AN ANALYSIS OF IMPLEMENTATION OF THE RESOLUTION PLAN UNDER IBC IN INDIA *VIS-À-VIS* CORPORATE RESCUE IN THE UNITED KINGDOM

A Dissertation submitted to the National University Of Advanced Legal Studies, Kochi in partial fulfilment of the requirements for the award of LL.M. Degree in International Trade Law

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PREFACE

Myself being an LLM student who specializes in International Trade Law doing my postgraduate studies in the National University of Advanced Legal Studies, it has been always a directional path of thought process in international law for me. I was always fascinated by the knowledge of international affairs and how countries operate in the international sphere. But one subject which grabbed my heart entirely was the deterioration of corporates in our country recently. So I decided to do my dissertation related to this topic under the title "An Analysis Of Implementation Of The Resolution Plan Under IBC In India *Vis-À-Vis* Corporate Rescue In The United Kingdom".

Any country's legal framework has a critical influence in its economic growth. If a country's legal framework is well-constructed and implemented, the country's worldwide standing will undoubtedly be strong. The Insolvency and Bankruptcy Code (IBC) of 2016 is India's second most important law reform after the establishment of the Goods and Services Tax. It's because the IBC not only makes India more strong in terms of the legal framework, but it also gives it a new economic identity and recognition on a worldwide scale. The Insolvency and Bankruptcy Code (IBC) of 2016 consolidates and amends the law governing the insolvency resolution procedure in India. One of the most common questions we get is how the Indian IBC 2016 compares to other insolvency codes used across the world. Because foreign insolvency and bankruptcy laws have been in existence for a long time and have dealt with a variety of instances, a closer examination of their laws may provide further information. As we all know, IBC 2016 was implemented in May of 2016, thus it is still new and developing. The dissertation seeks to chart the rescue procedure in India and UK, their legislative history, their present insolvency regime and the role of restructuring in it and as well as the efficiency of the rescue plans.

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LIST OF ACRONYMS/ABBREVIATIONS

- AIR- All India Reporter
- BIFR- The Board for Industrial and Financial Reconstruction
- CIRP - Corporate Insolvency Resolution process
- CVA - Company Voluntary Arrangement
- CoC - Committee of Creditors
- CORPN Corporation
- DRT - Debt recovery tribunal
- ER – English report
- IA 1986- Insolvency Act
- IBBI - Insolvency and Bankruptcy Board of India
- IBC - Insolvency and Bankruptcy Code, 2016
- IRP - Insolvency resolution professional
- NCLT - National Company Law Tribunal
- NCLAT- National Company Law Appellant Tribunal
- RDDBI -Recovery of Debts Due to Banks and Financial Institutions.
- SCC- Supreme Court Cases

- SICA - The Sick Industrial Companies Act
- SIP - Statement of Insolvency Practice
- UK- United Kingdom
- UKHL- United Kingdom House of Lords
- UNCITRAL- The United Nations Commission on International Trade Law
- V.- versus

CHAPTER-1

INTRODUCTION

"Corporate rescue is a major intervention necessary to avert eventual failure of the company."

Professor Belcher[1]

Every business is an 'organisation'. The word 'organisation' is obtained from the word 'organ', which means that any 'organisation' has several characteristics of an 'organ'. Like any 'organ', the organisation has a chance to either develop or decay. Some professions, enterprises, and industries, all of which are unquestionably organisations, are necessary to be strong, while others are required to be sick. After a few years, a healthy organisation can become sick. Some diseased organisations will perish, while others may resurrect. It is impossible for all startups to succeed. Some will be successful, while others will be unsuccessful. Even if a startup is genuine, it may fail. Some startups are phoney, with the sole purpose of defrauding the system and stealing public funds. The illness could be caused by a variety of internal or environmental factors. It could be short-term or long-term. It can also be chronic.

CORPORATE DEATHS

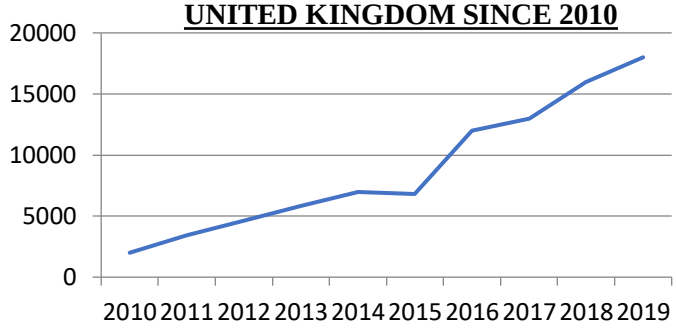
Allowing an organisation to die naturally is the wisest course of action if it is no longer functional and is likely to become a perpetually sick unit. It is never a cheerful sight to see someone on their deathbed, with virtually no possibility of recovery and kept alive by mechanical means. 'Mercy killing' is frequently preferable to prolonging the misery. Some businesses will inevitably fail, but they will be dealt with quickly and efficiently. Instead of being stymied by prior judgments, entrepreneurs and lenders will be able to move forward. Previously, the Companies Act of 2013 controlled corporate companies. Companies sickness issues were handled by High Courts. To say the least, my research with this legal structure was unsatisfactory. Cases used to stretch on for years, wasting vast amounts of national resources. The antiquated provisions were no longer fulfilling the purpose for which they were created. Non-corporate entities such as partnership firms, individuals, HUFs, and other non-corporate entities are currently controlled under the

[1] Belcher, A., 1997. *Corporate Rescue*. London: Sweet & Maxwell.

Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920. When the Insolvency Code becomes applicable to them, these will be transferred to DRT.[2]

A financially distressed company is a curse not only to its investors but also to the economy at large. Financial distress is a situation when the firm is not able to meet its obligations or promises. The indicators of a financial distressed company are poor performance, no profits or least profits, poor management and so on. To be financially viable, a company has to make sure it meets the requirements of the investors at large. Thus, economic reforms and regimes to help a financially distressed company are of utmost importance. The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code") is a watershed moment in Indian law.[3] The average number of cases granted to India's insolvency courts increased to 30.29 percent in 2019, according to the Insolvency and Bankruptcy Board of India, with 3312 cases in 2019. This data proves that India as a developing economy has the right blend of insolvency laws and that more and more financially distressed companies are taking the protection of the Code. In United Kingdom, a highly developed nation, the data shows that there are around 18,000 underlying insolvency cases in the year 2019 (Image 1).

