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Emerging Ideas on IBC

18 RETHINKING IBC: ROLE OF PROMOTERS/ MANAGEMENT IN RESOLUTION OF THE CORPORATE DEBTOR

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EXECUTIVE SUMMARY

The scheme of the Insolvency and Bankruptcy Code, 2016 (IBC) recognises that a successful resolution of a corporate debtor (CD) warrants engagement and active cooperation of all its key stakeholders. Out of all the stakeholders of the CD, one of the critical stakeholders whose cooperation is necessary for a successful resolution of the CD is that of the erstwhile promoters/ management. Typically, the promoters who have been in management and control over affairs of a CD are most interested in preserving its value. Further, often the promoters possess specific sectoral and micro level skills and knowledge which can be beneficial to run operations of the CD during the insolvency resolution process.

However, the current IBC regime, through various ineligibilities including those under section 29A create disincentives for the promoters to actively cooperate in resolution process of the CD. The non-cooperation of the promoters negatively impacts the resolution process and may result in loss to the creditors and other stakeholders. Accordingly, this paper seeks to suggest the approach which may be adopted for improving cooperation of erstwhile promoters through creation of positive incentives rather than negative repercussions.

Keywords: Section 29A, Disqualification, Promoters, Resolution Plan

INTRODUCTION

Economic systems encouraging entrepreneurship are premised on individuals willing to take risk in building their businesses and expecting a return.[1] As risk is the reward for business, failures are also inevitable. To address these business failures and ensure stability of the financial system,[2] having an efficient legal framework is necessary.[3] Jurisdictions which lack an efficient legal system to resolve business failures run the risk of creditors losing their debt which increases the costs of credit in the market and impacts the overall economy.[4]

For ensuring an efficient insolvency resolution framework it is incumbent upon the states to adopt an approach which creates incentives for restructuring of viable enterprises,[5] ensures continuity of business, maximises value of debtor's assets for the benefit of creditors and balances the interest of all the stakeholders.[6] While these objectives are well-established, there is less consensus on the optimal design for adopting an insolvency resolution framework for which there is no 'one size fits all approach'.[7] Typically, the states based on their institutional set up and credit culture adopt a resolution framework for distressed companies ranging from a 'creditor in possession' to a 'debtor in possession' model. States adopt these models for optimising outcomes: (a) prior to insolvency when the company is financially sound (ex-ante efficiency); and (b) once the company enters into insolvency (ex-post efficiency).[8]

Typically, in a financing transaction, lending to healthy companies will not take place without sufficient creditor control rights.[9] Accordingly, creditors play an important role in ensuring ex-ante efficiency by constraining management of the company to act responsibly and in their interest.[10] Authors have argued that ex-ante efficiency can reduce if the reorganisation process favours the management and lets them off lightly.[11] However, at the same time insolvency law should not be excessively harsh such that the management tries to avoid it at any cost, by engaging in risky behaviours including 'gambling' with the company's assets,[12] hiding losses through the use of creative accounting or spending less on product quality and research & development.[13] Further, excessive creditor friendly regimes lead to low risk taking, innovation and investment by companies.[14]

Studies have also shown that if insolvency law is too tough on management of distressed entities, it can entail losses for ex-post efficiency due to bias of the creditor in liquidating/monetising the assets of the distressed entity to an outside buyer who is not cash constrained (even if inefficient vis-à-vis the existing manager whose retention can increase ex post efficiency).[15] Further, ex-post efficiency can increase if the existing management possessing necessary skills is retained to run to the business of the CD.[16] Considering these aspects, an ideal insolvency/bankruptcy law should seek to balance the interest of both the managers (i.e. promoters, directors, key managerial personnel) and creditors.[17]

However, the Indian insolvency regime, appears to be highly tilted in favour of the creditors as against the existing management and promoters of the CD. This is due to various ineligibilities contained under section 29A of the IBC, which prohibit promoters and their connected parties to submit a resolution plan.[18] Section 29A of the IBC states that persons who are/have (a) undischarged insolvents, (b) wilful defaulters, (c) having an account classified as non-performing asset (NPA), (d) convicted for any offence punishable with imprisonment of two years as provided under schedule 12 of the IBC or seven years, (e) disqualified to act as a director under the Companies Act, 2013, (f) prohibited from trading in the securities market, (g) promoters of a company in which an avoidance transaction has occurred in the past, (h) a connected person[19] who is disqualified under section 29A (1) (a) to (i) of the IBC, shall be ineligible to submit a resolution plan under IBC.

Surprisingly, the ineligibilities prescribed under section 29A of the IBC are not only applicable to a formal court approved resolution process under IBC but even to pre-packaged insolvency resolution process,[20] liquidations,[21] loan transfers,[22] and out of court restructurings.[23] Due to high disqualification criteria under section 29A of the IBC, promoters and existing management are often under the threat of losing the control over their companies,[24] which at times disincentivize them to cooperate with the resolution professional (RP) during the resolution process under IBC.[25] This lack of cooperation by promoters and erstwhile management[26] of the CD causes information asymmetry which discourages many prospective resolution applicant to submit their resolution plans, which overall affects the maximization of value for creditors.

Given persistence of these issues in the current insolvency framework under IBC, this research paper aims to address measures for securing active participation and cooperation of erstwhile promoters and management under the Indian insolvency regime. In this regard, the authors in this paper examine: (a) the global best practices related to participation of promoters in resolution process of a company, which can be drawn upon on this aspect to streamline the insolvency regime in India and (b) the legal and regulatory changes required to be introduced to incentivize promoter participation in the resolution process of a company.

APPROACHES TO BUSINESS FAILURES AND PROMOTER PARTICIPATION

USA

The constitution of the USA authorises the Congress to enact laws on bankruptcy. In exercise of this power the Congress in 1978 codified the 'Bankruptcy Code' as Chapter 11 of the United States Code (US Code or U.S.C.).[27] Chapter 11 of US Code contains the uniform federal law that governs all the bankruptcy cases of both individuals and companies.[28] The Federal Rules of Bankruptcy Procedure, 1983 govern the procedural aspects of the bankruptcy process along with the local rules of each bankruptcy court.[29]

Chapter 11 of the US Code is based on the premise that the existing management is best suited to turnaround the distressed company for the benefit of creditors and other stakeholders.[30] Accordingly, during the reorganisation process, the existing management of the debtor remains in the control of the debtor company and exercises all the rights and powers to maximize the value of the assets for the benefit of creditors and interest holders.[31] In USA, the existing management and promoters acting through the debtor company are entitled to submit reorganisation plan for revival of the debtor company. In fact, there is an exclusive period of 120 days where only the debtor[32] can submit the plan for its turnaround.[33] If a debtor files a reorganisation plan within the 120-day exclusivity period, the exclusive period is further extended to 180 days.[34] The reason for the extension of the exclusivity period to 180 days is to provide the debtor an opportunity to obtain confirmation of a plan without having to defend against a competing plan at the same time.[35] Once the exclusivity period expires, any party in interest[36] except the U.S. Trustee may file a reorganisation plan.[37]

