

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 132, 133 & 134 of 2023**

[Arising out of Order dated 02.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in I.A. No. 1/MB/C-I/2023 and I.A. No. 99/MB/C-I/2023 and I.A. No. 150/MB/C-I/2023 in C.P. (IB) No.1231/MB/C-I/2021]

**IN THE MATTER OF:**

**Vistra ITCL (India) Ltd.**

**...Appellant**

**Versus**

**Torrent Investments Pvt. Ltd. & Ors.**

**...Respondents**

**Present:**

**For Appellant:**

Mr. Kapil Sibal, Sr. Advocate with Ms. Pooja Dhar, Mr. Piyush Mishra, Mr. Sanjeev Kumar, Mr. Anshul Sehgal, Ms. Anusha Nagrajan, Mr. Divyanshu Jain, Mr. Partul Pratap Singh, Advocates

**For Respondents:**

Mr. Mukul Rohatgi, Mr. Ramji Srinivasan, Mr. Arun Kathpalia, Sr. Advocates with Mr. Anoop Rawat, Ms. Shally Bhasin, Mr. Vaijayant Paliwal, Mr. Rishabh Jaisani, Mr. Sagar Dhawan, Mr. Rishabh Jaiswani, Mr. Nikhil Mathur, Ms. Shruti Pandey, Mr. Harit Lakhani, Mr. Daksh Kadian, Mr. Ahkam Khan, Ms. Samidha Mathur, Mr. Udbhav Nanda, Mr. Sagar Dhawan, Advocate for R-1

Mr. Gopal Jain, Sr. Advocate with Mr. V.P. Singh, Ms. Anindita Roychoudhury, Mr. Bharat Makkar, Mr. Sushrat Garg, Advocates for R-2

Mr. Dr. Abhishek Manu Singhvi, Sr. Advocate with Mr. Mahesh Agrwal, Mr. Manu Krishnan, Ms. Niyati Kohli, Mr. Pratham Vir Agarwal, Ms. Manavi Aggarwala and Mr. Anwesh, Advocates for R-9

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**With**

**Company Appeal (AT) (Insolvency) No. 139 of 2023**

[Arising out of Order dated 02.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in I.A. No. 1/MB/C-I/2023 and I.A. No. 99/MB/C-I/2023 and I.A. No. 150/MB/C-I/2023 in C.P. (IB) No.1231/MB/C-I/2021]

**IN THE MATTER OF:**

**Indusind International Holdings Ltd.**

**...Appellant**

**Versus**

**Torrent Investments Pvt. Ltd. & Ors.**

**...Respondents**

**Present:**

**For Appellant:**

Mr. Dr. Abhishek Manu Singhvi, Sr. Advocate with Mr. Mahesh Agrwal, Mr. Manu Krishnan, Ms. Niyati Kohli, Mr. Pratham Vir Agarwal, Ms. Manavi Aggarwala and Mr. Anwesh, Advocates

**For Respondent:**

Mr. Mukul Rohatgi, Mr. Ramji Srinivasan, Mr. Arun Kathpalia, Sr. Advocates with Mr. Anoop Rawat, Ms. Shally Bhasin, Mr. Vijayant Paliwal, Mr. Rishabh Jaisani, Mr. Sagar Dhawan, Mr. Rishabh Jaiswani, Mr. Nikhil Mathur, Ms. Shruti Pandey, Mr. Harit Lakhani, Mr. Daksh Kadian, Mr. Ahkam Khan, Ms. Samidha Mathur, Mr. Udbhav Nanda, Mr. Sagar Dhawan, Advocate for R-1

Mr. Gopal Jain, Sr. Advocate with Mr. V.P. Singh, Ms. Anindita Roychoudhury, Mr. Bharat Makkar, Mr. Sushrat Garg, Advocates for R-2

Mr. Kapil Sibal, Sr. Advocate with Ms. Pooja Dhar, Mr. Piyush Mishra, Mr. Sanjeev Kumar, Mr. Anshul Sehgal, Ms. Anusha Nagrajan, Mr. Divyanshu Jain, Mr. Partul Pratap Singh, Advocates for R-3, 4, 5, 6.

## **J U D G M E N T**

### **ASHOK BHUSHAN, J.**

These two Appeals have been filed against the same order dated 02.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-I in I.A. No.1/MB/C-I/2023 and I.A. No. 99/MB/C-I/2023 and I.A. No.150/MB/C-I/2023 in C.P. (IB) No.1231/MB/C-I/2021. The Appellants in Company Appeal (AT) (Ins.) No. 132, 133 & 134 of 2023 are Financial Creditor of the Corporate Debtor namely Reliance Capital Limited whereas Company Appeal (AT) (Ins.) No.139 of 2023 has been filed by IndusInd International Holdings Ltd., a Resolution Applicant in the CIRP process of Reliance Capital Limited. We need to notice facts and sequence of the events giving rise to these appeals:

- (i) On 29.11.2021, Reserve Bank of India superseded the Board of Directors of Reliance Capital Limited (Corporate Debtor) and appointed Shri Y. Nageswara Rao, Respondent No.2 herein as the Administrator.
- (ii) By order dated 06.12.2021, National Company Law Tribunal, Mumbai Bench initiated Corporate Insolvency Resolution Process against the Corporate Debtor.
- (iii) On 18.02.2022, the Administrator issued invitation for Expression of Interest.

- (iv) On 26.04.2022, Administrator issued the Request for Resolution Plan (RFRP) in terms of Regulation 36B of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as CIRP Regulations). In response to RFRP no satisfactory Resolution Plan were received.
- (v) RFRP was reissued on 22.10.2022, last date for submission of Resolution Plan was 28.11.2022. Four Resolution Applicants submitted their signed plans namely (i) Torrent Investments Pvt. Ltd. (ii) IndusInd International Holding Ltd. (iii) Cosmea Financial and Piramal Group; and (d) Oaktree Capital.
- (vi) In 26<sup>th</sup> CoC meeting, the members opined that the bid values that have been received are not acceptable.
- (vii) On 14.12.2022, Challenge Mechanism Process Note was issued by the Administrator.
- (viii) On 19.12.2022, steps for Challenge Mechanism Process Note was issued.
- (ix) On 21.12.2022, Challenge Mechanism Process was conducted in which two Resolution Applicants namely (i) Torrent Investments Pvt. Ltd. (for short 'Torrent') (ii) IndusInd International Holding Ltd. (for short 'IIHL') participated. IIHL participated until third round of the Challenge Mechanism with final NPV of Rs.8110 Crores and Torrent Investments Pvt. Ltd. submitted bid till fourth round with final NPV of Rs.8640 Crores, each as self-certified by

them subject to verification by CoC Advisors. The Administrator, on the same day, sent an email to the Resolution Applicants that highest NPV is INR 8640 Crore.

- (x) On 23.12.2022, 29<sup>th</sup> CoC meeting conducted on the submission of Revised Draft Resolution Plan as per Challenge Mechanism. Covering email of IIHL included additional payments totaling to Rs.9000 Crores which was in deviation from the final bid submitted by IIHL. In the minutes of the meeting, it was noted that the CoC Advisors will evaluate and compare both the plans and will share the presentation and evaluation by 28.12.2022.
- (xi) The Torrent sent an objection to the Administrator citing media reports with reference to revision in bid by IIHL. On 31.12.2022, Torrent filed I.A. No. 1/MB/C-I/2023 in C.P. (IB) No.1231/MB/C-I/2021 before the Adjudicating Authority praying for various reliefs.
- (xii) On 03.01.2023, the Adjudicating Authority allowed prayer (E) of the I.A. No. 1/MB/C-I/2023 and directed the Administrator not to submit any non-compliant plan to the CoC. Torrent was given liberty to implead the CoC as party to the application.
- (xiii) On 03.01.2023, 30<sup>th</sup> CoC meeting was held. The Process Advisor informed the CoC that NPV calculated on the basis of financial proposal of Torrent and IIHL were different from the NPV submitted by the Resolution Applicants in the Challenge Mechanism. Several options were suggested including discussion

with both the Resolution Applicants that the value submitted by them is not in line with the Challenge Mechanism Note and giving a final chance to them to file revised bid. Another option was that both the Resolution Applicants be given opportunity to do another Challenge Mechanism Process, where the base line would be Rs.8640 Crores. It was decided that both the Resolution Applicants may make corrections to their Draft Resolution Plans submitted on 22.12.2022 and resubmit within 24 hours of the communication.

- (xiv) On 03.01.2023, IIHL sent a letter to the Administrator clarifying its calculation of NPV.
- (xv) On 04.01.2023, Administrator issued emails to Torrent and IIHL asking them to submit draft resolution plan with highest bid amount alongwith details of upfront payment and deferred payment submitted by them in the Challenge Mechanism.
- (xvi) On 06.01.2023, the Administrator received email from IIHL and Torrent including draft resolution plan. Torrent gave draft resolution plan with revised offer offering entire amount of Rs.8640 Crores as upfront. IIHL gave its revised draft resolution plan including some additional payment.
- (xvii) On 06.01.2023, CoC held its 31<sup>st</sup> meeting where it opined that outcome of the Challenge Mechanism undertaken was sub optimal and not satisfactory. The CoC in its commercial wisdom

proposed that an extended round of Challenge Mechanism with the existing bidders be conducted.

- (xviii) On 09.01.2023, Torrent filed I.A. No. 99/MB/C-I/2023 seeking impleadment of the CoC in the application and addition of certain additional prayers.
- (xix) On 10.01.2023, a resolution was passed by the CoC with 98% votes in favour of the extended Challenge Mechanism.
- (xx) On 10.01.2023, IHL filed an application before the Adjudicating Authority for impleadment.
- (xxi) On 11.01.2023, Torrent filed an additional affidavit bringing on record subsequent events.
- (xxii) On 12.01.2023, the Adjudicating Authority continued the interim order. Adjudicating Authority heard the parties.
- (xxiii) On 18.01.2023, the CoC made a statement that it will not hold the extended Challenge Mechanism till 23.01.2023.
- (xxiv) On 23.01.2023, the Adjudicating Authority after hearing the parties reserved the order and continued the interim order.
- (xxv) A Company Appeal (AT) (Ins.) No. 87-88 of 2023 was filed by Vistra ITCL (India) Ltd. against order dated 23.01.2023 which was withdrawn on 25.01.2023 noticing that order of Adjudicating Authority shall be pronounced in the week commencing 30.01.2023.

(xxvi) On 31.01.2023, the Adjudicating Authority granted further exclusion of 90 days according to which last date for conclusion of CIRP comes by 17.03.2023.

