भारतीय दिवाला और शोधन अक्षमता बोर्ड
Insolvency and Bankruptcy Board of India

Supported by:
UK Government

EVOLUTION OF INDIAN INSOLVENCY ECOSYSTEM AND WAY FORWARD

(A Publication of IBBI in collaboration with British High Commission under the FCDO Programme)

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FOREWORD

The evolution of India's insolvency ecosystem showcases remarkable transformation and resilience, highlighted by the introduction of the Insolvency and Bankruptcy Code (IBC / Code) in 2016. The IBC incorporates global best practices for resolving distressed companies, allowing dignified exits for honest failures, and unlocking credit for better use. The IBC has enhanced ease of business, strengthened creditor rights, and enhanced the recovery rates for financial institutions. The key measures taken by the Government and the Regulator have brought about catalytic impact on improvements in outcomes.

Since the inception of the IBC until March 2024, the National Company Law Tribunal (NCLT) has admitted 7,567 cases. The Code has helped rescue 3,171 distressed companies and close unviable ones. Notably, 40% of the resolved companies were previously inactive, demonstrating its ability to revive stagnant businesses. Creditors have recovered ₹3.36 lakh crore, which is about 85% of fair value and 162% of the liquidation value. This recovery has enabled creditors to provide additional credit, promoting economic growth. In FY 2023-24, a record 269 resolution plans were approved, a 42% increase from the previous year's 189 plans. Further, since the introduction of the Code in 2016, there has been a record decline in gross non-performing assets (GNPA) of Scheduled Commercial Banks to 3.0 percent and net non-performing assets (NNPA) ratio to 0.7 percent as on December, 2023.

The RBI’s 2022-23 report notes that the IBC remains the primary mechanism to recover stressed assets, accounting for 43% of the total recovered amount. The IBC has redefined debtor-creditor relationships, prompting debtors to settle debts before their cases are admitted under IBC. Significantly large number of applications for insolvency resolution were withdrawn before admission, exemplifying settlement of debts.

A study by IIM Ahmedabad found that for resolved firms, the IBC framework led to increase in sales, employee expenses, total assets, CAPEX, a threefold increase in market valuation, and significant improvement in liquidity of the resolved firms.

Knowledge resources are crucial for evaluating the effectiveness of the IBC framework and its outcomes, and these are critical inputs for future policy and regulatory reforms in line with the main objectives of the Code of value maximization and timely resolution of the companies in distress. A wealth of information, including newsletters, annual reports, research papers, and other publications, is available on the IBBI website, contributed by both internal and external stakeholders.

The current ‘Thought Leadership Booklet’, titled "Evolution of the Indian Insolvency Ecosystem and Path Forward," represents a collaborative effort between the Insolvency and Bankruptcy Board of India (IBBI) and the Foreign, Commonwealth and Development Office (FCDO). It aims to deepen stakeholders' understanding of India's current insolvency and bankruptcy landscape and examines insolvency law practices in major global jurisdictions. This publication explores the evolution of India's insolvency system, reflecting on past developments and possible intervention in future.

I extend my gratitude to the FCDO-UK, EY (the FCDO Programme's implementing partner) and the IBBI team for putting in efforts for shaping this publication. I commend the authors for their thorough research and insightful analysis. I am confident that this publication will be an invaluable asset to the entire range of stakeholders of the insolvency and bankruptcy ecosystem.

Jayanti Prasad
Whole time member, IBBI

ADMISSION PROCEDURE OF THE INSOLVENCY RESOLUTION PROCESS

MADHAV KANORIA
PARTNER, CYRIL AMARCHAND MANGALDAS

Admission Procedure of the Insolvency Resolution Process: A Comparative Analysis

Madhav Kanoria (Partner, Cyril Amarchand Mangaldas)

Introduction

In an ideal credit market, it is imperative to have efficient mechanisms to deal with corporate distress, which is a significant phase of a corporate business cycle.[1] This is the reason why an efficient framework of insolvency law forms a crucial component of overall economic development and financial system stability. It also allows the relevant stakeholders, including creditors such as banks and financial institutions, to be adequately assured of their rights involved in the process and allows availability of debt capital at a lower cost,[2] thereby facilitating credit extension.[3]

The increasing significance of an optimum structure of insolvency laws led United Nations to release the *Legislative Guide on Insolvency Law* ("**Legislative Guide**"),[4] which has immensely helped the nations across the globe and functioned as a guidance in drafting and putting together their requisite insolvency laws.[5] For instance, the Bankruptcy Law Reforms Committee that was responsible for drafting India's current comprehensive insolvency law i.e. the Insolvency and Bankruptcy Code, 2016 ("**the Code**") relied on the principles enshrined in the Legislative Guide, as evidenced from the BLRC Report,[6] in framing the Code.

It is pertinent to note that the Legislative Guide has recognized that the standard for commencement of insolvency proceedings is central to the design of the insolvency law.[7] Not only the Legislative Guide, but the World Bank Principles for Insolvency and Creditor/ Debtor

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[1] A Hundred Small Steps, Report of the Committee on Financial Sector Reforms, Planning Commission, Government of India, 2009, page 165.
[2] *Udichibarna Bose, Stefano Filomeni, Sushanta Mallick,* Does bankruptcy law improve the fate of distressed firms? The role of credit channels, Journal of Corporate Finance, Volume 68, 2021, available at https://www.sciencedirect.com/science/article/pii/S0929119920302807, accessed on January 23, 2023
[3] Principles for Effective *Insolvency* and Creditor/Debtor Regimes, World Bank, 2016, Page ii and 1.
[4] Legislative Guide on Insolvency Law, UNCITRAL, 2005.
[5] *id.*
[6] The Report of the Bankruptcy Law Reforms Committee, Bankruptcy Law Reforms Committee, 2015.
[7] *supra* note 4.

Regimes ("**World Bank Principles**"),[8] also note that the insolvency's commencement criteria should be clearly defined in the applicable insolvency legislation.

Commencement Standard of Insolvency

As per the Legislative Guide, essentially, there are two standards for commencement of insolvency – (a) liquidity/ cash flow test, wherein the debtor has ceased to make payments and does not have sufficient cash flow to service existing debt payments (hereinafter referred to as "**Cash Flow Test**") and (b) balance sheet test, wherein the excess of liabilities over assets is relied as the basis of indication for financial distress (hereinafter referred to as "**Balance Sheet Test**"). Notwithstanding the advantages and disadvantages associated with each of the aforementioned tests, the Legislative Guide has stated that a standard for initiating insolvency procedure must be transparent, certain and cost effective, such that there are inbuilt proper and adequate safeguards to prevent improper use of the respective insolvency proceeding.[9]

As per the Cash Flow Test, insolvency against an entity can commence if it is unable to pay its debts as and when they become due and payable.[10] In this regard, the World Bank Principles state that the Cash Flow Test is the preferred test to commence insolvency against an entity, as it is unable to pay its debts as they mature. The Legislative Guide notes that the Cash Flow Test has been used extensively as a parameter to trigger insolvency proceedings as it activates insolvency in fairly early stages of an entity's financial distress.[11] However, it is essential that the relevant insolvency law provides adequate guidance to the court to determine whether such a test has been complied with or not.[12]

As per the Balance Sheet Test, the excess of liabilities over assets of an entity is an indication of financial distress and is the threshold to initiate insolvency.[13] However, it is essential that the valuation of assets and liabilities are done on a fair market basis.[14] Further, the Legislative Guide also highlights that a practical limitation of such a test is the fact such information in relation to its assets and liabilities is under the control of the debtor and hence, it is rarely possible for other parties to ascertain the true state of the debtor's financial affairs.[15]

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[8] Principles for Effective Insolvency and Creditor/Debtor Regimes, World Bank, 2016.
[9] UNCITRAL Legislative Guide, Part I, para 21 on page 45.
[10] *Insolvency and Tests of Insolvency: An Analysis of The "Balance Sheet" and "Cashflow" Tests*, Julie E. Margaret, Australian Accounting Review, Volume 12, No. 2, 2002.
[11] *supra* note 4.
[12] *supra* note 8.
[13] *supra* note 4.
[14] *supra* note 4.
[15] *supra* note 4.

In this article, the authors engage in comparative analysis of admission procedures in the insolvency laws adopted by four jurisdictions namely India, United Kingdom ("**UK**"), United States of America ("**US**") and Singapore. In relation to the specified jurisdictions, this article deals with, in detail, the various insolvency procedures available to resolve a financial distressed company, the respective commencement standards for the same and the eligible parties which can trigger the same.

Position in the United Kingdom

The statutory framework for insolvency law in UK is primarily contained in the Insolvency Act, 1986 ("**UK Insolvency Act**") along with the relevant rules, *inter alia,* including the Insolvency Rules (England and Wales), 2016. It is to be noted that, pursuant to a consultation framework set up by Department for Business, Energy & Industrial Strategy (**BEIS**) in 2016 to review the insolvency law in UK, Mr. Alok Sharma, the then Business Secretary of the UK announced in 2020 that the UK government would announce permanent measures coupled with temporary covid measures to help the companies avoid insolvency,[16] one such pertinent change being the Corporate Insolvency and Governance Act, 2020 ("**CIGA**"), which received the Royal assent on June 25, 2020[17] and has significantly amended the UK Insolvency Act.

Presently, there are the following procedures available for companies that facing financial distress and/or in insolvency – (a) Administration (b) Company Voluntary Arrangement ("**CVA**") (c) Schemes and restructuring plan (d) Voluntary winding up (e) Compulsory winding up and (f) Pre-pack. The initiation and admission procedures for each are discussed in the subsequent paragraphs.

Administration

Administration is a mechanism, wherein the incumbent management of the financially distressed company is discharged, and an external *administrator* is appointed to manage such company for the benefit of all the creditors, with the protection of moratorium,[18] to take measures to resolve the financial distress and/or insolvency.

[16] *Ali Shalchi,* Corporate Insolvency and Governance Act 2020, House of Commons Library, No. 8971, April 06, 2022.
[17] *id.*
[18] Insolvency Act, 1986, Schedule B1, paragraph 1.

Under the UK Insolvency Act, the administration can be initiated either *by the court* or *out of court* (introduced through an amendment by the Enterprise Act, 2002).

As far as initiation of the administration *by the court* is concerned, it can be commenced by a requisite application to the said effect by the company, its directors, one or more of the company's creditors or a combination of these parties.[19] The provisions of paragraph 11 of Schedule B1 of the UK Insolvency Act provide that the court may make an administration order, if it is satisfied that -

a) The company is, or is likely to become, unable to pay its debts; and
b) Administration is likely to achieve one of the purposes[20]/ objectives being :

i. rescue of the company as a going concern;

ii. if the administrator thinks rescue as a going concern is not reasonably practicable or that a better result can be achieved for creditors as a whole,[21] the second objective is to achieve a better result for the company's creditors than is likely if the company is wound up;

iii. third objective, which only applies if the administrator thinks it is not reasonably practicable to achieve the first two objectives and if it will not "unnecessarily harm" the interests of the creditors as a whole,[22] is to realise property to distribute the proceeds to the secured or preferential creditors.

In relation to the test of *company is, or is likely to become, unable to pay its debts,* it is significant to note that Section 123 of the UK Insolvency Act, which applies to administration provisions in Schedule B1,[23] defines the *inability to pay debt* and a company is deemed to be unable to pay its debts in either of the below mentioned situations –

a) a creditor who is owed more than GBP 750 by the company serves a statutory demand on the company and the company fails to pay the demanded amount within three weeks;
b) a judgment remains unsatisfied;
c) it is proved to the court that the company is unable to pay its debts as they fall due;
d) is proved to the court that the company's liabilities (including contingent and prospective liabilities) are more than the company's assets.

[19] Insolvency Act, 1986, Schedule B1, paragraphs 11-13.
[20] Insolvency Act, 1986, Schedule B1, paragraph 3(1).
[21] Insolvency Act, 1986, Schedule B1, paragraph 3(3).
[22] Insolvency Act, 1986, Schedule B1, paragraph 3(4).
[23] Insolvency Act, 1986, Schedule B1, paragraph 111(1).

Further, administration *out of court* can be initiated on the requisite application of either the holder of floating charge or the company/ its directors. In case of the holder of the floating charge, such person must *inter alia* file with the court a notice of appointment, along with a statement by the administrator that he/she consents to such appointment, in his opinion the purpose of administration is reasonably likely to be achieved and other prescribed things.[24] Further such an administrator may not be appointed, in case either a provisional liquidator of the company has been appointed under section 135 of the UK Insolvency Act, or an administrative receiver of the company is in office.[25] In case of initiation of *out of court* administration by the company or its directors, the respective applicant has to file the notice of intention to appoint with the court, along with a statutory declaration *inter alia* stating that the company is or is likely to become unable to pay its debts and it is not under liquidation.[26] Furthermore, such person must *inter alia* file with the court a notice of appointment, along with a statement by the administrator that he/she consents to such appointment, in his opinion the purpose of administration is reasonably likely to be achieved and other prescribed things.[27]

It is to be noted that, in case of initiation of administration *by the court* or *out of court* by the holder of floating charge, the courts in UK may pass an administration order, even if it is not satisfied that the *company is or is likely to become unable to pay its debts*.[28] However, the same relaxation is not provided to *out of court* administration initiation by the company or its directors.

Once an administrator has been appointed, there is a general moratorium on the enforcement of remedies without the consent of the administrator or the permission of the court.[29]

It is significant to note that the administrator shall set out the proposals for achieving the purpose of administration, wherein such a proposal may include a CVA under Part I of the UK Insolvency Act or a compromise or arrangement under Part 26 or Part 26A of the Companies Act, 2006,[30] the admission procedures of each of which have been dealt with below.

[24] Insolvency Act, 1986, Schedule B1, para 18.
[25] Insolvency Act, 1986, Schedule B1, para 17.
[26] Insolvency Act, 1986, Schedule B1, para 27(2).
[27] Insolvency Act, 1986, Schedule B1, para 29(3).
[28] Insolvency Act, 1986, Schedule B1, para 35.
[29] Insolvency Act, 1986, Schedule B1, para 42-43.
[30] Insolvency Act, 1986, Schedule B1, para 49(3).

It is pertinent to note that the English court retains the discretion to not admit the company into administration, even if the pre-conditions, as specified above (para 11 of Schedule B1) are satisfied.[31]

CVA

CVA refers to a proposal, which is submitted by the directors of a company or by the administrator if the company is undergoing administration or by the liquidator if the company is undergoing liquidation, to the company and to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs.[32] The aforesaid proposal *inter alia* must contain the name of a person ("**nominee**"), qualified to be an insolvency practitioner, if the CVA is being proposed by the directors, who will act as a trustee or otherwise for supervising the implementation of the CVA.[33]

The nominee, if the CVA has been initiated by the directors, then submits a report to the court on whether the CVA has a reasonable prospect of it being approved and a creditors' meeting be called, after which the subsequent process is completed. In order for companies to access CVA, it is not necessary that the company is *insolvent* or *unable to pay its debts*,[34] being one of the significant thresholds for administration. Further, since the benefit of moratorium is not available within the CVA, it is usually coupled with administration or Part A1 (moratorium) procedure.[35]

Schemes

Under Part 26 *(Arrangements and Reconstruction)* of the UK Companies Act, 2006, companies may enter scheme of arrangement, which can be initiated by the company itself, any of the company's creditors or shareholders or by the company's administrator or liquidator. Since the scheme is not typically an insolvency procedure, it is even available to companies that are not in financial distress.

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[31] *Rowntree Ventures Ltd v. Oak Property Partners Ltd* [2016] EWHC 1523 (Ch).
[32] Insolvency Act, 1986, Part I, Section 1(1).
[33] Insolvency Act, 1986, Part I, Section 1(1).
[34] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles*, *(*Cambridge University Press, 2017), Page 418.
[35] Restructuring and Insolvency in the UK (England and Wales): Overview, *By James Terry, Tom Bannister, Emma Simmonds and Lauren Pflueger, Akin Gump LLP,* available at https://uk.practicallaw.thomsonreuters.com/9-501-6812?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a298483

Further, schemes, just like CVA, are used in conjunction with administration or liquidation procedures. The existing management continues to manage the company during such a procedure and is not displaced by an insolvency practitioner.[36]

Restructuring Plan

With a view to mitigate the impact of the coronavirus pandemic, Part 26A *(Arrangement and Reconstructions: Companies in Financial Difficulty)* was inserted into the Companies Act, 2006 through the CIGA. Under this procedure, an application to initiate scheme of arrangement between the company and its members or creditors (or any class of them) can be filed inter alia subject to the following eligibility conditions[37] –

a) the company must have encountered, or is likely to encounter, financial difficulties affecting its ability to carry on business as a going concern; and

b) the purpose of the scheme proposed must be to eliminate, reduce, prevent or mitigate the effect of those financial difficulties.

Further, restructuring plan procedure is not available to companies providing financial services.[38] Till now, the process has been used for few companies *inter alia* including Virgin Atlantic Airways Limited and Deep Ocean Group.[39]

Part A1 Moratorium

Another measure to counter the impact of the coronavirus pandemic in UK is the standalone moratorium procedure introduced as Part A1 of the UK Insolvency Act through the CIGA. Essentially, this moratorium is to facilitate the rescue of a company in financial distress by providing it with a payment holiday in respect of certain debts and protection from action from certain types of creditors, so that the company has breathing space in which to explore its rescue and restructuring options.[40]

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[36] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles*, *(*Cambridge University Press, 2017), Pages 411 and 412.
[37] Companies Act, 2006, Part 26A, Section 901A (UK).
[38] Companies Act, 2006, Part 26A., Section 901B (UK).
[39] DeepOcean – The first UK cross-class cram-down case under the Corporate Insolvency and Governance Act 2020, *By James Stonebridge,* available at https://www.nortonrosefulbright.com/en/knowledge/publications/c7f8568a/deepocean
[40] Restructuring and Insolvency in the UK (England and Wales): Overview, *By James Terry, Tom Bannister, Emma Simmonds and Lauren Pflueger, Akin Gump LLP,* available at https://uk.practicallaw.thomsonreuters.com/9-501-6812?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a789571

Schedule ZA1 states that a company is eligible to seek protection by filing for moratorium except for the companies that are expressly excluded under the list provided in this paragraph, *inter alia* including certain financial service providers, certain overseas companies, social housing providers, securitisation companies, a company for which moratorium is already in force or was in force at any time during the period of 12 months ending with the filing date and is subject to an insolvency law procedure in the UK.[41]

A moratorium is initiated by the director of the company by filing a statement that the director is unable to or will be unable to pay the debts and also a statement from the monitor (a qualified person proposed to be appointed by directors for monitoring the moratorium)[42] that the moratorium is likely to help in the rescue of the company as a going concern. This procedure is also an informal procedure where no court hearing is required, and the court will make its decision basis the documents that have been filed. A moratorium usually last for 20 days but can be extended by another 20 days or for a longer period with the agreement of the company's creditors or the court.[43]

Voluntary Winding Up

Under Chapter II of the UK Insolvency Act, a company may be wound up voluntarily if:

a) when the period (if any) fixed for the duration of the company by the articles expires, or on the occurrence of any event which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring it be wound up voluntarily; or

b) if the company resolves by special resolution that it be wound up voluntarily.

Further, before a company passes a resolution for voluntary winding up, it must give written notice of the resolution to the holder of any qualifying floating charge under Section 84(2A) of the UK Insolvency Act and the resolution for winding up would have been passed only either after the expiry of 5 business days from the date of the aforesaid notice or the person concerned has consented to such winding up.

It is to be noted here that voluntary liquidation of a solvent company is termed ‘a members’ voluntary winding up’ and, where an insolvent company is involved, this is then known as ‘a

[41] Insolvency Act 1986, Schedule ZA1, para 1.
[42] UK Insolvency Act, Schedule ZA1, Para A6(1).
[43] UK Corporate Insolvency and Governance Act 2020: A more debtor-friendly restructuring regime? | Global law firm | Norton Rose Fulbright; UK Insolvency Act, Schedule ZA1, Para A9.

creditors' voluntary winding up'.[44] The only difference in the members' voluntary winding up and creditors' winding up is the fact that, in members' voluntary winding up, a declaration is required under Section 89 of UK Insolvency Act from the directors regarding the solvency of the company.[45]

Compulsory Winding Up

A petition for winding up may be presented by any creditor (including contingent or prospective creditors), the company, the directors (with all directors joining the petition acting as a board following unanimous or majority resolution), a contributory or the clerk of a magistrates' court in enforcement of a fine.[46]

Under Section 122 of the UK Insolvency Act, a company can be ordered to be wound up by the court, which *inter alia* includes the following circumstances:

a) If the company has by special resolution resolved that the company be wound up;

b) If the company is unable to pay its debts (as per Section 123 of the UK Insolvency Act); and

c) If the court is of the opinion that it is just and equitable for the company to be wound up.

In this regard, it has been observed that the court can exercise its discretion and has refused to entertain a winding up petition on substantial grounds and in good faith.[47] In *Favermead Ltd v. FPD Savills Ltd*,[48] the court granted an injunction on a winding up petition being presented on the grounds of the debt being disputed.

It is also to be noted that such a petition can also be presented to a court by an administrator after a distribution.

Pre-Pack

Pre-packaged administration (or pre-pack sale) procedure refers to a process wherein, the directors of a financially distressed company appoint an insolvency professional to evaluate

[44] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles*, *(*Cambridge University Press, 2017), Page 453.
[45] UK Insolvency Act, Section 90.
[46] UK Insolvency Act, Section 124(1).
[47] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles*, *(*Cambridge University Press, 2017), Page 458.
[48] [2005] BPIR 715.

its financial position[49] and subsequently conclude an agreement with the creditors, in advance of the statutory administration procedures.[50] Pre-Pack, essentially being a debtor in possession procedure, does not entail displacement of the incumbent management in favour of any third party. Further, since the process does not find reference in any of the formal insolvency laws of UK, there is no specific initiation threshold for triggering pre-pack. It is also contended that pre-packs were in a way formalized through the amendment of the UK Insolvency Act by Enterprise Act, 2002 through the introduction of streamlined system of out-of-court routes into administration and simpler means of exiting administration.[51]

Position in Singapore

The present insolvency law framework in Singapore is governed by Insolvency, Restructuring and Dissolution Act ("**IRDA**"), which was introduced in 2018 pursuant to review of the erstwhile framework of corporate insolvency contained in the Companies Act, 1967 ("**Singapore CA**") by the Insolvency Law Review Committee in its report in 2013.[52] Overall, there are two major insolvency procedures for companies in financial distress – (a) judicial management and (b) winding up, the admission procedures of each of which have been dealt with in detail below. It is to be noted that as per the case of *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd*, even though the (Singapore) Insolvency Restructuring and Dissolution Act, 2018 prescribes Cash Flow Test as the parameter for initiating insolvency,[53] such an inability to pay debts can also be imminent or prospective i.e., to meet future obligations as they fall due.[54]

Further, the companies in financial distress can also enter into a scheme of arrangement which is not strictly an insolvency procedure[55] but can be accessed by companies to restructure their debt in all circumstances *inter alia* including insolvency. The Singapore High Court has exclusive jurisdiction over the corporate insolvency process.[56]

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[49] *UK pre-packs endorsed…but "clean-up" recommended,* By Glen Fannery, Eurofenix, Autumn 2014; *Pre Packaged Insolvency Resolutions: The Way Forward,* Ernst Young & Society of Insolvency Practitioners of India, March, 2019.
[50] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles*, *(*Cambridge University Press, 2017), Page 371.
[51] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles*, *(*Cambridge University Press, 2017), Page 375.
[52] Report of the Insolvency Law Review Committee, Insolvency Law Review Committee Singapore, 2013
[53] *Sun Electric Power Pte Ltd. v. RCMA Asia Pte Ltd* (formerly known as Tong Teik Pte Ltd). [2021] SGCA 60.
[54] Insolvency Restructuring and Dissolution Act, 2018, s.90.
[55] Wee Meng Seng & Hans Tjio, Singapore as International Debt Restructuring Center: Aspiration and Challenges, 57 TEX. INT'l L. J. 1 (2021)
[56] *id.*

Judicial Management

Under judicial management, a company in financial distress is rehabilitated with the help of a court appointed judicial manager. The judicial manager must perform its functions to achieve one or more of the following purposes of judicial management[57] –

a) the survival of the company, or the whole or part of its undertaking, as a going concern; or

b) the approval under section 210 of the Singapore CA (provisions in relation to compromise or arrangement) or section 71 of IRDA, pertaining to a compromise or an arrangement; or

c) a more advantageous realisation of the company's assets or property than on a winding up.

Before the enactment of IRDA, the judicial management procedure was an opportunity to restructure the debts of a company only if that company had become insolvent, i.e., unable to pay its debt.[58] However this has changed post the introduction of the IRDA.

As per Section 90 of the IRDA, a company, or its creditors can apply to the court to initiate proceedings,[59] if the company is unable to pay its debts or is unlikely to pay its debt[60] (i.e., *prospective illiquidity*) and if there is "*reasonable probability*" that the company can be rehabilitated as a going concern instead of resorting to winding up.[61] Further, if a company or its directors (pursuant to a resolution of its members or the board of directors) or any creditor (including any contingent or prospective creditor) makes an application in this regard, Section 91 of the IRDA, int this regard, notes as follows –

"*the* ***Court may make a judicial management order*** *in relation to the company if, and only if* ***the Court is satisfied that the company is or is likely to become unable to pay its debts****; and the Court considers that* ***the making of the order would be likely to achieve one or more of the purposes of judicial management*** *mentioned in section 89(1)."*

A company may also be placed under judicial management by a resolution of the creditors,[62] which is an *out of court process*[63] which *inter alia* involves the company calling a meeting of creditors at which a resolution is passed by a majority in number and value of the company's creditors present and voting.[64] As per Section 94, if a company stipulates that it is unable to

[57] Insolvency Restructuring and Dissolution Act, 2018, s.89.
[58] Ministry's Response to Feedback from Public Consultation on The Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring (The Draft Bill), February 27, 2017.
[59] Insolvency Restructuring and Dissolution Act, 2018, s.90.
[60] Section 90(a) of the IRDA
[61] Section 90(b) of the IRDA
[62] Insolvency Restructuring and Dissolution Act, 2018, s.94.
[63] *Angelia Thng and Esther Lim,* Restructuring and Insolvency in Singapore: Overview, Thomson Reuters, January 01, 2022.
[64] IRDA, Section 94(11)(e).

pay its debts or likely to become, unable to pay its debts or if one of the reasons highlighted under section 89 is likely to be achieved then a company may obtain the aforesaid resolution passed by the creditors of the company.[65] Further, it is to be noted that a notice of 7 (seven) days should be given to inform the creditors of the company's intentions to be placed under judicial management.[66]

Scheme of Arrangement (*Singapore SoA*)

The Singapore SoA is one of Singapore's primary modes of debt restructuring and distressed business reorganisation.[67] Under Section 210 of Singapore CA, a company, its shareholders, creditors, or the liquidator can apply to the court to summon a meeting of the creditors to consider the proposed scheme of arrangement.[68]

Subsequent to the enactment of IRDA, a company may also file for approval of a pre-package scheme.[69] As per section 71, "*the Court may, on an application made by the company, make an order approving the compromise or arrangement, even though no meeting of the creditors or class of creditors has been ordered under section 210(1) of that Act or held.*" However, under section 63 of the IRDA, such a scheme of arrangement is only applicable to companies that are liable to be wound up under IRDA.[70] Further, section 125 of the IRDA lay down conditions under which a company can be wound up, which *inter alia* include –

a) "*the company has by special resolution resolved that it be wound up by the Court;*
b) *default is made by the company in lodging the statutory report or in holding the statutory meeting;*
c) *the company does not commence business within a year after its incorporation, or suspends its business for a whole year;*
d) *the company has no member;*
e) *the company is unable to pay its debts;*
f) *the Court is of the opinion that it is just and equitable that the company be wound up;*
g) *the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner which appears to be unfair or unjust to other members*"[71]

[65] Insolvency Restructuring and Dissolution Act, 2018, s.94(1).
[66] Insolvency Restructuring and Dissolution Act, 2018, s.94(2).
[67] *Supra* note 96.
[68] Ministry's Response to Feedback from Public Consultation on The Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring (The 'Draft Bill"), February 27, 2017.
[69] Insolvency Restructuring and Dissolution Act, 2018, s.71.
[70] Insolvency Restructuring and Dissolution Act, 2018, s.63.
[71] Section 125

Winding Up

As per the IRDA, a company may either apply for the voluntary winding up procedure, or it may be wound up by the order of the court.[72] Part 8 of the IRDA governs the winding up procedure, as detailed below.

Court ordered winding up

As per section 124 of the IRDA, the court may order compulsory liquidation on receiving an application from one of the creditors, the shareholders of the company, a director of the company, liquidator, a judicial manager or various ministers on grounds specified under Section 125 of IRDA (as have been detailed in para 5.1.2.2 of this article).

It is pertinent to note that one of the circumstances under which a company may be wound up is if the company is unable to pay its debts. In this regard, Section 125(2) of the IRDA states that a company is deemed to be unable to pay its debts if "(*i) it fails to satisfy a demand exceeding $15,000, (ii) if it does not satisfy a judgement passed by the court or (iii) if it is proved to the satisfaction of the court that it is unable to pay its debt."* [73] To determine of the company is unable to pays its debts, this sub-section states that the court may look into contingent and prospective liabilities of the company.[74]

Further, Section 124 of the IRDA further states that a director might not present a winding up application "*unless a prima facie case for winding up is established to the satisfaction of the court*". Therefore, a director can only present an application after receiving the court's permission in this regard.

Voluntary winding up

A. Under Section 160 of IRDA, a company can be wound up voluntarily under either of the following two circumstances –

a) "*when the period (if any) fixed for the duration of the company by the constitution of the company expires or, where the constitution of the company provides that the company*

[72] IRDA, s.119
[73] Insolvency Restructuring and Dissolution Act, 2018, s.125(2).
[74] *id.*

is to be dissolved on the occurrence of an event, when that event happens, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily; or if the company so resolves by special resolution."[75]

b) if the company so resolves by special resolution."

B. In this regard, the directors have to lodge a declaration with the Official Receiver and Registrar of Companies stating the following –

a) Where the directors of a company have made and lodged with the Official Receiver a statutory declaration in the prescribed form, and have lodged a declaration in the prescribed form with the Registrar of Companies —

i. that the company cannot by reason of its liabilities continue its business; and

ii. *that meetings of the company and of its creditors have been summoned for a date within 30 days after the date of the declaration, the directors must immediately appoint a licensed insolvency practitioner to be the provisional liquidator*.[76]

C. It is also to be noted that, for a company to be wound up voluntarily, it also has to comply with certain requirements in relation to declaration of solvency. As per Section 163 of the IRDA,

i. Where it is proposed to wind up a company voluntarily pursuant to a members' voluntary winding up, the directors of the company or, in the case of a company that has more than 2 directors, the majority of the directors must, before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, make a declaration to the effect that—

- *they have made an inquiry into the affairs of the company; and*
- *at a meeting of directors, they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up.*

ii. There must be attached to the declaration a statement of affairs of the company showing, in the prescribed form-

- *the assets of the company and the total amount expected to be realised from those assets;*
- *the liabilities of the company; and*

[75] Section 160
[76] Section 161(1)

- *the estimated expenses of the winding up,made up to the latest practicable date before the making of the declaration.*[77]

D. Within 7 days of the company passing resolution to voluntarily wind up the company, the company is required to file a copy of the resolution with the Registrar of Companies.[78] Further a notice of such resolution should be given to the Gazette and one English newspaper with 10 days of such resolution having been passed.[79]

Early winding up

An official receiver can trigger early liquidation of a company when it does not have sufficient assets to fund the administration of liquidation.[80] As per section 209 and 210 (1) of IRDA, the test is to see "*if the realisable assets of the company are insufficient to cover the expenses of the winding up and the affairs of the company do not require any further investigation.*"[81] This saves the time and cost that is usually involved if the court waits till the company has become insolvent. On realising that a company is headed towards insolvency, a liquidator can be appointed to manage such assets and realise their value.

Test for admission

It is pertinent to note that, in the case of *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (*"***Sun Electric Case***"),* it was clarified that the cash flow test was the sole determinative test to assess the threshold to initiate insolvency in Singapore.[82] The court further stated that the aforesaid test assesses whether the company's current assets exceed its current liabilities such that it is able to meet all debts as and when they fall due. Further, "current assets" and "current liabilities" refer to assets which would be realisable and debts which would fall due within a twelve-month timeframe.

A list of non-exhaustive factors that would be considered under the cash flow test, include:

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[77] Section 163 (1) and (2).
[78] Section 160(2)(a)
[79] Section 160(2)(b)
[80] *Meng Seng Wee*, Singapore as International Debt Restructuring Center: Aspiration and Challenges, EW Barker Centre for Law & Business Working Paper 21/02, February 22, 2021.
[81] Insolvency Restructuring and Dissolution Act, 2018, s.209 & 210(1). EW Barker Centre for Law & Business Working Paper 21/02
[82] *Sun Electric Power Pte Ltd. v. RCMA Asia Pte Ltd* (formerly known as Tong Teik Pte Ltd). [2021] SGCA 60.

"*the quantum of all debts which were due or would be due in the reasonably near future; whether payment was being demanded or was likely to be demanded for those debts; whether the company had failed to pay any of its debts, the quantum of such debt, and for how long the company had failed to pay it; the length of time which had passed since the commencement of the winding up proceedings; the value of the company's current assets and assets which would be realisable in the reasonably near future; the state of the company's business, in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales; any other income or payment which the company might receive in the reasonably near future; and arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.*"[83]

The Court of Appeal, in Sun Electric Case, held that the cash flow test correlates with whether a company "*is unable to pay its debts*". "*It is not the total asset to total liability ratio which determines a company's present ability to pay its debts. Instead, this is determined by the liquidity of the assets and when the debts fall due*."[84] Thus, the Court of Appeal concluded that the Parliament could not have intended the balance sheet test as it is not a good indicator of the company's present ability to pay its debts.

Position in the United States

The provisions relating to insolvency/bankruptcy are contained in Title 11 of the United States Code otherwise known as the Bankruptcy Code ("**US Code**") and the Bankruptcy Federal Rules.[85] The procedures under this Code are divided as per the entity that is undergoing insolvency/bankruptcy. Chapter 7 contains liquidation proceedings that are applicable to both individuals and businesses. Chapter 9 provides for a planned negotiation for municipalities – cities, towns, villages, taxing districts, municipal utilities in school districts that are financially distressed. Chapter 11 deals with the reorganisation procedure under the Code. Chapter 12 and Chapter 13 set out the procedure for financially distressed family farmers, fishermen and wage earners.

[83] *Sun Electric Power Pte Ltd. v. RCMA Asia Pte Ltd* (formerly known as Tong Teik Pte Ltd). [2021] SGCA 60.
[84] *id.*
[85] U.S. Code, Title 11

The United States has a separate dedicated court that has jurisdiction over all the bankruptcy cases.[86] The Federal Court has exclusive jurisdiction.[87] The main insolvency restructuring procedures are contained in Chapter 11 (Reorganization) and Chapter 7 (Liquidation).

Subchapter 1 of Chapter 3 *(Case Administration)* lays down the provisions for commencement of a case under Title 11. As per section 301, a voluntary case commences when a petition is filed with the bankruptcy court. Section 303 of this Chapter states that an involuntary case can commence only under Chapter 7 and Chapter 11. Such an involuntary case can only be filed against a person. As per Section 101(41)- the term "*person*" *inter alia* includes corporations but does not include governmental units.

Chapter 7 *(Liquidation)* provides for liquidation procedures. Unlike the debtor in control model in Chapter 11, a trustee is appointed under this Chapter. Chapter 7 proceedings provide a clean slate to the debtor.[88] Under Chapter 7 as soon as a petition is filed, there is a stay on creditors from taking any action against the debtor[89] and subsequently a trustee is appointed who administers the whole process.[90]

Chapter 11 proceedings are utilised for restructuring/reorganising an entity to keep the entity as a going concern. It is mainly a "debtor-in control process" wherein the debtor comes up with a plan for restructuring and assumes the powers of a trustee and can continue its functions subject to certain court approvals.[91] Chapter 11 proceedings can be initiated even when the company is ***not*** insolvent.[92] The bankruptcy court is required to look at the application and determine if the application has been submitted in "*good faith*".[93]

In relation to *good faith,* the standard proposed in *SGL Carbon Corporation* is "*if the proposed plan serves a valid re-organisation/restructuring purpose*".[94] In the case of *SGL Carbon Corporation*, the court had dismissed Chapter 11 application filed by a healthy financial company because it saw no need to rehabilitate or re-organise the company.[95] The reorganisation plan in this case was submitted to escape anti-trust liability and was not

[86] Bankruptcy Courts and Cases – Journalist's Guide, United States Courts, accessible at www.uscourts.gov
[87] *id.*
[88] *David R. Hague*, Loopholes for the Affluent Bankrupt, 94 St. John's L. Rev. 107 (2020), Loopholes for the Affluent Bankrupt (stmarytx.edu)
[89] 11 USC s.362(a)
[90] S. 701(a)
[91] id
[92] Talha A. Chaudhry, To Stay or Not to Stay: Resolving the Issue of Non-Bankrupt Parties Inconsistently Finding Protection through Bankruptcy's Automatic Stay Mechanism, 96 TUL. L. REV. 955 (2022), page 960
[93] Id Chapter 11 - Bankruptcy Basics | United States Courts (uscourts.gov) 1129(a)(3)
[94] *In re SGL Carbon,* **200 F.3d 154***,* 166-67 (3d Cir. 1999)
[95] *id at 4.*

motivated to actually re-organise or rehabilitate the company as the Code has envisaged. In *Re Genesis Health Ventures Inc.,* It was held that the court looks into the following factors while determining good faith: "*(a) If the plan has been proposed with honesty and good intentions and with a basis for expecting that reorganization can be effected, (b) fosters result consistent with the code's objectives and (c) the plan is fundamentally fair in dealing with the creditors*".[96] In *re Sound Radio Inc.,* it was also clarified that the court will look to see if there are no Alterio motives and there is a realistic probability for effective reorganisation.[97]

In order to determine if a company is unable to pay its debt, the cash flow test is used. The Fifth Circuit in *Langham, Langston & Burnett v. Blanchard*, held that "*one is insolvent under the bankruptcy statute when his assets, if converted into cash, at a fair not forced sale will not pay his debts."*[98] An Ohio court stated in *Cellar Lumber Co. v. Holley* that cash flow insolvency is "*the inability to pay debts as they become due in the ordinary course of business*." It is a "*broader concept than balance sheet solvency, originating with merchants or traders*."[99]

Overall, the insolvency proceedings can be classified as voluntary and involuntary cases under the US Code, each of which are dealt with in detail below –

Involuntary Cases

The thresholds for initiating involuntary insolvency against a person under Chapter 7 and Chapter 11 are a) *by three or more entities, each of which is a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims*, b) *if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $10,000 of such claims* c) *if such person is a partnership—by fewer than all of the general partners in such partnership*; (d) *or if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner,*

[96] 266 BR 591.
[97] 93 BR 849
[98] *Langham, Langston Burnett v. Blanchard.* United States Court of Appeals, Fifth Circuit. Aug 15, 1957. 246 F.2d 529 (5th Cir. 1957)
[99] *Cellar Lumber Co. v. Holley*, 9 Ohio App. 2d 288 (1967).

or a holder of a claim against such partnership; (e) *or by a foreign representative of the estate in a foreign proceeding concerning such person.*

Voluntary Cases

As per Section 1121 of Title 11 of the US Code, a debtor can file a plan with the petition for commencing a voluntary case. A plan can also be filed subsequently after the commencement of a voluntary or involuntary case. The debtor has an exclusive right to file a plan after the commencement of a voluntary or involuntary case, during the first 120 days of the case. This exclusivity period may be extended or reduced by the court. But in no event may the exclusivity period, including all extensions, be longer than 18 months. Generally, the debtor (or any plan proponent) must file and get court approval of a written disclosure statement before there can be a vote on the plan of reorganization. Upon approval of the disclosure statement, the plan proponent must mail to *inter alia* all the creditors information which *inter alia* includes notice of the time within which acceptances and rejections of the plan may be filed. Further, as per Section 1128 of the US Code, after notice, the court shall hold a hearing on confirmation of a plan, wherein a party in interest may object to confirmation of a plan. As per Section 1129 of the US Code, at the plan confirmation hearing, the US court shall confirm a plan only if the substantive requirements, as specified in Section 1129 of the US Code have been complied with in the plan.

Position India

The insolvency and liquidation framework of India is governed by the (Indian) Insolvency and Bankruptcy Code, 2016 ("**Code**" or "**IBC**"), read with the relevant rules and regulations, being a comprehensive legislation containing provisions for the insolvency resolution and liquidation of corporate persons (other than financial service providers unless notified by the Central Government),[100] partnership firms and individuals. The provisions relating to insolvency resolution of individuals and partnership firms have not been notified yet, with the exception of personal guarantor to a corporate debtor, for which the framework has been enabled vide notification dated November 15, 2019.[101] In relation to financial service providers[102] ("**FSPs**"), the Central Government issued the Insolvency and Bankruptcy

[100]Section 3(7) of the IBC defines a corporate person as *a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider*

[101] Vide notification G.S.R. 854(E) dated November 15, 2019.

[102] Section 3(17) of the Insolvency and Bankruptcy Code, 2016 defines a financial service provider as *a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator*; Vide notification S.O. 4139(E) dated November 18, 2019, only non-banking finance companies having an asset size of INR 500 crores or more will be resolved under the FSP Rules, available at https://ibbi.gov.in//uploads/legalframwork/7bcd2585a9f75b9074febe216de5a3c1.pdf

(Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules 2019 (the **"FSP Rules**") which are applicable to FSPs, as may be notified by the Central Government under section 227 of the Code. The FSP Rules aim to provide a framework for insolvency and liquidation of systemically important FSPs other than banks and are currently applicable to non-banking financial companies (NBFCs) with an asset size of INR 500 Crores .[103]

Corporate Insolvency Resolution Process ("CIRP")

In India, insolvency proceedings in respect of a corporate debtor can be initiated if the corporate debtor defaults[104] in payment of an amount of INR 1,00,00,000 (Indian Rupees One Crore) or more.[105] Insolvency proceedings can be initiated either voluntarily (i.e., by the corporate debtor itself) or involuntarily (i.e., by a financial creditor or an operational creditor of the corporate debtor) by filing an application before the relevant judicial forum envisaged under the IBC – referred to as the "**Adjudicating Authority**" – which is the National Company Law Tribunal ("**NCLT**") having territorial jurisdiction over the place where the registered office of the corporate debtor is located[106].

