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INDIAN SUPREME COURT UPHOLDS CONSTITUTIONALITY OF NEW INSOLVENCY REGIME

February 2019

INTRODUCTION

On 25 January 2019, the Supreme Court of India (**Supreme Court**) delivered its judgment (**Judgment**) in *Swiss Ribbons Pvt. Ltd. v. Union of India* (**Swiss Ribbons**). This has been eagerly awaited by the market as the matter consolidated multiple petitions challenging the constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016 (**Code**) before multiple high courts in India between April 2018 and November 2018. The Supreme Court therefore considered multiple substantive issues of law, including on various critical issues such as the constitutional validity of the Code, Section 29A of the Code and on the differentiation between financial and operational creditors.

This note provides a summary analysis of this landmark Judgment and the appendices to the note set out the chronology of events surrounding the case and a detailed analysis of the arguments put forth by the petitioners and the respondents and the Supreme Court's views on each of the issues determined under the Judgment:

1. CONSTITUTIONALITY

The Supreme Court has held that the Code is constitutional and that courts should exercise limited interference in economic legislation.



Certainty about Code, optimism about RBI framework

Ruling the Code to be constitutional will hopefully provide judicial certainty as to the legitimacy of the key principles of the Code. Given the Supreme Court's reluctance to interfere in policy matters, its approach to the 12 February 2018 circular issued by the Reserve Bank of India (**RBI**) (which is being heard on 19 February 2019) remains to be seen. However, the Supreme Court's endorsement of the commonly assumed perspective that the corporate insolvency process exists for the "*revival of the corporate debtor*" might potentially cause some issues in the longer term.

2. DISTINCTION BETWEEN OPERATIONAL AND FINANCIAL CREDITORS

Supreme Court has held that distinction between financial creditors and operational creditors is justified both in the corporate insolvency resolution process as well as

in liquidation. Principle about similarly situated creditors (determined by reference to their rights) was recognised, but the court fell short of expressly stating that operational and financial creditors are not similarly situated.

Distinct rights but equal treatment?

It is positive that the Supreme Court has held that financial creditors can justifiably be treated differently in the context of their differential rights under the Code (e.g. representation on the committee of creditors). However, it is surprising and disappointing that the Supreme Court has been less clear about the differentiation in relation to recovery. By relying on the fact that most plans provide for equal treatment of operational creditors rather than clearly recognising the two sets of creditors as not being similarly situated, the Supreme Court has left the door ajar for litigation in cases where this may not be the case, even if the plan complies with law by providing liquidation value to operational creditors.

3. SECTION 29A UPHELD BUT CERTAIN LIMBS DILUTED

- The Supreme Court upheld the constitutionality of Section 29A and of the one-year period in Section 29A(c). However, it also held that the prohibition under Section 29A(j) on "*related parties*", and "*relatives*" from bidding should only apply to those parties who are connected with the business activity of the resolution applicant.
- The Supreme Court also held that bidders do not have "*vested rights*" and hence, dismissed the challenge to the retrospective application of Section 29A on this basis.

Section 29A – Confusion continues

The historic concern surrounding Section 29A is that it is over-inclusive and has unintended consequences and most market participants agree that it needs revision. However, the Supreme Court has addressed this in a manner that may have unintended consequences. The focus of the decision was on fairness and it seems unlikely that the Supreme Court was seeking to reverse the policy of the legislature or the previous decision of the Supreme Court in *Arcelor Mittal* judgment[1], both of which restrict devices pursuant to which restricted parties participate in the bidding process via third parties. However, the effect of the Judgment is that this is now possible. The courts or resolution professionals (**RPs**) might ordinarily still be able to restrict such structures under Section 29A under the "*acting jointly or in concert*" limb, but the reference to such parties being connected in the Judgment creates some doubt as to how this is now to be interpreted. It is curious that in ruling on such an important policy matter, the

[1] *ArcelorMittal India Private Limited v Satish Kumar Gupta*, Civil Appeal Nos. 9402-9405/2018.

Supreme Court did not set out a more detailed comparison with the *Arcelor Mittal* judgment to ensure that there is an internally consistent line of law and policy in this regard. Therefore, this point is may need judicial re-examination.

Beyond the retrospectivity issue, the ruling that bidders have no vested rights has the potential to be used in litigation against challenges by bidders.