Image 1: TOTAL COMPANY INSOLVENCIES IN UNITED KINGDOM SINCE 2010



A nation that influences the world economy at large has the third highest number of insolvency cases after France and United States respectively and it charts out the importance of reviving a financially distressed company and "rescuing it."

Rescue plans among the world economies are different. India has incorporated in its Code the notion of the same, named as "Resolution plan" under Section 5(26) of the Code. A resolution plan is a proposal that tries to solve the problem of the corporate debtor's insolvency and, as a result, its inability to repay debts. It must be approved by the committee of creditors ("COC") and adhere to

[2] V.S Datey, Guide To Insolvency and Bankruptcy Code 1-5 (Taxman's 2019).
[3] *M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr* [2018]. 1 SCC 407.

the IBC's statutory provisions. Furthermore there is no limit on number of Resolution Plans, which can be prepared and submitted and no limit on number of modifications to Resolution Plans. India has only one feasible way of rescuing the financially distressed company. Under the United Kingdom, the features of "Corporate Rescue" are quite broad unlike India, also owing to the fact that it is acknowledged as "Corporate Rescue" in United Kingdom whereas in India the "the resolution plan" remains a plan that is never properly executed.

Bankruptcies are a forbidden subject in India, despite the fact that they are a common occurrence in the worldwide corporate sector. Promoters would rather create a false sense of success than reveal that a company is going bankrupt. Because of this reason, the government was aimed to pass the Insolvency and Bankruptcy Code. After the government's reformation, when creditors/lenders of a firm in India have given up on getting any of the loan amounts from the company, they can seek the National Company Law Tribunal (NCLT). They would then be able to recoup some of the money by selling the company or its assets to others in the form of bids.
Some well-known and huge bankruptcies happened in the last 10 years in India are[4]:-

1. **<u>Dewan Housing Finance Ltd. (DHFL)</u>**

Dewan Housing Finance Ltd. (DHFL) is a non-banking financial organisation founded by Rajesh Kumar Wadhawan in the year 1984. The company was founded to help low- and middle-income people in India's tier 2 and tier 3 cities obtain house financing. After HDFC, DHFL was the second home finance firm to be established. For more than three decades, the company has operated well, maintaining strong growth and even acquiring companies such as Deutsche Postbank Home Finance. In Maharashtra, the business also embarked on slum development and slum rehabilitation initiatives. Several initiatives were sponsored with loans that the corporation had raised. This carefully controlled rise of DHFL was cut short on January 29, 2019, when Cobrapost, a collective of journalists, published an expose on DHFL. The expose claims that DHFL transferred Rs. 31,000

[4]Aron Almeida, 8 Biggest Bankruptcies in India in the Last 10 Years, TRADE BRAINS (Oct. 07, 2021, 8:00 PM), https://tradebrains.in/biggest-bankruptcies-in-india/.

crores from loans to different shell businesses for the personal wealth of its promoters, including Kapil Wadhawan, Aruna Wadhawan, and Dheeraj Wadhawan.

To pay off their debt, the corporation began selling a variety of enterprises. Later in the year, DHFL missed bond payments and interest payments totalling Rs 900 crore. This compelled credit rating agencies to take action. The stock price has now dropped by approximately 97 percent. The RBI was compelled to replace DHFL's board of directors as a result of their defaults, and began processing a resolution for DHFL under the Insolvency and Bankruptcy Code. DHFL would shortly be transported to NCLT (National Company Law Tribunal) as well. Behind-the-scenes investigations found even more troubling information. By December 2019, DHFL had filed for bankruptcy after defaulting on a debt of Rs 90,000 crores, and its promoters had been charged with money laundering. Meanwhile, the RBI has authorised the Piramal Group's acquisition of DHFL.

2. Reliance Communications

Today, Anil Ambani's biggest failure is Reliance Communications (RCom). Rcom, on the other hand, was formerly one of the most competitive competitors. RCom has already spent Rs 8,500 crore on 3G spectrum purchases in over 13 areas. As RCom became embroiled in the 2G scam, trouble began to brew. Almost 14 firms in the business were able to profit from the 2G scam, resulting in even higher profit margins. RCom began to lose market share over time, and by 2014, it was ranked fourth in the telecom sector. The introduction of Jio into Indian markets, which also began providing free data services, was the final nail in Rcom's coffin. Rcom's debt had risen to Rs 43,000 crore in 2017 from Rs 25,000 crore in 2010. Approximately half of the company's debt was used to buy spectrum. RCom has ceased its business in 2017 and began selling its assets to pay off its debt and the company is still on trial before NCLT.

3. Jet Airways

The airline's massive fuel expenses were one of the main causes for the Jets' demise. Fuel accounts for roughly 40% of an airline's costs. When aviation fuel becomes more expensive, it is not necessarily passed on to customers. This is due to the fact that no single player has a large enough market share to impact the pricing. As a result of the competition, the airlines' profit margins are reduced. Jet also had to deal with the rupee's depreciation. International airlines are affected since they now have to pay more in dollars to other countries for rent, maintenance fees, and refuelling

charges at international airports. The Rupee had a reputation for being Asia's worst-performing currency. The Jets' downfall was ultimately due to these issues.

4. Alok Industries

One of Alok Industries' initial blunders was borrowing Rs 10,000 crores for expansion purposes in 2004. Worst of all, Alok chose to use this to open new plants rather than enhancing or fully utilising their present ones. What Alok failed to consider was the prospect of a drop in industry demand. Alok's asset turnover deteriorated as a result of these conditions, which included poor demand and fierce competition. Another of Alok's blunders was investing in real estate in 2007. It bought homes in Mumbai's Lower Parel neighbourhood. Following the 2008 financial crisis, the real estate market took a hit. Alok's situation deteriorated significantly as a result of consistent losses and rising debt. Alok Industries owed a total of Rs.30,000 crores to its creditors. With a proposal of Rs. 5000 crores, Reliance and JM Financial Asset Reconstruction Company won the auction for the company.

5. Essar Steel

Essar Steel was a subsidiary of the Ruia family-owned Essar company, which was founded in 1969. The company originally got into debt in 2002, when it had to go through Corporate Debt Restructuring to pay off a debt of Rs. 2,800 crore. Essar was fortunate in that it survived and was back on track by 2006. Essar took on its ambitious growth objectives once more. Unfortunately, these plans were impeded by delays in environmental licences and a lack of natural gas. Essar was once again engulfed in debt by 2015, this time totaling Rs 42,000 crore. The company's plans to save it were thwarted by falling commodities prices.