However, under Chapter 11 of the US Code, the bankruptcy court can appoint a trustee for causes including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor company by the current management,[38] or if appointment of trustee is in the best interest of the creditors.[39] Once the trustee is appointed the debtor loses its exclusive right to submit the reorganisation plan for its turnaround.[40] But even if the trustee gets charge over the management of the debtor, still the promoters and other shareholders are eligible to submit a resolution plan in the resolution process.[41] Further, the trustee cannot decide to change current management of the debtor company unless it is either utterly incompetent, will not follow the trustee's instructions, or is demonstrably committing fraud.[42]

In the USA, the creditors are required to vote on the reorganisation plan submitted by the promoters/ existing management of the debtor. If such reorganisation plan is approved by the creditors, then the promoters are entitled to receive the benefits of starting the operations of the company on a clean slate basis with extinguishment of past liabilities pursuant to a discharge order passed by the bankruptcy court.[43] Typically, the bankruptcy court orders for the discharge as soon as practicable after the debtor completes all payments under the plan. However, a discharge may be revoked if the bankruptcy court finds that the discharge was obtained fraudulently[44] on account of transfer or concealment of assets, or false oaths or in sworn testimony at the meeting of creditors.[45] This revocation can be sought within one year of the discharge's being granted by any creditor, trustee, U.S. Trustee.[46]

While there is no bar on the erstwhile promoters and directors to submit a resolution plan for the debtor company there are various provisions under the US Code which make the directors and existing management liable for prosecution on account of any bankruptcy fraud (which includes concealment of estate property,[47] false oaths and certifications, false claims, improper receipt of estate property, bribery, destruction or falsification of records, withholding information from the trustee, wrongful trading).[48] These crimes include penalties of fines and/or imprisonment for not more than five years. However, altering, destroying, or concealing records with the intent to obstruct proper administration of the estate could also lead to additional fines and/or imprisonment of up to 20 years.[49]

From the above analysis, it is the clear that the bankruptcy regime in USA supports the notion that the existing management representing equity holders have greater incentives to maintain the firm as a going concern and therefore should be in control during the resolution process of the company.[50] While the bankruptcy regime in USA does penalise the directors and promoters for bankruptcy fraud, it does not disallow them and their connected parties from submitting the reorganisation plan on account of *inter-alia* default in repayment of any loan or guarantee obligations.

UK

In UK, the insolvency process for companies as well as individuals is regulated by the Insolvency Act 1986 (UK Insolvency Act) and Insolvency Rules, 2016. The UK Insolvency Act contains provisions relating to: (a) company voluntary arrangements (CVAs); (b) administrations (both court-based and out-of-court appointments); (c) winding up; and (d) administrative receiverships.

Administration under UK insolvency regime is the most prevalent procedure used for corporate insolvencies.[51] The administration proceedings can be initiated against the insolvent companies by way of an application to the court[52] made by the company itself, or a creditor; or in certain circumstances by a clerk of a magistrates court.[53] Upon initiation of administration proceedings, an Administrator (similar to RP under IBC) is appointed by the court.[54] The Administrator is vested with the power to take necessary measures for managing the affairs, business and property of a company during the administration process[55] and to sell the assets of the company. The Administrator can remove the existing directors of the company and make fresh appointments.[56] Further, the existing management requires prior consent of the Administrator before exercising any power under the charter documents (articles of association, memorandum of association) of the company or under the Companies Act which interfere with the Administrator's functions under the UK Insolvency Act.[57]

Under the scheme of UK Insolvency Act, the existing management of the company (including the erstwhile promoters, directors, and employees) is required to cooperate with the Administrator.[58] They are obligated to provide information to the Administrator concerning the promotion, formation, business, dealings, affairs, or property of the company.[59] The Administrator can approach the court if the existing management fails to cooperate with it.[60] Based on the application made by the Administrator, the court can summon the ex-management[61] and even pass order for arrest of the person and seizure of the books, papers and records.[62]

Apart from administration, CVAs are typically used as out of court restructurings between the company in stress and its creditors, which are taken on record by the court once approved by the creditors.[63] CVA's can be triggered by directors of a company[64] or, if the company is in administration or liquidation, its insolvency officer.[65] A CVA is binding once approved by minimum 50% of shareholders and a majority 75% in value of the claims of unsecured creditors voting at the CVA meeting.[66] However, a CVA cannot affect the rights of preferential or secured creditors without their consent and agreement.[67] Typically, a standalone CVA does not trigger a moratorium on creditors' actions (except for small companies).[68] However, a CVA is at times used after initiating administration to take advantage of the moratorium.[69] There is no express restriction on the promoters/shareholders to be part of the CVA and regain control of the company upon making payment to the creditors. Further, similar to CVA, even pre-pack sales are used under the administration process to sell business of the insolvent companies as a going concern.[70] The pre-pack sales are implemented by using Administrator's power to sell a company's assets without the approval of creditors.[71]

Typically, pre-pack sales are initiated once the company resolves to appoint an advisor (qualified to be insolvency practitioner).[72] Once the terms of sale are agreed, the advisor (i.e. insolvency practitioner) is then appointed as the Administrator under the administration process and the sale is concluded immediately.[73] Earlier, there were concerns of transparency and accountability in the sale of assets of insolvent companies to connected parties under the pre-pack process. In fact, the Graham Committee which was set up to examine issues related to connected party sale under pre-pack process, in its Report (Graham Report) noted that over two thirds of pre-packs involved sales to a connected party.[74] The Graham Report further noted that the sale of assets to a connected party under the pre-pack process had less probability of success *vis-à-vis* sale to an unconnected party.[75] However, still the Graham Report did not recommend for imposing a blanket prohibition on connected parties to acquire assets under the pre-pack process. Instead, it recommended for measures which could improve price discovery such as approval of pre-pack sale to connected parties by a pre-pack pool (consisting of independent insolvency practitioners) etc.[76] The recommendations made under the report have now been incorporated under the 'Statement of Insolvency Practice 16'. The SIP regulates the process of sale to connected parties.[77]

It is pertinent to note that while the UK insolvency regime does allow connected parties and promoters to participate in the resolution process (i.e. CAV, administration, pre-pack sales) of a company and submit resolution plans, it also imposes liability on the directors/promoters for committing offences related to insolvency of the company. Under the UK Insolvency Act, if any person who has taken part in the promotion, formation or management of the company has misapplied/ misappropriated/ wrongfully retained money or property of the company, then a Liquidator, creditor or shareholder, can file an application and seek an order from the court requiring them to repay or restore the property or contribute to the company's assets by way of compensation for breach of duty.[78] Similar reliefs are also available where the directors or promoters have been involved in fraudulent[79] or wrongful trading.[80] Additionally, the Company Directors Disqualification Act, 1986 (CDDA 1986) allows the courts to disqualify a director upto 15 years[81] on account of breach of fiduciary duty, misfeasance, misapplication of company's property, failure to comply with statutory provisions,[82] responsibility for causing insolvency of the company,[83] etc. Once the court disqualifies a person to be director under the CDDA 1986, it is a criminal offence for such person to be a director of a company or take certain other roles relating to company management.[84]

