

NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH

C.P.(IB)No.35/GB/2019

*Under Section 7 of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating) Authority) Rules 2016.*

In the matter of:

Guarantco Ltd. ... Financial Creditor  
-Versus-  
Calcom Cement India Ltd. ... Corporate Debtor

**Coram:**

**Hon'ble Mr Hari Venkata Subba Rao, Member (J)**

.....

**ORDER**

**Date of Order: 29<sup>th</sup> January 2020**

Both sides are present. Order pronounced in open court vide separate sheets. In the result the company petition is allowed. Mr. Dilip Kr. Niranjana, 255, 2<sup>nd</sup> Floor, D-21, Corporate Park, Dwarka, Sector-21, New Delhi – 110 075, email [dilip.niranjana@gmail.com](mailto:dilip.niranjana@gmail.com) having IBBI registration No.IBBI/IPA-002/IP-N00552/2017-2018/11690 is hereby appointed as Interim Resolution Professional.

  
Adjudicating Authority  
National Company Law Tribunal  
Guwahati Bench, Guwahati

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NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH, GUWAHATI

CP (IB) No.35/GB/2019

*Under Section 7 of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*

In the matter of:

GuarantCo Ltd. ... Petitioner/Financial Creditor  
-Versus-  
Calcom Cement India Ltd. ... Respondents/Corporate Debtor

**Coram:**

Hon'ble Mr. Hari Venkata Subba Rao, Member (J)

ORDER

Date of Order: 29<sup>th</sup> January, 2019

This is an application filed by the Financial Creditor (in short, FC), GuarantCo Ltd. under Section 7 of the Insolvency & Bankruptcy Code, 2016 (in short, IBC) for initiating Corporate Insolvency Resolution Process (in short, CIRP) against the Corporate Debtor (in short, CD), Calcom Cement India Ltd.

2. Brief facts of the application, as narrated by the FC, are as follows:

- A. The FC is a company incorporated under the provisions of the Companies Act, 2001 of the Republic of Mauritius having its registered office at Alexander House, 35 Cybercity, Ebene, Mauritius for the purpose for mobilizing private sector local currency investment for infrastructure projects and supporting the development of financial markets in lower income countries in Africa and Asia and the FC company is belonging to the Private

Infrastructure Development Group (PIDC) and is funded by the governments of United Kingdom, Sweden, Australia, Switzerland and Netherlands.

- B. In and around 2007, the CD, Calcom India Ltd. approached the FC to stand as guarantor for the loan facility/ies it had availed from various Indian Banks and the FC agreed to execute guarantee(s) in favour of Indian Banks with reference to loan facilities availed by the CD from the Indian Banks – Axis Bank Ltd. and HDFC Bank Ltd. On 11.11.2008, the OC and the FC entered into a Deed inter alia for the purpose of establishing the terms and conditions on which the CD will reimburse and indemnify the FC in respect to payments made by the FC to the Indian Banks of the CD pursuant to the guarantees invoked by those lenders in case the CD failed to repay their loans. The said Deed was entered into based on the representations made by the CD that it will, at all times honour its commitments.
- C. Thereafter, an Amended and Restated Recourse Agreement was entered into between the FC and the CD on 18.05.2009, to amend the existing Deed dated 11.11.2008 and pursuant to the same, charge was created in favour of the FC and necessary Form 8 in terms of the provisions of erstwhile Companies Act, 1956 was filed by the CD with the Registrar of Companies. The said charge was also modified from time to time and as on the date of filing of the present application, the charge has not yet been satisfied as the obligation of the CD is outstanding.
- D. The FC pursuant to the said Amended and Restated Recourse Agreement executed guarantees in favour of Axis Bank Ltd. and HDFC Bank Ltd. on 16.06.2009 and 20.05.2009 respectively with

reference to the loan facilities availed by the CD from these banks and pursuant to the default made by the CD in the year 2011 with reference to the loan facilities it had availed from Axis Bank Ltd. and HDFC Bank Ltd., the guarantees executed by the FC as guarantor were invoked by both the banks in their capacity as beneficiaries of the said guarantees. Accordingly, both Axis Bank Ltd. and HDFC Bank Ltd. issued demand notices on 27.12.2011 and 23.12.2011 respectively. The FC on the basis of the said demand notice and guarantees invoked, paid an amount of USD 10,842,267.16 and USD 11,221,084.9 to Axis Bank Ltd. and HDFC Bank Ltd. respectively.