It is pertinent to note that the Code creates two categories of creditors i.e., financial creditors and operational creditors. As per the Code, *financial creditor* to (including any assignee),[107] refers to any person to whom a financial debt is owed wherein financial debt has been defined as debt together with interest, if any, which is disbursed against the consideration for time value of money.[108] It may further be money that is borrowed or raised in any of the manners as prescribed in Section 5(8) of the Code or otherwise, *inter alia* including money raised from a real estate allottee under a real estate project,[109] as Section 5(8) is an inclusive definition. On the other hand, *operational creditor* (including any assignee) means a person to whom operational debt is owed to,[110] wherein operational debt means a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the government or any local authority.[111] The distinction between financial creditors and operational creditors, on the grounds of *inter alia* including different ways to initiate CIRP, has been upheld by the Supreme Court in *Swiss Ribbons v.*

[103] MCA Notification dated November 18, 2019.
[104] Section 3(12) of IBC defines the term "default" to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.
[105] Section 4(1) o the IBC.
[106] Section 60(1) of the IBC.
[107] IBC, Section 5(7).
[108] IBC, Section 5(8).
[109] IBC, Explanation to Section 5(8)(f)
[110] IBC, Section 5(20).
[111] IBC, Section 5(21).

Union of India.[112] Separately, in 2017, the Insolvency and Bankruptcy Board of India (Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") was amended to recognize another category of creditors referred to as '***other creditors***', i.e., the creditors which are neither financial nor operational creditors. However, a key difference in respect of 'other creditors' is that such creditors are not permitted under the statute to file an application with the NCLT to initiate insolvency proceedings against the relevant corporate debtor.

Further, there are three parties which can initiate CIRP - (a) financial creditor (b) operational creditor and (c) corporate applicant, each of which have been dealt with in detail below.

Initiation of CIRP by a financial creditor

If a corporate debtor commits default in respect of any financial debt,[113] a financial creditor can either by itself or jointly with other financial creditors file an application before the NCLT under Section 7 of the Code, to initiate CIRP against the corporate debtor. The application is required to be made in the prescribed format. Amongst others, the financial creditor is also required to propose the name of the insolvency professional proposed to act as an interim resolution professional. In the context of filing an insolvency application, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.[114]

In relation to certain creditors that form a class of creditors, such as (a) debt being in the form of securities or deposits and a trustee/ agent acting as authorized representative on behalf of all such financial creditors); (b) a class of creditors, containing at least 10 (ten) financial creditors[115], the application has to be filed by not less than 100 (one hundred) of such creditors in the same class or not less than ten per cent of the total number of such creditors in the same class, whichever is less.[116] Similarly, if the application to initiate CIRP were to be filed by real estate allottees, then such an application has to be filed by not less than 100 (one hundred) of such allottees under the same real estate project or not less than ten per cent of the total number of allottees under the same real estate project, whichever is less.[117]

[112] Writ Petition (Civil) No. 99 of 2018.
[113] IBC, Explanation to Section 7(1).
[114] Explanation to Section 7(1) of the IBC.
[115] IBBI CIRP Regulations, Regulation 2(aa).
[116] IBC, First Proviso to Section 7(1).
[117] IBC, Second Proviso to Section 7(1).

The application to initiate CIRP by a financial creditor must *inter alia* be accompanied by record of default with the information utility[118] or a certified copy of entry in banker's book or an order of court or tribunal adjudicating upon non-payment of debt.[119] Once the aforesaid application has been filed, NCLT shall ascertain the existence of default within 14 days of receipt of the application and if not, then it shall record its reasons in writing for the same.[120] The NCLT, basis its satisfaction of occurrence of default, completeness of the aforesaid application and pendency of any disciplinary proceedings against the proposed interim resolution professional (IRP), may admit or reject the application to initiate CIRP. In case of rejection, the NCLT will give an opportunity to the FC to rectify the defect, if any, within 7 days.

In this regard, it is to be noted that the time frame of 14 (fourteen) days to ascertain existence of default has been held to be directory in nature as held by Hon'ble Supreme Court in *Surendra Trading Co. v. Juggilal Kamlapat Jute Mills Company Ltd.*[121] Further, the National Company Law Appellate Tribunal ("**NCLAT**") has subsequently held that even though the aforesaid time frame is not mandatory in nature, there is no dispute that the admission/ rejection order has to be passed with utmost expedition.[122]

The test for admission of an application for the initiation of CIRP against a company by a financial creditor had been laid down by the Hon'ble Supreme Court in several cases, most notably *Innoventive Industries Ltd v. ICICI Bank*[123] and *E S Krishnamurthy v. Bharath Hi-Tech Builders Pvt Ltd.,*[124] The well-accepted test, until recently, was that the role of NCLT, while adjudicating CIRP applications filed under Section 7, is to (i) ascertain whether debt has been granted; (ii) default has occurred in payment / repayment of the debt when such debt was due and payable and (iii) the application filed by the financial creditor is complete. This was considered as a paradigm shift and the test that was followed was a "default" test which is inspired by the Cash Flow Teast but modified to the extent that default committed in paying / repaying the threshold amount is sufficient for initiation of CIRP.

Recently, the Supreme Court in *Vidarbha Industries Power Limited v. Axis Bank Limited ("**Vidarbha Industries Case**"),*[125] which was further clarified in its review order dated

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[118] Information Utilities, being an entity registered with IBBI under Section 210 of the Code, are essentially repositories of financial information responsible for authentication of the financial information.
[119] IBBI CIRP Regulations, Regulation 2A
[120] IBC, Section 7(4).
[121] (2017) 16 SCC 143.
[122] *Techno Electric & Engineering Co. Ltd. V. McLeod Russel India Ltd.,* Company Appeal (AT) (Insolvency) No. 367 of 2020.
[123] (2018) 1 SCC 407.
[124] (2022) 3 SCC 161.
[125] (2022) 8 SCC 352.

September 22, 2022,[126] departed from its earlier ruling in *Innoventive Industries* and other judgments and has held that the NCLT has discretionary powers under Section 7 of the Code to admit or reject the application, even if default is established and is allowed to look into other factors *inter alia* including financial health and viability of the corporate debtor. In this regard, the Supreme Court observed that unlike in case of an application by an operational creditor wherein the NCLT "*shall*" admit the insolvency application if the pre-requisite conditions are met, Section 7(5) of the IBC that deals with application by a financial creditor contemplates that if the NCLT is satisfied that a default has been committed the corporate debtor, it "*may*" admit the insolvency application. The review petition filed against the decision in *Vidarbha Industries* was also dismissed by the Supreme Court[127]*.* However, a larger bench comprising of 3 judges (Dr. D.Y. Chandrachud C.J., P.S. Narasimha J. and J.B Pardiwala J.) has taken cognizance of the conflicting position taken in *Vidarbha Judgment* from the previous judgments (including *Innoventive Industries*) and notice has been issued to the respondents. The matter is now pending consideration before the Supreme Court. Unless overturned by the larger bench of the Supreme Court or subsequent legislative amendments, this ruling is likely to cause delays in admission of insolvency proceedings resulting in further value deterioration, which was expressly sought to be curtailed by early admission of insolvency proceedings.

It is worthwhile to note that the Ministry of Corporate Affairs, in its recently issued consultation paper dated January 18, 2023,[128] (**MCA Consultation Paper**) inviting comments from stakeholders on changes being considered to the IBC. Amongst others, in order to address the concerns raised pursuant to the *Vidarbha Judgment*, it is proposed to amend Section 7 of the IBC such as to limit the criteria for admission of CIRP application to "existence of debt" and "default" in line with the principles laid down by the Supreme Court in *Innoventive Industries* and thus the term "*may*" appear in section 7 ought to be replaced with "*shall*". However, the same is at the stage of consideration and will have to be followed-up by a legislative amendment for giving effect to the intent.

Initiation of CIRP by Operational Creditor

An operational creditor can file an application to initiate CIRP against the corporate debtor under section 9 of the Code. However, before filing such application, the operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the default amount to the corporate debtor.[129]

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[126] *Axis Bank Limited v. Vidarbha Industries Power Limited,* (2022) SCC Online SC 1339.
[127] Review Petition (Civil) No. 1043 of 2022 decided on September 22, 2022
[128] Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016, Ministry of Corporate Affairs, No. 30/38/21, January 18, 2023.
[129] IBC, Section 8(2).

Within 10 (ten) days of the receipt of the demand notice or copy of the invoice(s), as applicable, the corporate debtor is required to respond and bring to the notice of the operational creditor, either: (i) existence of dispute, if any, or record of pendency of any suit or arbitration proceedings filed before the receipt of such demand notice / invoice(s) or (ii) evidence attesting to the fact that the unpaid operational debt has been paid. Subsequently, if corporate debtor does not respond to the demand notice, citing *dispute,* or no payment is made by the corporate debtor within 10 days from the date of such notice, then the operational creditor can file an application for initiating CIRP against the corporate debtor before the NCLT. The NCLT, within 14 (fourteen) days, shall admit/ reject the application basis *inter alia* the completeness of the application, payment of the unpaid operational debt and existence of dispute.[130] In case of rejection, the NCLT will give an opportunity to the OC to rectify the defect, if any, within 7 (seven) days.

In this regard, it is significant to note that the Supreme Court in *Mobilox Innovations Private Ltd.* v. *Kirusa Software Private Ltd.*,[131] which was further followed in *Vishal Vijay Kalantri v. DBM Geotechnics & Constructions Pvt. Ltd. & Anr.,*[132] has held that the dispute must truly exist in facts and should not be spurious, hypothetical and illusory. The NCLAT in *Anoop Kumar Chhawchharia Vs. Emgreen Impex Ltd. & Anr.,*[133] while dealing in appeal with the order of NCLT regarding Section 9 application and reinforcing the cashflow test within the scheme of the Code, held that the fact that the corporate debtor is a healthy company, not substantiated by the corresponding balance sheet, cannot be a sole basis to substantiate that it does not require to go to CIRP and that high turnover with positive net worth may reflect good fund flow but it does not substantiate a good cash flow.

Initiation of CIRP by the Corporate Applicant

As per Section 10 of the Code, a *corporate applicant* may file an application, on the occurrence of a default, to initiate CIRP against the corporate debtor. A *corporate applicant* has been defined under Section 5(5) of the Code to mean the corporate debtor, individuals who are in charge/individuals who have control and supervision of the financial affairs of the corporate debtor or any member or partner who is authorized to make an application on behalf of the corporate debtor. The corporate applicant must *inter alia* submit with the application a special resolution passed by shareholders of the corporate debtor or the resolution passed by at least 75 percent of the total number of partners, as the case may be, approving filing of the application. The NCLT, within 14 days, shall admit/ reject the

[130] IBC, Section 9(5).
[131] (2018) 1 SCC 353.
[132] 2020 SCC OnLine SC 1087
[133] 2021 SCC OnLine NCLAT 2235.

application basis the completeness of the application and the pendency of disciplinary proceedings against the proposed IRP.[134] In case of rejection, the NCLT will give an opportunity to the corporate applicant to rectify the defect, if any, within 7 (seven) days.

The NCLAT in *Unigreen Global Private Limited vs. Punjab National Bank and Ors*.[135] has compared sections 7 and 10 of the Code and held that the test laid down by the Supreme Court with regard to applications by financial creditors under section 7 *in M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr*.[136] is applicable to Section 10 i.e. the moment the Adjudicating Authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it must give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the Adjudicating Authority.

It is significant to be noted here that, as one of the relief measures introduced during Covid-19 pandemic, vide Insolvency and Bankruptcy Amendment (Ordinance), 2020,[137] Section 10A was inserted into the Code which states that no application to initiate CIRP would be filed for defaults occurring on or after March 25, 2020 for a period of six months which was later extended to 1 year until March 25, 2021,[138] provided that no application ***shall ever be filed*** for initiating CIRP for defaults occurring during the aforesaid period.

Pre-Packaged Insolvency Resolution Process ("PPIRP")

Prior to the Covid-19 pandemic, there was no tailored insolvency resolution process for micro, small and medium enterprises (**MSMEs**) in India. Due to the unique nature of their business and simpler corporate structures, PPIRP was introduced by way of amendment to the IBC (effective from April 4, 2021) to provide an efficient alternative insolvency resolution process for corporate persons classified as MSMEs. Pre-pack is a *debtor-in-possession* hybrid model as opposed to the *creditor-in-control* model for corporate rescue under the IBC.

As per Section 54-A of the Code, a corporate debtor who has committed a default of at least INR 10 lakhs,[139] is eligible to access PPIRP on the compliance of the following conditions:

a) it has not undergone PPIRP or completed CIRP, as the case may be, during the period of three years preceding the initiation date;

[134] IBC, Section 10(4).
[135] 2017 SCC Online NCLAT 566.
[136] 2018 1 SCC 407.
[137] No. 9 of 2020, dated June 5, 2020.
[138] Vide notification no. S.O. 4638(E) dated December 22, 2020.
[139] Notification S.O. 1543(E), dated 09.04.2021

b) it is not undergoing CIRP;

c) no order requiring it to be liquidated is passed under section 33;

d) it is eligible to submit a resolution plan under section 29A;[140]

e) the financial creditors of the corporate debtor, not being its related parties and representing not less than ten percent of the value of the total financial debt of such creditors,[141] have proposed the name of the insolvency professional to be appointed as resolution professional, and the financial creditors of the corporate debtor, not being its related parties, representing not less than 66% in value of the financial debt due to such creditors, have approved such proposal;

f) the majority of the directors or partners of the corporate debtor, as the case may be, have made a declaration stating, inter alia that – (i) the corporate debtor shall file an application for initiating PPIRP within a definite time period not exceeding ninety days, and (ii) the PPIRP is not being initiated to defraud any person;

g) the members of the corporate debtor have passed a special resolution, or at least three-fourth of the total number of partners, as the case may be, of the corporate debtor have passed a resolution, approving the filing of the application.

Furthermore, as per Section 54A(4) of the Code, the corporate debtor, before seeking the approval from the financial creditors, will *inter alia* provide a base resolution plan, as specified in Section 54K, which will subsequently serve as the basis for the entire PPIRP.

If a corporate debtor meets the requirements, as envisaged under Section 54A of the Code, then the corporate applicant can file an application to initiate PPIRP against the eligible corporate debtor, furnishing *inter alia* the requisite approvals and declaration regarding the existence of any transactions of the corporate debtor that may be within the scope of provisions in respect of avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI of the Code.

The NCLT, within a period of 14 days shall either admit or reject the application, basis the completeness of the application. However, prior to rejection, the NCLT will give notice to the applicant to rectify the defect within 7 days from the date of the notice.

[140] Section 240A of the Code specifies that clauses (c) and (h) of Section 29A of the Code do not apply to PPIRP of MSME corporate debtor.
[141] IBBI Pre-Pack regulations, 2021, Regulation 14(4).

Until now, only a handful of cases have been admitted into PPIRP, with Amrit India Limited being the most recent.[142] It is to be noted that, in the matter of *Krrish Realtech Private Limited,*[143] the NCLAT held that the NCLT has the jurisdiction to grant time to the intervenors to submit objections to the application initiating PPIRP under Section 54C of the Code.

The Government is also considering widening the scope of applicability of Pre-pack provisions to cover other entities (as may be specified) in addition to the MSMEs, which would entail amendment to the existing provisions of the IBC. The proposal has been put forward for further consideration in the MCA Consultation Paper.

Fast Track Corporate Insolvency Resolution (FIRP)

Chapter IV of the Code contains the provisions in relation to FIRP. It is essentially a fast track insolvency resolution process for specified entities to be completed within a time frame of 90 days.[144] Presently, an application for initiating FIRP can be made in respect of the following entities[145] –

a) a small company as defined under clause (85) of section 2 of Companies Act, 2013[146] or

b) a Startup[147] (other than the partnership firm) as defined in the notification of the Government of India in the Ministry of Commerce and Industry number G.S.R. 501(E), dated the 23rd May, 2017; or

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[142] In the matter of Amrit India Limited, CP (IBPP) No. 03 (PB)/ 2022, NCLT New Delhi, Order dated November 28, 2022.
[143] Company Appeal (AT) (Insolvency) Nos. 1008, 1009 & 1010 of 2021, order dated December 21, 2021.
[144] IBC, Section 56(1).
[145] MCA Notification S.O.1911(E), dated June 14, 2017.
[146] A small company means *a company, other than a public company,— (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees: Provided that nothing in this clause shall apply to— (A) a holding company or a subsidiary company; (B) a company registered under section 8; or (C) a company or body corporate governed by any special Act;*
[147] An entity is considered a start-up if *i. Upto a period of seven years from the date of incorporation/registration, if it is incorporated as a private limited company (as defined in the Companies Act, 2013) or registered as a partnership firm (registered under section 59 of the Partnership Act, 1932) or a limited liability partnership (under the Limited Liability Partnership Act, 2008) in India. In the case of Startups in the biotechnology sector, the period shall be upto ten years from the date of its incorporation/ registration. ii. Turnover of the entity for any of the financial years since incorporation/ registration has not exceeded Rs. 25 crore iii. Entity is working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation. Provided that an entity formed by splitting up or reconstruction of an existing business shall not be considered a 'Startup'.*

c) an unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding rupees one crore.

As per Section 57 of the Code, an application for initiating FIRP can be made by a creditor or the corporate debtor before the NCLT, along with proof of default and other information, as may be specified by IBBI. The remaining procedure is conducted as per the provisions of CIRP specified in Chapter II of the Code.[148]

The MCA Consultation Paper has proposed to widen the scope of applicability of the FIRP provisions to the corporate entities with larger asset size (as may be notified by the Central Government). Further, it is proposed to remodel the existing provisions such that the FIRP can be driven by the unrelated financial creditors through an informal out-of-court process, with ultimate sanction of the resolution plan by the NCLT and other appropriate checks and balances. An Expert Committee constituted by IBBI has also submitted a report on "*Framework Report on Creditor Led Resolution Approach in Fast-track Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016"* in May, 2023.

Liquidation

As per Section 33 of the Code, the NCLT may order liquidation of the corporate debtor under the following conditions –

a) where before the expiry of the CIRP period or maximum period permitted for completion of CIRP, if the NCLT does not receive a resolution plan; or

b) If the NCLT rejects the resolution plan under section 31; or

c) If the RP before the expiry of the CIRP, intimates the NCLT, of the decision of the CoC, taken by 66% majority after its constitution, to liquidate the corporate debtor; or

d) Where the resolution plan approved by the NCLT is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interest is prejudicially affected by the contravention, may make an application to the NCLT to pass the liquidation order.

Once the NCLT has passed the above-mentioned order, liquidation process is carried out in accordance with the process specified in Chapter III of the Code.

[148] IBC, Section 58.

It is pertinent to note that a company, which intends to liquidate voluntarily and has not committed default, may initiate voluntary liquidation process under Chapter V of the Code.[149] As per Section 59 of the Code, a company shall have to *inter alia* meet the following conditions to be eligible to initiate voluntary liquidation process –

a) a declaration shall be needed from majority of the directors of the company stating that they have made a full inquiry into the affairs of the company, and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation and the company is not being liquidated to defraud any person;

b) within four weeks of a declaration under the above-mentioned clause (a), there shall be a special resolution of the members requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator or a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator;

c) If the company owes any debt to any person, creditors representing two-thirds in value of the debt of the company shall approve the above-mentioned resolution, special or general as the case may be, within seven days of such resolution.

Further, the company shall also inform the Registrar of Companies and IBBI about the special or general resolution of members to liquidate the company within seven days of such resolution or the subsequent approval by the creditors.[150] The voluntary liquidation of the company is deemed to have commenced from the date of the special or general resolution of the members, as required under Section 59(3)(c), once the requisite approval from the creditors has been obtained.

Scheme of Arrangement (Scheme)

Under Section 230 of the Companies Act, 2013, an application in respect of the Scheme may be made under Section 230(1) of the CA 2013 by creditors (or class thereof)/members (or class thereof) of the company, or by the company itself ("**Applicant**"), before the jurisdictional NCLT (i.e., the NCLT's bench within whose jurisdiction the company is incorporated). The NCLT may, on the application of the company or of any creditor or member of the company,

[149] IBC, Section 59(1).
[150] IBC, Section 59(4).

order a meeting of the creditors (or class thereof), or of the members (or class thereof), as the case may be, to be called, held and conducted in such manner as the NCLT directs.

It is pertinent to note that the scheme of arrangement, as specified under the Companies Act, 2013, often finds reference in the resolution plans wherein provisions for scheme of merger/amalgamation/demerger (of business undertaking) of the corporate debtor with another company of the resolution applicant are provided for. This is in line with Regulation 37(c) of CIRP Regulations which states that a resolution plan may, as a measure for insolvency resolution of a corporate debtor, provide for *merger or consolidation of the corporate debtor with one or more persons*.

Conclusion

As stated by the Legislative Guide, the commencement criterion of any insolvency law procedure is one of the predominant factors towards determining its efficiency in resolving the corporate entity out of financial distress. It is essential that an insolvency law framework clearly provides for the admission procedure, which *inter alia* involves laying down the commencement standard i.e. Balance Sheet Test and/or Cash Flow Test. For instance, in India, the BLRC Report had stated that, owing to India's low average standard in accounting, balance sheet test cannot be an appropriate parameter to trigger insolvency law procedures and accordingly prescribed *default* or Cash Flow Test as the threshold for initiating insolvency, with the exception of Scheme, which is less of a typical insolvency law procedure.

The insolvency law courts (NCLT in India) also play a crucial role in determining the efficacy of admission procedures, as *interpreting* the law might lead to contradictory observations, which can blur the defined ambit of the law. For instance, the *Vidarbha* case gave unbridled powers to NCLT to consider factors other than just default to commence CIRP. On the other hand, courts can also assist the stakeholders in appropriately interpreting the law. For example, the *Sun Electric* case in Singapore clarified the initiation threshold and held that the cash flow test would be the sole determinant for triggering insolvency and/or winding up.

For some jurisdictions such as UK, a mixture of Cash Flow Test and Balance Sheet Test has anyway been provided for in the UK Insolvency Act, which makes the ambit of trigger way wide and on the other hand, it also prospectively assesses the ability of a company to pay its debts which not only have fallen due already but which may be unpaid on being due in the near reasonable future.

In addition to formal insolvency procedures, it is essential that the framework provides for some kind of out-of-courts settlement mechanism so as to encourage the creditors and the debtor to come together to a mutually agreeable debt resolution result, which may or may not be triggered strictly on the basis of default, thereby reducing costs and increasing the speed with which the distressed entity could be taken out of financial difficulties. UK's out of court administration or pre-pack, Singapore SoA, Scheme under the Indian Companies Act, 2013 and Chapter 11 proceedings in the U.S. are prime examples of how the debtors and creditors can agree to resolve the distress. However, at the same time, it is essential that the courts involvement is kept to a minimum, at least in the adjudication of admission of insolvency, so as to not take away the autonomy of parties involved and blur the distinction between formal and informal insolvency law procedures.

Delays in admission procedure (in India) has been time and again recognized as the crucial reason for the less effectiveness and less productive results of the insolvency law, which is why it is not just the responsibility of the legislature to clearly define the thresholds for initiation in the law but also of the courts to not deviate from the intent and scheme of the law and to render decisions consistent with the provisions and the precedents.

CHALLENGES OF INSOLVENCY RESOLUTION IN REAL ESTATE SECTOR

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Challenges of Insolvency in the Real Estate Sector

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Introduction

The introduction of Insolvency and Bankruptcy Code, 2016 ("**IBC**") is the biggest reform in the laws governing insolvent persons in India, which is founded on principles of value maximization of assets of such person and safeguarding the principal of going concern.

The quarterly newsletter of the Insolvency and Bankruptcy Board of India ("**IBBI**") for July – September, 2022 analyses the sector-wise distribution of the corporate debtors ("**CD**"), where it has been noted that real estate business is the second largest sector with the largest number of Corporate Insolvency Resolution Processes ("**CIRP**") having been initiated, second only to the manufacturing sector, and that real estate insolvencies contribute to 21% of all the admitted CIRPs until September, 2022[151]. Despite this, the successful resolution of real estate companies through the CIRP has been extremely low at only about 4% of the admitted cases until September 2021[152].

The executive has attempted to address the financial constraints of the real estate developers in completing the respective projects, by offering last-mile funding to such developers on a need-basis. The Government of India has established the 'Special Window for Completion of Construction of Affordable and Mid-Income Housing Projects ("**SWAMIH**")' fund to provide financing for completion of the stressed, brownfield and residential projects registered under the Real Estate (Regulation and Development) Act, 2016 ("**RERA**")[153].

However, the SWAMIH Fund only addresses concerns related to pre-insolvency cases, despite the fact that the Central Government has also notified that a debt raised from the

[151] Insolvency and Bankruptcy Board of India, 'The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India, July – September, 2022', p. 11

[152] Faizan Haidar, 'Realty Check: Just 4% IBC cases resolved' (The Economic Times, April 27, 2022) <ibc: Realty Check: Just 4% IBC cases resolved - The Economic Times (indiatimes.com)>

[153] Madhurima Nandy, 'SWAMIH fund gets Rs. 5000 crore capital infusion from govt' (LiveMint, December 8, 2022) <SWAMIH fund gets ₹5000 crore capital infusion from govt | Mint (livemint.com)>

SWAMIH fund shall be covered under the definition of 'interim finance'[154], as defined under the IBC[155]. This is because one of the criteria for availing the SWAMIH financing is that the concerned real estate project must have a positive net worth[156], which is often difficult for an already stressed real estate project undergoing CIRP. By virtue of this requirement, the Government of India has, in effect, highlighted its preference towards financing only such projects which have future development potential. Furthermore, the limitation of merely providing financing to stressed real estate projects is that it does not address the concerns relating to future development potential of such projects. Therefore, even with the provision of debt financing by the government, once CIRP is initiated against the respective real estate developer with no development potential, it often fails to attract sound resolution applicants and the CD may inevitably head into liquidation.

This article intends to explore certain specific challenges that are faced in the insolvency within the real estate sector in India, while analysing the status of the homebuyers, the upsides and downsides of the process as it exists for the real estate companies, and critically evaluating the viability itself of CIRP in real estate sector in India.

Viability of Real Estate CIRPs

The challenges involved in the real estate insolvencies are manifold, and only a few of them have been highlighted here. An essential question that the challenges in the real estate insolvency sector poses is that whether the resolution of a real estate company through the IBC route is even viable.

The crucial consideration for any resolution applicant in the CIRP of any CD is the future business potential that such CD may have for the successful resolution applicant. In the CIRP of a real estate company, typically, such future business potential of the CD tends to be very minimum, owing to lack of development potential in the underlying projects. Furthermore, there is an underlying understanding that a resolution of a real estate company would essentially result into the homebuyers getting possession of their flat/ apartments. In such a scenario, there exists significant uncertainty in the economic viability of the CD entity post the delivery of the flats to the homebuyers, as the CD would be left with no source of revenue post the delivery of flats.

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[154] Ministry of Corporate Affairs, Notification No. S.O. 1145(E) dated March 18, 2020 <Sec.-515.pdf (ibclaw.in)>

[155] Insolvency and Bankruptcy Code 2016, s. 5(15)

[156] SBICAP Ventures Limited, 'SWAMIH Investment Fund I FAQ' <SWAMIH Investment Fund I FAQ – SBICAP Ventures Ltd.>

In such a scenario, it is unlikely that a sound investor sees a resolution through the process prescribed under the IBC as commercially viable. There does not appear to be any economic incentive for a resolution applicant to participate in the CIRP of a real estate insolvency, as there is no return on equity possible unless the homebuyers are willing to fund further development process of the concerned real estate project, which is unlikely since the same may not be commercially possible for such individual homebuyers or due to lack of trust in the CD. Therefore, in a real estate insolvency, only such projects may seem to be commercially viable to a prospective resolution applicant which has some development potential, in terms of either unsold inventory, free land at its disposal, or unused floor area ratio ("**FAR**") for further development, which it can use for its return on equity.

Status of Homebuyers in Real Estate Insolvencies

While the economy as a whole suffers huge financial implications every time a corporate person goes into insolvency, the real estate sector is peculiar for the reason that it also involves retail homebuyers, who often invest their life savings in such real estate projects, as a pertinent stakeholder in the entire CIRP.

Homebuyers as 'financial creditors' under IBC

The status of the homebuyers as a stakeholder under IBC has had a chequered history. At its inception, IBC did not provide for the homebuyers to be considered as 'financial creditors', thereby limiting the rights of such homebuyers under the IBC. However, the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 ("**Amendment Ordinance**") was brought in to provide the homebuyers with the statutory status as 'financial creditors', and the same was directed to be enforced by the Supreme Court in the case of *Chitra Sharma v. Union of India*[157].

In pursuance of the Amendment Ordinance and the aforementioned judgment of the Supreme Court, the IBC was amended in 2018 ("**2018 Amendment**") to explicitly include the homebuyers within the definition of "financial creditors" under the IBC[158], effectively providing homebuyers with the right to initiate insolvency proceedings and representation in the CoC of the CDs. The constitutionality of 2018 Amendment was challenged before the Supreme Court in the case of *Pioneer Urban Land and Infrastructure Limited v. Union of India*[159] ("**Pioneer Judgment**"), where the Court upheld the constitutionality of the 2018 Amendment.

[157] (2018) 18 SCC 575
[158] Insolvency and Bankruptcy Code (Amendment) Act, 2018
[159] (2019) 8 SCC 416

Homebuyers as a 'single class' of financial creditors

Pursuant to the 2018 Amendment, the homebuyers were compressed into a single class, represented by an authorised representative in the CoC of the respective CD. However, the difficulties associated with compressing such large number of homebuyers into one single class with a single vote are significant.

Section 25A of the IBC stipulates that the minorities within a 'class' of creditors are bound by the decisions of the majority. The Supreme Court, in the *Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Limited & Ors.*[160] ("**Jaypee Kensington Judgment**") held that a dissenting homebuyer within a class of homebuyers (who collectively vote in favour of the resolution plan), cannot be considered as a 'dissenting financial creditor' within IBC, because the voting share of the 'class of creditors', constituted of homebuyers, would be in terms of the total financial debt owed to that class as a whole. Divergence may exist within such class of homebuyers, however, their vote would only be collectively considered, as a class.

Such "one size fits all" approach in respect of homebuyers presents a pertinent challenge to a homebuyer not in agreement with the decision of the majority, since it denies the homebuyers an adequate representation in the CoC, despite being classified as a 'financial creditor'. Further, it disparages the value of vote of an individual homebuyer without providing them the rights of a dissenting financial creditor, including the right to receive payment of liquidation value prior to any payment being made to the assenting financial creditors[161].

Furthermore, such an approach also leads to undesirable consequences in situations where there exist different towers in the same project with different underlying issues. There could be situations where some of the flats may have been sold to homebuyers even when the relevant statutory approvals have not been obtained, making them impossible to be completed. In such a case, the imposition of the decision of the majority upon a dissenting homebuyer, to whom there is little chance of their flat being delivered, is seemingly unfair.

Issues surrounding Authorised Representative of Homebuyers

[160] (2022) 1 SCC 401

[161] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, regulation 38(1)

Representation of a huge number of individual homebuyers by a single authorised representative is bound to be a complex issue. Despite the fact that such an authorised representative is bound to act in the interest of the homebuyers[162], it is not the homebuyers who have the initial say in the appointment process of their authorised representative. The Insolvency and Bankruptcy Board of India (Insolvency Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") provides under Regulation 4A that it would be the IRP who would initiation the appointment process of authorised representative, by putting before the homebuyers a choice between three Insolvency Professionals nominated at the behest of the IRP themselves[163]. The homebuyers exercise their choice in selecting the authorised representative only amongst the three Insolvency Professionals nominated by the IRP, without any substantial knowledge of the background and experience of such Insolvency Professionals. Furthermore, it is the Adjudicating Authority which finalises the appointment process of the authorised representative of the homebuyers *vide* an approval of appointment under Regulation 16A of the CIRP Regulations, rather than the homebuyers[164].

The choice of authorised representative is restricted since the current framework do not provide for a mechanism for change in authorised representative, and thus, if such a situation arises the homebuyers will have to knock the doors of the Adjudicating Authority for such replacement. While IBBI is cognizant of this issue and has highlighted the same in its Real Estate Discussion Paper[165], the same is yet to addressed by the legislature.

Another challenge in respect of the authorised representative is that the payment of fees of the authorised representatives is often unaddressed, hoping the recovery from the resolution plan to provide for it, thereby disincentivising such authorised representatives. The CIRP Regulations only prescribe the fees payable to authorised representatives for attending the CoC meetings[166], however, the role of authorised representatives goes way beyond merely attending CoC meetings, and includes *inter alia* garnering the vote of the homebuyers on specific issues before every CoC meeting, and apprising a large number of individual homebuyers with the updates of the CIRP against the respective CD.

Lack of Exit Mechanism for Homebuyers

Despite such restrictions to their rights, the individual homebuyers do not have any prescribed exit mechanism from the CIRP of the respective real estate developer. Neither is there any

[162] Insolvency and Bankruptcy Code, 2016, s. 25A(3A)
[163] CIRP Regulations, Regulation 4A
[164] Ibid at Regulation 16A
[165] Insolvency and Bankruptcy Board of India, 'Inviting suggestions/inputs from public for effective and expeditious resolution of Real Estate Projects', June 14, 2022 ("**Real Estate Discussion Paper**")
[166] CIRP Regulations, Regulation 16A(8)

statutory prescription nor an established market practice enabling the individual homebuyers to opt to sell their allotted flats back to the CD or any third party to exit from the CIRP of the CD. On account of the vote of the homebuyers being considered in a 'class', if an approved resolution plan provides for an extension in timeline for getting the possession of the respective flats, the dissenting individual homebuyers will continue to be bound by the decision of the majority, even if such an extension is onerous to it.

No Realisation in Liquidation

In the event of liquidation of a CD, once the assets are sold, the recovery from such sale is distributed amongst the stakeholders as per the waterfall mechanism set out in Section 53 of the IBC.[167] In most cases, since the possession of the flats has not been handed over and only an agreement of sale has been executed in the favour of the homebuyers, they do not have any right to an immovable property created until the delivery of their flats and execution of sale agreement in respect of their flats. Consequently, the homebuyers are placed at a perilous position, on account of them ranking lower in the waterfall mechanism, as they are unsecured financial creditors[168]. In such situations, the secured financial creditors have the right to enforce their respective security during liquidation of the CD[169], and derive at least some repayment towards their dues, which may leave the reserve completely dry resulting in the homebuyers recovering nil dues. Therefore, in the event that a real estate developer undergoes liquidation, the homebuyers may not derive any return on their investment.

IBC'S Onerous Obligations Upon Real Estate Developers

It is pertinent to note that a major concentration of the long stretched real estate IBC cases have propped up in the Noida, Greater Noida and Gurugram regions of the Delhi NCR, or such other areas where the local development authorities have provided the real estate developers with the lands for development of their respective projects on leasehold basis. The local authorities have no incentive to further the cause of the IBC, which is a central legislation. The local development authorities are generally hesitant to cooperate or provide their consent (which is often mandatory for effective implementation of any resolution plan) on account of the resolution plans providing little to no recovery of their dues.

[167] Insolvency and Bankruptcy Code 2016, s. 53
[168] Flat Buyers Association Winter Hills – 77, Gurgaon v. Umang Realtech, Company Appeal (AT) (Insolvency) No. 926 of 2019
[169] Insolvency and Bankruptcy Code 2016, s. 52

In a typical CIRP of any CD, the operational creditors of the CD are only statutorily required to be paid their liquidation value[170], which is generally nil, and therefore such operational creditors are usually paid no amount or a significantly low amount, as a part of the resolution plan. Such treatment of the operational creditors is attributable *inter alia* to the fact that typically they do not form part of the CoC and thus, do not have any voting rights over the resolution plans submitted for the CD but the same, once approved, is binding upon them[171].

In the cases of real estate insolvencies, the statutory development authorities, like New Okhla Industrial Development Authority ("**NOIDA**") and Yamuna Expressway Industrial Development Authority ("**YEIDA**"), are also treated as operational creditors of the real estate developers[172]. However, their treatment under the resolution plans is seemingly different from the operational creditors of other companies. The reason behind such differential and seemingly preferential treatment of the operational creditors of the real estate companies is that the lands leased from such statutory development authorities form a crucial part of the company's assets, and therefore, their cooperation is required for the successful implementation of any resolution plan.

Furthermore, the approval of any resolution plan by the Adjudicating Authority does not dispense with the requirement of separately seeking consent and approvals of the local development authorities, if the same is mandatory under the respective contract or any applicable law[173]. Therefore, in the event that such a local development authority takes a hard stance in respect of its dues for providing its consent, it would become significantly difficult to implement any resolution plan despite the completion of the entire CIRP.

The plans submitted by the resolution applicants in a real estate insolvency are also subjected to strict scrutiny by the courts, and the same was dealt with at length by the Supreme Court in the Jaypee Kensington Judgment. An overview of the issues dealt with in a catena of judicial pronouncements provides us with an illustration of the challenges faced by potential resolution applicants in a real estate insolvency.

A. Treatment of Claims of Local Development Authorities

[170] Ibid at s. 30
[171] Ibid at s. 31(1)
[172] New Okhla Industrial Development Authority v. Anand Sonbhadra, 2022 SCC Online SC 631
[173] Antanium Holdings Pte. Limited v. Sujana Universal Industries Limited, through its RP Mr. Ramakrishnan Sadasivan, 2021 SCC Online NCLAT 167; Parveen Bansal v. Amit Spinning Industries Limited, CA No. 360 (PB) 2018 in CP No. (IB) 131 (PB)/2017; International Asset Reconstruction Company Private Limited v. M/s Transstroy Tirupathi Thiruthani Chennai Tollways Private Limited, IA No. 1110 of 2020 in CP (IB) No. 262/7/HDB/2018; Metro Cash & Carry Private Limited v. Synergy Kitchens & Hospitality Private Limited, IA (IB) No. 878/KB/2022 in CP (IB) No. 1601/KB/2019

The differential treatment of the local development authority, YEIDA, despite being an operational creditor, was highlighted in the Jaypee Kensington Judgment. The Supreme Court had directed the resolution applicants of Jaypee Infratech Limited ("**JIL**") to reconsider the nil payments that they were initially offering the local development authorities, owing to their peculiar position in respect of the CD.

B. Treatment of Dissenting Financial Creditors

In the Jaypee Kensington Judgment, the Supreme Court had noted that the resolution plan of NBCC in JIL's insolvency had sought to discharge the obligations towards the dissenting financial creditors by providing them with proportionate share in equity and rights to certain land parcels available to CD. In this regard, the Supreme Court held that a dissenting financial creditor cannot be forced to remain attached to the CD by way of treatment of its claims in the nature of equities or other securities. The Court held that the payment, as provided under IBC, could only be made in monetary terms or the dissenting financial creditors must be allowed to enforce their security interest. Thus, a dissenting financial creditor cannot be forced to accept repayment in means other than monetary terms, while it is possible that the assenting financial creditors can commercially agree for such structures with the resolution applicants. In view of this, the resolution applicants must also make provision for the monetary payments to the dissenting financial creditors, which cumulates into an additional financial burden upon a real estate resolution applicant.

C. Modification of Terms of Contracts

The Supreme Court has held in the Jaypee Kensington Judgment that the consent requirement from statutory authorities for modification of agreements executed with them cannot be done away with, nor can be supplanted with the consents of CoC and the Adjudicating Authority. It has been judicially established that a contract cannot be unilaterally modified by virtue of the resolution plans[174]. Thus, any resolution plan must mandatorily provide the manner in which the requisite statutory and governmental permits and consents shall be obtained.

[174] Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Limited & Ors., (2022) 1 SCC 401; K.L. Jute Private Limited v. Tirupati Jutes Industries Limited, CA (AT) (Ins) No. 272 of 2019; DBM Geotechnics and Construction Private Limited v. Dighi Port Limited, CP 1382/I&BP/NCLT/MAH/2017; Standard Chartered Bank v. Ruchi Soya Industries Limited, CP (IB) 1371 & 1372 (MB)/2017

D. Additional Compensation for Land Acquired by State Authorities

In *YEIDA v. Shakuntla Education and Welfare Society & Ors.*[175] ("**Shakuntala Education case**"), the Supreme Court, while upholding the validity of an executive order of Uttar Pradesh Government for payment of additional compensation to farmers, had refused to deal with similar questions in respect of corporate persons under insolvency, while observing in respect of Supertech Limited:

> *"69. With respect to the contention of the respondent No. 19-Supertech with regard to initiation of CIRP, we are not concerned with the said issue in the present proceedings. The law will take its own course."*

Many of the real estate companies undertake construction and development on underlying lands which have been acquired from individuals by the government authorities under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, and then reallotted to such real estate developers. However, there exists uncertainty in respect of the compensation that is payable for the acquisition of land by the real estate developer. While the Shakuntala Education case clarified certain aspects of the compensation payable by a real estate developer not undergoing CIRP, there still exists a legislative and judicial lacuna in respect of such additional compensation payable for acquisition of land by a CD under CIRP.

In respect of the JIL's insolvency, such uncertainty has culminated into the resolution plans for JIL being challenged in respect of the amounts that were apportioned to YEIDA for payment of farmers' compensation. Such a position of law shall add severe financial obstacle on the resolution applicant or the CD in the resolution processes where any sort of land acquisition has occurred, or additional farmers' compensation is payable. Furthermore, they add an element of uncertainty for the resolution applicants in terms of the amount they might have to provision towards such compensation.

Other Challenges in Real Estate Insolvencies

A. Judiciary's Ad-Hoc Resolution Mechanisms within IBC

Reverse CIRP and Project-Wise CIRP

[175] 2022 SCC Online SC 655

In a typical CIRP, the board of directors of the CD is suspended post the initiation of CIRP, and the operation of the CD is handed over to the IRP, who is guided by the decisions of the CoC. The resolution process ends in either a resolution applicant taking over the CD, or with the liquidation of the CD. The promoters lose their say in the entire process as soon as a CIRP is admitted against the CD. Furthermore, in a typical CIRP, the process is initiated against the entire entity of the CD, rather than specific portions of the businesses of the CD.

However, the aforementioned typical scheme of things in a CIRP does not fit well within a real estate insolvency. A real estate developer may have multiple ongoing projects. All such projects may not be at a similar stage of construction or associated with the similar financial strains. It often happens that while the homebuyers have been delivered the flats/ apartments in some projects of the real estate developer, certain other parts of the same projects or other projects of the real estate developer may not have even reached a construction completion stage.

In such a scheme of things, there may even arise issues in respect of delivery of the flats to the homebuyers. While some homebuyers may be able to get possession of their flats in one project of the CD where construction has been completed and sale deed has been executed prior to the initiation of CIRP[176], other homebuyers in another project of the CD may not be able get possession of their respective flats on account of imposition of moratorium under Section 14 of the IBC, whereby IRP is restricted from alienating any asset of the CD post the initiation of CIRP[177].

This complexity and peculiarity of the real estate sector led to two judicial inventions in the CIRP of real estate developers: (a) reverse CIRP; and (b) project-wise CIRP. The courts and tribunals have found fitting to use their inherent powers to direct a reverse CIRP and/ or a project-wise CIRP in certain cases of real estate insolvencies.