4. WITHDRAWAL RIGHTS UNDER SECTION 12A UPHELD

- The Supreme Court upheld the withdrawal rights introduced in Section 12A of the Code, ruling that the 90% threshold (for financial creditor approval for withdrawal) was justifiable because insolvency is a collective process.
- The Supreme Court also held that the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which requires a withdrawal application under Section 12A to be submitted before issue of invitation for expression of interest from interested bidders, is directory and not mandatory. Therefore, a withdrawal application may be allowed in exceptional cases even after the issue of invitation for expression of interest.

Withdrawal – risk to deal certainly

The concept of withdrawal rights in the Code are in themselves difficult to reconcile with the general architecture of the Code. However, the reluctance of the court to interfere with a legislative choice and its explicit recognition of insolvency being a collective process is positive.

The withdrawal provision, when coupled with the Supreme Court's ruling in the *Brilliant Alloys* judgment (reiterated in the Judgment), which allowed withdrawal after issue of invitation for expression of interest will adversely impact deal certainty. It creates the risk of the process under the Code being used for price discovery.

5. ECOSYSTEM SURROUNDING THE CODE

The Supreme Court also upheld the status of information utilities and held that RPs play only a facilitatory role. The Supreme Court has directed the Government to set up circuit courts (to address the issue of the National Company Law Appellate Tribunal (**NCLAT**) only being located in Delhi) and has directed that the National Company Law Tribunals (**NCLTs**) and NCLATs function under the Ministry of Law and Justice rather than under the Ministry of Corporate Affairs.

Status quo maintained

It is helpful that the Supreme Court is supportive of the concept of information utilities, even if they are few in number today, as they may play a useful role in the future. On the role of the RPs, whether or not the Code intended for the RPs to have as limited a role as mere facilitation is debatable, but the Supreme Court has continued with its earlier approach and hence this may not cause much change in practice. On the circuit courts, given the complex nature of litigation under the Code, query whether or not this will have a meaningful effect in practice or whether it will lead to increased inefficiency. The effect of the change of the supervising ministry remains to be seen, although support for the Code is unlikely to change.

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APPENDIX 1 – CHRONOLOGY OF EVENTS

- **April 2018** – Supreme Court consolidated various petitions challenging constitutional validity of the Code (including petitions in relation to *Binani Cements*). It requested the government of India and RBI to file representations before it in *Swiss Ribbons*.
- **July 2018** – Petitions related to corporate insolvency resolution process (**CIRP**) of Bhushan Power & Steel Limited were consolidated with *Swiss Ribbons*.
- **September 2018** – Petitions filed by companies in the sugar, steel, power and shipping sectors challenging constitutional validity of the RBI circular dated 12 February 2018 (**RBI Circular Petitions**) were consolidated with *Swiss Ribbons* and stayed with an order, the effect of which is that hearings on the RBI Circular Petitions will be resumed after the final order on *Swiss Ribbons* has been passed. The RBI Circular Petitions have been listed for hearing on 19 February 2019.
- **28 November 2018 to 15 January 2019** – Hearings on *Swiss Ribbons* held.
- **25 January 2019** – Supreme Court delivered the Judgment.

APPENDIX 2 – DETAILED ANALYSIS OF ISSUES COVERED IN THE JUDGMENT

ISSUE 1: OVERALL CONSTITUTIONALITY OF THE CODE, THE OBJECTIVES OF THE CODE AND ITS FAIRNESS		
ARGUMENTS PRESENTED[2]	**RULING BY THE SUPREME COURT**	**COMMENT**
Arguments by the Petitioner: ▪ *Focus on creditor recovery*: The object of the Code should be the revival of the corporate debtor but it is encouraging liquidations and is being used by Committees of Creditors (**COC**) as a recovery mechanism. (Paragraph 2 of the Judgment). ▪ *Public interest*: The Code is against the public interest as it enables larger corporates to accumulate wealth and has resulted in public sector banks taking large write-downs. (Argument raised in court but not referred to in the Judgment). ▪ *Restrictive nature of the Code is unconstitutional*: The procedure under the Code is restrictive and leaves no alternate mechanism for settlement of debt or sale of assets[3] and is biased against the promoters	**Supreme Court supported the Code and its constitutionality**. ▪ *Limited court interference*: In accordance with United States' and Indian case law, the courts must grant the legislature greater latitude with respect to economic legislation and should not interfere in policy matters unless it is palpably arbitrary. (Paragraphs 7 and 8 of Judgment). ▪ *Support for the Code*: The Supreme Court discussed the objectives of the Code and the emphasis provided under the Code to resolution over liquidation and held that the Code is a beneficial legislation rather than a tool for recovery. (Paragraphs 9 - 12 of the Judgment).	**Right outcome but debatable description of the basis of the Code, which may create issues in the longer run.** It is encouraging that the Supreme Court has upheld the constitutionality of the Code and has rejected the regressive arguments of the petitioner. Hopefully, this will shut the door on a number of lingering policy level challenges. That said, in Paragraph 12, the court has endorsed a perspective (prevalent amongst Indian policy makers) that the Code exists for the revival of debtors. This was also earlier upheld by the NCLAT in *Binani Industries* judgment[4]. This is, in our view, a debatable perspective as the Code provides for collective creditor action[5]. In the longer

