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Case Analysis: “Ultra Tech Nathdwara Cement Ltd., (Formerly known as Binani Cement Ltd.) Vs. Union of India”

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ABSTRACT

For a long time, Insolvency and Bankruptcy Code has raised the issue of treatment of outstanding tax dues of the corporate debtor. The same has been answered in the recent Rajasthan High Court judgment in the case of “Ultra Tech Nathdwara Cement Ltd. vs. Union of India”, the Court rejected the claim of the GST Department stating that once a resolution plan is approved by the Adjudicating Authority, all dues and liabilities stands extinguished. The court while relying on Section 31 of the Code held that the Department cannot recover any amount over and above the amount stated in the resolution plan and such a plan becomes binding upon the Government Authorities once approved by the Adjudicating Authority.

Keywords: Outstanding tax dues, Corporate Debtor, GST Department, Resolution Plan

I. INTRODUCTION

It is seen that by far the Insolvency and Bankruptcy Code, 2016 has been one of the most vital legislation in India. It was brought into existence for a time-bound insolvency resolution process. According to section 5(26) of the IBC, a resolution plan is submitted by the applicant to the Resolution professional for restructuring and reviving of the stressed assets of the corporate debtor. Resolution Plan is the recovery route for a corporate debtor which, if paid in compliance with the approved resolution plan, frees the former from his past liabilities and dues. The successful applicant's resolution plan once accepted becomes binding.

The Courts in various judgments have given their interpretation to diverse provisions of the IBC to make it a viable legislation. The Hon'ble High Court of Rajasthan in “*Ultra Tech Nathdwara Cement Ltd., (formerly known as Binani Cement Ltd.) vs. Union of India, through the Joint Secretary, Department of Revenue, Ministry of Finance & Ors.*” reiterated the

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supremacy of IBC over any other prevailing law for the time being in force and held that once the terms of a resolution plan are approved by the Adjudicating Authority, the same is binding on all the stakeholders including the statutory creditors of the corporate debtor.

II. DETAILS OF THE PARTIES TO THE DEAL

(A) Binani Cement Limited.

Binani Cement Limited (Corporate Debtor / BCL/ Company), a segment of the *Braj Binani Group* and a subsidiary of *Binani Industries Limited*, was listed at BSE / NSE³. With an integrated plant in India and China and grinding units in Dubai, Binani Cement is among India's reputable cement manufacturers with a global production capacity of 11.25 million tonnes per annum. Product portfolio for the Company includes:

- a) Ordinary Cement Portland (OPC);
- b) Portland Cement Pozzolona (PPC); and
- c) Ground Granulated Blast-Furnace Slag (GGBFS)⁴.

BCL has numerous production interests in cement, zinc, and glass fibre. It included the manufacture, sale and distribution of branded cement. Under the IBC, BCL was brought to CIRP and admitted in July 2017. Resolution Applicant offered 100 per cent plus resolution for industrial, operational, and other creditors, and BCL was successfully transferred to the Resolution Applicant upon approval by the Hon'ble NCLT.

In 2018, the Binani Cements was acquired for INR 7,900 crore by the Aditya Birla Group-owned cement firm through CIRP⁵. It was later renamed as *Nathdwara Cement UltraTech*⁶.

(B) Ultratech Nathdwara Cement Limited.

Ultratech Nathdwara Cement Ltd. is a cement manufacturer and a retailer. It was incorporated on 15th January 1996 as a Public company. It is listed as a non-govt company and registered with the Company Registrar, Kolkata⁶. The company manufactures Pozzolana Portland, Ordinary cement and Granulated blast-furnace slag through its factories in India, China and Dubai and retails it on nearly 4000 dealers through a very wide ranging

³Company History - UltraTech Nathdwara Cement Ltd., Economic Times, <https://economictimes.indiatimes.com/ultratech-nathdwara-cement-ltd/infocompanyhistory/companyid-3086.cms>.

⁴ Binani Cement <http://binaniindustries.com/our-business-areas/cement/>.

⁵ Maulik Vyas, Rajasthan HC allows UltraTech's plea against tax dept in Binani Cements' old dues, (Apr 08, 2020, 04:05 PM) <https://economictimes.indiatimes.com/industry/indl-goods/svs/cement/rajasthan-hc-allows-ultratechs-plea-against-tax-dept-in-binani-cements-old-dues/articleshow/75046778.cms?from=mdr>.