1. Umang Realtech Insolvency

In the case of *Flat Buyers Association Winter Hills – 77, Gurgaon v. Umang Realtech*[178] ("**Umang Realtech Judgment**"), the concepts of reverse CIRP and project-wise CIRP were introduced by the National Company Law Appellate Tribunal ("**NCLAT**"). The promoter of the concerned CD offered to infuse funds, while remaining outside the CIRP and acting merely as a financial creditor, to ensure that the CIRP is successfully completed and the homebuyers

[176] Alok Sharma & Ors. v. IP Constructions Private Limited, Company Appeal (AT) (Insolvency) No. 350 of 2020
[177] Insolvency and Bankruptcy Code, 2016, s. 14(1)(b)
[178] Company Appeal (AT) (Insolvency) No. 926 of 2019

take possession of their flats/ apartments. The homebuyers and institutional financial creditors accepted the aforesaid proposal of the promoter of the CD. Accordingly, the NCLAT held that in situations such as these, it is very difficult to follow the normal course of CIRP. Thus, a reverse CIRP can be followed in cases of real estate companies in the interest of the homebuyers, the survival of such companies, and to ensure the completion of the projects which provides employment to large number of unorganised workmen. The NCLAT provided the promoters of CD with timelines and protectionist directions to ensure that the interests of the stakeholders in the CIRP are not compromised and to ensure timely completion of the project and the CIRP.

In the aforesaid case itself, the NCLAT had introduced the concept of project-wise CIRP as well. It had held that in CIRP against a real estate company, if the stakeholders of one project initiate a CIRP against CD, then the said CIRP is confined only to that particular project. Such CIRP cannot affect any other project of the CD at any other place, where separate plans are approved by separate authorities, with different land, landowners, allottees, financial and operational creditors. In spite of the NCLAT's clarification, various applications are currently pending before the NCLAT wherein homebuyers and other stakeholders have prayed for clarification that the moratorium imposed does not cover other projects of the CD.

It is pertinent to note, however, that despite the judicial innovation in this case, the CD is far from being resolved till date. Various orders of the Adjudicating Authority highlight the issues still plaguing the resolution of the CD, including the non-payment of the amount due by all the homebuyers in spite of the NCLAT's order directing the homebuyers to do so. Furthermore, the flats which have been completed by the CD do not have electricity and water connection, on account of pending dues to the local electricity and water authorities, and are being provided the same through non-sustainable arrangements such as diesel generators and tanker-supply of water. The construction and delivery of all the flats has not been completed by the CD well beyond the initial deadline of June 30, 2020, as set by the Adjudicating Authority *vide* its order dated February 4, 2020.

Thus, in order to maximise the value of CD, it is essential to make appropriate provision in the applicable law to restrict the CIRP only to the specific project in relation to which the CIRP was initiated, rather than extending it to all the projects of the CD.

2. HDIL Insolvency

In *Whispering Tower Flat Owner Welfare Association v. Abhay Narayan Manudhane, RP of Corporate Debtor*[179], the NCLAT had permitted the project-wise CIRP of M/s. Housing

[179] Company Appeal (AT) (Insolvency) No. 896 of 2021

Development & Infrastructure Limited, which was approved by the CoC in its commercial wisdom, because each of the projects of the CD were at different stages of completion.

3. Soni Infratech Insolvency

In *Anand Murti v. Soni Infratech Private Limited*[180], it was the Supreme Court which granted its approval to a reverse CIRP of a real estate developer. The project was 75% complete and an ex-director of the CD had arranged for funds to complete the entirety of the project. There was a settlement reached between the promoter of the CD, the homebuyers, and the financial creditors on almost all counts, in a meeting organised for the stakeholders. The promoter of the CD submitted an undertaking to complete the project as per the revised timelines under the modified resolution/ settlement plan, and accordingly, requested for a reverse CIRP. The Supreme Court held that in the peculiar facts of the case, it is in the interests of the homebuyers if the promoter is permitted to complete the housing project, and therefore, allowed the reverse CIRP to occur herein.

4. Supertech Insolvency

Reverse CIRP and project-wise CIRP were again called into play by the NCLAT in the case of *Ram Kishor Arora, Suspended Director of M/s. Supertech Limited v. Union Bank of India & Anr*[181]*.* The NCLAT directed the constitution of CoC only for the specific project in relation to which the CIRP was initiated, and directed the IRP to merely supervise the progress and construction of all other projects of the CD. Thus, the NCLAT only initiated the effective CIRP against one project of the CD, while the others were allowed to operate with the cooperation of the existing staffs and employees of the CD under the IRP's supervision. The NCLAT also directed the promoter to infuse money into the CD as interim finance, thereby also invoking the concept of the reverse CIRP herein.

Like the CIRP of the aforementioned Umang Realtech, the CIRP of Supertech Limited is also facing issues on account of lack of cooperation from the local state authorities. It has been reported that the CD has handed over possession of many flats to the respective homebuyers without procuring occupancy certificate from the NOIDA and Greater NOIDA authorities[182], which effectively casts a doubt over the legality of the possession of the flats by the homebuyers.

Limited Legislative Recognition to Project-Wise CIRP

[180] 2022 SCC Online SC 519
[181] Company Appeal (AT) (Insolvency) No. 406 of 2022
[182] 'Supertech offered 9,705 flats without occupancy certificates: Interim resolution professional to NCLAT' (Economic Times, December 29, 2022) <Supertech news: Supertech offered 9,705 flats without occupancy certificates: Interim resolution professional to NCLAT - The Economic Times (indiatimes.com)>

While reverse CIRP has not been consolidated into the bare act of the IBC and the regulations thereof, project-wise CIRP has been incorporated to an extent (although in a limited manner) into the CIRP Regulations[183]. The CIRP Amendment Regulations, 2022[184] have added *inter alia* regulations 36B(6A) and 37(m) to the CIRP Regulations, which allows the IRP to undertake project-wise sale of assets of the CD. Under regulation 36B(6A), the IRP may issue request for resolution plan for sale of one or more assets of the CD, with the approval of the CoC, upon not receiving a resolution plan for the entire assets of the CD as a whole. Regulation 37(m) allows for submission of resolution plans wherein one or more assets of the CD are sold to one or more successful resolution applicants, while providing a manner of dealing with the remaining assets.

The CIRP Amendment Regulations, 2022 were brought in pursuance of the IBBI Discussion Paper, 2022[185], which were targeted at resolving the delay issues in CIRP across all sectors, rather than being limited to the real estate sector alone. Therefore, while the CIRP Regulations now permit for sale of the CD in a project-wise manner, the extant regulations do not provide for restricting the CIRP to only the stressed project instead of making it applicable to the entire CD as a whole (which leads to imposition of moratorium on the entire CD).

Challenges associated with the Reverse CIRP and Project-Wise CIRP approach

We note from the aforementioned judicial cases that the reverse CIRP and project-wise CIRP approaches are brought into play by the courts and tribunals only in certain facts and circumstances. In fact, the non-universal nature of these approaches has also been highlighted in a recent judgment of National Company Law Tribunal, Chennai, in the case of *N. Kumar v. M/s. Tata Capital Housing Finance Limited*[186], wherein the tribunal refused a project-wise CIRP of the CD, while distinguishing the Umang Realtech Judgment on facts, and stating that neither the IBC not the regulations therein provide for project-wise splitting of the CD. The statutory and regulatory lacuna in respect of reverse CIRP and project-wise CIRP is a major challenge to these approaches carved out for real estate insolvencies.

[183] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), 2016
[184] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2022 ("**CIRP Amendment Regulations, 2022**")
[185] Insolvency and Bankruptcy Board of India, 'Discussion paper on changes in the corporate insolvency resolution process to reduce delays and improve the resolution value', June 27, 2022
[186] N. Kumar, RP of M/s. Sheltrex Developers Private Limited v. M/s. Tata Capital Hosing Finance Limited, IA(IBC)/1245(CHE)/2020 in CP(IB)/889(CHE)/2019

With respect to project-wise CIRP, such uncertainties include but are not limited to the extent of operational control of the IRP on projects of CD which are outside CIRP, lack of clarity on bifurcation of creditors of the CD for each of its projects, decision on which assets of the CD are under moratorium, and complications in relation to avoidable transactions which may spill across various projects of the CD (some of which may be outside CIRP).

In relation to reverse CIRP, there may arise challenges in reaching a consensus amongst various stakeholders of the CD, and there exist uncertainties with respect to the mode through which such consensus may be reached. An essential pre-condition to reverse CIRP seems to be that significant construction activity had already been undertaken for such projects, and therefore, such approach may not be viable for the projects where the construction has not started or has barely started.

B. Court-Monitored Resolution of Amrapali Group outside IBC

Various homebuyers had booked their flats in the Amrapali projects between 2010-2014. However, the Amrapali Group, in breach of their obligations, did not deliver the flats to the homebuyers, did not make requisite payments to the Noida or Greater Noida authorities, nor did they make loan repayments to the banks. Since IBC at its inception did not provide for the homebuyers to be considered within the definition of 'financial creditors', the Supreme Court entertained writ petitions of the homebuyers under Article 32 of the Constitution of India, and opted to depart from the IBC process to ensure justice for the homebuyers.

The Supreme Court, in a detailed judgment[187], had passed certain directions against the Amrapali Group of Companies, including *inter alia* (a) the cancellation of their registration under the Real Estate (Regulation and Development) Act, 2016; (b) appointment of NBCC (India) Limited for completing the various projects of the Amrapali Group, at a fixed rate of commission; (c) direction to homebuyers to deposit the outstanding amounts due under their respective agreements in a court-designated bank account; (d) appointment of court receiver to exercise the rights of the Amrapali Group as lessee of the leased lands; (e) direction to the Noida and Greater Noida authorities to execute agreements to give effect to the said order of the Supreme Court; and (f) direction to initiate criminal actions against the promoters of the Amrapali Group.

Limitations of Court-Monitored Resolutions

[187] Bikram Chatterji v. Union of India, (2019) 19 SCC 161

At present, the Amrapali Group's case is ongoing before the Supreme Court and is an ever-evolving situation. In a recent order[188], the Supreme Court has held that the claims of the statutory corporations and the governmental organisations against the Amrapali Group shall only be taken up for consideration after claims of the homebuyers for possession of the flats booked by them are resolved, as the homebuyers' plight is basic issue for which the matter is taken up for consideration from time to time.

Despite the good intention of the Supreme Court to ensure justice for the homebuyers, the financial strains on the Amrapali projects are far from being resolved. The court receiver of the Amrapali Group recently submitted before the Supreme Court that the Noida and Greater Noida local authorities have been uncooperative in generating funds for the stalled projects by not allowing the sale of unused FAR of the projects[189]. Furthermore, the 3000 flats in the Amrapali projects which have been completely constructed by NBCC have not been provided with water and electricity connections by the Noida and Greater Noida authorities[190].

Such a stance of the local authorities highlights the non-alignment of the incentives of the local authorities in terms of furthering the cause of resolution of real estate developers and protecting the interests of homebuyers, and demonstrates the limitations associated with court-monitored resolution process of real estate developers. Despite the Supreme Court directly monitoring the process and NBCC completing the construction of a portion of the flats, without the cooperation of the local development authorities, a resolution process is not without its challenge.

Furthermore, the directions that were passed by the Supreme Court in the Amrapali case cannot be replicated by courts and tribunals in other real estate insolvencies with similar challenges, as there is no legislative backing for the same.

C. Other Issues Associated with Real Estate Insolvencies

The IBBI, vide another discussion paper[191], had invited comments from the stakeholders on the need for separate regulatory framework for homebuyers in the CIRP of real estate

[188] Bikram Chatterji v. Union of India, Writ Petition (Civil) No. 940 of 2017, order dated July 18, 2022
[189] 'Give Management of Amrapali Group to UP Govt if Financial Issues not Resolved: Court Receiver to SC' (Outlook, December 2, 2022) <Give Management Of Amrapali Group To UP Govt If Financial Issues Not Resolved: Court Receiver To SC (outlookindia.com)>
[190] Ibid
[191] Insolvency and Bankruptcy Board of India, 'Inviting suggestions/inputs from public for effective and expeditious resolution of Real Estate Projects', June 14, 2022

projects, or on requirement of modifications to the existing framework of IBC to provide for the issues relating to homebuyers in real estate insolvencies.

Some of the issues in relation to the CIRP of a real estate corporate person were *inter alia*: (a) monitoring of construction during CIRP; (b) treatment of land title in the resolution plan, when the same is not in the name of the CD; (c) project-wise or tower-wise resolution of CD; (d) treatment of dissenting homebuyers; and (e) differing consequences on homebuyers who have taken possession of their flats and those who have not, if the CD goes into liquidation.

It is pertinent to note that out of the many issues in relation to real estate insolvencies highlighted under the Real Estate Discussion Paper, only the project-wise CIRP issue has been partially addressed by the CIRP Amendment Regulations, 2022, despite the CIRP Amendment Regulations, 2022 being passed brought into effect after the Real Estate Discussion Paper.

Possible Solutions?

Commercial viability of a real estate project undergoing CIRP is the major roadblock in the successful resolution of real estate companies. As mentioned above, projects with absolutely no future development potential may not see a resolution through the CIRP and are headed towards liquidation if the IBC is invoked, which severely compromises the interests of the homebuyers.

Insolvencies in the real estate sector can be made viable for resolution only in the event that there exist significant net future receivables for the CD, or if there exists a development potential in the projects of the CD which the successful resolution applicant may commercially utilise for its return on equity.

A.State Intervention

The necessity of state intervention in cases of real estate insolvencies, where there is no development potential in the underlying projects, is paramount. State intervention may be considered wide enough to encompass actions by legislature, executive and the judiciary.

The judiciary has attempted to address certain issues in the resolution process of real estate developers by means of judicial inventions both, within and outside the scope of IBC, as is

evident from the paragraphs above. The Supreme Court went over and beyond in the Amrapali Group case to protect the interests of the homebuyers. However, a court driven process of resolution of any entity has its limitations. There exists uncertainty in respect of the process in the minds of the stakeholders due to lack of a pre-defined framework, the courts are ill-equipped to decide on commercial matters in respect of the resolution process, there does not exist any timeline for completion of such a court-driven resolution process, and the fact that the courts in India are already overburdened with a plethora of pending litigations.

The executive has at least attempted to address the concerns of the stressed real estate developers by means of SWAMIH Fund, as discussed above. However, the need of the hour is for the legislature to come into action and frame relevant regulations for the resolution of distressed real estate developers. As is evident in the Amrapali Group's case, the lack of incentive with the local development authority to further the resolution process of any real estate developer creates substantial hurdles. Therefore, there exists a requirement to frame such laws that would obligate such local development authorities to cooperate in the resolution process of a real estate developer, including the ensuring the right to sell the unused FAR without any consent requirement of any such local development authority.

In addition to the aforementioned recommended actions to be taken by the legislature, it would serve well for all the stakeholders involved in a real estate insolvency, if the local development authorities formulate appropriate and uniform policies to consider and approve resolution plans. This would, effectively, clear the uncertainty for any prospective resolution applicant in a real estate insolvency as far as the consideration of its resolution plan by such local development authorities is concerned and shall significantly speed up the resolution process. It is pertinent to note that as planning authorities, the ultimate responsibility for difficulties faced by homebuyers falls upon the local development authorities. The IBBI has, in fact, taken note of the hurdles posed to a successful resolution of a CD on account of the government authorities, including the local development authorities, and has recently proposed to amend Section 31 of the IBC to bind *inter alia* the local development authorities to honour the pre-existing contractual arrangements that such authorities may have with the CD.[192]

Furthermore, there is a need for a separate scheme of resolution of the completely distressed real estate projects, as the resolution objective of the IBC is not being met within the four corners of the IBC as it exists at the moment in respect to the real estate insolvencies.

[192] Insolvency and Bankruptcy Board of India, 'Invitation to comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016', January 18, 2023

B.Resolution Applicant to create Development Potential

In a stranded real estate project with no development potential, it may be the prospective resolution applicants that may have to come up with creative means of freeing up the development potential in the CD's real estate projects. However, it must be borne in mind that any such proposal shall have to be approved by the entire class of homebuyers, wherein building consensus amongst the individual homebuyers may be an uphill task. The subsequent paragraphs explore some of the proposals which may be considered by prospective resolution applicants.

1. *Extinguishment of Allotment Rights of Homebuyers*

A resolution applicant may propose the release of allotment previously made to the homebuyers in lieu of a of return of a specified percentage of the original investment of the homebuyers in their respective allotted flats, that is, the homebuyers may be required to take a haircut on their original investment akin to other financial creditors. This process of extinguishing the possession rights of the homebuyers, if approved by the homebuyers and permitted by the Adjudicating Authority, shall free up the assets of the CD for the successful resolution applicant, and enable it to generate cash flows into the company by reselling such flats, thereby paving way for the resolution of CD through the IBC route.

2. Phase-wise Delivery of Flats

A prospective resolution applicant may structure a resolution plan which proposes delivery of flats in priority to those homebuyers that are willing to make additional payments in consideration of receiving the possession, and the homebuyers who are not willing to make such additional payments shall receive the possession only once the priority delivery is completed. However, any such proposal by a resolution applicant shall be contingent upon the status of construction of the concerned project, as the resolution applicant shall have to assess the viability of delivering any flat on a priority basis.

3. Reserving the Right to Perform Operation & Maintenance

A prospective resolution applicant may explore the possibility of monetising the operation and maintenance aspect of the projects that it is taking over. It may provide in its resolution plan that post the construction and delivery of the flats, the operation and maintenance of such project shall be contracted to only such resolution applicant at the agreed price, rather than

any other third party. Therefore, while there may not exist any further development potential in the project itself, a resolution applicant may determine the viability of its return on equity by virtue of post-construction maintenance activities.

The above proposals are merely illustrative in nature, and if implemented by prospective resolution applicants, they shall provide them with arbitrage opportunity in such projects which in itself does not have any development potential as such. It is pertinent to note, however, that any such approach by a resolution applicant shall be case specific and therefore, any kind of real comfort can be given to the homebuyers only when there exists a legislative scheme for all such stranded real estate projects with no development potential.

Consequently, the viability of the resolution of real estate companies through IBC is an issue that requires significant consideration on part of all stakeholders, including the legislature, executive and the judiciary.

PRE-PACKS IN INDIA: ADDRESSING THE CHALLENGES WITH THE CURRENT FRAMEWORK AND LEARNINGS FROM OTHER JURISDICTIONS

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In collaboration with The Asian Business Law Institute ("ABLI")- A Singapore based Think Tank

Introduction

It has been astutely observed that pre-packs "*inhabit a space on the spectrum somewhere between a pure contractual workout and a formal insolvency or rehabilitation proceeding*".[193] The interstitial nature of a pre-pack makes it a useful bridge across what many debtors may view to be a daunting chasm between life as a solvent company, and life as an insolvent company. A pre-pack enables a debtor to have a degree of control and normalcy while it works towards negotiating a restructuring or resolution proposal with its creditors in the pre-filing phase. It avoids some of the negative connotations and adverse publicity of entering a full-blown insolvency or restructuring proceeding and alleviates the debtor's fears of relinquishing agency over its fate.

Pre-packs can encourage debtors not to stick their heads in the sand and to take active steps to preserve or enhance the value of a business as a going concern. This in turn benefits the creditors by enhancing their recoveries and having greater predictability over the restructuring outcome.

However, the very features that make pre-packs attractive during the pre-filing phase (*ie*, the inherent informality, privacy, and lack of intervention by the court or insolvency officeholder) naturally give discomfort to creditors who may place greater emphasis on accountability, transparency, close supervision and strict controls on the debtor.

For a pre-pack regime to be effective, debtors and creditors alike must see that the regime works for them. In this regard, it is crucial for there to be a framework in place – whether by legislation or informal guidelines or codes of conduct – that governs how a pre-pack process

[193] Sumant Batra, "Making India a Developed Country in 25 Years: Importance of Robust Insolvency Ecosystem & Efficient Contract Enforcement", The Insolvency and Bankruptcy Board of India's 2022 report IBC: Idea, Impressions and Implementation.

should be conducted while engaging in pre-filing information sharing and plan negotiations. Because there is no court or insolvency officeholder to regulate compliance with such a framework, the rules must be designed to promote mutual cooperation and self-regulation, that is to say, they should reflect a *quid pro quo* that benefits both debtors and creditors.

This article will focus on India's specialised pre-pack regime for micro, small and medium enterprises ("**MSMEs**"), exploring some criticisms that have been raised of the system, and suggesting some learning points that may be drawn from other jurisdictions.

India's Pre-Pack Regime for MSMEs

MSMEs are critical to India's economy, contributing significantly to India's GDP and providing employment to a sizeable population. In 2021, to address the economic and financial disruption wreaked by the COVID-19 pandemic, India introduced a pre-pack regime for MSMEs through the passage of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 to amend the Insolvency and Bankruptcy Code, 2016, and the promulgation of the Insolvency and Bankruptcy Board of India (Pre-Packaged Insolvency Resolution Process) Rules, 2021 and the Insolvency and Bankruptcy Board of India (Pre-Packaged Insolvency Resolution Process) Regulations, 2021.

At the outset, to clarify the terminology used in this article, in the Indian context a "pre-pack" typically refers to the particular voluntary and consensual insolvency procedure by which a financially-distressed corporate debtor enters into a prior agreement for the sale of all or part of its business or assets to a buyer. This takes place through direct negotiations between the buyer and the seller, rather than through a public bidding process. Once the pre-pack is approved by the relevant authority, the resolution professional who is appointed to manage the affairs of the debtor can simply go ahead to effect such a sale. The idea is that with the benefit of the pre-agreement, debt recovery can take place at a much faster pace than a regular insolvency resolution process, and in so doing preserve value and ensure business continuity. In this manner, the Indian pre-pack regime is more akin to the United Kingdom's pre-pack administration, as opposed to, for instance, the Chapter 11 concept of a pre-pack (which, save for that under Section 363 of the Bankruptcy Code, does not necessarily involve a sale of the debtor's business or assets).

The Indian pre-pack regime (referred to as "**PIRP**" or "**PPIRP**" in some writings) is intended to be the efficient alternative to the corporate insolvency resolution process ("**CIRP**") for the MSME sector, by setting up a process which allows for quicker, cost-effective and value-maximising outcomes for stakeholders, in a manner which is least disruptive to business

continuity and preserves jobs.[194] Its quasi-formal nature also calls for fewer court filings and reduced usage of court resources (as compared to CIRP), which serves the purpose of reducing the administrative burden on the Indian courts.

As described in the 32nd Report of the Standing Committee on Finance, "*The IBC (Amendment) Ordinance, 2021 w.e.f. 4.04.2021 was amended to provide a pre-packaged resolution process framework that aims at causing minimal disruption to MSME debtors' business activities to ensure job preservation, by combining the efficiency, speed, cost, effectiveness and flexibility of workouts outside the courts with the binding effect and structure of formal insolvency proceedings.*"[195]

The pre-pack process – simplified as compared to CIRP – is considered to be appropriate for MSMEs, given their relatively simpler corporate structures and debt profiles. It also fills the gap existing under the old regime, as MSMEs were often not able to meet the triggering default threshold of INR 1 crore (INR *1*0,000,000) required to enter into CIRP.[196]

The Indian pre-pack regime for MSMEs has been described as a "debtor in possession, creditor in control" hybrid model, which represents a shift for India's traditionally creditor-driven insolvency landscape. An overview of the process is set out below.

Threshold Requirements

a) The corporate debtor: (i) must qualify as an MSME;[197] (ii) must have defaulted on its debts and obligations of at least INR 10 lakhs (INR 1,000,000); and (iii) must be eligible to file a resolution plan under Section 29A of the Insolvency and Bankruptcy Code, 2016.[198]
b) If the corporate debtor has undergone or completed a pre-pack or CIRP in the previous three years, or is currently undergoing a CIRP at the time of filing for a pre-pack, or has had a liquidation order issued against it, it is precluded from filing for a pre-pack.[199]

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[194] Insolvency and Bankruptcy Board of India, Pre-Packaged Insolvency Process, Information Brochure (last updated 30 June 2021).
[195] 32nd Report of Standing Committee on Finance (2020-2021) (Seventeenth Lok Sabha) Ministry of Corporate Affairs: Implementation of Insolvency and Bankruptcy Code – Pitfalls and Solutions (August 2021).
[196] See, *eg*, Catherine Shen, "Pre-Packaged Insolvency – Doing It the Indian Way" Asian Business Law Institute (26 July 2021).
[197] Within the meaning of Section 7(1) of the Micro, Small and Medium Enterprises Development Act, 2006. See Section 54A(1) of the Insolvency and Bankruptcy Code, 2016.
[198] Insolvency and Bankruptcy Code, 2016 s 54A(2)(d).
[199] Insolvency and Bankruptcy Code, 2016 s 54A(2).

c) Only the corporate debtor itself can file an application for the initiation of the pre-pack process.

Pre-Filing / Initiation of the Process

a) At the pre-filing stage, the process is entirely informal and takes place out of court, giving the corporate debtor adequate flexibility to discuss and negotiate with its creditors.
b) The corporate debtor must convene a meeting of its unrelated financial creditors to, among other things, obtain the approval of such creditors (representing not less than 66% in value of debt) to commence the pre-pack process,[200] and agree on the appointment of an insolvency professional to act as the pre-pack process resolution professional ("**RP**").
c) The debtor must obtain the necessary internal approvals for the commencement of the pre-pack process, which include the passage of a special resolution.[201] A majority of the directors must also make a declaration stating, among other things, that the debtor shall file an application for initiation of the pre-pack process within a definite time period not exceeding 90 days; that the process is not being initiated to defraud any person; and the name of the insolvency professional approved by the creditors to be appointed as the RP.[202]
d) At this stage, the debtor must also prepare among other things a base resolution plan,[203] which is essentially the debtor's proposed plan to resolve its financial distress. This base resolution plan will be enclosed alongside other documents with the notice for convening the meeting(s) seeking approval for the filing of an application to initiate the pre-pack process. In this manner, the base resolution plan is socialised early with the debtor's financial creditors.
e) Only after all the necessary creditor, shareholder and other internal approvals are obtained does the debtor file an application to the National Company Law Tribunal ("**NCLT**").[204] The NCLT will decide upon the application within 14 days.

The Process

[200] Insolvency and Bankruptcy Code, 2016 s 54A(2)(e) and (3). If the corporate debtor has no financial debt or where all financial creditors are related parties, it shall convene meetings of unrelated operational creditors, who shall perform the same functions and duties as the unrelated financial creditors.
[201] Or a resolution passed by at least three-fourths of the total number of partners of the corporate debtor. See Section 54A(2)(g) of the Insolvency and Bankruptcy Code, 2016.
[202] Insolvency and Bankruptcy Code, 2016 s 54A(2)(f).
[203] The requirements for such a base resolution plan are set out in Section 54K of the Insolvency and Bankruptcy Code, 2016.
[204] The requirements for such application are set out in Section 54C of the Insolvency and Bankruptcy Code, 2016.

a) If the NCLT admits the debtor's application, the NCLT will declare a moratorium; appoint the RP to oversee the pre-pack process; and require the RP to make a public announcement of the initiation of the pre-pack process.[205] The date on which the NCLT admits the debtor's application is the commencement date.[206]

b) From this point onwards, the process runs on a 120-day timeframe.[207] As will be explained below, the RP must submit a creditor-approved resolution plan to the NCLT within 90 days,[208] and the NCLT will take a further 30 days to decide whether such plan is satisfactory.

c) Upon appointment, the RP gains access to the debtor's financial and corporate information, and may attend meetings of members, directors or partners as the case may be, among other powers.[209]

   (i) Notwithstanding the appointment of the RP, the management of the debtor continues to vest in the directors (or partners), who are required to "*make every endeavour to protect and preserve the value of the property of the corporate debtor, and manage its operations as a going concern*".[210] This is subject to the Committee of Creditors ("**COC**"), comprising of the debtor's financial creditors, resolving to vest the control and management of the debtor with the RP instead.[211] If such a resolution is passed (by 66% vote), the RP must apply to the NCLT for the same. If the NCLT considers that the affairs of the corporate debtor have been conducted in a fraudulent manner, or been grossly mismanaged, the NCLT may then make an order vesting the management of the debtor in the RP.[212]

d) Within two days of commencement, the debtor must submit to the RP the list of creditors' claims and a preliminary information memorandum (containing information relevant for formulating a resolution plan).[213] By the same deadline, the debtor must also submit the base resolution plan to the RP, which shall present it to the COC.[214] The COC may allow the debtor to revise the base resolution plan.[215]

e) Within seven days of commencement, the RP must constitute and convene the COC.[216] The COC's approval (by a vote of not less than 66%) is required for various types of transactions, such as raising interim finance over certain thresholds as defined by the

[205] Insolvency and Bankruptcy Code, 2016 s 54E(1).
[206] Insolvency and Bankruptcy Code, 2016 s 54C(5).
[207] Insolvency and Bankruptcy Code, 2016 s 54D(1).
[208] Insolvency and Bankruptcy Code, 2016 s 54D(2).
[209] Insolvency and Bankruptcy Code, 2016 s 54F(3).
[210] Insolvency and Bankruptcy Code, 2016 s 54H(a) and (b).
[211] Insolvency and Bankruptcy Code, 2016 s 54J(1).
[212] Insolvency and Bankruptcy Code, 2016 s 54J(2).
[213] Insolvency and Bankruptcy Code, 2016 s 54G(1).
[214] Insolvency and Bankruptcy Code, 2016 s 54K(1).
[215] Insolvency and Bankruptcy Code, 2016 s 54K(2).
[216] Insolvency and Bankruptcy Code, 2016 s 54I(1).

COC; granting of security interests over the debtor's assets; and entering into related-party transactions.[217] The COC also retains the right to initiate CIRP against the debtor at any point in time even while it is undergoing the pre-pack process.[218]

f) The RP must also, among other things, confirm the list of claims submitted by the debtor; inform the creditors about these claims; maintain a list of updated claims; monitor the affairs of the debtor; inform the COC of any breaches of any obligations by the board or debtor of the relevant legislative provisions; prepare an updated information memorandum; and file applications for avoidance of transactions and fraudulent or wrongful trading.[219]

g) As mentioned above, the ultimate aim is for the RP to submit a resolution plan, approved by the COC by a vote of not less than 66%, to the NCLT within 90 days of the debtor's entry into the pre-pack process.[220]

   i. This could be the base resolution plan as presented by the corporate debtor to the financial creditors at the pre-commencement stage, or as subsequently revised by the debtor if so permitted by the COC.

   ii. If the resolution plan does not impair any claims owed by the debtor to its operational creditors, the COC may approve such a plan for submission to the NCLT.[221]

   iii. However, if the resolution plan is not approved by the COC or the resolution plan involves any impairment to operational creditors,[222] the RP must invite the submission of alternative resolution plans from prospective resolution applicants to compete with the base resolution plan.[223]

   iv. The COC will review these competing alternative resolution plans against evaluation criteria and select one plan,[224] which it may then approve for submission to the NCLT if it is "*significantly better*" than the base resolution plan.[225]

   v. If the selected resolution plan is not "*significantly better*" than the base resolution plan, the resolution applicant (whose alternative resolution plan is chosen) and the corporate

[217] Insolvency and Bankruptcy Code, 2016 s 28.
[218] Insolvency and Bankruptcy Code, 2016 s 54O.
[219] Insolvency and Bankruptcy Code, 2016 s 54F(2).
[220] Insolvency and Bankruptcy Code, 2016 ss 54D(2), 54K(13) and 54K(15).
[221] Insolvency and Bankruptcy Code, 2016 s 54K(4).
[222] Claims are considered to be impaired "*where the resolution plan does not provide for the full payment of the confirmed claims as per the updated list of claims maintained by the [RP]*": see Explanation II to Section 54K of the Insolvency and Bankruptcy Code, 2016.
[223] Insolvency and Bankruptcy Code, 2016 s 54K(5).
[224] Insolvency and Bankruptcy Code, 2016 s 54K(9).
[225] Insolvency and Bankruptcy Code, 2016 s 54K(10) and (12).

debtor (who submitted the base resolution plan) will enter into a competitive "Swiss challenge" process by upgrading their respective proposals.[226] The COC will assign a score to each successive iteration based on the evaluation criteria and the procedure will repeat until one of the parties outscores the other within the prescribed time limit of 48 hours. The winning plan will then be reviewed by the COC for final approval before submission to the NCLT.

h) If no resolution plan is approved by the COC within these 90 days, the RP must file for termination of the pre-pack process.[227]

Exiting the Process

a) The NCLT will decide on whether the resolution plan submitted to it is satisfactory within 30 days.[228] If so, the NCLT will pass an order to approve the same and the pre-pack process terminates with a resolution. The approved resolution plan will henceforth be binding on all creditors, and will whitewash all past defaults and liabilities. If not, the NCLT will pass an order rejecting the resolution plan,[229] and the pre-pack process is terminated without a resolution.[230]
b) Hence, the entire pre-pack process (whether successful or not) is envisaged to take a total of 120 days.

What the Current Framework Does Well

A pre-pack regime for India's MSME sector is sorely needed, and India's current pre-pack framework is a welcome development. We highlight three points.

First, once the debtor has filed its application to the NCLT and the formal portion of the pre-pack process is commenced, the regime imposes a strict timeframe of 120 days. The time pressure encourages the corporate debtor and the RP to work quickly and collaboratively to move through the formal portion of the pre-pack process, maintaining the momentum from the informal pre-filing stage. Unlike other insolvency regimes where a corporate debtor may be mired in the formal insolvency process for years on end due to repeated extensions of time, all the while incurring further additional costs, it appears that the Indian pre-pack regime side-steps this issue by simply providing that if the necessary steps cannot be completed

[226] Insolvency and Bankruptcy Code, 2016 s 54K(11).
[227] Insolvency and Bankruptcy Code, 2016 s 54K(12).
[228] Insolvency and Bankruptcy Code, 2016 s 54L(1).
[229] Insolvency and Bankruptcy Code, 2016 s 54L(3).
[230] Insolvency and Bankruptcy Code, 2016 s 54N(1).

within the designated timeframe, the pre-pack process comes to an end. Notably, there is no legislated procedure to obtain an extension of time.

Secondly, the amount of court involvement in the Indian pre-pack process aims to strike a healthy balance between autonomy and flexibility for the corporate debtor and protection for creditors. As can be seen from the pre-pack process outlined above, involvement of the NCLT is only envisaged at two points: first, when the debtor files an application to commence the pre-pack process (by which point the debtor would have already engaged in informal out-of-court discussions with its financial creditors); and second, when the RP submits the approved resolution plan (by which point the debtor is ready to exit the pre-pack process). The limited court involvement is intended to ensure that the court does not become the bottleneck in the system, but yet ensures that at the end of the day, the approved resolution plan is given the NCLT's blessing as a safeguard from subsequent challenge.

While there may be limited court involvement, there is a concerted effort to ensure that there is no compromise on protection for the creditors – in particular, the operational creditors who are not part of the COC, and who may not have been engaged in the pre-filing stage. For one, the RP is not permitted to submit the base resolution plan to the COC for approval if such plan involves the impairment of the operational creditors' claims. Additionally, at the second stage of court intervention (*ie*, the approval of the resolution plan), the NCLT ensures that a three-fold criteria list is met: (i) that the RP is duly approved by the COC; (ii) that the submitted resolution plan meets the requirements of a resolution plan under Section 30(2) of the Insolvency and Bankruptcy Code, 2016; and (iii) that the resolution plan has provisions for its effective implementation. The interests of operational creditors will be considered in the course of examining these requirements.

Thirdly, the "debtor in possession, creditor in control" hybrid approach blends advantageous aspects of both systems. Since the existing management is kept in place, their expertise and know-how can be relied on to protect and preserve the value of the property of the debtor. This facilitates business continuity and cost-efficiency even while the insolvency process is ongoing, ultimately maximising the value to be returned to stakeholders. This rationale is also particularly apt for MSMEs, which by their nature may tend to have more informal tie-ups and rely more heavily on the promoter's personal connections.[231] This is in contrast to an insolvency process where the existing management is displaced by an insolvency professional who may lack the specific expertise, experience or connections in the debtor's industry, and who may inadvertently manage the affairs of the debtor in a sub-optimal manner.

[231] See, for *eg*, Abishek Sinha, "Pre-package Insolvency: A Maiden Chapter Towards the Rescue of MSMEs", Indian Legal Solution (7 October 2021).

Concurrent with the debtor remaining in possession, the creditors have significant control. As mentioned above, the appointed RP would have been chosen by the financial creditors prior to the commencement of the pre-pack process, and after his appointment reports to the COC including updating the COC if the debtor or its management has breached any provisions of the Insolvency and Bankruptcy Code, 2016 and its related rules and regulations. The COC's approval (by 66% of voting share) is also required for the types of transactions listed in Section 28 of the Insolvency and Bankruptcy Code, 2016. Most importantly, the COC's approval is required for the submission of the resolution plan (which could be the base resolution plan put forward by the corporate debtor) to the NCLT.

Potential Areas of Improvement

Despite the plus points of the current pre-pack framework as set out above, the take-up rate of this process has been relatively low. As of December 2022,[232] there appears to have been only four applications for pre-packs since the commencement of the framework in April 2021. This suggests there could be significant issues with the implementation of the pre-pack process on the ground. In this regard, feedback from the Indian community suggests that some of the issues with the pre-pack regime for MSMEs may in fact be borne out of the aspects identified above.

First, some commentaries take the view that the pre-pack regime is still too complex for MSMEs to handle, as it still largely mirrors the formal insolvency process in the CIRP. This is exacerbated by the ambitious 120-day timeframe within which numerous matters need to be achieved. Within the first 90 days, the RP needs to – among other things – confirm the list of claims provided to it by the corporate debtor, constitute the COC, obtain COC approval for the resolution plan (and possibly conduct the competitive process with alternative resolution plans), and file applications for avoidance transactions. All of the above may be complicated by the fact that MSMEs generally tend to have fairly poor record-keeping, which could drag out the timelines. If the 90-day timeline is not met, the pre-pack process terminates and the debtor simply goes back into CIRP (and possibly liquidation if that CIRP fails), which defeats the point of introducing the pre-pack process in the first place: achieving a swift and cost-effective resolution. To address this concern, suggestions have been mooted to either amend the legislation to provide for a more reasonable and achievable timeframe,[233] or to enact a formal procedure to allow for extension(s) of time to be sought for the completion of the pre-

[232] Jagadish Shettigar and Pooja Misra, "Why only 2 firms chose pre-pack insolvency resolution in a year", livemint.com (19 September 2022).
[233] See, for *eg*, Abishek Sinha, "Pre-package Insolvency: A Maiden Chapter Towards the Rescue of MSMEs?" Indian Legal Solution (7 October 2021).

pack process.[234] Ultimately, in order to meet the tight timelines, corporate debtors must be prepared to do all the necessary groundwork in the informal pre-filing stage.

Secondly, some commentaries take the view that the "debtor in possession" aspect of the Indian pre-pack regime for MSMEs is fundamentally inconsistent with well-established principles of insolvency jurisprudence in India. Essentially, the criticism is that it places the same set of promoters – who were responsible for causing the debtor to become insolvent in the first place – back at the helm of the debtor.[235] This stands in stark contrast with the fact that such promoters would not have been permitted, under Section 29A of the Insolvency and Bankruptcy Code, 2016, to submit a resolution plan. There is a fear that placing such promoters in charge of the debtor (rather than a neutral insolvency professional) creates an opportunity for asset stripping, and deprives creditors of the chance to utilise the "golden hours" for effective intervention.[236] Arguably, it is wrong to assume that the debtor's inability to pay its debts is necessarily attributable to the promoter. If the debtor's descent into insolvency was simply a function of external factors such as sluggish growth in a particular economic sector, then there is nothing objectionable about the notion of having the existing management remain in place. In any event, the concern of continued mismanagement by the promoters is largely mitigated by the COC's ability to resolve for management of the debtor to be vested in the COC, under Section 54J of the Insolvency and Bankruptcy Code, 2016. This empowers the creditors with an effective check against potential abuse by the corporate debtor.

Commentaries also point out that the "debtor in possession" aspect of the pre-pack regime makes it difficult for the RP to juggle and discharge his many statutory responsibilities. Since management over the debtor does not automatically transfer to the RP upon commencement of the pre-pack process, the RP has to rely heavily on effective communication and cooperation with the existing management of the debtor in order to discharge his duties (which could be difficult if the promoters are uncooperative or not aligned). These difficulties are all the more exacerbated by the tight 120-day timeframe as mentioned above.[237]

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[234] See, for *eg*, Ashwin Sasikumar and Ananya Shukla, "Critical Analysis of the Pre-Packaged Insolvency Framework in India", The Corporate Law Blog (11 January 2022).

[235] See, for *eg*, Pranav Karwa and Gaura Karwa, "A Critique of 'Debtor in Possession Model' Under Pre-Pack Insolvency in India", The CBCL Blog (6 June 2021); Krrishan Singhania *et al*, "Indian Insolvency Law and Pre-Pack Insolvency Process: An Analysis: Part 1" IndiaCorpLaw (21 October 2021); Shivam Bhattacharya and Naman Jain, "Pre-Packaged Insolvency for MSMEs in India: A Shot in the Arm?" Indian Review of Corporate and Commercial Laws (1 June 2022).

[236] See, for *eg*, Vinson Kurian, "Pre pack resolution process has some serious pitfalls", Hindu Business Line (11 May 2021).

[237] See, for *eg*, Pranav Karwa and Gaura Karwa, "A Critique of 'Debtor in Possession Model' Under Pre-Pack Insolvency in India", The CBCL Blog (6 June 2021).

Interestingly, at the other end of the spectrum, other commentaries suggest that the "debtor in possession" aspect of the pre-pack regime does not go far enough. This is because the creditors through the COC ultimately retain control over many key transactions that the debtor may enter into, decide on the approval of the resolution plan, and even retain the right to initiate CIRP at any point in time even while the pre-pack process is ongoing.[238] The criticism is therefore that the pre-pack regime still remains, at its heart, a "creditor in control" model notwithstanding the "debtor in possession" label.

Thirdly, some criticise the lack of transparency in the pre-pack process, particularly where the operational creditors are concerned. These creditors are not required to be consulted in the pre-filing stage, and even when the pre-pack process starts, they are not invited to form a part of the COC. Since the operational creditors are shut out from discussions and decision-making, this may generate fears that they are being treated unfairly,[239] and ultimately cause a schism between the operational and financial creditors.[240] However, since the RP is not permitted to submit a resolution plan that impairs the operational creditors' claims without calling for the submission of alternative resolution plans (and possibly entering into the competitive process), and the NCLT is required to be satisfied that the approved resolution plan meets all requirements in Section 30(2) of the Insolvency and Bankruptcy Code, 2016 (including the requirement in Section 30(2)(b) that a resolution plan must provide for operational creditors to receive the amount they would have received in the event of a liquidation or the amount they would have received if the money distributed under the plan were distributed as per the hierarchy of the liquidation waterfall in Section 53(1), whichever is the higher), it is arguable that these fears of unfair treatment of operational creditors are somewhat overblown. That being said, the general criticism on lack of transparency is valid – as is the case for all pre-packs – and in the next section we will describe the approach taken in Singapore and Malaysia to facilitate transparent and open communication between the debtor and its creditors, and it is suggested that India may draw some helpful lessons from these jurisdictions' experience.