- E. Thereafter, the FC demanded the payment so made to Axis Bank and HDFC Bank pursuant to their invocation of guarantees from the CD in terms of the Amended and Restated Recourse Agreement. However, the CD failed to honour its commitment in terms of the Amended and Restated Recourse Agreement. As a consequence, the FC had filed a legal case against the CD which was later withdrawn at the request of the CD as (i) the CD had entered into a Corporate Debt Restructuring (CDR) scheme with its other local lenders and needed the FC to withdraw its legal proceedings against the CD and (ii) also needed the FC to give consent to the CD to enter into a master restructuring agreement and related security documents with its CDR lenders.
- F. The FC in this regard entered into a Memorandum of Understanding on 26.07.2012, wherein apart from other conditions, it agreed to the request of the CD to settle and restructure its dues under the Amended and Restated Recourse Agreement into long tenor loans

subject to certain conditions. Prior to the said MOU, the total liability of the CD towards the FC was as under:

a. Details of the total amount paid under the Guarantee i.e. USD 22,063,352.06 are as under:

Date of payment	Axis Bank (amount in USD)	HDFC Bank (amount in USD)
19.12.2011	-	188,596.36
11.01.2012	10,842,267.16	-
27.01.2012	-	10,945,415.09
23.03.2012	-	87,073.45

b. An amount of USD 430,000 towards full and final settlement of all claims raised by the FC including travelling, legal, consultancy etc. such figure does not include expenses that are yet to be billed to/paid by the FC.

c. Guarantee Fees of USD 745,402 relating to the period ended September 30, 2011.

d. Guarantee Fees of USD 387,625 for the period commencing October 1, 2011 and interest and other outgoings.

G. Vide MOU dated 26.07.2012, the FC agreed to waive off certain amounts and accordingly, in clause 3 of the MOU the final principal amount of INR 1,193.2 million which the CD was liable to pay was agreed upon. The important terms of the MOU are as under:

*Clause: 4: Calcom agrees to fully cooperate with GuarantCo and use its best endeavours to obtain all regulatory approvals, including approaching the RBI, MOF or other authorities for restructuring the Total liability into the GuarantCo USD Loan. The parties hereby agree that in case the approval of the RBI is not received for any*

*reason for the GaurantCo USD loan, the total liability will be repayable by Calcom to GuarantCo as rupee denominated loan. with a principal value of INR 1,193.2 million (GuarantCo INR Loan) and interest equivalent to that payable on the rupees loan extended by the CDR Participants to Calcom, subject to terms being agreed. In such circumstances, Calcom agrees to fully cooperate with GuarantCo and use its best endeavours to obtain all regulatory approvals, including approaching the RBI, MOF or other authorities for restructuring the Total Liability into the GuarantCo INR Loan.*

- H. One of the understandings between the FC and the CD in the MOU dated 26.07.2012 was that in case no approval is received from RBI, with reference to the loan being denominated in US Dollars, then the total liability will be repayable by the CD to the FC as a rupee denominated loan. Further, the interest equivalent to that payable on rupees loan extended by the Corporate Debt Restructuring participants to the CD will be applicable. As per clause 2.4.2 of the Master Restructuring Agreement dated 26.07.2012 entered between the CD and the CDR participants pursuant to CDR, the rate of interest on the existing term loans has been agreed upon as 8.5%. The relevant clause 2.4.2 of the Master Restructuring Agreement reads as follows:

*"2.4.2 Interest on Existing Term Loan:*

*Each of the Lenders and the Borrowers hereby agree that interest shall accrue on the principal amount of the Existing Term Loan outstanding as on Cut Off Date at the rate of 8.5% per annum with monthly rests and be charged in accordance with the practice of each lender, more fully described in Part-B of Schedule IIIA."*

I. Pursuant to the above restructuring and entering into the MOU on 26.07.2012, an application was made to RBI on 25.09.2012 for seeking approval for restricting the amount discharged under and in connection with guarantee obligation, along with interest and expenses, into a long tenor loan and after several communications from each side, the RBI rejected the said application on 12.09.2014. Pursuant to rejection on 12.09.2014 by the RBI, the FC and the CD vide letter dated 15.01.2017 preferred a joint submission before the RBI reiterating the terms of the transaction and requesting approval of the same. The said request including the forwarding request letter by Axis Bank Ltd. dated 03.02.2017 was also not entertained by the RBI and vide order dated 01.03.2017 rejected the same.

J. Since the RBI did not approve repayment of the loan amount in US Dollars, the FC and the CD filed a joint application on 19.06.2017 with the RBI seeking approval for CD to remit the principal amount in INR on the terms of repayment as agreed by the parties. The important submissions made by the FC and the CD vide above letter is as under:

*"a. That the application made vide letter dated Axis/TFC/4015/2016-17 dated 3<sup>rd</sup> Feb 2017 be considered under the provision of "Structured Obligation" (SO), permitted vide A. P. (DIR Series) Circular no.40 dated March 02, 2010 and A. P. (DIR series) Circular N.120 dated June 26, 2013.*

*b. The rate of interest Calcom proposes to pay to Guarantco is 8.5% p.a., well below the threshold imposed by RBI for such loans. Moreover, such rate is significantly lower than the rate Calcom is paying on the restructured loans of its Indian Lenders (which today stands at 9.45% p.a.)*

