique factual matrix of this case, this Court must adopt an interpretation of the NCLT's residuary jurisdiction which comports with the broader goals of the IBC. Sir P.B. Maxwell in his commentary, *On Interpretation of Statutes*[129], has emphasized that a provision should be given an harmonious interpretation which comports with the intention of the Legislature. The commentary provides:

> "The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important, and it is by the light which each contributes that the meaning must be determined. **Among them is the rule that that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the legislature. The paramount object, in construing penal as well as other**

[129] Roy Wilson, Brian Galpin and Peter Benson Maxwell, On Interpretation of Statutes, (11th edn., Sweet and Maxwell 1962).

> **statutes, is to ascertain the legislative intent and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention.** They are indeed frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Sir Edward Cole's words, to suppress the mischief and advance the remedy."
>
> **(emphasis supplied)**

165 Given that the terms used in Section 60(5)(c) are of wide import, as recognized in a consistent line of authority, we hold that the NCLT was empowered to restrain the appellant from terminating the PPA. However, our decision is premised upon a recognition of the centrality of the PPA in the present case to the success of the CIRP, in the factual matrix of this case, since it is the sole contract for the sale of electricity which was entered into by the Corporate Debtor. In doing so, we reiterate that the NCLT would have been empowered to set aside the termination of the PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of the NCLT under Section 60(5)(c) of the IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an *ipso facto* clause like Article 9.2.1(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor, and not push it to its corporate death by virtue of it being

the corporate debtor's sole contract (as was the case in this matter's unique factual matrix).

166 The terms of our intervention in the present case are limited. Judicial intervention should not create a fertile ground for the revival of the regime under section 22 of SICA which provided for suspension of wide-ranging contracts. Section 22 of the SICA cannot be brought in through the back door. The basis of our intervention in this case arises from the fact that if we allow the termination of the PPA which is the sole contract of the Corporate Debtor, governing the supply of electricity which it generates, it will pull the rug out from under the CIRP, making the corporate death of the Corporate Debtor a foregone conclusion.

K.3 Dialogical Remedies

167 As indicated above in section "**J.3**" of this judgment, we would like to take this opportunity to note the desirability of Parliament providing its legislative vision on the broader validity of *ipso facto* clauses. We have outlined some of the complex considerations in paragraph 138.

168 In the past, this Court has adopted such dialogical remedies – where the Court engages in a dialogue in its judgments with the other two organs of government so that each organ can best perform its constitutionally assigned role. To illustrate, in its judgement in **S. Sukumar** vs **The Secretary, Institute of Chartered Accountants of India**[130], a two judge Bench of this Court, speaking through Justice Adarsh Kumar Goel, held as follows:

[130] (2018) 14 SCC 360.

> "53.1.The Union of India may constitute a three member Committee of experts to look into the question whether and to what extent the statutory framework to enforce the letter and spirit of Sections 25 and 29 of the CA Act and the statutory Code of Conduct for the CAs requires revisit so as to appropriately discipline and regulate MAFs. The Committee may also consider the need for an appropriate legislation on the pattern of Sarbanes Oxley Act, 2002 and Dodd Frank Wall Street Reform and Consumer Protection Act, 2010 in US or any other appropriate mechanism for oversight of profession of the auditors. Question whether on account of conflict of interest of auditors with consultants, the auditors' profession may need an exclusive oversight body may be examined. The Committee may examine the Study Group and the Expert Group Reports referred to above, apart from any other material. It may also consider steps for effective enforcement of the provisions of the FDI policy and the FEMA Regulations referred to above. It may identify the remedial measures which may then be considered by appropriate authorities. The Committee may call for suggestions from all concerned. Such Committee may be constituted within two months. Report of the Committee may be submitted within three months thereafter. The UOI may take further action after due consideration of such report."

169 Conscious as we are of the fact that this case is about statutory and not constitutional interpretation, we think it would be apposite to quote the following observations by Anne Meuwese and Marnix Snel[131]:

> "The core of constitutional dialogue between the judiciary and the legislature is that they engage in a conversation about constitutional meaning, in which both actors (should) listen in order to learn from each other's perspectives, which can then lead to modifying their own views accordingly... In this way, 'dialogue' represents the 'middle way between judicial supremacy on the one hand, and legislative supremacy on the other'.