(xxvii) On 02.02.2023, final orders were pronounced by the Adjudicating Authority allowing the I.A. No. 1/MB/C-I/2023 and I.A. No. 99/MB/C-I/2023. The Administrator was directed to take the resolution process of the Corporate Debtor to its logical conclusion and the Administrator and the CoC were not to allow deviation in the highest NPV financial proposal of INR 8110 Crore of IIHL and the highest NPV financial proposal of INR 8640 Crore of the Applicant – Torrent. Order is contained in Paras 133 to 136, which is to the following effect:

*“132. Such challenge mechanism having been conducted and already concluded on 21<sup>st</sup> December 2022 with the Administrator's email confirming Torrent's highest NPV bid of INR 8,640 crores (in terms of the re-issued RFRP) in accordance the challenge mechanism note and the steps, with the avenues available for value maximization stand exhausted in light of express provisions of Regulation 39 (IA) as well as the term of the challenge mechanism note and steps and the clock cannot be reset through modification/re-issuance of RFRP once again so as to defeat the process paper, challenge mechanism note, and the regulatory scheme introduced vide the amendment dated 30 September 2021, rendering the same*

*redundant and nugatory. We are also of the view that the Administrator/CoC, use a challenge mechanism for value maximization in terms of Regulation 39(1A), and they should lead the said challenge mechanism to its logical conclusion in terms of Regulation 39(3). The proposed second round of the challenge mechanism is ultimately and effectively leading to conduct of a fresh/second challenge mechanism in deviation with the process paper, challenge process note, and the CIRP Regulations which is in violation of the scheme of Regulation 39(1A) of MUMBAT BENCHA the CIRP Regulation. Further, under the provisions of the Code and the CIRP Regulations, there are specific triggers for the exercise of commercial wisdom (actions that specifically require either evaluation by or the approval of the CoC, e.g. actions under Section 28 of the Code, approval of resolution plans or evaluation of their feasibility and viability under Section 30 of the Code). The CoC, cannot exercise its commercial wisdom which is ultra vires the procedural framework provided under the Code read with the CIRP Regulations. This view is also upheld by the Hon'ble NCLAT in the case of Dwarkadhish Sakhar Karkhana Limited Vs. Pankaj Joshi, Company Appeal (AT) (Insolvency) No. 233 of 2021, upheld by the Hon'ble Supreme Court vide its order dated 12th July, 2021 in Civil Appeal No(s). 2317/2021).*

*We are, thus, of the view that CoC cannot device an illegal mechanism to circumvent the scheme of Code to indirectly be able to negotiate further with the resolution applicants post conclusion of the statutory scheme of challenge process under Regulation 39(1A). The settled legal principle of ‘Quando aliquid prohibetur ex directo, prohibetur et per obliquum’ dictates that one cannot do indirectly what one cannot do directly. Applying this principle in the present case, consideration of the revised financial proposal of the IIHL (revised after the conclusion of the challenge mechanism), being in gross violation of the challenge mechanism as well as Regulation 39(1A) & 39(18) of CIRP Regulations, cannot be done indirectly under the garb of declaring the result of the challenge mechanism as sub-optimal and resetting the clock back to Regulation 36B in derogation of the regulatory intent, especially when the final financial proposal of the Applicant was much above the minimum threshold set in the challenge mechanism. The proposed second round of the challenge mechanism is nothing but an act to indirectly achieve what could not have been achieved by adhering to the challenge mechanism in terms of the challenge process note.*

133. *In view of our above observations and for the reasons stated above, we hereby allow Application bearing No. 1 of 2023 and declare*

*that the challenge mechanism for financial bids with respect to the Corporate Debtor under the challenge Process Note stood concluded on 21.12.2022 with the financial bid of the applicant at INR 8,640 Crores being the highest financial bid as communicated by the respondent by its email dated 21.12.2022. It is hereby declared that issuance of process note for extended challenge mechanism is thus in violation of Regulation 39 (1A) of the CIRP Regulations.*

*314. The Respondents, Administrator and the CoC, shall not allow any deviation in the highest NPV financial proposal of INR 8110 Crore of IIHL and the highest NPV financial proposal of INR 8640 Crore of the Applicant/Torrent. Further, the Resolution Plan of IIHL along with the Original Bid value of INR 8110 Crore, and not enhanced value shall be placed before the CoC along with the final plan of the Applicant/Torrent comprising of NPV of INR 8640 Crore.*

*135. It is further directed that the Administrator shall take the Resolution Process of the Corporate Debtor to its logical conclusion and the CoC in its own wisdom and absolute discretion shall take appropriate decision to complete the Corporate Insolvency Resolution Process, in compliance of the provisions enshrined in the code within stipulated period*

*by adopting due process under Regulation 39 of the CIRP Regulations.*

*136. The Interlocutory Application bearing IA No. 1 of 2023, IA No. 99 of 2023 and IA No. 150 of 2023, are disposed of as allowed in the above terms.”*

(xxviii) Aggrieved against the order dated 02.02.2023, as noted above, Company Appeal (AT) (Ins.) No. 132, 133 & 134 of 2023 has been filed by the Vistra ITCL (India) Ltd. whereas Company Appeal (AT) (Ins.) No.139 of 2023 has been filed by IndusInd International Holdings Ltd (IIHL).

2. We have heard Shri Kapil Sibal, learned senior counsel appearing for Vistra ITCL (India) Ltd., Shri Mukul Rohatgi and Shri Ramji Srinivasan, learned senior counsels appearing for Torrent Investments Pvt. Ltd. Dr. Abhishek Manu Singhvi, learned senior counsel has been heard for IndusInd International Holdings Ltd (IIHL). We have also heard Shri Gopal Jain, learned senior counsel appearing for the Administrator (Respondent No.2).

3. Shri Kapil Sibal, learned senior counsel appearing for the Appellant – Vistra ITCL (India) Ltd. submits that the Adjudicating Authority committed serious error in interdicting the insolvency resolution process by passing interim order on 03.01.2023 which was continued till passing of the final order which effectively prohibited the CoC to exercise its jurisdiction vested in it regarding consideration of the draft resolution

plans which were submitted to the Administrator consequent to the Challenge Mechanism held on 21.12.2022. It is submitted that even after conclusion of Challenge Mechanism on 21.12.2022, the jurisdiction and power of the CoC to direct for extended Challenge Mechanism or to negotiate with both the Resolution Applicants to enhance their plan value is not prohibited. Learned counsel for the Appellant has relied on Clauses, 3.17.17, 4.2.4, 4.2.9, 4.3.7, 4.4.4 and 4.4.7 of the RFRP dated 26.04.2022 in support of his submission that jurisdiction and power of CoC to discuss the resolution plans and to take any further negotiation or any further steps is fully protected by the aforesaid clauses of the RFRP in exercise of which jurisdiction CoC resolved on 06.01.2023 that plan value of both the resolution plans is **sub optimal and not satisfactory**. It is submitted that debt of the Corporate Debtor is Rs.25,000 Crores and liquidation value being Rs.13,000 Crores both the plans were much below the liquidation value also. It is submitted that the decision of the CoC to conduct an extended Challenge Mechanism amongst the existing bidders cannot be held to be contrary to Regulation 39(1A) (b) of the CIRP Regulations. It is submitted that the Adjudicating Authority has prohibited the CoC to take steps to maximize the value of the Corporate Debtor and to take steps to undertake price discovery of the Corporate Debtor. It is submitted that on 28.08.2022, Torrent has given resolution amount of Rs.4000 Crores. On 28.11.2022, it was increased to Rs.4500 Crores and post Challenge Mechanism it has given NPV of Rs.8640 Crores. IIHL on 28.08.2022 has given resolution amount of Rs.4000 Crores, on 28.11.2022 increased the

amount to Rs.5060 Crore and on 21.12.2022 given Rs.8110 Crores NPV. This clearly indicates that within a period of few months from 28.08.2022 to 21.12.2022 both the Resolution Applicants themselves have increased their value to about Rs.4000 Crores and Rs.3000 Crores, respectively. IHL although in the Challenge Mechanism has given NPV of Rs.8110 Crores but by a covering email alongwith the draft resolution plan has offered additional payment totaling to Rs.9000 Crores. It is submitted that the Respondent No.1 has not correctly calculated NPV. The Torrent, who in the Challenge Mechanism has offered upfront payment of Rs.3750 Crores and balance as deferred amount has revised its offer offering to make entire Rs.8640 Crore as upfront payment. The facts and sequence of events clearly lead the CoC to resolve to take further steps to extend Challenge Mechanism to find out correct price discovery for maximizing the value of the Corporate Debtor. Shri Sibal further submitted that the Adjudicating Authority has no jurisdiction to entertain I.A. 1/MB/C-I/2023 which was filed at the stage when the plans submitted by the Resolution Applicants were under the process of verification and consideration. Neither both the Resolution Applicants have submitted their signed Resolution Plans nor Administrator has certified that both the Resolution Plans are compliant of the I&B Code and its Regulations. At this premature stage, the Adjudicating Authority ought not to have entertained any application, which entertainment is not contemplated in the I&B Code. It is submitted that the Regulation 39(1A) Sub-clause (b) does not restrain holding of extended Challenge Mechanism or Second Challenge Mechanism. In any

case, jurisdiction of CoC is in no manner is fettered by Regulation 39(1A) (b). It is submitted that within a span of 24 days, Torrent has increased value of bid from Rs.1100 Crore upfront to Rs.3750 Crore upfront and then within further two weeks from Rs.3750 Crore upfront to Rs.8640 Crore upfront, which clearly indicate that there is more value to discover and same cannot be interdicted by judicial intervention at this stage. Shri Sibal submitted that the relevant clauses of RFRP were relied and submitted before the Adjudicating Authority which has not been considered. It is submitted that value maximization is a dynamic process and when no plan is satisfactory, negotiation and discussion for discovery of price can be done until unless CoC is satisfied. It is further submitted that as per the Challenge Mechanism Process, CoC is the sole authority to determine the NPV which determination is binding on the Resolution Applicants. The self-certification by Torrent that it's NPV is Rs.8640 Crores does not prohibit the Administrator and the CoC to find out the correct NPV submitted by Torrent. There can be no dispute that in the CIRP Process timelines have to be given due weight but in the name of timelines, maximization of the value of Corporate Debtor cannot be sacrificed. According to the exclusion granted by the Adjudicating Authority, 270 days of CIRP period was there till 31.01.2023, hence, the decision taken by the CoC in its meeting dated 06.01.2023 in no manner breaches the timelines. Both the plans being sub optimal and unsatisfactory, CoC proceeded to take steps to find out real value of the Corporate Debtor which cannot be

interdicted by judicial intervention as has been done by the impugned order.

4. Shri Mukul Rohatgi, learned senior counsel appearing for the Torrent Investments Pvt. Ltd. refuting the submissions of learned counsel for the Appellant contended that the second Challenge Mechanism is in violation of Regulation 39 (1A) of the CIRP Regulations. Regulation 39(1A) was introduced in the CIRP Regulations w.e.f. 30.09.2021 to achieve an objective i.e. to remove the shortcomings and pitfalls in the CIRP process causing delays on account of unsolicited bids received from the Resolution Applicants. Shri Mukul Rohatgi has relied on the Report of the Standing Committee on Finance dated 03.08.2021, Insolvency Law Committee Report, May, 2022 as well as IBBI Discussion Paper dated 27.08.2021 to highlight the purpose and object for which Regulation 39(1A) was inserted in the Regulation. It is submitted that CIRP is required to be conducted in a time bound manner. When the Challenge Mechanism was concluded on 21.12.2022, the CoC has to vote on the resolution plans received consequent to the Challenge Mechanism. There can be no dispute to the proposition that the CoC in its consideration can either approve the plan or reject the plan but the CoC cannot refuse to vote on the resolution plan received consequent to completion of Challenge Mechanism. The commercial wisdom of the CoC is not unlimited, it cannot be exercised arbitrarily and in derogation of the Code and the Regulations. The CoC and RFRP being creature of the Code and Regulations cannot circumvent

the scheme laid down under the CIRP Regulations. The decision of the CoC to give a second extended round of the Challenge Mechanism is purely an attempt to give second chance to IIHL. The sub-optimal and unsatisfactory nature of the resolution plans were purely engineered to circumvent the interim order dated 03.01.2023. The decision is motivated on the revised offer given by the IIHL. Shri Mukul Rohatgi further submitted that the CoC has not chosen to file an Appeal against the order dated 02.02.2023. The Appellant – Vistra ITCL (India) Ltd. is not the CoC nor any authority has been annexed to file the present appeal. Appellant being an authorized representative of Bondholders forming part of the CoC there has to be written instructions of the Financial Creditors it represents in favour of the Appellant, hence, the appeal is not competent at the instance of Vistra ITCL (India) Ltd. and deserves to be dismissed on this count. Learned senior counsel relied on provisions of Section 25A to support his submission. It is submitted that after 03.01.2023, CoC started helping IIHL which again is unlawful. The increase of the offer made by IIHL from Rs.8110 Crore to Rs.9000 Crores is contrary to the Challenge Mechanism process. The CoC has no jurisdiction to resort to another Challenge Mechanism. No mantra of maximization can be applied after insertion of Regulation 39(1A). Regulation 39(1A) is peremptory in nature and no discretion is left in the CoC thereafter. The best bid value which is obtained under Regulation 39(1A) is nothing but negotiation as per decision of CoC. The Administrator on 21.12.2022 itself has declared highest NPV as Rs.8640 Crore. The objective of maximization is fully achieved by Regulation 39(1A). The

mechanism evolved by Regulation 39(1A) is a flawless mechanism which does not leave any power in the CoC to adopt any other process.