*c. Considering that instrument involved is a "term loan" (not being a capital market instrument), through having a minimum*

*average maturity period of more than three year, we therefore request that Calcom be permitted to remit an amount not exceeding INR 135.91 Crore, comprising the principal amount of INR 87.64 Crore, and outstanding interest of INR 48.27 Crore (computed @8.5 per annum until 15<sup>th</sup> April 2017).*

K. Pursuant to the said joint application dated 19.06.2017, the RBI provided approval vide Order dated 21.07.2017 directing that the "*total outflow from beginning should not exceed principal amount of INR 112 crores + 8.5% interest p.a. after invocation of guarantee amount + 2% guarantee fee p.a. before invocation of guarantee amount.*" And after RBI approval dated 21.07.2017, the FC received certain payments from the CD. Following receipt of certain payments, the interest rate used to make the payments was contradictory to the Joint Application submitted to RBI and the RBI Approval Order dated 21.07.2017. As mentioned above and agreed between the parties in the Joint Application and also as per the RBI Approval Order dated 21.07.2017, the rate of interest was 8.5%, but the CD made the calculation of Libor + 250 bps which was against the mandate of RBI Approval Order and the agreement between the parties.

L. Further, the CD tried to delay in making the payment on one pretext or the other, taking the ground that the FC needs to issue invoices to receive the payment, despite there was no such requirement as per the RBI approval towards payment of the guarantee amount paid by the FC. The CD was making the excuse that as the FC was delaying in issuing invoices, therefore, the CD is not able to make payments, though the CD has previously made payments to the FC without any invoices.

M. As the FC had already suffered loss due to delay in receiving payments made by it in the year 2011 due to one reason or the other, it issued the invoices as per the requirement of the CD. But again, the CD

has failed to make payment on the pretext of denying the rate of interest of 8.5%, though approved by the RBI. Even on issuing many reminders by the FC, the CD had failed to pay the amount of agreed interest. The last payment received by the FC was Rs.47,600,000/- (Rupees Four Crore Seventy Six Lakh only) in June, 2019 and Rs.47,600,000/- (Rupees Four Crore Seventy Six Lakh only) in July, 2019. However, these instalments are insufficient to cover the principal instalments overdue and also do not include the interest as agreed between the FC and the CD pursuant to the MOU, Joint Application to RBI and also as directed by RBI vide its Approval Order dated 21.07.2017. The principal amount of Rs.95,200,000/- (Rupees Nine Crores Fifty Two lakh only) and the interest amount of Rs.365,799,748/- (Rupees Thirty Six Crores Fifty Seven Lacs Ninety Nine thousand Seven hundred Forty Eight only) remained pending to be paid by the CD as on 03.07.2019, which is agreed between the parties, as mentioned in the Joint Application dated 19.06.2017 and also as per the direction of the RBI vide its Approval Order dated 21.07.2017.

N. As the CD had failed to honor its commitment, the FC issued a final demand cum recall notice on 09.09.2019 asking the CD to repay the outstanding amount towards principal and interest and an addendum to the said notice was also issued on 27.09.2019 rectifying the outstanding amount after considering the payment received in July, 2019 mentioning the total amount due as on 27.09.2019. Since the CD failed to pay the financial debt to the FC, the FC has filed the present application under Section 7 of the Code for initiating corporate insolvency resolution process against the CD. The amount now outstanding post issuance of the final demand cum recall notice dated 09.09.2019 and addendum dated 27.09.2019 is Rs.1,002,878,537/- (Rupees One hundred Crores Twenty Eight lacs Seventy Eight thousand Five hundred Thirty Seven only (with

interest accruing until full repayment) [principal outstanding being Rs.624,400,000/- (Rupees Sixty Two crores Forty Four lacs only) and interest amount being Rs.378,478,537/- (Rupees Thirty Seven Crores Eighty Four lacs Seventy Eight thousand Five hundred Thirty Seven only)] would qualify as default for the purpose of filing this application under section 7 of the Code.

3. The respondent/CD filed detailed affidavit in reply along with certain documents marked as annexures. The main contention raised by the CD is that the words "should not exceed" mentioned in the RBI letter dated 21<sup>st</sup> July, 2017 applies to the principal amount as well as the payable rate of interest and guarantee fee respectively that would mean the principal amount of INR 112 crores, interest @8.5% p.a. and guarantee fee @ 2% (for the period before invocation of guarantee) are the maximum amounts which can be remitted to FC by CD and any amount less than these capped amounts under each head can be paid in accordance with the MOU. It is the contention of the FC that the words "should not exceed" as mentioned in clause (ii) of the letter dated 21 July 2017 is applicable only to the principal amount of Rs.112 crores and not to the interest rate and as such the CD should pay a fixed interest of 8.5% p. a. to the FC, irrespective of the interest rate agreed between the parties under the MOU dated 26.07.2012. The other contention is that there is a preexisting dispute between the parties with regard to the rate of interest and as per the Memorandum of Understanding (MOU) dated 26.07.2012 entered into between the parties, any dispute arising with regard to the enforceability of the terms & conditions of the MOU has to be referred to an Arbitrator and, therefore, the above company petition filed by the FC is pre-matured and is not maintainable. It is the further contention of the respondent/CD that the FC having not accepted the appointment of retired Chief Justice Mukul Mudgal as the Sole Arbitrator ought to have suggested the name of an Arbitrator of their choice and, therefore, the FC is barred from filing the above company application on account of their inaction in naming an Arbitrator. It is also the contention of the respondent / CD that the FC failed

