

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,  
NEW DELHI BENCH  
I.A. NO. 1228 OF 2021  
IN  
COMPANY PETITION (IB) NO. ND.409 (PB) / 2017**

**IN THE MATTER OF:**

Vikram Bajaj (Resolution Professional of Net 4 India Limited) ...Applicant  
Versus  
Internet Corporation for Assigned Names and Numbers & Others ...Respondents

IN

Edelweiss Asset Reconstruction Co. Ltd ... Financial Creditor  
Versus  
Net 4 India Limited ...Corporate Debtor

**PRELIMINARY WRITTEN SUBMISSIONS ON THE ISSUE OF JURISDICTION**

Respondent No. 1 to the Application (i.e., the Internet Corporation for Assigned Names and Numbers or **ICANN**) above named respectfully submits as follows:

1. These Preliminary Submissions (**Preliminary Submissions**) are being filed by ICANN in the IA No. 1228 of 2021 in CP (IB) NO. ND.409 (PB) of 2017 (**Application**) i.e., filed by the Applicant, Mr. Vikram Bajaj, being the Resolution Professional (**RP**) of Net 4 India Limited (**Corporate Debtor**) under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (**IBC**) against ICANN and also Mr. Jasjit Singh Sawhney and Net 4 Network Services Ltd. (**Other Respondents**).
2. ICANN states that these Preliminary Submissions as well as its appearance before this Hon'ble Tribunal as well as any oral and written submissions are without prejudice to its objection to the jurisdiction of this Hon'ble Tribunal. ICANN's appearance and these Preliminary Submissions are made in good faith and with a view to assist the Hon'ble Tribunal and ought not to be read as ICANN submitting to the jurisdiction of this Hon'ble Tribunal.

**I. ICANN REQUESTS FOR AN OPPORTUNITY TO FILE A REPLY TO THE APPLICATION**

3. ICANN submits that the Application raises serious and disputed questions of fact and law and requests at least until 16 March 2021 (i.e., 4 days) to file a written reply to the Application in order to enable it to place its case - including the correct facts - before this Hon'ble Tribunal. ICANN submits that until and unless ICANN is able to file such a reply, the Application ought not to be heard and disposed of especially since there are several misleading statements / factual inaccuracies in the Application and submissions made by other parties. The filing of these preliminary submissions ought not, therefore, to be treated as a waiver on ICANN's part of its right to file a substantive reply to the Application.
4. Without prejudice to the foregoing, and for the sole purpose of opposing grant of any **ad-interim order** pending hearing and disposal of the Application, in keeping with the directions of this Hon'ble Tribunal, ICANN is filing the present preliminary written submissions to supplement the oral submissions made before the Hon'ble Tribunal on 12 March 2021.

## II. JURISDICTION OF THIS HON'BLE TRIBUNAL

5. At the outset, it is submitted that the question of jurisdiction goes to the root of the matter and must be decided prior to any order (even interim or ad-interim order) is passed. It is settled law that an order passed in the absence of jurisdiction is a nullity. In the present case, it is respectfully submitted that this Hon'ble Tribunal does not have the jurisdiction to adjudicate on the matter.

### A. IBC does not have extra-territorial application

6. This Hon'ble Tribunal derives its jurisdiction from the IBC. Section 1(2) of the IBC expressly states that "*It extends to the whole of India.*" There is no provision which *ipso facto* makes the IBC applicable to foreign parties or contracts governed by foreign law.
7. Section 234(1) provides that the Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of IBC. There is presently no agreement between India and United States of America for enforcing the provisions of IBC in the United States of America. Consequently, the IBC does not and cannot apply in this case. Absent such an agreement, there cannot be any case for extra-territorial application of the IBC.
8. Should the Applicant (i.e., the RP) require any injunctive reliefs against ICANN, the Applicant must approach the jurisdictional courts in the United States of America.