5. Dr. Abhishek Manu Singhvi, learned senior counsel appearing for IIHL adopted the submissions raised on behalf of Vistra ITCL (India) Ltd. It is further submitted that Torrent has misrepresented the NPV submitted by it. Torrent's correct NPV is much lower than Rs.8640 Crores. In the plan submitted by Torrent on 21.12.2022, the upfront amount was Rs.3750 Crores and balance was reflected as deferred payment. Torrent subsequently has made offer with entire Rs.8640 Crore as upfront which is not permissible. It is submitted that IIHL has not changed its NPV which was offered in the Challenge Mechanism. NPV submitted by IIHL has not been revised over and above Rs.8110 Crore offered by IIHL, it offered additional payment of Rs.660 Crores in the Escrow towards release of shares and NCDs of Rs.200 Crores payable after 7 years 1 day to the Creditors. IIHL has remained committed to NPV submitted by bid in the Challenge Mechanism of Rs.8110 Crores (entire upfront). NPV is not the sole criteria in the RFRP and Challenge Mechanism to accept or reject the bid of the Resolution Applicant. It is submitted that the CoC ought to have adopted a transparent and on line bidding process to ensure maximization of value.

6. Shri Ramji Srinivasan, learned senior counsel appearing for Torrent also refuted the submissions of the Appellant. It is submitted that the process undertaken on 21.12.2022 was as per the announced steps. On

21.12.2022, the Challenge Mechanism stood completed, the NPV of Rs.8640 Crores was held to be highest NPV received in the 4<sup>th</sup> Round. IIHL did not continue in the 4<sup>th</sup> Round and it was Torrent only which participated in the 4<sup>th</sup> Round. It is submitted that on 17.12.2022, the Torrent has written to the Administrator asking whether after Challenge Mechanism any Resolution Applicant can change the financial proposal which was replied by the Administrator that no change in financial proposal can be allowed. As per Regulation 40A of the CIRP Regulations, within 30 days of receipt of resolution plan the CoC has to consider the plan for approval. The Adjudicating Authority has only directed that it is for the CoC to exercise its jurisdiction as required by CIRP Regulation. The power reserved to the CoC in RFRP is subject to the CIRP Regulation. The CoC did not reserve power to negotiate. The CoC adopted the Challenge Mechanism Method as negotiation mechanism. The CoC cannot go back to old negotiation, toppling bid received from IIHL of Rs.9000 Crores, has to be ignored. IIHL in the Challenge Mechanism elected not to go any higher from Rs.8110 Crores. Timelines and certainty are two most important factors in the insolvency resolution process. No increase in the final bid is permissible after conclusion of the Challenge Mechanism. The CoC cannot go endlessly to find out the maximum value of the Corporate Debtor. Regulation 39(1A) prohibit the CoC to take another course. The Regulation 39(1A) was introduced to end the uncertainty and delay in the process. The Challenge Mechanism is multiple opportunity to negotiate. The Process Paper shall prevail over RFRP as mentioned in the Process Paper itself.

Challenge Mechanism itself contemplate multiple challenges, nobody came to bid more than Rs.8640 Crores which was offered by Torrent as NPV. In the CoC meeting dated 23.12.2023, the Torrent was not held to be non-compliant and there was no whisper of sub-optimal in the said meeting. The view taken by the CoC in its meeting dated 06.01.2023 that it has right to negotiate is contrary to the RFRP and Process Document.

7. Shri Gopal Jain, learned senior counsel appearing for the Respondent No.2 submits that Administrator was in the process of verification of draft plans received from both the Resolution Applicants after 21.12.2022. The Administrator has not yet certified that plans received from Torrent and IIHL are compliant plans. In the 29<sup>th</sup> CoC meeting held on 23.12.2022, authorised representative of the Administrator has informed the CoC members that financial proposal submitted by IIHL was different from the final bid submitted on 21.12.2022. Before the Administrator could complete the vetting process for the two plans received on 21.12.2022, Torrent filed I.A. No. 1/MB/C-I/2023 where the CoC was not even impleaded. The process of evaluation was pending and no decision was taken either by the Administrator or the CoC and there was no reason for Torrent to feel aggrieved and file application before the Adjudicating Authority. Interim order dated 03.01.2023 effectively put prohibition on the Administrator's ability to consolidate the resolution plans. In the meeting held on 03.01.2023, Process Advisor to CoC pointed out that NPV calculated based on financial

proposal of both Resolution Applicants are different from the NPVs submitted in the challenge mechanism. On 04.01.2023, Administrator issued emails to Torrent and IIHL to submit Revised Plans with highest bid amount submitted by them in Challenge Mechanism. On 06.01.2023, the Administrator has received emails from both Torrent and IIHL enclosing revised draft resolution plans. Torrent gave revised offer with entire Rs.8640 Crores as upfront payment. IIHL also gave revised draft resolution plan with revised offer. In the meeting held on 06.01.2023, the Administrator informed the CoC that revised draft resolution plans received from Torrent and IIHL are being reviewed. Administrator also informed the CoC that the plan received on 22.12.2022 had outstanding compliance issues which was addressed to both Resolution Applicants.

8. We have considered the submissions of learned counsel for the parties and perused the record.

9. From the submissions of learned counsel for the parties and materials on the record following issues arise for consideration in these appeals:

- I. Whether the Appellant – Vistra ITCL (India) Ltd. has no appropriate authority to pursue the present Appeal and the Appeal is not competent at its instance?
- II. Whether after completion of Challenge Mechanism on 21.12.2022, the Committee of Creditors was obliged to put the

draft plans submitted by the Resolution Applicants on 22.12.2022 to vote without it having any other option?

- III. Whether after the result of Challenge Mechanism held on 21.12.2022 under Regulation 39(1A) (b) value maximization was achieved and Committee of Creditors was prohibited to take any further steps towards value maximization?
- IV. Whether clauses 4.2.4, 4.2.9, 4.3.7 and 4.4.7 of the RFRP permit the Committee of Creditors to negotiate, enter into discussion with the Resolution Applicants to increase their plan value, amend their plan or to tweak any other Challenge Mechanism, before completion of voting and if Committee of Creditors chooses so or the clauses permits so, they are ultra-vires under Regulation 39(1A) (b)?
- V. Whether the decision of the Committee of Creditors taken in the meeting dated 06.01.2023 to conduct an extended Challenge Mechanism amongst both the Resolution Applicants is impermissible and violative of Regulation 39(1A) (b)?

**Question No. I**

10. Shri Mukul Rohatgi, learned senior counsel appearing for Respondent No. 1 – Torrent has challenged the locus of the Appellant to file this Appeal against order dated 02.02.2023. It is submitted that the Appellant has not placed on record appropriate authority to pursue the present appeal. It is submitted that the Appellant is authorised

representative of Bondholders forming part of the CoC and the authorised representative is required to always act in accordance with the prior written instructions from the Financial Creditors it represents. Section 25A and Section 21(6A) of the I&B Code has been relied in the above context.

11. We need to notice certain facts to consider the objection regarding locus raised by the Respondent No.1. Appeal arises out of I.A. No. 1/MB/C-I/2023 and I.A. No. 99/MB/C-I/2023. I.A. No.1/MB/C-I/2023 was filed by the Torrent Investment Pvt. Ltd. on 30.12.2022, in which application initially only respondent impleaded was Nageswara Rao, Administrator of Reliance Capital Ltd., in which application interim order was passed on 03.01.2023 and by interim order dated 03.01.2023 following liberty was granted to the Applicant (Torrent):

*“... Liberty is granted in favour of the Applicant to add CoC as a party respondent to the Application if it deems fit. In the event CoC is arrayed as party respondent Application be served to the newly added respondent well in advance before the adjourned date.”*

12. In response to the liberty granted by the Adjudicating Authority, an I.A. No.99/MB/C-I/2023 was filed by the Torrent Investments Pvt. Ltd. on 09.01.2023. In the application, Vistra ITCL (India) Ltd. was proposed as Respondent No.2. In the application apart from Nageswara Rao, Administrator who was arrayed as Respondent No.1 following were proposed as Respondents:

**“VISTRA ITCL (INDIA) LIMITED**, having its office at IL. & FS Financial Centre, Plot No. C 22. G-Block, Bandra Kurla Complex, Bandra East, Mumbai, Maharashtra - 400051

... Proposed Respondent No.2

**ASSET CARE AND RECONSTRUCTION ENTERPRISE LIMITED**, having its office at 2nd Floor, Mohan Dev Building, 13, Tolstoy Marg, New Delhi - 110001

... Proposed Respondent No.3

**IDBI TRUSTEESHIP SERVICES LIMITED**, having its office at Asian Building, Ground Floor, 17, R. Kamani Marg, Ballard Estate, Mumbai, Maharashtra-400001

... Proposed Respondent No.4

**INDUSIND BANK LIMITED**, having its office at 2401, General Thimayya Road, East St, Pune, Maharashtra – 411001.

... Proposed Respondent No.5

**YES BANK LIMITED**, having its office at Yes Bank House, Off Western Express Highway, Santacruz East, Mumbai, Maharashtra – 400055.

... Proposed Respondent No.6

**MAZSON BUILDERS AND DEVELOPERS PRIVATE LIMITED**, having its office at 70, Nagindas Master Road, Fort, Mumbai, Maharashtra – 400023.

... Proposed Respondent No.7

**ARVUTAM ENTERPRISES PRIVATE LIMITED**, having its office at Sun Paradise Business Plaza, 7<sup>th</sup> Floor, Tulsi Pipe Road, Lower Parel (West), Mumbai, Maharashtra – 400013.

... Proposed Respondent No.8”

13. The prayer in the application was to amend I.A. No.1/MB/C-I/2023 as detailed in Schedule A. Para 2 of Schedule A stated:

*“II. Add the following paragraphs after paragraph no.2 in the Interlocutory Application No.1 of 2023:*

*2A Respondent Nos. 2 to 8 are the members of the Committee of Creditors of the Corporate Debtor (“CoC”).”*

14. Vide order dated 18.01.2023, application I.A. No.99/MB/C-I/2023 having been allowed, the Appellant - Vistra ITCL (India) Ltd. stands arrayed as Respondent No.2 to the I.A. No.1/MB/C-I/2023. As noted above, Vistra ITCL (India) Ltd. has been impleaded as Respondent No.2 to the Applicant’s application I.A. No.1/MB/C-I/2023 on application of the Torrent itself where it has been pleaded that Respondent no. 2 to 8 are the members of the CoC. The fact is undisputed that the Appellant - Vistra ITCL (India) Ltd. is member of the CoC. The Applicant – Torrent did not implead the CoC in its application rather impleaded Respondent No. 2 to 8 who were Financial Creditors being members of the CoC. The Appellant - Vistra ITCL (India) Ltd. having been impleaded as Financial Creditor, a member of the CoC, has every right to challenge order dated 02.02.2023 passed in I.A. No.1/MB/C-I/2023, where present Appellant is arrayed as Respondent by the Applicant – Torrent itself.