to raise invoice for the due amount which is their own fault and, therefore, the default if any cannot be attributed to the CD. It is also the contention of the CD that they have addressed a letter to the RBI for clarification with regard to the rate of interest and, therefore, they need not make any payment till they receive clarification from RBI.

The advocate appearing for the respondent / CD relied on the judgment of the Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Another Vs. Union of India & Others in support of the above contentions.

4. Before going into the merits of the above contentions raised by the respondent / CD, it is important to mention certain admitted facts on both sides and also the relevant correspondence that took place between the parties in this regard. It is an admitted case on both sides that the respondent / CD availed loan facilities from HDFC Bank and Axis Bank and committed default in repayment. It is also an admitted fact between the parties that the FC stood as guarantor for repayment of the above loan on behalf of the respondent / CD and also repaid the amounts to the respective banks on invocation of the guarantee after entering into an MOU dated 26.07.2012. It is also an admitted fact between the parties that their application to the RBI for repayment of the loan amount in foreign currency was rejected by the RBI against which they have submitted a joint application to the RBI for permitting them to repay the loan amount with interest in Indian Rupees. It is also an admitted fact that the FC has issued demand notice dated 09<sup>th</sup> September, 2019 calling upon the CD to pay a principal amount of Rs.67.20 Crores and Rs.37,77,03,120.00 as interest. As the FC failed to give credit of payment of Rs.4.76 Crores made by the CD on 03<sup>rd</sup> July, 2019, the FC issued addendum to the final demand cum recall notice dated 09<sup>th</sup> September, 2019 on 27.09.2019. The respondent / CD issued notice dated 22.10.2019 appointing Mr. Mukul Mudgal, Former Chief Justice, Punjab & Haryana High Court as Arbitrator by invoking the arbitration clause for which the FC sent reply dated 31.10.2019 disputing the unilateral arbitrator appointment of Mr. Mukul Mudgal.

The following is the relevant correspondence that took place between the parties, which is filed along with the reply affidavit by the CD:

(1) Table showing computation of the amount of INR 55.72 Crores – Annexure D– page 59 (email dated 24 Jun 2018) –

Particulars	Outstanding (INR-Crores) as on 31 October 2019	Basis	Status
Principal	57.68	As per RBI approval dated 21 July 2017 and MOU dated 26 July 2012, subject to a maximum of INR 112 Crores	Not disputed (After considering last payment made on 03 October 2019)
Interest	6.20	3 Month LIBOR + 250 bps	Disputed (subject to clarification from RBI, as sought vide the Answering Respondent's Letter dated 13 November 2019)
Less:- Excess Guarantee Fees	(6.25)	As per annexure B enclosed	Admitted
Less:- Interest on Excess Guarantee Fees	(1.90)	As per Annexure B enclosed i.e. 3 Month LIBOR + 250 bps	As per MOU
Net amount as on 31.10.2019	55.72		

(2) Joint application dated 19.06.2017 sent to the Chief General Manager, Reserve Bank of India by both parties, which is as under: –

*"Dear Sir,*

*We understand that from the referenced letter from your office hat our above mentioned application has been rejected on account of noncompliance with the provisions of Notification No. FEMA 29/2000 – RB dated 26<sup>th</sup> September 2000 ('notification'), which restricts the amount*

*remitted/credited to not exceed the rupee equivalent of the amount paid by the non-resident guarantor against the invoked guarantee.*

*We would like to request your esteemed office to reconsider our application under the provision of "Structured obligation" ('SO'), permitted vide A.P. (DIR series) Circular No.40 dated March 02, 2010 and A. P. (DIR Series) Circular No.120 dated June 26, 2013. The provision of SO was introduced to facilitate routing of funds in the infrastructure sector in the backdrop of growing need of financial support leading to laying of a comprehensive policy framework covering credit enhancement by non-resident entities against domestic debt raised through issue of capital market instruments by specified Indian infrastructure companies subject to special conditions. Subsequently, such facility of SO was extended to all borrowers eligible to raise ECB under the automatic route. Enclosing the copies of the circulars in Appendix A.*

