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COMPUTATION OF HEAD OFFICE OVERHEADS AND LOSS OF PROFIT DAMAGES IN CONSTRUCTION DISPUTES

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I. INTRODUCTION

One of the major challenges in Construction disputes is the computation of damages on account of *overhead costs* ("**OC**") and *loss of profit* ("**LOP**") that a contractor is entitled to be awarded. Such damages are sought on the basis of delay in completion of the project that has been caused by the employer which resulted in the contractor incurring OC.

Determining delay damages in such disputes involves complex calculations and estimations. There are various formulae for computing construction delay damages in relation to the OC & LOP that may be applied by any Arbitral Tribunal ("**AT**") and Courts. In this piece, we discuss the various formulae for computation of damages on account of OC & LOP, the law governing the award of damages under the Indian Contract Act, 1872 ("**Contract Act**") and the approach of Courts towards the application of various formulae.

II. HEAD OFFICE OVERHEADS & LOSS OF PROFITS

A. Head-Office Overheads:

In construction disputes, the OC is generally categorised as 'Head-Office Overheads' ("**HOH**") which include administrative expenses, rent, electricity, utilities expenses, insurance costs etc. [1]. According to the Society of Construction Law's Delay and Disruption Protocol ("**SCL Delay Protocol**"), HOH refers to all incidental expenses associated with the contractor's overall business operations, including those that cannot be directly attributed to the project [2]. The contractor may claim such damages under two methods:

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i. Opportunity based claim: Due to the delay the contractor lost the opportunity to earn the OC and profit in other projects; or

ii. Actual OC that the contractor incurred based claim: Due to the delay the contractor incurred additional OC to complete the project.

Usually, a computation on the basis of the Actuals is difficult due to the reason that the contractor does not have the complete record of the OC expenses to quantify the HOH. Therefore, the preferred approach for calculating the HOH is the Opportunity based claims using the various established formulae [3]. However, the contractor is required to prove that he had projects other than the one that is the subject matter of the dispute and that he could have utilized his resources on the other project(s) [4].

B. Loss of profit:

Loss of profit is the loss incurred by a contractor due to a decline in the profit margin brought on by the extension of the contract, or due to the profit the contractor was unable to realize during the prolonged period as the contractor was unable to allocate resources and labour to another project due to the extension of the current contract, or when the contractor was unable to complete the work because the employer had violated the terms and conditions of the contract [5]. However, such a claim is only available to the contractor if they are able to show that while allocating their resources to the delayed contract, the contractor was aware of such profits that could have been earned in other projects [6].

III. FORMULAE FOR COMPUTATION OF HOH AND LOP:

The substantive provisions regarding damages for breach of contract in India, are as such silent on the method of calculation of such damages. Therefore, various formulae are applied by the courts and arbitral tribunals for calculating for computing HOH and LOP claims. The Supreme Court of India ("**SC**") discussed the three most applied formulae *viz Hudson*, *Emden* and *Eichleay* formula in the calculation of construction delay damages in the seminal judgment of ***McDermott International Inc. vs. Burn Standard Co. Ltd.*** [3] ("***McDermott***"). This section discusses the different formulae which are applied for calculation HOH and LOP rate in construction delay disputes.

A. Hudson Formula–

HO/Profit%*	x	Contract sum	x	Period of delay (In weeks)
100		Contract period		
*HOH and profit percentage as provided under the tender/contract.				

The *Hudson* formula links HOH and LOP together on the assumption that contractors normally add a single percentage to their prices to cover both and this percentage is provided in the tender/contract itself. This formula is to be applied on the total contract value and not the value of the works completed [7]. The formula would showcase that in the event there is a delay in the performance of the contract, the contractor will be entitled to get additional sums under the contract as the calculation is derived from a number which in itself contains an element of HOH and profit which ultimately leads to double counting. This double-counting has been subjected to criticism [8]. This formula needs to be adjusted before it is applied by any AT or Court as it assumes that there has been no variation in the contract price and ignores the responsibility of the contractor to realistically make best efforts to mitigate his losses during the period of delay [9].