[2] The petitioner, challenging the Code, was represented by Senior Advocate, Mukul Rohatgi (supported by other Senior Advocates) and the Code was defended by K.K. Venugopal, Attorney General for India.

[3] The petitioners argued that this was a breach of Article 14 of the Constitution of India, which deals with the right to equality amongst equals and natural justice.

[4] *Binani Industries Limited v Bank of Baroda,* Company Appeal (AT) (Insolvency) No. 82 of 2018.

[5] Conceptually, the Code is clearly a United Kingdom (**UK**) style regime where the object is to recover value for creditors rather than to turn around the corporate debtor. This is why the COC controls proceedings as a structural matter in the Code. The revival model is closer to a chapter 11 model, which is why it has a debtor-in-possession model (which the Code does not adopt). Whilst the COC has the freedom to decide the right course of action, and of which the revival and restructuring of the debtor is just one among various possibilities, that determination is driven by the fact that a going concern is likely to yield greater creditor value. Indeed, the COC could just as well determine that there is no benefit in the CIRP and end it resulting in liquidation. In this context, the fact that the CIRP precedes liquidation means that the Code *only* exists to provide an opportunity for the revival of the debtor. In

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and operational creditors. (Argument raised in court and Paragraph 2 of the Judgment). **Arguments by Respondent:** ▪ *"Judicial hands-off"*: The Code is a policy response to the large scale Non-Performing Assets (**NPA**) issue and there should be limited judicial interference as regards economic regulation. (Arguments raised in court and Paragraph 4 of the Judgment). ▪ *Benefits of the Code*: The Code is an improvement over previous insolvency regime in many respects. (Argument raised in court but not referred to in the Judgment).		run, the judicial perspective on revival may lead to incongruous outcomes.

fact, this construct is intended to ensure that there is a "*stick*" so that the CIRP succeeds in view of the failure of the earlier Board for Industrial and Financial Reconstruction (BIFR) mechanism under Sick Industrial Companies (Special Provisions) Act, 1985, but the fact remains that the CIRP is for the benefit of the creditors.

ISSUE 2: TREATMENT OF FINANCIAL CREDITORS VIS-À-VIS OPERATIONAL CREDITORS		
ARGUMENTS PRESENTED	**RULING BY THE SUPREME COURT**	**COMMENT**