Fourthly, some commentaries have noted that despite the Indian pre-pack process partially taking place out-of-court, where there is a need to rely on the NCLT, it is at key stages – *ie*, to admit the application to commence the pre-pack process, and to approve the final resolution plan.[241] As such, the pre-pack regime does not go far enough to truly reduce the administrative burden placed on the NCLT and reduce bottlenecks in the process. The

[238] See, for *eg*, Ashwin Sasikumar and Ananya Shukla, "Critical Analysis of the Pre-Packaged Insolvency Framework in India", The Corporate Law Blog (11 January 2022).
[239] See, for *eg*, Ashwin Sasikumar and Ananya Shukla, "Critical Analysis of the Pre-Packaged Insolvency Framework in India", The Corporate Law Blog (11 January 2022).
[240] See, for *eg*, Vinson Kurian, "Pre pack resolution process has some serious pitfalls", Hindu Business Line (11 May 2021).
[241] See, for *eg*, Krrishan Singhania *et al*, "Indian Insolvency Law and Pre-Pack Insolvency Process: An Analysis: Part 1" IndiaCorpLaw (21 October 2021).

underlying lack of sufficient judicial infrastructure (referring to issues such as vacancies and the lack of expertise at the NCLT to address corporate insolvency), which was and continues to be an issue where the CIRP is concerned,[242] thus similarly afflicts the pre-pack regime. This issue, however, is a complex and systemic one, and ultimately may only be ameliorated through concerted long-term efforts to develop a deeper insolvency bench that is well-equipped to analyse resolution plans. In the meantime, it has been suggested that the Insolvency and Bankruptcy Board of India, being the sectoral regulator, could be empowered to provide approvals for the pre-pack process.[243] It has also been suggested that in view of the wide discretionary powers vested in the NCLT (including the power to re-open a pre-pack), the NCLT should be issued with guidance notes on how to exercise such powers.[244] This will build consistency and reinforce trust in the overall ecosystem.

Fifthly, the applicability of the current pre-pack regime is limited to MSMEs as defined in the Micro, Small and Medium Enterprises Development Act, 2006. As this excludes partnerships, sole proprietorships, Hindu undivided families and other unregistered business houses, the scope of the pre-pack regime unfortunately omits the vast majority of India's actual MSMEs. As such, some commentaries take the view that the legislative intent of providing relief to stressed and distressed MSMEs has not been met, and suggest that the scope of the pre-pack regime should be widened in order to bring the benefits of the pre-pack system to more other Corporates and LLPs.[245] In this connection, it is heartening to note that the Insolvency Law Sub-Committee, which was the committee responsible for developing the pre-pack framework for MSMEs, has indicated that they intend to extend the pre-pack regime to all other companies in due time.[246]

Sixthly, there is a lack of alignment between corporate insolvency and personal bankruptcy. In *Lalit Kumar Jain v Union of India & Ors*,[247] the Supreme Court of India laid down the

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[242] For instance, in the context of CIRP, the adjudicating authority is required to decide on applications within 14 days. However, empirical research shows that the average number of days taken for admission is in fact 133 days. See, "Policy Inputs on Report of Subcommittee on Prepacks", Dr Neeta Shikha and Urvashi Shahi, Centre for Insolvency & Bankruptcy, Indian Institute of Corporate Affairs. See also Akshaya Kamalnath and Aparajita Kaul, "Adding mediation to India's corporate resolution process" International Insolvency Review published by INSOL International and John Wiley & Sons Ltd (2022).

[243] See, for *eg*, Krrishan Singhania *et al*, "Indian Insolvency Law and Pre-Pack Insolvency Process: An Analysis: Part 1" IndiaCorpLaw (21 October 2021); ZBA, "Pre-Packaged Insolvency Resolution Process Framework – A Leap Forward" The Legal 500 (15 March 2021).

[244] See, *eg*, Catherine Shen, "Pre-Packaged Insolvency – Doing It the Indian Way" Asian Business Law Institute (26 July 2021).

[245] See, for *eg*, Abishek Sinha, "Pre-package Insolvency: A Maiden Chapter Towards the Rescue of MSMEs?" Indian Legal Solution (7 October 2021); Shivam Bhattacharya and Naman Jain, "Pre-Packaged Insolvency for MSMEs in India: A Shot in the Arm?" Indian Review of Corporate and Commercial Laws (1 June 2022).

[246] See The Art of the Pre-Pack Guide (Jacqueline Ingram and Ryan Cattle eds, 2nd Ed), "Chapter 8: India" Bahram Vakil *et al*.

[247] *Lalit Kumar Jain v Union of India & Ors* (2020) 10 SCC 703 (Transfer Petition (c) No. 1034 of 2020 with Nos. 1027, 1029-30, 1035-36 and 1146-48 of 2020).

proposition that the approval of a resolution plan does not by itself discharge a personal guarantor of a corporate debtor of his liabilities under the contract of guarantee. In other words, the release or discharge of a principal borrower from the debt owed to it by its creditor through an involuntary process (*eg*, by operation of law or due to liquidation or insolvency proceedings) does not absolve the guarantor of his liability, which is said to arise out of an independent contract. In the context of pre-packs for MSMEs, this means that even if a resolution plan is successfully approved by the NCLT and becomes binding on the debtor, members, creditors and other stakeholders, the liability of the personal guarantor *vis-à-vis* the particular creditor still technically exists. To that extent, the state of the law is dissatisfactory as arguably, a secondary liability should not persist when the underlying primary liability has been extinguished by way of a final and binding resolution plan (notwithstanding that this was an "involuntary" process). We note, however, that this is an issue underlying corporate insolvency in India generally and is not limited to the pre-pack regime, save that the problem is particularly jarring for MSMEs since their shareholders and managers often also act as guarantors for debts incurred by the MSMEs. So long as this inconsistency persists, honest but unfortunate shareholders and managers are not likely to find the insolvency system attractive, as they do not enjoy an effective discharge of debts under the personal insolvency regime.[248] The Indian pre-pack process thus may remain an unattractive option to corporate debtors.

Finally, there is a more general criticism of whether India's pre-pack regime really goes far enough as a whole. As highlighted at the very outset of this article, many of the advantages of pre-packs lie in the pre-filing stage, among which flexibility and confidentiality are key. The idea is that parties need only to approach the court when the restructuring or resolution proposal is already agreed upon by the majority of creditors, and when all that is left to do is to obtain the court's blessing. This is precisely why under the US's sophisticated and well-developed insolvency regime, a super-speed "one-day pre-pack" which completely minimises any negative press to the debtor is perfectly achievable.

In contrast, under India's current pre-pack regime, debtors are required to approach the NCLT for approval to enter into the formal pre-pack process, upon which a public announcement is required to be made. This neutralises any benefits of confidentiality that the pre-pack process is generally intended to bring. Moreover, any momentum that might have been gained in the pre-filing process through the socialisation of the base resolution plan with creditors may ultimately be upset if in the 120-day time frame that follows, alternative resolution plans are invited and the competitive process is triggered, meaning that the ultimate resolution plan submitted to the NCLT for approval might differ from the base resolution plan. It bears mentioning that the debtor's base resolution plan would have been presented to the financial creditors at the pre-filing stage, and it would have invariably been

[248] Aurelio Gurrea-Martinez, "Implementing an insolvency framework for micro and small firms" International Insolvency Review published by INSOL International and John Wiley & Sons Ltd (2021).

a factor taken into account by the creditors when deciding whether to approve the debtor's application to initiate the pre-pack process. In this manner, the subsequent opportunity for the base resolution plan to be "re-written" under the current Indian pre-pack regime arguably defeats the benefit of the certainty and predictability that a debtor which operates under a system where the only instance that court approval is required is at the end stage (when the majority of the creditors' support on a particular resolution or restructuring plan has already been obtained) would enjoy.

Learning Points from Other Jurisdictions

In addition to the specific areas of improvement raised in the previous section which relate directly to the legislative framework, India may also wish to draw specific learning points from other jurisdictions, in particular with regard to the "soft" aspect of creditor engagement, which is key to the informal pre-filing portion of the pre-pack process.

As alluded to at the outset of this article, much of the success and efficacy of a pre-pack process depends on the corporate debtor engaging in a transparent and open manner with its creditors. In this regard, informal standards, guidelines and principles can serve to guide the debtor's conduct and dealings with its creditors when attempting a pre-pack process. For example, the Associate of Banks in Singapore has promulgated a set of principles for facilitating out-of-court workouts through its Principles & Guidelines for Restructuring of Corporate Debt ("**ABS Guidelines**"). The ABS Guidelines provide a non-statutory framework which encourages various good practices to ensure an orderly and fair process while an out-of-court workout is being attempted. The ABS Guidelines encourage:

a) early provision of information by debtors which is complete, accurate and independently verified;
b) equal sharing of information;
c) implementation of a standstill to allow for the preparation and analysis of detailed information and accompanying discussions and negotiations;
d) active involvement of senior management;
e) appointment of a lead bank early in the restructuring process to manage and coordinate that process;
f) appointment of a steering committee to represent the lenders' interests; and
g) appointment of a special accountant or independent financial advisor whose role involves reviewing the debtor's financial controls and systems, assessing the debtor's projections and financial information and plan of action, and preparation of an estimated valuation of the debtor in liquidation and the expected dividend to each lender.

In a similar vein, in Malaysia, the Bank Negara Malaysia's Corporate Debt Restructuring Committee ("**CDRC**") has also issued a code of conduct which governs mediated out-of-court debt restructuring workouts under the auspices of the CDRC ("**CDRC Code of Conduct**"). While the CDRC Code of Conduct is not legally binding on the participants, any breach of or non-compliance with the code is regarded with serious concern by the CDRC. The CDRC Code of Conduct prescribes the following expectations of the CDRC relating to the conduct of a debt restructuring workout:

a) a set of Key Restructuring Principles to guide the participants' negotiations, which includes the principle that the existing priority and status of claims of the creditors shall be recognised and acknowledged under the debt restructuring scheme, the principle that any new monies provided by creditors to sustain the viability of the business shall be accorded senior ranking status to the existing debts of the debtor, and the principle that, where appropriate, there should be consolidation of the operating accounts of the debtor with the aim of providing transparency to its creditors of its actual cash flows;
b) the establishment of a creditors committee comprising representatives from all or substantially all classes of creditors, to be actively involved in the evaluation, negotiation and finalisation of the proposed restructuring scheme;
c) the issuance of a responsibility statement duly executed by a director of the debtor accompanying the proposed scheme; and
d) the observance of a standstill period for the negotiation of the restructuring scheme and the completion of legal documentation and operationalisation of the scheme, during which the debtor is obliged to manage and conduct its business in the ordinary and usual course and not to take certain actions without the prior approval of the creditors participating in the CDRC process, such as creating new security interests, disposing of material assets, incurring expenses outside the ordinary course of business and creating any preferences to any of its creditors.

Although the ABS Guidelines and the CDRC Code of Conduct relate to out-of-court workouts and not pre-packs, the same principles, practices and guidelines can be similarly applied in both situations since they both relate to informal processes conducted outside the aegis of the court. In an out-of-court process, negotiating parties would not be able to turn to a judicial body to seek directions and orders to facilitate the restructuring process (such as information disclosure, controls on payments and disposals by the debtor, or a moratorium on enforcement action). The parties in an out-of-court workout or the pre-filing phase of a pre-pack restructuring would instead have to rely on commercial bargaining and mutual cooperation to work towards a restructuring plan. Informal guidelines can serve to provide debtors and creditors a set of baseline standards or benchmarks for conducting a fair, orderly and transparent out-of-court restructuring process.

The adoption of such codes of conduct or guidelines benefits both the debtor and its creditors alike, and it is suggested that the relevant stakeholders in India should seriously consider developing and promulgating such a code or guideline.

From the creditors' perspective, the implementation of safeguards and controls gives the creditors comfort that their interests will not be adversely affected during the pre-pack negotiations. From the debtor's perspective, the setting of standards and guidelines gives it greater clarity on what it needs to do in order to gain the trust of its creditors, and the implementation of a standstill period allows it to focus on preserving continuity of its business operations and developing a viable restructuring plan. The establishment of creditor committees during the pre-filing phase also helps both the debtor and its creditors as it streamlines communications between the parties and enhances coordination among creditors, thereby reducing the risk of the debtor being pulled in different directions by creditors with opposing views of how the business or the restructuring should be conducted.

There is a further point to be made regarding the benefits from the debtor's perspective, in particular in relation to information disclosure. In certain jurisdictions, the court or adjudicating authority that decides whether to approve a pre-pack must consider whether the debtor has disclosed all necessary information that creditors require in order to make an informed decision. For example, under Singapore's pre-pack regime (implemented through a scheme of arrangement), the debtor must provide the creditors intended to be bound by the pre-pack with a statement setting out information on the debtor's property and financial prospects, how the proposed scheme (pre-pack) will affect their rights, and other such information as is necessary to enable them to make an informed decision on whether to approve the scheme.[249] If such disclosure is not done, this constitutes a ground for dismissing an application for approval of the pre-pack.

This is well-illustrated in a recent decision of the Singapore Court, *Re DSG Asia Holdings Pte Ltd*,[250] where the debtor's application for the sanction of a pre-pack scheme was dismissed precisely on the basis of inadequate information disclosure. There, the scheme company had – prior to seeking the sanction of the scheme – assigned a certain related-party debt to a third-party potential investor (the "**Investor**"). In the debtor's application for sanction, an objecting creditor argued that because the purchase price that the Investor paid for the debt assignment had not been disclosed prior to the vote solicitation, the voting process was not a fully informed one.

[249] Insolvency, Restructuring and Dissolution Act 2018 s 71(3)(a).
[250] [2022] 3 SLR 1250.

The Court agreed with the objecting creditor, holding that the purchase price at which the Investor acquired the related creditors' rights and became a creditor was information necessary to enable each creditor to make an informed decision whether to agree to the scheme. It was reasonable for any of the creditors to consider whether the treatment of the Investor under the scheme would, in light of the purchase price that the Investor had paid, be fair in comparison to the treatment of that creditor. However, since the debtor failed to disclose the purchase price, the other unsecured creditors could not assess whether the scheme treated them fairly in comparison to the Investor. The debtor's inadequate disclosure alone provided sufficient reason to dismiss the application for sanction, although separately the Court also held that the necessary voting requirements were not fulfilled with the Investor's placement in a single voting class (of unsecured creditors).

The *DSG* case goes to show that transparency, accountability and the appropriate level of information disclosure are key in a pre-pack process. Insofar as codes of conduct and guidelines can provide practical guidance on what sort of information should be disclosed, it can help smoothen the path for debtors so that they are not tripped up at the final stage when they are seeking court approval.

In addition, codes of conduct and guidelines can serve to provide a "roadmap" for the key steps that are required to be undertaken by the negotiating parties in order to develop a robust, holistic and workable restructuring plan. The implementation of a standstill between the debtor and financial creditors, for example, is often a crucial first step in order to maintain the stability of the debtor's core business operations and functions. The standstill is not just a measure which protects the debtor from actions from its creditors, but also serves to protect the creditors against individualistic and self-interested actions from other creditors. One common example is where a creditor with a relatively small debt position pressures the debtor to repay it in full ahead of other creditors with the threat of commencing formal court proceedings if the debtor fails to do so. The standstill agreement can also be used as a platform for creditors to set their expectations for the debtor in terms of the milestones for the restructuring, the necessary financial controls (such as restrictions on substantial payments or disposal of assets) to be put in place and the key commercial expectations for the eventual restructuring plan.

Thereafter, with a standstill in place, the parties can then focus on carrying out the due diligence necessary to understand and evaluate the debtor's financial and operational position, and its future prospects and viability as a going concern. Guidelines can serve to instruct the debtor on the expected information it should disclose to its creditors and to provide the assurance of adequate confidentiality safeguards to protect trade sensitive information. The frank and open sharing of information (including information that may reflect negative prospects of the debtor's future) enables parties to reach a common and realistic understanding of the scale of the problem, which lends to more fruitful and reasoned

restructuring negotiations as the parties' expectations can be calibrated to the realities of the situation. In an out-of-court process, with confidentiality protections in place, the debtor might even be willing to disclose a greater extent of information than it might have to disclose in a court proceeding (since the latter usually entails disclosure in the public domain). With meaningful and substantive information disclosure, the debtor and creditors (and their respective advisers) can have a better understanding of the key pieces of information that will guide the development of a restructuring plan, such as the debt and asset position of the debtor, the cash flow position and near/medium-term projections, the valuation of key assets, the rights and expected recoveries of different classes of creditors, and the viability of the business moving forward.

After establishing shared understanding of the debtor's position, the parties would then be in a better position to negotiate a restructuring plan in an informed manner. Again, guidelines can assist this process by establishing a common set of standards for what would be considered a fair and reasonable proposal. The Key Restructuring Principles in the CDRC Code of Conduct (mentioned above) provides an illustrative example of the building blocks that may be used to undergird a proposed restructuring plan and includes principles such as respecting the existing priorities of creditors, granting senior priority status to new monies, establishing a sustainable post-restructuring debt level, and compensating shortfalls to creditors by issuance of equity, equity hybrids or deferred instruments.

That being said, while inspiration can be drawn from the Key Restructuring Principles in the CDRC Code of Conduct, ultimately, if India chooses to develop its own codes of conduct or guidelines, the key restructuring principles that it chooses to enact should be tailored according to India's legal framework on corporate insolvency, and India's prevailing market standards and practice.

Ultimately, the hope is that with a robust legislative framework coupled with "soft" customs that will facilitate and enable pre-packs, India will continue to develop into a jurisdiction where it is possible for a debtor to undergo speedy resolution of its insolvency process. While the US's "one-day pre-pack" may be regarded as an unachievable gold standard for now, a relatively swift and speedy resolution is very much within the realm of possibility, and should be a goal to work towards to. In this regard, the pre-negotiated restructuring of Pacific International Lines ("**PIL**"), the world's 12th largest liner company and Southeast Asia's largest carrier, serves as a good example of how conducting a fair, orderly and transparent pre-filing process can enhance the outcome of a restructuring and preserve value for creditors.

Case Example of Pre-Negotiated Restructuring: Pacific International Lines

Although a pre-negotiated restructuring is conceptually distinct from a pre-pack restructuring in Singapore (in that a pre-negotiated restructuring is one where the key terms of the restructuring are negotiated with principal creditors before the filing of any court proceedings but votes are not actually solicited), there is a significant amount of overlap in the measures that can be utilised in both processes to guide parties towards an agreed restructuring plan.

PIL's US$3.3 billion debt restructuring, which took place in Singapore in 2021, involved a combination of a US$1.1 billion scheme of arrangement as well as an out-of-court restructuring of the company's remaining debts. While PIL could have followed the traditional restructuring route by commencing moratorium proceedings without a comprehensive restructuring proposal in place, a different approach had to be conceptualised in light of the experience faced by Hanjin Shipping which was declared bankrupt in 2017.

Prior to its collapse, Hanjin Shipping had been the world's 7th largest containership company. It began restructuring discussions with its creditors in April 2016. However, restructuring discussions subsequently hit a snag and resulted in the company's main lender withdrawing its support. A day after the withdrawal of support was announced, Hanjin Shipping filed proceedings in the Seoul Bankruptcy Court for the equivalent moratorium relief. However, instead of providing the company with the relief it needed, the court filing resulted in an immediate supply chain implosion which ultimately resulted in its demise as many of its vessels became stranded or were seized.

Drawing from the lessons of the Hanjin Shipping bankruptcy, PIL took early action and adopted a bold legal strategy by embarking on a pre-negotiated restructuring process with the assistance of legal advisors, an investment banker to advise on capital raising and an operational consultant to improve the company's cash flow and profitability.

Three key steps were crucial to the success of PIL's pre-negotiated restructuring. The first was a consensual standstill on enforcement action, which PIL only sought from its bank lenders. Given the highly competitive nature of the container shipping industry which demands service reliability, it was clear that PIL needed to continue its operations in order to preserve its business. However, with the increasing liquidity crunch, cash needed to be preserved and managed carefully. As such, a strategic decision was made to seek a consensual standstill and a principal and interest holiday from PIL's bank lenders whilst continuing repayments to PIL's trade suppliers and financial lessors who were situated in other jurisdictions. PIL was able to obtain the standstill on a consensual basis, thus obtaining breathing room to work on the restructuring terms and avoiding the industry backlash that

would have accompanied a court filing. In exchange for the consensual standstill, PIL provided the lenders with the same informational safeguards that they would have obtained from the Singapore courts if a formal application had been filed on a voluntary and consensual basis.

The second key step undertaken was the strategic establishment of an informal steering committee which would have the ability to build momentum towards obtaining the necessary consents to implement the restructuring. This was done to facilitate restructuring negotiations and to ensure that the restructuring would have the support of a critical group of creditors. In particular, it was considered that as it would not be feasible to include a large number of unsecured creditors in the informal steering committee, the informal steering committee would at least hold in aggregate the necessary quantum of debts required to implement the restructuring through a cross-class cram-down.

Finally, the lynch pin to the pre-negotiated restructuring was the US$112 million emergency credit facility which was extended to PIL by Heliconia Capital Management (the investor that subsequently acquired the majority stake in PIL) to facilitate continued operations while the restructuring plan was negotiated.

Realistically, PIL would only be able to obtain financing if the facility was backed by security. However, it did not have any unencumbered assets which it could use as security for the facility. Although Singapore's (then) new restructuring regime (drawing inspiration from US Chapter 11) allowed PIL to apply to court for an order that Heliconia be granted a priming lien over some of its assets in relation to the emergency financing, this would have magnified unwanted publicity and potentially caused delays which would increase the risk of business failure. In the circumstances, PIL sought to persuade secured financial lenders who had an equity cushion to support the emergency credit facility on the basis that PIL could seek a court order to the same effect.

Given the prospect of PIL being compelled to file for a moratorium to utilise those provisions, certain supportive lenders eventually agreed to enter into deeds of undertaking pursuant to which each of them would make payment of an agreed committed sum to Heliconia (which would in aggregate be equal to the new financing provided) in the event that the restructuring was not successful. This essentially gave Heliconia the certainty that it could recover the funding extended to PIL if the restructuring fell through, mirroring the protection it might have been able to obtain under a court order granting it super priority for rescue financing extended.

The series of key steps above stabilised the operations of PIL during the crucial restructuring negotiation phase, and preserved the value of the business as a going concern. During this period, PIL was able to obtain the support of a significant bloc of creditors for the intended restructuring scheme, placing it in a good position to commence court proceedings in order to seek leave to convene the scheme meetings and eventually obtain sanction of the scheme after the requisite approval thresholds were met.

All in all, the foresight and ability of PIL and its advisors to take meaningful steps months before formal court proceedings were even commenced meant that the actual court process for confirming the scheme could take place on an expedited timeline. The entirety of the court process concluded in slightly under four months – a duration almost unheard of in the context of large-scale Singapore restructurings.

Drawing from the PIL example where a complex US$3.3 billion restructuring concluded within just four months of entering into the formal court process, it appears eminently possible that the restructuring of an Indian MSME (with, presumably, a less complicated debt profile) can in principle take place within the statutorily-prescribed timeframe of 120 days. What is required is bold, swift and decisive action by the company and its advisors, creative use of the existing tools provided in the legislative framework as a carrot or a whip where necessary, and clear commitment on the part of the company to foster good communications and build trust with its creditors.

Conclusion

India's enactment of a pre-pack regime for MSMEs is indisputably a well-intentioned development which demonstrates keen sensitivities to the benefits of implementing restructuring through a pre-pack. To further reap the benefits of its pre-pack regime, it would be key for India to develop a more robust restructuring ecosystem, with the aim of growing the sophistication of both debtor and creditor communities, as well as that of the restructuring professionals community and the insolvency bench. Another suggested key development is the enactment of a framework that governs pre-filing information sharing and plan negotiations. With these "soft" aspects in place to supplement the formal statutory legislation, it is hoped that India's pre-pack regime for MSMEs will begin to see a renewed uptake, and form the basis for the introduction of pre-pack regimes for Indian corporations as a whole, in time to come.

LITIGATION FUNDING IN INSOLVENCY CASES

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Litigation Funding in Insolvency Cases

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We all know but too well that… that branch of justice, which is particularly dignified with the name of equity, is only for those who can afford to throw away one fortune for the chance of recovering another… So long as the expense of seeking relief at law stands on its present footing, the purpose of seeking that relief will… afford a sufficient ground for allowing any man, or every man, to borrow money on any terms on which he can obtain it.

Jeremy Bentham, "Defence of Usury – Letter XII" (1787)[252]

As for the Company's or creditors' interests, without the funding, the Company would not be able to pursue the Claims… success in the Claims would result in more assets for distribution to the Company's creditors. It is undeniable that litigation funding has an especially useful role to play in insolvency situations.

Chua Lee Ming J, Re Vanguard Energy Pte Ltd [2015] 4 SLR 597; [2015] SGHC 156[253]

Introduction

Entities in insolvency situations often find themselves in the frustrating situation of having a liquidity crunch or other cashflow issues caused by non-payment of receivables by debtors, at the same time being unable to pursue those same receivables precisely because of the lack of funds for legal and other professional costs.

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[252] Bentham, Jeremy. *Defence of Usury*. London: Payne and Foss, 1787.

[253] *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597; [2015] SGHC 156 at [46].

In Singapore, litigation funding is an increasingly popular option for entities in such circumstances. In brief, litigation funding is the provision by one entity (hereinafter the "funder") of funds to a party with a putative cause of action (hereinafter the "claimant"), so as to allow the claimant to prosecute such claim. In return, the funder generally receives a cut of the proceeds in the event of success.

The past decade has seen a range of statutory and judge-led reforms which have directly or indirectly expanded the availability of litigation funding in Singapore, or have otherwise expanded the capability of insolvent entities to prosecute causes of action notwithstanding shortages of funds. These reforms furthermore have general applicability to the insolvency sphere. This article will first consider seven significant new developments in this regard, before turning to provide a comparative assessment of the position in Singapore as it presently stands with developments in England, the United States and India. Finally, it will make certain observations about areas of Singapore law which may benefit from further rationalisation or clarification.

Developments In Singapore

The seven developments in Singapore law referred to above are:

a) Statutory expansion of the categories of proceedings in which third-party litigation funding arrangements are permitted;

b) Creation of a super-priority regime to facilitate the provision of rescue financing to insolvent companies, the proceeds of which can be deployed to fund recovery actions;

c) Judicial acceptance of assignments of causes of action and/or the proceeds of causes of action by entities in formal restructuring processes; and

d) Statutory creation of a new right of insolvency officeholders to assign the proceeds of causes of action arising in insolvency;

e) Judicial clarification of the ambit of the doctrines of maintenance and champerty, and therefore the permissible range of litigation funding arrangements;

f) Statutory expansion of the rights of creditors of companies to enter into funding arrangements in consideration of changes in their statutory distribution priorities in liquidation; and

g) Legalisation of conditional fee arrangements between solicitors and their clients, and the availability of such fee arrangements in corporate insolvency proceedings heard in the Singapore International Commercial Court (SICC).[254]

We discuss each in turn.

A. Statutory expansion of the categories of proceedings in which third-party litigation funding arrangements are permitted

The default position under Singapore law is and remains that agreements for litigation funding by third parties are contrary to public policy and unenforceable save where expressly permitted, a legacy of common law prohibitions on maintenance and champerty. In brief, maintenance is "*the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference*", whereas champerty is a subset of maintenance which occurs where funding is provided "*in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action*".[255] Maintenance and champerty were traditionally prohibited under English common law and from there received into Singapore law.[256] The normative basis for such prohibitions has traditionally been rationalised as a matter of public policy, namely, to preserve the purity of justice by preventing "*trafficking in litigation*".[257]

Over successive rounds of statutory reforms, however, the traditional prohibitions on litigation funding in Singapore have been progressively rolled back in respect of prescribed categories of proceedings. In particular, the Civil Law Act 1909 has seen multiple rounds of amendment to expressly permit litigation funding in respect of the following:

a) Since 1 March 2017 – international arbitration proceedings and all court or mediation proceedings connected to international arbitration;[258] and

[254] A specialist division of the General Division of the Singapore High Court with jurisdiction to hear disputes which are "*international and commercial in nature*": see sections 18A and 18D of the Supreme Court of Judicature Act 1969.
[255] *Lim Lie Hoa and another v Ong Jane Rebecca* [1997] 1 SLR(R) 775; [1997] SGCA 17 at [23].
[256] Application of English Law Act 1993 s 3.
[257] *Trendtex Trading Corpn v Credit Suisse* [1982] AC 679 at 694.
[258] Civil Law (Amendment) Act 2017 s 2 read with Civil Law (Third-Party Funding) Regulations 2017 reg 3 (version effective between 1 March 2017 and 27 June 2021).

b) Since 28 June 2021 – domestic arbitration proceedings and all court or mediation proceedings connected thereto, SICC proceedings and appeals or mediation proceedings arising from such proceedings.[259]

In addition, maintenance and champerty were also declared to no longer be civil torts as of the 1 March 2017 reforms.[260]

Prospective litigation funders must comply with certain restrictions throughout the relevant funding arrangements.[261] They must carry on the principal business of litigation funding[262] and have at least S$5 million either in paid-up share capital or assets under management.[263] Where a funder, having entered into a funding arrangement, then ceases to comply with the above requirements (or any such other additional requirements as may be required), the funding arrangement is no longer enforceable against it, subject to the funder's right to apply to the relevant court or arbitral tribunal for discretionary relief.[264]

As can be seen, the effect of these reforms has principally been to permit litigation funding arrangements for most types of alternative dispute resolution (ADR), such as arbitration and mediation. Such reform is particularly welcome as there has been a marked increase in the usage of such ADR procedures in Singapore over the last few years. In 2021, the Singapore International Arbitration Centre handled 469 new cases (its third-highest on record, trailing only 2019 and 2020) with sums in dispute totalling US$6.54 billion.[265] Mediation too has gone from strength to strength in Singapore, with mediation filings more than doubling between 2019 and 2021.[266] Accordingly, the practical impact of such reforms will be all the greater.

B. Creation of regime for super-priority arrangements to facilitate provision of rescue financing

[259] Civil Law (Third-Party Funding) (Amendment) Regulations 2021 reg 2.
[260] Civil Law (Amendment) Act 2017 s 2.
[261] Civil Law Act 1909 ss 5B(3) and (8).
[262] Civil Law (Third-Party Funding) Regulations 2017 reg 4(1)(a).
[263] Civil Law (Third-Party Funding) Regulations 2017 reg 4(1)(b).
[264] Civil Law Act 1909 s 5B(4)-(6).
[265] Singapore International Arbitration Centre, "Annual Report 2021" at pp 16-17, https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf (accessed 17 January 2023).
[266] Aditya AK, "Mediation filings have doubled since 2019: Singapore Law Minister K Shanmugam". *Bar and Bench* (29 September 2021).

The second development is the statutory creation of a regime for super-priority financing pursuant to which companies undergoing restructuring through a scheme of arrangement[267] or judicial management[268] may obtain rescue financing from existing creditors or third parties, pursuant to which the Court may grant the rescue financing one (or more) of the following four tiers of super-priority:[269]

a) An order that the debt arising from the rescue financing be treated as part of the costs and expenses of winding up, and therefore paid in priority to all unsecured claims and most preferential claims against the company;[270]

b) An order that the debt arising from the rescue financing have priority over all unsecured and preferential claims against the company, if the company would not have been able to obtain the rescue financing without such priority being given;[271]

c) An order that the debt arising from the rescue financing be secured either by unencumbered property of the company or as a subordinate security to an existing security, if the company would not have been able to obtain the rescue financing without such security;[272] and/or

d) An order that the debt arising from the rescue financing be secured by a security interest that is of equal or even higher priority than an existing security interest, if the company would not have been able to obtain the rescue financing otherwise and if there is adequate protection for the interests of the existing security holder.[273]

Super-priority was first introduced in the 2017 amendments to the Companies Act,[274] before being ported to the Insolvency, Restructuring and Dissolution Act 2018 (IRDA) upon its entry into effect on 30 July 2020. Super-priority encourages the provision of rescue financing to indebted entities as it gives the lender confidence that there is a higher likelihood of the lender being able to recover their principal; as has been observed, lenders "*who provide this type of new financing to indebted firms to support their debt restructuring usually require priority over existing debt, equity and other claims…* [i.e.] *super-priority*."[275] In turn, the rescue financing thus obtained by the insolvent company can be deployed to fund recovery actions (amongst

[267] A procedure under Singapore law by which a company may compromise its liabilities to all of its creditors (or classes thereof) simultaneously: see section 210 of the Companies Act 1967.
[268] The Singapore equivalent of the English and Australian administration regimes, involving the appointment of an insolvency practitioner to take over control of a company from its existing management and try to either restructure the company's liabilities or achieve an orderly winding-down of its affairs and assets: see generally Part 7 of the Insolvency, Restructuring and Dissolution Act 2018.
[269] Insolvency, Restructuring and Dissolution Act 2018 ss 67 and 101.
[270] Insolvency, Restructuring and Dissolution Act 2018 ss 67(1)(a) and 101(1)(a).
[271] Insolvency, Restructuring and Dissolution Act 2018 ss 67(1)(b) and 101(1)(b).
[272] Insolvency, Restructuring and Dissolution Act 2018 ss 67(1)(c) and 101(1)(c).
[273] Insolvency, Restructuring and Dissolution Act 2018 ss 67(1)(d) and 101(1)(d).
[274] Companies (Amendment) Act 2017 ss 22 and 28.
[275] Financial Stability Board, "Approaches to Debt Overhand Issues of Non-financial Corporates" at p 15.

other uses), and therefore gives such companies additional options in the funding of such proceedings.

C. Judicial acceptance of assignments of causes of action and/or proceeds of causes of action

Liquidators have always been empowered to sell the property of a company, including things in action, whether under the provisions of the old Companies Act 1967[276] or the recent IRDA.[277]

A major judge-made development in the availability of litigation funding in Singapore came in 2015, when, adopting lines of English and Australian authorities in this regard,[278] such powers of sale were interpreted by the Singapore High Court in *Re Vanguard Energy Pte Ltd* ("*Vanguard*") as also permitting liquidators to sell either the company's causes of action or the proceeds of such causes of action to litigation funders.[279] The Court additionally went further to reason that by giving liquidators such a statutory power of sale, Parliament must have intended to create a statutory exception to the doctrines of maintenance and champerty, which therefore categorically could not apply to such sales.[280]

In contrast, a mere agreement to use the proceeds of litigation to repay litigation funders (in contrast with an assignment) was not a sale and did not fall within this exception. Such agreements would therefore continue to have to be justified on a case-by-case basis with reference to the established exceptions to the doctrines of maintenance and champerty to be permissible.[281] These exceptions are where:

a) The assignment was incidental to a transfer of property;
b) The assignee had a legitimate interest in the outcome of the litigation; or
c) There was no realistic possibility that the administration of justice would suffer as a result of the assignment, having regard to (i) whether the assignment conflicted with existing public policy directed to protecting the purity or due administration of justice and the interests of vulnerable litigants, and (ii) the public policy in favour of ensuring access to justice by all, including the impecunious.[282]

[276] Companies Act 1967 (version effective prior to 30 July 2020) s 272(2)(c).
[277] Insolvency, Restructuring and Dissolution Act 2018 s 144(2)(b).
[278] *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597; [2015] SGHC 156 at [16]-[21].
[279] *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597; [2015] SGHC 156 at [12(a)] and [14]-[24].
[280] *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597; [2015] SGHC 156 at [29].
[281] *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597; [2015] SGHC 156 at [25] and [49].
[282] *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597; [2015] SGHC 156 at [32]-[49].

On the facts in *Vanguard*, the High Court was satisfied that the funding arrangements in question fell within these recognised exceptions, as (i) the assignees included shareholders, current or former directors, and creditors of the company, and therefore could not be said to be "*uninterested strangers*" or "*wanton intermeddl*[ers]" with the proceedings,[283] and (ii) steps had been taken to ensure the purity of justice, in that the liquidators would continue to have control of the legal proceedings. The assignees' input would therefore be limited only to the choice of solicitors and on the settlement or discontinuance of the claims, and they would not be in a position to influence the outcome of the litigation.[284] Therefore, the High Court was satisfied that there was no breach of the doctrines of maintenance and champerty, especially when balanced against the countervailing public policy of ensuring access to justice.

The High Court's additional guidance on when litigation funding arrangements will not contravene the doctrines of maintenance and champerty, though technically *obiter*, has been significant insofar as it provides parties seeking to obtain litigation funding but who do not fit into any of the recognised statutory exceptions a further and additional string to their bow pursuant to which they may yet obtain judicial recognition and sanction of their funding arrangements. As we will see below, this additional ground has been effective in rescuing litigation funding arrangements which would otherwise have been prohibited for not falling within any of the other statutory exceptions to the principles of maintenance and champerty.

The principles in *Vanguard* were affirmed and expounded upon shortly after in *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd*[285] ("*Solvadis*"). In that decision, the High Court further established the following principles in relation to a liquidator's decision to sell an insolvent company's causes of action or the proceeds thereof:

a) The liquidator's power of sale is subject to the court's control. In determining whether a liquidator's exercise of such power should be subject to the court's intervention, the overarching consideration should be whether the liquidator was acting in good faith, as a corollary of the well-established principle that courts do not lightly intervene in a liquidator's discretion;[286] and

[283] *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597; [2015] SGHC 156 at [47]-[48].
[284] *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597; [2015] SGHC 156 at [46].
[285] [2018] 5 SLR 1337.
[286] *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2018] 5 SLR 1337; [2018] SGHC 210 at [34]-[37]. *Cf* the similar principle in personal bankruptcy of the "perversity standard", namely, that the decision of a private trustee in bankruptcy will only be overturned by the court where "*no reasonable trustee could have come to that decision*": *Zhang Hong En Jonathan v Private Trustee in Bankruptcy of Zhang Hong'En Jonathan* [2021] 4 SLR 139; [2020] SGHC 262 at [22] and [36]-[44].

b) In assessing the liquidator's good faith in relation to the sale of a cause of action or the proceeds thereof, the following factors (amongst others) should be taken into account albeit on a non-exhaustive and non-determinative basis:[287]

i. The nature and complexity of the causes of action, and the risks involved in their pursuit. A particular risk is the Singapore insolvency doctrine of the estate costs rule, pursuant to which a successful litigant against a company in liquidation must have his adverse costs order satisfied in priority to the other general expenses of the liquidation, including the liquidator's own costs and remuneration. Accordingly, the liquidator must be conscious that by commencing litigation in the company's name, or even by continuing with proceedings that had been commenced prior to the liquidation,[288] they are chancing not only the *new funding* provided by the litigation funder, but also the *existing* assets of the company to the extent that they may have to be utilised to satisfy the adverse costs order, thus depleting the recovery for other creditors, potentially even including preferential ones. Where a liquidator breaches the estate costs rule by not being able to pay adverse costs ordered against the company, the liquidator will be personally liable to make up the difference to the successful litigant.[289] Hence, liquidators who intend to commence or continue with litigation in the company's name would be well-advised to take precautions against adverse costs orders, such as by obtaining indemnities from supportive creditors.[290]

ii. The prospects of success of the proposed action.

iii. The amount of costs likely to be incurred in the action, and the extent to which these costs can be met by the funder.

iv. The extent to which the funder will contribute to meeting any adverse costs order.

v. The level of the funder's premium. In this regard, Australian courts have found that a "*grossly excessive profit*" by the funder "*at the expense of the company*" would be objectionable.[291] In *Solvadis* itself, however, the High Court rightly emphasised that in determining what is "*excessive*", the relevant comparator scenario is the status quo, i.e., a situation where the company would receive nothing at all because no action was possible for want of funds.[292]

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[287] *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2018] 5 SLR 1337; [2018] SGHC 210 at [38]-[39].

[288] *Lim Siew Soo v Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation) (Metax Eco Solutions Pte Ltd, intervener)* [2021] 4 SLR 556; [2021] SGHC 32 at [171(a)].

[289] *Lim Siew Soo v Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation) (Metax Eco Solutions Pte Ltd, intervener)* [2021] 4 SLR 556; [2021] SGHC 32 at [35] and [39]-[42].

[290] *Ho Wing On Christopher and others v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817; [2006] SGCA 25 at [64]-[72].

[291] *Re Movitor Pty Ltd v Sims* (1996) 19 ACSR 440 at 451-452.

[292] *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2018] 5 SLR 1337; [2018] SGHC 210 at [49]-[51].

vi. The interests of the general body of creditors and the effect that the funding arrangement may have on them (for example, by inordinately depleting their recovery).

vii. The extent to which the liquidators will maintain control of the proceedings. As we have seen above, this is also a factor relevant in assessing whether a funding arrangement contravenes the doctrines of maintenance and champerty. However, the fact that a funding arrangement provides that the assignee will have control of the litigation does not in itself mean that a court will not sanction it, for the liquidator is entitled to relinquish control of proceedings as a "*permissible corollary*" to an assignment agreement.[293] That said, note also that the assignment of the proceeds of an insolvency cause of action (as subsequently defined) cannot take place unless the insolvency officeholder continues to maintain control of the action and does not take instructions thereon from the funder.[294]

The above principles would also apply *mutatis mutandis* in the judicial management and personal bankruptcy contexts. As with liquidators of companies, judicial managers[295] and the Official Assignee (or a private trustee in bankruptcy, as the case may be)[296] are empowered to sell the company/bankrupt's property in the discharge of their duties and may therefore also enter into litigation funding arrangements on the basis of such assignments.[297]

D. *Statutory rights of insolvency officeholders of companies to assign the proceeds of insolvency causes of action*

Singapore law recognises certain statutory causes of action (hereinafter "insolvency causes of action") that arise in formal insolvency proceedings, such as judicial management or liquidation. Insolvency causes of action allow judicial managers or liquidators to apply to Court to unwind or "avoid" the effect of certain transactions that the company's former management had entered into, typically with the intention and/or effect of dissipating the company's assets and putting them beyond the reach of its creditors (hence their alternative nomenclature of "avoidance actions"). Examples of such insolvency causes of action include applications:

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[293] *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2018] 5 SLR 1337; [2018] SGHC 210 at [53]-[54]; *POA Recovery Pte Ltd v Yau Kwok Seng and others and another appeal* [2022] 1 SLR 1165; [2022] SGHC(A) 2 at [86]-[99]. Note, however, that in the latter case, the assignee was controlled by the principal claimants.

[294] Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) 2020 regs 5(5)-(6).

[295] Insolvency, Restructuring and Dissolution Act 2018, First Schedule, paragraph (b).

[296] Insolvency, Restructuring and Dissolution Act ss 377(1)(a), 36 and 39. The Official Assignee is a Singapore public authority entrusted with management of the estates of bankrupts, and private trustees in bankruptcy are licensed insolvency practitioners who may be appointed in place of the Official Assignee in appropriate cases: see sections 16 and 36 of the Insolvency, Restructuring and Dissolution Act 2018.