[131] Anne Meuwese and Marnix Snel, 'Constitutional Dialogue': An Overview, Utrecht Law Review, vol. 9, issue 2, p. 128 [March, 2013].

170 The Court is at its heart, an institution which responds to concrete cases brought before it. It is not within its province to engraft into law its views as to what constitutes good policy. This is a matter falling within the legislature's remit. Equally, when presented with a novel question on which the legislature has not yet made up its mind, we do not think this Court can sit with folded hands and simply pass the buck onto the Legislature. In such an event, the Court can adopt an interpretation – a workable formula – that furthers the broad goals of the concerned legislation, while leaving it up to the legislature to formulate a comprehensive and well-considered solution to the underlying problem. To aid the legislature in this exercise, this Court can put forth its best thinking as to the relevant considerations at play, the position of law obtaining in other relevant jurisdictions and the possible pitfalls that may have to be avoided. It is through the instrumentality of an inter-institutional dialogue that the doctrine of separation of powers can be operationalized in a nuanced fashion. It is in this way that the Court can tread the middle path between abdication and usurpation[132].

L NCLAT's decision on the issue of liquidation

171 NCLT in paragraph 35 of its order dated 29 August 2019 upheld the right of the appellant to terminate the PPA, in case a liquidation process is initiated against the Corporate Debtor. The appellant had neither challenged this issue in its appeal before NCLAT nor was it raised by any other party. However, the NCLAT deleted the observations made by the NCLT in paragraph 35, thereby holding that the appellant cannot terminate the PPA even if the Corporate Debtor

[132] This phrase is taken from - O Ferraz, 'Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa' in Oscar Vilhena Vieira, Upendra Baxi, Frans Viljoen (eds), Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa (PULP, Pretoria 2013) 375, 393.

goes into liquidation. Since no pleadings or prayers were made in relation to paragraph 35 of NCLT's order, NCLAT could not have considered this issue as a subject matter of the appeal. We hold that the NCLAT exceeded its jurisdiction by considering the issue of liquidation. In the absence of any liquidation proceedings initiated against the Corporate Debtor, we are not required to consider the issue of whether the appellant would be entitled to terminate the contract in such a context. Such a discussion would be academic in nature, and beyond the scope of this appeal.

M Appellant's liability to pay for the electricity injected by the Corporate Debtor

172 The appellant had served a notice of termination to the Corporate Debtor with effect from 7 June 2019, though the termination could not be carried out due to the operation of interim protection which had been granted to the respondents by the NCLT. It was contended on behalf of the appellant that it cannot be made to suffer on the ground of erroneous injunctions granted by the NCLT and NCLAT, due to which it had to pay a higher tariff because it could not terminate the PPA with the Corporate Debtor and procure electricity at a cheaper tariff from another power producer. Since we have set aside the termination of the PPA based on the reasons discussed above, the appellant is liable to pay for the electricity procured after 7 June 2019. Consequently, the appellant's claim in respect of compensation for the termination of the PPA in terms of Article 9.3.1 of the PPA does not arise because it is restrained from terminating the PPA. Hence, this contention of the appellant has been rendered otiose.

N Conclusion

173 In conclusion, we hold that:

(i) The NCLT/NCLAT could have exercised jurisdiction under section 60(5)(c) of the IBC to stay the termination of the PPA by the appellant, since the appellant sought to terminate the PPA under Article 9.2.1(e) only on account of the CIRP being initiated against the Corporate Debtor;

(ii) The NCLT/NCLAT correctly stayed the termination of the PPA by the appellant, since allowing it to terminate the PPA would certainly result in the corporate death of the Corporate Debtor due to the PPA being its sole contract; and

(iii) We leave open the broader question of the validity/invalidity of *ipso facto* clauses in contracts for legislative intervention.

Consequently, for the above reasons we find no merit in this appeal and it is accordingly dismissed.

174 Pending application(s), if any, stand disposed of.

…….....J.
[Dr Dhananjaya Y Chandrachud]

…….....J.
[M. R. Shah]

New Delhi;
March 8, 2021.