PRESENT LEGAL REGIME IN INDIA IN RELATION TO THE PARTICIPATION OF THE ERSTWHILE PROMOTER GROUPS IN RESOLUTION OF THE CD

Inception of section 29A

Prior to the inception of the IBC, the Bankruptcy Law Reforms Committee submitted its report dated November 4, 2015 (BLRC Report) to the Hon'ble Finance Minister which laid down the broad contours of the proposed insolvency regime in India.[85] The BLRC Report daftly explored the sensitive subject of participation of erstwhile promoters in the insolvency resolution process of the CD and warned that an insolvency regime should specifically draw a line between 'malfeasance' and 'business failure'.[86] The BLRC Report warned the legislature against subscribing to the stereotype of 'rich promoters of defaulting entities'. Subscribing to such a stereotype fosters two schools of thought, neither of which represent the complete and accurate picture of the state of affairs of the company, namely: (a) all defaults necessarily involve malfeasance; and (b) promoters should be held personally and financially responsible for defaults of the firms that they control.[87] The BLRC Report stipulated that to get a true and complete picture for the reasons of default in a CD and to evolve a legal regime for insolvency resolution of such firms, the legislature should also inter-alia take into account the following perspectives:[88]

> 1. **Some business plans will always go wrong.** In a growing economy, firms make risky plans of which some plans will fail, and will induce default. If default is equated to malfeasance, then this can hamper risk taking by firms. This is an undesirable outcome, as risk taking by firms is the wellspring of economic growth. Bankruptcy law must enshrine business failure as a normal and legitimate part of the working of the market economy.
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> 2. **Limited liability corporations are an important mechanism that fosters risk taking.** Historically, limited liability corporations were created with the objective of

> taking risk. If liability was unlimited, fewer risky projects would be undertaken. With limited liability, shareholders have the ability to walk away, allowing for greater exploration of alternative business models. Since exploration benefits society through risk taking, it is important to protect the concept of limited liability, which bankruptcy law must aim to do.

In other words, the BLRC Report expressly highlighted that a legislature should refrain from making *a carte blanche* assumption that the financial strain in a CD is *ipso facto* by virtue of mismanagement/ fraudulent management of the CD by its erstwhile management.

In line with the observations in the BLRC Report, the scheme of the IBC in its original iteration enacted on May 28, 2016, did not disqualify the erstwhile promoters of the CD from submitting resolution plans for the CD. However, while none of the *travaux préparatoires* highlighted any immediate trigger for the same, the legislature subsequently felt the need to prohibit certain categories of persons from participating in the corporate insolvency resolution process (CIRP) of the CD. Accordingly, the Hon'ble President of India promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ordinance) which introduced section 29A into the scheme of the IBC. As per the objects and reasons of the Ordinance, one of the key objectives for promulgation of the Ordinance was the necessity '*to provide for the prohibition of certain persons from submitting a resolution plan who, on account of their antecedents, may adversely impact the credibility of the processes under the Code*'.[89]

Subsequently, the Ordinance was replaced by the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (Amendment Act). The object sought to be accomplished for the disqualification of erstwhile promoters was to prohibit persons who, with their misconduct contributed to defaults of the CD or are otherwise undesirable to submit a resolution plan. This is evidenced from para 2 of the Statement of Objects and Reasons to the Amendment Act, reproduced as under:[90]

> Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.

In other words, one of the primary objects of introducing section 29A into IBC was to prohibit persons who contributed to the default of the CD or are otherwise undesirable to regain control of the company at a discount in the insolvency resolution process of such company.

It is relevant to note that when the Insolvency and Bankruptcy Code (Amendment) Bill, 2017 (Amendment Bill), was tabled before the lower house of the Parliament, for enacting the Amendment Act, the then Hon'ble Finance Minister espoused the necessity to prohibit certain persons from submitting a resolution plan for CDs under IBC. Particularly with regards to section 29A(c) of the IBC, he submitted to the Parliament that *dehors* section 29A(c) of the IBC, persons who are in management and control of the CD and on whose account the CD has been rendered insolvent will have an opportunity to get the same enterprise back at a discounted value without discharging the payment obligations of the CD. He submitted that enabling errant promoters to acquire the CD at a discounted value is not the object of IBC.[91]

However, when the Amendment Bill was tabled before the Parliament, the members of the Parliament raised several reservations regarding the Amendment Bill, particularly around section 29A(c) of the IBC which is based on a default-based liability, and which may arise out of honest business decisions by the promoters and management of the CD. The primary concerns raised by the members of the Parliament in relation to section 29A(c) of the IBC are as under:

(a) Firstly, several members of the Parliament raised a concern that companies may suffer financial crises for many reasons such as downturn in the market, change in the overall economic scenario, strikes, labour problems, change in government policies etc.[92] In fact, the affairs of a company may turn non-performing on account of factors outside the control of the erstwhile management of the CD. Accordingly, making the erstwhile management of the CD ipso facto responsible for the financial crises of the CD and disqualifying such person to submit a resolution plan would be unfair and unjust;

(b) Secondly, it was submitted that section 29A(c) read with section 29A(j) of the IBC makes the net of connected persons extremely wide. Having such a broad category of persons disqualified from submitting a resolution plan would hamper the competitive bidding process for the company.[93] This increases the possibility of liquidation of the company which is against the very spirit of IBC. It was further argued that while there may be suitors for 'large insolvent firms which have been referred to bankruptcy courts', there would be no takers left to submit resolution plans for smaller firms, especially in light of the wide net of ineligibility cast under section 29A of the IBC;[94] and

(c) Thirdly, it was submitted that the grace period of one year given to the erstwhile promoters to regularise their defaults is too short a period. Many industry segments run in business cycles and if a company has a downturn at a low point in its business cycle, it may take more than a year (generally two to three years) for the business cycle to turn around.[95]

Notwithstanding the aforementioned reservations, the Amendment Bill was passed in the Lok Sabha on December 29, 2017. Subsequently it was passed in the Rajya Sabha on January 2, 2018 and finally received presidential assent on January 18, 2018.