15. Now coming to the submission of Respondent No.1 that Appellant has not filed any authority which may permit the Appellant to pursue the

Appeal. We have looked into the records of both the Appeals Company Appeal (AT) (Ins.) No. 132, 133 & 134 of 2023 as well as Company Appeal (AT) (Ins.) No.139 of 2023. The Appeal by the Appellant has been filed through one Supratik Dasgupta, Assistant Vice President at Vistra ITCL (India) Ltd. Vistra ITCL (India) Ltd. has also filed appearance in Company Appeal (AT) (Ins.) No.139 of 2023 by Dy. No. 67069 dated 15.02.2023. Copy of the Board Resolution passed at the 57<sup>th</sup> meeting of Administrative Committee of Board of Directors of Vistra ITCL (India) Ltd. held on 24 August, 2021 has been annexed where Board of Directors has accorded for delegation of authority to the personnel named therein jointly and/or severally to represent in any legal proceedings. Mr. Supratik Dasgupta has been delegated authority to represent the Vistra ITCL (India) Ltd. and on the strength of resolution, the appeal has been filed through Mr. Supratik Dasgupta. When Board of Directors of the Appellant has authorised filing of the appeal by authorized person, we fail to see how the appeal filed by Vistra ITCL (India) Ltd. is incompetent. The submission of learned counsel for Respondent No.1 that Bondholders has not authorized filing of the Appeal does not commend us. The Board of Directors is fully competent to take all steps on behalf of Vistra ITCL (India) Ltd. including initiation of legal proceedings. When the Board has authorised filing of the appeal through authorised representative, the submission cannot be accepted that Appellant is not authorised by the shareholders. Interests of the shareholders are looked by the Board of Directors of the Vistra and Board having been authorized, the preliminary objection raised by Respondent

No.1 cannot be accepted. The Appeal by financial creditor who is member of the Coc and as per learned senior counsel for the Appellant, holds 90% vote share in the CoC, there is sufficient locus with the Appellant to challenge the impugned order dated 02.02.2023. Appellant being Financial Creditor in the CoC which is admitted fact, there is no lack of jurisdiction in the Appellant to file this appeal.

**Question No. II to V**

16. Questions II to V being interrelated are being considered together. Before we enter into the rival submissions of learned counsel for the parties, we need to notice relevant statutory provisions governing the CIRP and relevant clauses of RFRP, Process Document and Challenge Mechanism Process Steps.

17. Section 30 of the I&B Code provides for submission of Resolution Plan. Sub-section (2) of Section 30 provides that the Resolution Professional shall examine each resolution plan received by him to confirm that each resolution plan provides for as detailed in Sub-section (2) of Section 30. Further, Sub-section (3) of Section 30 provides that the Resolution Professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in Sub-section (2). Sub-section (4) of Section 30 provides that –

*“(4) The committee of creditors may approve a resolution plan by a vote of not less than <sup>3</sup>[sixty-six] per cent. of voting share of the financial*

*creditors, after considering its feasibility and viability, <sup>4</sup>[the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board.”*

18. The Board has framed regulations namely CIRP Regulations, 2016 in exercise of power conferred under various Sections of the Code including Section 30 with Section 240 of the Code. Chapter X of the Regulations deals with ‘Resolution Plan’. Regulation 36A provides for ‘Invitation for Expression for Interest’. Regulation 36B provides for ‘Request for Resolution Plan’. Regulation 36B, which is relevant for the present case is as follows:

**“36B. Request for resolution plans.** – (1) *The resolution professional shall issue the information memorandum, evaluation matrix and a request for resolution plans, within five days of the date of issue of the provisional list under sub-regulation (10) of regulation 36A to –*

- (a) every prospective resolution applicant in the provisional list; and*
- (b) every prospective resolution applicant who has contested the decision of the resolution professional against its non-inclusion in the provisional list.*

*(2) The request for resolution plans shall detail each step in the process, and the manner and purposes of interaction between the resolution professional and the prospective resolution applicant, along with corresponding timelines.*

*(3) The request for resolution plans shall allow prospective resolution applicants a minimum of thirty days to submit the resolution plan(s).*

*(4) The request for resolution plans shall not require any non-refundable deposit for submission of or along with resolution plan.*

*<sup>2</sup>[(4A) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.*

*Explanation I. – For the purposes of this sub-regulation, “performance security” shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of*

*resolution plan and business of the corporate debtor.*

*Explanation II. – A performance security may be specified in absolute terms such as guarantee from a bank for Rs. X for Y years or in relation to one or more variables such as the term of the resolution plan, amount payable to creditors under the resolution plan, etc.]*

*(5) Any modification in the request for resolution plan or the evaluation matrix issued under sub-regulation (1), shall be deemed to be a fresh issue and shall be subject to timeline under sub-regulation (3).*

*<sup>1</sup>[Provided that such modifications shall not be made more than once.]*

*(6) The resolution professional may, with the approval of the committee, extend the timeline for submission of resolution plans.*

*(7) The resolution professional may, with the approval of the committee, re-issue request for resolution plans, if the resolution plans received in response to an earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list:*

*Provided that provisions of sub-regulation (3) shall not apply for submission of resolution plans under this sub-regulation.]”*

19. Regulation 37 deals with 'Resolution Plan' and Regulation 38 deals with 'Mandatory contents of the Resolution Plan'. Regulation 39 deals with 'Approval of Resolution Plan'. In Regulation 39, Regulation (1A) and Regulation (1B) were inserted by (Third Amendment) Regulations, 2021 w.e.f. 30.09.2021. Regulation 39 as amended w.e.f. 30.09.2021 is as follows:

**“39. Approval of resolution plan. –** <sup>1</sup>[(1) *A prospective resolution applicant in the final list may submit resolution plan or plans prepared in accordance with the Code and these regulations to the resolution professional electronically within the time given in the request for resolution plans under regulation 36B along with*

(a) *an affidavit stating that it is eligible under section 29A to submit resolution plans;*

<sup>2</sup>[\*\*\*]

(c) *an undertaking by the prospective resolution applicant that every information and records provided in connection with or in the resolution plan is true and correct and discovery of false information and record at any time will render the applicant ineligible to continue in the corporate insolvency resolution process, forfeit*

*any refundable deposit, and attract penal action under the Code.*

<sup>3</sup>*[(1A) The resolution professional may, if envisaged in the request for resolution plan-*

- (a) allow modification of the resolution plan received under sub-regulation (1), but not more than once; or*
- (b) use a challenge mechanism to enable resolution applicants to improve their plans.*

*(1B) The committee shall not consider any resolution plan-*

- (a) received after the time as specified by the committee under regulation 36B; or*
- (b) received from a person who does not appear in the final list of prospective resolution applicants; or*
- (c) does not comply with the provisions of sub-section (2) of section 30 and sub-regulation (1).]]*

<sup>4</sup>*[(2) The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him: -*

- (a) *preferential transactions under section 43;*
- (b) *undervalued transactions under section 45;*
- (c) *extortionate credit transactions under section 50; and*
- (d) *fraudulent transactions under section 66, and the orders, if any, of the adjudicating authority in respect of such transactions.]*

<sup>1</sup>[(3) *The committee shall-*

- (a) *evaluate the resolution plans received under sub-regulation (2) as per evaluation matrix;*
- (b) *record its deliberations on the feasibility and viability of each resolution plan; and*
- (c) *vote on all such resolution plans simultaneously.*

*(3A) Where only one resolution plan is put to vote, it shall be considered approved if it receives requisite votes.*

*(3B) Where two or more resolution plans are put to vote simultaneously, the resolution plan, which receives the highest votes, but not less than requisite votes, shall be considered as approved:*

*Provided that where two or more resolution plans receive equal votes, but not less than requisite votes, the committee shall approve any one of them, as per the tie-breaker formula announced before voting:*

*Provided further that where none of the resolution plans receives requisite votes, the committee shall again vote on the resolution plan that received the highest votes, subject to the timelines under the Code.”*

20. Regulation 36B as noted above sub-regulation (2) provides that the request for resolution plans **shall detail each step in the process**, and the manner and purposes of interaction between the resolution professional and the prospective resolution applicant, along with corresponding timelines. In the present case request for Resolution Plan was issued by the Administrator on 26.04.2022. We need to notice certain clauses of RFRP dated 26.04.2022, which RFRP is also relevant for subsequent process undertaken. Clause 3.17.16 and 3.17.17 which are relevant are as follows:

*“3.17.17 The Resolution Plan(s) that are in compliance with the provisions of the IBC shall be considered by the CoC in accordance with Regulations 39(3), 39(3A) and 39(3B) of the CIRP Regulations. The Administrator and the CoC (along with any person authorised by the CoC in this regard) reserve the right to negotiate with the Resolution Applicant(s) and/or the Resolution*

*Bidder(s) prior to such plan(s) being put to vote for approval by the CoC in order to achieve a successful resolution of RCAP with the objective of maximising the value of the Corporate Debtor for all stakeholders.”*

21. Learned counsel for the Appellant has also referred to various other clauses of the RFRP which clauses were also noticed by the Adjudicating Authority in its impugned order while noticing submission of Vistra ITCL (India) Ltd. Clause 4.2.4 provides as follows:

*“4.2.4 Notwithstanding anything contained in this RFRP, the CoC reserves the absolute right to:*

- (a) consider, accept or vote on any Resolution Plan and/or Combined Resolution Plan, with or without modification;*
- (b) reject any Resolution Plan and/or Combined Resolution Plan;*
- (c) annul the Resolution Plan process and reject all Resolution Plans and/or Combined Resolution Plans and call for submission of new Resolution Plans from any Person;*
- (d) select or approve any proposal or Resolution Plan or Combined Resolution Plan, as it may deem fit;*
- (e) call upon the Resolution Applicant and/or the Resolution Bidder to make modifications*

*to the plan and/or submit a revised Resolution Plan and or revised Resolution Bid and/or Combined Resolution Plan;*

- (f) aggregate the Resolution Plans and/or Resolution Bids or any part thereof to achieve successful resolution of the Corporate Debtor. It is clarified that the Successful Resolution Applicant shall be responsible for implementation of such Resolution Plan and the CoC/Administrator or any of their respective professional or legal advisors shall have no liability in respect thereof;*
- (g) allow one or more Resolution Applicants and/or Resolution Bidders to jointly submit a Resolution Plan;*
- (h) call for submission of revised Resolution Plan and/or Resolution Bids from the Resolution Applicants and/or Resolution Bidders who have already submitted Resolution Plans and/or Resolution Bids; or*
- (i) re-issue the invitation for EOIs or re-issue request for Resolution Plans from Resolution Applicants and/or Resolution Bidders (including any new Resolution Applicants and/or new Resolution Bidders).”*

22. The above clause indicate that power reserved under 4.2.4 is notwithstanding anything contained in RFRP. The clause has been used

in a manner which clearly emphasize that the rights of CoC enumerated in the clause are without any condition. Clause 4.2.9 contains a caveat to the Resolution Applicants, which provides as follows:

*“4.2.9 The Resolution Applicant(s) and/or Resolution Bidder(s) should note that:*