[297] For a case involving the assignment of a cause of action by a private trustee in bankruptcy, see generally *Re Fan Kow Hin* [2019] 3 SLR 861; [2018] SGHC 257.

a) to unwind transactions at an undervalue. A transaction at an undervalue occurs where (amongst other requirements) an insolvent entity had entered into a transaction for consideration the value of which is significantly less than the value of the consideration provided by that same entity.[298]

b) to unwind unfair preferences. An unfair preference occurs where (amongst other requirements) an insolvent entity had entered into a transaction the effect and intention of which was to put a particular creditor in a better position in that entity's insolvency.[299]

c) (in respect only of companies) for declarations that the insolvent company had previously engaged in fraudulent and/or wrongful trading. Fraudulent trading occurs where (amongst other requirements) the company's business had been carried on with intent to defraud creditors of the company or for any other fraudulent purpose. Wrongful trading occurs where (amongst other requirements) a company incurs debts or liabilities without reasonable prospect of meeting them in full.[300]

Prior to the entry into effect of the IRDA, the corporate and personal insolvency regimes in Singapore had differed in that in corporate insolvency, the right to commence such insolvency causes of action was deemed to be vested solely in the relevant insolvency officeholders themselves, such as judicial managers and liquidators, and therefore could not be assigned as part of a litigation funding transaction notwithstanding the *Vanguard* and *Solvadis* line of cases discussed above.[301]

Hence, for example, it was previously not possible for a liquidator of a company to carry on a claim to unwind a transaction as being either at an undervalue or an unfair preference which had been commenced during the judicial management period of that company, even if the judicial manager and the liquidator were factually the same person, as the judicial manager's right to commence such an action was personal to him in such office.[302]

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[298] Insolvency, Restructuring and Dissolution Act 2018 ss 224, 226, 361 and 363.
[299] Insolvency, Restructuring and Dissolution Act 2018 ss 225-226 and ss 362-363.
[300] Insolvency, Restructuring and Dissolution Act 2018 ss 238-239.
[301] *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2018] 5 SLR 1337; [2018] SGHC 210 at [33].
[302] *Neo Corp Pte Ltd (in liquidation) v Neocorp Innovations Pte Ltd* [2006] 2 SLR(R) 717; [2006] SGCA 15 at [14]-[16] and [24]-[39]; *Neo Corp Pte Ltd (under judicial management) v Neocorp Innovations Pte Ltd and another application* [2005] 4 SLR(R) 681; [2005] SGHC 167 at [15].

By contrast, in personal insolvency, the proceeds of such insolvency causes of action were vested in the bankrupt's estate,[303] and therefore could be assigned by their trustees.[304] It is not clear what (if any) the basis of such distinction originally was.[305]

Since the entry into effect of the IRDA, however, this distinction between the corporate and personal insolvency regimes has been abolished.[306] Liquidators and judicial managers are therefore now expressly empowered to enter into litigation funding arrangements involving the assignment of insolvency causes of action in accordance with certain prescribed regulatory requirements, including:

a) When soliciting funding, the insolvency practitioner must provide a written notice to the prospective funder containing all material information in relation to the claim;[307]

b) An offer of funding must be made in writing and contain a confirmation that there are no actual or potential conflicts of interest in the provision of the funding, or else a description of the conflict;[308]

c) The funding must be properly authorised, generally by the creditors or a representative body thereof, or else the Court;[309]

d) The insolvency officeholder must not personally receive any commission or fee from the funder in respect of the proposed funding;[310]

e) The insolvency officeholder must maintain control and oversight of the proceedings, and must not take instructions from the funder on the conduct of the action;[311] and

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[303] Bankruptcy Act (Cap 20) (version effective prior to 30 July 2020) s 102(4). The Bankruptcy Act was repealed with effect from 30 July 2020.

[304] *Re Fan Kow Hin* [2019] 3 SLR 861; [2018] SGHC 257 at [5] and [10]-[11].

[305] The Singapore High Court noted in ***Re Castlewood Group Pte Ltd (in creditors' voluntary liquidation)*** [2022] SGHC 117 at [7] that it "*may be that it would be more rational to not distinguish*" between the personal and corporate insolvency regimes on this point, "*but that is where we are*". In the Parliamentary debates abolishing the distinction, no reason was given for the existence of such a distinction in the first place: see *Singapore Parliamentary Debates, Official Report* (1 October 2018) vol 94 (Edwin Tong Chun Fai, then Senior Minister of State for Law).

[306] Insolvency, Restructuring and Dissolution Act 2018 s 144(1)(g) and First Schedule, paragraph (f).

[307] Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020 regs 4(1)-(3).

[308] Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020 regs 4(4)-(5).

[309] Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020 regs 4(6)-(10).

[310] Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020 regs 5(3).

[311] Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020 regs 5(5)-(6).

f) The funding arrangement must be disclosed to the Court and every party to the proceedings as soon as possible.[312]

This expansion of the categories of permitted litigation funding is a particularly welcome change in Singapore's insolvency sphere. Besides being an additional avenue for recovery in itself, it should not be forgotten that the defendants of insolvency causes of action are not infrequently the errant directors of the insolvent company themselves, whom the liquidators/judicial managers are trying to take to task for breaches of their duties to the company, or else the related parties of such errant directors (for instance, in the capacity of dishonest assistants of the directors' wrongdoing or knowing recipients of their gains). It would as a matter of principle be particularly egregious for companies to be left without practical recourse against errant directors or their confederates as a direct consequence of having been earlier stripped of their assets by those same directors.

A. Judicial clarification of the application of the doctrines of maintenance and champerty

As mentioned above, not all litigation funding contracts will be able to avail themselves of one of the statutory or judge-made exceptions. In particular, claims in respect of insolvency causes of action for corporate insolvencies which continue to be governed by the old provisions of the Companies Act 1967 will not be able to avail themselves of the abovementioned expansion of the right of corporate insolvency officeholders to assign the proceeds of insolvency causes of action.

The practical concern in this regard is that the law governing insolvency causes of action is generally that of the law in force at the date of the impugned conduct. This is by application of the general presumption against retrospective applicability of law. Hence, litigation funding by way of an assignment of a cause of action or the proceeds thereof would not be statutorily available to corporate insolvency officeholders in respect of insolvency causes of action where the facts for such causes of action arose before 30 July 2020.[313] Such funding arrangements would have to be approved, on a case-by-case basis, as falling within the recognised exceptions to the doctrines of maintenance and champerty identified above, if they are to be enforceable.

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[312] Insolvency, Restructuring and Dissolution (Assignment of Proceeds of an Action) Regulations 2020 regs 5(7)-(8).

[313] *Marina Towage Pte Ltd v Chin Kwek Chong and another* [2021] SGHC 81 at [13]-[17], citing (amongst others) the presumption against legislative retrospectivity contained in section 16(1)(c) of the Interpretation Act 1965.

The number of such cases should fall over time. Nonetheless, insolvent companies and their officeholders who find themselves in such a position will be assisted by the greater clarity on the precise ambit of the doctrines of maintenance and champerty through a series of recent court decisions. The guidance offered in these decisions will be useful to claimants and funders alike in determining "best practices" to maximise the chances of their proposed funding arrangements finding judicial favour.

We highlight three recent decisions in this regard. First, in *Re Castlewood Group Pte Ltd (in creditors' voluntary liquidation)*,[314] a liquidator sought to enter into a funding arrangement in respect of the proceeds of an insolvency cause of action brought under the old Companies Act 1967 provisions. The Court was unable to permit this, essentially for the same reasons given at paragraphs 0 and 0 above, but was nonetheless willing to find that the funding arrangement did not engage the doctrines of maintenance and champerty. As the Court noted, this was tantamount to reaching the same result by different methods.[315]

In coming to this conclusion, the Court appeared to be primarily influenced by the fact that the litigation funders were creditors of the company (and therefore had an interest in the litigation) and that the proceedings would be under the control of the liquidator (as relevant to the consideration of maintaining the purity of justice).[316] It is possible that future funding arrangements with similar characteristics would be more likely to find favour with the Courts, on the basis of this precedent.

Second, in *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*,[317] the SICC found that the concepts of maintenance and champerty did not apply to arrangements between a defendant and its solicitors, on the basis that as maintenance and champerty "… *concerned intermeddling that encourages lawsuits by financing them, and are not engaged where defence of a lawsuit is concerned.*"[318] This reasoning would appear to be of fully general application insofar as it concerns the financing of a legal defence to an action, and if applied consistently, would appear to mean that insolvent companies and insolvency officeholders are generally at liberty to enter into litigation funding arrangements to fund a legal defence of an action brought against them without being concerned about potentially contravening the doctrines of maintenance and/or champerty.

[314] [2022] SGHC 117.
[315] *Re Castlewood Group Pte Ltd (in creditors' voluntary liquidation)* [2022] SGHC 117 at [9]-[10].
[316] *Re Castlewood Group Pte Ltd (in creditors' voluntary liquidation)* [2022] SGHC 117 at [9].
[317] [2022] 4 SLR 198.
[318] *Sanum Investments Ltd and another v Government of the Lao People's Democratic Republic and others and another matter* [2022] 4 SLR 198; [2022] SGHC(I) 9 at [54].

The practical relevance of this distinction is because although there generally are automatic statutory moratoria against the commencement or continuation of legal claims against entities undergoing insolvency processes,[319] such moratoria are not absolute and leave may be granted for the commencement or continuation of creditor proceedings where appropriate.[320]

Hence, it is not unknown for creditors to seek leave of Court to bring claims against entities undergoing formal insolvency, particularly where a claim cannot be brought by way of a proof of debt as it does not fall within the statutory categories of debts provable in bankruptcy, judicial management or liquidation (as the case may be).[321] Such creditors may be seeking to crystallise their cause of action as a Court judgment in their favour and then prove for the same, or attempting to set aside full or partial rejections of their proofs of debt.[322]

In either scenario, however, if the applicant creditor is successful, this necessarily diminishes the slice of the pie available to all other creditors who therefore may be interested in funding the insolvency officeholder's defence of the action.

Lastly, in *POA Recovery Pte Ltd v Yau Kwok Seng*[323] ("*POA Recovery*"), the Appellate Division of the High Court emphasised that in assessing the applicability of the "legitimate interest" exception to the doctrine of maintenance and champerty (see paragraph 0b) above), the court would look past the superficial structure of a litigation funding arrangement to assess the true commercial arrangements between the parties, in order to understand whether the public policy concerns of trafficking in litigation were genuinely engaged.

There, 1,102 investors individually assigned their claims against alleged fraudsters to a special purpose vehicle ("SPV") incorporated for the purpose of streamlining and simplifying

[319] See, in this regard, section 96(4) of the Insolvency, Restructuring and Dissolution Act 2018 for judicial management, section 133(1) of the Insolvency, Restructuring and Dissolution Act 2018 for compulsory liquidation, section 170(2) of the Insolvency, Restructuring and Dissolution Act 2018 for creditors' voluntary liquidation and section 327(1)(c) of the Insolvency, Restructuring and Dissolution Act 2018 for bankruptcy.
[320] A key consideration in respect of the grant of such leave is whether the applicant's claim and remedies sought are of such nature that they should ordinarily be dealt with through the filing of proofs of debt within the bankruptcy/corporate insolvency regime. See, in this regard, *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671; [2004] SGHC 25 at [42]-[63] (for liquidation) and *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd and another* [2022] SGHC 271 at [32]-[44] (for bankruptcy).
[321] Insolvency, Restructuring and Dissolution Act 2018 ss 218(3) and 345(3).
[322] See, in this regard, Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 r 132 (for liquidation), Insolvency, Restructuring and Dissolution (Judicial Management) Regulations 2020 reg 47 (for judicial management) and Insolvency, Restructuring and Dissolution (Personal Insolvency) Rules 2020 r 63 (for bankruptcy).
[323] [2022] 1 SLR 1165.

the litigation against the fraudsters.[324] Overturning the first instance decision,[325] the Appellate Division found that what mattered for the purposes of the "legitimate interest" exception was the "*totality of the transaction*", pursuant to which the investors at all times controlled the SPV, which would itself have no share in the proceeds of the litigation (as all such proceeds were to be repaid to the investors). Hence, and absent "*any* [other] *element of impropriety*", the SPV arrangement was not in itself objectionable as contravening the doctrines of maintenance or champerty, and indeed promoted efficiency in the administration of justice, as the alternative would be the filing of hundreds or thousands of applications and consolidating them subsequently.[326]

This clarification by the Appellate Division is a welcome and timely one. In the modern context, it is not uncommon for alleged frauds, scams or other forms of corporate wrongdoing to affect large sections of the retail public simultaneously. Various large-scale collapses in the cryptocurrency sphere, for instance, have affected many hundreds if not thousands of investors (not all of whom may be based in Singapore) at once.[327] The Appellate Division's approach in permitting innovative and cost-efficient litigation structures such as those employed in *POA Recovery* on the basis that they do not, on their true construction, contravene the actual public policy considerations engaged by the doctrines of maintenance and champerty, is commercially-minded and flexible, and will increase the access to justice of parties affected by similar cases.

B. Statutory expansion of the right of creditors of companies to provide funding in prior consideration of change in distribution priorities

Among the new provisions enacted together with the IRDA are the new subsections 204(2)-(3), which provide that a creditor of a company in liquidation may, prior to giving the liquidator an indemnity for costs of recovery action, paying any monies or giving any indemnity to protect or preserve any assets, or indemnifying the liquidator in relation to his expenses, prospectively seek an order of court providing that the distribution of assets thereby recovered, protected or preserved or expenses successfully recovered be varied so as to

[324] *POA Recovery Pte Ltd v Yau Kwok Seng and others and another appeal* [2022] 1 SLR 1165; [2022] SGHC(A) 2 at [6].
[325] *POA Recovery Pte Ltd v Yau Kwok Seng and others and another appeal* [2022] 1 SLR 1165; [2022] SGHC(A) 2 at [95]; *POA Recovery Pte Ltd v Yau Kwok Seng and others (Joseph Jeremy Kachu Li and others, third parties)* [2021] SGHC 41 at [7] and [42]-[44].
[326] *POA Recovery Pte Ltd v Yau Kwok Seng and others and another appeal* [2022] 1 SLR 1165; [2022] SGHC(A) 2 at [84]-[90] and [94]-[100].
[327] See e.g., *Re Zipmex Co Ltd and other matters* [2022] SGHC 196, involving an application for a statutory moratorium by a cryptocurrency exchange platform. Noting the "*large number of creditors… most of whom are situated outside Singapore*" affected by the applications, the court there took the unprecedented step of broadcasting its proceedings on YouTube, a popular public video sharing platform (at [3]).

give that creditor an advantage over others, in consideration of the additional risk taken by the creditor.

Subsections 204(2)-(3) of the IRDA represent a major advance in that unlike their predecessor provision, section 328(10) of the Companies Act 1967, they permit creditors to obtain prospective orders, as opposed to having to wait until after the assets in question were actually recovered before bringing an application for change of distribution priorities. This former limitation had greatly diminished the utility of section 328(10) of the Companies Act 1967, since creditors minded to provide such funding would have to hazard the additional risk that, even if there was actual recovery from an action that they had funded, the Court might not approve the requested change in distribution priorities.

Hence, in *Vanguard*, a case decided under the old Companies Act 1967, an alternative prayer sought by the applicant liquidators was for an order under section 328(10) of the Companies Act 1967 approving a payment waterfall mechanism in respect of assets recovered, pursuant to which the assignees would have been repaid in priority to other creditors. The Court disallowed this prayer on the basis that on its own face, that provision could only have retrospective effect: "*the language in s 328(10) is clear – the court has no power to make an order until after assets have been recovered, protected or preserved, or expenses have been recovered.*"[328] With the new subsections 204(2)-(3) of the IRDA, this concern will no longer arise.

However, it must be borne in mind that subsections 204(2)-(3) of the IRDA apply only to companies. As section 352(6) of the IRDA (on the priority of debts in personal bankruptcy) has not been similarly upgraded, the personal bankruptcy regime therefore continues to lack a mechanism for the prospective alteration of distribution priorities in consideration of funding provided by a creditor.[329]

C. Legalisation of conditional fee arrangements between solicitors and their clients

Finally, another recent measure has been a set of inter-related statutory amendments legalising conditional fee arrangements by solicitors in Singapore for certain categories of proceedings, principally arbitration and SICC proceedings, and court and mediation

[328] *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597; [2015] SGHC 156 at [53]-[54].
[329] *Yiong Kok Kong (as the private trustee in bankruptcy of the bankrupt estate of Goh Ming Hue Julius, a bankrupt) v Liu Chien Min* [2022] SGHC 297 at [29]-[32].

proceedings in relation thereto, with effect from 4 May 2022,[330] and expanding the jurisdiction of the SICC to cover corporate insolvency proceedings whether under the IRDA or the formerly applicable provisions under the Companies Act 1967, with effect from 1 October 2022.[331] The cumulative effect has been to permit foreign-qualified lawyers and local-qualified lawyers registered in joint law ventures or their constituent foreign law practices, Qualifying Foreign Law Practices, or licensed foreign law practices[332] to represent parties before the SICC, and to do so on the basis of conditional fee arrangements.[333]

Conditional fee arrangements permit solicitors to enter into so-called "*no win, no fee*" or "*no win, less fee*" arrangements in respect of contentious proceedings pursuant to which the solicitor's remuneration will be subject to a discount (or not payable at all) depending on the outcome.[334] Such conditional fee arrangements will be particularly useful to parties in insolvency contexts, as it limits the upfront outlay required for legal fees.

Accordingly, the cumulative effect of these reforms has again been to permit parties greater choice, not just in their choice of representation but also the terms and fee arrangements of such representation. The overall outcome will be greater access to justice by parties, particularly those in insolvency contexts who may otherwise have been put off from seeking to vindicate their rights.

A Comparitive Look

The above developments in Singapore cannot be seen in isolation, but rather must be understood as part of a global shift towards emphasising access to justice through liberalising the litigation funding regime in insolvency contexts and otherwise. To illustrate this, we consider recent developments in relation to litigation funding in three jurisdictions, namely England, the United States and India.

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[330] Legal Profession (Amendment) Act 2022 s 6 read with Legal Profession (Conditional Fee Agreement) Regulations 2022 reg 1.

[331] Courts (Civil and Criminal Justice) Reform Act 2021 ss 56(2) and 69(b). See also Singapore International Commercial Court Rules 2021 O 23A, which will provide the general framework for the procedural rules governing such proceedings in the SICC.

[332] These are various categories of foreign law firms permitted to provide certain legal services in Singapore: see generally Legal Profession Act 1966 ss 169-173.

[333] It must be noted, however, that such solicitors are not able to make submissions as to Singapore law, including Singapore insolvency law: see the Legal Profession Act s 36P(1A)(b) and Singapore International Commercial Court Rules 2021 O 3 r 1(1A).

[334] Law Society of Singapore Guidance Note 5.6.1 of 2022 at paras 11 to 13. Solicitors must note, however, that contingency fee arrangements, pursuant to which solicitors receive a specified percentage of the client's recovery, continue to be champertous and prohibited (at paras 5 to 7 thereof).

We begin with England. Many if not most of the innovations and developments identified above are in fact of English origin, such that Singapore has in substance merely been catching up with the existing English position for some time now.

For instance, it appears to have been held as early as in *Seear v Lawson*[335] that private trustees in bankruptcy could assign causes of action for valuable consideration, notwithstanding the ostensibly champertous nature of such transactions. This principle was then extended to companies in liquidation in *In re Park Gate Waggon Works Co.*[336]

Similarly, the distinction between the assignment of causes of action belonging to the insolvent entity (or the proceeds thereof) and causes of action belonging to the insolvency officeholder (or the proceeds thereof) discussed at paragraph 0 above appears to have been first recognised more than a hundred years later in *Re Oasis Merchandising Services*.[337]

As in Singapore, this disjunct required statutory intervention in England, which appears to have come by the insertion in 2015 of a new section 246ZD of the Insolvency Act 1986 (c.45) (UK)[338]. Section 246ZD, like its counterpart provisions section 144(1)(g) and paragraph (f) of the First Schedule of the IRDA, expressly gives an administrator or liquidator the power to assign insolvency causes of action or the proceeds thereof.

As can be seen therefore, the overall trend of recent developments in litigation funding particularly in insolvency situations appears to be generally similar between Singapore and England.

We next consider the United States. There appears to be no federal prohibition on champerty and maintenance, which is a matter to be resolved at the state level. In California, for instance, it appears that the doctrines of champerty and maintenance were never adopted at all.[339]

Even where such prohibitions exist, the trendline appears to be in favour of greater access to litigation funding. For instance, the statutory prohibition under New York law on the purchase of claims by companies as being champertous was amended in 2004 to exempt

[335] (1880) 15 Ch D 426.
[336] (1881) 17 Ch D 234.
[337] *Re Oasis Merchandising Services Ltd* [1998] Ch 170 (CA) at 181-187.
[338] Small Business, Enterprise and Employment Act 2015 (c.26) (UK) s 118.
[339] *In re Cohen's Estate* 66 Cal. App. 2d 450 (1944) at 458.

any transaction in excess of US$500,000, a comparatively small figure by the standards of litigation funding.[340] Still further, it also appears that New York state courts will in any event interpret existing prohibitions on champerty restrictively and generally refrain from applying them to litigation funding arrangements. For instance, it has been held that "*… the champerty statute does not apply when the purpose of an assignment is the collection of a legitimate claim. What the statute prohibits… is the purchase of claims with the intent and for the purpose of bringing an action that the purchaser may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up… in an effort to secure costs*" (internal citation marks omitted).[341] This would permit most, if not all, commercial funding arrangements.

We turn finally to India. It appears to be definitively settled following the decision by the Supreme Court of India in *Bar Council of India v A.K. Balaji*[342] that "*there is no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation*."[343] By contrast to the position in Singapore, however, it appears that Indian lawyers continue to be absolutely precluded from entering into conditional fee arrangements with their clients.[344]

Conclusion And Assessment – The Way Forward

As can be seen from the above, the litigation funding landscape for Singapore has changed significantly in the past decade due to innovations by Parliament, the Courts and practitioners alike.

The author respectfully suggests that the development of Singapore's litigation funding landscape is, however, still ongoing and incomplete, and makes two observations on areas where Singapore law could yet achieve greater rationalisation or improvement and in respect of which further legislative and/or judicial reforms can be hoped for.

First, it is to be hoped that Parliament will continue to progressively embrace more types of proceedings to litigation funding arrangements, and consider eventually lifting all such restrictions altogether. When the 2017 amendments permitting litigation funding in respect of

[340] Judiciary Law § 489(2) (New York).
[341] *Trust for the Certificate Holders of Merrill Lynch Mortgage Investors, Inc. v Love Funding Corp.* 918 N.E.2d 889 (2009) at 894-895.
[342] [2018] 3 MLJ 470.
[343] *Bar Council of India v A.K. Balaji* [2018] 3 MLJ 470 at [35].
[344] Indian Bar Council Rules Part VI Chapter II r 20 states: "*An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof.*"

international arbitration proceedings were debated in Parliament, the then Senior Minister of State for Law Ms Indranee Rajah made clear that this was merely a preliminary first phase, and that if all went well, further types of dispute resolution proceedings would also be opened to litigation funding:[345]

> *At the outset, third-party funding will only be permitted for international arbitration proceedings, and related court and mediation proceedings. This will allow the framework to be tested within a limited sphere by parties of commercial sophistication. The framework may be broadened in future after a period of assessment… The framework will facilitate the use of third-party funding in appropriate cases, commencing with international arbitration proceedings… At the same time, we will continue to monitor the third-party funding landscape here and abroad and will seek to ensure that best practices are adopted here.*

Consistent with the above, the Singapore Ministry of Law has also stated that their decision to now proceed with a second phase of liberalisation for litigation funding is because the first phase was deemed to have been a success: [346]

> *Singapore first introduced a framework for* [litigation funding] *in 2017… Funders and the business, legal and arbitration communities have responded positively. More funders now have a presence here, and businesses have shown increasing interest in additional options for financing litigation. Respondent's to Minlaw's public consultation in 2018 on the* [litigation funding] *framework also supported the extension of the framework to more categories of proceedings.*

If indeed the categories of proceedings in respect of which litigation funding is permissible were to be expanded further, then the author respectfully submits that proceedings (outside the SICC) with a view to rehabilitating or restructuring companies in financial distress should be included in the next wave of reform.

This is a matter of particular importance to the local insolvency community. It is common to encounter debtor entities in temporary yet severe financial distress, with fundamentally sound and viable businesses which it would be relatively value-destructive to wind up solely on the basis of short-term cashflow issues. Unfortunately, such entities may in some cases have entirely or mostly run down their working capital in trying to continue operations while

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[345] *Singapore Parliamentary Debates, Official Report* (10 January 2017) vol 94 (Indranee Rajah, then Senior Minister of State for Law)

[346] Ministry of Law website, "Third-Party Funding to be Permitted for More Categories of Legal Proceedings in Singapore" (21 June 2021), https://www.mlaw.gov.sg/news/press-releases/2021-06-21-third-party-funding-framework-permitted-for-more-categories-of-legal-preceedings-in-singapore, (accessed 17 January 2023).

managing their creditors, and therefore can no longer even afford the necessary legal and/or professional insolvency advice on how to address their present financial issues.

Expansion of the statutorily-permitted categories of proceedings in respect of which litigation funding is permissible would permit such debtors to enter into bespoke funding arrangements with specialist funders that may include, for instance, terms pegging the funders' recovery to the specific outcomes and milestones achieved in the course of the restructuring proceedings. This will increase the confidence of existing management in entering into such funding arrangements, increase the number and prospects of successful restructurings in Singapore, increase practical access to the various restructuring mechanisms found in the IRDA and therefore ultimately would, in the long term, also further Singapore's oft-stated ambitions of becoming a restructuring hub as well.

Second, it is also to be hoped that over time, Parliament will harmonise certain inconsistencies or disjoints in the existing legislation relating to litigation funding. For instance, at present, the regulatory requirements relating to the funding of a general cause of action and an insolvency cause of action are very different: see paragraphs 0 and 0 above. The normative basis for distinguishing the two is not clear as there is no obvious reason why the competing public policy considerations of access to justice as opposed to purity and due administration of justice should apply differently in each. It is therefore to be hoped that Parliament will in due course harmonise these regulations by standardising them on a single unified basis.

Similarly, creditors of a company in liquidation are presently able to obtain prospective orders for the changing of distribution priorities, but not creditors of a natural person in bankruptcy: see paragraph 0 above. There is no obvious reason why creditors of a natural person should be deprived of this option, nor is it clear from the relevant Parliamentary debates that this distinction is even intentional. It is therefore to be hoped that Parliament will in due course harmonise the position under the personal insolvency regime with that of the corporate insolvency regime by amending section 352(6) of the IRDA along the same lines as the present section 204 thereof.

Overall, however, the author wholeheartedly agrees with the Ministry of Law's observations, quoted at paragraph 0 above, that the first round of litigation funding reform has been successful overall, and that further liberalisation is certainly to be desired in the interests of advancing the public policy objective of furthering access to justi

SPEEDING UP INSOLVENCY RESOLUTION: THE US EXPERIENCE

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Speeding Up Insolvency Resolution: The US Experience

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Introduction

The United States and India both share the goal of enabling streamlined and efficient insolvency resolution procedures. A key component to streamlining the process and maximizing its efficiency is minimizing the time involved in the bankruptcy or resolution process.

The US Bankruptcy Code ("Bankruptcy Code" or "Code") has existed since 1978. By comparison, India's Insolvency and Bankruptcy Code ("IBC") was passed into law only in 2016. Although the IBC is young compared to the Bankruptcy Code, it has made a significant impact in India. Like any process, however, the insolvency resolution process set forth by the IBC is susceptible to delay. Consequently, minimizing the time involved in the insolvency resolution process is a key aspect of improving outcomes under the IBC.

Indeed, the IBC contemplates a speedy resolution process.[347] And on paper, the IBC imposes a significant consequence for the failure to move quickly: if creditors do not approve a resolution within the time set by the law, the debtor will be forced into liquidation, regardless of creditors' wishes or the debtor's own financial state.[348]

Existing research shows that the implementation of the IBC has been effective in shortening the length of a case.[349] The IBC's combination of a streamlined process and creditor control over that process is designed to allow creditors to receive a quick recovery.[350]

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[347] Hon. Jason D. Woodard, *Racing to Resolution: A Preliminary Study of India's New Bankruptcy Code*, 52 GEO. WASH. INT'L L. REV. 393, 397 (2020) (describing the IBC as "imbued with a sense of urgency"); M/s Surendra Trading Co. v. M/S Juggilal Kmalapat Jute Mills Co., (2017) Civil App. No. 8400 (India) ("Time is of the essence.").

[348] Woodard, *supra* note 347 at 418 (noting, however, that the clock does not start until the application is admitted).

[349] *Id.* at 402 ("[L]iquidation remains the norm thus far, but case lengths have shortened dramatically."); *Time to Resolve Insolvency (years) – India*, THE WORLD BANK, https://data.worldbank.org/indicator/IC.ISV.DURS?locations=IN (showing the time to resolve insolvency proceedings drastically decreasing from 2018 to 2019).

[350] Woodard, *supra* note 347 at 412 ("Indian lawmakers attempted to deliver rapid creditor recoveries by streamlining the process and giving creditors controls.").

Notwithstanding these significant accomplishments, delays still exist in the IBC's insolvency resolution process.[351] In fact, a significant source of delay occurs in the initiation process, before the formal resolution process has even commenced.[352] Commentators have remarked that the time between the filing of an insolvency application and its eventual admission is "disconcerting."[353] Although the IBC sets out a 14-day period for admission of an application, in practice, admission often takes much longer.[354] For instance, the average time for admission of an insolvency application by an operational creditor was 468 days during the 2020-2021 period, increasing to 650 days in the 2021-2022 period.[355] Thus, the process is delayed before it has even gotten started: the average time for admission has outpaced the IBC's deadline for completing an entire resolution proceeding.[356]

Initially, the IBC provided that the resolution process by completed within 180 days from the date of admission, with the possibility of a one-time extension of up to 90 days if creditors so vote.[357] However, that timeline has since been extended to 330 days. If a resolution cannot be completed within the time specified, the adjudicating authority must initiate liquidation proceedings.[358] Commentators have raised concerns that the IBC's strict deadlines, coupled with its mandate to initiate liquidation once the deadline has passed, may impede the IBC's objective of reviving a corporate debtor's financial health.[359]

Like the IBC, the Bankruptcy Code uses deadlines to move a case through the process. For example, in a case involving a small business debtor, only the debtor may file a plan during the first 180 days post-petition.[360] The court may extend this exclusive filing period to 300 days if the debtor demonstrates, by a preponderance of the evidence, that the court will confirm a plan within a reasonable period of time.[361] In a case where a small business debtor

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[351] Dev Chatterjee, *India reexamines its landmark bankruptcy reforms*, NIKKEI ASIA (Sept. 24, 2021), https://asia.nikkei.com/Business/Finance/India-reexamines-its-landmark-bankruptcy-reforms (noting that "the debt resolution process has been plagued by delays and legal uncertainty").
[352] Woodard, *supra* note 347 at 413 (observing that the initiation process "requires creditors to jump through a few hurdles before the debtor is effectively captured by the system").
[353] Shri M. Rajeshwar Rao, *Resolution of Stressed Assets and IBC*, RESERVE BANK OF INDIA (May 6, 2022), https://www.rbi.org.in/scripts/BS_SpeechesView.aspx?id=1306.
[354] *Id.*
[355] *Id.*
[356] *Id*; Insolvency and Bankruptcy Code, 2016, § 12 (providing that corporate insolvency resolution process be completed within a period of 330 days from date of admission).
[357] Samanna Gaffoor, *Time Period for Corporate Insolvency Resolution Process under IBC – An Analysis*, IPLEADERS (June 7, 2018), https://blog.ipleaders.in/time-period-corporate-insolvency/ (noting that resolution to extend 180-day period must be passed at a meeting of the creditors' committee by a vote of 75% of the voting shares).
[358] *Id*.
[359] *Id*.
[360] 11 U.S.C. §1121(e).
[361] 11 U.S.C. §1121(e)(2).

elects to proceed under subchapter V of chapter 11, discussed further below, the debtor is the only party that may file a plan; however, the debtor must comply with other deadlines in order to move the case along.[362] In a chapter 11 case that does not involve a small business, the debtor has a 120-day exclusive period to file a plan, and the court may extend the debtor's exclusive period to file a plan "for cause" up to 18 months. Further, the debtor has 180 days after the petition date to obtain acceptances of its plan.[363] The court may extend or reduce this acceptance period for cause; if the court chooses to extend the period, it may do so for up to 20 months.[364]

Notwithstanding efforts by both US and Indian laws to minimize delay through the implementation of deadlines, cases in both the US and India have experienced significant delays in practice. As the Bankruptcy Code has been in existence for several decades, there has been ample opportunity in the US to analyze the various causes of delay in the US bankruptcy process. This article identifies those causes and explores several recent trends in US bankruptcy law and practice designed to be responsive to concerns about delay. These trends include the increasing use of restructuring support agreements ("RSAs") and ultra-fast, "drive-thru" bankruptcies in large cases, and the enactment of the Small Business Reorganization Act ("SBRA") to streamline the reorganization process for small businesses. In addition to these examples from law and practice, the article takes note of a recent study assessing the need for an infrastructure boost within the US bankruptcy system, in the form of additional bankruptcy judges and clerks.

After examining the US experience, the article will explore the relevance of the information obtained for India. In particular, the article will assess whether any of the changes occurring in US bankruptcy law and practice might be worth considering for India.

Before turning to the details, a caveat is warranted. The SBRA, enacted in 2019 and effective in 2020, deals only with "small businesses," which are defined in the Bankruptcy Code to mean businesses with aggregate, noncontingent, liquidated secured and unsecured debts of no more than $7,500,000, not less than 50% of which arose from the debtor's commercial or business activities.[365] Like the US, India has a special procedure available to small businesses, classified in India as micro, small and medium enterprises ("MSMEs").[366] This process, however, is not the focus of this article. Rather, the article draws upon changes made by the SBRA to minimize the time spent in bankruptcy and asks whether any of the law's changes might be applicable to speeding up the corporate insolvency resolution

[362] 11 U.S.C. §1189.
[363] 11 U.S.C. §1121.
[364] 11 U.S.C. §1121(d).
[365] 11 U.S.C. § 1182(1).
[366] Misha & Shreya Prakash, *How does PPIRP work in India?* SHARDUL AMARCHAND MANGALDAS (Oct. 1, 2021), https://www.amsshardul.com/insight/how-does-ppirp-work-in-india/.

process ("CIRP") under the IBC. With this framework in mind, the article will now explore the US experience.

The US Experience: Key Areas of Delay

This article's US area of focus is chapter 11 of the Bankruptcy Code. Chapter 11 is the section of the Code that provides for reorganization.[367] In a chapter 11 case, the debtor typically remains "in possession" of its business, meaning that no outsider is appointed to manage the debtor's affairs in bankruptcy or to run the debtor's business.[368] As mentioned, the Code gives a chapter 11 debtor a specified period of time during which it may propose a plan without fear of creditors or other parties in interest proposing a competing plan.[369] Once a plan is proposed (whether by the debtor or, if the exclusive period has run, by another party in interest), creditors whose rights are affected by the plan vote on it, and the court will confirm the plan if it receives the requisite number of votes and satisfies additional requirements laid out in the statute.[370]

Although revisions have been made throughout the years, chapter 11 has existed more or less in its current form since 1978. Consequently, there has been ample time to study chapter 11's usage and to identify its strengths and weaknesses. One of the most comprehensive recent studies emerged when the American Bankruptcy Institute, the largest association of bankruptcy professionals in the United States,[371] convened a Commission to Study the Reform of Chapter 11 in 2011 ("Commission" or "ABI Commission"). The Commission undertook a methodical study of chapter 11, critically assessing the law and potential reforms through the use of independent research, advisory committees, and public field hearings.[372] In 2014, the Commission released a comprehensive report assessing the current US bankruptcy reorganization process under chapter 11 and recommending various changes to that process. As part of its assessment, the Commission identified several areas of delay in chapter 11 bankruptcy. These areas are described in more detail below:

Valuation- The Commission found that disputes about valuation, including disputes among experts as to valuation methodology, are a source of delay in chapter 11 cases.[373] Valuation

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[367] *Chapter 11 – Bankruptcy Basics*, U.S. COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics.
[368] *Id.*
[369] *Id.*
[370] *Id.*
[371] *About Us*, AM. BANKR. INST., https://www.abi.org/about-us.
[372] *Final Report and Recommendations,* AM. BANKR. INST. COMMISSION TO STUDY THE REFORM OF CH. 11 13 (2012-2014), https://abiworld.app.box.com/s/pwtg5hi7ln3ty3kelnnt (hereinafter, "ABI Report").
[373] *Id.* at 20 n. 73.

issues are nearly inevitable and may arise at several points throughout a chapter 11 case. For example, the collateral of a secured creditor may need to be valued to determine whether that secured creditor is adequately protected in the bankruptcy. In addition, if creditors believe they would receive more in a liquidation than a reorganization, the value of the debtor's business in both scenarios must be determined.

Appointment of a trustee or examiner- Although, as mentioned above, a chapter 11 debtor's management is not typically displaced during a bankruptcy proceeding, in some chapter 11 cases, the court may appoint a trustee to run the debtor's business, or the court may appoint an examiner to investigate certain aspects of the debtor's business or management's behavior. The Commission found that delay can occur in both cases.[374]

Creditors' committee activity- It is standard practice for a committee of unsecured creditors to be appointed in a chapter 11 case.[375] When a creditors' committee is active, the estate—and the creditors—may benefit if more assets are recovered or if creditors participate to show their support for a plan. However, the Commission noted that the benefits of an active unsecured creditors' committee must be balanced against the potential costs and delays associated with more activity.[376] Although it is rare for a committee's tactics to delay the resolution of a case, when it does happen, committee gamesmanship or stalling can harm the bankruptcy estate.[377] Notably, the Commission pointed out that in most cases, the bankruptcy court and the United States Trustee[378] have sufficient authority to monitor committee activity and to implement protections if needed.[379] One way to curtail committee gamesmanship is to ask the court to order the committee to share its professionals with the debtor or other committees; another mechanism is to cap the committee's professional fees and expenses.[380] Notably, the Commission found that the existence of multiple committees in one case, such as a creditors' committee and an equity security holders' committee, can "complicate negotiations, delay the reorganization process, and create additional administrative expenses to the debtor's estate, particularly in terms of higher professional fees."[381] The Commission also warned that committees comprised of creditors who are nearly or completely "out of the money" have incentives to delay the case in the hope that with time, the debtor's business may turn around, and their recovery may increase.[382]

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[374] *Id.* at 34.
[375] 11 U.S.C. §1102(a)(1) (noting that in a regular chapter 11 case, "the United States trustee *shall* appoint a committee of creditors holding unsecured claims") (emphasis added).
[376] ABI Report at 48.
[377] *Id.*
[378] The United States Trustee oversees the administration of the bankruptcy case. 28 U.S.C. §586.
[379] ABI Report at 48.
[380] *Id.*
[381] *Id.* at 42 n. 160.
[382] *Id.* at 68.

Classification of creditors-The way in which the plan proponent (typically the debtor) classifies creditors can have a significant impact on the chapter 11 process.[383] Because creditors vote on the plan, the plan proponent may attempt to structure classes of creditors so as to isolate or minimize dissenting creditors or to otherwise ensure that creditors who do support the plan dominate the class.[384] Creditors who believe they have been classified incorrectly, or who otherwise wish to delay or disrupt the plan confirmation process, may question the basis of the plan proponent's classification decisions and slow down the case.[385] The Commission found that "claims classification and voting are subject to significant gamesmanship."[386]

Plan confirmation requirements- The Commission found that certain plan confirmation requirements are often disputed among the plan proponent and its creditors. Specifically, the Commission found that the requirement in the Bankruptcy Code that a plan be accepted by at least one impaired class of creditors caused significant delay, cost, gamesmanship, and consequent value destruction.[387] The Commission therefore recommended eliminating this requirement, finding that the provision's gatekeeping benefits were significantly outweighed by its disadvantages.[388] For small business debtors in particular, the Commission found that components of the plan confirmation process, notably the absolute priority rule[389] and the new value corollary,[390] either "doomed" many small business cases or created so much uncertainty, expense, and delay in the plan process that small business debtors were often dissuaded from using the process altogether.[391]

As mentioned, the ABI Commission's report is the most comprehensive study of chapter 11 of the Bankruptcy Code and identifies some of the key areas slowing down the process for US chapter 11 debtors. Although the law has changed in some respects since the release of the Commission's report, debtors have also found their own ways to reduce delay in chapter 11. In addition, scholars have identified a possible capacity problem that may slow down the

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[383] *Id.* at 265.
[384] *Id.*
[385] *Id.*
[386] *Id.*
[387] 11 U.S.C. § 1129(a)(10); ABI Report at 267.
[388] ABI Report at 267.
[389] The absolute priority rule, partially codified in the Bankruptcy Code, requires that, to be "fair and equitable," and hence confirmable, a plan must not allow junior classes of creditors and equity holders to receive a debtor's property unless all senior classes either consent or are paid in full. *See* 11 U.S.C. §1129(b)(2)(B)(ii).
[390] The new value corollary, sometimes also called the "new value exception," allows former equity holders to participate in the reorganized company if they make additional contributions—i.e., provide new value—to the business.
[391] ABI Report at 305.

chapter 11 process even further. The next part explores each of these changes, trends, and revelations.

Ways of Addressing Delay in the US

This part explores some of the ways that US law and practice have evolved to address delay in a chapter 11 case. Since the publication of the Commission's report in 2014, the US government has enacted the Small Business Reorganization Act of 2019. The SBRA, passed partially in response to the Commission's concerns about the delays small businesses experience in chapter 11, seeks to streamline the chapter 11 reorganization process for small businesses.

Although no legislation has passed to address delays for larger debtors, US bankruptcy practice has seen large corporate debtors take matters into their own hands, engaging in various practices to speed up the resolution of their cases. These practices include the use of restructuring support agreements, or RSAs, and the use of ultra-fast, "drive-thru" bankruptcies.

Finally, legal scholars have warned that the bankruptcy system, as currently constituted, is ill-prepared to handle a sudden influx of cases efficiently and effectively. Thus, these scholars have called for boosting the infrastructure supporting the bankruptcy system, namely by increasing the number of bankruptcy judges and clerks throughout the country.

Change in law: *The Small Business Reorganization Act of 2019*. The SBRA created a new subchapter, subchapter V of chapter 11, to allow small businesses (and some individuals) to file a more streamlined version of a chapter 11 case.[392] The SBRA's goal was to make small business bankruptcies faster and cheaper, in light of findings by the legislature that the high costs and complexities of the regular chapter 11 process made it difficult or impossible for small businesses to reorganize successfully.[393] Key features of the SBRA include:[394]

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[392] Lauren G. Raines, *A Business Bankruptcy Overview: How Subchapter V, the CARES Act and the Consolidated Appropriations Act Have Expanded Relief for Businesses and Business Owners in Bankruptcy*, BRADLEY (Mar. 22, 2021), https://www.bradley.com/insights/publications/2021/03/a-business-bankruptcy-overview-how-subchapter-v-the-cares-act-consolidated-appropriations-act; *see also* H. Rept. 116-171 (116th Cong. 2019-2020).

[393] Lei Lei Wang Ekvall & Timothy Evanston, *The Small Business Reorganization Act: Big Changes for Small Businesses*, AM. BAR ASS'N (Feb. 14, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/02/small-business-reorg/.