### B. Territorial Jurisdiction of Indian courts excluded by agreement

9. The commercial relationship between the Corporate Debtor and ICANN is governed by the RAA. The RAA contains a jurisdictional clause, the relevant portion reads as follows:

*"In all litigation involving ICANN concerning this Agreement (whether in a case where arbitration has not been elected or to enforce an arbitration award), jurisdiction and exclusive venue for such litigation shall be in a court located in Los Angeles, California, USA; however, the parties shall also have the right to enforce a judgment of such a court in any court of competent jurisdiction."*

(emphasis supplied)

10. Therefore, all issues / litigation arising under the RAA including ICANN's right to terminate the RAA must be adjudicated exclusively by the courts at Los Angeles, California, USA. It is settled law in India that exclusive jurisdiction clauses must be given effect to and should be inferred to mean that there was an intention to exclude all other courts from exercising jurisdiction. For this reason, it is respectfully submitted that this Hon'ble Tribunal has no jurisdiction in respect of the same.

### C. In any event, there is no personal jurisdiction over a foreign entity

11. In any event, ICANN respectfully submits that it does not submit to the jurisdiction of Indian courts and tribunals and it is not subject to the jurisdiction of Indian courts or tribunals. In this regard, ICANN submits as follows:
  - ICANN is not registered to do business within the territorial jurisdiction of this Hon'ble Tribunal or in India. It is incorporated with its principal place of business in California, USA.
  - ICANN does not own any property or bank accounts within the territorial jurisdiction of this Hon'ble Tribunal or in India.
  - ICANN does not have an agent for service of process or a registered address within the territorial jurisdiction of this Hon'ble Tribunal or in India.

D. In any event, this Hon'ble Tribunal's jurisdiction under the IBC is not invoked in the present case.

12. The jurisdiction of this Hon'ble Tribunal is available only in limited circumstances when it will result in the corporate death of the corporate debtor. This was recently held by the Supreme Court in *Gujarat Urja Vikas Nigam Limited v. Amit Gupta (Civil Appeal No. 9241 of 2019, decided on 08.03.2021)*. In particular, it was held as follows:

*"The jurisdiction of the NCLT under Section 60(5)(c) of the IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract ... if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract (as was the case in this matter's unique factual matrix)."*

(emphasis supplied)

13. In the present case, the RP's stance that the Corporate Debtor will be out of business upon the termination of the RAA requires scrutiny. There is clear evidence that the Corporate Debtor has many streams of business that are not related to the RAA and will not be directly impacted by the legitimate and lawful termination of the RAA.

a. Per the Corporate Debtor's own website, the Corporate Debtor provides a host of services. These include: "Hosting, Email, Easysite, Office 365, Cloudserver, SSL, Reseller"; and providing registrations under country code top-level domains (ccTLDs). A screenshot of the Corporate Debtor's website offering the aforesaid services is annexed as **Annexure A**.

b. The RAA is required only for registering domain names under gTLDs. The Corporate Debtor is not required to be accredited by ICANN through the RAA for providing any of the other services.

c. In addition, the Corporate Debtor acts as a registrar for the .IN ccTLD pursuant to an agreement with the .IN ccTLD operator, NIXI. That contract with NIXI will not be impacted by the termination of the RAA. Currently, the Corporate Debtor is the registrar for approximately 73,000 .IN domain names that have no connection to the termination of the RAA. By comparison, the Corporate Debtor is the registrar for 76,699 domain names in gTLDs. Thus, the RAA accounts for approximately only half of the Corporate Debtor's registrar business. The RAA likely accounts for less than half of the Corporate Debtor's overall business when the Corporate Debtor's other lines of business, such as hosting, email, and acting as a reseller, are taken into account.

14. Even after the termination of the RAA, there are several other streams of business that are available to the Corporate Debtor. The aforementioned observations by the Hon'ble Supreme Court in *Gujarat Urja* (supra) are therefore, clearly attracted to the present case and this Hon'ble Tribunal's jurisdiction is clearly not attracted.

15. It is settled law that "*jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results*" (*Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors. (Civil Appeal Nos. 9170-9172 of 2019)*). The Corporate Debtor as well as the Other Respondents have made various factual submissions as to why the termination of the RAA is invalid. This is not a question that relates to or arises from the insolvency of the Corporate Debtor and therefore, the NCLT does not have the jurisdiction.