- (a) Neither the Administrator nor the CoC shall have any obligation to undertake or continue the Submission Process with the Resolution Applicant and/or the Resolution Bidder having the best technical capabilities or highest/ best financial plan. Notwithstanding anything contained hereinabove, the CoC reserves the right to engage in discussions with any Resolution Applicant(s) and/or the Resolution Bidder(s).*
- (b) If the Administrator receives only a single Resolution Plan, then the Administrator on the instructions of the CoC or the CoC have the discretion to either discuss with the said Resolution Applicant to better terms of the said Resolution Plan, or annul the Submission Process.*
- (c) The CoC may, in its sole discretion, request and require Resolution Applicants and/or the Resolution Bidders to submit the Resolution Plan(s) and/or the Resolution*

*Bid(s), as the case may be in such form and manner that will ensure, inter alia:*

- (i) insolvency resolution of the Corporate Debtor is achieved in accordance with the provisions of the IBC, the CIRP Regulations and the FSP Rules; and*
- (ii) maximization of value of assets of the Corporate Debtor is achieved.”*

23. Clause 4.3.7 reserves right to the Administrator as well as the CoC to negotiate terms of the resolution plan with one or more Resolution Applicants. Clause 4.3.7 is as follows:

*“4.3.7 The Administrator and the CoC shall have the right to negotiate terms of the Resolution Plan(s) and/or Resolution Bid(s) with one or more Resolution Applicant(s) and/or Resolution Bidder(s) (including Successful Resolution Applicant) to achieve the successful insolvency resolution of the Corporate Debtor and maximize the value for all stakeholders. The timelines and process for the negotiation shall be determined and/ or communicated, if necessary, at a later date. By submitting the Resolution Plan(s) and/or Resolution Bid(s), the Resolution Applicant and/or the Resolution Bidder, as the case may be, shall be deemed to have unequivocally agreed that any process of negotiation adopted by the CoC shall be binding on them and that they have no objection in following any such process. The Administrator*

*(acting for the CoC) or the CoC shall not be bound to disclose the scores of any Resolution Applicant or disclose the methodology adopted in arriving at such scores. It is further clarified that the Resolution Applicant and/or the Resolution Bidder shall not have the right to request clarifications on the scoring made as per the Evaluation Criteria or seek information as regards the methodology adopted for the scoring of its Resolution Plan(s)."*

24. Clause 4.4.4 deals with steps of negotiation/discussion with one or more Resolution Applicants. Clause 4.4.4 is to the following effect:

*"4.4.4 Step III- Negotiation/discussion with one or more Resolution Applicants), and Resolution Bidders) and Due Diligence of Resolution Applicant(s) and Resolution Bidders)*

*(a) The CoC, reserves the right to negotiate any of the terms of the Resolution Plan(s) and/or Resolution Bid(s) for the purpose of Combined Resolution Plan under Option 2 with any or all Resolution Applicants and/or Resolution Bidders at any stage in their sole discretion, in order to assess all the Resolution Plans and/or Resolution Bids on the mentioned parameters. The CoC and/or the Administrator (acting on the instructions of the CoC) may, at their sole discretion, decide any method or process for negotiation, finalization and determination of the Successful Resolution Applicant and*

*each Resolution Applicant and/or Resolution Bidder shall be bound by the terms governing such a process, which shall be decided by the CoC.*

- (b) The CoC in its discretion may declare a benchmark price for Resolution Bids to be submitted for each of the Clusters and may also separately declare benchmark price for submission of a Resolution Plan under Option 1 or Combined Resolution Plan under Option 2.*
- (c) The CoC, the Administrator or any other professional advisor as appointed by the CoC or the Administrator reserve the right to conduct due diligence on the Resolution Applicant(s) and/or Resolution Bidder(s) with the assistance of external agencies at any stage of the Submission Process. The scope of the due diligence shall include but not be limited to the following parameters:
  - (i) compliance with Applicable Laws;*
  - (ii) submission of documents for the requisite, "know your customer" checks to the satisfaction of CoC and/or the Administrator (who is acting on the instructions of the CoC);*
  - (iii) review of the financial and operational capability of the Resolution Applicant and/or the Resolution Bidder;**

- (iv) *any other matter, which the CoC and/or the Administrator (acting on the instructions of the CoC) may deem fit or necessary, and*
- (v) *the Resolution Applicant's and/or Resolution Bidder's ability and intent to run the Corporate Debtor under Option 1 or the relevant Cluster under Option 2 as the case may be, as a going concern as part of the implementation of the Resolution Plan.*

*(d) During the negotiations, or post the negotiations, the Resolution Applicant(s) and/or Resolution Bidder(s) may be required to submit revised/modified financial proposals and/or revisions to ensure compliance with Applicable Law in accordance with the timelines specified by the Administrator (in consultation with the CoC).”*

25. On 22.10.2022, Process Paper was issued. The process paper begins with following statement:

*“Date: October 22, 2022*

***RESOLUTION PLAN SUBMISSION PROCESS  
FOR RELIANCE CAPITAL LIMITED***

*(to be read with the RFRP dated April 26, 2022 and other clarifications issued thereafter in the VDR)*

*This is with reference to the Corporate Insolvency Resolution Process of Reliance Capital Limited (“RCL”).*

*We refer to request for resolution plans (“RFRP”) issued by the Administrator on April 26, 2022 and the clarifications issued in terms thereof from time to time. Further to consultations of the CoC, please see below the resolution plan finalisation process (“Process Paper”). This is a part of the RFRP. No other term of the RFRP shall be considered amended or modified and should any contradiction arise between the RFRP and this Process Paper, the Process Paper shall prevail. This Process Paper is being issued in furtherance to the RFRP and the provisions of the IBC and CIRP Regulations including Regulation 36B (7) of the CIRP Regulations to all Resolution Applicants identified in the Final List of Prospective Resolution Applicants issued by the Administrator dated April 19, 2022 and updated on October 20, 2022.”*

26. We have noted above that in pursuance of Process Document issued on 22.10.2022, Resolution Plans were received on 28.11.2022. The CoC thereafter decided to adopt Challenge Mechanism with respect to the Resolution Plans received. The Challenge Mechanism Process Note was issued on 14.12.2022. Following part of the Challenge Mechanism Process Note needs to be noticed:

**“Reliance Capital Limited – Challenge Mechanism**

**I. Background:**

*With reference to the ongoing Corporate Insolvency Resolution Process (“**CIRP**”) of Reliance Capital Limited (the “**Corporate Debtor**” or “**RCAP**”), the request for resolution plans was issued by the Administrator dated 26<sup>th</sup> April 2021 along with the various FAQs and clarifications were issued by the Administrator and the Committee of Creditors (“**CoC**”) from time to time including process paper dated 22<sup>nd</sup> October 2022 (“**Process Paper**”) in terms of the provisions of the Code including Regulation 36B(7) of the CIRP Regulations (collectively referred to as the “**RFRP**”) to the prospective resolution applicants (“**PRAs**”). Accordingly, PRAs submitted their duly executed resolution plans in accordance with the terms of the RFRP on 29<sup>th</sup> August 2022.*

*The Process Paper required the PRAs to submit duly executed resolution plans on 28<sup>th</sup> November 2022, which would be followed by a challenge mechanism to maximize the value of the resolution plans.*

*Set forth below is the challenge mechanism (“**Challenge Mechanism**”) to be conducted amongst Resolution Applicants who have submitted Resolution Plans on 28<sup>th</sup> November 2022 (“**Resolution Applicants**” or “**Bidders**” or “**RA**”).*

*The Challenge Mechanism shall be read along with the terms of the RFRP.*

**II. Key Notes:**

- 1. By participating in the Challenge Mechanism, each Resolution Applicant accepts that it has understood the Challenge Mechanism and confirms that the process is fair and reasonable.*
- 2. Each Resolution Applicant accepts and acknowledges that participation in the Challenge Mechanism does not in any manner confirm the eligibility or compliance of the Resolution Applicant or its resolution plan in terms of the provisions of the Code or the RFRP.*
- 3. To ensure confidentiality, the details of the resolution plans of Resolution Applicants will not be disclosed. Only the NPV of the highest financial proposal contained in a resolution plan ("**Highest NPV**") at the end of each round will be disclosed.*
- 4. The CoC is not obligated to approve the resolution plan which has the highest NPV or scored the highest as per the Evaluation Matrix and any resolution plan shall be approved solely on the basis of the commercial wisdom of the CoC. The CoC while approving a resolution plan will consider the*

*feasibility and viability of each resolution plan and other factors. The Administrator/ CoC and their advisors reserve the right to evaluate compliance and the Resolution Applicants shall provide such modifications or clarifications as may be required by Administrator or CoC. Furthermore, all compliant Resolution Plans will be put to vote by the CoC as per the requirements of the IBC Code.*

- 5. This Challenge Mechanism does not confer any rights on any Resolution Applicant including the Resolution Applicant with the Highest NPV.*
- 6. The Resolution Applicants shall not make any modifications to their Resolution Plan (other than to incorporate the final proposal made by the Resolution Applicant in the Challenge Mechanism) unless otherwise requested by the Administrator and the CoC and their respective advisors. Notwithstanding the above, it is reiterated that there shall be no modifications to the financial proposal pursuant to the Challenge Mechanism of each Resolution Applicant.”*

27. In pursuance of the Challenge Mechanism Process Note, the Challenge Mechanism was held on 21.12.2022, which was conducted in four rounds. IIHL participated upto third round offering a bid of NPV

Rs.8110 Crores whereas Torrent participated upto fourth round giving NPV of Rs.8640 Crores.

28. Much submissions have been made by learned Counsel for the parties on the interpretation of Regulation 39(1A) as inserted with effect from 30.09.2021 and its effect and consequences on the jurisdiction of the CoC. Learned Counsel for Respondent No.1 has referred to the Report of the Insolvency Law Committee May, 2022. Paragraph 2.42 of the report provides:

*“2.42. Although deference to the wisdom of the CoC in commercial matters is an established norm, such commercial wisdom should be exercised as per the procedure laid down by the Code and the regulations. Where the regulations specify the procedure for conducting the CIRP, unless they are ultra vires to the Code, participants are required to comply with them. Non-compliance of the same undermines the certainty, predictability and transparency of the process thereby making it unfair for the participants and being detrimental to the development of a market for resolution plans. Since the regulations are framed in furtherance of the objectives of the Code and its provisions, a reliance on its objectives (value maximisation) for non-compliance of the procedure will go against the scheme of the Code.”*

29. Reliance has also been placed on the Report of the Standing Committee on Finance, Implementation of Insolvency and Bankruptcy Code – Pitfalls and Solutions. On the heading performance review of the NCLT system, following observations have been made in the report

*“Second, it should be noted that invited bidders are asked to submit their respective resolution plans within the specified deadlines. These resolution plans are then evaluated by the CoC. In the meanwhile, other bidders may suddenly emerge and submit their own resolution plans. These bidders typically wait for the H1 bidder to become public, and they then seek to exceed this bid through an unsolicited offer that is submitted after the specified deadline. Currently, the CoCs have significant discretion in accepting late and unsolicited resolution plans.*

*These unsolicited, late bids create tremendous procedural uncertainty. As a result genuine bidders are discouraged from bidding at the right time. The overall process is vitiated and there are significant delays leading to further value erosion. The Committee believes that the IBC needs to be amended so that no post hoc bids are allowed during the resolution process. There should be sanctity in deadlines, so that value is protected and the process moves smoothly.”*

30. The third material, which has been relied is Discussion Paper dated 27<sup>th</sup> August, 2021 of Insolvency and Bankruptcy Board of India. In the

Discussion Paper, it was noted that there was no cap on the number of revisions that may be allowed in a Resolution Plan, which has effect on delaying a resolution. In paragraphs 20, 21, 30 and 31, following have been captured.

