



OCTOBER 2018

# DUE DILIGENCE OF RESOLUTION APPLICANTS – SECTION 29A

## RECENT DEVELOPMENTS

Impact of recent judgment of Honourable Supreme Court of India dated October 4, 2018



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# INTRODUCTION

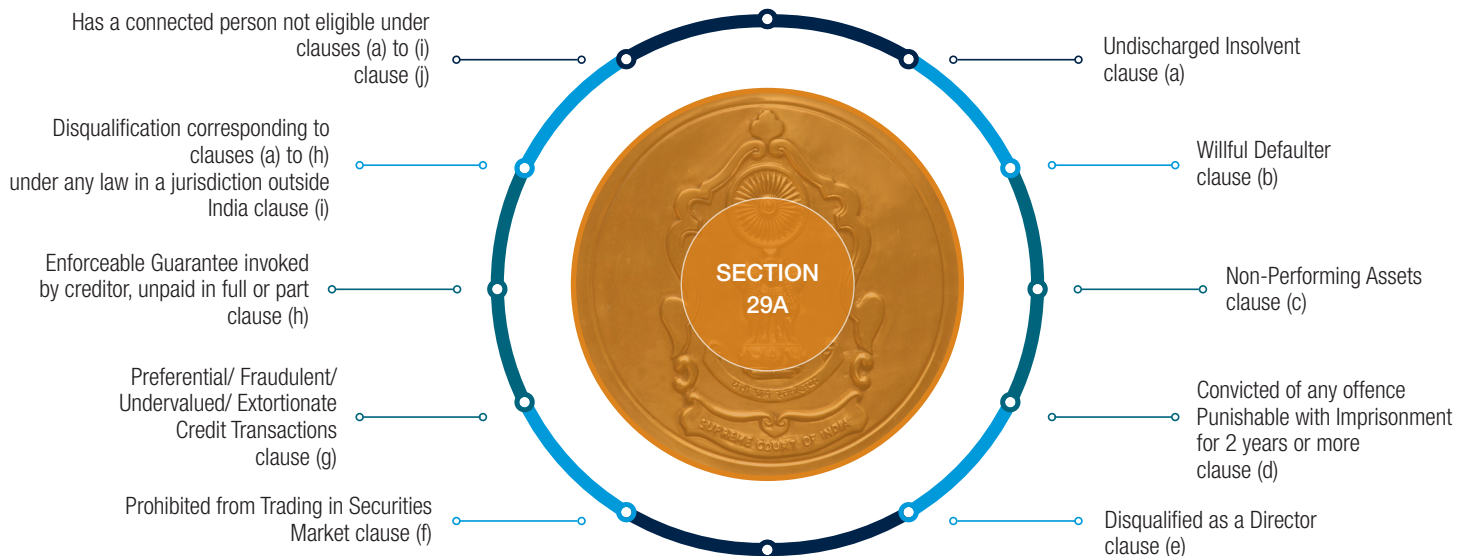
Section 29A of the Insolvency and Bankruptcy Code, 2016 (“the Code”) has emerged as one of the key statutes in determining the eligibility of Resolution Applicants in the Corporate Insolvency Resolution Process (“CIRP”). The Code, in its original form had not incorporated any provisions to prevent defaulting promoters from buying-back the corporate debtor, which could occur potentially at steep discounts. Subsequently, through an amendment to the Code, Section 29A was inserted with retrospective effect from November 23, 2017.



A second amendment to the Code, effective from June 6, 2018, included amendments to Section 29A. Regulation 36A(8) of the CIRP Regulations, among other things, requires the Resolution Professional to conduct due diligence of the prospective Resolution Applicants under the provisions of Section 29A.

The most recent Judgment dated October 4, 2018 of the Honourable Supreme Court of India, explains and reinstates the importance of conducting a thorough due diligence under Section 29A. As noted by the Honourable Supreme Court of India, “great care must be taken to ensure that persons who are in-charge of the corporate debtor, for whom such resolution plan is made, do not come back in some other form to regain control of the company without first paying off its debts.” The Supreme Court judgment also asserts that the Resolution Professional needs to confirm that a resolution plan, among other things, does not contravene the provisions of Section 29A.