Judicial interpretation post addition of section 29A to the IBC

Following the introduction of section 29A of the IBC, the ineligibility under section 29A(c) to submit a resolution plan on account of default to repay the debt was challenged before the Hon'ble Supreme Court of India in the matter of *Swiss Ribbons Private Limited and Another v. Union of India and Others*[96] (Swiss Ribbons). In Swiss Ribbons, while upholding the constitutional validity of section 29A(c) of the IBC, the Hon'ble Supreme Court held that the rationale of section 29A(c) is that a person who is unable to repay a loan taken, in whole or in part, within this period of one year and three months (which, in any case, is after an earlier period where the CD and its financial creditors sit together to resolve defaults that continue), shall be rendered ineligible to become a resolution applicant. The Hon'ble Supreme Court held that such a legislative policy which holds that 'a person who is unable to service its own debt beyond the grace period referred to above, is unfit to be eligible to become a resolution applicant' cannot be found fault with. The Supreme Court went on to hold as under:

> The saying of Jesus comes to mind – if the blind lead the blind, both shall fall into the ditch. The legislative policy, therefore, is that a person who is unable to service its own debt beyond the grace period referred to above, is unfit to be eligible to become a resolution applicant. This policy cannot be found fault with.

In addition to the above, the Hon'ble Supreme Court in the matter of *ArcelorMittal India Private Limited v. Satish Kumar Gupta and Others*[97] (Arcelor Mittal) interpreted the terms 'control' and 'promoter' in a wide ambit, thereby further broadening the already expansive latitude of section 29A(c) of the IBC. In Arcelor Mittal the Hon'ble Supreme Court observed that section 29A is a 'see through provision' which requires piercing the corporate veil and examination of the person who is actually in 'control' of the CD while evaluating a person's ineligibility to submit a resolution plan under IBC.[98] Finally, while analysing the scope and ambit of section 29A(c) of the IBC, the Hon'ble Supreme Court went on to hold that while identifying the persons who are promoters/in management/control of the CD for the purposes of section 29A(c) of the IBC', 'the corporate veil of the CD is not only pierced but is torn to tatters'.[99]

In addition to the above, the reach of section 29A of the IBC was extended legislatively as well, far beyond insolvency resolution processes of CDs. This aspect is analysed below.

Applicability of section 29A of the IBC to other processes

The interpretation of section 29A provided by the Hon'ble Supreme Court in *Swiss Ribbons* and *Arcelor Mittal*, supported the notion that persons who are in management of companies which have committed default on loan repayment and guarantee obligations should not be allowed to actively participate in the resolution process under IBC. Further, the credence provided by the Hon'ble Supreme Court to the legislative intent behind addition of section 29A of the IBC, had prompted the Reserve Bank of India (RBI) and the Insolvency and Bankruptcy Board of India (IBBI) to apply disqualification under section 29A of the IBC to even out of court workouts, loan transfers, liquidation, pre-packaged insolvency resolution process. At present, section 29A of the IBC is applicable to the following restructuring processes:

(a) **Out of court restructuring:** At present, the 'Prudential Framework for Resolution of Stressed Assets dated June 7, 2019 (Prudential Framework) issued by the RBI regulates the contractual out of court workout between the company and its creditors. The Prudential Framework does not permit for automatic upgradation of account as 'standard' without compliance with section 29A i.e., change of control and management of the CD unless 10% of the total outstanding debt is repaid post restructuring;[100]

(b) **Transfer of loan exposures:** The RBI (Transfer of Loan Exposures) Directions, 2021 (Transfer of Loan Exposure Directions), does not allow transfer of loan exposures by banks and financial institutions to erstwhile promoters of the CD disqualified under section 29A of the IBC.[101]

(c) **Liquidation:** Under IBC, the Liquidator is not allowed to sell the immovable and movable property or actionable claims of the CD in liquidation to any person who is not eligible to be a resolution applicant.[102] In other words, if a CD is subjected to liquidation under the IBC,[103] then the persons who are disqualified under section 29A of the IBC are also disqualified to acquire the assets of the said CD in such liquidation process. Further, the erstwhile promoters of the CD are disqualified from participating in any scheme of compromise or arrangement proposed under section 230 of the Companies Act, 2013 during the liquidation of the CD.[104]

(d) **Pre-pack:** Section 54A(2)(b) of the IBC stipulates that only a CD which is eligible to submit a resolution plan in terms of section 29A of the IBC is eligible to undergo a pre-packaged insolvency resolution process (pre-pack).

BLANKET EXCLUSION OF ERSTWHILE PROMOTERS – CONSEQUENCES

Impact on rescue financing at early stage of stress

The success of any debt restructuring is highly conditioned on the availability of credit which can be used to ensure survival of the CD during the insolvency resolution process (rescue finance).[105] In the absence of means to avail the rescue finance, an ailing CD runs the risk of being liquidated.[106] A liquidation of the company may result in the destruction of the going concern value of its business which has detrimental consequences for creditors as well as purchasers that benefit from the continuing existence of the distressed business.[107] Being cognizant of such risk, the 'UNCITRAL Legislative Guide on Insolvency Law' stipulates that during the insolvency resolution process, the CD must have access to funds which can enable it to meet the costs associated with maintaining the value of assets.[108]

Typically, at the early stages of stress, a company has a better potential for turnaround due to better value of its assets. However, obtaining funds for the CD at the early stage of stress (during the informal process) becomes problematic.[109] This is because, even though there may be some provision under the formal rescue law for some type of 'super priority' for a debtor's ongoing funding, that law normally does not extend to such an arrangement under the informal process.[110] However, at the informal stage of insolvency, one of the means by which the CD may obtain liquidity is through the extension of loans by the shareholders (or their family members or friends) to the debtor.[111]

In this context, it may be noted that the average shareholding of promoters in the Indian companies have been fairly stable at around 50%, since 2001.[112] Due to high concentration of equity ownership of promoters in the corporate governance structures in India, they may be well placed to provide financing/support to resolve financial distress in the company. However, given the applicability of section 29A to both formal (i.e., IBC) as well informal resolution process (i.e., June 7 restructurings) there is always high certainty that if the informal restructuring process fails then the promoters ultimately lose their control from management of the CD. Due to this risk, the promoters are often reluctant to fund at the informal stage of resolution of the CD which in turn leads to rise in initiation of CIRP against companies and increase the risk of liquidation.