⁶ Ultratech Nathdwara Cement Limited, (June, 20, 2020), <https://www.zaubacorp.com/company/ULTRATECH-NATHDWARA-CEMENT-LIMITED/U26941WB1996PLC076612>

distribution market⁷.

The NCLAT on 14th November 2018, approved the *INR 7,900 crore* offer of the Ultratech Nathdwara Cement Limited for Binani Cement Limited, and the name of Binani Cement was changed to '*Ultratech Cement Ltd.*' after procuring the debt-ridden cement company.

(C) Lenders.

The main lenders of the Binani Cement as on the date on initiation of CIRP were Bank of Baroda, Canara Bank, Edelweiss, IDBI Bank, Central Bank of India and IFCI⁸.

Ultratech's bid was *INR 1000 crore* more than what was offered by Dalmia Bharat Group⁹. Binani Cement owed *INR 6,313 crore* to financial creditors (banks) and operational creditors and paid back in full under the resolution plan of UltraTech.

Thereby, the lenders approved Ultratech's resolution plan.

The Central Taxes Depart. of Govt. of Raj. demanded for a sum of *INR 479.73 crores* which was confirmed by the COC only at *INR 61.05 crores*, they also approached the Hon'ble Supreme Court of India against the NCLAT order, and the court dismissed the appeal.

The present written petition submitted by the Ultratech to the Rajasthan HC demanding that it pass a mandatory injunction, preventing the department from issuing any further notice of this kind, and quashing the notices already provided regarding the sums payable by Binani prior to its acquisition by Ultratech.

III. CHRONOLOGY OF EVENTS

Date	Particulars
June 16, 2017	A press release (" <i>June 2017 Press Release</i> ") was issued by the RBI, that identified ' <i>Binani Cement Limited</i> ' (BCL) amongst the 12 large loan defaulters accounts for which banks had to initiate CIRP under the IBC, 2016.
June, 2017	The Bank of Baroda thereby initiated insolvency proceedings

⁷ UltraTech Nathdwara Cement, Pitchbook, <https://pitchbook.com/profiles/company/11887-21#overview>

⁸ Binani Cement lenders vote for UltraTech's Rs 7,965 crore bid, Times of India, (May 29, 2018) http://timesofindia.indiatimes.com/articleshow/64361539.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppsthttps://timesofindia.indiatimes.com/business/india-business/binani-cement-lenders-vote-for-ultratechs-rs-7965crbid/articleshow/64361539.cms#:~:text=The%20lead%20lenders%20of%20Binani,and%20IDBI%2C%20along%20with%20others.

⁹ Tanya Thomas, Malvika Joshi, Binani Cement lenders back UltraTech's offer, (May 29, 2018), <https://www.livemint.com/Companies/RG3WEyAnUOP2GIWREJ9ZwI/Binani-Cement-lenders-back-UltraTechs-offer.html>

	against BCL in NCLT Kolkata under IBC.
July 25, 2017	NCLT admitted the application filed by Bank of Baroda u/s 7 of the IBC to initiate CIRP against BCL. <i>Mr. Vijaykumar Iyer</i> was appointed as the Insolvency Resolution Professional (IRP).
July 28, 2017	The notification concerning the CIRP and invitation for submission of proof of claims was made available via public announcement.
August 22, 2017	IRP constituted the COC and convened the 1 st meeting. COC then appointed the IRP as the Resolution Professional (RP).
October 13, 2017	Expressions of Interest were invited by the RP from all interested resolution applicants to present resolution plans for reintegrating BCL.
November, 2017	<i>IBC (Amendment) Ordinance 2017</i> promulgated pursuant to which section 29-A has been incorporated into the code.
January 11, 2018	90 days extension of the CIRP period granted by NCLT.
January 19, 2018	The <i>2017 Amendment</i> published in the official gazette replaced the <i>2017 Ordinance</i> being effective from November 23, 2017.
February 23, 2018	6 resolution plans were presented before COC.
February 27, 2018	“Rajputana Properties Private Limited (RPPL)” had been declared as the H1 bidder.
March 14, 2018	The resolution plan for the RPPL was approved by the COC.
March 19, 2018	RP filed a request for RPPL’s Resolution plan with the NCLT.
May 2, 2018	NCLT dismissed the Resolution plan of the RPPL and directed COC to consider other resolution plans.
May 28, 2018	Ultratech Cements Ltd. (UCL) revised Resolution plan was approved by COC.
May 31, 2018	Resolution plan for UCL was submitted by the RP to the NCLT.