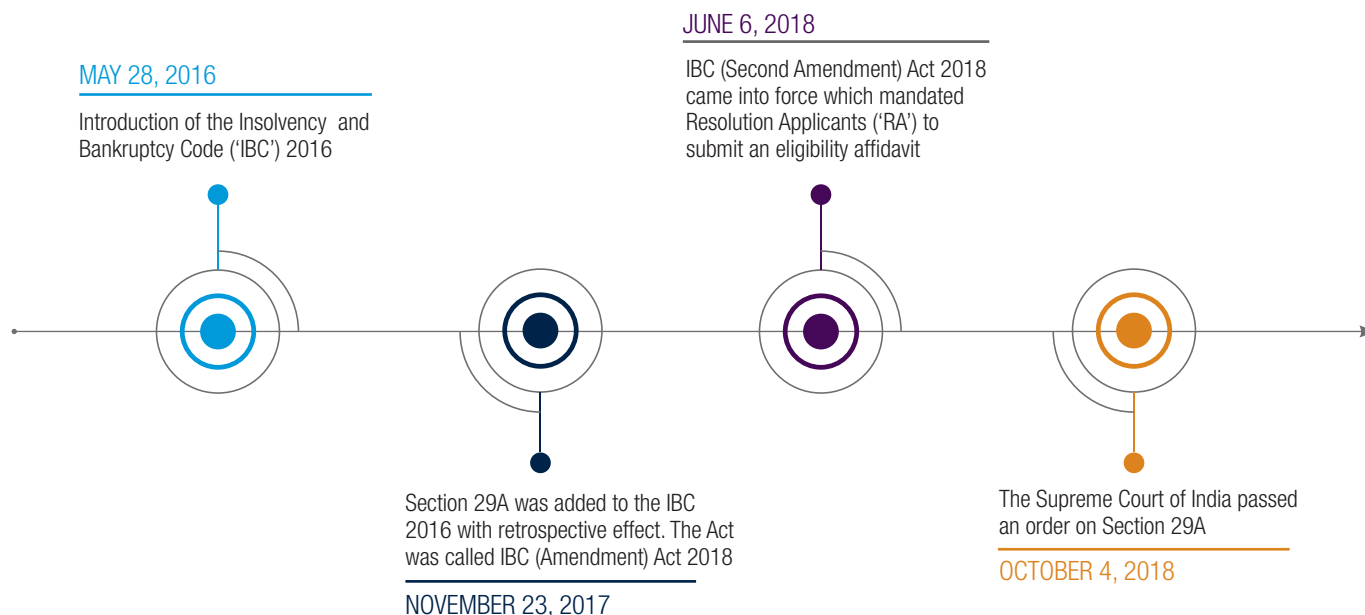
## Persons Not Eligible to be Resolution Applicant



### Source References:

(i) The Insolvency and Bankruptcy Code, 2016 (amended to date) (ii) Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (amended to date); (iii) Honourable Supreme Court of India Judgment dated October 4, 2018 in the matter of Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta and Ors. arising from Corporate Insolvency Resolution Process (CIRP) of Essar Steel India Limited (Civil Appeal Nos. 9402 – 9405 of 2018); and (iv) Awareness material dated October 6, 2018 issued by the Insolvency and Bankruptcy Board of India (IBBI) relating to the said Judgement<sup>1</sup> of the Honourable Supreme Court of India.

# EVOLUTION OF SECTION 29A



- The Insolvency and Bankruptcy Code 2016 (enacted on May 28, 2016)
  - defined a “Resolution Applicant” as any person who submits a resolution plan to the Resolution Professional.
- Insolvency and Bankruptcy Code (Amendment) Act, 2018 (enforced with retrospective effect from November 23, 2017)
  - Section 29A was newly inserted for ‘Persons not eligible to be Resolution Applicant’ that listed the criteria/ situations when a person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person met those criteria.
- Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (enforced with effect from June 6, 2018)
  - mandated the Resolution Applicant to submit a resolution plan, along with an affidavit stating that the Resolution Applicant is eligible under Section 29A. Hence, this amendment also placed responsibility on the Resolution Applicant to confirm its eligibility to submit a resolution plan.
  - specified that a Resolution Applicant would not be disqualified, subject to certain conditions, if the Resolution Applicant acquired a non-performing asset through a previous CIRP.
  - laid out the criteria for disqualification of persons convicted for any offence punishable with imprisonment.
  - increased the ambit of connected persons of Resolution Applicant by including family members of connected persons who are individuals. A connected person comprises – (1) Any person who is the promoter or in the management or in control of the Resolution Applicant; (2) Any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan and; (3) the holding company, subsidiary company, associate company or related party of a person referred to in category 1 and 2 above, except a Resolution Applicant which is a financial entity and who is not a related party of the corporate debtor.