In June 2017, Essar was included on the RBI's list of 12 stressed accounts that would be subject to insolvency proceedings under the IBC. The company was thereafter placed under the National Company Law Tribunal. Essar Steel was auctioned off and ultimately purchased by ArcelorMittal and Nippon Steel of Japan. ArcelorMittal Nippon Steel India (AM/NS India) was the new name for the corporation.

6. Lanco Infra

Lagadapati Amarappa Naidu and Lagadapati Rajagopal, who was a Lok Sabha member, created Lanco Infra in 1986. The company's growth in its first year was unrivalled, thanks to several significant contracts, mostly in the construction industry. Soon after, the corporation expanded into new fields such as electricity generation, transportation, solar energy, coal mining, and so on. Lanco was one of the fastest growing companies in the world by 2010. It was also one of India's earliest independent power producers and the country's largest private power supplier. Lanco's company suffered significantly as a result of the UPA government's policy reversals in 2012, which were otherwise supported by them. Monthly average merchant power costs in January 2012 were around 3 per unit, according to India Energy Exchange, down from a peak of 10.78 per unit in April 2009. Lanco's revenue quickly declined, making it harder for the corporation to obtain debt from banks. Due to the company's dismal financials, interest payments accounted for 60% of its expenses by March 2017. Lanco Infra was included on the RBI's list of 12 stressed accounts that would have to go through bankruptcy proceedings under the IBC in June 2017. Lanco, once India's largest infrastructure company, is currently facing insolvency proceedings before the NCLT.
It's difficult to imagine that such massive bankruptcies have occurred at first. However, in retrospect, they provide excellent business insights. The word 'debt' has been a recurring theme in all of them. If used correctly, it can help the company flourish or it might lead to the same destiny as the companies mentioned above.

The dissertation seeks to chart the rescue procedure in India and UK, their legislative history, their present insolvency regime and the role of restructuring in it and as well as the efficiency of the rescue plans. The Indian insolvency regime, being incorporated in The Insolvency and Bankruptcy Code, 2016 phases the term as “resolution plan” as defined under Section 5(26) of the Code which defines it as a “*plan proposed by [resolution applicant] for insolvency resolution of the corporate debtor as a going concern*.” Whereas under the UK Insolvency law of 1986 charts out methods to rescue the company. These two countries depict the two poles of restructuring, whereas “resolution plan” is just a part of the insolvency regime in India, in United Kingdom; corporate rescue rules the Insolvency Act. The paper brings out the differences, the failures and the success rate of both the legislations. The comparison is made between India and UK owing to the stark contrast between both the countries, India being a developing country and also, a nation wherein the Insolvency regime is still a toddler and the United Kingdom, being a highly developed nation that

has a well drafted insolvency regime and a nation that influences the world economy not just economically but also culturally and politically.

ORGANISATION OF THE STUDY

The dissertation is divided into five major chapters:-

- Chapter 1 deals with the introduction to the insolvency procedure in India and U.K.
- The next chapter, that is chapter 2 elaborates the historical evolution of the insolvency regime in the United Kingdom and India. It further elaborates the case laws and circumstances that led to the enactment of the present legislation in both the countries.
- Chapter 3 has envisaged the corporate rescue plans in the United Kingdom and it elaborates the rescue plans in the United Kingdom and talks about Company Voluntary Arrangement, Receivership (as it stands abolished) and Administrative orders. It also briefly talks about pre- packs.
- Chapter 4 details on the Resolution plan in India as it stands today and analysis the various case laws which had led to the success/failure of the Resolution plan. The Amtek Auto-Liberty House case is elaborated in detail. The chapter also briefly discusses the proposal of pre-packs in the country.
- The final chapter (chapter 5) will include the concluding remarks and suggestions for the Insolvency Regime in India with special focus on reviving the financially distressed companies.

LITERATURE REVIEW

Frisby[5] (2017)- This book tries to look at, in the principal example, the possibility of corporate salvage and whether, as a belief system, its advancement is essentially the best arrangement. The book at that point proceeds to look at the different methods into which insolvent organizations may enter, with specific accentuation on those that are, in the universal view, non-terminal as in they can possibly convey a rescue result. The legitimate structure of this methodology is inspected so as to measure their conceivable viability in accomplishing rescue. Just as concentrating on legitimate standards, the book draws on an exact investigation of more than 3500 organizations

[5] Sandra Frisby, *Corporate Rescue: Law and Practice (Contemporary Studies in Corporate Law)* (2017).

entering organizational or regulatory receivership between September 2001 and September 2006, and furthermore draws on arrangement of meetings with experts, agents and different partners in order to offer a more educated view regarding bankruptcy practice and how it might help, or something else, in the accomplishment of the destinations of the Enterprise Act. The creator likewise looks at current recommendations for future change of the law and endeavors to assess their conceivable effect on this complex however entrancing zone of law and practice.

Batra[6]- The book clarifies the legislative history and the evolution of the Insolvency Regime in India. He had examined the process of law under insolvency and criticized the insufficient legislation with regard to the rescue procedure in India. The author also explains key dimensions of new insolvency law based on best practices and experience in other jurisdictions.

Makhija (2018)[7]- The author had examined the evolution and the development of the insolvency regime in India. The author has further tried to explain the legislative intend, the major case laws and the importance of corporate restructuring over liquidation. The judicial pronouncement related to the rescue structure has been well explained by the author.

Omar, Dr. Jennifer (2016)[8]- This elaborates on the various rescue mechanisms in the United Kingdom. It further clarifies the legislative history and the evolution of the Insolvency Regime in the United Kingdom with an in depth analysis of the Cork Committee Report, Insolvency Act 1986 and the Enterprises Act 2002. He had examined the process of law under insolvency and criticized the insufficient legislation with regard to the rescue culture.

STATEMENT OF PROBLEM

UNCITRAL Model Law has come up with a unique model law to enhance the promotion of universal laws on reconstructing and insolvency. This new model law is now accessible for domestic application in countries all over the world. Since its publication in 1997, the previous model law has only been applied in 44 states in the United States. While the Indian Insolvency regime which is just three years old phases the term "resolution plan" as a "plan proposed by

[6] Sumant Batra, *Corporate Insolvency Law and Practice* (2017).
[7] Ashish Makhija, *Insolvency And Bankruptcy Code Of India* (1st edn, Lexis Nexis 2018).
[8] Omar, Dr & Gant, Dr Jennifer 'Corporate Rescue in the United Kingdom: Ten Years after the Enterprise Act 2002 Reforms' (2016).