*In our case as well, Calcom Cement India Ltd ("Calcom") obtained guarantees of Rs.112 Crore from GuarantCo Ltd. ("GuarantCo") covering loans provided HDFC Bank and Axis Bank to Calcom for establishing a 1.7 MTPA cement plant in Assam. Calcom began construction of the plant in 2009, but due to a few adverse developments, could not meet its interest obligations to its lenders in 2011, including to Axis bank and HDFC Bank. GuarantCo's guarantees therefore got invoked and GuarantCo paid the full Rs.112 crore to the said banks by remitting USD 22.06 million.*

*Under the terms agreed between GuarantCo and Calcom, such amount of Rs.112 crore was repayable to GuarantCo by Calcom on an immediate basis. However, recognizing Calcom's financial crisis, GuarantCo worked with Calcom to restructure the Company's debt, and the terms of such restructuring included providing time to Calcom to repay its dues to GuarantCo. An interest rate of 8.5% p.a. was agreed as payable on such deferred payments. Enclosing the calculation of hypothetical dues to HDFC Bank and Axis Bank as Appendix B.*

*Calcom has already made payment of INR 20.72 Crore to GuarantCo towards principal, leaving balance principal due at INR 91.28 crores. Calcom now proposes to pay this principal to GuarantCo, along with interest of INR 43.365 Crore (Calculated up to 15 Jan 2017, at a rate of 8.5% p.a.).*

Given the above facts, we would like to cover our compliance with the conditions stated in structure obligation provisions:

Condition	Compliance
<p>1. Provider of such credit enhancement to be a multilateral / regional financial institutions and Government owned development financial institutions or a direct / indirect equity holder;</p>	<p>GuarantCo Ltd. is an international development financial institution owned by the governments of the UK, the Netherlands, Sweden, Switzerland and Australia. GuarantCo is part of the Private Infrastructure Development Group ("PIDG") and is internationally rated AA- (Fitch) and A1 (Moody's). GuarantCo was established in 2006 to help address and overcome existing constraints in the supply of local financing to infrastructure projects and to help the development of local financial markets in developing countries.</p>
<p>2. Underlying debt instrument to have a minimum average maturity of three years</p>	<p>The underlying debt of HDFC Bank and Axis Bank covered by GuarantCo's guarantees had sanctioned average maturities greater than 3 years.</p>
<p>3. In case of default and if the loan is serviced in Indian Rupees, the maximum applicable rate of interest permitted is the higher of the coupon of the bonds guaranteed, or 250 bps over the prevailing secondary market yield of 5 years Government of India security, as on the date of novation.</p>	<p>The rate of interest Calcom proposes to pay to GuarantCo is 8.5% p.a. well below the threshold imposed by RBI for such loans. Moreover, such rate is significantly lower than the rate Calcom is paying on the restructured loans of its Indian lenders (which today stands at 9.45% p.a.</p> <p>The interest proposed to be collected by GuarantCo is ca. Rs.11.81 Crore less than that permitted by RBI (calculated at the rate of 5Yr G-Sec + 2.5%). Calculation of such amounts are available in Appendix C.</p>
<p>4. Guarantee fee and other costs in connection with credit enhancement restricted to a maximum 2 per cent of the principal amount involved;</p>	<p>The guarantee fee collected by GuarantCo from 02 March 2010 (the date of A.P. (DIR Series) Circular No.40) to 13 March 2012 (the date of last payment under the guarantee) was ca. Rs.7.6 Crore in excess of the guarantee fee permissible under the said Circular No.40. However, as covered above, GuarantCo proposes to recover ca. 11.81 Crores less than permissible as</p>

	<p>per the said Circular No.40, which more than adequately compensates for the over-recovery of guarantee fees. Calculation of such amounts are available in Appendix D.</p>
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We undertake that the total of guarantee fee (paid) and the proposed interest payout to GuarantCo would not exceed the aggregate ceiling for interest and guarantee payout permitted under A.P.(DIR Series) Circular No.40 dated 2<sup>nd</sup> March 2010.

Considering that instrument involved is a 'term loan' (not being a capital market instrument), through having a minimum average maturity period of more than three years, we therefore request that Calcom be permitted to remit an amount not exceeding INR 135.91 crore, comprising the principal amount of INR 87.64 crore, and outstanding interest of INR 48.27 crore (computed @8.5% per annum until 15<sup>th</sup> April 2017). (Note that such amounts have been updated from the letter dated 3<sup>rd</sup> February 2017, to account for a further repayment made by Calcom on 03/04/2017 to GuarantCo).

We hope our request will receive a positive consideration by your esteemed office. We would be happy to provide any further information as required by RBI."

(3) Letter dated 21<sup>st</sup> July 2017 addressed by RBI to Calcom Cement India Ltd.:

*"Invocation of non-resident guarantee and remittance thereof.*

1. Please refer to your letter dated June 19, 2017.
2. Keeping in view the submissions made in the aforesaid letter, we advise that we do not have any objection from FEMA, 1999 angle for amortized repayment of the outstanding guarantee invoked amount of INR 91.28 crores payable to GuarantCo Ltd. along with interest of 8.5% p.a. by your company subject to the following conditions:
  - i. The company is required to submit Form 83 to the Director, Balance of Payments Statistics Division, Department of Statistics and Information Management, Reserve Bank of India, Bandra-Kurla Complex, Mumbai 400 051 to obtain the loan registration number. Loan Key Number RBI/Approval Route/2017-18/1 should be used in this regard.