*“20. Regulation 36B of the CIRP Regulations contain provision regarding request for resolution plans. It provides for a minimum of 30 days for prospective resolution applicants to submit the plans and allows for revision/ modification of the request for resolution plan (RFRP) subject to the 30-day timeline but there is no cap on the number of revisions that may be allowed in a resolution plan. These have the effect of delaying resolution. There are also cases where the resolution applicants revise the resolution plans multiple times, with or without the consent of the CoC, leading to delays in completing the process.*

*21. The CoC, at many times keeps on entertaining these plans for value maximization. It, however, creates uncertainty about the process and rather places an incentive on the PRAs to offer lesser at the initial stages. If sufficient competition is not achieved in the process, such practice may even lead to less than optimum value for the corporate debtor. Invariably, the delay in the process adds to the costs leads to further destruction of the value of the CD.*

**Proposed Amendment**

**30.** *Considering the issues in RFRP and to provide for option for Swiss challenge to the CoC, it is proposed to amend the regulations to provide for:*

- (i) The RP and CoC to place the RFRP with due consideration of the market conditions.*
- (ii) The CoC shall decide on allowing for revision of the RFRP, number of such revisions and timelines for the same on ex-ante basis. The number of revisions shall not exceed 2.*
- (iii) CoC shall decide the timelines within which it will allow for negotiation and changes to the submitted resolution plans*
- (iv) CoC and RP shall not entertain unsolicited revision to resolution plans.*
- (v) The CoC shall decide whether it considers appropriate to opt for a swiss challenge method and if the same is decided by the CoC, then it should be provided in RFRP on ex-ante basis.*
- (vi) The CoC to decide basis for evaluation, timelimit within which the challenge process shall be concluded and the minimum threshold for improvement over the resolution plan on ex-ante basis.*

### ***Economic Analysis***

**31.** *The proposed amendment would help by allowing additional options to the CoC for resolution of a firm while under CIRP. The cap on number of extensions in RFRP would ensure that the sacrosanct timelines envisaged under the Code is practicable. Further, such an amendment would help instilling faith amongst stakeholders in the corporate insolvency resolution process and prevent potential misuse in absence of any specifications. This would also ensure that the CIRP remains timebound and value obtained is a competitive one and the maximum achievable given the market condition.”*

31. The insertion of Regulation 39(1A) was made in the Regulations with object to curtail submission of unsolicited Resolution Plan and number of revisions, which can be permitted in the Resolution Plan. The Swiss Challenge Method was also referred to as one of the option, which can be adopted by the CoC. The cap on number of extension in the RFRP was also with the same objective. Regulation 39(1A) has two parts, i.e. (a) and (b). For ready reference Regulation 39(1A) is extracted below:

*“39(1A) The resolution professional may, if envisaged in the request for resolution plan-*

*(a) allow modification of the resolution plan received under sub-regulation (1), but not more than once; or*

*(b) use a challenge mechanism to enable resolution applicants to improve their plans.”*

32. Sub-regulation (1A) begins with the expression “*Resolution Professional may, if envisaged in the request for resolution plan -- (a) allow modification of resolution plan received under sub-regulation (1), but not more than once: or (b) use a Challenge Mechanism to enable resolution applicants to improve their plans*”. The insertion of Regulation 39(1A) was with clear object to reduce the delay, which is caused in submission of final Resolution Plan. It has been submitted that although in sub-clause (a), there is restriction in modification of Resolution Plan not more than once, but there is no such restriction in clause (b). The Challenge Mechanism by its nature envisages multiple rounds of challenge, hence, no other expression was required in the Regulation, except the word “a Challenge Mechanism”. The consequence of insertion is that the Resolution Professional may either permit Resolution Applicant to modify its Plan, but not more than once, or to use a ‘Challenge Mechanism’ to enable Resolution Applicant to improve their Plan.

33. The question which needs to be considered and answered is whether Regulation 39(1A) contains an implied prohibition on the jurisdiction of the CoC to enter into any further negotiations with Resolution Applicant or to further ask a Resolution Applicant to increase its Resolution Plan value.

34. Regulation 39(1A) is a provision incorporating a procedural mechanism for Resolution Professional for finalization of Resolution Plan submitted by Resolution Applicants. Now, we need to notice other relevant statutory Regulations, which throw light on the jurisdiction of CoC to proceed further when Resolution Plan is received from the Resolution Applicants and duly certified by the Resolution Professional. As noted above, the authority and jurisdiction to consider Resolution Plan for approval is vested with the CoC after considering its feasibility and viability under Section 30, sub-section (4) of the Code.

35. Regulation 36B, sub-regulation (7), empowers Resolution Professional with the approval of the CoC to re-issue request for Resolution Plans, if the Resolution Plans received in response to an earlier request are not satisfactory. Regulation 36B, sub-regulation (7) is self-explanatory even if Resolution Professional with the approval of CoC uses a Challenge Mechanism to enable Resolution Applicants to improve their Plans and consequently the Resolution Applicants submit their improved Plan, the power under Regulation 36B, sub-regulation (7) can very well be exercised by the CoC to decide to re-issue request for Resolution Plan. As noted above, request for Resolution Plans under Regulation 36B(2) is required to detail each step in the process. The RFRP issued on 26.04.2022 is referable to Regulation 36B, sub-regulation (2). Hence, we need to look into detailed steps, which are contained in the RFRP with regard to resolution process.

36. We have noted in the foregoing paragraphs, the relevant clauses of RFRP on the strength of which, the learned Counsel for the Appellant submits that the right of CoC to negotiate with Resolution Applicants, even if Challenge Mechanism is intact and Regulation 39(1A) does not contain any fetter on the right of the CoC to proceed further after Challenge Mechanism. Clause 3.17.17 for ready reference is extracted below:

*“3.17.17 The Resolution Plan(s) that are in compliance with the provisions of the !BC shall be considered by the Coe in accordance with Regulations 39(3), 39(3A) and 39(3B) of the CIRP Regulations. The Administrator and the CoC {along with any person authorised by the CoC in this regard} reserve the right to negotiate with the Resolution Applicant(s) and/or the Resolution Bidder(s) prior to such plan(s) being put to vote for approval by the CoC in order to achieve a successful resolution of RCAP with the objective of maximising the value of the Corporate Debtor for all stakeholders.”*

37. The above clause will indicate that after a Resolution Plans are received in accordance with Regulation 39(1A), the right of the CoC to negotiate with Resolution Applicants, after receipt of the Plan and/ or before the Plan is put to vote, is clearly reserved. Clause 4.2.4 again reserves the right of CoC to annul the Resolution Plan process and call for submission of new Resolution Plan from any person/ Resolution Applicant

to make modification to the Plan and to submit a revised Resolution Plan or revised Resolution Bid or Combined Resolution Plan. Clause 4.2.4 (c), (e), (h) and (i) clearly envisage such consequence. The submission of the Respondent that after completion of Challenge Mechanism under Regulation 39(1A), the power of CoC is circumscribed and CoC is only obliged to vote on the Plans received consequent to Challenge Mechanism is clearly unsustainable, in view of the above explicit clauses of RFRP. Clause 4.2.9, further makes it clear that CoC is not obliged to continue the Submission Process with the Resolution Applicant, even if the best technical capabilities or highest financial plan received, the CoC reserves the right to engage in discussion with any Resolution Applicant. Clause 4.2.9, sub-clause (a), clearly indicate the said conclusion.

38. The submission of learned Counsel for Respondent No.1 that the aforesaid Clauses of RFRP are *ultra vires* to Regulation 39(1A) also needs to be answered. When we look into Regulation 39(1A), this was inserted empowering Resolution Professional to allow modification of the Resolution Plan, but not more than once or use a Challenge Mechanism to enable Resolution Applicants to improve their Plans. The Regulation 39(1A) cannot be read containing any fetter on the right of the CoC to take further action as per RFRP after receipt of the Resolution Plan consequent to Challenge Mechanism. We may in this context refer to a judgment of this Tribunal in ***Jindal Stainless Ltd. vs. Mr. Shailendra Ajmera, Resolution Professional of Mittal Corp Ltd. & Ors. – Company Appeal***

**(AT) (Ins.) No. 1058 of 2022** decided on 18.01.2023, which was a judgment delivered by this Bench. In the above case also CoC decided to undertake a Challenge Process in order to give opportunity to Resolution Applicants to improve their Plans. The Challenge Process was conducted on 15.07.2022. The Applicants were notified that signed and compliance Resolution Plan must be submitted by 18.07.2022. The Appellant, Respondent No.1 and two other Resolution Applicants submitted their amended Resolution Plans by 18.07.2022. However, on 19.07.2022, Respondent No.1 sent an e-mail that he is willing to submit the entire NPV offered as upfront payment within 30 days. Respondent No.2 also sent an email on 19.07.2022, further improving its offer. The CoC on 03.08.2022 resolved to put all four Plans received by 18.07.2022 to vote. At that juncture, Respondent No.2 filed an IA before the Adjudicating Authority, in which IA, the Adjudicating Authority passed an order dated 11.08.2022, directing the CoC to consider the revised Resolution Plan submitted by Respondent No.2, which order came to be challenged in the Appeal before this Tribunal. This Tribunal in the said case has also referred to the Insolvency Law Committee Report dated May, 2022 as well as the Discussion Paper dated 27.08.2022 as noticed above. This Tribunal held that there can be no fetter on the power of CoC to cancel or modify any negotiation with the Resolution Applicant including a Challenge Process, but it is the wisdom of the CoC to take a decision in this regard. Following was laid down in paragraph 20:

*“20. There can be no fetter on the power of the CoC to cancel or modify any negotiation with the Resolution Applicant including a Challenge Process but it is the wisdom of the CoC to take a decision in that regard. CoC, in the facts of the present case, did not take any decision to disregard the Challenge Process completed in 13th CoC meeting held on 15.07.2022 and it decided to vote on the plan which voting process has begun.”*

39. The above judgment of this Tribunal is sought to be distinguished by learned Counsel for Respondent No.1 on the ground that in the said case, the CoC despite having right to change the modalities did not exercise its power to cancel, modify, withdraw or abandon the process of challenge at any stage. Whereas in the RFRP of the present case, no such power is reserved to CoC. Clause 4.2.4 of the RFRP of the present case provides that *“Notwithstanding anything contained in the RFRP, the CoC reserve the absolute right”* and clause 4.2.4 (c) provides *“annul the Resolution Plan process and reject all Resolution Plans and/or Combined Resolution Plans and call for submission of new Resolution Plans from any Person”*. The above clause is wide enough to empower the CoC to annul the Resolution Process including the Challenge Process. Further Clauses of RFRP of the present case clearly reserve the power of CoC to call the Applicants for negotiations or improving their Resolution Bid. Hence, the CoC is not denuded of its power to take action under RFRP in the present case and the law laid down by this Tribunal in **Jindal Stainless Ltd.** (supra) that there can be no fetter on the power of CoC to cancel or modify any negotiation with the

Resolution Applicant including a Challenge Process is fully attracted in the present case. The Adjudicating Authority itself in its judgment has noticed that Challenge Process can be cancelled if any fraud is found in the Challenge Process. The power to cancel a Challenge Process is not confined only to the cases of fraud detected, but there may be other circumstances also, when Challenge Process may be annulled by the CoC with right to initiate fresh Challenge Process or a Revised Challenge Process. One of such circumstances under which CoC is fully justified to discard the Challenge Process is a case when CoC comes to the conclusion that there was cartelization between Resolution Applicants. The present is not a case where CoC has decided to annul the Challenge Process conducted on 21.12.2022, but CoC has decided to proceed with extended challenge round between Resolution Applicants.