[resolution applicant] for insolvency resolution of the corporate debtor as a going concern." Whereas under the UK Insolvency law of 1986 graph out various methods to rescue the company. These two countries depict the two poles of restructuring, whereas "resolution plan" is just a part of the insolvency regime in India, in United Kingdom; corporate rescue rules the Insolvency Act. The paper brings out the differences of both the legislations, the success of the corporate restructuring plan with reference to the judicial pronouncement in both the countries. The paper determines to conduct a comparative analysis of both the countries that doesn't have the common link of restructuring procedure and tries to conclude with the viable solution to the insolvency restructuring of both the countries.

HYPOTHESIS

Implementing the various procedures of corporate rescue as stated under UK Insolvency Law into India's insolvency regime would increase the success rate of revival of Indian companies.

RESEARCH QUESTIONS

1. Whether the current insolvency regime of India does justice to the concept of restructuring?
2. Whether the UK Insolvency Law 1986 is far better in achieving corporate rescue than the Indian regime?
3. What are the reasons for lesser success rate of corporate rescue in India?
4. Whether the various corporate rescue mechanism of UK could be adopted by India?

RESEARCH OBJECTIVES

The major objectives of this research are-

- To examine the loophole of the current Insolvency Regime of India and to compare it with the Insolvency legislation of UK with special reference to the corporate restructuring and revival process.
- To analyse the reason of the ineffective/nugatory implementation of corporate rescue in India.
- To provide suggestions and modifications in the current Insolvency and Bankruptcy Code, 2016 with an emphasis on rescue over liquidation.

METHODOLOGY

I have relied on the Doctrinal Method of Research. A comprehensive study of both the primary and secondary available data is made. A lot of articles have been referred. Apart from the published articles that were accessible through the remote access of NUALS Kerala, I have also relied on web sources, databases, books and law journals. The various primary resources of study, referred by me include enacted piece of legislation, judicial precedents etc. The secondary resources include works of various eminent authors' text books, law journals, newspapers etc.

CHAPTER-2

INSOLVENCY AND BANKRUPTCY IN INDIA AND UK

Lord Ellenborough stated: *"The principle of (insolvency) bankruptcy laws is to prevent persons craftily obtaining into their hands great substance of other men's goods, and at their own wills and pleasures consuming the substance obtained by credit of other men and it is always to be remembered that it is protection of persons who have so given credit which is the professed object of bankruptcy laws."*[9]

Until now, only a little research has been conducted to trace the history/evolution of Bankruptcy laws. Paul Huvelin's bibliographical sketch[10] unearths the dearth of any jurisprudence in Insolvency and Bankruptcy Laws. Although if one shuffle through the history of Ancient Greece, a most common practice of paying debts could be found, referred to as 'Peonage.' Peonage is a synonym to "debt slavery" thus if one could not pay the debts on time, his freedom would be caged until the very payment of such debts. Later in pre- medieval era, Bankruptcy was seen as a crime and bankrupts were subsequently treated as criminals who were eventually put in jails. Since then bankruptcy and insolvency laws sprung up all around the world and countries came up with their own bankruptcy criteria. All bankruptcy laws, no matter where it originated had two general objects. Primarily, to secure a fair division of the insolvent debtor's property among all his creditors and *secondly*, to prevent on the part of insolvent debtor, conduct detrimental to the interest of his creditors.[11]

The Insolvency and Bankruptcy Laws in the United Kingdom and India has fairly confined to the above stated two objectives but both the laws have gone through a vast revolution both in ways of alteration and renovation, in the recent past and this chapter seeks to analyse the evolution of

[9] *Sutton v Weeley*, [1806] 7 East 442: 103 ER 171.
[10] *L'Histoire du Droit Commercial* [1904].
[11] Levinthal and Louis Edward 'The Early History of Bankruptcy Law' 66 (5): 223. JSTOR 3314078.

bankruptcy and insolvency laws in the United Kingdom and India and their current status in the world economy.

2.1 BANKRUPTCY/INSOLVENCY LAWS IN UK

The insolvency laws in the United Kingdom have taken its roots from the ancient times. The bankruptcy and insolvency legislations of the United Kingdom could be divided into three major phases- before, during and post 19th century. The Magna Carta of 1915 had the ninth clause as :

"*If, for lack of means, the debtor is unable to discharge his debt, his sureties shall be answerable for it. If they so desire, they may have the debtor's lands and rents until they have received satisfaction for the debt that they paid for him, unless the debtor can show that he has settled his obligations to them*"[12]

and following the same, The Bankruptcy Code of 1542 came into place, which is described as the first English law statute that dealt with Insolvency. It brought into effect the *pari-passu* principle, keeping everyone on the same footing under Insolvency for the first time. But the Code still had incorporated the treatment of non-debt payers as criminals. This was also followed by a number of precedents such as *Fowler v. Padget*[13] wherein bankruptcy was treated still as a crime. The debt-prisons were full of bankrupts termed as "criminals" with the precedents and the Code of 1542 worsening the situation. Such awful state of debt- prisons carved way for modern company legislations which led to the Joint Stock Companies Act, 1844 along with the Joint Stock Companies Winding Up Rules of 1844. The situation of debt prisons improved with the Limited Liabilities Act of 1855 which confined an individual's (investor's) liability only to the amount that he has invested and not beyond that. Still, the conception of bankrupts were the same as criminals and it did not change for long until Debtor's Act 1869 that abolished the perception of earmarking Bankrupts as criminals and it took away the concept of debt-prison. Thus, this Act created a layer of protection surrounding the bankrupt/ insolvent and this shelter lead to cases such as *Salomon v. Salomon*[14]where it was proved that even the smallest business enterprise will have protection (shelter).

[12] Holt, J. C. [1992] Magna Carta. Cambridge: Cambridge University Press.
[13] *Fowler v. Padget* [1789] 7 Term Rep 509;101 ER 1103.
[14] *Salomon v.* A *Salomon* & Co Ltd [1896] UKHL 1, [1897] AC 22.

Thus the 19th century in the United Kingdom saw a transition in the bankruptcy and insolvency laws from terming a bankrupt as criminal to refuge him under the wider notion of various legislations in place. Thus, this century also marked an era of shaping the economy in the United Kingdom owing to the fact that such a thick layer of protection for insolvents/ bankrupts encouraged more and more investors to come up in the economy.