July 2, 2018	The SC ordered the NCLAT to assume responsibility for all matters pending.
November 14, 2018	NCLAT accepted the revised resolution plan submitted by the UCL.
November 19, 2018	The SC approves UCL's resolution plan for Binani Cement Limited.
November 26, 2018	Binani, (under Ultratech's control and management) sent a letter to the Department, duly informing them of the payment of the Ultratech Plan amounts to the Department and that the residual debt was extinguished under the terms of the Ultratech Plan ¹⁰ .
February 11, 2019	Writ Petition filed by the Ultratech Nathdwara Cement Ltd. After being aggrieved of the demands issued by the CGST Department ¹¹ .
July 26, 2019	The demand for a sum of <i>INR 479.73 crores</i> by the Central Taxes Depart. of Govt. of Raj., was confirmed by the COC only at <i>INR 61.05 crores</i> , they also approached the Hon'ble Supreme Court of India against the NCLAT order, and the Hon'ble Supreme Court dismissed the appeal ¹² .
January 20, 2020	The order passed by the NCLAT was also challenged by the Commissionerate of the Central Excise and the respondent Commissioner of the CGST by filing an appeal before the Supreme Court, which was dismissed ¹³ .
April 7, 2020	The Rajasthan HC quashed the claims submitted by the GST Department for the dues of Binani (re-named <i>Ultratech Nathdwara Cement Ltd.</i>), which had arisen prior to the approval of the Ultratech's resolution plan ¹⁴ .

IV. ISSUE

Whether the resolution plan approved by the COC and passed by the Adjudicating Authorities is binding on the GST Department.

¹⁰ Page 5 of the Judgment.

¹¹ Page 2 of the Judgment.

¹² Page 6 of the Judgment.

¹³ Page 6 of the Judgment.

¹⁴ Megha Mittal, Shreya Jain, Washout of Prior-period Claims in Resolution Plans: Rajasthan HC closes the door for pre-CIRP claims after revival of Corporate Debtor , (April 9, 2020), <http://vinodkothari.com/2020/04/washout-of-prior-period-claims-in-resolution-plans/>.

V. ARGUMENTS

(A) Petitioner

1. The Petitioners argued that once a resolution plan is submitted by a resolution professional, it becomes final only after the approval of the COC and therefore such a resolution plan after COC's approval cannot be questioned in the court of law.
2. It was further submitted by the Petitioners that under the various provisions of IBC, the financial creditors are given preference in the scheme of the IBC when the resolution plan is being finalized and the central or state government which are categorized as operational creditors have to make a sacrifice.
3. The Petitioner by relying on the 2019 amendment to section 31(1) of IBC argued that the Commercial Taxes Department or the State Government as the case maybe (here the GST Department) cannot recover any amount which is above to what has been stated in the approved Resolution Plan.
4. While relying on the provisions of the IBC and the speech given by the Finance Minister at the time of 2019 Amendment made to the Code, the petitioners argued that the provisions of the Code becomes binding on to the Government and thereby is not liable to make any further claim other than what is mentioned or stated in the Resolution Plan.

(B) GST Department

1. The Respondents argued that they were never heard by the COC before the resolution plan was finalized and hence this approved resolution plan is not binding on the Department.

VI. JUDGMENT

(A) Once resolution plan has been approved by Committee of Creditors (COC), it becomes binding-Section 31 of the IBC

Under section 31(1) of the IBC, once the Adjudicating Authority (i.e. NCLT) passes the resolution plan that had been approved by the COC¹⁵, *"it becomes binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders who are*

¹⁵ Approval of Resolution Plan should be in accordance to Section 30(2) of IBC.

involved in such resolution plan”¹⁶. After the order of passing the approved resolution plan by the Adjudicating Authority, the period of moratorium under section 14 of the Code comes to an end and a Resolution Professional furnishes information (proof) relating to the conduct of the CIRP and the resolution plan to the Insolvency and Bankruptcy Board of India (IBBI).