B. Eichleay Formula–

Step 1				
Contract Billings / Total Billings for Contract period	X	Total overhead for contract period	=	Overhead allocable to the contract
Step 2				
Allocable overhead / Days of Performance	=	Daily overhead rate		
Step 3				
Daily Contract Overhead Rate	x	Days of compensable delay	=	Amount of recovery

The *Eichleay* formula aims to first allocate HOH to the project for the entire duration of the full contract time, and then to reassess it on a daily basis to calculate the compensation due. The benefit of this method is that it takes into account actual instead of anticipated period to perform the contract, as the HOH & LOP is not double-counted in the result [10]. However, this *Eichleay* method is criticized for being theoretical and its inability to provide any mechanism for allocation of wasted overheads when there are two or more sources of delay.

C. Emden Formula–

$$\frac{\text{H or } [(\text{Total HOH} + \text{Profit})/\text{Total Turnover})]\ \%}{100} \times \frac{\text{Contract sum}}{\text{Agreed contract period (in weeks)}} \times \text{Period of delay caused by Employer (In weeks)}$$

The *Emden* formula was developed by Canadian courts [11] and operates on the lines of the *Eichleay* method. This formula may be preferred in the cases where the actual costs of head office staff directly engaged upon the individual contract are not obtainable as it takes the value of H (from the above formula) as the Head-Office percentage computed by dividing the cumulative OC & Profit of the Contractor's organisation by the Total Turnover [12]. The HOH percentage is calculate using the *Emden* formula by dividing the contractor's organization's overall overhead cost and profit by its overall turnover. Pertinently, the *Emden* formula only considers the actual HOH and profit percentage in contrast with the *Hudson* formula.

IV. PRE-REQUISITES UNDER LAW GOVERNING THE AWARD OF DAMAGES UNDER THE INDIAN CONTRACT ACT, 1872:

A. When Time is of Essence OR Extension of Time is provided:

Section 55 of the Contract Act deals with situations when a party to a contract in which time is of essence fails to perform its obligations within the stipulated time. In construction contracts, generally, time is not of essence unless specifically provided for [13] in the contract or determinable from the intention of the parties [14]. For claiming damages on account of *inter alia*, HOH and lost profit due to prolongation caused by the employer, a contractor must show that time is of essence under the contract.

B. Establishment of Losses suffered due to Breaches:

The SC while dealing with LOP claim under Section 73 of the Contract Act has held that once it is proved that the opposite party is guilty of breach of contract, and the claimant has executed its part of the contract, the claimant would be entitled to damages by way of LOP [15]. There is a catena of judgments that have stressed on the requirement for the contractor to establish the losses sustained due to the breaches of the employer in order to claim damages [16]. Further, a contractor is obligated to take reasonable steps to mitigate the loss consequent on the breach [17]. The aforesaid principles of proving loss and mitigation of damages have been held to be inviolable and a part of the fundamental public policy of India for the award of unliquidated damages under Section 73 of the Contract Act [18].

V. APPROACH OF COURTS IN INDIA VIS-À-VIS THE APPLICATION OF FORMULAE FOR CALCULATING HOH AND LOP DAMAGES:

a. The method applicable for the computation of damages generally depend on the facts and circumstances of each case [19] and only the legal obligations are to be considered and not the expectations, however reasonably it may be assumed [20].

b. It is in the domain of the arbitrator to apply the appropriate formula for the calculation of damages [21].

c. The selection of one formula over the other by the arbitrator for the calculation of delay damages, is not amenable to a challenge under Section 34 of the Arbitration and Conciliation Act, 1996 [22].

d. A mere reliance on any formula for determining damages in absence of any evidence of actual loss would be contrary to law and the principles of award of damages. Consequently, any formula applied without any proof of actual loss will be patently illegal and in conflict with public policy of India [23].

e. A Court may set aside an award which applies any formula without considering any overlap that may be present in the HOH and LOP claims [24].

f. A contractor is obligated to take reasonable steps to mitigate the loss consequent on the breach [25].

VI. CONCLUSION:

While the AT may apply any formulae for the computation of HOH and LOP claims, the pre-requisites discussed in the previous sections of this piece are to be necessarily followed, as per the dicta of the Courts. The contractor has to mandatorily provide evidence / proof of loss suffered by him due to delays caused by the employer for establishing claims for HOH and LOP. The contractor also has to showcase that he had means of mitigating the damages, and took reasonable measures to reduce the damages. It is only after considering these broad principles, any of the formulae for determining the construction delay damages, *inter alia*, HOH and LOP rates. Thus, any award of damages under HOH and LOP by simply relying on the formulae for the computation of damages, without following the pre-requisites/principles may be set aside for being in conflict with the public policy of India.