The efforts to shape the economy and to properly legislate on insolvency laws were seen in the 20th century also. The efforts made up in the 20th century in the United Kingdom could be dealt in three phases- *Primary* phase was of establishing a honored system of priorities among the creditors of a company, *Secondly,* phase was of rescuing the business which was mainly because of the Cork Committee Report, 1982[15] and *Thirdly,* the efforts were made for the purpose of ascertaining accountability for people who either benefitted or worsened from Insolvency.

27 January 1977 is the key date throughout the entire existence of insolvency laws in the United Kingdom. It was on this day that an interdisciplinary board was shaped, managed by Kenneth Cork. The board's errand was to investigate the condition of bankruptcy law in the United Kingdom and to propose proposals for its improvement by method of authoritative change. Before digging into the results of the Cork Committee, there are some starter perceptions deserving of note. Sir Kenneth Cork's dad was occupied with the bookkeeping calling, a vocation additionally attempted by his child, who established a bookkeeping firm Cork Gully during the 1960s. The company's essential action was, aside from the coincidental arrangement of bookkeeping administrations to customers, the rebuilding of endeavors and exchange of deeds of game plan between an account holder organization and its lenders. These deeds of course of action hosted the point of authoritatively restricting gatherings to a reimbursement understanding.[16] The rescue culture as stated in the Cork Report is interesting, pursuing to the fact that until the coming up of the Cork Report, Insolvency was a general notion and reviving the almost dead entity was not known to many. The basic question that the Cork Report asked was- *Why left to die when you could be revived?* Thus, the Cork Report of 1982 is considered to be a turning point in the rescue culture of not just UK but rest of the world too. The report said;

[15] *Cork* Review Committee *Report on Insolvency Law and Practice 1982* [Cmnd 8558].

[16] The history of the firm and its most prominent clients is discussed in Sir Kenneth Cork's excellent autobiography, titled *Cork on Cork* [Macmillan, 1988].

"*We believe that a concern for the livelihood and wellbeing of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked*".[17]

While the United Kingdom insolvency framework was not totally out of date at the time that the Cork Committee was shaped, the framework as it existed was not adjusted to the requirements of present-day business. Except for some little changes, the law had not been the object of any genuine modification for various years. The law on close to home chapter 11 was still administered by the Bankruptcy Act 1914, applying just to England and Wales. Scotland and Northern Ireland had their very own insolvency systems; however there were critical similitude between the three frameworks. Corporate bankruptcy was administered by a bound together system under the Companies Act 1948, applying to the sum of the United Kingdom. This Act gave methodology to wilful liquidation started by the organization and additionally its investors just as an automatic liquidation started by loan bosses. There was additionally a strategy accessible whereby a trade off or course of action could be made between the organization and its leasers, in comparative structure to the casual deed of game plan and an antecedent to the cutting edge Scheme of Arrangement. There was, notwithstanding, nothing similar to methodology focused on corporate recuperation or recovery that had been received somewhere else. Some early models are referred to, for example, legal administration in the South African Companies Act 1926 or *redressement judiciaire* in the French Decree of 20 May 1955, later supplanted by the Law of 13 July 1967. Developing awareness of the requirement for a salvage situated method implied, be that as it may, that the approach in 1978 of the most popular recuperation model as Chapter 11 of the Bankruptcy Code of the United States ("Chapter 11") significantly intrigued the Cork Committee, as the discussion fully expecting its creation and resulting authorization harmonized with the start of the board of trustees' considerations.

The major legislation that governs the insolvency in the United Kingdom is Insolvency Act 1986 which came as a result of the Cork Report. Few other changes have been made by the Enterprises

[17] *Ibid.*

Act, 2002 though. The rescue culture in the UK has developed since then and a lot of corporate rescue plans have been executed. This could also be seen in the new Corporate Insolvency and Governance Act 2020 (government's response to Covid-19) which introduces new corporate restructuring tools in the United Kingdom economy during the unprecedented pandemic.

Thus, the relevant legislation governing insolvency in the United Kingdom can be found in the:[18]

- Companies Act 2006
- Insolvency Act 1986 (as amended)
- Insolvency Rules 1986 (as amended)
- The Insolvency (England and Wales) Rules 2016
- The Enterprises Act, 2002

Lord Hoffmann summarised the collective nature of insolvency proceedings in *Cambridge Gas Transportation Corpn v. Official Committee of Unsecured Creditors of Navigator Holdings plc*[19], as:

"The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established…The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them."

[18] Judiciary for England And Wales, *The Administrative Court Judicial Review Guide 2020* <https://www.gov.uk/government/publications/liquidation-and-insolvency/liquidation-and-insolvency> accessed 19 March 2020.

[19] [2007] 1 AC 508 (PC) at [14] and [15]. See also Singularis Holdings Ltd v Pricewater house Coopers [2015] 2 WLR 971 (PC) per Lord Sumption JSC at [11].

2.2 BANKRUPTCY/INSOLVENCY LAWS IN INDIA

The canon of the economy is simple, the fittest will survive and the weakest will be weeded out. Often mercy killing is healthier than extending the agony and hence, the same applies for companies and organizations too. At this stage the concept of Insolvency comes into play. Insolvency in the plain dictionary meaning refers to the state of being insolvent or a situation when someone is unable to confront the debts. When a company becomes insolvent, a lot of questions come up such as whether it possibly will be rehabilitated or not, whether it should proceed with the liquidation process or not and likewise. There arises the need of laws that govern insolvency proceedings. Corporate insolvency regulations and procedures have evolved in two important ways over the decade. There has been a theoretical change from ex post responses to business crises to how corporate actors handle insolvency risks. Therefore, insolvency responsibilities have been updated to allow participants in corporate and insolvency processes to consider organizational collapse as a problem that should be foreseen and avoided rather than referred to after the case. These developments are more representative of wider social and regulatory performance auditing patterns and challenges in terms of risk management needs. For company and insolvency lawyers, such developments are important. They redefine a number of questions within new framework assumptions and rethink the challenges and agendas of company insolvency law. In recent years, there has been a considerable increase within the incidence of economic condition and bankruptcy cases. The surge in such cases exposed the inefficiencies that were rise in the legal regimes governing economic condition and bankruptcy across the world.