(B) Amendment to Section 31 of the IBC vide gazette notification dated 6th August, 2019.

In August 2019, the IBC was amended by the *Insolvency and Bankruptcy (Amendment) Act, 2019* (“**2019 Amendment**”)¹⁷.

a) Amendment to the Statutory Provision.

The *2019 Amendment* via “notification dated 6.08.2019” has amended section 31(1) by adding to the original language (after the words “members, creditors”) the words “*the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed*” in the list of stakeholders who would be bound by the resolution plan.¹⁸

In simple words, it means that the term “creditors” is not exhaustive and includes the Central Government, the State Government or any local authority to whom such dues are owed by the liquidating company.¹⁹ This also includes authority to whom statutory dues are owed such as the income tax authority,²⁰ thereby, making the Government bodies bound by the resolution plan once approved by the Adjudicating Authority. It must be noted that the explicit inclusion of government dues²¹, which did not originally form part of the Code, further gives an indication that such inclusion was a result of practical situations that cropped up while approving of resolution plans.²²

b) Intention of the legislature behind the amendment to Section 31(1) of IBC.

i. IBC has an overriding effect.

The Finance Minister while drawing a comparative analysis with the Securities and Exchange Board of India (SEBI), drew attention to section 238 of IBC which provides that “*IBC will*

¹⁶ Section 31(1) of the Insolvency and Bankruptcy Code, 2016.

¹⁷ The Insolvency and Bankruptcy Code (Amendment) Act, 2019 (August 5, 2019), <https://ibbi.gov.in/uploads/legalframework/630af836c9fbbbed047c42dbdfd2aca13.pdf>.

¹⁸ *Id.*

¹⁹ *Supra* 2.

²⁰ *Id.*

²¹ Vide notification dated 06.08.2018.

²² *Supra* 12.

prevail in case of inconsistency between two laws”²³.

ii. Providing Indemnity (or surety) to successful resolution applicant.

The amendment to section 31(1) made the Government bound by the resolution plan once the plan is approved and passed by the Adjudicating Authority. This means that once a resolution plan is approved, the Government cannot raise any further claims on the same and will be bound by such a plan. This amendment to the said section was one of the ways to provide surety or a sense of assurance to the person who intends to participate in the resolution proceeding or in simple words want to become a resolution applicant. The ‘2019 Amendment’ now clearly makes the resolution plan binding on the Government. This ensures that the Government cannot make any further claims post the approval of the resolution plan. So, this gives a major sense of assurance to the people who want to step ahead as a resolution applicant.

(C) The Purpose of IBC is “to secure the interest of the Financial Creditors” first.

a) Purpose of the IBC is salutary.

The main objective of IBC is to revive a dying industry in distress by virtue of a resolution plan. Such a resolution plan is offered by a resolution applicant and once such an offer is approved by the appropriate authority (i.e. NCLT and COC), it becomes binding to every creditor who has statutory dues concerned with the distressing industry. Also, the Finance Minister while bringing the 2019 Amendment raised that “*to achieve the objective of revival of an industry in distress, the government would be ready to sacrifice leaving the interest of the dying industry in the hands of the Resolution Professional and the COC as the case may be*”.

The Central Government and the State Government has been categorized as ‘Operational Creditors’ and therefore, no right of audience to the resolution proceedings is given to the operational creditors which also include the GST Department. Therefore, once the resolution plan has been finalized, the financial creditors are given precedence in the ratio of payments.

b) Reliance on the Supreme Court Judgment on *Committee of Creditors of Essar Steel India Ltd. through Authorised Signatory vs. Satish Kumar Gupta & Ors.*²⁴.

i. IBC itself differentiates between the financial and operational creditors.

²³ Pg. 9 of the Judgment.

²⁴ Civil Appeal No. 8766-67 of 2019.

The Supreme Court laid down a clear distinction between the two types of creditors that IBC mainly looks upon i.e. the financial creditors and the operational creditors on the basis of their nature and characteristics.