Impact on entrepreneurship and decision-making process

Entrepreneurship involves innovation and risk-taking which are widely viewed as critical components for success of any economy.[113] Studies show that in high power distance countries (includes India),[114] it may be wise to enhance risk-taking propensity/ attitudes in order to foster engagement of people in innovative and entrepreneurial activities.[115]

Entrepreneurial activity can increase if the law and policy related to insolvency provide partial insurance or otherwise reduce the costs of failure.[116] However, excessive strong creditor rights in any insolvency regime can destroy companies' incentives to undertake value-enhancing but risky projects and may induce firms to do value-reducing diversifying acquisitions.[117] Further, to cope up with high creditor rights and risk of losing control over the company, the promoters may choose unprofitable diversifying investments that reduce the probability of distress.[118] Additionally, companies may be tempted to hoard high-recovery fixed assets which in spite of their low profitability would be easily converted into cash and deter bankruptcy application in situations of financial distress.[119]

In light of the above, it may be noted that one of the key objectives of the IBC is to promoter entrepreneurship.[120] However, due to risk of losing control on account of various ineligibilities created under section 29A of the IBC, the promoters may become sceptical to take risk and make investments in innovation, which is turn is affects the economic growth of the country. In this regard, it is pertinent to note that research and development (R&D) expenditures in India stood at 0.68% of the gross domestic product (GDP) between 2014 and 2018, compared with, for example, over 2% for both China and Singapore, and over 3% for Japan and Israel.[121] Authors have argued that one possible explanation of less R&D expenditure in India in relation to its GDP is the low participation of industries and corporates in the research and development activities.[122]

Impact on cooperation by promoters

It is unsurprising that out of all the stakeholders of the CD, one of the critical stakeholders whose cooperation is necessary for a successful resolution of CD is the erstwhile promoters. This is mainly on account of the fact that the promoters who have been in management and control over the affairs of a CD are more likely to possess the specific sectoral and micro level skills/knowledge required for managing the affairs of a concern the concerned CD in stress. However, given the disqualifications imposed on the CD read with inherent assumption made by the legislature *vis-à-vis* the culpability of promoters, it is unsurprising that the erstwhile promoters are disinclined to support the RPs/ members of the committee of creditors (CoC) in resolving the CD.

Admittedly, the IBC mandates cooperation from erstwhile management of the CD.[123] If the promoters fail to provide such cooperation then the RP has the right to approach the jurisdictional Adjudicating Authority (AA) for necessary directions.[124] Additionally, IBC[125] stipulates that if an officer of the CD fails to extend the requisite cooperation to the CD, such officer shall be punishable with imprisonment for a term between three to five years, or with fine ranging between ₹ 1 lakh to ₹ 1 crore.

However, notwithstanding these legal protections, there are practical challenges which makes the penal consequences[126] a weak deterrent against cooperating with the RP. Since, laws and formal rules are 'obligations backed by incentives', when obligations and incentives are combined, cooperation is strongly reinforced. The joint effect of incentives and obligations on contributions is significantly more positive than the impact of obligations alone.[127] Further, the level of 'cooperation' a person may extend is subjective and it cannot be judicially determined whether a promoter is extending necessary cooperation to fullest of his ability. Furthermore, extending cooperation by an individual is an exercise involving 'personal skill and knowledge'. As has been rightly acknowledged in the context of 'specific performance' under the Specific Reliefs Act, 1963, the courts cannot meaningfully direct a person to specifically perform an obligation which involves 'personal skill and knowledge'.

While it cannot be denied that in recent times the legislature has recognised that the resolution of the CD can be maximized if the erstwhile promoters get to actively participate in resolution process and have allowed them to make settlement offers under section 12A of the IBC, however, on account of continued restrictions under section 29A of the IBC, the erstwhile promoters find themselves in an ambivalent scenario, where while the IBC allows them to make settlement proposal and withdraw a company from IBC (i.e. 12A of the IBC) and at the same time also makes sure that they become incapacitated to submit the resolution plans for the CD both at insolvency as well as the pre-insolvency stage (i.e. restrictions under the Prudential Framework, Transfer of Loan Exposure Directions, section 29A of the IBC, pre-pack).

In view of the above, it is trite to mention that it has been regularly noticed that eliciting the cooperation of promoters has been one of the most difficult challenges for a RP while conducting a CIRP. The inevitable consequence of the lack of cooperation by promoters results in an information asymmetry which cannot be bridged by RP/CoC and impacts value maximization for creditors.

Value maximization and concerns over concentration

A number of US commentators have argued that the primary function of insolvency law is to maximize the collective return to creditors.[128] In fact, the IBC's key objective is to maximize the value of CD for the benefit of all the stakeholders. Driven by the objective of value maximization, matured jurisdictions such as the UK and USA have allowed promoters and their connected parties to submit a resolution plan for the company without any default-based ineligibility as provided under section 29A of the IBC (i.e., classification of account as NPA and default on guarantee obligations). Further, in these jurisdictions the promoters often get the benefit of discharge of debt and can start operations of the company without burden of past liabilities.

However, under the Indian insolvency regime, the restrictions imposed on the promoters and their connected person under section 29A and the judicial precedents surrounding the same have narrowed the pool of resolution applicants who are qualified to submit resolution plans for the CD. Narrower pool of resolution applicants is likely to translate to lower competitiveness in the resolution process of the CD and consequently lower resolution amount proposed under resolution plans for the CD. In fact, an argument can be made that several instances, especially in wherein promoters, despite their bona fide efforts, were unable to avert the CD's financial stress on account of factors beyond their control, the erstwhile promoters and their related parties would fight the hardest and offer the highest resolution amount to acquire a CD under the terms of a resolution plan.[129]

It is relevant to note that, as per the statistics published by the RBI in its Report on Trend and Progress of Banking in India,[130] in the year 2021-22, banks and financial institutions resolved NPAs aggregating to an amount of approximately ₹ 1,99,250 crore under the aegis of IBC whereby such banks and financial institutions recovered approximately ₹ 47,421 crore. In other words, on an average, the banks and financial institutions recovered approximately 23.8% of the amounts due and payable to them and took a haircut of more than 75% of their exposure in the CD under the scheme of the IBC. It is relevant to note that while IBC proved to be the most successful legal framework for the resolution of NPAs, its performance has only been marginally better than the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), which resolved NPAs aggregating to a sum of ₹ 1,21,642 crore whereby the concerned banks and financial institutions recovered an amount of ₹ 27,349 crore (i.e. 22.5% of their exposure). While there is no empirical evidence to demonstrate whether allowing erstwhile promoters to submit resolution plans would increase or reduce the recoveries by the lenders, there is an argument to be made that such recoveries could potentially be higher in case the erstwhile promoters are allowed to participate in the CIRP of the CD, for the reasons elucidated in the foregoing paragraphs.

DEFAULT BASED INELIGIBILITY UNDER SECTION 29A OF THE IBC – HAMMER IN PLACE OF SCALPEL?

At the outset, whether an economic legislation like the IBC should concern itself with moral considerations itself is a fundamental issue which requires some examination. While such examination is not the focus of this research paper, it is worthwhile to mention that several scholars on the subject have argued that 'Insolvency law is supposed to be an empty vessel according to the normative theory where all the economic and social goals are the problem of other laws'.[131] Accordingly, an argument can be made that under IBC, which has always styled itself as an 'economic legislation'[132] a resolution applicant who offers a resolution plan which inter-alia : (a) resolves the stress of the CD and maximises value to the stakeholders of the CD to the highest extent *vis-à-vis* the other resolution applicants; and (b) demonstrates that the resolution plan submitted by him is more feasible, viable and efficaciously implementable than the competing resolution plans, then the CoC, in its commercial wisdom should have the right to approve such a resolution plan for the CD notwithstanding the antecedents of the resolution applicant.