E. Section 14(2A) of the IBC does not grant this Hon'ble Tribunal the required jurisdiction

16. The contention by the RP that the RAA offers a "critical" service and therefore the NCLT is empowered to stay termination of the same in terms of Section 14(2A) of the IBC is completely misplaced.
- a. First, the RP is required to demonstrate that the contract between ICANN and the Corporate Debtor is "critical". The RP has not done so and expects the Hon'ble Tribunal to rely only on its mere say so. The contents of paragraph 13 above are repeated.
  - b. In any event, even if the contract is deemed as "critical", termination is expressly allowed under Section 14(2A) for non-payment. As on date of termination, it is undisputed that there were unpaid dues under the RAA. (See paragraph 2.17(a) and page 51 of the Application). Therefore, the termination is valid under Section 14(2A) of the IBC. The validity must be determined as on the date of termination. The IBC does not provide for post-hoc payment / remedying the breach in order to resuscitate a terminated contract especially when the termination is issued in the face of successive and multiple breaches.
  - c. This Section cannot be construed as being a leeway to a corporate debtor to continually breach the contract by which these goods / services are provided. Nothing in the IBC allows continuance of contracts even in the face of serious contractual breaches. There have been serious breaches of the RAA (previously outlined and also set out in the Termination Notice) and this is not repeated herein but is incorporated fully.
  - d. The breaches are causing harm to the public at large. Many educational institutions, businesses, individuals etc. in India and abroad are suffering in their businesses and livelihoods due to continuous breaches of the RAA.
17. Therefore, Section 14 (2A) is of no assistance to the Applicant.

F. Courts must refrain from exercising jurisdiction when enforcement of its orders is doubtful

18. The RP has submitted that the enforceability of this Hon'ble Tribunal's directions ought not to concern the adjudication of the matter. However, this is contrary to the settled law that courts must refrain from granting reliefs that it cannot enforce. In *Suresh Jindal v. Rizzoli Corriere Delia Sera Prodzoini T.V.S.p.a & Ors.*, AIR 1991 SC 2092, the Supreme Court of India held as follows:

*"Even if we give a direction as proposed, it might be difficult for this Court to ensure that the respondents carry out these directions. Even the appellant would not be in a position to ensure that such directions are complied with. It is well known that a court will not issue directions over the compliance of which it has no control. In view of this we think that we should not issue such general directions as indicated above."*

19. The RP's reliance on the case of *SEL Manufacturing Co. Ltd.* before the District of Delaware (Bankruptcy) to state that they will take appropriate steps as required for enforcement of the NCLT's order is misplaced. This was not a case where the remedy was originally granted in India and was subsequently enforced in the USA. Instead, it was a case where on the basis of ongoing and existing insolvency proceedings in India, remedies were sought in the USA. Therefore, properly analysed, the case actually supports the contention of ICANN. The appropriate remedy (if any) of the RP is to apply to the relevant courts in Los Angeles, California and seek recognition of the present insolvency proceedings and CIRP of the Corporate Debtor and on that basis, seek remedies there.

**III. THE APPLICATION IS NOT MAINTAINABLE ON ACCOUNT OF RES JUDICATA**

20. Strictly without prejudice to the foregoing, it is submitted that the present Application is barred by the doctrine of *res judicata*. The subject matter and the issues raised by the

Resolution Professional in the present Application have already been adjudicated by this Hon'ble Tribunal previously.

21. The RP, through an IA No. 5621 of 2020 in this petition (**First Application**) had *inter alia* sought to prevent ICANN from terminating the RAA and *inter alia* prayed as follows:

*"a) Direct Respondent No.1, Internet Corporation for Assigned Names and Numbers, to not terminate the Registrar Accreditation Agreement dated 14 October 2014;"*

22. After hearing parties on the First Application, this Hon'ble Tribunal passed its order on the merits of the First Application on 25 January 2021 (**January 25 Order**) and disposed of the First Application. The January 25 Order notes in detail the background to the Application, as well as the arguments advanced by all parties. Specifically, in relation to the Resolution Professional's prayer regarding ICANN being directed to not terminate the RAA, this Hon'ble Court was pleased to hold as under:

*"Regarding the reliefs (a) and (b), notwithstanding as to whether jurisdiction to deal with these issues relating to the agreements the Corporate Debtor entered into with R1 and R2, lies in India or elsewhere, looking at the far reaching implications likely to set in, if agreements R1 and R2 entered into are terminated, we hereby request R1 and R2 not to terminate these agreements at least until three months from hereof, so that the CIRP progress is not hampered.*

....