REFERENCES

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[13] *Welspun Specialty Solutions Ltd. v. ONGC*, (2022) 2 SCC 382.

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ARBITRATION

DELAY CAUSED BY THE AWARD HOLDER DISQUALIFIES HIM FOR THE GRANT OF INTEREST FOR THE SAID PERIOD

The Supreme Court (**'SC'**) in *Executive Engineer (R and B) v. Gokul Chandra Kanungo* has held that Arbitrator while exercising the discretion under Section 31(7)(a) of Arbitration and Conciliation Act, 1996 ("A&C Act"), may grant interest but the same should be based on a reasoning. The SC noted that the Arbitrator had without assigning any reasons awarded interest for the period post completion of the work as well as for the period when the respondent was delaying the pendency of the proceedings. Thus, the Court exercised its power under Article 142 of the Constitution and reduced the rate of interest from 18% p.a. to 9% p.a.

THE COURT CAN CONDUCT A PRELIMINARY INQUIRY UNDER SECTION 11 OF THE A&C ACT TO ASCERTAIN THE ARBITRABILITY OF DISPUTE

The SC in *Emaar India Ltd. v. Tarun Aggarwal Projects LLP* has held that the arbitration agreement must be construed considering the intention of the parties and if Arbitration mechanism has been precluded for the redressal of the dispute by the Arbitration agreement, the same cannot be invoked by the parties. Further, it was held that the Court is empowered to hold a preliminary inquiry in order to ascertain if the dispute falls within the 'Excepted Matters' and the parties are legally qualified to move to Arbitration.

INVOCATION OF ARBITRATION BY ONLY ONE OF THE CONSTITUENTS OF THE JOINT VENTURE IS NOT VALID INVOCATION OF ARBITRATION

The Delhi High Court ('**DHC'**) in *Consulting Engineers Group Limited v. National Highways Authority of India (NHAI)* has held that a joint venture (JV) in itself is a legal entity and therefore, action by only one of the parties to the joint venture could not be construed as action on part of the JV. Thus, the court opined that when an agreement is entered into by the parties by forming a consortium /joint venture, one of the members of the consortium cannot separately invoke the arbitration agreement in their individual capacity.

A SPECIFIC PERFORMANCE OF CONTRACT ORDERED IN AN ARBITRAL AWARD CANNOT BE SET ASIDE ON THE GROUND THAT THE PARTIES WERE INCAPABLE OF SPECIFIC ENFORCEMENT

The Madras High Court ('**MHC**') in *M/s. Macro Marvel Projects Ltd v. J. Vengatesh and Ors.* has held that when the parties have chosen arbitration as the mode of dispute adjudication through a valid arbitration clause, the award of the Arbitral Tribunal cannot be set aside merely because an alternate view is possible. The autonomy of the arbitral award has to be upheld unless it can be set aside on any one of the specific grounds available under Section 34 of the Arbitration and Conciliation Act, 1996.

ARBITRATION CANNOT BE INVOKED FOR DETERMINING WHETHER A CLAIM IS A 'NOTIFIED CLAIM'

The DHC in *M/s Janta Associates and Co. Ltd. v. Indian Oil Foundation & Anr.* has held that the determination of a claim being a 'Notified Claim' is outside the scope of Arbitration. The Court observed that according to the General Conditions of Contract ("GCC") Arbitration can be invoked in respect of conflicts regarding 'Notified Claim' contained in the Final Bill. In absence of any Final Bill, the conflict regarding dues owed by one party could not be referred to Arbitration. However, Arbitration could be invoked in respect of any subsequent claims which were included in the Final Bill. Thus, the Court reiterated the rule laid down by the Supreme Court that specific matters under the GCC are precluded from Arbitration and the determination of a claim being a 'Notified Claim' is outside the scope of Arbitration.