Arguments by the Petitioner:
▪ *No distinction between financial creditors and operational creditors*: The distinction is artificial as both types of creditors would give (presumably the corporate debtor) either money in terms of loans or money's worth of goods and services. (Paragraph 2 of the Judgment).
▪ *Discrimination against operational creditors*:
  ▪ Operational creditors can only participate in COC meetings if their debt exceeds 10% and even then, cannot vote. This allows financial creditors to serve their own interests. (Argument raised in court but not referred to in the Judgment other than a brief reference in Paragraph 2).
  ▪ Financial creditors are not required to prove default and may initiate CIRP even if the default amount is disputed, whereas operational creditors need to establish default. (Paragraph 2 of the Judgment).
▪ *Liquidation waterfall*: The liquidation waterfall creates an arbitrary distinction between the two classes of creditors to the disadvantage of operational creditors and is based on flawed premises. (Argument raised in court but not referred to in the Judgment).
Arguments by Respondent:
▪ *Rational distinction between financial creditors and operational creditors*: There is a rational distinction between the two kinds of debt based on a number of factors.
	The Supreme Court upheld the distinction between financial creditors and operational creditors and its constitutionality.
	▪ *Constitutionality of the distinction both in the CIRP process and in liquidation*: Equal treatment applies in relation to equals, but there is "*intelligible differentia*" between operational creditors and financial creditors as evident from their nature of debt, nature of underlying contract, amounts involved, availability of different fora for resolving disputes, ability to establish default and the financial creditors' involvement in assessing viability and feasibility to restructure debt etc. (Paragraphs 27, 28 and 84 of the Judgment).
	▪ *Equitable treatment of similarly placed creditors*: Supreme Court cited UNCITRAL's guideline on ensuring equitable treatment for similarly situated creditors. All creditors need not be treated identically, but in a manner that reflects the different bargain they have struck with the debtor. NCLAT has always considered whether operational creditors are given roughly the same treatment as financial creditors and if they are not, such plans are either rejected or modified. (Paragraphs 45 and 46 of the Judgment).
	▪ *Discrimination against operational creditors*:
		Right ultimate outcome, but the reasoning creates the risk of litigation on the ground that operational creditors are not well treated in a plan.
		While it is positive that the Supreme Court has recognised the distinction between operational and financial creditors, it has not provided the absolute clarity that lenders were seeking in relation to recoveries. It reached its conclusion without categorically opining that operational and financial creditors are not similarly situated, thereby approving differential treatment in concept.
		The Supreme Court instead appeared to be swayed by the fact that Section 30(2)(b) of the Code provides minimum liquidation value protection to operational creditors and that in any event most resolution plans provide for operational creditors to receive "*roughly the same treatment as financial creditors*".
		This begs the question as to what if the plans do not provide for anything other than liquidation value to operational creditors or indeed provide anything short of "*roughly equal*" treatment of operational creditors? In such circumstances, the Judgment leaves the door open to litigation and it is unfortunate that the court did not

ISSUE 2: TREATMENT OF FINANCIAL CREDITORS VIS-À-VIS OPERATIONAL CREDITORS		
ARGUMENTS PRESENTED	**RULING BY THE SUPREME COURT**	**COMMENT**
(Argument raised in court and Paragraph 4 of the Judgment). ▪ *Liquidation waterfall*: The respondents cited examples of jurisdictions like UK and France to prove that each jurisdiction had a liquidation waterfall suited to its needs. (Argument raised in court but not referred to in the Judgment). ▪ *COC composition*: The Code was modelled as a creditor-driven process and the COC composition is justifiable since it is the financial creditors who possess the necessary expertise to control the debtor and take decisions, unlike operational creditors who are only concerned with their own business. (Argument raised in court but not referred to in the Judgment). ▪ *Discrimination against operational creditors*: Financial creditors need not establish default at the time of admission of application since the information maintained by the financial creditor verifies this fact, but any dispute regarding the amount under default may be raised at the time of admission of claims. (Paragraph 4 of the Judgment).	▪ *Difference in initiation regime under Section 7 and Sections 8 and 9 of the Code*: Financial creditors must establish that a default has occurred in relation to a "claim" which is "due" (which then becomes a "debt"). Operational creditor only needs to claim a right to payment of liability in respect of a debt. Therefore, there is justification for the different regimes. (Paragraphs 37 and 38 of the Judgment). ▪ *Operational creditors' rights*: Banks and financial institutions are best equipped to assess feasibility and viability of the corporate debtor's business. Rights of the operational creditors are protected due to the requirement to pay them liquidation value in priority. (Paragraphs 39 – 44 and 46 of the Judgment).	clearly state that operational creditors are not similarly situated.