[394] Raines, *supra* note 392.

a) Elimination of fees. The SBRA eliminates certain administrative expenses for small business debtors, notably payment of fees to the United States Trustee.
b) Elimination of a creditors' committee. The SBRA provides that no creditors' committee is to be appointed unless on motion. This was designed to speed up the case, because in many small business cases, creditors are not very active. In addition to speeding up the case, elimination of the creditors' committee eliminates the need for debtors to pay the fees of the committees' professionals.
c) Simplifying the plan proposal process. Under the SBRA, only the debtor may file a plan of reorganization. This eliminates the possibility that creditors will file competing plans. In addition, there is no need for the debtor to prepare and file a separate disclosure statement along with its plan, although the debtor will need to provide information about itself during the case.
d) Simplifying the plan confirmation process. The SBRA eliminates the absolute priority rule for small business debtors. As discussed above, the ABI Commission identified this rule as a key source of delay in small business cases in particular.
e) Elimination of voting. Under the SBRA, creditor voting is not necessary to confirm a plan. Notably, subchapter V does not require the debtor to receive acceptance of at least one impaired class of creditors in order to confirm a plan. This Code provision was another source of delay that the ABI Commission identified. This means that a debtor in subchapter V may confirm a plan without the approval of any class of creditors, thus eliminating sources of delay stemming from creditor classification and plan confirmation.
f) Appointment of a trustee. Although every subchapter V case requires the appointment of a trustee, the trustee does not generally operate the debtor's business. Instead, the debtor's management remains in place to operate the business, and the trustee's role is primarily to facilitate the development of a plan and the payments under the plan.
g) Introduction of strict deadlines. A subchapter V debtor must comply with the SBRA's deadlines or risk having its case dismissed or converted. There are also deadlines for the court: notably, the bankruptcy court must hold a status conference within 60 days of the order of relief. Fourteen days prior to this status conference, the debtor must file a notice with the court explaining its progress toward confirming a consensual plan. The debtor is also required to file a plan within 90 days. The debtor may obtain a one-time extension of this period if it can show that the need for the extension is attributable to circumstances for which it should not justly held accountable. In other words, a debtor may only receive an extension if it can point to circumstances beyond its control that justify such extension.[395]

In sum, many of the provisions implemented by the SBRA are directly responsive to the concerns identified in the ABI Commission's report regarding delays in chapter 11.

[395] *See* Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019*, 106 (June 2022), https://www.alsb.uscourts.gov/sites/alsb/files/SBRA%20Guide%20June%202022%20Compilation%20FINAL.pdf.

Because the SBRA is so new, detailed research does not yet exist on the question of its effectiveness, and in particular on the question of whether courts are holding debtors to the strict deadlines outlined in the statute. However, one recent case indicates that courts may indeed be holding debtors accountable to the deadlines. In *In re National Small Business Alliance*,[396] the debtor did not comply with the deadline to file a plan. The debtor filed four amendments to its plan, and in the face of multiple objections, the bankruptcy judge denied confirmation of the debtor's fifth amended plan. The court then revoked the debtor's designation as a small business debtor and appointed a regular chapter 11 trustee to displace the debtor's management. The court noted that revoking the debtor's election of subchapter V was consistent with Congress's stated goals of ensuring that subchapter V cases move quickly through the reorganization process. *National Small Business Alliance* thus suggests that courts will hold debtors accountable for the SBRA's stringent timing requirements. In addition, the court's remedy was not to remove the debtor from the reorganization process entirely but rather to move the debtor out of the subchapter V process. The court did so after determining that, due to the complexities of the case and the necessity of moving more slowly with respect to this particular debtor, the regular chapter 11 process was a better fit.

Other early data indicates that subchapter V is working as intended. During its first year, subchapter V accounted for approximately 23% of all chapter 11 filings,[397] and as of June 30, 2022, almost 4,000 debtors had elected to proceed under the new subchapter.[398] Although plan confirmation continues to be contentious issue,[399] the data indicate that subchapter V cases are confirmed at twice the rate and dismissed at half the rate of other small business cases.[400] The median time to confirmation has been four months faster for subchapter V cases compared to other small business cases, and approximately 70% of confirmed subchapter V plans have been consensual.[401] Again, these are early results, but they nevertheless suggest that subchapter V is streamlining and facilitating the reorganization process for small businesses.

Change in practice: *RSAs and "drive-thru" bankruptcies*. Two trends among larger businesses to speed up the chapter 11 process are RSAs and ultra-fast bankruptcies. An RSA is a contract between the debtor and one or more of its creditors setting forth a

[396] For a fuller discussion of the case, see Sean Kulka, *The Benefits of Subchapter V – But Are You Guaranteed to Stay?* JD SUPRA (Aug. 4, 2022), https://www.jdsupra.com/legalnews/the-benefits-of-subchapter-v-but-are-1707266/.
[397] Teadra Pugh, *Analysis: Four Statistical Snapshots of Subchapter V's 1st Year*, BLOOMBERG L. (Feb. 22, 2021), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-four-statistical-snapshots-of-subchapter-vs-1st-year.
[398] Daniel J. Casamatta & Michael J. Bujold, *The USTP's Position on Select SBRA Legal Issues*, AM. BANKR. INST. J. (2022), *available at* https://www.justice.gov/ust/page/file/1549151/download.
[399] Pugh, *supra* note 397 (noting that questions about the duration of plan payments and the meaning of the phrase "fair and equitable" were contentious issues within the plan confirmation process).
[400] Casamatta & Bujold, *supra* note 398.
[401] *Id*.

framework for the treatment of debt and a timeline for reorganizing that debt.[402] Parties often, but not always, enter into an RSA prior to the debtor filing for bankruptcy.[403] RSAs are similar in many respects to prepackaged bankruptcies, but prepacks contemplate the filing of a bankruptcy plan, while RSAs do not always provide for this.[404] Parties can use an RSA to set forth the terms of the treatment of creditor claims as well as the course of bankruptcy proceedings, and they can do all of this before a case is even commenced.[405] Because of this, RSAs have been touted as tools that can reduce uncertainty about the bankruptcy process for many parties.[406]

Specifically, because creditors are committed to the process outlined in the RSA they have signed, debtors know in advance how those creditors will react to the proposals the debtor makes in bankruptcy.[407] Because they are often negotiated prior to a formal bankruptcy filing, RSAs give debtors and creditors the freedom to negotiate in a less pressured environment.[408] For their part, creditors may appreciate an RSA because it provides more certainty as to the debtor's plans for the bankruptcy case.[409] In short, RSAs can speed up the formal bankruptcy process because many of the details about that process are worked out prior to the parties going to court.[410]

Despite these advantages, scholars have criticized RSAs on several fronts. Specifically, RSAs can distort the voting process by binding creditors in advance and hence removing their "ability to vote for or against a proposed reorganization simply on the merits."[411] Because RSAs can provide for the payment of fees to some groups and not others, scholars have also characterized RSAs as a "generalized assault" on the requirement that chapter 11 plans provide the same treatment for each class of claims or interests.[412] Others have noted that RSAs "pose a potential avenue for opportunistic abuse" because some RSAs "hold value

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[402] Peter J. Haley, *Restructuring Support Agreements: A Means to Eliminate Uncertainty in the Reorganization* Process, NELSON MULLINS (Nov. 22, 2021), https://www.nelsonmullins.com/idea_exchange/blogs/the_bankruptcy_protector/chapter_11_plans/restructuring-support-agreements.

[403] *Id.*

[404] *Id.*

[405] *Id.*

[406] *Id.*

[407] *Id.*

[408] *Id.*

[409] *Id.*

[410] *Id.*

[411] David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366, 369 (2020).

[412] Stephen J. Lubben, *Holdout Panic,* HARV. BANKR. ROUNDTABLE (May 3, 2022), https://blogs.harvard.edu/bankruptcyroundtable/tag/restructuring-support-agreements/.

maximization hostage to a reordered priority scheme."[413] In short, RSAs can significantly speed up a case, but can be vehicles for opportunism, favoritism, and even abuse as well.

RSAs may also be an important component of so-called "drive-thru" bankruptcies, so named because they allow the debtor to speed through the bankruptcy process, sometimes in a matter of only hours. The case of Belk, a department store chain, is a notable example. Belk filed for chapter 11 bankruptcy in the Southern District of Texas and emerged as the quickest prepackaged case, from filing to emergence, under the Bankruptcy Code to date.[414] The bankruptcy court confirmed the plan the morning after it was filed, and the parties consummated the plan later that same afternoon.[415] The U.S. Trustee objected to the speed at which Belk's plan was confirmed, arguing that Belk's 90,000 creditors were denied due process because a judicial decision finally determined their rights prior to those creditors being notified of the proceeding.[416] The bankruptcy court, however, confirmed Belk's plan over the U.S. Trustee's objection and entered a "Due Process Preservation Order" with the aim of protecting creditors' rights.[417] This order gave parties in interest 35 days to object to the plan.[418] Despite this order, because the pan was consummated mere hours later, any would-be objector would have an uphill battle to sustain an objection to a plan that would need to be unwound if the objection were sustained.[419] Some scholars have decried *Belk* as an example of the ways procedural protections, including due process, are disintegrating due to debtors' desire to speed through chapter 11.[420] By contrast, other scholars have defended *Belk* as an innovative use of the bankruptcy system and have pointed out that Belk solicited and received acceptances from over 99% of its impaired creditors prior to filing the case.[421] However, it is difficult to tell if Belk will succeed in the long term; notably, scholars have claimed that by failing to give due assessment to the plan's feasibility, the court risked triggering an unnecessary liquidation later.[422]

In sum, recent changes to large chapter 11 practice have arguably made it easier for large corporate debtors to emerge from bankruptcy much more quickly than before. However, these innovations may unduly sacrifice due process and other substantive and procedural principles and protections the Bankruptcy Code has in place to ensure fairness and to protect parties' rights. Going forward, it will be important to continue to assess these and other

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[413] Edward J. Janger & Adam J. Levitin, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, HARV. BANKR. ROUNDTABLE (July 7, 2020), https://blogs.harvard.edu/bankruptcyroundtable/tag/restructuring-support-agreements/.
[414] Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 Am. Bankr. L.J. 247, 249 (2022).
[415] *Id.* at 249.
[416] *Id.*
[417] *Id.*
[418] *Id.*
[419] *Id.* at 250.
[420] *Id.* at 251.
[421] *Id.* at 252.
[422] *Id.* at 252-53.

innovations to ensure that they strike the right balance between increasing speed and protecting the integrity of the bankruptcy system.

***Legal scholarship**: Calls for an infrastructure boost*. When the COVID-19 pandemic hit, many believed that a surge of bankruptcy cases would soon follow.[423] Consequently, scholars began to study the need for an infrastructure boost to accommodate the anticipated rapid growth in cases. Although a surge of bankruptcy cases has yet to materialize in the US, it is still worthwhile to consider the scholarship proposing increased infrastructure, as the need for such an increase may arise in the future, due to a recession or another unforeseen event.

Shortly after the pandemic hit, scholars in the US began to estimate the demands that consumer and business debtors would make on the US bankruptcy system to assess whether the system had adequate capacity to meet those demands.[424] Using the US unemployment rate, a historically reliable indicator of future demand for US bankruptcy relief, three scholars analyzed the relationship of the local unemployment rate to the number of bankruptcy cases filed in each judicial district in the country.[425] Based on the local unemployment rate, the scholars projected the number of bankruptcies that would occur in each district and, using data from the Federal Judicial Center, estimated the time bankruptcy judges would spend in court hearings on each case.[426] The scholars then identified districts in the US that they suspected would have too few judges to meet an increase in demand.

The scholars presented two additional alternative scenarios, allowing them to suggest a range for increasing the number of bankruptcy judges.[427] In all scenarios, the scholars concluded that additional judges would be necessary. To accommodate anticipated demand for an increase in bankruptcy judges, the scholars identified two ways to quickly increase the number of judges: appoint temporary judges and recall retired judges.[428] The authors also urged Congress to provide additional funds so that judges could hire additional court staff as needed.[429]

In summary, recent changes in US law and practice and a recent scholarly study have all presented new ideas for ways in which the US bankruptcy process could be streamlined and made more efficient for an increasing number and variety of debtors. Because these

[423] Benjamin Iverson, Jared A. Ellias, & Mark Roe, *Estimating the Need for Additional Bankruptcy Judges in Light of the COVID-19 Pandemic*, 11 HARV. BUS. L. REV. ONLINE 1, 3 (2020).
[424] *Id.* at 4.
[425] *Id.* at 9.
[426] *Id*.
[427] *Id.* at 7.
[428] *Id.* at 18.
[429] *Id.* at 3.

innovations are new, it is too soon to say definitively whether their benefits outweigh their drawbacks, although early results in many instances seem promising, particularly with respect to the SBRA. The next part will examine the relevance of these ideas for India.

Relevance for India

The focus of this part is on the CIRP under the IBC. In general, the CIRP is a more creditor-friendly and creditor-centric process than chapter 11 of the US Bankruptcy Code.[430] However, like the Bankruptcy Code, the IBC imposes deadlines throughout the process. Notably, the IBC imposed a 180-day timeline for the CIRP, extendable by another 90 days at the discretion of the Adjudicating Authority. However, per a 2019 amendment to the IBC, the maximum time within which the CIRP must be completed, including any extension or litigation period, is 330 days.[431] To extend the time period, the committee of creditors must pass a resolution supported by 66% of the total voting share. Subsequently, the resolution professional must apply to the Adjudicating Authority for approval of the extension.[432]

Other deadlines imposed by the IBC are designed to move the case along. For example, the IBC requires the first meeting of the committee of creditors to be held within 7 days of the filing of the report of its constitution to the Adjudicating Authority and within 30 days from the date the insolvency proceeding begins.[433] The resolution professional must appoint two registered valuers—to determine the debtor's fair value and liquidation value—within 7 days of his appointment but not later than the 47th day from the date the proceeding begins.[434] The resolution professional must also prepare an information memorandum so that a resolution plan may be formed. This memo must be submitted to each member of the committee of creditors within two weeks of the resolution professional's appointment, but no later than the 95th day from the insolvency commencement date.

If the resolution plan is not timely filed, the Adjudicating Authority may pass orders for the corporate debtor to be liquidated.[435]

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[430] Insolvency & Bankruptcy Board of India, *Frequently Asked Questions (FAQs) on Corporate Insolvency Resolution Process (CIRP)*, *available at* https://ibbi.gov.in/uploads/faqs/CIRPFAQs%20Final2408.pdf.
[431] Ishita Ayan Dutt, *IBC Resolutions Exceed New Time Limit of 330 Days Prescribed by Govt*, BUS. STANDARD (Oct. 29, 2019), https://www.business-standard.com/article/companies/ibc-resolutions-exceed-new-time-limit-of-330-days-prescribed-by-govt-119102800661_1.html.
[432] *Id*.
[433] Insolvency & Bankruptcy Board of India, *Frequently Asked Questions (FAQs) on Corporate Insolvency Resolution Process (CIRP)*, *available at* https://ibbi.gov.in/uploads/faqs/CIRPFAQs%20Final2408.pdf.
[434] *Id*.
[435] *Id*.

In short, like the Bankruptcy Code, the IBC contains deadlines at various stages of the process, designed to keep the process moving.

Key areas of delay in the Indian process

Even with the longer timeline implemented in 2019, existing research has shown that most resolutions take longer than the deadline to complete.[436] Like the US, infrastructure may be a reason for delay, as existing research points to the inadequacy of the National Companies Law Tribunal, the Adjudicating Authority, as one of the reasons that cases are not closed in a timely manner.[437] Another study observed various stages of delay during the case itself and noted that approval of a resolution plan is one stage of delay.[438] Delays within a case have significant consequences, since a case that fails to resolve within the deadline will be ordered into liquidation. The same study noted that admission of the case also takes longer than the prescribed timeline.[439] Among the observed reasons for delay were diverse creditor groups, competing claims, and inadequate court capacity,[440] all reasons that are present in the US context as well.

Thus, comparing the areas of delay in the Indian process with those in the US process, several similarities can be observed. In both the US and India, the plan approval (or plan confirmation, as it is called in the US) process is an area of delay. Similarly, in both countries, creditor involvement in a case can slow things down, particularly when there are diverse groups of creditors with competing claims. Finally, although the capacity of the US court system seems adequate for the time being, there are concerns that capacity will be insufficient in the longer term. In India, capacity issues seem to be present already and appear to be a source of delay in both initiating and resolving cases.

Conclusion

The US experience offers various ideas for speeding up the insolvency resolution process: through legislative reform that removes various barriers, through out-of-court agreements with creditors that lessen the time spent in court, and through ensuring that the system has

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[436] Dutt, *supra* note 431 (noting that the average time taken for completion of 156 CIRPs that have yielded resolution plans has overshot the new deadline and that some cases have dragged on for over 2 years).
[437] *Id*.
[438] Neeti Shikha & Urvashi Shahi, *Assessment of Corporate Insolvency and Resolution Timeline*, INS. & BANKR. BD. OF INDIA (Jan. 2021), https://ibbi.gov.in/uploads/publication/2021-02-12-154823-p3xwo-8b78d9548a60a756e4c71d49368def03.pdf (observing that for every one case resolved under the IBC, four cases end up in liquidation).
[439] *Id.*
[440] *Id.*

adequate infrastructure, in the form of judges and clerks, to keep cases moving along. Yet, the US experience, particularly with respect to RSAs and drive-thru bankruptcies, also offers a caveat: speed should not be sought simply for the sake of speed. Instead, when seeking mechanisms to speed up a process, the advantages gained through streamlining the process must be weighed against the possible impacts to due process and substantive and procedural protections.

A further caveat is warranted when seeking to draw upon ideas in the US for India. India's IBC is very different from the US Bankruptcy Code, and each system has its own particular goals, strengths, and weaknesses.[441] Reforms that succeed in the US may not work as well or at all in India and vice versa. Notably, the causes and consequences of delay are dissimilar in the two countries.[442] Still, the US experience does offer some thoughts as to what might be useful in India.

As a first measure, it is important to focus on deadlines. Although the IBC has stringent deadlines with strict consequences for failure to adhere to them, in practice, cases do drag on. Notably, the IBC curtails judicial involvement and discretion when it comes to extension of time, because the case is immediately converted to liquidation if a plan is not approved within the timeline specified.[443] Such a consequential deadline risks liquidating a financial distressed but economically efficient company for whom reorganization would be the better option.[444]

In some sense, the US and India appear to be at opposite ends of the spectrum when it comes to deadlines. Pushing a case into liquidation when no one wants that outcome creates unnecessary risks for companies and their creditors. The equities of the case and the realities of the situation on the ground occasionally demand more flexibility than what the law allows. On the other hand, allowing judges infinite discretion to extend deadlines, as has occurred in the US in the past, creates the risk of companies wallowing in bankruptcy and risks reorganizing companies that would have been better off in a speedy liquidation. A middle ground seems ideal.

The SBRA points to a possible middle ground: tying the grant of an extension to specific findings—i.e., that the cause of delay was due to circumstances beyond the debtor's control.

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[441] Rahul Saikia, *Corporate Bankruptcy Resolution: Juxtaposing the US and India*, FINANCIER WORLDWIDE (Mar. 2020), https://www.financierworldwide.com/corporate-bankruptcy-resolution-juxtaposing-the-us-and-india#.Y5j9HOxufFp.

[442] Woodard, *supra* note 347 at 404 (noting that both countries' codes impose time limits, but for different periods of time and with different consequences if reorganization efforts fail).

[443] *Id*. at 418.

[444] *Id*. at 419-20.

In other words, the SBRA allows judges to extend the deadline for plan approval, but it ties that judicial discretion to something concrete: an analysis that the extension must be needed due to circumstances beyond the debtor's control. It is ultimately up to a court to make those findings and to enforce those deadlines, but the standard for doing so allows the court some discretion to make a principled extension based on the particular facts and circumstances before it. In addition, such an extension is for one time only. Thus, while the grant of an extension may prolong the case, allowing the judge some discretion to consider the facts and circumstances may help prolong only those cases that truly need more time, while shutting down other cases that would drag on.

Of course, in order to have a court make a decision about a deadline and extension, there must be adequate court capacity. Recently, a panel of the Indian parliament "bemoaned a shortage of bankruptcy court judges and asked the government to appoint more—including those with High Court experience—to improve the quality of judgment and limit the risk they can be challenged."[445] Thus, looking at ways to increase court infrastructure is another way to help ensure that cases move through the system quickly. When thinking about how to boost capacity, the answer doesn't necessarily have to be more judges. Building up existing judicial experience and expertise can boost capacity, and building up infrastructure in terms of increasing court staff and court space can do so as well.

Another idea is to re-envision the court's role in the insolvency resolution process. Through the rise of RSAs, prepacks, and drive-thru bankruptcies, US debtors are experimenting with processes that significantly lessen the time spent in court and the involvement of the judge in the case. Although further study would be needed to determine the specific ways in which aspects of a CIRP could be moved out of court, it should be noted that reducing court workload is a way to increase capacity. Of course, as the US experience shows, the less the court is involved, the greater the concerns about fairness and respect for basic insolvency law principles. Still, devising ways to "prepackage" more of the insolvency resolution process may be worth considering.[446]

Similar to the study conducted in the US, research could also be conducted in India based on the IBC's implementation to date to better understand the structural mismatch between the number of cases, the resulting workload, and the courts available to address them. Such a study could lead to more principled suggestions for building up the infrastructure of the courts in a way that would be responsive to the problems identified.

[445] Chatterjee, *supra* note 351**Error! Bookmark not defined.**.

[446] *See id*. ("Earlier this year, the government introduced a 'prepackaged' bankruptcy process similar to those prevalent in other countries, under which banks and borrowers agree to a financial settlement before the courts get involved, only approaching a judge to obtain approval. This system is so far only for small and mid-size enterprises, however.").

In both the US and India, it appears that diverse creditor groups and issues with creditor classification can create delay. The US's response to this problem in the small business context is to reduce the role of creditors by eliminating the creditors' committee and eliminating voting. Although similar responses could be explored in India, it seems unlikely that such reforms would take hold due to the prominent role that creditors play in the CIRP.

In conclusion, the US experience points to various ways to speed up the insolvency resolution process. Not all of these ways could or should take hold in India. Nevertheless, India can draw upon the US's experience—its successes and its pitfalls—when thinking about ways to speed up the insolvency resolution process under the IBC.

Bibliography

Bonapfel, Paul W. *A Guide to the Small Business Reorganization Act of 2019* (June 2022).

Casamatta, Daniel J. & Michael J. Bujold. *The USTP's Position on Select SBRA Legal Issues*, AM. BANKR. INST. J. (2022).

Chatterjee, Dev. *India Reexamines Its Landmark Bankruptcy Reforms*, NIKKEI ASIA (Sept. 24, 2021).

Dutt, Ishita Ayan. *IBC Resolutions Exceed New Time Limit of 330 Days Prescribed by Govt*, BUS. STANDARD (Oct. 29, 2019).

Ekvall, Lei Lei Wang & Timothy Evanston. *The Small Business Reorganization Act: Big Changes for Small Businesses*, AM. BAR ASS'N (Feb. 14, 2020).

Gaffoor, Samanna. *Time Period for Corporate Insolvency Resolution Process Under IBC – An Analysis*, IPLEADERS (June 7, 2018).

Haley, Peter J. *Restructuring Support Agreements: A Means to Eliminate Uncertainty in the Reorganization Process*, NELSON MULLINS (Nov. 22, 2021).

Iverson, Benjamin, Jared A. Ellias, & Mark Roe. *Estimating the Need for Additional Bankruptcy Judges in Light of the COVID-19 Pandemic*, 11 HARV. BUS. L. REV. ONLINE 1 (2020).

Janger, Edward J. & Adam J. Levitin. *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, HARV. BANKR. ROUNDTABLE (July 7, 2020).

Kulka, Sean. *The Benefits of Subchapter V – But Are You Guaranteed to Stay?* JD SUPRA (Aug. 4, 2022).

LoPucki, Lynn M. *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247 (2022).

Lubben, Stephen J. *Holdout Panic*, HARV. BANKR. ROUNDTABLE (May 3, 2022).

Prakash, Shreya & Misha. *How does PPRIP work in India?* SHARDUL AMARCHAND MANGALDAS (Oct. 1, 2021).

Pugh, Teadra. *Analysis: Four Statistical Snapshots of Subchapter V's 1st Year*, BLOOMBERG L. (Feb. 22, 2021).

Raines, Lauren G. *A Business Bankruptcy Overview: How Subchapter V, the CARES Act and the Consolidated Appropriations Act Have Expanded Relief for Businesses and Business Owners in Bankruptcy*, BRADLEY (Mar. 22, 2021).

Rao, M. Rajeshwar. *Resolution of Stressed Assets and IBC*, RESERVE BANK OF INDIA (May 6, 2022).

Saikia, Rahul. *Corporate Bankruptcy Resolution: Juxtaposing the US and India*, FINANCIER WORLDWIDE (Mar. 2020).

Shikha, Neeti & Urvashi Shahi, *Assessment of Corporate Insolvency and Resolution Timeline*, INS. & BANKR. BD. OF INDIA (Jan. 2021).

Skeel, Jr., David A. *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366 (2020).

Woodard, Jason D. *Racing to Resolution: A Preliminary Study of India's New Bankruptcy Code*, 52 GEO. WASH. INT'L L. REV. 393 (2020).

Sector-Specific Insolvency- Power, Steel and Telecom

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Introduction

The year 1828, marked the beginning of insolvency specific legislation in India with the introduction of Statute 9 (Geo. IV c. 73) which was applicable to the Presidency cities of Bombay, Madras, and Calcutta. The Indian Insolvency Act, 1848 was thereafter introduced which distinguished between traders and non-traders. This was followed by the Presidency Towns Insolvency Act passed in 1909 and the Provincial Insolvency Act enacted in 1907(replaced by the Provincial Insolvency Act of 1920). These two laws remained in effect until the Insolvency and Bankruptcy Code, 2016 repealed them.[447]

Post-independence, the Companies Act, 1956 was the sole piece of legislation actually being used to address corporate insolvency from 1956 to 1985. The government's initial policies focused on growing the manufacturing sector of the economy, which required sizable investments, hence it decided to invest through sizable development finance institutions ("**DFIs**") which were established with the goal of promoting industrial development. The DFIs received a chair on the boards of these companies in exchange for credit and were supposed to give creditors direct control over the management of the firms. However, in the absence of any guiding legislation, this approach led to a misallocation of economic capital in favor of the creditors and led to spreading of financial sickness throughout industrial companies by the early 1980s. The total count of sick industrial establishments increased from 26,758 to 119,606 between 1981 and 1985.[448] Consequently, the Tiwari Committee in 1980 suggested the introduction of Sick Industrial Companies Act,1985 ("**SICA**") which was followed by the establishment of the Board of Industrial and Financial Reconstruction ("**BIFR**") and the Appellate Authority for Industrial and Financial Reconstruction. The SICA became the first law that was solely concerned with corporate restructuring; however, the scope of its application was restricted only to "sick" industrial companies.[449] The insufficiency of insolvency resolution under the Companies Act, 1956 and the SICA, 1985 was evident during the 1990s as both of these acts were unsuccessful in providing fruitful outcomes considering

[447] Dr. Sushama Yadav, 'Legal Practices of Insolvency and Bankruptcy in India' (2022) 8(1) IJMR <https://eprajournals.com/IJMR/article/6437/download> accessed 14 December 2022.
[448] Ministry of Finance, Economic Survey (1987-88) ch 4 <https://www.indiabudget.gov.in/budget_archive/es1987-88/4%20Industrial%20Performance.pdf> accessed 14 December 2022.
[449] Sick Industrial Companies Act ("SICA") 1985, s 3(1)(o).

the considerable procedural delays, value destruction on account of the delays and ultimate loss to the creditors.[450]

Apart from the SICA, multiple adjoining legislations were introduced in the coming years one of them being the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("**RDDBFI Act**"), which led to the creation of Debts Recovery Tribunals ("**DRTs**") and Debts Recovery Appellate Tribunals ("**DRATs**") for the swift adjudication and recovery of debts owed to banks and financial institutions, as well as for the treatment of insolvency, bankruptcy of individuals and partnership firms. The RDDBFI Act was applicable in situations where the total amount owed to any bank, financial institution, or group of banks and other financial institutions was a minimum of Rs 10 lakh or more.[451] Although the DRTs were established to expedite the resolution of matters involving collection of debts, they suffered from shortage of resources, multiple backlogs and insufficient recovery. Between 2012 and 2013, their recovery rates were merely 17% and 14%, respectively.[452] In addition, since the RDDBFI Act was not applicable to lenders apart from banks and certain financial institutions, it diminished the faith of private lenders, financial and foreign institutions from entering the Indian debt market.[453]

The RDDBFI Act was followed by the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**") enacted with a view to strengthen the rights of secured creditors against delinquent debtors and eliminate the delay caused to banks in the recovery of loans. It followed a unique approach in permitting the secured creditors to enforce their security interest without the involvement of a court or tribunal on the fulfillment of conditions mentioned under the SARFAESI Act.[454] Any debtor who wished to dispute the steps taken by a creditor pursuant to the SARFAESI Act may do so via an appeal in the DRT within forty-five days of the enforcement measures being taken.[455]

Regrettably, despite the presence of multiple statutes, it was found that most of them were inadequate in bringing a swift resolution to the insolvency of corporate entities, which delays led to an erosion of asset value and dissuaded investors. Hence, the government in the year 2016 with the aim of increasing foreign investment and aligning Indian practices to global market standards went on to enact the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code/IBC**"). The Code follows a creditor in control approach (with certain

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[450] Rajeswari Sengupta, 'Evolution of the Insolvency Framework for Non-Financial Firms in India' <http://www.igidr.ac.in/pdf/publication/WP-2016-018.pdf> accessed 14 December 2022.
[451] RDDBFI Act, s 1(4).
[452] Reserve Bank of India, Report on Trends and Progress of Banking in India, 2012-2013 <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/0RTP21112013_F.pdf> accessed 14 December 2022.
[453] Supra 6.
[454] Section 13, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act").
[455] SARFAESI Act, s 17.

exemptions) and operates with the ultimate aim of preserving the 'going concern' status of the corporate debtor. Once an insolvency application is admitted against the corporate debtor by the adjudicating authority, a moratorium starts functioning under Section 14 of the Code barring the institution of new suits and continuation of any pending litigations, the intent of which is to provide necessary breathing space to the corporate debtor, within which a time bound insolvency resolution framework could operate.

The corporate insolvency resolution process ("**CIRP**") of a company under the Code starts with public announcement and appointment of an interim resolution professional ("**IRP**") under Section 16 of the Code. The board of the Company gets suspended and the IRP and subsequently the Resolution Professional ("**RP**") appointed under Section 22 of the Code is tasked with the day to day management of the Company. A Committee of Creditors ("**CoC**") consisting of Financial Creditors ("**FCs**") or Operational Creditors ("**OCs**"), in the absence of any FC is constituted and it is the CoC whose approval is required to be sought by the RP in regard to critical matters of the corporate debtor such as raising of interim finance, creation of security interest, change in capital structure, amendment of constitutional documents etc.[456] It is the CoC who is solely responsible for approving the resolution plan with respect to the corporate debtor. The entire CIRP process is required to be completed under 180 days with a one time extension of 90 days as stipulated under the Code.[457]

During the CIRP process, the RP invites claims by FCs, OCs and other creditors in appropriate claim form and goes on to admit the claims after verification. The RP then issues an Invitation for Expression of Interest ("**IEOI**") inviting Prospective Resolution Applicants ("**PRAs**") to submit their bid for the corporate debtor. In the event the CoC approves the resolution plan of a Resolution Applicant ("**RA**") with a sixty six percent majority,[458] the said RA goes on to be declared by the CoC as the successful RA and the RP files the resolution plan with the National Company Law Tribunal ("**NCLT**") for its approval. Post such approval, the successful resolution applicant is required to implement the plan in terms of the approved resolution plan. However, if no plan gets approved within a period of 270 days, the corporate debtor may be referred to liquidation by the CoC, which referral is required to be confirmed by the NCLT.

Now, with a broad perspective of history of insolvency procedures in India and the process under the Code, we now discuss the contours of insolvency resolution for power, steel and telecom sectors.

[456] Section 28 of the Insolvency and Bankruptcy Code, 2016.
[457] Section 12 of the Insolvency and Bankruptcy Code, 2016.
[458] Section 30 of the Insolvency and Bankruptcy Code, 2016.

Iron & Steel Sector

Overview of the Steel Sector

The Indian steel industry was de-licensed and de-controlled in 1991 and 1992 respectively. Since the de-regulation, the steel industry has flourished in a delicensed and resurgent economy which presented a rising demand for steel. In 2021, India with a capacity of 118.1 million tonnes was the world's second largest crude steel producer.[459] Further, the production of total finished steel (alloy/stainless+ non alloy) stood at 113.60 million tonnes in 2021-22 (provisional), a growth of 18.1% over the last year.[460] Currently, the Government with an eye to the future, has in its National Steel Policy 2017 laid down a long term growth plan for the Indian steel industry, both on demand and supply sides, and is gradually shifting preference for domestically manufactured iron and steel products in government procurements.[461] India's growth consumption is fuelled by infrastructure construction, automobile and railway sectors.

Despite the above stated continuous growth, the steel industry is considered as the largest contributor of non-performing assets ("**NPAs**") to the banking system. Notably, at the time of initiation of the Code, steel companies accounted for five out of the twelve stressed entities notified by the RBI ("**Dirty Dozen**") for immediate resolution under the Code. These five companies included Essar Steel, Monnet Ispat, Bhushan Steel, Electrosteel Steels and Jindal Steel and Power Limited. The Dirty Dozen then constituted 25% of total non-performing assets in the country with the five steel companies together constituting more than a sixth (22 million tonnes) of the total crude steel capacity in India with a total debt of Rs. 1.4 lakh crores as of 31 March 2016.[462] One becomes intrigued as to why a staggering number of steel companies were insolvent or at the brink of insolvency during the period of 2015-18. The reason for the same may be seen in the practice of leveraging assets and taking on high debts, prevalent in the steel sector.

Historically, the Indian steel sector has witnessed a poor loan repayment record having a share of 10.24% (Rs 3.1 lakh crore) of the total loans given by the banking industry. In 2017, the stressed assets of the steel sector comprised around 29.38% of the total gross NPA and stood at Rs 1.5 lakh crore.[463] In hindsight, the rise in stressed assets could be attributed to the aggressive expansion adopted by the industry during 2005-2010 which was financed by high interest debt. Come 2015-16, the interest accumulated manifold which coupled with weak demand and surge in cheaper imports during led to the rise in stressed steel assets

[459] An Overview Of Steel Sector, Ministry of Steel, https://steel.gov.in/overview-steel-sector
[460] An Overview Of Steel Sector, Ministry of Steel, https://steel.gov.in/overview-steel-sector
[461] An Overview Of Steel Sector, Ministry of Steel, https://steel.gov.in/overview-steel-sector
[462] https://bloncampus.thehindubusinessline.com/b-learn/insight/a-look-at-two-successful-ibc-cases-in-the-steel-industry/article26281699.ece
[463] https://www.financialexpress.com/industry/stressed-assets-of-steel-sector-and-their-recovery/747740/

accounting for 37% exposure of the banking sector during that period.[464] The situation was further aggravated by unavailability of cheap raw material caused by the suspension of mining of iron ore in domestic mines especially in Goa and Karnataka.[465] Debt financed overseas acquisitions by steel companies, capacity expansions, and the subsequent fall in exports resulted in capacity overhang, huge losses, unemployment and wide socioeconomic impact.[466] It was in such a scenario that the Code was implemented and a total default of Rs. 570.01 billion was admitted under it as on December, 2018.[467]

Post IBC Scenario

Post the introduction of IBC, multiple steel sector companies have witnessed resolution. Some of the examples of successful resolution are summarized below:

I. Bhushan Steel Limited

Bhushan Steel Limited ("**BSL**") was an upcoming steel company which witnessed considerable success during the early 2000s. However, it went on to take substantial loans for capacity expansion from both public and private sector banks especially in regard to its plant in Odisha. The management had expected recovery of profit on the full operation of the Odisha plan, however sadly the same could never be achieved. It was in early 2010-11 that BSL started facing financial problems with its debt rising to a staggering Rs. 1,118 crores which further worsened in the years 2013-14.[468] It is to also be noted that ever since its inception, BSL was a highly leveraged company and held a debt profile 3.5 times in proportion to its equity.[469] The staggering amount of debt coupled with interest, loss in profit and fall in global steel prices resulted in a scenario wherein the company was making just enough profit to cover its finance cost. Subsequently the huge debt profile along with poor management of BSL pushed it to brink of insolvency and its CIRP was initiated in 2017 by the State Bank of India ("**SBI**") under the newly enacted Code.

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[464] https://economictimes.indiatimes.com/industry/indl-goods/svs/steel/insolvency-proceedings-for-stressed-accounts-may-lead-to-consolidation-in-the-steel-sector/articleshow/59285919.cms
[465] https://www.moneycontrol.com/news/business/insolvency-code-leads-to-steel-sector-consolidation-in-2018-what-to-expect-in-2019-3277271.html
[466] https://economictimes.indiatimes.com/industry/indl-goods/svs/steel/npa-resolution-to-help-resume-lending-to-steel-sector-report/articleshow/60211848.cms
[467] Arti Chandani, Rajiv Divekar, Abdus Salam, Mita Mehta, A Study to Analyze Impact of Insolvency And Bankruptcy Code 2016 On NPA's Of Commercial Banks with Reference To Iron And Steel Sector, Symbiosis Institute of Management Studies, Symbiosis International (Deemed University), Pune
[468] https://www.studocu.com/in/document/mangalore-university/bachelor-of-commerce/bhushan-steels-case-study/7251025
[469] https://www.studocu.com/in/document/mangalore-university/bachelor-of-commerce/bhushan-steels-case-study/7251025

The resolution of BSL came at a time wherein the Code was at its nascent stage and hence there were several ambiguous legal principles which were crystallised during BSL's CIRP process (discussed below). During its CIRP, Bamnipal Steel Limited ("**BASL**"), a wholly owned subsidiary of Tata Steel Limited ("**TSL**") emerged as the successful resolution applicant. BASL was incorporated in 2018 as a special purpose vehicle set up solely to facilitate the acquisition of BSL. The entire borrowing raised by BASL were also backed by Letters of Credit from TSL. After multiple delays, including litigations such as that by Neeraj Singhal, former vice chairman and managing director of BSL to stay TSL takeover, by operational creditor Larsen & Tourbo Limited to prioritize their payments etc., the resolution plan for Bhushan Steel was finally approved by the NCLT on 15 May 2018 and it was renamed to Tata Steel BMSL Limited. With this resolution, BASL and through it TSL went on to acquire a 72.65 % stake in BSL for an aggregate amount of Rs 158.89 crore and provided additional funds aggregating to Rs 35,073.69 crore to the ensuing entity by way of debt/convertible debt. The remaining 27.35% of the share capital was to be held by the existing shareholders of BSL and the financial creditors who received shares in exchange for the debt owed to them. As a part its resolution plan, BSL paid Rs. 35,100 crores to the financial creditors of BSL to settle their claims. The implementation of the resolution plan was by way infusion of money via issue of equity shares and inter-corporate deposits with new shares also being allotted on a preferential basis.[470]

State Bank of India V Bhushan Steel Limited [C.A No. 244(PB)/2018, C.A. No. 186(PB)/2018, C.A. No. 217(PB)/2018 & C.A. No. 176(PB)/2018 in C.P. (IB)-201(PB)/2017]

Brief Facts:

BSL was admitted into CIRP on 26 June 2017 vide a Section 7 application filed by the State Bank of India ("**SBI**") under the Code. The IRP of BSL received claims worth Rs. 56,080 crores from 53 financial creditors along with claims worth Rs. 2846.52 crores from 751 operational creditors and Rs. 0.22 crores from two other creditors. During the CIRP process, the RP of BSL received 3 resolutions plans out of which the ones submitted by TSL and JSW Living Private Limited were found to be complaint with the requirements of the Code and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 ("**CIRP Regulations**"). TSL was subsequently notified as the highest scoring RA and its resolution plan was approved by the CoC of BSL. The resolution plan submitted by TSL was subsequently placed before the NCLT to seek its approval and acceptance in accordance with the terms of the Code. It is to be noted that the resolution of BSL was one of the first such resolution witnessed under the newly implemented Code and

[470] https://mnacritique.mergersindia.com/bhushan-steel-tata-steel-insolvency-resolution/

hence multiple issues were raised with respect to its implementation with respect to the interpretation of provisions of the Code and the power of adjudicating authority under it. The interpretation of such issues went on to lay the foundation for resolution of other companies further on. We would now analyse some of such issues in further detail.

Issues:

1. Whether TSL was eligible to be a RA under Section 29A of the Code.
2. Whether the rights of the employees of the BSL have been protected by the RA vide its Resolution Plan.
3. Whether the Resolution Plan is tenable since the consent of the operational creditor Bhushan Energy Limited ("**BEL**") was not sought prior to termination of its Power Purchase Agreement ("**PPA**") with BSL.
4. Whether Larsen & Turbo ("**L&T**") can be considered as a secured creditor under section 30(2) and 31 of the Code
5. Whether the NCLT can approve/direct the grant of statutory reliefs and concessions, including waving of taxes and duties to RA in relation to resolution plan.

Analysis:

A.Whether TSL was eligible to be a RA under section 29A of the Code.

There were two contentions in regard to TSL's ineligibility under section 29A of the Code:

a) that Mr. C. Sivasankaran, an undischarged creditor must be treated as a 'connected person' in terms of Explanation (i) of Section 29(A) as he controlled TSL; and
b) That 'Tata Steel UK', a 100% subsidiary of TSL was prosecuted and convicted for non-compliance of the Health and Safety at Work Act, 1974.

In terms of the above, the NCLT held as follows:

a) "that Mr. C Sivasankaran cannot be held to be 'connected person' under Explanation I to Section 29A of the Code for the following reasons":
   - Mr. C Sivasankaran had through his company, Sterling Infotech Private Limited ("**SIPL**"), pledged his shares with Standard Chartered Bank ("**SCB**") in lieu of a loan of worth INR 600 crores;

- that TSL had agreed to buy the shares from SCB in the event of default by SIPL at a pre-determined price to prevent the shares from being purchased by an undesirable third party and that it was in a nature of pre-emptory right and was not a guarantee;
- the undertaking furnished by TSL to SCB had expired in March 2009 and was not been acted upon by SCB; and
- there was no imputation that SIPL and TSL acted in concert.

Further, the eligibility of TSL was upheld under Section 29A of the Code for the following reasons:

a) that Tata Steel UK was convicted for non-compliance of certain provisions of the HWA Act, which prescribes a punishment of imprisonment not exceeding 'two years' or 'fine' or 'both'. Tata Steel UK was imposed with a punishment of fine, whereas bar on the eligibility to be a RA as provided under Section 29A(d) of the Code mandates conviction with a punishment of imprisonment of two years or more. It was held that Section 29A does not render an RA ineligible under the Code solely due to an imposition of fine, hence TSL is eligible to submit the resolution plan for BSL; and

b) it was clarified that the fetters of Section 29A(d) are only applicable to natural persons. While relying on ***Standard Chartered v Directorate of Enforcement and Ors***[471], the tribunal held that such disqualifications do not apply on juristic persons, since they cannot be imprisoned.

B. Whether the rights of the employees of BSL have been protected by the RA vide its Resolution Plan.

The NCLT held that the Resolution Plan submitted by TSL does protect the interests of the employees and stated the following reasons:

a) it provides for continuity of employment of the employees of BSL and payment of back wages; and

b) once a Resolution Plan has been approved by the tribunal under Section 31(1) of the Code, it becomes binding on all the stakeholders which includes the employees as well. Hence, post such approval the same cannot be objected to by them.