The court further believed that IBC itself at many places in its provision has given such a distinction between these two categories of creditors, one of them being the difference in the payment of the debts to the financial creditors and the operational creditors under section 30(2)(b) of the IBC; *“the operational creditors receive a minimum payment being not less than liquidation value”*²⁵. This concept of minimum payment does not apply to financial creditors. Talking about the minimum payment, the ‘2019 Amendment’²⁶ states that the minimum amount that must be paid to the operational creditors shall be either of the following:

- i. *“The amount payable under the resolution plan if the same was to be distributed as per the distribution waterfall applicable in liquidation proceedings as per section 53 of the Code, or*
- ii. *The amount payable if the liquidation value was to be distributed in liquidation proceedings as per section 53, whichever is higher”*

Moreover, the Supreme Court lays down that such minimum payment made to the operational creditors must be *“fair and equitable”*, protecting them from not being subjected to any discriminatory treatment and thus setting a minimum limit as given under IBC.

Further, the *UNCITRAL Legislative Guide*²⁷ talks about the *“equitable treatment”* that should be given to similarly positioned creditors and not between two classes of creditors i.e. financial and operational creditors. The Court believed that *“equality principle cannot be stretched to treating un-equals equally, as that will destroy the very objective of the Code-to resolve stressed assets”*.²⁸

- ii. The distribution of funds to various class of creditors is dependent upon the commercial wisdom of the COC.

As laid down u/s 21(2) of the IBC, the COC comprises of all the financial creditors of the corporate debtor and while deciding a resolution plan, it must look at the *“feasibility and viability”* of such a plan. The committee while deciding all the aspects of the plan, must take

²⁵Insolvency and Bankruptcy (Amendment) Act, 2019, (August 5, 2019), <https://ibbi.gov.in/uploads/legalframework/630af836c9fbbbed047c42dbdfd2aca13.pdf>.

²⁶ Paragraph 6, *Supra* 2.

²⁷ Legislative Guide on Insolvency Law, https://www.uncitral.org/pdf/english/texts/insol-ven/05-80722_Ebook.pdf

²⁸ Paragraph 53, Civil Appeal No. 8766-67 of 2019.

into consideration the appropriate amount that is to be paid to the different classes of the creditors including the operational creditors.

The Supreme Court in the Essar case (*supra*) has observed that operational creditors play a critical and an important part in running the business of the corporate debtor as a “*going concern*”. As an example to understand this situation better, the Court gave the instance where a resolution plan does not provide the payment of the electricity dues. It is necessary to pay such dues as ‘electricity’ as it forms the most basic and essential element for running or carrying of a business by the corporate debtor.

The court further stated that though there is no fiduciary duty of the COC towards working in the best interest of the stakeholders including the operational creditors, the secured creditors under the Code in the nature of a trustee to safeguard the interests of all the stakeholders²⁹. Though the COC comprises of the financial creditors who enjoy voting strength and control decision making in the Committee³⁰, the financial creditors still need to ensure that the amount allocated to the operational creditors is justified as being in the best interest of all the stakeholders of the corporate debtor.³¹

iii. Limited power of judicial review of the Adjudicating Authorities (i.e. NCLT and NCLAT) in respect of a resolution plan duly approved by the COC.

The NCLT/ NCLAT has a power of limited judicial review. These Adjudicating Authorities (i.e. NCLT / NCLAT) u/s 30 of the Code check whether the resolution plan approved by the COC complies with the parameters mentioned under the said section and that the plan is not in contravention to any provisions mentioned under the Code. The Supreme Court further in the Essar Case (*supra*) came to a conclusion that “*if the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters*”³².

The Supreme Court by this decision has stressed that the ultimate decision of what to pay and how much to pay to each class of creditors is with the COC, provided the COC takes into account that the corporate debtor needs to keep going as a ‘*going concern*’ during the

²⁹Think of unsecured creditors, Financial Express, (April 2, 2018), <https://www.financialexpress.com/opinion/think-of-unsecured-creditors-too/1117965/>

³⁰ Mahesh Agarwal, Giving creditors their fair share, (21 June 2019), <https://www.vantageasia.com/insolvency-bankruptcy-creditors-share/>

³¹Arcelor Mittal Steals Essar from Ruias, May 2020, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Arcelormittal-Steals-Essar-From-Ruias.pdf

³² Civil Appeal No. 8766-67 of 2019.

insolvency resolution process.³³ This means that the commercial wisdom of the COC in approving a resolution plan must be such that it maximises the value of the assets of the corporate debtor and that the interest of all the stakeholders including the operational creditors have been taken care of.