ISSUE 3: CONSTITUTIONAL VALIDITY OF SECTION 29A		
ARGUMENTS PRESENTED	**RULING BY THE SUPREME COURT**	**COMMENT**
Arguments by the Petitioner: ▪ *Violation of fundamental rights*: Section 29A of the Code is too broad and violates basic freedom of conducting trade and business for non-defaulting promoters and their relatives. Concepts such as "connected persons", "related parties" and "persons acting in concert" are vague. (Argument raised in court but not referred to in the Judgment). ▪ *Against objectives of the Code*: Section 29A is against the objectives of the Code relating to: (i) time-bound insolvency resolution, since it leads to challenges before NCLT and NCLAT; and (ii) maximisation of value, since it restricts promoters who may be willing to pay the best price, from bidding. (Paragraph 2 of the Judgment). ▪ *Retrospective application*: The retrospective application of Section 29A is illegal as it disallowed promoters who were in the process of submitting bids for their companies from the resolution process. (Paragraph 2 of the Judgment). ▪ *Scope*: Section 29A should be read down to include only such ineligibility criteria which bars wilful defaulters from submitting bids and not those promoters, connected persons, related parties and persons acting in concert which have not committed "malfeasance".	**The Supreme Court upheld the constitutional validity of Section 29A of the Code in general. However, it has limited the scope of Section 29A to "relatives" and "related persons" of the resolution applicant that are connected to the business activity of the resolution applicant.** ▪ *Retrospective application*: A resolution applicant has no vested interest to have its resolution plan considered or approved, which addresses any concerns on the retrospective applicability of Section 29A.[6] (Paragraphs 64, 65, 68 and 69 of the Judgment). ▪ *One-year period for NPA criterion*: Is not arbitrary and is defensible as a matter of policy. (Paragraphs 70-72 of the Judgment). ▪ *Related parties*: Restriction on "related parties" in Explanation I of Section 29A(j) must be read only to include only those related parties that are connected to the business activity of the resolution applicant. (Paragraphs 73-75 of the Judgment). ▪ *Persons in management or control in future*: The petitioners' argument that the portion of definition of "connected persons" under Section 29A, which	**Promoter friendly interpretation.** Although most practitioners feel that Section 29A is over-inclusive and needed some dilution, the approach of the Supreme Court is somewhat surprising. Whilst the Supreme Court perhaps rightly focussed on fairness, its approach risks having unintended consequences. The interpretation of "relatives" and "related parties" having to be connected to a restricted party would seemingly open the door to structures where a restricted party acts through a relative or related person that was not previously connected with the business. It is hard to reconcile this approach with the legislative intent behind Section 29A and spirit of the previous *Arcelor Mittal* judgment. A court or an RP might ordinarily feel that the "*jointly and acting in concert*" test might prevent abuse, but there is a reference (paragraph 75) to such parties being connected as well. This begs the question as to whether the Supreme Court is interpreting an incremental requirement here too. We will probably need further judicial determination on this point for certainty to emerge.

[6] The Supreme Court held the same in relation to Section 35 of the Code which requires a purchaser under a liquidation sale to also be eligible under Section 29A.

ISSUE 3: CONSTITUTIONAL VALIDITY OF SECTION 29A		
ARGUMENTS PRESENTED	**RULING BY THE SUPREME COURT**	**COMMENT**
(Arguments raised in court and Paragraph 66 of the Judgment). **Arguments by Respondent:** ▪ *Violation of fundamental rights*: Section 29A does not violate any basic freedoms as it was created by statute and can be curbed by statute as well. Ample leeway has been provided to promoters under the Code to initiate CIRP under Section 10 and regularise their accounts under Section 29A. It is absurd that despite the promoter's inability to revive the company, he should be put on the driver's seat by diluting Section 29A. The ouster of relatives is justified in the Indian context where family business is the norm and is equally applicable in other jurisdictions like the US and France. (Argument raised in court but not referred to in the Judgment). ▪ *Retrospective application*: Just because Section 29A relies on antecedent facts for its application does not mean it is retrospective. (Paragraph 4 of the Judgment). ▪ *Scope*: Section 29A is not aimed at malfeasance. Instead, it is aimed at ineligible persons who are undesirable in the widest sense of the term, i.e., persons unfit to take over the management of a corporate debtor. It would be unreasonable to read down the eligibility criteria or peg the same to lofty standards of wilfulness and malfeasance. (Paragraphs 4 and 5 of the Judgment). ▪ *NPA related eligibility criteria*: The one-year period under the NPA related eligibility	refers to persons who will be in management and control of the corporate debtor, is not indeterminate since this is by reference to management and control of the corporate debtor during the term of the resolution plan. (Paragraph 76 of the Judgment). ▪ *MSME exemption*: Exemption from Section 29A granted in respect of "Micro Small and Medium Enterprises" (**MSMEs**) is constitutional and defensible from a policy perspective. (Paragraphs 77 – 81 of the Judgment).	Therefore, this interpretation is "*promoter friendly*" in that it eases some of the previous restrictions on them.

ISSUE 3: CONSTITUTIONAL VALIDITY OF SECTION 29A		
ARGUMENTS PRESENTED	**RULING BY THE SUPREME COURT**	**COMMENT**
criterion is not arbitrary since it provides ample time to resolve the NPA and has been prescribed in view of RBI guidelines for classification of an NPA as a sub-standard account after one year of classification as an NPA. (Paragraph 4 of the Judgment).		