Admittedly, the Hon'ble Supreme Court in the matter of *Navtej Singh Johar and Others v. Union of India*[133] differentiated between 'social morality' and 'constitutional morality', the scheme of the constitution itself acknowledges the need to restrict a person's fundamental right to carry on trade, business and commerce *inter-alia* on considerations of public order, decency or morality.[134] Accordingly, it is not uncommon for economic legislations to stipulate provisions motivated heavily by moral considerations as opposed to mere economic considerations. For instance, section 23 of the Indian Contract Act, 1872, states that the consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another, 'or the court regards it as immoral, or opposed to public policy'.[135] In light of this, the authors assume for the purposes of this paper that there is merit in economic legislations such as IBC for taking into account moral considerations.

In view of the above, the authors do find merit in disqualifying certain persons from submitting a resolution plan. For instance, there is a good reason to disqualify a promoter who has been classified as a wilful defaulter for having siphoned off monies borrowed from the banks or failed to discharge its payment obligations despite having the ability to do so, from submitting a resolution plan. Similarly, there are good reasons to disqualify persons who are serving imprisonment for having committed a crime or are disqualified from accessing securities markets from submitting a resolution plan.

However, with respect to default-based ineligibility under IBC, as was rightly mentioned in the Parliament during the debates on the Amendment Act, it needs to be borne in mind that 'there are good apples and then there are bad apples'[136] and the law is required to distinguish the same. Further, in the matter of *Venkatesan Sankaranarayanan, the Resolution Professional for RTIL Limited v. Nitin Shambhukumar Kasliwal & Others*,[137] in the context of section 66 of the IBC, the National Company Law Tribunal (NCLT) Mumbai expressly recognised the difference between 'fraudulent intent' and a 'bad commercial decision' and eschewed from penalising erstwhile promoters for 'bad commercial decisions' taken by them while running the affairs of the company. It is curious that while the scheme of the IBC itself recognises the need to avoid penalising promoters who have undertaken bad commercial decisions in the context of section 66 of the IBC, the same legislation ignores this approach in the context of section 29A(c) and section 29A(h) of the IBC.

However, the authors submit default-based ineligibility as prescribed under section 29A(c) and section 29A(h), makes no distinction whatsoever between a promoter who was in management of a CD at the time of a downward business cycle and a promoter who actively siphoned off monies from the CD leading to its financial stress. The statement of objects and reasons of the Amendment Act and the blanket ban on all the promoters who failed to regularise the defaults of their respective companies from participating in the CIRP of the CD demonstrates that the scheme of the IBC has made a presumption that the erstwhile promoters of the CD are *ipso facto* responsible for such state of affairs of the CD on account of their mismanagement/fraudulent management. The authors submit that by way of such presumption, the IBC appears to have subscribed to the same stereotype which the BLRC Report warned against.

In view of the above, the authors submit that while the underlying object of the Amendment Act is appreciable, it appears to have become a little too far reaching by virtue of default-based ineligibilities under section 29A(c) and section 29A(h) of the IBC. The authors submit that there is definitely a discernible logic to the idea of weeding out certain persons 'who, with their misconduct contributed to defaults of the CD or are otherwise undesirable to submit a resolution plan' from participating in the insolvency resolution process of a CD. However, rather than delicately excluding such persons who are genuinely undesirable to submit resolution plans for the CD on account of their past antecedents, the IBC has taken the approach of blanketly disqualifying all the erstwhile promoters of the CD by way of a presumption elucidated hereinabove. The authors see this as a classic example of using a hammer to do a scalpel's job.

WAY FORWARD

In developed jurisdiction the perception behind insolvency of a company has shifted from a moral failure to an economic failure. Today, it is recognised that despite bona-fide business decisions and viable risks taken by the promoters and management, the company may still suffer losses due to various extraneous factors such as change in technology, increase in competition, and change in economic policy of the government. To incentivize entrepreneurship various jurisdiction have adopted legal frameworks to support entrepreneurs and given them second chance to revive the operations of their companies. Further there is evidence that these entrepreneurs can use their experience and lessons from failures to grow their businesses at a faster pace in terms of turnover and jobs.[138] Considering this aspect, the authors submit that giving second chance to promoters who had not been involved in any fraudulent conduct of the insolvent company will increase entrepreneurship and improve resolution of distressed companies. To this end, it is proposed that default-based ineligibilities must be removed from the IBC. The authors argue that the mischief sought to be cured by way of section 29A(c) and section 29A(h) of the IBC was to disqualify persons who contributed to the defaults of the CD from participating in the resolution process of the CD. The authors argue that this mischief can be addressed by making suitable revisions to the extant provisions of law even *de hors* section 29A of the IBC:

Making a distinction between incorrect and fraudulent business decisions

The foregoing paragraphs of the paper demonstrate that the scheme of the IBC, particularly in sections 29A(c) and 29A(h) of the IBC adopt a principle of 'strict liability' based on default. In other words, if the CD has been classified as an NPA or if a company has failed to discharge its obligations towards the guarantee, then notwithstanding the intention or bona fides, such person/persons who are in management and control of such persons are rendered ineligible to submit a resolution plan in terms of section 29A.

At the outset, the authors submit that as has been rightly observed in the BLRC Report, a growing economy crucially depends on firms/entrepreneurs taking certain commercial risks in their business. If defaults on account of such honest business decisions are equated with and penalised at par with the conduct of fraudulent promoters, this will prejudicially hamper risk taking by firms/ entrepreneurs. It is trite to mention that this is an undesirable outcome, as risk taking by firms is the wellspring of economic growth. Accordingly, the authors submit that the IBC, along lines similar to the insolvency regime in the USA and UK, should only penalise erstwhile promoters who have indulged in fraud and allow honest promoters to redeem themselves by submitting resolution plan for CD. Accordingly, the authors submit that default based strict liability (as imposed under section 29A(c) and 29A(j) of the IBC), in terms of which a promoter by virtue of default by company is disqualified to submit a resolution plan without any inquiry into the intention/bona fides of the promoter should be done away with under the scheme of the IBC.

Admittedly, in this context, an argument may be made that it is impracticable to 'separate the wheat from the chaff' i.e., to make a distinction between promoters who have been conducting their businesses in a bona fide manner; and promoters who have conducted the business of the CD in a fraudulent manner. However, the authors submit that even if section 29A(c) and 29A(h) are repealed from the scheme of the IBC, the mischief sought to be cured by way of these amendments are in any event getting addressed by the extent provisions of the IBC.

As regards, section 29A(b) of the IBC, it is noteworthy that in the event any person/entity deliberately and in a mala fide manner fails to discharge any of its payment obligations (including under a contract of guarantee[139]), then such person and the persons who are in management and control of such person would be classified as 'wilful defaulters' in terms of the RBI's 'Master Circular on Wilful Defaulters' dated July 1, 2015. *A fortiori,* such person would be disqualified would be disqualified to submit a resolution plan in terms of section 29A(b) of the IBC. Accordingly, even if section 29A(h) is repealed from the scheme of the IBC, any person who has deliberately and in a *mala fide* manner failed to discharge its payment obligations (including under the terms of a guarantee) or has been in management/control of such borrower *ipso facto* stands disqualified under section 29A(b) of the IBC.