C. Whether the Resolution Plan is tenable since the consent of BEL, an operational creditor, was not sought prior to termination of its Power Purchase Agreement ("PPA") with BSL.

[471] Standard Chartered Bank and Ors v Directorate of Enforcement and Ors, AIR 2005 SC 2622.

The tribunal held that prior consent for the termination of the PPA under the resolution plan of TSL was not required since:

a) Regulation 39(6) of the CIRP Regulations clarifies that a resolution plan which would otherwise require consent of members of the corporate debtor under the terms of the constitutional document, shareholders' agreement, joint venture agreement or other document of a similar nature shall take effect notwithstanding such consent has not been obtained; and

b) TSL had envisaged termination of two PPA entered into between BEL and the BSL in terms of the resolution plan submitted and the same was permitted by Regulation 39(6) of the CIRP Regulations.

D. Whether L&T can be considered as a secured creditor u/s 30(2) and 31 of the Code.

The tribunal held that L&T cannot be treated as a secured creditor owing to the following reasons:

a) that the claim made on behalf of L&T was unsustainable as there were no documentation on record showing any creation of security warranting a view that L&T should be regarded as a secured creditor;

b) that Section 55(4)(b) of the Transfer of Property, 1882 is only applicable on immovable properties. It provides that the seller is entitled for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer. However, since plants and machineries do not qualify as an immovable property as under Section 55(4)(b) of the Transfer of Property, 1882, therefore, there can be no creation of charge on such plants and machineries by way of their supplies, erection and installation; and

c) charge can only be created upon execution of a document as under Section 132 of the Companies Act, 2013. Hence, L&T remains to be an operational creditor.

E. Whether the NCLT can approve/direct the grant of certain statutory reliefs and concessions, including waving of taxes and duties to RA in relation to resolution plan?

The tribunal inter alia held that it is not empowered to issue any directions with respect to the certain statutory reliefs and concessions, including wavier of taxes and duties that has been sought by TSL under its resolution plan. The same were clarified to not be condition

precedent to the resolution plan. The NCLT further observed that treating such reliefs and concessions as 'condition precedent' to the resolution plan would render it 'incomplete'.

In view of the above and after extensive perusal of the resolution plan submitted by TSL, the NCLT accepted and approved the same and laid a touchstone for subsequent resolutions to take place.

II. Essar Steel

The CIRP of Essar Steel was one the longest running resolutions under the Code lasting for about 900 days. Vide numerous judgements pronounced during its CIRP, Essar Steel went on to establish the basic tenets of the Code and established the supremacy of the financial creditors in the CoC with respect to distribution of claims. The legal principle of 'commercial wisdom of the CoC being supreme and all prevalent" was all propounded in this matter by the Hon'ble Supreme Court.

Essar Steel founded in 1969 and controlled by the Ruia family was one of India's oldest and leading steel companies, operating in the private sector. It was involved in steel manufacturing including making of pellet and iron bars and at a time was India's second largest steel producing entity. While on surface it boasted of substantial financial success, its books were marred by huge debt amounting to Rs. 2800 crores as of 2002 which were then restructured.[472] It went on to borrow huge sums of money from banks like SBI, ICICI Bank, Syndicate Bank etc. for the expansion of their steel plant in Hazira. However, due to the delay in obtaining environmental approval and shortage of availability of natural gas, the expansion could not materialize. It was tragic that the operational failure of the company occurred around the time when the world was reeling under the 2008 financial crisis which had the effect of lowering global steel prices. The combined effect of all the above resulted in Essar Steel accumulating a debt of around Rs. 42,000 crores by 2015.

The stressed situation of Essar Steel led the RBI to notify it among the Dirty Dozens to be resolved under the Code. Its CIRP was initiated at the instance of SBI and Standard Chartered Bank ,which went on to file a Section 7 application under the Code. The CoC of the company in December 2017 invited for resolution plans from PRAs. It is substantial to note that Section 29A of the Code was notified during the CIRP of Essar Steel thereby making the Ruia family ineligible to submit a resolution plan for the corporate debtor. In the first round, resolution plans were submitted by two companies namely ArcelorMittal and Numetal, however since 25% stake in Numetal was held by Rewant Ruia and ArcelorMittal had a stake in the bankrupt Uttam Galva, they were disqualified under Section 29A of the Code. Both

[472] https://insider.finology.in/investing/arcelormittal-essar-steel-acquisition

Numetal and ArcelorMittal challenged such disqualifications before the NCLT and after multiple litigations were found to be eligible under the Code after the exit of Rewant Ruia from the former and settling of unsettled dues of Uttam Galva by the latter.[473]

Subsequently, it was ArcelorMittal which offered Rs. 42000 crores as repayment to the creditors under its resolution plan and emerged as the successful RA. The company was then renamed as ArcelorMittal Nippon steel India (AM/NS INDIA).[474]

Committee Of Creditors of Essar Steel India Limited V Satish Kumar Gupta & Ors [(2020) 8 SCC 531]

Brief Facts:

Standard Chartered Bank ("**SCB**") had extended a loan to Essar Steel Offshore Limited ("**ESOL**"), a wholly-owned foreign subsidiary of Essar Steel who had also guaranteed the loan amount. SCB had issued a demand notice to Essar as a result of ESOL's inability to pay the sum owed. Since Essar Steel was unable to comply with SCB's demands, it filed for the CIRP of Essar Steel along with SBI, the authorized representative member of the Joint Lenders' Forum ("**JLF**") who had collectively lent money to Essar Steel. Essar Steel also acknowledged the default, however insisted on the absence of any wilful default on their part.

During the CIRP, ArcelorMittal's emerged as the successful resolution applicant and its bid was approved by the NCLT in March 2019. Under the approved resolution plan, ArcelorMittal offered the FCs an advance cash payment of around Rs. 42,000 crore and a capital infusion of Rs 8,000 crore over the following few years. Its offer however did not provide much for the OCs of Essar Steel's and the resolution plan approval order was challenged. The National Company Law Appellate Tribunal ("**NCLAT**") went on to again approve ArcelorMittal's plan in 2019 but modified the financial distribution by mandating an equal recovery plan for all creditors, including FCs and OCs. This was then challenged by the FCs of Essar Steel in the Hon'ble Supreme Court which went on to hold the following:

A) *Primacy of CoC in insolvency resolution process*

The apex court upheld the supremacy of CoC and held that it is the CoC which has the authority to determine the resolution of the corporate debtor based on commercial acumen. The Code does not lay down any criteria for the revival or liquidation of the corporate debtor and the same shall be decided based on the analysis of the CoC based on "feasibility and

[473] https://www.moneycontrol.com/news/business/companies/essar-steel-insolvency-timeline-a-saga-of-many-twists-and-turns-in-ibcs-biggest-case-4641971.html
[474] https://insider.finology.in/success-stories/essar-steel-and-its-revival-from-bankruptcy

viability of the resolution plan". Such examination must encompass all facets of a resolution plan, including the allocation of funds among the different classes of creditors. Further, neither the adjudicating nor the appellate authority under the Code is authorized to assess the business decisions of the CoC.

B) *Equality between secured and unsecured creditors*

The Hon'ble Supreme court while drawing a distinction between equal and equitable treatment, held that the latter cannot be extended to treat non-equals equally, as doing so would undermine the fundamental purpose of the Code (i.e., to settle troubled assets). Therefore, each creditor must be treated fairly according to the category to which it belongs: secured or unsecured, financial or operational. It stated that the resolution plan may allow for unequal payments to different class of creditors so long as the IBC and its regulations are complied with. It was held that the CoC was empowered to classify the creditors and determine the payment of secured creditors payments based on the value of their security.

C) *Jurisdiction of the NCLT and the NCLAT*

The Hon'ble Supreme Court clarified the restricted jurisdiction of the NCLT and NCLAT under the Code and that the tribunals cannot interfere with the business decision of a majority of the CoC. While considering approval of a resolution plan, the Hon'ble Supreme Court held that the NCLT cannot exercise equitable or discretionary authority outside of the scope of the Code and was allowed to only conduct a limited judicial review to ensure that the CoC has ensured the following during the approval of the resolution plan:

- continuation of the corporate debtor as a going concern throughout the CIRP;
- maximisation of the value of its assets; and
- balanced the interests of all stakeholders, including operational creditors.

D) Utilization of the profits of the corporate debtor during CIRP to repay creditors

The apex court went on to reverse the NCLAT's directive which had stated that the earnings of the corporate debtor during the CIRP must be divided amongst all FCs and OCs in proportion to their admitted claims. The court observed that the Expression of Interest or Request for Resolution Plan for Essar Steel did not provide for this eventuality and accordingly, revenues gained during the CIRP could not be utilized to the payment of any of the creditors' debts.

E) Formation of sub-committees by the CoC

The Hon'ble Supreme Court clarified that sub-committees of CoC may be appointed to negotiate with resolution applicants or to carry out other ministerial or administrative duties, however all such acts of the sub-committee must be approved and ratified by the CoC. It was further clarified that decisions under Section 28 of the IBC and the approval of the resolution plan under Section 30(a) can only be taken by the CoC.

F) Termination of Personal Guarantees and determination of unresolved claims

The NCLAT had held that creditors' rights against guarantees given by the promoter/promoter group of the corporate debtor ceased upon payment of the guaranteed debt, subject to the acceptance of the resolution plan providing for payment to the lenders. The Hon'ble Supreme Court in the present matter went on to vacate the NCLAT's decision on the grounds that, once a resolution plan is approved by the CoC, it is binding on all parties, including guarantors. However, their guarantees are not voided by the same. Hence, if the resolution plan does not provide for the complete recovery of the lenders' obligation, the lenders may pursue the guarantors for the remaining debt. Further, the apex court clarified in unequivocal terms that a successful RA cannot be burdened with unresolved claims after the approval of the resolution plan, thereby being one of the first judgements to have propounded the clean slate theory for a successful resolution applicant.

III. Monnet Ispat

Monnet Ispat & Energy Limited ("**MIEL**") incorporated in 1990 was primarily engaged in manufacture of steel intermediaries e.g., sponge iron, ferro alloys, pellets etc and went on to develop steel making facilities in Raipur and Raigarh.[475]. It was among the Dirty Dozen notified by the RBI and was admitted into insolvency on 18 July 2017 pursuant to a Section 7 application filed by the SBI. MIEL had previously availed fund based and non-fund-based loan facilities from various banks and financial institutions including SBI, the lead creditor, and its erstwhile associate banks, viz. State Bank of Patiala, State Bank of Mysore, State Bank of Bikaner and Jaipur, State Bank of Hyderabad, and State Bank of Travancore. The company had been facing financial stress since early 2011-15 due to similar factors as stated for other steel companies including the influx of cheap Chinese steel products, impact on account of government policies in making available key natural resources namely coal and iron ore for steel industry, de-allocation of coal mine by the Hon'ble Supreme Court in

[475] https://www.iiipicai.in/wp-content/uploads/2021/11/Case-Study-of-Monnet-Ispat-Energy-Limited-MIEL.pdf

September 2014, delay in ramp-up of its integrated steel plants, higher interest rates etc. At the end of FY 17, MIEL's debt stood at Rs.12,262 crore and it had consistently been recoding losses since FY15 which had eroded its net worth.[476]

MIEL was among the first few resolutions achieved under the Code with the consortium of JSW Steel-AION Capital emerging as the successful RA infusing approximately Rs. 2,875 crores in MIEL.[477] The lenders of MIEL suffered a 77.69% haircut and in addition to the upfront payment of Rs 2,457 crore, the resolution plan provided Rs 219 crore through optionally convertible preferential shares and an additional Rs 212 crore through fresh equity of 12.5%. Multiple litigations also took place with respect to the mines allotted to MIEL and finally pursuant to the NCLT's decision the resolution plan did not transfer the allotted mines to JSW Steel-AION Capital.

Power Sector

Snapshot of India's Power Sector

In the next 30 years, India's growing industrialisation and urbanisation would boost the country's demand for electricity. Despite an improvement in India's electricity generating capacity, the country still relies largely on non-renewable sources of energy with thermal power accounting for the majority of the energy production. Currently, as a result of the India's pledge to the Paris Agreement, there is a drive to increase the country's renewable energy producing capacity. With solar and wind energy becoming less expensive, cleaner forms of energy are now affordable, still access to electricity and the quality of electricity supplied to consumers remain inadequate with the overall energy deficit accounting to 0.7% with a 2% peak deficit. In particular states, such as Jammu and Kashmir and the north-eastern regions, the shortage situation is worse. Moreover, according to the statistics, in 2018, over 53% of the villages had access to power for domestic usage for fewer than 12 hours per day.[478] Despite the fact that all villages are electrified, the continuous supply of energy remains a challenge.

The poor financial condition of the electrical distribution businesses, which hinders their ability to purchase power and expand the supply network, is another significant issue. While the

[476] https://www.iiipicai.in/wp-content/uploads/2021/11/Case-Study-of-Monnet-Ispat-Energy-Limited-MIEL.pdf
[477] https://bloncampus.thehindubusinessline.com/b-learn/insight/a-look-at-two-successful-ibc-cases-in-the-steel-industry/article26281699.ece
[478] Villages With Availability Of Electricity For Domestic Use, Mission Antyodaya, Ministry of Rural Development, https://missionantyodaya.nic.in/preloginStateElectricityReport2018.html.

Ujjwal DISCOM Assurance Yojana ("**UDAY**") partially handled the distribution companies' ("**DISCOMS**") obligation to banks, their debt to generating companies ("**GENCOs**") is also a cause for concern. According to the Standing Committee on Energy, there have been 34 stressed thermal power facilities with an existing debt of Rs 1.74 lakh crore as of June 2017 i.e. post-UDAY period.[479] These tendencies demonstrate that excess electricity capacity and the electrification of rural areas may not indicate a continuous and high-quality power supply throughout the nation. As of today, the electrical sector in India is monopolised by fossil fuels, particularly coal, which produce approximately 75 percent of the nation's electricity.[480] The government is working to enhance renewable energy investment. According to the government's proposed National Electricity Plan for 2022, the country does not require any additional fossil fuel power facilities in the electric utility industry until 2027, in addition to those now under development.[481] In 2029–2030, it is anticipated that non-fossil fuel production will provide approximately 44.7% of the overall gross energy generation.[482]

Reasons for Increased Insolvency in Power Sector

India's power sector consists of three arms for generation, transmission and distribution. Presently, the distribution arm of the sector i.e., the distribution companies are primarily government owned and have consistently been incurring huge losses and owe a debt of around Rs 1,21,030 crore to the generating companies as of January 2022.[483] Further, the GENCOs are unable to migrate to another entity due to the monopoly of the state owned DISCOMS in the electricity distribution segment. These DISCOMS suffer from around 17% huge aggregate & technical losses and due to their debt profile are unable to invest in high quality infrastructure. The result is piling up of dues with the DISCOMS with the resulting loss shifting to the GENCOs. While the state DISCOMS are bailed out by the state or central governments, it is the GENCOs which are on the receiving end and are driven towards insolvency. According to the present data, DISCOMS in Rajasthan, Uttar Pradesh, Jammu & Kashmir, Telangana, Andhra Pradesh, Karnataka, Madhya Pradesh, Maharashtra, Jharkhand and Tamil Nadu account for the major portion of dues to GENCOs, one of the reasons for high power sector insolvency from the stated areas.[484]

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[479] 37*th* Report: Stressed /Non-performing Assets in Electricity Sector, Standing Committee on Energy, March 7, 2018, http://164.100.47.193/lsscommittee/Energy/16_Energy_37.pdf.

[480] https://ember-climate.org/global-electricity-review-2021/g20-profiles/india/

[481] https://cea.nic.in/wp-content/uploads/irp/2022/09/DRAFT_NATIONAL_ELECTRICITY_PLAN_9_SEP_2022_2-1.pdf

[482] https://cea.nic.in/wp-content/uploads/irp/2020/12/Optimal_mix_report_2029-30_FINAL.pdf

[483] https://economictimes.indiatimes.com/industry/energy/power/discoms-outstanding-dues-to-gencos-rise-4-4-to-rs-121030-crore-in-january/articleshow/88786913.cms

[484] https://economictimes.indiatimes.com/industry/energy/power/discoms-outstanding-dues-to-gencos-rise-4-4-to-rs-121030-crore-in-january/articleshow/88786913.cms

Further, it is also to be noted that it is majorly the thermal plants who are witnessing insolvency since their viability is contingent on a complex matrix of elements including the seamless supply of coal, favourable power purchase agreements with distribution firms, the demand for and price of non-thermal power sources. The annulment of coal block assignments by the Hon'ble Supreme Court in 2014 adversely impacted a significant number of these plants.[485] During 2017-18, India added more renewable capacity (11,788 MW) than thermal and hydro combined for the first time (5,400 MW).[486] The rise of renewable sources is an additional factor which challenges the growth of thermal plants. The renewable plants offer cheaper supply of electricity for tariff-sensitive and debt-burdened DISCOMs and hence they are unwilling to enter into/extend the PPAs of the existing GENCOs. This means that the companies who established coal-fired thermal power plants are either unable to begin production due to a scarcity of coal or unable to find consumers. As of 2018, 34 thermal power plants with a total of 40,130 MW of assets and Rs 1.74 lakh crore were at risk of defaulting on their debt. According to the finance ministry, seven of these stressed projects, including Adani Power's Korba (Chhattisgarh), Adhunik's Jharkhand facility, and GMR's Kamalanga (Odisha), had been resolved.[487]

In addition to challenges connected to coal supply and power purchase agreements, the consensus among industry stakeholders is that competitive bidding by private operators, the incapacity of promoters to inject equity, and contractual or tariff-related disputes have exacerbated the sector's woes. The Covid-19 pandemic also contributed to the decline of the sector majorly. The majority of state-owned utilities have incurred substantial losses, necessitating continued assistance from state governments in the form of subsidies, loans, and guarantees. The DISCOMS were also provided huge assistance during the Covid-19 pandemic, however their total net worth still stands at a negative 62,000 crores.[488] Further, in 2021, the Ministry of Power ("**MoP**") clarified that insolvency proceedings can be initiated against state-owned electricity DISCOMs and GENCOs in case of default of payment by the creditors. This clarification came in reference to a case filed by Tamil Nadu Generation and Distribution Company ("**TANGEDCO**") against CIRP initiated by South India Corporation Private Limited in High Court of Madras.[489] Although, presently it is the GENCOs which are bearing the brunt of insolvency proceedings but with the above stated decision (discussed

[485] https://prsindia.org/files/bills_acts/bills_parliament/2014/SC_order.pdf
[486] https://www.business-standard.com/article/economy-policy/india-to-draw-investments-worth-80-bn-in-renewable-energy-sector-report-118111401225_1.html#:~:text=India%20added%20record%2011%2C788%20MW,energy%20capacity%20in%202017%2D18
[487] https://economictimes.indiatimes.com/industry/energy/power/how-indias-power-story-derailed-blowing-a-rs-1-74-lakh-crore-npa-hole/articleshow/65822950.cms?from=mdr
[488] https://www.hindustantimes.com/ht-insight/economy/applying-the-insolvency-code-to-the-power-distribution-sector-101641128199330.html
[489] https://economictimes.indiatimes.com/industry/energy/power/insolvency-proceedings-can-be-initiated-against-state-owned-discoms-power-ministry/articleshow/87665480.cms

below), we may soon witness a scenario where multiple DISCOMS are admitted under the Code.

Examples of Insolvent Power Companies

A. Lanco Amarkantak Power Limited

Lanco Amarkantak Power Limited ("**LAPL**") is a GENCO with power generation facilities near the Korba, Chhattisgarh. LAPL with a capacity of 600 MW has three identical units out of which only one is operational and is primarily dependent on coal as its principal fuel. LAPL started encountering financial troubles following the fall of its Gurugram-based parent business, Lanco Infratech Limited. The project's lenders, led by Power Finance Corporation Limited ("**PFC**") pushed for insolvency proceedings against LAPL. Subsequently, a Section 7 application filed by Axis Bank Limited was admitted in NCLT, Hyderabad in September 2019. The company was required to pay banks almost Rs. 12,000 crores with attempts to address the default using traditional methods, such as corporate debt restructuring proving unsuccessful. The tribunal in the meantime ordered for the liquidation of Lanco Infratech Limited, the parent company of the Lanco group, after banks failed to come together on a resolution plan during the company's bankruptcy proceedings. The parent business alone owed more than INR 45,000 crores to banks.[490]

Initially, Vedanta and iLabs Group submitted their bid with Vedanta's offer of INR 2,800 crore being preferred by the CoC, however the same failed to materialize.[491] In 2022, expression of interest were received from Reliance Industries, Adani Power, Oaktree Capital's fund, O P Jindal promoted Jindal Power Ltd, and a consortium of PFC and REC Limited.[492] The initiation resolution plans were submitted in August and in October 2022, at the 48th meeting of the CoC, lenders resolved to hold a closed bidding process. As a result, the three resolution applicants – Adani Power, Reliance Industries, and the PFE-REC consortium were tasked with submitting respective offers that were superior to the initial ones submitted in August.[493] Adani Group and Reliance Industries backed out from bidding process with PFC-REC consortium offering an upfront cash payment of Rs. 3,020 crores at the auction.[494]

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[490] https://economictimes.indiatimes.com/industry/energy/power/nclt-okays-start-of-lanco-amarkantak-bankruptcy-process/articleshow/71121072.cms?from=mdr.

[491] https://economictimes.indiatimes.com/industry/banking/finance/lenders-reject-rs-2800-crore-vedanta-offer-for-lanco-unit/articleshow/88844642.cms.

[492] https://economictimes.indiatimes.com/industry/energy/power/ril-adani-power-among-companies-bidding-for-lanco-amarkantak/articleshow/89835935.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

[493] https://economictimes.indiatimes.com/industry/energy/power/adani-ril-skip-lanco-unit-auction-citing-ibc-rule/articleshow/95898163.cms

[494] *Ibid.*

In December 2022, the PFC-REC led consortium along with their partner entities SJVN Limited and Damodar Valley Corporation outbid the remaining RAs in the CIRP of LAPL and have subsequently emerged as the Successful Resolution Applicants whose plan has been approved by the LAPL CoC.

B.Lanco Mandakini Hydro Power

The CIRP of Lanco Mandakini Hydro Energy Private Limited ("**LMHEPL**") is the first insolvency to be witnessed under the Code with respect to a hydropower company. LMHEPL is a special purpose vehicle promoted by the Lanco Group. It was set up to implement two hydroelectric projects of 76 MW each, namely Phata Byung and Rambara Hydro on river Mandakini in Uttarakhand. The hydel power plant across river Mandakini in Uttarakhand was to be built with an investment of Rs. 5200 crores, partly via debt and equity.[495] The debt was financed by a consortium of six banks led by Axis Bank, and the construction started in August 2009, to be completed in 3 years. Due to various modifications in the project design, the cost of the project was revised upwards to Rs. 772 Cr in May 2013, with the debt component going up to Rs. 592 Cr. However, due to the occurrence of severe floods in Uttarakhand in 2013, the project suffered severe damages which resulted in multiple revision of project cost on account of reconstruction.[496] This resulted in the inability of LMHEPL to repay its debt which stood at around 785 crores in 2016. The initial round of CIRP of LMHEPL attracted offer from Norway's state-owned green energy company Statkraft however the same was not approved by the CoC. LMHEPL vide the directions of the NCLT in IA No. 269/2021 dated 20 October 2021 then issued a fresh Expression of Interest in October 2021. The second round of resolution again witnessed participation from Statkraft which emerged as the successful RA.

C.Essar Power Madhya Pradesh Limited

Essar Power Madhya Pradesh Limited is ("**EPMPL**") a subsidiary of Essar Power Limited and owns a 1,200 MW thermal power plant in the district of Singrauli in Madhya Pradesh. ICICI Bank had initiated CIRP under Section 7 of the Code against EPMPL with regard to default of around over ₹5,300 crore to the lenders including PFC and REC Limited. It was among the 30 stressed power plants identified by the government and started facing financial woes in 2014 after the cancellation of 200 coal block allocations by the Hon'ble Supreme Court.

[495] https://power.industry-report.net/lanco-mandakini-hydro-energy-pvt-ltd/
[496] https://www.financialexpress.com/market/axis-bank-led-consortium-puts-lanco-hydel-plant-in-uttarakhand-up-for-sale/1238040/

The Section 7 application was accepted, with the final PRAs including Adani Power Limited, Vedanta Limited, Jindal Power Limited, and NTPC Limited. However, it was only Adani Power Limited and Vedanta Limited which ended up submitting the resolution plans. Therein, the resolution plan of Adani Power Limited was unanimously approved by the CoC. The approved resolution plan envisaged for the payment of Rs 2,500 crore against the admitted claim of Rs 12,070 crore from financial and operational creditors. At the time, EPMPL's liquidation value was approximately Rs 1,734,400,000, but its actual market worth was approximately Rs 2,657,200,000. Subsequently, post the NCLT approval, Adani Power Limited acquired EPMPL in March 2022.

CIRP applications have also been admitted against other projects of Essar Power Limited including that by ICICI against Essar Power Jharkhand Limited, an SPV incorporated for developing 1,200 MW thermal power plant in Tori, Jharkhand.

D.KSK Mahanadi Power Company Limited

KSK Mahanadi Power Company Limited ("**KSK**") operates a 3600 MW coal based power project comprising of six units of 600MW each in the state of Chhattisgarh. Its CIRP was initiated on 03 October 2019 vide a Section 7 application filed by PFC under the Code. The support infrastructure of the KSK power plant namely the water pipeline and storage infrastructure as well as the railway sidings that connect the power plant to the main railway line, are housed in two special purpose vehicles namely KSK Water Infrastructure Private Limited ("**KWIPL**") and Raigarh Champa Rail Infrastructure Private Limited ("**RCRIPL**"). KSK owns a 49% shareholding in both these entities. Both KWIPL and RCRIPL are also admitted into insolvency as of 01 January 2021 vide Section 7 applications filed by Punjab National Bank and Axis Bank Limited respectively.

The CIRP of KSK attracted bidders such as Adani, Tata, Brookfield and Jindal Steel Power. It is to be noted that the value of the KSP plant is associated with and dependent upon KWIPL and RCRIPL and hence the potential bidders wanted the consolidation of all three CIRPs. Presently, multiple applications have been made to consolidate the CIRP of KSK with that of KWIPL and RCRIPL. In light of their pendency, the National Company Law Appellate Tribunal, Hyderabad ("**NCLAT**") has indefinitely stayed the CIRP of KSK vide its order dated 07 June 2022. Meanwhile, SBI has also sold its NPA in KSK to Aditya Birla ARC for Rs 1,622 crore, accepting a haircut of almost 58% against their total outstanding.[497]

[497] https://timesofindia.indiatimes.com/sbi-sells-ksk-mahanadi-power-loan-account-to-aditya-birla-arc-for-rs-1622-crore/articleshow/93657272.cms

TANGEDCO

In November 2021, the Ministry of Power clarified that the CIRP can be initiated against state-owned electricity distribution and generation companies. This was in pursuance of a case filed at the Madras High Court by Tamil Nadu Generation and Distribution Company ("**TANGEDCO**"). South India Corporation Private Limited, an operational creditor had filed a Section 9 application for initiation of CIRP proceedings against TANGEDCO. TANGEDCO in *TANGEDCO v. Union of India and Ors*. [W.P.No.19785 of 2021] had filled a writ petition under Article 226 of the Constitution of India, 1950 requesting for an order declaring that Section 9 of the Code is invalid and void in as much as it covers its applicability to conflicts emerging under the Electricity Act, 2003 and further a government owned enterprise like itself cannot be made subject to insolvency proceedings. The primary question before the High Court was whether a government-controlled corporation is subject to the NCLT's jurisdiction under the Code. The Madras High Court ruled against TANGEDCO and held that there are no exemptions in this regard under the Companies Act, 2013 and Code, therefore they can be made subject to insolvency proceedings.

Increased Liquidation in Power Sector

The inability of GENCOs to find buyers during their CIRP process has also witnessed an increased trend in the recent years. It is estimated that Indian banks are facing a loss of INR 37,200 crores due to the increased liquidation of GENCOs.[498] In the 2018, the government designated 34 stressed coal projects with a total capacity of 40 gigawatts and a bank liability of INR 1.7 lakh crore for resolution under the Code, however, only 12 of those projects have witnessed resolution as of March 2022.[499] Since the sector is capital intensive in nature, the buyers consider multiple parameters such as asset size and value, capacity of the project, stage of construction, presence of litigation, availability of raw materials including coal and water, operational cost before investing in such projects. The absence of any of the above stipulations can prevent resolution of a power plant. Further, due to a push in clean energy in the market, the investors are generally reducing their thermal portfolio which thereby results in reduction in prospective offers. Presently, the power plants under liquidation include East Coast Energy (1,320 mw) in in Andhra Pradesh, Essar Power Jharkhand (1,200 mw), Monnet Power (1,050 mw) in Odisha, Lanco Babandh (1,320 mw), Odisha, Vandana Vidyut (270 mw), Chhattisgarh, KVK Nilanchal Power Ltd, Odisha (1,050 mw), Lanco Vidarbha Power (1,320), Maharashtra, Simhapuri Energy (600 mw) Andhra Pradesh and Athena Chhattisgarh Power (1,200 mw).[500]

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[498] https://www.business-standard.com/article/finance/banks-to-take-rs-37-200-cr-hit-by-liquidating-10-power-projects-bofa-122060700689_1.html

[499] https://economictimes.indiatimes.com/industry/energy/power/how-indias-power-story-derailed-blowing-a-rs-1-74-lakh-crore-npa-hole/articleshow/65822950.cms?from=mdr

[500] https://bfsi.economictimes.indiatimes.com/news/banking/banks-stare-at-rs-37200-hit-from-liquidation-of-ten-power-plants/92104651

Telecommunication Sector

Brief Snapshot

With 1,179,49 million customers as of 31 January 2021, India's telecommunications network is the second largest in the world in terms of the number of fixed and mobile telephone users as well as by the number of interest users.[501] It boasts one of the lowest call rates in the world, made possible by the hyper-competition among its giant telecom companies. Since the 1990s, the Indian telecom industry has experienced rapid market liberalisation and expansion, becoming one of the most competitive and fastest-growing telecom industries in the world.[502] Presently, India has a total tele-density of 84.90%, with the rural sector, which is mostly untapped, having a tele-density of 58.85% and the urban market having a tele-density of 134.44%.[503] The rapid growth of the telecom industry has been helped by the government's liberal policies, which provided open access to markets for telecommunications equipment and a fair regulatory regime for providing telecom services to Indian consumers at reasonable pricing. Affordable prices, increased accessibility, the introduction of Mobile Number Portability (MNP), expanding 3G and 4G coverage, changing subscriber consumption patterns, government initiatives to increase India's domestic telecom manufacturing capacity, and a supportive regulatory environment have all contributed to the industry's exponential growth over the past few years.[504]

To further facilitate digital connection, the government has authorised the sale of IMT/5G frequency for the nationwide implementation of 5G services. This auction concluded in July 2022 with a total revenue of $18,776 billion.[505] It is to be noted that the telecom is the third largest industry in terms of foreign investment, accounting for 6.43 percent of overall FDI inflow, and is directly responsible for 2.2 million jobs and indirectly responsible for 1.8 million jobs. Between 2014 and 2021, FDI inflows into the telecom sector increased by 150%, from $8.32 billion between 2002 and 2014 to $20.72 billion. Under the automatic method, 100% FDI is now permitted in the Telecom industry.[506]

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501 https://www.trai.gov.in/sites/default/files/PR_No.37of2021_0.pdf

502 https://www.forbes.com/2011/10/18/forbes-india-mukesh-ambani-sunil-mittal-battle-of-titans.html

503 https://www.trai.gov.in/sites/default/files/PR_No.06of2021.pdf

504 https://www.investindia.gov.in/sector/telecom#:~:text=The%20Telecom%20sector%20is%20the,%248.32%20bn%20during%202002%2D2014

505 https://www.investindia.gov.in/sector/telecom#:~:text=The%20Telecom%20sector%20is%20the,%248.32%20bn%20during%202002%2D2014

506 https://www.investindia.gov.in/sector/telecom#:~:text=The%20Telecom%20sector%20is%20the,%248.32%20bn%20during%202002%2D2014

A.Aircel and Reliance Communications Limited

Aircel, the sixth largest telecommunications company provider in the country, along with its subsidiaries Aircel Cellular and Dishnet Wireless, decided to file for bankruptcy in February 2018 as a result of intense competition and excessive amounts of debt. It owes around Rs 27,000 crore to its creditors and vendors on a standalone basis.[507] It was the fourth telecom provider to collapse after the businessman Mukesh Ambani-led Reliance Jio launched in September 2016, triggering a disruptive pricing war with its unlimited calls and texts and cheap internet. Aircel generated approximately INR 400 crores in monthly revenue, of which INR 100 crores came from termination costs to other carriers and INR 280 crores from suppliers and network uptime. The remainder was allocated to licencing, tax payments, and interest charges. The decision was spurred by the RBI's decision to abandon all debt restructuring plans in support of the IBC as well as to expedite resolution.[508]

On similar lines, Reliance Communications Limited ("**RCom**") decided to opt for voluntary insolvency following its failure to sell assets for paying back its lenders and reeling under debt of over Rs 46,000 crores.[509] RCom was incorporated in the year 2004 was the flagship company of Reliance Anil Dhirubhai Ambani Group. RCom together with its subsidiary Global Cloud Xchange Limited ("**GCX**") was a leading global communications services provider with a vast global subsea network, a global on-net Cloud ecosystem and extensive Indian and global presence. However, due to intense competition in the industry, by the end of 2017, RCom had halted its operations at the time. Thereafter, the Swedish company Ericsson, who had a multi-year managed services agreement with RCom came in seeking insolvency proceedings against the telco company with a claim amount of Rs 1,150 Crores. Ericsson filed the petition of insolvency resolution under Section 9 of the Code in September 2017.

UV Asset Reconstruction Company ("**UV ARC**") emerged as the successful RA in the CIRP of both Aircel and RCom. However, the acquisition stuck till date due to litigations over transfer of spectrum to the RA under the resolution plan and subsequent RBI ban on ARCs for investing in insolvency companies under the Code. While vide a notification dated October 2022, the RBI had again allowed ARCs with net owned funds of Rs. 1000 crores to participate as a RA, however the court's decision is still awaited for UV ARC to proceed to take over the

[507] https://www.bqprime.com/law-and-policy/aircel-insolvency-uv-arc-proposes-rs-6630-crore-resolution-plan-funded-through-zero-coupon-debentures#:~:text=Aircel%2C%20along%20with%20its%20group%20entities%2C%20has%20telecom,its%20creditors%20and%20vendors%20on%20a%20standalone%20basis.

[508] https://economictimes.indiatimes.com/news/company/corporate-trends/debt-laden-aircel-to-file-for-bankruptcy-at-nclt/articleshow/62977061.cms

[509] https://economictimes.indiatimes.com/markets/stocks/news/rcom-to-go-for-insolvency-as-it-fails-to-repay-debt/articleshow/67796926.cms

above stated companies.[510] If the such acquisition is refused, Aircel and RCom may be staring at potential liquidation.

B.Draft Indian Telecommunication Bill, 2022

The Department of Telecommunications ("**DoT**") has on 21 September 2022 released the Indian Telecommunication Bill, 2022 ("**Bill**") which consolidates and amends the Indian Telegraph Act 1885, Indian Wireless Telegraphy Act 1933, and The Telegraph Wires, (Unlawful Protection) Act 1950. The Bill in Chapter 5 (Restructuring, Defaults in Payment and Insolvency) addresses situations wherein payment defaults or insolvency proceedings have been initiated against a telecommunication company (Telco/ Corporate Debtor).

Section 20(2) specifies cumulative conditions for an insolvent Telco to hold its licenses or rights under the assignment agreements. Such conditions are to be in addition of the terms and conditions specified under the allotted license or assignment and include-

a) continuation of supply or operation of telecommunication services and network respectively or the utilisation of the assigned spectrum;
b) absence of default in payment of any dues under the allotted license or assignment agreement including of any fees, charges and other payable amounts; and
c) adherence to any additional or modified terms and conditions.

Further, as per section 20(3) of the Bill, if the insolvent Telco fails to comply with the conditions stated above, then the assigned spectrum shall automatically revert back to the control of the Central Government. It shall then be to the discretion of the Central Government to allow the continuation of use of the allotted spectrum by the Telco, subject to placing its revenue in a designated account with the applicable license fee and charges being paid first in priority during the CIRP period. The RP vide section 20(4) of the Bill is mandated to ensure compliance with Section 20(3) above. In the event the RP (a) expects to not be able to comply with conditions specified in Section 20(3) of the Bill; or (ii) intends to either wholly or in part shut down or suspend the telecommunication services, availability of telecommunication network or use of spectrum by the Telco; it shall provide a prior notice of thirty days to the Central Government in regard to such actions. Upon receipt of the RP's notice, the Central Government in terms of Section 20(5) of the Bill, may by notification direct the management of the license, assignment agreement, or any identified business or property of the Corporate Debtor to any person or entity. This may be done with the view to ensure (a) national security, (b) consumer interest, or (c) security, reliability and continued supply of telecommunication services or availability of telecommunication network in India or any part of it.

[510] https://www.communicationstoday.co.in/uv-arc-does-not-have-rs-1000-cr-nofs-to-acquire-aircel-rcom/

In its present form, the Bill runs contrary to the Code and goes on to defeat the very purpose of the enacted of IBC. It is to be noted that the courts including the Apex Court in *Innoventive Industries Ltd. v. ICICI Bank (*Civil Appeal Nos. 8337-8338 of 2017) have held that the Code in terms of section 238 is complete in itself. The primary objective of the Code is to cover the lengths and breadths of all processes relating to reorganization and insolvency resolution of a corporate debtor in order to ensure effective and timely resolution. However, with the present Bill, Telcos undergoing insolvency shall now be governed by two statutes which will effectively defeat the purpose of the Code. The Bill goes on to stipulate payment of 'any dues' for the retention of license by the Telco. The term 'any dues' has not been defined and may arguably include within its ambit past payable dues.

Further, it is important to note that the primary reason for the insolvency of telcos such as RCom and Aircel was due to their inability to pay government dues under the allotted spectrum licenses. The Bill prescribes the reversion of spectrum to the Central Government on such non-payment. This in turn shall erode the value of the insolvent Telco and result in significant haircuts for its creditors. Further, the Bill does not clarify if the priority envisaged would be a super priority over the other Corporate Insolvency Resolution Process costs, which if envisaged cannot be achieved without a related amendment to the IBC. The Bill also empowers the Central Government to direct the management/property of the insolvent Telco to any third party. This may potentially conflict with the existing provisions of the IBC which automatically vests the management and assets under the RP's control.

CONCLUSION

In light of the above, we understand that the insolvency of each sector is peculiar and is dependent on the product or service type, operational cost, geopolitical and economical situations etc. While the steel and power sector have witnessed multiple resolutions under the Code, we are hopeful to witness a successful resolution soon under the Telecom sector. The extensive analysis of the above sectors are a testament to the success of the Code which has established itself as a proactive, dynamic, and time-bound regime. This is evident from the fact that as of September 2022, 3946 out of 5893 insolvencies admitted under the Code have been closed. Of these, the corporate debtor was rescued in 2139 cases, 846 have been closed on appeal or review or settled, 740 have been withdrawn, 553 cases have ended in approval of resolution plan and 1807 have ended in liquidation.[511]

The Code has also brought a cultural and behavioral shift in the management of a company which is now steered towards treatment of distress during its early stages. The Code via its competitive bidding mechanism selects the best possible candidate for the resolution of a

[511] https://ibbi.gov.in/uploads/publication/f3ddc90d7391bcae84ef2f87f793eb3c.pdf

corporate debtor and in its absence, results in liquidation. Hence, by shifting viable business to effective managers or providing an exit mechanism for unviable businesses, the Code ensures reallocation of resources and continuity of economic cycle.[512] This also has had the effect of improving India's ease of doing business and attracts foreign investments. The Code has also had the effect of resolving the NPA problem of the banking system and thereby has strengthened the lending capacity of the Indian credit market.

[512] https://ibbi.gov.in/uploads/publication/f3ddc90d7391bcae84ef2f87f793eb3c.pdf

A SECTORAL APPROACH TO INSOLVENCY LAW

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A Sectoral Approach To Insolvency Law[513]

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Introduction

A sound and efficient insolvency regime is important for better investment, innovation, economic growth, and cost of credit in the market.[514] The insolvency regime has a direct bearing on allocation of resources in an economy[515] and it allocates losses to creditors and limits impacts on societies in a structured way. The Insolvency and Bankruptcy Code in India was designed with an intention to alleviate the financial distress faced by entities, thereby releasing the locked capital and solve the ever-ending problem of NPAs.[516] The law was designed as a sector agnostic law and it was enacted with the aim that it will help companies to resolve their stress in a timely manner.[517]

When it comes to designing insolvency laws, different approaches have been adopted by various jurisdictions and while these differences reflect varying legal traditions, different policy choices also come to bear when designing insolvency laws.[518] Interestingly, when it comes to designing an insolvency framework, many nations rely on global experience, notably through the World Bank Principles for Insolvency/Creditor Rights Systems[519] and the

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[513] Dr. Rebecca Parry, Professor, Nottingham Law School, UK and Dr. Neeti Shikha, Lecturer, School of Law, University of Bradford. Authors would like to thank Chetan R, National Law School of India University, Bangalore for his research inputs.

[514] Müge Adalet McGowan & Dan Andrews, 'Insolvency Regimes And Productivity Growth: A Framework For Analysis' (OECD Working Paper No.1309) <https://www.oecd.org/economy/growth/insolvency-regimes-and-productivity-growth-a-framework-for-analysis.pdf>.

[515] Ravi Mittal, 'Cross-border Insolvency Resolution' (IBBI Quarterly Newsletter) <https://ibbi.gov.in/uploads/resources/c7c2ac1cf824e7ec6d90d165d8725630.pdf>.

[516] Diksha Munjal, 'Explained | The Insolvency and Bankruptcy Code (IBC)- where does it stand today?' (*The Hindu*, 06 October 2022) <https://www.thehindu.com/news/national/explained-what-is-the-insolvency-and-bankruptcy-code-ibc-and-where-does-it-stand-after-more-than-five-years-of-being-in-place/article65969421.ece>.

[517] Neeti Shikha & Urvashi Shahi, 'Assessment of Corporate Insolvency and Resolution Timeline' (IBBI Research Initiative) <https://ibbi.gov.in/uploads/publication/2021-02-12-154823-p3xwo-8b78d9548a60a756e4c71d49368def03.pdf>.

[518] Wendy Akpareva, 'Designing Insolvency Laws; 'One Size Fits All' Or 'Tailored To Measure'' (Conference Paper, INSOL Europe Academic Colloquium) <https://www.academia.edu/33506596/DESIGNING_INSOLVENCY_LAWS_ONE_SIZE_FITS_ALL_OR_TAILORED_TO_MEASURE>.