TIME PERIOD UTILISED IN PRE-ARBITRATION MECHANISM WOULD NOT BE COMPUTED WHILE DETERMINING LIMITATION PERIOD FOR REFERRING TO ARBITRATION

The DHC in the case of Welspun Enterprises Ltd. v. NCC Ltd., observed that when the parties have amicably decided for a multi-tier dispute resolution mechanism, arbitration cannot be invoked till the predetermined modes have been exhausted prior to arbitration. For determining the period from which the limitation period would commence, reference was made to Section 12A of Commercial Courts Act, 2015 as per which, the period exhausted in pre-institution mediation would not be included in the limitation period. Thus, it was concluded that the limitation period for referring the dispute to arbitration would be computed only after pre-arbitration mechanism has been exhausted

THE LIMITATION PERIOD FOR COUNTERCLAIMS ENDS ON THE DATE OF THE NOTICE OF ARBITRATION

The MHC in *M/s.Chennai Water Desalination Ltd., (CWDL) v. Chennai Metropolitan Water Supply and Sewerage Board (CMWSSB)* placed reliance on the Supreme Court Judgment in State of Goa Vs. Praveen Enterprises (2012) 12 SCC 581 and held that the counter claim made by the respondent is time barred because the limitation for 'such counter claim' should be computed as on the 'date of service of notice' of 'such claim on the claimant' and not on the date of final counter claim. Additionally, it was decided that limitation is a matter of 'public policy' and that an error in limitation would unquestionably subject an award to the provisions of Section 34(2)(b)(ii) read with Clause (ii) of Explanation 1 thereat.

THE ARBITRATOR WOULD BECOME INELIGIBLE IF HE IS IN THE POSITION OF 'CONTROLLING THE COMPANY'

THE ARBITRATOR WOULD BECOME INELIGIBLE IF HE IS IN THE POSITION OF 'CONTROLLING THE COMPANY'

The Orissa High Court ("**OHC**") in the case of *Abhay Trading Pvt. Ltd. V. National Aluminium Company Ltd. (NALCO)*, the Orissa High Court has held that in order to meet the dual requirements of clause 9 of the seventh schedule read with Section 12(5) of the Arbitration and Conciliation Act, 1996 ('A&C Act') of making an arbitrator ineligible, a person must not only be in the management but also have control over the company. The court in this case determined that although an Executive Director (ED) (Project and Technical) of NALCO would be involved in the company's management, that fact alone does not imply that the ED is "controlling" NALCO. He would be one of numerous EDs who work for NALCO. Therefore, the contention that Clause 9 of the Seventh Schedule to the Act would not apply under the circumstances of the current case holds merit.

ALL THE APPLICATIONS ORIGINATING FROM THE ARBITRATION WILL BE DECIDED BY THE COURT IN WHOSE JURISDICTION 'THE SEAT' IS SITUATED IN

The Punjab & Haryana Court ('**P&H HC**') in the case of *National Highway Authority of India (NHAI) and another v. Yashpreet Singh and another* has held that the execution of an arbitral award should be filed in the seat court and not the place where the acquired land is situated.

Relying on the Hon'ble Supreme Court's decision in *Sundaram Finance Limited Vs. Abdul Samad, (2018)*, the P&H HC held that there is no need to request a transfer of decree from the Court which would have jurisdiction over the arbitral proceedings and that the award holder may file the execution petition anywhere in the nation where it can be enforced. The Hon'ble High Court also determined that once the arbitral award is passed, Section 42 of the A&C Act, is not applicable, and any applications made after the award would not be governed by Section 42.

THERE IS NO BAR ON THE ARBITRATION OF DISPUTES OF UNREGISTERED PARTNERSHIP FIRM UNDER SECTION 69 OF THE INDIA PARTNERSHIP ACT, 1932

The Calcutta High Court ('**CHC**') in Md. Wasim & Anr. v. M/s Bengal Refrigeration and Company & Ors, has held that the bar of Section 69 of the Indian Partnership Act, 1932 does not come into play and arbitration can be initiated against an unregistered partnership firm. Relying on the judgment of the Supreme Court in Umesh Goel v. Himachal Pradesh Cooperative Group Housing Society Ltd., the Court observed that arbitral proceedings do not come under the ambit of 'other proceedings' given under Section 69(3) of the Indian Partnership Act, 1932. Accordingly, the CHC held that there is no impediment in initiating arbitration against an unregistered partnership firm.

ARBITRAL AWARD IN WHICH THE AWARD AMOUNT IS NOT COMPUTED BY THE ARBITRATOR AND COMPUTATION OF THE AWARD AMOUNT IS DELEGATED TO A THIRD PARTY, IS LIABLE TO BE SET ASIDE UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996

The Calcutta High Court (CHC) in M/s Usha Martin Ltd. v. M/s Eastern Gases Ltd. has held that the arbitrator cannot delegate its power to determine the award amount on a third party including a Chartered Accountant and such an award is liable to be set aside under Section 34 of the Arbitration and Conciliation Act, 1996. The Court noted that the mandate of Section 31 of the Arbitration and Conciliation Act, 1996 is to give a reasoned award and the arbitrator is bound to apply his mind while making an arbitral award. Thus, the Court set aside the arbitral award on the ground of patent illegality and public policy under Section 34 of the Arbitration and Conciliation Act, 1996.