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# SNAPSHOT OF RECENT SUPREME COURT OF INDIA JUDGMENT IMPACTING SECTION 29A

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While determining the eligibility of Resolution Applicants, Arcelor Mittal India Private Limited and Numetal Limited to submit a resolution plan for Essar Steel India Limited, the Honourable Supreme Court of India in its judgment dated October 4, 2018 settled several issues relating to CIRP under the Insolvency and Bankruptcy Code, 2016. The key highlights of the judgment covering Section 29A are summarized below.



## Clarification on responsibilities of the Resolution Professional

The Supreme Court judgment provides clarity and direction on the role and duties of the Resolution Professional, when examining each resolution plan under Section 30(2) to confirm the eligibility or ineligibility of Resolution Applicants as per Section 29A.

The Supreme Court judgment requires the Resolution Professional to ensure Section 29A compliance. The Resolution Professional needs to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors ('CoC'), who may or may not approve it. The Resolution Professional is required to give his or her "prima facie opinion" to the CoC confirming, if any law, including Section 29A has or has not been contravened. The Supreme Court ruling also emphasizes that it would be in the fitness of things, if the Resolution Professional appends a due diligence report with respect to each of the resolution plans under consideration, and to state briefly as to why a resolution plan does or does not conform to the law.



## Clarification on responsibilities of the Committee of Creditors

It is the CoC that will approve or disapprove a resolution plan, given the statutory parameters of Section 30 (relating to submission of resolution plan). Where a Resolution Applicant is found to be ineligible at the time of submission of the resolution plan under Section 29A(c), the Resolution Applicant shall be allowed by the CoC such period, not exceeding 30 days, to make payment of overdue amounts in accordance with Section 29A(c).

The rejection of a resolution plan by the CoC claiming that the resolution plan 'violates the provisions of any law', including the ground that a Resolution Applicant is ineligible under Section 29A, is not final. The Adjudicating Authority (National Company Law Tribunal) acting quasi-judicially (as this relates to question of law), can determine whether the resolution plan violates the provisions of any law, including Section 29A of the Code, after hearing the arguments of the Resolution Applicant as well as the CoC. Subsequently, an appeal can be preferred from the decision of the National Company Law Tribunal to the Appellate Authority, National Company Law Appellate Tribunal.



## Lifting the corporate veil and knowing the real persons

It is "imperative" to identify who are the "real" individuals or entities who are acting jointly or in concert, and who have set up such a corporate vehicle for the purpose of submission of a

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# SNAPSHOT OF RECENT SUPREME COURT OF INDIA JUDGMENT IMPACTING SECTION 29A (CONTD.)

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resolution plan. For acting jointly, what is to be ascertained is whether certain persons have got together and are acting jointly in the sense of acting together. It includes any understanding, even if it is informal, and even if it is to indirectly cooperate to exercise control over the Corporate Debtor. Whether a person is or is not acting in concert depends upon the facts of each case.



## Curing the ineligibility

Ineligibility under Section 29A(c) can be cured, if the Resolution Applicant proposing to submit the resolution plan makes payment of all overdue amounts before submission of a resolution plan within the specified period in accordance with Section 29A(c). Further, great care must be taken to ensure that persons who are in-charge of the corporate debtor do not come back in some other form to regain control of the corporate debtor without first paying off its debts.

If a person has been a promoter, or in the management, or control, of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place, and in respect of which an order has been made by the Adjudicating Authority under the Code, such person is ineligible to present a resolution plan under Section 29A(g). This ineligibility cannot be cured by paying off the debts of the corporate debtor.



## Disapproval of resolution plans

The Supreme Court judgment also concludes that if a resolution plan does not receive the approval of the CoC with the requisite 66 percent of the voting share of financial creditors, the Resolution Professional is required to invite a fresh resolution plan within the time limits specified, where no other resolution plan is available. An aggrieved Resolution Applicant can approach the Adjudicating Authority (National Company Law Tribunal) for relief only after a resolution plan has been evaluated by the CoC after voting, and not prior to that.