40. We need to notice the background facts and circumstances, which led the CoC to take a decision to embark on extended challenge method and to find out as to whether such decision can be said to be arbitrary and in violation of any statutory provisions of the Code. We have noticed above that RFRP was initially issued on 26.04.2022 and the Plans were invited in August 2022 and 28<sup>th</sup> November 2022 was the last date for submission of Resolution Plans. The Challenge Mechanism was concluded on 21.12.2022. The Adjudicating Authority in paragraph 101 itself has noticed the different amounts, which were offered by Respondent No.1 and IIHL during the span of few months. On 28.08.2022, Respondent No.1

offered an amount of Rs.4000/- crores with upfront amount of Rs.1000/- crores; on 28.11.2022, Respondent No.1 offered an amount of Rs.4500/- crores with upfront amount of Rs.1100/- crores and in the Challenge Mechanism it offered NPV of Rs.8640/- crores with upfront amount of Rs.3750/- crores. Similarly, IIHL on 28.08.2022 offered an amount of Rs.4000/- crores; on 28.11.2022, it offered an amount of Rs.5060/- crores with upfront amount of Rs.4100/- crores and in Post Challenge Mechanism it offered an NPV amount of Rs.8110/- crores with upfront amount of Rs.8110/- crores. It is also relevant to notice that although Respondent No.1 has initially offered upfront payment of Rs.3750/- crores, but it sent an e-mail to Administrator that it is ready to make the entire payment of Rs.8640/- crores upfront. Further, IIHL has also sent an e-mail, explaining its NPV and stating that it is ready to stick with NPV of Rs.8110/- crores and it is ready to make additional payment of Rs.890/- crores, totaling Rs.9000/- + crores approx. All these facts have been noticed by the CoC in its meeting, which needs to be briefly referred. In the meeting of the CoC held on 23.12.2022, on the Agenda Item No.3 – Update on the resolution process of the Corporate Debtor, the e-mail of IIHL was read, where it came to notice that IIHL included revised NPV of INR 9000+ crores, which was in deviation from the final bid submitted by it in Challenger mechanism process, i.e. INR 8110/- crores. The CoC also noticed in the meeting the deadline of January 31, 2023. It is useful to extract following part of the Agenda Item:

*“After multiple deliberation it was decided that both the draft resolution plans received by the Administrator will be evaluated by the CoC advisors and a comparison of both the plans received will be presented to the CoC members and subsequently the COC members can deliberate on how to further engage with the bidders in relation to the resolution process. The view of the COC members was sought on the approach to be followed:-*

*LIC, EPFO, Broadpeak, JC Flower, Yes Bank, SSG, Trust Group, Vistra, Franklin, CS agreed to the said approach.*

*It was proposed that the CoC advisors will share the presentation and evaluation by 28th December 2022 and next CoC will be scheduled on 3rd January 2023 to discuss on the same. Further, discussion can be scheduled with the Resolution Applicants subsequently basis the deliberation in that COC.*

*The Chair apprised the members that advisors are of the view further exclusion period will be required to be sought from the NCLT as the deadline of January 31, 2023 may not be sufficient and if the CoC is also of the same view the same can be discussed and put to vote in the next CoC meeting. The Chair requested the advisors and the COC members to endeavor to complete the process by the deadline of January 31, 2022.*

*The Chair further apprised the CoC members on the discussion held with the RBI to updated on the CIR Process of Reliance Capital Limited.”*

41. The next meeting of the CoC was held on 03.01.2023 where at Agenda item No.4 – To Update on the Resolution Process of the Corporate Debtor, the CoC was informed about interim order passed by the Adjudicating Authority in the IA filed by Respondent No.1. It is also recorded in the Minutes of the Meeting that Process Advisor to the CoC updated the forum that NPV calculated based on the financial proposal (part of the revised draft resolution plan) of both applicants was different from the NPV submitted by the RAs in the Challenge Mechanism. Both the Resolution Applicants were required to be communicated to make corrections to the draft resolution plan submitted on 22.12.2022, to reflect the correct financial proposal that was finalized by them as part of the Challenge Mechanism process and re-submit the draft within 24 hours of the said communication. Both the Resolution Applicants submitted their amended Draft Resolution Plans and the next Meeting of the CoC was held on 06.01.2023. In the Meeting held on 06.01.2023, at Agenda Item No.4 – To Update on the Resolution Process of the Corporate Debtor, it is useful to extract the entire Minutes of Agenda Item No.4, which is to the following effect:

***“Agenda 4 – To Update on the Resolution Process of the Corporate Debtor***

*The legal counsel of the Administrator updated CoC members that as per the interim order of Hon'ble NCLT dated January 3, 2023, only the draft resolution plan that are in accordance with the Challenge Mechanism note issued on December 14, 2022 can be considered by the Administrator.*

*The legal counsel of the Administrator further updated the CoC members that in the interest of time and efficacy a request was made to Torrent Investments Private Limited ("Torrent") and IndusInd International Holdings Ltd ("IIHL") vide email to submit the draft resolution plan incorporating the highest Bid Amount (along with details of Upfront Payment and Deferred Payment) submitted by them in the Challenge Mechanism process conducted on December 21, 2022 by January 06, 2023.*

*The plans were received from Torrent and IIHL and the same is under review by the Administrator and advisors to the Administrator and the CoC.*

*The legal counsel of the Administrator apprised the CoC members that the highest NPV as per the last challenge mechanism was INR 8,640 crores. The CoC discussed at length the developments since the conclusion of its challenge mechanism. It was summarized as below. That the resolution plans were first received on November 28, 2022. Comments on plans were circulated to the bidders by the Administrator and CoC's process and legal*

*advisors on December 12, 2022. Revised drafts were received from certain bidders on December 19/20, 2022. The draft plans that were received had outstanding compliance as well as interpretational issues. CoC expressed its anguish and dissatisfaction with the outcome of the process and the events that have transpired thereafter. The COC was of the view that it demonstrates that outcome of the challenge mechanism undertaken was sub optimal and not satisfactory. The CoC discussed various options and the extant provisions of the RFRP enabling the same were set out. The COC specified that the RFRP specifically contained provisions which enabled the CoC to improve resolution plans in such manner as it deems fit. Amongst other clauses, clause 3.17.17, clause 4.2.4, clause 4.2.9 clause 4.3.7, clause 4.4.4 and clause 4.4.7 specified that the CoC retained the right at all times to negotiate with bidders to improve the resolution plans. The challenge mechanism note had also specifically provided that the note will have to read along with the aforementioned provisions in the RFRP. The Administrator and his advisors gave their views on the way forward. However, in light of the above, the COC, in its commercial wisdom, proposed that a extended round of challenge mechanism with the existing bidders is conducted.*

*In terms of incremental bids for the further rounds, SSG, Trust Capital and ACRE recommended*

increments of INR 500 crores each in the subsequent 2 rounds (from round 1) and INR 250 crores per round thereafter. Further, Deutsche Bank suggested recommended increments of INR 1,000 crores, INR 750 crores and INR 500 crores in the 3 subsequent rounds post Round 1 an INR 250 crores per round thereafter.

As concurred by the CoC members it was agreed that the threshold bid amount for the respective bidding round shall be as follows:

<i>Round 1</i>	<i>Threshold Bid Amount (NPV basis)</i>
<i>Round 1</i>	<i>INR 9500 crores</i> <i>Additional condition - Upfront cash amount should be - INR 8000 crores</i>
<i>Round 2</i>	<i>Threshold Bid Amount of Round 1 + INR 500 crores (INR 10,000 crores)</i>
<i>Subsequent Rounds,</i>	<i>Threshold Bid Amount of Round 2 + INR 250 crores thereafter</i>

The commercial decision of the CoC was that the bids received on December 21, 2022 as per the outcome of challenge mechanism shall stand valid and any increment by the bidder in the extended round of challenge mechanism shall be over and above the NPV bid submitted on December 21, 2022.

The CoC discussed at length and specified that any payments to creditors will be included in the

*calculation of NPV being bid for as part of the Challenge Mechanism.*

*It was proposed by the CoC that the challenge mechanism is conducted on January 16, 2022.*

*The Legal counsel to the Administrator mentioned that there is a hearing before NCLT on January 12, 2023. In the event the above proposal of the CoC is approved by the CoC's vote, then the Administrator shall update the NCLT of the said development. The legal counsel to the CoC also mentioned that the CoC shall file necessary intervening application in the said matter along with the decision of the CoC to continue the bidding process.*

*Necessary communication will be done to the PRAs in relation to the next steps. Further, details of the extended round of challenge mechanism shall be circulated to all the 4 Resolution Applicants who submitted under Option 1 as on November 28, 2022.*

*Voting agenda 4(a): RESOLVED THAT the Challenge Mechanism note for conduct of extended round of challenge process including the thresholds and conditions of bidding and for removal of difficulties in terms of the provisions of the RFRP be approved and issued on behalf of the CoC to the resolution applicants that have submitted their Resolution Plan on the Submission Date.*

*The Administrator raised concerns on the timeline considering the litigation that are ongoing and there is limited time available for achieving the milestone as envisaged under RFRP and for putting the compliant resolution plan for approval of the CoC, having said that it was proposed that an exclusion of 90 days be sought from the NCLT for completion of the CIR process and accordingly necessary application be filed with the NCLT.*

*CoC members concurred with the same and accordingly the said agenda shall be put to vote.”*

42. As per Voting Agenda Item No.4(a), it was Resolved in the Meeting to hold extended round of challenge process which was approved with 98% of vote share. After 06.01.2023, the Advisor communicated to the Resolution Applicants about the Extended Challenge Mechanism, on which Respondent No.1 filed an IA No.99/MB/C-1/2023 to amend its prayer in IA No.1/MB/C-1/2023. The Minutes of CoC held on 06.01.2023 clearly recorded the dissatisfaction of the CoC with the outcome of the process and the events that have transpired thereafter. The CoC was of the view that it demonstrates that outcome of the Challenge Mechanism undertaken was **sub optimal and not satisfactory**. The CoC in its meeting has also referred the relevant Clauses of RFRP and it was clearly mentioned that CoC retained the right at all time to negotiate with bidders to improve the Resolution Plan.