In India, after the making of the Constitution, Article 19 (1) (g)[20] allowed for free trade, profession and occupation and Article 19(6) of the Constitution allowed entry and exit into the economic sphere with certain limitations. Apart from this, the Companies Act, 1956 which was based on Bhabha Committee[21] detailed the resolution process. In the said Act, Section 425, 433, 443, 444, 455, 463, 481 and 488 explains the process of resolution but later, it was found out that the Companies Act lacks efficiency in dealing with the "corporate insolvency regime." It neglected to give any arrangement to consideration of insolvency cost. It consigned most issues to courts, which in turn, consigned the fair treatment to an authority that is basically a lawful expert designated by

[20] Indian Constitution, Article 19(1)(g).
[21] Bhabha Committee Report, *Company Law Committee* [1952].

the court with a very restricted comprehension of the organization's insolvency and often, lacks expertise. The prospect of inferior recovery influenced parties from starting disintegration procedures under Companies Act. The ability to settle on benefits of disintegration was allocated exclusively to the legal executive (jurisdictional High Courts) by Companies Act yet the courts were most certainly not furnished with any authoritative system to evaluate merits. Absence of a supporting authoritative system brought about a disturbed legitimate procedure with every High Court translating individual cases distinctively and proclaiming orders. The change procedure for legitimate structure identified with indebtedness during the 1990s began with the presentation of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDDBI"). RDDBI Act came into picture by the discoveries of the Goswami Committee that was taking a shot at proposed upgrades to the administrative structure for indebtedness. Goswami Committee report in its introduction remorsefully stated, "There are sick companies, sick banks, ailing financial institutions and unpaid workers. But there are hardly any sick promoters. Therein lays the heart of the matter."

So as to fastening the recovery procedure, RDDBI was authorized with arrangements enabling Banks to document an application before an extraordinarily established Debt Recovery Council ("DRT") requesting a 'Testament of Recovery'. Endorsement of Recovery had a similar impact and standing as a Decree of a Civil Court. RDDBI Act neglected to make any upgrades in the jumbled indebtedness scene, basically because of the way that SICA had priority over RDDBI. At long last, DRTs were found to be overburdened with countless pending cases. Thinking about these hindrances with the purpose to speed up goals of non-performing assets the Government presented another enactment called The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) in 2002. Despite the fact that SARFAESI expedited the recovery procedure somewhat, its impact was constrained to verified resources. Also SARFAESI lacked provisions for reconstruction or rehabilitation, an aspect that is considered to be of utmost importance in a growing economy.

In May 2014, The National Democratic Alliance formed government in India and the first task was to rejuvenate the economy. This could not be done without improving India’s ranking on World Bank’s Ease of Doing Business. It was at once realized that an efficient insolvency law is a prerequisite to all of this. Recognising the urgency, the government initiated steps to reform the

insolvency law on priority. RBI cracked down significantly on the bad loans situation through an Asset Quality Review process, bringing to light the seriousness of the problem. All these years, India continued to fare badly in the World Bank's Ease of Doing Business ranking.[22] In 2010, India ranked at number 133 in the list of 189 countries in 2010 and climbed up to 136 in 2016 despite a number of reforms and measures adopted. Bankruptcy Law Reforms Committee (BLRC) was mandated to produce its recommendations urgently. Insolvency law is hence, brought up as the constitution of economic laws and therefore, forms a key structure within the monetary design of a country. Significantly for a rising economy, the existence of efficient financial condition regime has high economic importance. Financial condition and insolvency regime and related problems became a lot of and a lot of decisive within the globalization of capital and monetary markets. The earnings of various Indian enterprises have been negatively impacted in many areas as a result of the Global Financial Crisis. Furthermore, financial crisis experienced by multinational corporations' parent companies in other regions of the world can quickly spread to their Indian affiliates. Several notable Indian and foreign enterprises went bankrupt during the crisis, and others may still be in danger of going bankrupt. Prior to 2016, there was no single law dealing with insolvency and bankruptcy in India. The liquidation of companies was handled under various acts like SARFAESI, Companies Act, Provincial Insolvency Act, 1920 etc. It led to an overlapping of jurisdiction of different authorities like the High Court, Company law tribunal, Board for industrial and financial reconstruction (BIFR) and debt recovery tribunal. The overlapping of jurisdictions and multiplicity of laws made the process of insolvency resolution very confusing in India. The Insolvency and Bankruptcy Code harmonises the process of insolvency, restructuring and rehabilitation under the umbrella term of the "corporate insolvency resolution process". Hence, when it comes to historical evolution of the insolvency regime, India and UK definitely shares a lot. Both the nations had, prior to the present Insolvency regime, incorporated the insolvency into different patchworks mainly in the Companies Act of the respective countries. Both the Companies Act lacked dealing of corporate insolvency and issues related to costs and hence, the current insolvency regime came up as a blessing to the economies of both the countries.

[22] World Bank. 2016. Doing Business 2016. Washington, DC: World Bank. DOI:10.1596/978-1-4648-1440-2.

2.3 INSOLVENCY LAWS DURING THE TIME OF COVID-19

The international spread of the coronavirus ("COVID-19") is not only generating dramatic consequences from a social perspective but it is also heavily affecting the global economy. For this reason, Governments, financial regulators and international organizations are responding with a package of legal, economic and financial measures. Even though these responses differ across jurisdictions, they can be classified into three main categories: (i) those protecting consumers and employees affected by the closure of companies and layoffs; (ii) those protecting self-employed workers and companies against the economic losses and liquidity needs generated by the COVID-19 crisis; and (iii) those measures seeking to protect the stability of the financial system as a consequence of the lack of confidence and the number of defaults likely arising in the following months. While addressing these fundamental problems require a comprehensive package of legal, financial and economic reforms, this article focuses on the insolvency and insolvencyrelated reforms that have been (or could be) implemented as a response to the COVID-19 outbreak. Even though some of the measures suggested in this paper will apply to both individuals and corporations, this article emphasizes the role that insolvency law can play (if so) in assisting companies facing financial trouble as a result of COVID-19.[23]

The power and limits of insolvency law in times of COVID-19

Insolvency law provides a variety of mechanisms to minimize the destruction of value generated in a situation of financial distress.[24] First, when debtors are unable to pay their debts, creditors become entitled to enforce their claims and ultimately seize the debtor's assets. Therefore, their individual enforcement actions may end up destroying the going concern value of economically viable companies. For this reason, insolvency law responds by imposing a moratorium or automatic stay that will stop creditors from enforcing their claims while forcing them to act in a

[23] For an overview of the policy responses adopted by national legislators, see https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19 and https://som.yale.edu/faculty-research-centers/centers-initiatives/program-on-financial-stability/covid-19- crisis. For an analysis of the responses implemented by financial regulators and supervisors, see https://www.iif.com/covid-19 and Nydia Remolina, Financial Regulators' Responses to COVID/19, IBEROAMERICAN INSTITUTE FOR LAW AND FINANCE, WORKING PAPER 1/2020 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554557).