- Resolution Professional to run the process, examine and confirm that a resolution plan does not contravene Section 29A of the Code and provide the due diligence report.
- Committee of Creditors to approve or disapprove a resolution plan.
- Adjudicating Authority, if satisfied that the resolution plan as approved by the Committee of Creditors meets the requirements under the Code, it shall by order approve the resolution plan.



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# KEY SUCCESS FACTORS TO AN EFFECTIVE SECTION 29A DUE DILIGENCE

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The Resolution Professional has the responsibility to conduct Section 29A due diligence. A prospective Resolution Applicant submitting an affidavit stating that he/she is eligible under Section 29A to submit resolution plan will not suffice. Adequate due diligence on the prospective Resolution Applicants and its connected persons needs to be conducted effectively and within the requisite timeline to identify ineligibility, if any. The Resolution Professional should seek clarifications or additional information or document from the prospective Resolution Applicants, if needed for conducting the due diligence. The CoC should review the due diligence report submitted by the Resolution Professional at the time of approving or disapproving a resolution plan.

The aforesaid due diligence process is not restricted to simple public domain searches but entails conducting an extensive public record review and research in India and globally by deploying advanced research techniques and accessing multiple global proprietary databases in English and native language pertaining to defaults and violations. In addition, independent interaction and communication across various stakeholders in this due diligence process is needed to ensure effective Section 29A due diligence.



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# KEY SUCCESS FACTORS TO AN EFFECTIVE SECTION 29A DUE DILIGENCE (CONTD.)

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## Deep skill-sets to conduct due diligence effectively and in a timely manner

- The Resolution Professional will need to leverage the right skill-sets and expertise to conduct due diligence on the Resolution Applicants and their Connected Persons. The scale of the due diligence exercise may involve hundreds, or thousands of connected persons, involving entities or individuals, spread across multiple geographies and jurisdictions. Care needs to be taken to ensure that the due diligence is completed within required timelines. Depending upon the complexity of the due diligence exercise, the Resolution Professional may choose to engage a separate independent advisor to assist with such due diligence.

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## Identification of connected persons

- Each Resolution Applicant is required to provide an affidavit that includes a list of connected persons. As one starts conducting the due diligence, one may come across entities and individuals that were not identified as connected persons by the Resolution Applicants. In such cases, it is important to promptly confirm whether such entities should be considered as connected persons and therefore include or exclude them from the due diligence exercise.

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## Identification of red flags and reporting

- Conduct effective public domain research comprising media, regulatory, litigation, bankruptcy, credit default and other relevant checks across jurisdictions in English and native language, subject to the extent of information available in the public domain.
- Identify, review and report any red flags relevant to Section 29A. Ascertain whether such red flags potentially result in the ineligibility of a Resolution Applicant under Section 29A.
- Based on the procedures performed, the Resolution Professional will need to provide a detailed due diligence report to the CoC.

### Disclaimer:

The contents herein this publication is for general information only and is not to be construed as a legal advice or opinion or as a substitute for the advice of a legal attorney.



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# A&M SERVICE OFFERING – SECTION 29A DUE DILIGENCE

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A&M has deep expertise in conducting due diligence of companies and individuals in India and across the globe. A&M has a dedicated team to provide bespoke due diligence services coupled with hands on Insolvency and Bankruptcy resolution process experience and an understanding of the requirements for compliance with Section 29A.

## Our Experience



- We draw on our multi-industry and cross border experience to conduct incisive public record diligence to provide integrated solutions for compliance with Section 29A of the Insolvency and Bankruptcy Code, 2016.
- Litigation, regulatory, media, bankruptcy and credit default checks across jurisdictions.
- Access to global proprietary databases equipped to unearth global multilingual articles.

## Independence



- Independent, with no audit conflicts.

## The A&M Difference



- One of the most trusted due diligence service providers.
- Managed and supervised one of the largest Section 29A compliance review in India covering more than 2,900 connected parties across 40 jurisdictions.
- Significant experience of working on due diligence assignments across an array of countries in Asia, Europe, Latin America, North America, Africa, Caribbean and the Pacific.





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With over 3000 people across four continents, we deliver tangible results for corporates, boards, private equity firms, law firms and government agencies facing complex challenges. Our senior leaders, and their teams, help organizations transform operations, catapult growth and accelerate results through decisive action. Comprised of experienced operators, world-class consultants, former regulators and industry authorities, A&M leverages its restructuring heritage to turn change into a strategic business asset, manage risk and unlock value at every stage of growth.

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