- ii. *Total outflow from beginning should not exceed principal amount of INR 112 crores + 8.5% interest per annum after invocation of guarantee amount +2% guarantee fee per annum before invocation of the guarantee amount.*
  - iii. *Reporting arrangements as applicable to the ECBs would be applicable to the novated loan.*
  - iv. *All the repayments should be in INR only and the lender, viz, GuarantCo can hedge their exposure in Rupee through permitted derivative products with AD Category I banks in India.*
  - v. *Payment of interest, etc., is liable to payment of withholding tax under the Indian Income Tax Act, 1961.*
3. *This communication is issued from the foreign exchange angle under the provisions of FEMA and should not be construed to convey the approval by any other statutory authority or Government under any other laws / regulations. Noting in the approval should be construed as approval from the credit angle and of the financial or any other aspect of the company. If further approval or permission is required from any other regulatory authority or Government under the relevant laws / regulations, the applicant should take the approval of the concerned agency before effecting the concerned transaction. Further, it should not be construed as regularizing or validating any irregularities, contravention or other lapses, if any, under the provisions of any other laws/ regulations.*

*Yours faithfully,  
Sd/. Praveen G. Kulkarni  
Manager"*

- (4) The email dated 13.03.2019 sent by the CD to the FC, details of which are given below-

*"Dear Mr. Perera,*

*We are to pay you a total amount of Rs.112 Cr towards principal amount as per MOU, out of which we have already made payment of principal due till 1<sup>st</sup> Apr 2018 of Rs.40.04 Crore and as on date principal liability outstanding towards GuarantCo Loan is Rs.71.96 Cr.*

*With regard to interest, as per our agreement we have to pay interest @3 M LIBOR + 250 basis points, payable quarterly. As per our calculation the*

*interest payable as of 31<sup>st</sup> Mar 2019 is Rs.26.3 Cr and as against this, we have already paid you a sum of Rs.26.3 Cr.*

*Further, guarantee fees @ 2.00% p.a. which comes out to Rs.4.41 Cr needs to be paid to GuarantCo. Against this, we have already paid you a sum of Rs.10.66 Cr. Hence, excess guarantee fees of Rs.6.25 Cr post adjustment of this excess payment.*

*Hope, above facts provide you clarification on dues from CCIL. We will make you payment towards principal and interest accordingly.*

*Regards,*

*Kumar”*

- (5) Letter dated 17<sup>th</sup> May 2019 addressed by the CD to the FC – which reads as under:

*“Dear Sir,*

*We disagree with the content and facts related to interest rate applicability in your letter dated 3<sup>rd</sup> May 2019 and deny your assertions in relation to the same.*

*You are well aware that RBI had denied our joint application to convert your dues in to either a USD – denominated or a INR–denominated loan as envisaged under our MOU. The final sanction provided vide the final RBI Letter is at variance with both clause 3 and clause 4 of our MU and the interest rate allowed by RBI in its letter is only a cap or maximum rate payable and not a reflection of any agreed interest rate between us.*

*After the receipt of RBI letter, the agreed rate of interest continued to be the rate of interest as mentioned in clause 3 of MOU which is well within the limits prescribed by RBI. Hence interest was computed accordingly till 31<sup>st</sup> Mar 2018 and was paid to you on 26<sup>th</sup> Feb 2018 & 12<sup>th</sup> Apr 2018. In these circumstances there is no basis for payment of any additional amounts to you except those payable as per the mutually agreed rate of interest which is as per clause 3 of our MOU read with the RBI Letter.*

*We have already intimated to you the amounts payable by us I our previous letters dated 29<sup>th</sup> Mar 2019 and 1<sup>st</sup> May 2019. Hence your invoice of Rs.45.75 crore towards accrued interest is not in line with our agreement read with RBI Letter and cannot be accepted. Accordingly, as intimated to*

*you vide our letter dated 29<sup>th</sup> Mar 2019 and 1<sup>st</sup> May 2019 a sum of Rs. 5.96 crore is due and payable as of 31<sup>st</sup> Mar 2019 after adjustment of the excess interest & guarantee fees already paid together with interest thereon. You are thus requested to raise an invoice of Rs. 5.96 crore, so that payment can be released forthwith.*

*Any delay in payment due to non-receipt of this revised invoice is and will be solely attributable to GuarantCo.*

*Thanking you,*

*For Calcom Cement India Ltd."*

(6) Annexure -E: letter dated 13.11.2019 addressed by the CD to RBI that reads as under:

*"Dear Sir,*

- 1. This is with reference to your aforesaid letter dated 21 July 2017 bearing reference No.CO.FED.ECBD.845/03.02.153/2017-18 vide which RBI was pleased to grant it's No Objection for amortized repayment as mentioned in the said letter, subject, inter-alia to the following condition:-  
"ii. Total outflow from beginning should not exceed principal amount of INR 112 crores + 8.5% interest per annum after invocation of guarantee amount + 2% guarantee fee per annum before invocation of the guarantee amount".  
(emphasis supplied)*
- 2. That since certain disputes have been arisen between GuarantCo Limited (GCO) and Calcom Cement India Limited (CCIL) in relation to the interpretation of the aforesaid condition imposed by RBI, by way of this letter, we are seeking a clarification of your aforesaid letter dated 21 July, 2017 with respect to the interest payable as per the said letter.*
- 3. GCO is claiming that the words "should not exceed" as mentioned in clause (ii) of your letter dated 21 July, 2017 is applicable ONLY to the principal amount of Rs. 112 crores and NOT to the interest rate as such CCIL should pay a fixed interest of 8.5% per annum to GCO irrespective of the interest rate agreed between the parties under the Memorandum of Understanding dated 26 July, 2012 ('MOU').*

4. *However, as per understanding of CCIL, the words "should not exceed" applies to the principal amount as well as the payable rate of interest and guarantee fee respectively. Accordingly, CCIL is permitted to pay to GCO the amounts as agreed under the MOU, subject to a maximum cap of 8.5% per annum insofar as interest is concerned. This would mean that the principal amount of INR 112 Crores, interest @ 8.5% per annum and guarantee fee @ 2% per annum (for the period before invocation of guarantee) are the maximum amounts which can be remitted to GCO by CCIL and any amount less than these capped amounts under each head can be paid in accordance with the MOU.*

*In view of above, we kindly seek your indulgence to clarify the meaning of the words "should not exceed" which have been used in the condition extrapolated above."*

5. Before going into the merits of the matter, it is important to place on record here that the arguments in the above matter were heard on 06.01.2020 and the matter was reserved for orders. In view of Bihu Vacation from 11.01.2020 to 19.01.2020, the order was not ready. As the major portion of the order was dictated immediately on reopening, the matter was ordered to be listed on 27.01.2020 for pronouncement of order and accordingly, it was listed on 27.01.2020 for pronouncement of the order. On 24.01.2020, the advocate appearing for the respondent made a mention at 10.30 AM before this Tribunal that they have received a clarification from the RBI with regard to the rate of interest and they may be permitted to bring this development on record. As the matter is already listed on 27.01.2020 for pronouncement of orders, this Tribunal orally directed the advocate of the respondent to intimate the other side to be available on 27.01.2020 before this Tribunal for making further submissions if any by both sides in the above matter and after hearing the submissions, once again listed for pronouncement of order today.

6. In order to examine the main contention of the CD with regard to the rate of interest, it is important to look into clause 4 of the MOU dated 26.07.2012 entered into

between the parties and compliance clause 3 of the joint application dated 19.06.2017 sent to RBI by both parties that reads as under:

*"4. Calcom agrees to fully cooperate with GuarantCo and use its best endeavours to obtain all regulatory approvals including approaching the RBI, MOF or other authorities for restructuring the Total Liability into the GuarantCo USD Loan. The parties hereby agree that in the case the approval of the RBI is not received for any reason for the GuarantCo USD Loan, the Total Liability will be repayable by Calcom to GuarantCo as a rupee denominated loan, with a principal value of INR 1,193.2 million ("GuarantCo INR Loan) and interest equivalent to that payable on the rupee loan extended by the CDR Participants to Calcom subject to terms being agreed. In such circumstances, Calcom agrees to fully cooperate with GuarantCo and use its best endeavours to obtain all regulatory approvals, including approaching the RBI, MOF or other authorities for restructuring the Total Liability into GuarantCo INR Loan."*

*Compliance clause 3*

*"The rate of interest Calcom proposes to pay to GuarantCo is 8.5% p. a. well below the threshold imposed by RBI for such loans. Moreover, such rate is significantly lower than the rate Calcom is paying on the restructured loans of its Indian lenders (which today stands at 9.45% p. a.)"*

7. The conjoint reading of the above clauses along with the clarification of RBI dated 15.01.2020 makes it very clear that the CD has agreed to pay interest equivalent to that payable on rupee loans extended by the CD or participants to Calcom and as the prevailing market rate of interest charged by CD or participants at the time of submission of joint application to RBI is higher than 8.5% p. a., the CD in its best commercial interest, agreed to pay 8.5% p. a. and accordingly, submitted the joint application for the approval of RBI. Therefore, the entire argument of the CD in regard to the payable rate of interest is only an afterthought to reduce its liability and is liable to be rejected.

Even otherwise, adjudication and crystallization of liability is beyond the scope of enquiry in an application filed under Section 7 of IBC.