ISSUE 4: WITHDRAWAL RIGHTS UNDER SECTION 12A UPHELD		
ARGUMENTS PRESENTED	**RULING BY THE SUPREME COURT**	**COMMENT**
Arguments by the Petitioner: ▪ Section 12A is unreasonable as it sets a high threshold for withdrawal and the need for COC approval causes delay and gives creditors the power to reject legitimate settlements. (Paragraph 2 of the Judgment). **Arguments by Respondent:** ▪ Section 12A provides an important safeguard and the 90% threshold is a reflection of the fact that insolvency is a collective process. COC approval is an essential check for balancing of all stakeholder interests given that CIRP is a public process involving public money. The twin checks of the COC and the NCLT are also required for avoiding frivolous withdrawal applications. (Arguments raised in court and Paragraph 4 of the Judgment).	**Supreme Court upheld the constitutional validity of Section 12A of the Code.** ▪ *Collective process*: Insolvency is a collective process and not a bilateral recovery matter, hence the 90% threshold has been prescribed since it amounts to substantially all the financial creditors. If the COC arbitrarily rejects a settlement, the NCLT/ NCLAT can set aside such decision and so the withdrawal process is not arbitrary. (Paragraphs 52 and 53 of the Judgment). ▪ *Late withdrawal possible*: Supreme Court appeared to endorse its position laid down in the *Brilliant Alloys* judgment that a withdrawal application may be accepted even after the issue of invitation for expression of interest in exceptional cases. It added that even if the COC has not been constituted, parties can approach the courts to consider the merits of withdrawal[7].	**Status quo maintained with some useful discussion by the Supreme Court.** The withdrawal right in Section 12A is a curious feature of Indian law and does not sit easily with the fact that insolvency is a collective process to avoid a "race to the bottom" and not a bilateral creditor recovery process. However, its inclusion is a legislative choice and so it is positive that the Supreme Court chose not to set this aside. It is also helpful that the Supreme Court recognised the collective nature of the insolvency process. However, the scheme of Section 12A becomes especially problematic when coupled with the ruling of the Supreme Court in the *Brilliant Alloy* judgment since it adversely affects deal certainty. It may potentially render the bidding process as a price discovery tool for the promoter.

[7] It appears that the court intended to close the door to the argument that prior to the constitution of the COC, the creditors could not determine the appropriateness of any withdrawal proposal.

ISSUE 5: POWERS OF RP		
ARGUMENTS PRESENTED	**RULING BY THE SUPREME COURT**	**COMMENT**
Arguments by the Petitioner: ▪ *Lack of expertise and neutrality*: Appointment of RPs to run the business of the corporate debtor is not in the best interests of all stakeholders as RPs lack technical expertise, charge high fees which forms part of the liquidation estate, and are appointed by the COC and therefore cannot be neutral. (Argument raised in court but not referred to in the Judgment). ▪ *Quasi-judicial functions*: Certain functions of RPs, such as collecting proof of claim, are judicial in nature and therefore are better vested with courts or judicial authorities. (Paragraph 2 of the Judgment). **Arguments by Respondent:** ▪ *Administrative functions*: RP's job is only to collate information and even when he exercises his discretion, it is done administratively and is within the oversight of the NCLT. (Paragraph 4 of the Judgment).	**Upheld the position of the RP and held that its powers are only facilitatory.** ▪ An RP acts under the supervision of the COC and can be replaced by the COC. Therefore, an RP is only a facilitator of the resolution process whose administrative functions are overseen by the COC and the NCLT. (Paragraphs 58 – 61 of the Judgment).	**Greater concentration of power in creditor hands.** Although the text of the Code clearly envisages a defined role for the RPs under the supervision of the COC, the RPs do have real responsibilities and play a key role. It is debatable as to whether the Code intended RPs to have a role as limited as "facilitation" alone, but in any event, the Supreme Court has continued a line of cases limiting the role of the RP, e.g. in the *ArcelorMittal* judgment[8]. However, RPs as a matter of practice, routinely refer any matter of judgment to the COC. This judgment is likely to mean that RPs are more likely to defer to the COC more widely than is already the case.