[24] Gregor Andrade and Steven N. Kaplan, How Costly Is Financial (not Economic) Distress? Evidence from Highly Leveraged Transactions That Became Distressed, 53 JOURNAL OF FINANCE 1443 (1998).

more coordinated manner. Thus, the use of a moratorium not only preserves value for the debtor but it can also promote a more efficient strategy by the creditors.[25]

Second, the existence of a situation of insolvency may incentivize key employees to abandon the firm. Similarly, suppliers and lenders might decide to terminate their business relations with the debtor if they know their claims face the risk of going unpaid. Therefore, as these circumstances can also destroy value, insolvency law helps minimize these costs by providing various regulatory responses. Among others, insolvency law generally allows post-petition claimants to obtain a priority for their new claims, usually in the form of administrative expenses.[26] Likewise, other solutions to deal with these problems may include the restriction of ipso facto clauses and the availability of rescue (or DIP) financing.[27] Third, debtors facing financial trouble may have incentives to engage in a series of opportunistic behaviors that can destroy or opportunistically transfer value at the expense of creditors. These opportunistic behaviors may include the transfer of assets to related parties, borrowing money in an irresponsible manner and investing in risky projects as a last attempt to rescue the firm. In order to solve these problems, insolvency law provides several mechanisms, including avoidance actions and, in some jurisdictions, special duties and liabilities for directors of financially distressed firms. Likewise, once the debtor is subject to the bankruptcy procedure, most jurisdictions around the world also require the appointment of an insolvency practitioner to manage or supervise the debtor. By doing so, the risk of engaging in opportunistic behaviors will be notably reduced. Therefore, insolvency law can provide once again a valuable response to preserve or restore value. Finally, insolvency law provides viable but financially distressed companies with powerful tools to facilitate a debt restructuring. Hence, they can emerge from bankruptcy with a new financial structure. This goal is achieved through several mechanisms. First, insolvency law provides an adequate forum for negotiation. Second, insolvency law provides several tools that can help facilitate the renegotiation of the debtor's financial commitments. These tools include the possibility that a majority (or qualified majority) of creditors may impose a decision on dissenting minority creditors and, in

[25] *Ibid.*
[26] John Armour, Gerard Hertig, and Hideki Kanda, Transactions with Creditors, in John Armour, Luca Enriques et al, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (Oxford: OUP, 2017), at 111.
[27] *Ibid.*

some jurisdictions, even the possibility that a reorganization plan can be imposed on dissenting classes of creditors.

Insolvency and insolvency-related reforms to minimize the harmful economic effects of the coronavirus

Due to the limitations of insolvency law described in section 2, some adjustments to the insolvency legislation might be needed in times of COVID-19. These adjustments are discussed in section. Other responses to facilitate financial restructurings in times of COVID-19 will be discussed in section. Before getting the details of these reforms, however, it discusses the appropriate scope of the insolvency and insolvency related responses implemented in times of COVID-19. Finally, it should be kept in mind that, while insolvency law can be helpful, it is not the panacea. Corporate insolvency law in the time of COVID-19 should be adjusted in several ways. First, legislators should suspend the duty to file for bankruptcy in countries where, as it happens in many European jurisdictions, corporate directors are required to initiate insolvency proceedings once a company becomes insolvent.[28] This policy recommendation, that was suggested in the early debates on the impact of COVID-19 on insolvency law,[29] has been recently implemented in various jurisdictions, including Germany, France, Spain, Luxembourg, Poland, Portugal, Russia, and the Czech Republic. It should be noted, however, that while countries like Germany have decided to suspend the duty to file for bankruptcy for a reasonable period of time, other jurisdictions initially decided to suspend this duty until the end of the state of emergency. In my opinion, the suspension of the duty to file for bankruptcy should last long enough to let companies recover from the effects of the COVID-19 crisis. Therefore, the German response seems more desirable than those implemented in jurisdictions just suspending this duty during the state of emergency.[30] In the absence of an actual or a de facto suspension of the right to file involuntary bankruptcy petitions, creditors will have the ability to force debtors to bear the direct and indirect costs associated with

[28] Aurelio Gurrea-Martínez, Directors' Duties of Financially Distressed Companies in the Time of COVID-19, OXFORD BUSINESS LAW BLOG, 24 September 20201 (available at https://www.law.ox.ac.uk/businesslaw-blog/blog/2020/03/directors-duties-financially-distressed-companies-time-covid-19).
[29] Aurelio Gurrea-Martínez, Directors' Duties of Financially Distressed Companies in the Time of COVID-19, OXFORD BUSINESS LAW BLOG, 24 September 2021 (available at https://www.law.ox.ac.uk/business-lawblog/blog/2020/03/directors-duties-financially-distressed-companies-time-covid-19).
[30] *Ibid.*

a procedure that, in the absence of COVID-19, would not even be needed.[31] Besides, depending on the jurisdiction, corporate directors can be exposed to several consequences such as being removed from the company's management to disqualifications and even special liability rules. In my view, while an insolvency proceeding can be helpful for many debtors affected by COVID-19, the decision to use the insolvency system should be made by the debtor. However, if it were shown that the debtor's state of insolvency was not generated by COVID-19 (for instance, because it was already insolvent before the outbreak), this exceptional legislation should not apply. Therefore, creditors should have the ability to put the debtor into bankruptcy under the general requirements existing in the pre-COVID-19 insolvency framework.

[31] Jerold B. Warner, Bankruptcy Costs: Some Evidence, 32 JOURNAL OF FINANCE 337 (1977).