8. Coming to the next aspect of default. In order to decide the above issue whether there is a default in repayment of the financial debt committed by the CD, it is important to mention here that the CD in their letter dated 17<sup>th</sup> May, 2019 at Para 4, as referred to above, clearly mentioned that the invoice raised by the FC demanding an amount of Rs.45.75 crores towards accrued interest is not acceptable to them. Therefore, it is very clear from the perusal of above Para that the FC has sent an invoice for Rs.45.75 crores towards accrued interest, which was not accepted by the CD. The CD further admitted in the same Para of the said letter that an amount of Rs.5.96 is due and payable as on 31<sup>st</sup> March, 2019 as per their calculation. Whereas the FC through their notice dated 09.09.2019 demanded an amount of Rs.67.20 lacs (Rupees Sixty Seven crores Twenty lacs only) as outstanding principal and Rs.37,77,03,120/- (Rupees Thirty Seven crores Seventy Seven lacs Three thousand One hundred Twenty only) aggregating to Rs.104,97,03,120/- as on 09.09.2019. Subsequently, the FC issued addendum dated 27<sup>th</sup> September, 2019 demanding an amount of Rs.62.44 crores towards principal and Rs.37,84,78,537/- towards interest as on 27.09.2019 after considering the payment of Rs.4.76 crores made by the CD on 03<sup>rd</sup> July, 2019. It is an admitted case on both sides that there are no payments after 03.07.2019. Whereas the above application is filed on 03<sup>rd</sup> October, 2019. In between July, 2019 and October, 2019 some more installments were also fell due for repayment. Therefore, it is very clear from careful examination of the above dates and events that the CD committed default in repayment of the financial debt in relation to the admitted amount disregarding disputed amount of interest. Admittedly, the amount of default is more than Rs.1.00 lac required for filing an application under Section 7 of the IBC. The FC having issued demand notice need not once again raise invoice and the argument of the CD about non-raising of invoice cannot be accepted.

9. Coming to the aspect of invocation of arbitration clause and appointment of Arbitrator. The CD got issued notice by invoking the arbitration clause after issuing demand notice and the addendum by the FC as counterblast and as an afterthought only to escape the liability and, therefore, it cannot be accepted.
10. With regard to the clarification from RBI is concerned, the above issue also stands clarified as the RBI has sent clarification vide their letter dated 15.01.2020 stating that the interest rate payable on borrowing is a commercial decision between both the parties and the approval of RBI sets only an upper limit on the amounts which can be remitted by the borrower to the lender. The above clarification of RBI goes against the contention of the CD with regard to the rate of interest and strengthens the claim of the FC.
11. therefore, from the above referred findings and observations, this Tribunal is of the considered opinion that the CD owes a financial debt and committed default in repayment of such debt to the FC. The FC also suggested the name of IRP and there being no disciplinary proceeding pending against him, the application under Sub-section (2) of Section 7 of the Code has to be admitted. Accordingly this Bench hereby admits the company petition by passing the following orders:

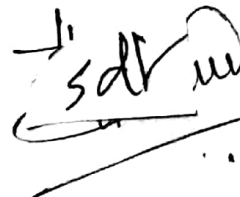
ORDER

- (i) *The petition filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating Corporate Insolvency Resolution Process in respect of CalCom Cement India Ltd.*
- (ii) *I hereby declare a Moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.*
- (iii) *The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency*

*Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of the Insolvency & Bankruptcy Code, 2016 shall be made immediately.*

- (iv) *Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:*
- a) *The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
  - b) *Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
  - c) *Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*
  - d) *The recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.*
- (v) *The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.*

- vi) *The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.*
- (vii) *The order of moratorium shall have effect from the date of admission till the completion of the Corporate Insolvency Resolution Process.*
- (viii) *Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.*
- ix) *Necessary public announcement as per Section 15 of the IBC, 2016 may be made.*
- (x) *Mr. Dilip Kr. Niranjana, 255, 2<sup>nd</sup> Floor, D-21, Corporate Park, Dwarka, Sector-21, New Delhi - 110 075, email [dilip.niranjana@gmail.com](mailto:dilip.niranjana@gmail.com) having IBBI registration No.IBBI/IPA-002/IP-N00552/2017-2018/11690 is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.*
- (xi) *The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant as per rules.*
- (xii) *Registry is hereby directed under Section 7(7) (a) of the I.B. Code, 2016 to communicate the order to the Financial Creditor, the Corporate*



*Debtor and to the Interim Resolution Professional by Speed Post as well as through e-mail.*

*(xiii) The Interim Resolution Professional is directed to strictly comply with the model timeline for CIRP as provided under Regulation 40A of IBBI (IRP for Corporate Person) Regulation, 2016.*

12. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Dated, Guwahati the 29<sup>th</sup> day of January, 2020  
//Deka/29-01-2020//

  
Member (Judicial)  
Adjudicating Authority