[8] Supra

ISSUE 6: ADJUDICATION STRUCTURE UNDER THE CODE		
ARGUMENTS PRESENTED	**RULING BY THE SUPREME COURT**	**COMMENT**
Arguments by the Petitioner: ▪ *Lack of expertise*: NCLTs and NCLAT do not compare to the procedural and substantive expertise of the high courts and Supreme Court. Access to high courts, and in some cases, the Supreme Court, should be allowed in insolvency matters due to the large stakes involved. (Argument raised in court but not referred to in the Judgment). ▪ *Invalid appointment*: Most incumbent NCLT judges were appointed under a committee which had been quashed. (Paragraph 2 of the Judgment). ▪ *Wrong ministry*: NCLT and NCLAT are functioning under the Ministry of Corporate Affairs (**MCA**) even though they should function under the Ministry of Law and Justice. (Paragraph 2 of the Judgment). ▪ *One bench of NCLAT*: Sole location in Delhi criticised. (Paragraph 2 of the Judgment). **Arguments by Respondent:** ▪ *Valid appointment*: All NCLT and NCLAT members have been appointed under the (Indian) Companies Act, 2013 and that this question should be decided upon once the Supreme Court has opined on other matters. (Paragraph 4 of the Judgment). ▪ *One bench of NCLAT*: The Attorney General for India provided an assurance that circuit	**Appointment of judges upheld, but other changes required to be made.** ▪ *Appointment*: Having considered the *Madras Bar Association* judgment[9] and the affidavit filed by the Government in this regard, the Supreme Court held that the issue of validity of appointment of NCLT and NCLAT members need not be examined. (Paragraph 14 of the Judgment). ▪ *One bench of NCLAT*: Supreme Court directed setting up of circuit benches of NCLAT within 6 months from the date of the Judgment. (Paragraph 16 of the Judgment). ▪ *Wrong ministry*: Supreme Court held that the NCLTs and NCLAT should function under the Ministry of Law rather than the MCA. (Paragraph 19 of the Judgment).	**Immediate stability the longer-term effects of the infrastructure changes remain to be seen.** Supporting the appointment of the judges provides short term support for critical architecture on which the Code depends. The concept of circuit courts may also help litigants, although query whether they will help to provide meaningful redress without a permanent location of the court (given the complex nature of this type of litigation) or increase inefficiency. The change of supervisory ministry is an important one from an administrative perspective and the effects remain to be seen in practice. However, there is broad support for the Code across ministries and so this ought not lead to a change in approach. However, how this transition is achieved and its effect in practice remains to be seen.

[9] *Madras Bar Association v Union of India*, (2015) 8 SCC 583.

ISSUE 6: ADJUDICATION STRUCTURE UNDER THE CODE		
ARGUMENTS PRESENTED	**RULING BY THE SUPREME COURT**	**COMMENT**
benches of NCLAT will be set up. (Paragraph 16 of the Judgment). ▪ *Wrong ministry*: The rules of business allocated amongst the ministries are mandatory and the rules of business have allocated matters arising out of the Code to the MCA. (Paragraph 18 of the Judgment).		

ISSUE 7: SUPPORT FOR INFORMATION UTILITIES		
ARGUMENTS PRESENTED	**RULING BY THE SUPREME COURT**	**COMMENT**
Arguments by the Petitioner: ▪ Certificate of debt or default issued by information utilities (**IUs**) (which have been created to record information of all stakeholders to a debt under the Code) is violative of Article 14 and Article 21 of the Indian Constitution[10] as it accords IUs arbitrary powers without any procedure being established by law in this regard. IUs' certificate was akin to a preliminary decree without any hearing or adjudication. (Paragraph 2 and Paragraph 54 of the Judgment). **Arguments by Respondent:** ▪ Information available with an IU is available to all in electronic form and is authenticated only after consultation with all stakeholders. Accordingly, the powers of IUs are not arbitrary or without procedure established by law. (Argument raised in court but not referred to in the Judgment).	**The Supreme Court dismissed the challenge against IUs.** ▪ The Supreme Court held that IUs are required to be registered with the relevant authority before they can function and quoted with approval the role they play in collating key information and authenticating and verifying it. (Paragraphs 55 – 57 of the Judgment).	**Support for a useful stakeholder.** Although there are presently few IUs in the market in practice, this is an innovative and useful solution in the Code to factual disputes, which were historically a key cause of delays. It is positive that the Supreme Court has recognised and upheld the validity of IUs.

[10] Article 21 of the Indian Constitution provides, *inter alia,* about procedure established by law.