*With regard to transfer of registrations with the registrar/corporate debtor to some other gaining registrar, looking at the extenuating circumstances such as Corporate Debtor getting into CIRP, R1 and R2, so long as dues are paid on time and services are provided on time to the Registered Name Holders (RNH), may act cautiously so that customer base of this registrar is not slipped into the hands of gaining registrars. Until the CIRP period is complete or until further orders, whichever is earlier, an SOP may be set up and follow the same by R3 & R4 counsel with the approval of the CoC taken by the RP. The same may be placed before this Bench within 15 days hereof and report compliance on fortnight basis."*

(emphasis supplied)

23. Therefore, by way of the January 25 Order, the Hon'ble Tribunal decided against allowing the prayer sought in the First Application. In particular, there is no direction or injunction restraining ICANN from terminating the RAA. The January 25 Order has not been appealed till date and has attained finality. A copy of the January 25 Order is annexed as Annexure No. 1 to the present Application.
24. The Application is a mere repetition of a relief that has been sought and rejected and is barred by *res judicata* or constructive *res judicata*.

#### **IV. NO CASE MADE OUT FOR GRANT OF INTERIM RELIEF**

25. Without prejudice to the foregoing, ICANN briefly sets out the reasons as to there is no case for interference with the termination.

##### **A. The termination is contractually valid**

26. It is submitted that the RAA's termination is contractually sound. There were numerous breaches of the RAA which are adequately set out in the termination notice dated 26 February 2021 and are not repeated herein.

27. Notably, Clause 15.6 of the RAA provides an in-built protection to the Corporate Debtor to challenge the termination - the termination takes effect after 15 days of the written notice. The 15 days' time is essentially the opportunity given to the Registrar to initiate arbitration to raise challenges to the termination under the RAA (if any). The RP has not challenged the termination of the RAA as per this, making it clear that the termination is contractually sound. Moreover, the RP cannot seek to take advantage of the contract while refusing to comply with its essential terms.

B. The termination is justified and must not be stayed

28. This is not a case of a simple business dealing where only commercial considerations of two parties matter. ICANN has a larger responsibility towards the Registered Name Holders / registrants and public at large. There have been thousands of complaints from Registered Name Holders. The Hon'ble Tribunal must balance the business and operational interests of small / large business, educational institutions, non-profits and individuals in India and abroad against the interest of the Corporate Debtor/ erstwhile promoters. The interest in keeping the Corporate Debtor (who continues to commit serious and fundamental breaches) as a going concern cannot possibly be bought by the sacrifice of thousands of its customers.

29. Most importantly, the Corporate Debtor has not approached this Hon'ble Tribunal with clean hands. It is a party that has flagrantly breached the Hon'ble Tribunal's binding directions. As per the January 25 Order, the SOP was to be placed before this Hon'ble Tribunal within 15 days. The Corporate Debtor / RP did not even place a draft of the SOP before this Hon'ble Tribunal or request for further time. They are clearly in breach and therefore, no indulgence must be shown to the Corporate Debtor.

30. It is to be noted that the Corporate Debtor has admitted that it is not in control of the operations (*Paragraph 2.3 and 2.8 of the Application*). There is barely any hope of the breaches being remedied satisfactorily.

31. ICANN is conscious that there is global-level public scrutiny as to why a defaulting registrar is being allowed to continue. Even then, ICANN has cooperated to the maximum extent possible. In particular:

a. ICANN has already extended its cooperation with the Corporate Debtor for several months (during the CIRP). It has sent out three breach notices (even though one is sufficient to terminate).

b. Despite its objection as to jurisdiction, ICANN exercised restraint and heeded to the request of this Hon'ble Tribunal by not terminating the RAA for more than a month. The cooperation extended by ICANN was entirely without prejudice to its rights and with a view to not defeat the spirit or the intent of January 25 Order. However, ICANN ought not to be restrained from terminating the RAA when the breaches of the RAA continue such that thousands continue to suffer, binding directions have not been complied with by the other parties and the dues remain unpaid.

32. Thus, after careful consideration and in full good faith and caution and as a last-resort measure, ICANN proceeded with the termination of the RAA and issued the Termination Notice.

33. In the circumstances, ICANN humbly submits that the Application must be dismissed.

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Place: Bangalore / New Delhi  
Date: 12 March 2021

**TRILEGAL**