In the present case at hand, the Court believed that two possible situations were left in front of the COC, one being liquidation of the Company (i.e. Binani Cements) and the other being the revival of this stressed company. The Court believed that the respondents would have gained significantly in the later because the amount paid to the operational creditors is the “*minimum of the liquidation value*”³⁴ of the assessed company which would amount to nil if the same would have liquidated after payment made to the secured creditors.

On the other hand, as per the resolution plan submitted for the revival of the assessed company, the respondents (i.e. the Department’s) rights have been secured to the extent of *INR 72 crores*. This amount of *INR 72 crores* provided to the GST Department under the resolution plan has already been deposited by the resolution applicant i.e. the petitioner company.

VII. ANALYSIS

The Hon’ble Court under this very judgment has held that the financial creditors have to be given an upper hand or priority in the payment of dues when a resolution plan is finalized. The idea behind including the financial creditors in the COC and excluding the operational creditors can be drawn from the objective of the IBC where the purpose of the statute is “*to revive the stressed industry by providing an opportunity to an eligible resolution applicant to take over such a dying industry and help start their functioning on a clean slate*”.

The Court in this case decided the matter in favour of the assessee and held that the objective of IBC is “*salutary*” and held that once the resolution plan is passed by the Adjudicating Authorities, it becomes binding on all the parties to such a plan. Further, no demand can be claimed above the accepted demand in the resolution plan that is to be paid by the resolution applicant.

The Finance Ministry by virtue of amending section 31 of the Code has brought under its umbrella the Central Government, the State Government and local authorities to be bound by the approved resolution plan to whom such dues are payable by the corporate debtor. In the

³³Pallavi Saluja, Essar Steel Judgment: Key Highlights, (16th November, 2019), <https://www.barandbench.com/columns/essar-steel-judgment-key-highlights>

³⁴ Amendment to section 30(2)(b) by the Insolvency and Bankruptcy (Amendment) Act, 2019.

present case at hand, the interests of the GST Department are better protected under the resolution plan submitted by the petitioner company i.e. the Ultratech Cement Ltd.

This case was instituted to raise a hinderance by demanding some previous or prior payments time and again when such dues have been already settled and the company has successful resolved. It is further believed that the resolution applicants who come ahead in reviving the distressed company should not be burdened with further litigation by the tax authorities.

VIII. CONCLUSION

The judgment correctly assesses that “*once the resolution plan is approved by the NCLT, the same is binding on all the concerned stakeholders including the government authorities*” as per the amended section 31 of the IBC.

The object of the Code's implementation was to make sure that the industries in distress are given a chance to be brought back to life with the aid of a resolution plan. One cannot create an obstacle by continuously requesting any of the previous or prior compensation when the same has been resolved and the company has been successfully revived. This judgment provides a sense of relief to all the resolution applicants who are aggrieved by the demands for payment of dues pre-CIRP, in spite of them already being paid according to the approved resolution plan.

This judgment goes a long way in ensuring that not only financial and operational creditors, but even tax and other governmental departments are more forthcoming in submitting their claims.³⁵ This would also achieve reduction in the frequency of any adverse actions/ litigations being taken/initiated against the corporate debtors once the approved resolution plan is implemented and dues of various creditors are settled as per the distribution approved by the COC.³⁶ This would also help achieve the objective of the IBC where the purpose of the statute is to revive the stressed industry by encouraging eligible resolution applicants to take over such a dying industry and help start their functioning on a clean slate.

³⁵ Rajeev Vidhani, Ashwiji Ramaiah, IBC Primary Reaffirmed-Yet Again, (April 15, 2020), <https://www.khaitan.co.com/thought-leaderships/IBC-Primacy-Reaffirmed-Yet-Again>

³⁶ *Id.*