Similarly, as regards section 29(c) of the IBC, it is relevant to note that under the out of court restructuring process, the borrowers who have committed frauds/ malfeasance/ wilful default are ineligible for restructuring, unless the existing promoters are replaced by new promoters, and the borrower company is completely delinked from such erstwhile promoters/management.[140] Further, under the formal insolvency resolution process, regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) already stipulates that an RP is required to examine if the CD and the persons who are engaged in managing the affairs of the CD are engaged in fraudulent transactions under section 66 of the IBC and file an application before the AA within a period of 135 days of commencement of insolvency praying for appropriate directions.[141] If the AA holds that the erstwhile management of the CD has entered into fraudulent transactions, then not only will such erstwhile management be liable to incur the consequences set out in sections 66 and 67 of the IBC but also stand disqualified to submit a resolution plan in terms of section 29A(g) of the IBC. In other words, section 29A(g) of the IBC already ensures that a person who has acted with malfeasance by entering into an avoidance transaction and contributed to the financial strain of the CD is excluded from submitting a resolution plan for the CD. This approach is somewhat similar to the legal position in the UK where directors who are disqualified by the court for committing bankruptcy frauds and are prohibited from holding directorship in companies for upto a period of 15 years.

In view of the foregoing paragraphs, the authors recommend the repeal of sections 29A(c) and 29A(j) of the IBC. However, in order to strengthen the rigour of section 29A(g) of the IBC, suitable amendments may be introduced into the scheme of the IBC and CIRP Regulations which stipulates that the timelines required to be followed by the RP under regulation 35A of the CIRP Regulations for examining whether the CD has entered into avoidance transactions are mandatory in nature and not directory and are required to be complied with. This will ensure that the AA expeditiously makes a determination on whether the erstwhile management of the CD indeed managed the affairs of the CD with malfeasance and hence deserve to be disqualified to submit a resolution plan in terms of section 29A(g) of the IBC.

While the authors recommend the repeal of sections 29A(c) and 29A(h) of IBC, it is submitted that in case the aforementioned provisions are retained in the scheme of the IBC, they should atleast undergo the following modifications:

(a) Increasing the grace period from one year to three years

As has also been suggested in the Insolvency Law Committee Report,[142] the legislature should consider increasing the grace period for regularising the defaults of a CD whose account has been declared an NPA, from one year to three years. This will provide sufficient opportunity for genuine promoters to regularise the defaults of the CD. This will ensure that erstwhile promoters who are legitimately instilling the necessary efforts to resolve the stress in the CD are not tarred with the same brush as errant promoters who have conducted the business of the CD fraudulently.

(b) Removal of default-based disqualification under section 29A of the IBC from liquidation

The authors argue that section 29A(c) and 29A(h) of the IBC should not be made applicable at least at the stage of liquidation of the CD. It is relevant to note that the IBBI issued a discussion paper dated November 3, 2022 recommending the insertion of a clarification into the scheme of IBC which makes the provisions of section 29A applicable even to schemes of compromises and arrangement under section 230 of the Companies Act, 2013 during liquidation. Under the scheme of the IBC, liquidation is a matter of last resort for a distressed company's revival and accordingly, it has been argued that no/minimal restrictions should be imposed at this stage.[143] Accordingly, for the reasons mentioned in this paper, there is merit in excluding persons who have engaged in fraudulent/mala fide conduct from participating even in the stage of liquidation of the CDs. However, in the interest of maximisation of value and considering that liquidation is the last possible opportunity to ensure such value maximisation, the authors submit that genuine promoters should be given an opportunity to participate in the liquidation process.

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[2] World Bank (2021), Principles for Effective Insolvency and Creditor/ Debtor Regimes, p. 1.

[3] Pomerleano M. and Shaw W. (2005), "Corporate Restructuring: Lesson from Experience", World Bank, p. 38.

[4] *Ibid.*

[5] McGowan M. and Andrews D. (2016), "Insolvency Regimes and Productivity Growth: A Framework for Analysis", OECD Working Paper no. 1309, p. 14.

[6] UNCITRAL Legislative Guide on Insolvency Law, 2005, p. 20.

[7] Supra Note 5, p. 14.

[8] *Ibid.*, p. 16.

[9] Ayottee K. and Yun H. (2005), "Matching Bankruptcy Laws to Legal Environment", The Journal of Law, Economics, and Organization, Vol.25, p. 17.

[10] Gilson S. and Vetsuypens M. (1994), "Creditor Control in Financially Distressed Firms: Empirical Evidence", Wash. U. L. Q., Vol. 72, p. 1005, 1008.

[11] Hart O. (1995), "Firms, Contracts, and Financial Structure", *Oxford University Press*, p. 172

[12] *Ibid.*

[13] Supra Note 5, p. 17.

[14] Acharya V. and Subramanian K. (2009), "Bankruptcy Codes and Innovation", The Review of Financial Studies, Vol. 22, p. 4949.

[15] Supra Note 9, p. 17.

[16] Aghion P. et. al. (1995), "Improving Bankruptcy Procedure", Washington University Quarterly 849, Vol. 72, p. 854.

[17] Supra Note 9, p. 17.

[18] Section 29A, IBC.

[19] The term 'connected person' used under section 29A(j) of the IBC means the following persons: (a) any person who is the promoter or in the management or control of the resolution applicant; or (b) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or (c) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (a) and (c). Provided that the ineligibility under point (c) is not applicable to a financial entity which includes any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999).

[20] Sections 54A and 54P, IBC.

[21] Regulations 2B, 37A, 37(8), IBBI (Liquidation Process) Regulations, 2016.

[22] Reserve Bank of India, (Transfer of Loan Exposure) Directions, 2021, para 9(I).

[23] Reserve Bank of India, Prudential Framework for Resolution of Stressed Assets, para 34.

[24] Sahoo M. and Guru A. (2020), "Indian Insolvency Law", 45 Vikalpa - Journal of Decision Makers 1, p. 5.

[25] Insolvency and Bankruptcy Board of India, Discussion Paper on changes in the corporate insolvency resolution process to reduce delays and improve the resolution value, at 1, June 27, 2022.

[26] Insolvency and Bankruptcy Board of India and International Finance Corporation, Understanding the IBC- Key Jurisprudence and Practical Considerations, 53 (2019) ["Moreover, the loyalty of the workforce may remain with the promoters or former management team. Employees may have been working with them for a considerable time and may feel both confused and threatened by the change in circumstances. The employees are informed that an IP is now in charge of the business, but they may also hear that in a matter of months, the promoter may return to the boardroom. This can cause a clash of loyalties and an atmosphere of disquiet. It is amid this atmosphere that the IP will have to seek information, documentation, and cooperation from the management and employees and run the CD as a going concern."]