[519] https://documents.worldbank.org/en/publication/documents-reports/documentdetail/518861467086038847/principles-for-effective-insolvency-and-creditor-and-debtor-regimes

UNCITRAL Legislative Guide on Insolvency Law and related instruments,[520] including cross border insolvency laws. Relevant documentation also includes obligations arising from international laws and institutions such as the Cape Town Convention, for airlines, and FSBs, for banks. In insolvency law, given underlying differences in social, economic, legal and other factors, conscious harmonisation of substantive laws has largely been avoided, although many countries have looked at the U.S. as an example of a successful insolvency system.

The functional equivalence theory, acknowledges that although each legal system originates from different traditional principles, rules and beliefs, they face similar problems which need solutions.[521]

Consequently, most legal systems adopt different solutions to deal with similar problems[522] and these solutions are only similar in relation to the specific function they perform within the society.[523] Thus, societies with similar societal problems can draw upon other societies' solutions to come up with a functional equivalent to tackle their problems. There can certainly be a uniform approach to the design of insolvency laws, as features such as a system for creditors to present and prove their claims will be needed. However, uniformity doesn't not mean that laws have to be same for all types of debtors. There could be a singular objective of law at a macro level but the micro approach to law depends upon the intricacies that business situations impose.[524]

Considering the Insolvency and Bankruptcy Code that lays down both substantive as well as procedural aspect of insolvency laws, it is worth considering or rather reconsidering if the procedural laws need to be same for all sectors. A study of cases in India has found that all the sectors reflect delays with wholesale & retail trade sectors taking 236 days to get approvals for the resolution plan, the construction sector taking 279 days and electricity and other sectors taking approximately 197 days.[525] The same study suggested that a corporate debtor from the service industry is subject to more delays as compared to the non-service/manufacturing industry.[526] The findings of this study are not in line with the general perception of RPs, which are of the view that "real estate" is the sector most prone to delay.[527]

There has been growing consensus among experts that India, like the UK, needs to have separate insolvency process for certain industries such as power utilities.[528] It is believed that having a separate process for core/critical sectors will further IBC norms of value

[520] https://uncitral.un.org/en/texts/insolvency
[521] Akpareva (n 5).
[522] Akpareva (n 5).
[523] R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds) *The Oxford handbook of Comparative Law* (Oxford, Oxford, 2008).
[524] Shikha & Shahi (n 4).
[525] Shikha & Shahi (n 4).
[526] Shikha & Shahi (n 4).
[527] Shikha & Shahi (n 4).
[528] Shikha & Shahi (n 4).

maximisation and protection of the corporate debtors.[529] There are existing examples of sector-specific insolvency norms, focusing on financial services industries, and the question arises as to whether sectoral approaches might be merited in other cases.

Why A Sector Specific Approach?

While the IBC was designed with the intention to become a one-stop resolution mechanism for all the sectors,[530] it is trite to state that it is not fit for all sectors. This is due to two reasons. Firstly, the general provisions do not suit the sector as some of its provisions can be counterproductive to value maximisation.[531] Secondly, given the effect of internationalities of sectors, certain sectors such as aviation, financial institutions, etc. already have an international framework.[532] It is expected that India would harmonise the national laws with existing global framework and for this harmonisation, a general domestic approach to insolvency would not fit well with the specific sector.[533] In this part of the paper, we will advance evidences from 5 major sectors namely banking/finance, energy, telecom, airlines and real estate where there are potentially wide public impacts.

Banking/Finance Sector

Banks play a special role in a country's economy,[534] in that, collectively, their functions are essential, there is extensive international guidance on prudential regulation, in particular capital adequacy and risk management procedures,[535] there is little on exit mechanisms for

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[529] Shardul S. Shroff, 'Decoding value maximization under the code's mandate' (*Asia Business Law Journal*, 15 July 2019) <https://law.asia/maximization-value-insolvency-code/>.
[530] 'Understanding the IBC Key Jurisprudence And Practical Considerations' (*IBBI Handbook*) <https://ibbi.gov.in/uploads/publication/e42fddce80e99d28b683a7e21c81110e.pdf>.
[531] *Ibid.*
[532] 'Global Frameworks or State-based Insolvencies—the Problem of Cross-border Insolvency' in Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford University Press 2009).
[533] Dalma Demeter & Zebo Nasirova, 'International Legal Harmonisation In Theory And Practice' (Conference Paper, Conference: 'Legal, Political and Administrative Consequences of Romania's Accession to the European Union', „Spiru Haret" University Legal and Administrative Studies) <https://www.researchgate.net/publication/332725687_International_legal_harmonisation_in_theory_and_practice>.
[534] See, e.g., Edward W. Kelley Jr., Are Banks still special? in Banking Soundness and Monetary Policy 263 (Charles Enoch, John H. Green, eds. 1997); E. Gerald Corrigan, Are Banks special?, in Federal Reserve Bank of Minneapolis Annual Report 1982, 5-7 (1982), also available via the Internet at http://minneapolisfed.org/pubs/ar/ar1982a.html
[535] See the various papers of the Basel Committee on Banking Supervision on the new Basel capital accord at http://www.bis.org/publ/bcbsca.htm.

unviable banks. important as to constitute a sort of public service[536] where failure would bring systemic risk. In order to justify this special attention, reference is commonly made to three characteristic functions of banks:[537]

- Banks hold highly liquid liabilities in the form of deposits that are repayable at par on demand. On the asset side, they generally hold long-term loans that may be difficult to sell or borrow against on short notice.[538] Any incident that disturbs confidence in the bank's ability to meet its payment obligations, can prompt massive withdrawals of deposits, causing liquidity problems that may threaten the bank's solvency.
- Further, they provide financial services that are core to an economy. Despite the complementary role of capital markets in the credit intermediation process and their capacity to mobilize capital, banks remain the primary source of liquidity for most financial and non-financial institutions.[539] What makes banks most special is their vulnerability to the loss of public confidence. Recent crises in financial systems worldwide have demonstrated the close linkages between financial stability and the health of the real economy. Economists therefore consider financial stability a public good,[540] warranting the attention of national legislatures. The public good is clearly served by lowering the probability of bank failures.[541]
- Nevertheless, despite the best efforts of prudential regulation and oversight, bank failures can and do happen. Mismanagement, fraudulent activities, excessive risk-taking or adverse market conditions can cause serious or even fatal financial problems.[542] Thus, the regulatory framework must deal not only with the ex-ante

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[536] In its message to Parliament recommending the adoption of the Swiss Banking Act of 1934, the Swiss Federal Council stated that the significant influence of those who dominate the financial market and grant grants is not contestable and that therefore banking had become a form of public service ("Der unbeschränkbare Einfluss derer, die den Geldmarkt beherrschen und den Kredit verteilen, ist unbestreitbar einer der grossen Machtfaktoren der Gegenwart. Bei diesen Verhältnissen ist die Banktätigkeit eine Art öffentlicher Dienst geworden."), BBl 1934 I 171/172.

[537] Carl-Johan Lindgren, Gillian Garcia, and Matthew I. Saal, Bank Soundness and Macroeconomic Policy, supra note 1, at 6 (1996).

[538] In the European Union a bank is qualified as a credit institution and defined as "an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account." See Article 1 of the Directive 2000/12/EC of the European Parliament and Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, 26.5.2000 L 126/1 Official Journal of the European Communities, available on the Internet at http://europa.eu.int/eurlex/pri/en/oj/dat/2000/l_126/l_12620000526en00010059.pdf.

[539] See E. Gerald Corrigan, Are banks special? A revisitation, in The Region, Special Issue 2000, Federal Reserve Bank of Minneapolis 2000, also available via the Internet at http://www.minneapolisfed.org/pubs/region/00-03/corrigan.html (stating that it remains highly unlikely that non-banks can provide very large amounts of liquidity on short notice).

[540] 7 See Charles Wyplosz, International Financial Instability, in Global Public Good (Inge Kaul, Isabelle Grunberg, and Marc A Stern eds.) New York, Oxford University Press 1999, and also Andrew Crockett, Why is financial stability a goal of public policy? in Federal Reserve Bank of Kansas City, Economic Review Fourth Quarter 1997 5, 9 (1997).

[541] See David T. Llewellyn, the optimum regulatory environment, Paper presented at de Nederlandsche Bank conference "Banking Supervision at the Cross Roads", Amsterdam, April 25, 2002. The paper can be downloaded from the Internet at http://www.dnb.nl/english/e_toezicht/index.htm.

[542] According to a recent study of the Center for the Study of Financial Innovation (CSFI) "Banana Skins 2002 The CSFI's annual survey on the risks facing banks", a survey that identifies major threats facing banks over

problem of how to prevent bank failures, but also with failing banks and those on the road to failure.

The Basel Committee's "Core Principles for Effective Banking Supervision" acknowledges that a prompt and orderly exit of banks that are no longer able to meet supervisory requirements is a necessary part of an efficient financial system, and that supervisors should be responsible for, or assist in, such an orderly exit.[543] Yet, the "Core Principles," as well as the "Core Principles Methodology",[544] do not discuss the specific modalities for an effective exit policy. Moreover, the legal frameworks in many countries lack clarity regarding procedures for dealing with distressed banks, and, as a result, such procedures are often determined on an ad hoc basis.[545] Can general insolvency law actually work for banks? A priori there is no reason not to apply general insolvency rules to banks. In fact, many aspects of a bank liquidation, such as the calculation of the assets, the verification of claims, the adjudication of disputed claims, and the distribution of assets will need to be handled largely in the same manner as the liquidation of a commercial company. In most European countries the insolvency law, therefore, applies to banks as lex generalis, while special rules (lex specialis)[546] or exemptions from the general regime[547] apply where called for by the specifics

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the next few years, credit risk is much the strongest concern because of the likelihood of severe loan losses resulting not just from recessionary forces, but from what are seen as poor lending decisions in the 1990s. The survey can be downloaded at http://www.csfi.fsnet.co.uk

[543] See explanatory note accompanying Principle 22 of the Basel Core Principles for Effective Banking Supervision of September 1997, available on the Internet at http://www.bis.org/publ/bcbs30a.pdf.

[544] The Core Principles Methodology (October 1999), which can be downloaded at http://www.bis.org, is a detailed guidance, divided into "essential criteria" and "additional criteria", for assessing compliance with the Core Principles.

[545] See Thomas Glaessner, Ignacio Mas, Incentives and the resolution of bank distress, 10 The World Bank Research Observer 53 (1995).

[546] For instance, Belgian banking law contains special avoidance provisions, see Article 29 of the Act of 22 March 1993 on the legal status and supervision of credit institutions. An English translation of the act is available on the Internet at http://www.cbf.be/pj/pjb/pjb_pdf/enjb00_1.pdf. The banking laws of Austria, Germany and Luxembourg reserve the right to petition for bankruptcy to the bank supervisor: Germany: Banking Act Section 46b (providing that the petition for the initiation of insolvency proceedings over the institution's assets may be filed by the BAFin only). An English translation of the act is available via the Internet at http://www.gbld.org/xml/Germany/Germany_GBA.pdf.
Luxembourg: Financial Sector Act Article 61(1)(authorizing only the prosecutor or the Luxembourg Monetary Institute LMI to initiate bankruptcy proceedings). The Act is available via the Internet at http://www.cssf.lu/docs/loi050493_update140202.pdf (only in French); Austria: Banking Act 1993 (as amended in 2000) Sec. 82(4) (authorizing only the Austrian Financial Market Authority FMA to petition for bankruptcy if a bank had been placed under supervision). An English translation of the act is available via the Internet at http://www.fma.gv.at/downloads/BWG.pdf.

[547] Austrian banking law declares that a bank cannot be subject to composition for creditors proceedings (Ausgleichsverfahren), which apply to commercial companies, see Austria: Banking Act Section 82. Similarly, the Portuguese banking law declares the general law relating to preventive bankruptcy measures and to measures of reorganization of undertakings and protection of creditors inapplicable to banks; Portugal: Decree-law 298/92 on the Legal Regime for Credit Institutions and Financial Companies 1992 Article 139 (2). An English translation of the decree is available via the Internet at http://www.bportugal.pt/publish/legisl/rgicsf2001_e.pdf). In Switzerland, banks, when subject to insolvency proceedings, are exempt from the requirement of convening a creditors assembly; see Article 36 (5) of the Banking Act 1934. The official German, French and Italian versions of the Banking Act can be found at

of bank insolvency. The European Union Bank Recovery and Resolution Directive[548] takes a more structured approach and requires resolution funds to be established to support the resolution of failing banks in place of state bailouts. Rather, it adopts a "bail in" approach that enables financial reconstruction of the entity but without the burden falling on taxpayers. Under a bail-in the shareholder's shares will be cancelled and creditors' claims will be compromised to the extent necessary for continued trading by the financial institution, with shares either being transferred to the creditors as compensation or being transferred to a third party buyer and compensation being paid to creditors.as well as macroprudential measures to prevent such cases, as well as cross-border management tools. The Directive was adopted in most of the EU Member States and revised in 2019,[549] including with the establishment of a single resolution mechanism.[550] Italy has long set forth several special rules for bank insolvency and these laws were amended to comply with the EU legislation.[551] Norwegian law sets out a special public administration regime for banks and provides that the general insolvency rules contained in the "Act on Debt Settlement Proceedings and Bankruptcy" apply in case of a winding up and liquidation, "insofar as appropriate"[552] and it has now adopted the EU Directive in requiring banks to establish recovery plans. The UK, prior to Brexit, was required to transpose EU law but now can establish its own framework. The Bank of England is the resolution authority for banks and aims to use ordinary insolvency procedures, combined with depositor protection, for most banks but for those that are large or complex there are concerns regarding wider financial stability and there is a special bank and building society administration regimes that can apply in such cases.[553]

Interestingly, the United States Congress opted very early for a special bank insolvency regime. Under the National Bank Act of 1864, it was the Comptroller of the Currency, rather than the judiciary who was empowered to appoint a receiver for national banks.[554] Alongside

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http://www.bk.admin.ch/ch/d/sr/c952_0.html and through the web-site of the Swiss Federal Banking Commission (SFBC) http://www.ebk.admin.ch. An unofficial English translation of the Act is available at http://www.kpmg.ch/library/ebk/.

[548] 2014/59/EU.

[549] BRRD II Directive ((EU) 2019/879).

[550] Single Resolution Mechanism II Regulation ((EU) 2019/877).

[551] Italy: Consolidated Banking Act 1993 Art. 80 (6), accessible on the Internet at http://www.bancaditalia.it/rootcollection;internal&action=_setlanguage.action?LANGUAGE =en.

[552] Norway: Act on Guarantee Schemes for Banks and Public Administration, etc. of Financial Institutions § 4-10 (2). A translation of the Act is reprinted in International Bank Insolvencies A Central Bank Perspective (Mario Giovanoli, Gregor Heinrich, eds., 1999) at pp. 174-187. The act is also accessible via the Internet at http://medlem.fnh.no/012M%20Avtalerregelverk/001M%20Bank/Oversatte%20lover/Banksikringsloven_engelsk.htm.

[553] When the Insolvency Act 1986 was enacted in the United Kingdom, it initially only applied to non-banks. The situation changed with the adoption of the Banks (Administration Proceedings) Order 1989, which declared the administration order procedure applicable to banks. To date this procedure has been applied in connection with several cases of distressed banks. See case studies in Andrew Campbell and Peter Cartwright, Banks in Crisis: The Legal Response, 154-159 (2002). The Banks (Administration Proceedings) Order 1989, Statutory Instruments 1989/1276, is available via the Internet at http://www.hmso.gov.uk/si/si1989/Uksi_19891276_en_1.htm.

[554] See Peter P. Swire, Bank insolvency law now that it matters again, 42 Duke L.J. 469 (1992); also available via the Internet at http://www.acs.ohiostate.edu/units/law/swire1//psduke.htm.

federal regulation, most American states established their own statutory regimes for supervising banks and resolving bank insolvencies. The Bankruptcy Act of 1898 explicitly excluded banks from its coverage and the Federal Bankruptcy Code continues to do so.[555] While insolvency regimes differ widely from country to country with respect to the extent to which they rely on special procedures for resolving bank failures, there is a marked trend toward providing the supervisor with wider powers and to either complement or replace powers previously exercised by judicial authorities.[556] To understand the rationale for such special procedures it is useful to look at the key differences between banking rules and corporate insolvency rules.

There is no gainsay that in India the IBC is not suited for financial service providers, which are authorised or registered by the RBI, SEBI (Securities and Exchange Board of India) or the IRDA (Insurance Regulatory and Development Authority). These include banks, financial Institutions, NBFCs (non-banking financial companies) and insurance companies.[557] This is a sector-specific framework. Currently, there is a confusion regarding the conflicting power of the two regulators, i.e., sectoral regulator and the insolvency regulation.[558] The Insolvency Code promised to be a major overhaul for the rescue of corporate persons, partnership firms and individuals.[559]

However, the IBC is limited in its scope and is applicable primarily to non-financial firms.[560] Financial Service Providers ("FSPs") have been deliberately excluded from its purview, subject to the provisions of Section 227.[561] This section empowers the Central Government to notify such FSPs that may be subjected to the Code, in consultation with sectoral regulators.[562] A pertinent reason for exclusion of FSPs from the Code is that they differ from the other non- financial firms in many ways such as handling of large public funds, channelizing of household savings and its systemic importance, etc.[563] During the resolution of an FSP, the objective is not just orderly rehabilitation/liquidation of the entity but also to

[555] 11 U.S.C. § 109(b)(2), (3), available on the Internet at http://uscode.house.gov/usc.htm.
[556] In France, the amendments to the Banking Act of 1999 strengthened the powers of the Banking Commission in dealing with problem banks. See, for example, the revised Article 45 of the Banking Act of 24 January 1984 (updated 1 September 1999) (available in the Global Banking Law Database at http://www.gbld.org/downloads/France/BA.pdf). The amendment also gives greater recognition to the role of the Banking Commission and the liquidators appointed by the Banking Commission in a judicial insolvency proceeding. For a thorough discussion of the increased powers of the Banking Commission, see Christophe Leguévaques, Droit des défaillances bancaires 451, 454 (2002).
[557] 'Frequently Asked Questions' (*RBI*) <https://www.rbi.org.in/Scripts/FAQView.aspx?Id=92>.
[558] 'Harmonising Regulatory Conflicts' (Indian Institute of Corporate Affairs Study) <https://cuts-ccier.org/pdf/Synthesis_Report-Harmonising_Regulatory_Conflicts.pdf>.
[559] 'IBC Idea, Impressions and Implementation' (*IBBI Report*) <https://ibbi.gov.in/uploads/whatsnew/b5fba368fbd5c5817333f95fbb0d48bb.pdf>.
[560] (n 16).
[561] The Insolvency and Bankruptcy Code 2016, s.227.
[562] 'Report Of The Sub-Committee Of The Insolvency Law Committee For Notification Of Financial Service Providers Under Section 227 Of The Insolvency And Bankruptcy Code, 2016' (*IBBI Report*) <https://ibbi.gov.in/uploads/resources/ca0c7be35204c196451a5f4918e08292.pdf>.
[563] 'Financial Inclusion' (*RBI*) <https://www.rbi.org.in/scripts/PublicationsView.aspx?id=10494>.

protect its consumers and maintain the integrity, stability and resilience of the financial system.[564]

The Supreme Court has also struck down a RBI circular dated, 12 February 2018, which sought to introduce new general frameworks for the resolution of stressed assets, to address a violation of Section 35AA of the Banking Regulation Act, 1949.[565] Section 35AA conferred power on the Central Government to authorise the RBI in issuing directions to any bank or banking institution for initiating an insolvency resolution process under the Insolvency Code, in respect of specific defaults.[566] This circular, which permitted the RBI to issue directions for reference to insolvency proceedings for all cases without considering specific defaults, was challenged before the court.[567]

The Supreme Court, in the final appeal proceeding, struck down this circular and held that the RB may only direct the initiation of insolvency proceedings in respect of specific defaults by specific debtors, with an express authorisation by the Central Government.[568] It cannot be used in a general sense. This also shows that while there seems to be consensus among the stakeholders that whilst the RBI can exercise power and issue regulations, the permission of central government seems to be vital. This has deepened the tension between the regulatory framework and led to less clarity and more regulation, rather say, overlapping regulation.[569]

There seems to be no policy consensus between the federal bank's power and the Committee note that the RBI has issued a Revised Framework with a view to resolve Stressed Assets in all the Sectors of the Economy. More confusion has emerged from the 2019 notification of the Ministry of Corporate Affairs,[570] which extended the insolvency framework applicable to corporate debtors under the IBC to financial service providers (FSPs), but with more modifications which was further notified by the Central Government. Hence, there exists a great amount of uncertainty and complexity in the applicable procedure of insolvency to banks and FSPs.

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[564] 'Report of Committee to Draft Code on Resolution of Financial Firms' (*DEA Report*) <https://dea.gov.in/sites/default/files/report_rc_sept21_1.pdf>.
[565] *Dharani Sugars v. Union of India*, (2019) 5 SCC 480.
[566] The Banking Regulation Act 1949, s.35AA.
[567] L. Viswanathan, Amey Pathak & Madhav Kanoria, 'Dharani Sugars v. Union of India: RBI's Regulatory Powers Re-affirmed by the Supreme Court' (*Cyril Amarchand Mangaldas*, 10 April 2019) <https://corporate.cyrilamarchandblogs.com/2019/04/rbis-regulatory-powers-indian-supreme-court/>.
[568] Saurav Roy, 'RBI's Circular Invalidated: A Potential Watershed Moment in the Indian Insolvency Regime' (*IndiaCorpLaw*, 05 April 2019) <https://indiacorplaw.in/2019/04/rbis-circular-invalidated-potential-watershed-moment-indian-insolvency-regime.html>.
[569] *Ibid.*
[570] The Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.

Energy Sector

The energy sector is one of the sectors which greatly suffers from a lack of a special insolvency procedure which is tailored towards its particular needs. Firstly, there are three primary sources of energy in India, (1) thermal power, (2) hydroelectricity, and (3) renewable energy.[571] All of these three operate in greatly different spheres with very different particulars, such as energy efficiency, cost, selling price, margins, etc.[572] Secondly, while the aim of any resolution process is to pay off the creditors and rejuvenate the corporation, there exist other major factors such as the non-payment of distribution companies (DISCOMs), non-receipt from third parties, etc.[573] Thirdly, considering electricity is an essential service which has to be generated, supplied and consumed immediately.[574] With long time durations of insolvency proceedings along with even longer procedures of filing appeals, imposing general procedures of insolvency on the energy sector would be detrimental to the society at large.[575]

This has even been reiterated by the 40th Standing Committee Report on Energy presented before the Lok Sabha in August 2018.[576] The report addressed the RBI's Revised Framework which introduced a new harmonised and simplified generic procedure for the resolution of stressed assets in the energy sector.[577] It advocated for a sector specific approach to be taken, particularly in the energy sector considering the peculiarities of the said sector. The Committee also noted that the New Guidelines of the RBI will only deepen the crisis of the Electricity sector as its leitmotif is distinct, peculiar and sector specific without any generic underpinning with other sectors of the economy.[578]

The Committee observe that the efforts of the private players in developing the Electricity Sector of this country have not been given due recognition otherwise their genuine constraints that have led to stress might have been addressed.[579] The Committee feel that the seminal significance and epochal importance of this sector has been conveniently given

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[571] Meghna Rao & Abeer Tiwari, 'India, Indian Energy Sector and IBC' (*IJPIEL*, 16 July 2022) <https://ijpiel.com/index.php/2022/07/16/india-indian-energy-sector-and-ibc-an-assay/>.
[572] James Chen, 'Energy Sector: Understanding What Types of Companies Comprise It' (*Investopedia*, 04 October 2022) <https://www.investopedia.com/terms/e/energy_sector.asp>.
[573] Prasanth Regy, 'Applying the insolvency code to the power distribution sector' (*Hindustan Times*, 02 January 2022) <https://www.hindustantimes.com/ht-insight/economy/applying-the-insolvency-code-to-the-power-distribution-sector-101641128199330.html>.
[574] Harsha Rajwanshi, 'Electricity is Different— A legal commodity' (*SCCOnline*, 17 October 2022) <https://www.scconline.com/blog/post/2020/10/17/electricity-is-different-a-legal-commodity/>.
[575] *Ibid*.
[576] 'Impact Of RBI's Revised Framework For Resolution Of Stressed Assets On NPAs In The Electricity Sector' (40th Standing Committee Report on Energy) <https://164.100.47.193/lsscommittee/Energy/16_Energy_40.pdf>.
[577] *Ibid*.
[578] *Ibid*.
[579] *Ibid*.

a go by. The committee, therefore, recommend that the Government should be sensitive to this vital sector of our economy which acts as a core to shoulder the other engines of the economy and thus the Committee postulate that the specific and realities of the sector should be considered for appropriate modulation of the RBI Guidelines.[580]

Thus, we see that there are differences in reasons for sectoral sickness, uniform principles of resolution have been introduced across the sectors and this has been not good for the insolvency resolutions. But it is worth noting that different ailments can be cured only with ailment specific remedies and if a single remedy is taken as a panacea for all maladies and applied uniformly all across, it is bound to be counterproductive and is sure to aggravate the problem. Insolvency resolution entails debt restructuring which is a more generous and flexible concept. The policy design should aim at streamlining and strengthening the sector squirming under ineluctable hardships.

It is worth noting that in the UK Retail energy supply has its own restructuring and insolvency regime. There are two parts to this regime that are worth noting at a high-level. The first of these is the Supplier of Last Resort, "SOLR" mechanism whose aim is to ensure that a failed supplier's customers avoid any interruption in their supply as a result of that failure. The failed supplier will typically have their supply licence revoked by Ofgem[581] as part of the invocation of the SOLR procedure and, thereafter, will proceed to a typical corporate insolvency process. It should be noted, however, that the use of the SOLR mechanism can complicate the subsequent insolvency process; for example, the new supplier may try to make a claim in that insolvency process in respect of certain liabilities it has incurred in honouring the customer credit balances which were transferred to it as part of the SOLR process.[582]

The second part of the regime is the special administration process for licensed retail energy suppliers. This special administration process was used for the first time in November 2021 in relation to Bulb Energy.[583] The procedure is initiated by the state regulator, the Gas and Energy Markets Authority, and is effectively used only for large supplier insolvencies where the SOLR process is not practicable.[584] It allows for the administrators to continue to trade the failed supplier in order to maintain continuity of supply to its customers and also, ultimately, to transfer different parts of the failed supplier's business to separate new suppliers so that the burden of these transferred customers can be removed from the insolvent supplier and these customers can have continuity of service. Government funding is provided for the protection of consumers and is vital, given the insolvency of the supplier

[580] *Ibid*.
[581] The Office of Gas and Electricity Markets, supporting the Gas and Electricity Markets Authority, is the government regulator for the electricity and downstream natural gas markets in Great Britain.
[582] See *Re Utility Point Ltd and others* [2022] EWHC 2826 (Ch).
[583] *Re Bulb Energy Limited* [2021] EWHC 3735 (Ch)
[584] Ibid, para 12.

and the continued outgoings required to meet customer claims, industry costs and social and environmental levies.

Telecom Sector

The telecom sector is yet another area that has faced insolvency proceedings and the treatment of dues in these sectors cannot adopt the same approach as in other sectors. The National Company Law Appellate Tribunal (NCLAT) has ruled in a case that the supplier Spectrum can be sold under the insolvency process, but only after government dues are cleared.[585] This has given a blow to the bankruptcy proceedings of defunct telecoms such as Aircel and Reliance Communications (RCom).[586]

It was the matter of *Union of India v Association of Unified Telecom Service Providers of India*,[587] wherein the supreme court has raised various questions in respect of telecom companies undergoing insolvency such as treatment of dues of DoT under the code, and permissibility of transfer of spectrum under a resolution plan, and has directed the same to be decided by the NCLT/National Company Law Appellate Tribunal (NCLAT) within two months, which remains currently *sub judice*. A decision on these issues would clarify various aspects in application of the code to regulated companies.[588]

In the UK this sector does not have a specific insolvency regime. After privatisation in the early 1980s[589] the telecom sector has included nonstate suppliers who will be subject to ordinary insolvency proceedings in the event of their insolvencies. For example, the mobile phone retailer Phones 4U entered administration in 2014.[590] It is likely that in the event of a major telecoms supplier insolvency the case would be handled as a compulsory liquidation to enable a government office holder, the Official Receiver, to take control and limit the impact on consumers.[591]

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[585] 'Telecom spectrum can be subjected to IBC proceedings, rules NCLAT' (*The Hindu Business Line*, 13 April 2021) <https://www.thehindubusinessline.com/news/national/telecom-spectrum-can-be-subjected-to-ibc-proceedings-rules-nclat/article34312817.ece>.

[586] Himanshi Lohchab, 'Spectrum sale under IBC after clearing government dues' (*ET Telecom*, 14 April 2021) <https://telecom.economictimes.indiatimes.com/news/nclat-says-lenders-cannot-treat-telcos-spectrum-as-security-interest-under-insolvency-proceedings/82058878>.

[587] (2020) 3 SCC 525.

[588] Anoop Rawat, 'IBC resolution within regulated sectors in the public interest' (*Asia Business Law Journal*, 04 January 2021) <https://law.asia/ibc-regulated-sectors-public-interest/>.

[589] The British Telecom sale was influenced primarily by a desire to enable wider share ownership. Zahariadis N, "To Sell or Not to Sell? Telecommunications Policy in Britain and France" (1992) 12 Journal of Public Policy 355, 366; and Richard Stevens, 'The Evolution of Privatisation as an Electoral Policy, c.1970–90', (2004) 18:2 Contemporary British History, 47, 61-64. DOI: 10.1080/1361946042000227733.

[590] https://www.pwc.co.uk/services/business-restructuring/administrations/phones4u.html.

[591] As in *Re Baglan Operations Ltd* [2022] EWHC 647 (Ch).

Airline Sector

Another example is of the aviation sector. Airline insolvencies differ from insolvencies of companies in other business sectors. The financing arrangements for the manufacture and purchase of aircraft, and the associated ownership and leasing arrangements, are usually complex and often vary considerably from case-to-case. Not to forget that this sector is heavily regulated globally and the regulations to which airlines are subject can impose limitations on the manner in which they operate and the ease with which enforcement action can be taken.

There is a complication that the assets involved in operating an airline's business are the subject of the financier's security. They are usually the aircrafts which are by nature moveable and this ability to move them with ease between different jurisdictions in short span of time can introduce complicated questions of conflict of laws and cross-border insolvency in distressed situations. Thus, there are unique aspects and challenges including complex financing and leasing arrangements; compliance of various sectoral regulations during the CIRP;[592] continuance of the registration under the Aircraft Act, 1934, and the Aircraft Rules, 1937, with employees that require niche skill sets;[593] and treatment of customer dues. Further, with aircraft equipment being prone to quick deterioration, completion of the CIRP in a time-bound manner is of the essence. Airline insolvencies are complex, multi-faceted and involve convoluted cross-border issues.[594]

The recent business environment for the aviation sector has shown that the sector is more susceptible to distress.[595] Their dependency on an array of macroeconomic factors such as fuel prices, cost of leasing facilities, and other geopolitical stress has posed business threat to the sector. Operating expenses of these carriers are 35-42 per cent of fixed in nature.[596] This is coupled with regulatory oversight in form of he is capping of price and excessive entry

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[592] *Ibid*.

[593] Nipun Kalra, 'Interdisciplinary aspects of aviation industry vis a vis insolvency and bankruptcy code, 2016' (*NUALS Restructuring and Insolvency Law Journal*, 28 October 2020) <https://nualsrilj.wordpress.com/2020/10/28/interdisciplinary-aspects-of-aviation-industry-vis-a-vis-insolvency-and-bankruptcy-code-2016/>.

[594] Neeti Shikha, Urvashi Shahi & Shreya Sharma, 'Aviation revival may run into turbulence' (*The Hindu Business Line*, 01 October 2020) <https://www.thehindubusinessline.com/opinion/aviation-revival-may-run-into-turbulence/article32745898.ece>.

[595] A.K. Sachdev, 'Aviation. In deep distress, aviation sector needs help' (*The Hindu Business Line*, 28 June 2021) <https://www.thehindubusinessline.com/opinion/in-deep-distress-aviation-sector-needs-help/article35005432.ece>.

[596] *Ibid*.

barriers such as fleet and equity requirements, route dispersal guidelines, regulated allocation of slots, make the market a collusive oligopoly.[597]

The KV Kamath committee had selected 26 sectors, including aviation, that will require quick restructuring based on certain financial parameters such as Ebitda, current ratio, debt service coverage ratio, etc.[598] This also indicates wider regulatory reforms and inadequate infrastructure facilities in India that makes the dependent on other external factors. IBC, a sector agnostic law, is not the best fit for restructuring the aviation sector. This is due to multiple reasons. The moratorium provision under the IBC is detrimental for preserving the value of the asset.[599] This industry is characterised by capital-intensive assets of which 81 per cent of the commercially operated aircraft are leased by foreign lessors that adds currency fluctuation appropriations in P&L statements of the operators.[600] Also, without an effective cross-border framework in place, the precariousness only increases the cost of financing for this sector.[601]

Time limit for CIRP is 180 days (extendable by 90 days) during which a moratorium is imposed as per section 14(d) of the IBC.[602] This moratorium is not favourable over the leased aviation assets as aircraft owners, lessors and other creditors are barred from enforcing its security or repossessing their security during this period.[603] Though the insolvency law provides for the interim resolution professional to take every step "*to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern*" as per section 20 of the act,[604] experience from Jet Airways shows that it is not a easy task, especially when airlines has been grounded for over a year.

In this regard, it is worth noting that Cape Town convention and protocol proposes two calendar month waiting period stipulated after which the security holder can repossess the

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[597] 'How Airline Markets Work… or Do They? Regulatory Reform in the Airline Industry' in Severin Borenstein & Nancy L. Rose, *Economic Regulation and Its Reform: What Have We Learned?* (University of Chicago Press 2014).

[598] Aparna Banerjea, 'Covid-19: Kamath committee identifies 26 sectors for loan restructuring' (*live mint*, 07 September 2020) <https://www.livemint.com/industry/banking/rbi-releases-report-on-resolution-framework-for-covid-related-stress-11599488314589.html>.

[599] Abhishek Kumar, 'Analysing the law on Airline Insolvency in India' (*The Contemporary Law Forum*, 13 March 2021) <https://tclf.in/2021/03/13/analysing-the-law-on-airline-insolvency-in-india/#Shortcomings_of_IBC_for_Airline_Insolvencies>.

[600] Shikha, Shahi & Sharma (n 50).

[601] Shikha, Shahi & Sharma (n 50.

[602] Kumar (n 55).

[603] Nikhil Gupta, 'The Murky Case of Aviation Insolvency in India' (*IndiaCorpLaw*, 27 August 2019) <https://indiacorplaw.in/2019/08/murky-case-aviation-insolvency-india.html>.

[604] 'Quixplained: Grounded since 2019, is there potential to revive Jet Airways?' (*India Express*, 03 November 2020) <https://indianexpress.com/article/explained/quixplained-grounded-since-2018-potential-revival-of-jet-airways-6908665/>.

asset seems more effective due to the reduction of time period as the creditors, at least those with interests on the capital assets (such as lessees) would incur reduced losses on the capital assets.[605] Given the high values of capital assets, most of the aircrafts operating under the airlines are acquired through capital/financial leasing that provides that on the failure to pay the dues on the leased products, the lessor would claim the repossession of the aircraft.[606] Article XI of the CTC mainly provides for such arrangements. Under current Insolvency laws, such repossession of aircraft becomes an issue, and the lessors would find themselves at a loss due to the 180-day waiting period under IBC.[607]

Cross border insolvency resolution proves to be yet another obstacle when it comes to airline insolvencies in India. As aforementioned, most aircrafts operating are obtained through financial leases.[608] These leases many a times are not restricted within the country but take place through cross border agreements. At present, Section 234 and 235 of the IBC assist in dealing with cross-border insolvency disputes.[609] Although these sections in the code were included to facilitate resolution of cross border insolvencies, it has been observed till now that no major steps had been taken to effectively implement the inter-governmental agreements.

The UK ratified the Cape Town Convention and made it part of English domestic law via the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (the CTC Regulations). In doing so, the UK made all of the key creditor-friendly Cape Town declarations, such as choice of law, self-help remedies and enforcement of IDERAs. The UK also adopted Cape Town's Alternative A insolvency regime via the CTC Regulations, with a maximum 60-day waiting period. The implementation of the Cape Town Convention and its related Aircraft Protocol by the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (the 2015 Regulations) has curtailed restrictions which ordinarily apply to the exercise of third parties' rights on the commencement of insolvency proceedings, for example, the moratorium applicable in administration.

There has been a recommendation for the creation of a Special Administration Regime ("SAR") to keep an insolvent airline flying for the purpose of repatriation. [610] Since this recommendation has not been picked up the protection of customers stranded by airline failures has been well-coordinated on an ad hoc basis. For example, 150,000 stranded

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[605] Rishiraj Baruah, 'India's insolvency law and the Cape Town Convention/' (*linkedin*, 10 June 2019) <https://www.linkedin.com/pulse/indias-insolvency-law-cape-town-convention-rishiraj-baruah/>.
[606] *Ibid*.
[607] The Cape Town Convention, Article XI.
[608] Poonam Nahar, 'Jet Airways: An Insolvency Resolution Journey' (*mondaq*, 08 March 2022) <https://www.mondaq.com/india/insolvencybankruptcy/1168814/jet-airways-an-insolvency-resolution-journey>.
[609] The Insolvency and Bankruptcy Code 2016, s.234 and s.235.
[610] *Airline Insolvency Review*, chaired by Peter Bucks, Airline Insolvency Review Final Report (March 2019).

customers were repatriated by the Civil Aviation Authority when Thomas Cook entered compulsory liquidation and another 80,000 when the Monarch Airline collapsed.[611] More recently the airline Virgin Atlantic was one of the first to use a new restructuring plan introduced in 2020.[612] In the absence of a special procedure, since the UK has implemented the Cape Town Convention the usual insolvency moratorium will not apply, and the airline will have to return the aircraft to the lessor or cure all debts by the end of a 60 day waiting period.

Real Estate Sector

Home buyers of stressed realty projects may be governed by a separate regulatory framework if a proposal put forward by the insolvency regulator for public comments is approved.[613] The Insolvency and Bankruptcy Code (IBC) was amended in 2018 to clarify the status of home buyers as financial creditors. However, a large number of real estate projects, including those of Supertech and Jaypee Infratech, are undergoing insolvency process. "*It has been represented to Insolvency and Bankruptcy Board of India (IBBI) that real estate projects require different dispensation than normal projects*," the regulator said.[614] The regulator is mulling over the question whether there is a need for any separate regulatory framework for homebuyers in the corporate insolvency resolution process (CIRP) of real estate projects or some modifications in the existing regulations, within the existing framework of the IBC.[615] Earlier, home buyers were given status of financial creditors and the law was amended to stipulate that at least 100 or 10% home-buyers will be required to initiate insolvency against a developer.[616]

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[611] https://www.nao.org.uk/wp-content/uploads/2020/03/Investigation-into-governments-response-to-the-collapse-of-Thomas-Cook-Summary.pdf. For a discussion of differing approaches to insolvencies in this sector see Pietro Benintendi, "Bankrupt in Europe: A Case Study of Three Recent Airline Insolvencies" (2019) 44 Air & Space Law 241.

[612] See *Virgin Atlantic Airways Limited* [2020] EWHC 2191 (Ch) in which a meeting to consider the plan was convened and [2020] EWHC 2376 (Ch) in which the plan was sanctioned.

[613] 'IBBI moots separate insolvency framework for home buyers' (*Financial Express*, 16 June 2022) <https://www.financialexpress.com/industry/ibbi-moots-separate-insolvency-framework-for-home-buyers/2562119/>.

[614] *Ibid*.

[615] Harsh Kumar, 'Explained: How Are Operational Creditors Different From Financial Creditors' (*Outlook*, 26 May 2022) <https://www.outlookindia.com/business/explained-how-are-operational-creditors-different-from-financial-creditors-news-198562>.

[616] Ramakrishnan Viraraghavan, 'Rights Of Homebuyers Under The Insolvency And Bankruptcy Code' (*Live Law*, 10 November 2022) <http://www-livelaw-in.gnlu.remotlog.com/columns/rights-of-homebuyers-under-the-insolvency-and-bankruptcy-code-213731>.

Thus, we see that there has been diversion from the set laws to accommodate the public interest, only to see that supreme court later turned down the decision.[617] A better approach could have been a separate framework for real estate. After all, law has diverged from the normal course followed in a Corporate Insolvency Resolution Process and adopted a more novel approach of a 'Reverse Corporate Insolvency Resolution Process' for real estate infrastructure companies in the interest of the allottees and survival of the real estate companies and to ensure completion of projects which provides employment to large number of unorganized workmen. Hence, instead of creating exceptions within the insolvency law to meet the sectoral requirement, it is better to adopt a sectoral approach to avoid any confusion.

In the UK there is no specific insolvency regime applicable for real estate developers and ordinary insolvency procedures will apply. Some may enter administration in order to complete the work free from pressure from creditors. A major property developer, Carillion, was subject to compulsory liquidation since there were insufficient funds to enable the appointment of an administrator. House buyers who have contracts with housing developers who enter insolvency proceedings may be protected under insurance carried by the developer[618] and this can enable an alternative builder to be found to complete the project. Those who are not insured may be able to recover their deposits under the finance arrangements that were used to fund the purchase,[619] otherwise they will be unsecured creditors in the insolvency. In contrast, there is a special insolvency regime for registered social housing providers, who will let out properties to tenants on a more affordable and secure basis than will tend to be available through private landlords.[620]

Conclusion

The sectors considered are not the only ones where there can be wide public impacts in the event of insolvencies. Yet insolvency proceedings commonly focus only on the interests of creditors, and this gives rise to a tension if continued trading is needed in the interests of customers. There is an increased risk of insolvencies that can have wide public impact, given growing dependence on nonstate companies as a result of privatisations and also the growth of nonstate companies in the digital services industry. This prompts consideration of whether a more nuanced approach to insolvencies is required in order that the public interest can be protected.

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[617] Souvik Ganguly, 'India – Homebuyers As Financial Creditors: Time For A Rethink?' (*Coventus Law*, 12 May 2022) <https://conventuslaw.com/report/india-homebuyers-as-financial-creditors-time-for-a-rethink/>.
[618] For example the National House Building Council Buildmark https://www.nhbc.co.uk/binaries/content/assets/nhbc/homeowners/development/for-full-details-of-the-buildmark-choice-policy....pdf, page 13.
[619] For example Consumer Credit Act 1974, s 75.
[620] Housing and Planning Act 2016, Chapter 5.

Since India is considering to revamp its insolvency framework and the experience of past 6 years with the Insolvency and Bankruptcy Code shows that the latter has not proved to be sector agnostic, it will be worth considering an approach which addresses sectoral challenges and helps harmonise internal conflict of stakeholders as well as international best practises in the said sector

About the Authors

The Asian Business Law Institute ("ABLI") is a permanent think tank based in Singapore that initiates, conducts and facilitates research and produces authoritative texts with a view to providing practical guidance in the field of Asian legal development and promoting the convergence of Asian business laws. It was launched in 2016 with the objective to remove unnecessary or undesirable differences between Asian legal systems that pose obstacles to free and seamless trade. One of ABLI's key initiatives is to promote the convergence of the practices and philosophies of corporate restructuring in Asia under a joint project with the International Insolvency Institute.

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