AN ARBITRATION CLAUSE CANNOT BE INVOKED BY MEMBERS OF A JOINT VENTURE IN THEIR INDIVIDUAL CAPACITY

The DHC in *Consulting Engineers Group Limited v. National Highways Authority of India (NHAI),* held that when an agreement of arbitration has been

entered into by the parties by forming a joint venture/consortium, they cannot invoke arbitration in their Individual capacity as in such a case there is never the intention of parties that one of the members of the consortium would separately invoke the arbitration clause. The court relied on *Gammon India Ltd. v Commissioner of Customs*, which recognized the joint venture as a legal entity and held that action brought by one would not be legally tenable and acceptable.

AN AGREEMENT ENTERED INTO BY ONE OF THE COMPANIES IN A GROUP WOULD NOT BE BINDING ON THE OTHER MEMBERS OF THE SAME GROUP HOWEVER BY INVOKING THE DOCTRINE OF 'GROUP OF COMPANIES' AN ARBITRATION AGREEMENT CAN BE MADE BINDING ON THIRD PARTY OR NON-SIGNATORY TOO

The DHC in *Esha Kedia v. Milan R. Parekh & Ors.* held that the circumstances under which the doctrine of group of companies could be made applicable to a non-signatory in following circumstances: (i) there is a direct relationship between them and the signatory, (ii) there is a subject matter commonality, (iii) the transaction is a composite nature (i.e., interlinked transaction) and (iv) the performance of the agreement is dependent on aid, execution and the performance of the ancillary or supplementary agreement. The court also opined that the signatures on the MoU containing an arbitration clause were taken by threat and coercion and therefore cannot be given effect while entertaining an application under Section 11 of the Arbitration and Conciliation Act, 1996.

PERIOD OF LIMITATION FOR INVOKING ARBITRATION CANNOT BE EXTENDED BY CONSENT

The DHC in the case of *Extramarks Education India Private Limited v. Shri Ram School & Anr.* has ruled that any statement made by the party in reply to the notice invoking arbitration would not extend the period of limitation if the claims raised by the claimant are ex-facie time-barred. The court opined that the limitation period for invoking a legal remedy cannot be extended by mutual consent of parties and a party after a prescribed period of limitation cannot concede the availability of legal remedy. The court referred to the judgment given in *BSNL & Anr. v. Nortel Networks India Pvt. Ltd.* where the apex court held that the court may decline to refer the dispute to arbitration when the claim is time-barred. The court in the present case has rejected the claim as being time-barred and held that the dispute involved was a 'deadwood' therefore it cannot be referred to arbitration.

THE COURT IN WHICH EXCLUSIVE JURISDICTION HAS BEEN CONFERRED BY THE PARTIES SHALL HAVE COMPETENT JURISDICTION AND THE SAME SHALL BE THE 'SEAT' OF ARBITRATION

The DHC in the case of *Kush Raj Bhatia v. DLF Power and Services Limited,* held that a place of Arbitration shall not be considered as the seat of Arbitration and when the parties have pre-decided and conferred an exclusive jurisdiction to a specific court, the same shall have the power and jurisdiction to decide the issues involved arising in the Arbitration. The court reiterated the rule that a place would be deemed to be the seat of arbitration unless there is any contrary indication.

CONFIRMING PARTIES CAN INVOKE ARBITRATION AS CONSENT OF A PARTY WHO HAS SIGNED THE AGREEMENT CONTAINING AN ARBITRATION CLAUSE IMPLIES THEIR WILLINGNESS TO REFER THE DISPUTE TO ARBITRATION

The DHC in *Ansal Properties & Infrastructure Ltd. & Anr. v. Dowager Maharanis Residential Accommodation Welfare & Amenities Trust & Anr.* noted that the copy of the notice through CC invoking Arbitration would be sufficient to make them aware of the intention of the parties to refer the dispute to Arbitration. Further, even a confirming party who is not bound by the terms but who has signed the Agreement has impliedly consented to refer a dispute arising to Arbitration. Thus, such confirming party can be referred to Arbitration by inferring its implied consent while signing the Arbitration Agreement.