[27] U.S. Const. art. I, § 8.

[28] Congressional Research Service (2012), "Bankruptcy Basics: A Primer", pp. 1-5.

[29]Federal Rules of Bankruptcy Procedure (U.S. Government Publishing Office Washington: 2018).

[30] Official Commissioner of Unsecured Creditors of Cybergenics Corporation v. Chinery (Re Cybergenics Corporation) 330 F3d 548, 573 (3rd Cir. 2003).

[31] 11 U.S.C §1106, 1107.

[32] The term 'Debtor' under Chapter 11 of the US Code includes both the individuals as well as companies. See, 11 U.S.C §101 (13) ["The term "debtor" means person or municipality concerning which a case under this title has been commenced.] and 11 U.S.C §101(41) ["The term "person" includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that— (A) acquires an asset from a person— (i) as a result of the operation of a loan guarantee agreement; or (ii) as receiver or liquidating agent of a person; (B) is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or (C) is the legal or beneficial owner of an asset of— (i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or (ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986; shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit."].

[33] 11 U.S.C §1121.

[34] *Ibid*.

[35] 11 U.S.C. § 1121(c)(3); David H. Buchbinder, Basic Bankruptcy Law for Paralegals, 304 (Wolters Kluwer 2017).

[36] See, 11 U.S.C. §1121© ['any party in interest', includes the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee.].

[37] 11 U.S.C. § 1121(c); 11 U.S.C. §307.

[38] 11 U.S.C. § 1104(a)(1).

[39] 11 U.S.C. § 1104(a)(2).

[40] 11 U.S.C. § 1121.

[41] 11 U.S.C. § 1121(c).

[42] Supra Note 35, p. 142.

[43] 11 U.S.C. § 1141.

[44] 11 U.S.C. § 1330; 11 U.S.C. § 1328(e).

[45] 11 U.S.C. § 727(a)(2), (4) (2012).

[46] 11 U.S.C. § 1328(e).

[47] 18 U.S.C. § 152(1).

[48] 18 U.S.C. § 152; Peterson R. (2006), "Criminal Liability for the Bankruptcy Practitioner" at Chapter XVI, p. 309 in Attorney's Liability in Bankruptcy by Corrine Cooper.

[49] 18 U.S.C. §§ 152, 1341, 1519, 3571.

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[51] Kelly S. et. al., A Practical Guide to UK Insolvency Proceedings.

[52] UK Insolvency Act, 1986, § 9(1).

[53] *Ibid*.

[54] UK Insolvency Act, 1986, § 13(1).

[55] UK Insolvency Act, 1986, § 14(1).

[56] UK Insolvency Act, 1986, § 14(2).

[57] UK Insolvency Act, 1986, § 14(4).

[58] UK Insolvency Act 1986, § 235.

[59] UK Insolvency Act 1986, § 235(2)(b).

[60] UK Insolvency Act 1986, § 237.

[61] UK Insolvency Act 1986, § 237(1).

[62] UK Insolvency Act 1986, § 236(5).

[63] UK Insolvency Act 1986, § 5.

[64] UK Insolvency Act 1986, § 1(1).

[65] UK Insolvency Act 1986, § 1(2).

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[67] Dr Kubi (2021), An Overview of Company Voluntary Arrangements in CAMA 2020, 3.

[68] UK Insolvency Act 1986, para 3(2) of Schedule A1.

[69] Supra Note 66, p. 269.
[70] *Ibid*.
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[75] Graham T. (2014), Graham Review Into Pre-Pack Administration, UK.
[76] *Ibid.*, para 9.1, p. 59.
[77] Insolvency Practitioner Association, Statement of Insolvency Practice 16 (Pre-Packaged Sales in Administration).
[78] UK Insolvency Act 1986, § 212.
[79] UK Insolvency Act 1986, § 213.
[80] UK Insolvency Act 1986, § 214.
[81] CDDA 1986, § 10(2).
[82] CDDA 1986, § 3.
[83] CDDA 1986, § 9.
[84] CDDA 1986, § 13.
[85] Report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design, 2015.
[86] *Ibid*. para 3.2.3, p. 23.
[87] *Ibid*.
[88] *Ibid.*
[89] Statement of Purpose of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017.
[90] Statement of Objects and Reasons, Insolvency and Bankruptcy Code (Amendment) Act, 2017, para 2.
[91] Lok Sabha Debates (Original Version), 16th Series, Volume XXVII, 13th Session, 2017-18/1939 (Saka) No.9, at pages 98-99, Friday, December 29, 2017/ Pausha 8, 1939 (Saka).
[92] *Ibid.* p. 103.
[93] Supra Note 5, pp. 118-119.
[94] *Ibid.*
[95] Supra Note 5, p. 126.
[96] Writ Petition (Civil) No. 99 of 2018.
[97] Civil Appeal Nos. 9402-9405 of 2018.
[98] Supra Note 97, para 29.
[99] *Ibid.*, para 29.
[100] Supra Note 23, para 24.
[101] Supra Note 22, para 9(m).
[102] Section 35(1)(f), IBC.
[103] Section 33, IBC.
[104] Supra Note 21, Regulation 2B.
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[107] Finch V. (2009), Corporate Insolvency Law- Perspective and Insights, *Cambridge Press* 29.
[108] UNCITRAL Legislative Guide on Insolvency Law, para 97, p. 114.
[109] A Tool Kit for Out of Court Workouts, World Bank Group, para 2.11, p. 22.
[110] *Ibid.*
[111] Supra Note 105, p. 42.
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[118] *Ibid.*, p. 3.

[119] Kind A. et. al., "The Effect of Creditor Rights on Capital Structure, Investment, Profitability, and Risk: Evidence from a Natural Experiment".

[120] See, preamble to the IBC.

[121] Nath S. et al. (2021), "India's Innovation Ecosystem for Productivity-led Growth: Opportunities and Challenges", Reserve Bank of India Occasional Papers, Vol. 42, No. 2, p. 74.

[122] *Ibid*.

[123] Section 19(1), IBC.

[124] Section 19(2), IBC.

[125] Section 70, IBC.

[126] Sections 19 and 70, IBC.

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[129] In the case of *R. Vijay Kumar v. Kasi Viswanathan* (2019 SCC OnLine NCLAT 227) and *C. Mahendra International Ltd. v. Naren Sheth* (2019 SCC OnLine NCLAT 332), the promoters had offered higher amount then the liquidation value of the corporate debtor, but their offers were rejected due to prohibition under section 29A(c) of the IBC. Ultimately, liquidation order was passed in these cases by the NCLT.

[130] Report on Trend and Progress of Banking in India, Reserve Bank of India, 2020-21.

[131] Brunstad G. et al., "The Three Faces of Bankruptcy Law" 408.

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