43. Now we need to also look into findings, which has been returned by Adjudicating Authority in the impugned order. In paragraph 126, the Adjudicating Authority has come to the conclusion that decision on second Challenge Mechanism was motivated by the late bid and also runs foul to the process set out in Regulation 39(1A). The following observations have been made by the Adjudicating Authority in paragraph 126:

*“126. We have also come across the judgment of the Hon’ble NCLAT in the matter of Jindal Stainless Limited vs Shailendra Ajmera (supra), where the challenge mechanism specifically reserved the right of the CoC to cancel or abandon the process at any stage including during the challenge process, however, the CoC in the present case did not prescribe such wide powers to the CoC, and in fact the challenge process was successfully concluded and as per their own process note approved by the CoC, after the conclusion of the challenge mechanism, the compliant resolution plans finalized in the challenge mechanism were required to be voted upon. The extended challenge mechanism in the instant case, as it appears from the minutes of the meeting of CoC held on 23.12.2022 and 03.01.2023 & 06.01.2023, was in fact decided on the basis of a late bid submitted by IIHL. In our view a late bid is not allowed to be considered as per the challenge mechanism*

*and the assurance given by the Administrator in its letter dated 22.12.2022, and therefore any decision on second challenge motivated by the late bid, besides running foul to the process set out in Regulation 39 (1A), suffers from the same infirmity as a late bid and any subsequent thought on sub-optimal or non-satisfactory apparently motivated on this basis should not be allowed.”*

44. It is relevant to notice that in the Minutes of the CoC Meeting, it was noticed that bid of IIHL was not in accordance with the Bid, which was offered in the Challenge Mechanism. The decision of the CoC to go for Extended Challenge Mechanism cannot be said to be based on the bid of IIHL and further the view of the Adjudicating Authority that second Challenge Mechanism runs foul to Regulation 39(1A) also cannot be sustained. The Adjudicating Authority has also noticed the judgment of this Tribunal delivered in **Jindal Stainless Ltd.** (supra) and has distinguished the said judgment on the ground that in the present case no extensive powers were reserved in the CoC in the RFRP. The relevant Clauses of the RFRP were referred to and relied before the Adjudicating Authority and even same were noticed by the Adjudicating Authority in its judgment in paragraph 78, which is to the following effect:

*“78. The process thus confers primacy upon the RFRP and renders the same an anchor document governing the process and which*

*cannot be rendered otiose by the Applicant's misreading of the Challenge Mechanism Note. The RFRP empowers the CoC to call for revised bids from the PRAs, re-negotiate and take all such necessary steps for achieving the value maximization of the Corporate Debtor's assets. Reliance is placed on clauses 4.2.4, 4.2.9 and 4.3.7 of RFRP."*

45. It is further relevant to notice that in the discussion by the Adjudicating Authority, which run from paragraph 125 to 133, there is no consideration of the relevant Clauses of RFRP and without adverting to relevant Clauses of RFRP, the Adjudicating Authority opined that the same run foul to Regulation 39(1A). The Adjudicating Authority further fell into error in coming to a conclusion that there is no power with the CoC to enter into negotiations with the Resolution Applicant, after the Challenge Mechanism and the exercise of the commercial wisdom is circumscribed by the framework for value maximization provided under the Code read with the Regulations.

46. Mr. Mukul Rohatgi has submitted that there is no scope of any negotiations by the CoC after Challenge Mechanism is concluded, since by the mechanism brought in by inserting Regulation 39(1A) of CIRP Regulations, the earlier negotiations process undertaken by the CoC has been substituted, which used to cause great delay in conclusion of the CIRP.

47. The question to be answered is whether the Regulation 39(1A) has taken place of the negotiation process and it forecloses any negotiation by CoC with Resolution Applicant. To answer the above, we need to notice the statutory scheme of the Code and the CIRP Regulations.

48. Section 30, sub-section (4) of the Code envisages consideration of Resolution Plan presented by Resolution Professional to the CoC for approval. The Resolution Applicant may also attend the meeting of the CoC in which the Plan of Resolution Applicant is to be considered. Section 30, sub-section (4) and (5) are as follows:

*“**30(4)** The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board:*

*Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution*

*plan where no other resolution plan is available with it:*

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

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

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

**(5)** *The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:*

*Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.*

49. Section 30, sub-section (4) statutorily contemplate approval of Resolution Plan by a vote, not less than sixty six per cent of voting share of the Financial Creditors “AFTER CONSIDERING ITS FEASIBILITY AND VIABILITY”. Thus, voting has to be there after consideration, which clearly negates the submission that after receipt of the Plan, subsequent to Challenge Mechanism, the CoC is obliged to put the Plan to vote and it has no other option.

50. Regulation 39(1A) (a) and (b) uses two expressions, i.e., “*allow modification of the resolution plan, but not more than once*” or “*use a challenge mechanism to enable resolution applicants to improve their plans*”. Both the above acts, i.e., modify the Resolution Plan and improve their Plans are acts of the Resolution Applicants.

51. As noted above, the consideration by the CoC comes after the Plan is examined by Resolution Professional and presented before the CoC and thereafter, the deliberation by CoC begins in the presence of Resolution Applicants. The process of negotiations, thus, can commence only after Plan comes for consideration, when the Resolution Applicants are also present. The modification of Plan not more than once and improvement of Plan under Regulation 39(1A) completes before deliberation on the Plan. Thus, it can neither foreclose, nor prohibit negotiations. The Clauses in RFRP as noticed above reserve right to the CoC to negotiate and interact with one or all Resolution Applicants, which obviously is subsequent act, after Plan is received under Regulation 39(1A). Hence, Regulation 39(1A)

cannot prohibit any negotiation or any further steps of the CoC. The view of the Adjudicating Authority that “*no negotiation or value maximization exercise can be individually undertaken by the CoC dehors the mandate of Regulation 39(1A)*” is contrary to the Scheme delineated by the Code and CIRP Regulations. The very concept of negotiation envisages dialogue between two parties. The word ‘Negotiate’ and ‘Negotiation’ are defined in the Black’s Law Dictionary to the following effect:

**“Negotiate, vb. (16c) 1.** *To communicate with another party for the purpose of reaching an understanding <they negotiated with their counterparts for weeks on end>.*

**2.** *To bring about by discussion or bargaining <she negotiated a software license agreement>.*

**3.** *To transfer (an instrument) by delivery or indorsement, whereby the transferee takes the instrument for value, in good faith, and without notice of conflicting title claims or defenses <Jones negotiated the check at the neighborhood bank>.”*

**“Negotiation, n. (16c) 1.** *A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. • Negotiation usu. Involves complete autonomy for the parties involved, without the intervention of third parties.*

**2.** *(usu. Pl.) Dealings conducted between two or more parties for the purpose of reaching an understanding.*

**3.** *The transfer of an instrument by delivery or indorsement whereby the transferee takes it for value, in good faith, and without notice of conflicting title claims or defenses.”*

52. The concept of negotiation, thus, itself contemplate dialogue between one party with another party for the purpose of reaching an understanding or completing a bargain. The concept of negotiation and statutory scheme negate the submission of Shri Rohatgi that Regulation 39(1A) has substituted the earlier acts of negotiations, which used to be undertaken by the CoC.

53. There is one more reason due to which interpretation suggested by Mr. Rohatgi cannot be accepted. Reference to Regulation 39(1A) contemplate modification of Resolution Plan and improvement of Resolution Plan at the instance of Resolution Applicant. The above modification or improvement in the Plan cannot be confined only to Plan value, rather, it shall cover the entire Plan and if it is held that any modification or improvement is not permissible after conclusion of process under Regulation 39(1A), it shall become handicap in successful resolution of the Corporate Debtor, since CoC may opine that certain modification and improvement in Plan are necessary for successful resolution of the Corporate Debtor. Thus, we are of the considered opinion that Regulation

39(1A) does not prohibit CoC from negotiating with Resolution Applicants or asking Resolution Applicants to further increase the Plan value.

54. We may refer to a judgment of Hon'ble Supreme Court in **(1993) 1 SCC 71 – Food Corporation of India vs. M/s Kamdhenu Cattle Feed Industries**. In the above case, tenders were issued by Food Corporation of India for sale of stocks of damaged food grains, in which Respondent Kamdhenu Cattle Feed Industries submitted a tender, which was highest tender, but tender was not accepted by Food Corporation of India. A Writ Petition was filed by the Respondent, challenging the Appellants refusal to accept the highest tender, which Writ Petition was allowed by the High Court. It was contended before the High Court that Food Corporation of India having chosen to invite tenders, it could not thereafter dispose of the stocks of damaged food grains by subsequent negotiation rejecting the highest tenderer. Appeal filed in the Hon'ble Supreme Court was allowed, setting aside the judgment of the High Court. The Hon'ble Supreme Court also held in the above case that highest tenderer can claim no right to have his tender accepted. It was further observed that inadequacy of the price offered in the highest bid could be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. In the above case, the action of the Food Corporation of India to negotiate with tenderers even after receiving of the bid of the Respondent, which was highest, was upheld. In paragraph 10 of the judgment, following was laid down:

**“10.** *From the above, it is clear that even though the highest tenderer can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case. Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this*

*requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise of power for public good.”*

55. One more question needs to be answered is as to whether conclusion of Challenge Mechanism on 21.12.2022 gave any right to Respondent No.1 to claim that his Resolution Plan, which had highest NPV should be put to vote? We may refer two Clauses of Challenge Mechanism Process note dated 14.12.2022, i.e. Key Notes Nos.4 and 5, which makes it clear that no right is accrued to Resolution Applicant having highest NPV. Clauses 4 and 5 of Key Notes is as follows:

**“4.** *The CoC is not obliged to approve the resolution plan which has the highest NPV or scored the highest as per the Evaluation matrix and any resolution plan shall be approved solely on the basis of the commercial wisdom of the CoC. The CoC while approving a resolution plan will consider the feasibility and viability of each resolution plan and other factors. The Administrator/ CoC and their advisors reserve the right to evaluate compliance and the Resolution Applicants shall provide such modifications or clarifications as may be*

*required by the CoC as per the requirements of the IBC Code.*

5. *This Challenge Mechanism does not confer any rights or any Resolution Applicant including the Resolution Applicant with the Highest NPV.”*

56. Judgment of Hon'ble Supreme Court in **“Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors, (2019) 2 SCC 1”** also needs to be referred, where it was held that no right accrues to the highest bidder. In para 79 following has been laid down:

*“79. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the Adjudicating Authority at this stage. A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster.”*

57. Thus, even if, Respondent No.1's Plan consequent to Challenge Mechanism held on 21.12.2022 was with highest NPV, it has no right to insist that the Plan should be put to vote by CoC, without taking any further steps by the CoC.

58. The Hon'ble Supreme Court in large number of judgments has laid down that commercial wisdom of CoC has to be given paramount importance. The Hon'ble Supreme Court in **K. Sashidhar vs. Indian Overseas Bank and Ors. – (2019) 12 SCC 150** has laid down following:

*“52. As aforesaid, upon receipt of a “rejected” resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully*

*informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the “commercial wisdom” of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.”*

59. The Adjudicating Authority in paragraph 129 has again concluded that no negotiation or value maximization exercise can be individually undertaken by the CoC in view of the provisions of Regulation 39(1A). We, thus, are of the considered opinion that Adjudicating Authority committed error in allowing IA No.1/MB/C-I/2023 and IA No.99/MB/C-1/2023.

60. In view of the foregoing discussions, we, thus conclude that even after completion of Challenge Mechanism under Regulation 39(1A)(b), the CoC retain its jurisdiction to negotiate with one or other Resolution Applicants, or to annul the Resolution Process and embark on to re-issue RFRP. Regulation 39(1A) cannot be read as a fetter on the powers of the CoC to discuss and deliberate and take further steps of negotiations with the Resolution Applicants, which resolutions are received after completion of Challenge Mechanism.

61. In view of the above discussions, we allow the Appeals in following manner:

- (i) The order impugned dated 02.02.2023 is set aside. IA No.1/MB/C-I/2023 and IA No.99/MB/C-1/2023 filed by Respondent No.1 are rejected.
- (ii) It is held that CoC is fully empowered as per the Clauses of RFRP to further negotiate with one or more Resolution Applicants, even after completion of Challenge Mechanism on 21.12.2022 and the decision of CoC taken on 06.01.2023 to undertake an Extended Challenge Mechanism is not violative of Regulation 39(1A).
- (iii) The CoC may proceed to fix a date after two weeks for holding a Revised Challenge Mechanism or/and to take any steps for further negotiations with the Resolution Applicants as per the relevant Clauses of the RFRP.
- (iv) A further exclusion of 30 days period is allowed.

The parties shall bear their own costs.

**[Justice Ashok Bhushan]  
Chairperson**

**[Barun Mitra]  
Member (Technical)**

**NEW DELHI**

**2<sup>nd</sup> March, 2023**

*Archana/Ashwini*