MERE USAGE OF WORD 'CAN' IN AN ARBITRATION CLAUSE WOULD NOT MAKE IT FUTILE

The DHC in the case of *Panasonic India Pvt. Ltd. v. Shah Aircon,* observed that mere usage of the word 'can' in an Arbitration clause will not vitiate the Agreement or render it ineffective. While interpreting the Arbitration clause, the intention of the parties must be considered by the court. Further, in the present case, the remainder of the clause, insofar as it refers to the venue of arbitration, the language of arbitration, the applicability of the Act, the requirement to give reasons, and the procedure for appointment of an arbitrator by reference to Court, also supports the view that the parties intended a mandatory reference to arbitration.

INSOLVENCY AND BANKRUPTCY

ORDERS BY ADJUDICATING AUTHORITY MUST SATISFY THE GENERAL REQUIREMENTS OF AN "ORDER" AND IS LIABLE TO BE SET ASIDE FOR LACKING REASONING

The National Company Law Appellate Tribunal (**'NCLAT'**) in Gandhar Oil Refinery (India) Ltd. v City Oil Pvt. Ltd. has held that in absence of any specific format for an order under Insolvency and Bankruptcy Code, 2016, the general rules regarding judgments and orders must apply. A judgement must contain the reasoning given by the judge to render the basis for reaching the conclusion and provide a better understanding to the parties so that they can avail appropriate remedy. Further, it was held that reasoned order forms a core ingredient of the principles of natural justice. Accordingly, the Tribunal, after observing that the impugned order passed by the Adjudicating Authority lacked reasoning and denied the Respondent an opportunity to reply, set aside the impugned order.

THE AMOUNT HELD BY THE BANK IN 'NO LIEN ACCOUNT' PAID BY THE CORPORATE DEBTOR IN FURTHERANCE OF ONE-TIME SETTLEMENT CANNOT BE APPROPRIATED BY THE BANK ONCE THE OTS FAILS

The NCLAT in Bank of India v. Vinod Kumar P Ambavat has held that money deposited in a bank by a Corporate Debtor with a bona fide intention in furtherance of the OTS and restricting the usage of the funds for utilization of any interest or principal till the settlement is approved cannot be amounts to 'asset' under Section 18(f) of the Insolvency and Bankruptcy Code, 2016. Further, the bank cannot appropriate such funds lying in 'no lien account' and the Resolution Professional can exercise its authority over such funds once the Corporate Insolvency Resolution Process is initiated.

CORPORATE DEBTOR'S PROVIDENT FUND CANNOT BE ATTACHED TILL MORATORIUM PERIOD IS EXHAUSTED

The NCLAT, Chennai in Mr. B. Parameshwara Udpa v. Assistant PF Commissioner & Anr. noted that proceedings against the Corporate Debtor and attachment of its bank account by 'EPFO' cannot be permitted until the Moratorium period is exhausted. It is pertinent to note that the amount for Provident Fund is not an asset of the Corporate

Debtor and cannot be appropriated by a Liquidator or an RP, provided that the Provident Fund is specifically kept by the Company as an 'Established Fund'. Thus, on failure of maintaining a separate PF Account the RP of Liquidator is not required to make provisions for the same.

ADJUDICATING AUTHORITY HAS LIMITED JURISDICTION UNDER SECTIONS 7, 9 AND 10 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016, AND CANNOT REFER THE PARTIES TO ARBITRATION UNDER SECTION 8 OF THE ARBITRATION AND CONCILIATION ACT, 1996

The NCLAT in Trafigura India Pvt. Ltd. v. TDT Copper Ltd. has held that the jurisdiction of the Adjudicating Authority under Sections 7, 9 and 10 of the Insolvency and Bankruptcy Code, 2016 is very limited. The Adjudicating Authority under the aforesaid sections is required to only determine if there is the existence of financial or operational debt and if there is default in the payment of the said operational or financial debt by the corporate debtor. Thus, even if there is an arbitration agreement between the financial / operational creditor and the corporate debtor, the Adjudicating Authority is first supposed to exercise its jurisdiction under Section 7, 9, and 10 and determine if the conditions for the initiation of corporate insolvency resolution process are satisfied. If the said conditions are met, corporate insolvency resolution process shall be initiated against the Corporate Debtor.

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