CHAPTER- 3

CORPORATE RESCUE IN UK: ISSUES AND CHALLENGES

"Assets would be more highly valued if utilized in the industry for which they were designed, rather than scrapped."[32]

The entry of firms and enterprises to the economy is of immense magnitude for nations at all level but equally imperative is the efficiency of corporate restructuring and insolvency process of the particular country. The rate of investment is completely reliant on the smoother implementation of entry and exit to the economy. Barriers to exit are equivalent to null investment. Also, equally important is the revival of the corporate entity. Having provisions for revival ensures that the economy is ever-growing. Revival of companies (the rescue culture) or resolving insolvency in the economy also adds to the ranking of a nation to the World Bank's Ease of Doing Business. Although India has shown fragmented development in its legislations and provisions related to bankruptcy but the major lump of it has been arguably come from the common law of the English Courts.[33]

This chapter discusses the revival plans under the Corporate Insolvency in the United Kingdom wherein it starts with the scheme of insolvency and further moves to a detailed analysis of the procedure for corporate resolution process therein. Furthermore, it also dwells deep into the concept of Corporate Rescue in the United Kingdom. The objective of this chapter is to find out the implementation of the United Kingdom's revival process. The target of this chapter is to discuss the corporate rescue culture in the United Kingdom and bring out the issues in the same even though accepting the fact that the nation stands at an advanced position in the arena of development.

3.1 SCHEME OF THE INSOLVENCY LAW

[32] Lynn M. LoPucki and George G. Triantis "A systems approach to comparing US and Canadian reorganization of financially distressed companies" 1994 Harvard International Law Journal at p 267.

[33] Restructuring Across Borders – India: corporate restructuring and insolvency procedures – March 2020 Allen & Overy.

The main reason for a proper legislation on insolvency in the United Kingdom was the economic distress of 1970 which made it almost impossible for companies to revive. Also, as seen in the previous chapter, it could be said that the Insolvency Act, 1986 has a relatively longer past but unfortunately the rescue culture doesn't have a long history to boast of. It was only after the Cork Committee report that rescue culture was taken up seriously. Thus, to understand the notion of scheme of the insolvency law with regard to corporate rescue in the United Kingdom, it is equally important that one need to understand the legislative intend and the report (mainly the Cork Report). The current insolvency law in UK is contained in Insolvency Act 1986 and the Insolvency Act 2000 that in total is called the "Insolvency Act" with the allied rules and regulations that form an inevitable part of it. Insolvency test is twofold: when a company is not in a situation to pay off its debts or in a situation when the liabilities of a company exceed that of its assets.

The insolvency law that is currently in UK was incorporated as a part of huge discussion followed by recommendations of the Cork Committee. Before the said legislations, the laws that governed the insolvency regime was included in the materials dealing with the subject, the Bankruptcy Act 1914, the Companies Act 1948, parts of the County Courts Act 1959 and the Deeds of Arrangement Act 1914. The Insolvency Act, 1986 was presumed to be a comprehensive legislation on the law of insolvency in the United Kingdom but later, a need to change the reform was immensely felt which led to introduction of the Insolvency Act of 2000 (it introduced statutory moratorium) and finally a much comprehensive and reliable legislation Act that is, the Enterprises Act, 2002 came into effect with a much-intended focus on corporate rescue as a whole. Thus, it could be said that the scheme of the insolvency laws in the United Kingdom has been modified from time to time owing to the fact that the government itself has come up with various reports (such as the Cork Report) and the United Kingdom Government Report on Insolvency of 2001 which relatively focused on making the insolvency law more comprehensive with a special focus on the rescue culture of the enterprises and to help the distressed enterprises continue as a going concern. Hence, UK's law was about reformations and codifying a completely new insolvency regime solely for the purpose of dealing with corporate and individual insolvency rather than dealing the same under different available patchworks. The detailed analysis of rescue culture and the legislation behind the same will be studied in a detailed facet in the upcoming pages.

3.2 THE CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP) AND CORPORATE RESCUE IN THE UNITED KINGDOM

In the realm of corporate law, it is not uncommon to find companies which are in financial distress. The primary reasons for these events, although not exhaustive, may include over-expansion, inadequate marketing, poor management, excessive interest rates, loss of market share, or even fraudulent activities.[34] The advanced law identifying with both individual and corporate indebtedness is right now contained in the Insolvency Act 1986. Despite the fact that of some vintage now, the Insolvency Act 1986 was the administrative reaction to the report and proposals of a multi-disciplinary advisory group entrusted with checking on bankruptcy law and practice at the time after 1970s. The Cork Report[35] helped the Insolvency Act 1986, which united in one rule both individual (personal) and corporate bankruptcy and simultaneously helped to formulate the law identifying with all types of indebtedness, including the presentation of the idea of corporate salvage using two new methodologies: the company voluntary arrangement and administration. During the early years following the entry of the Insolvency Act 1986, various issues were watched identifying with the underutilisation of the new strategies in contrast with receivership, which was frequently favored by principal creditors.

Insolvency Act 1986 and the Rescue Culture

The IA 1986[36] grasped the goal of advancing recuperation by the introduction of two new rescue systems: the CVA, covering organizations before formal insolvency and administration for organizations closer to bankruptcy. Although the Cork Committee considered a number of pre-existing procedures as examples of regimes that they might wish to emulate in some way in its deliberations over how to approach corporate rescue from a United Kingdom perspective, the inspiration for the two new recovery procedures was found in models that already existed within the law. Thus, the CVA and administration's structural underpinnings were discovered in a reduced and stripped-down form of the scheme of arrangement and receivership, respectively. The CVA tried to establish a framework for the sort of debtor-creditor discussion that was close to an informal workout, but administration was a more formal process managed by an administrator

[34] Parry R. Corporate Rescue (Sweet & Maxwell, 1st edition, 2008) p. 1.
[35] K. Cork, Sir (Chairman), *Insolvency Law and Practice: Report of the Review Committee* (Cmnd. 8558) (HMSO, 1982) ("Cork Report").
[36] Insolvency Act, 1986.

under the overall supervision of the court. Both procedures followed a course of increasing formality, with the CVA coming first and the administration coming last. Furthermore, unlike receivership, administration was designed to serve the interests of all creditors, including secured and unsecured, rather than simply the principal secured creditor. Rejecting the debtor-in-possession paradigm, the two procedures had one thing in common: they were both administered solely by an insolvency practitioner, even if the debtor had the right of initiation.

Cork Committee and Rescue Paradigm

It was after the Cork Report that the United Kingdom bankruptcy framework came up genuinely for saving organizations in distress. While there were a few techniques in presence that may meet a portion of the targets of salvage culture, they were in fact not good for present day purposes and the crucial points of corporate salvage. Receivership, which could be utilized to revamp organizations, didn't ensure rescue, rather most of strategies brought about the transfer of organizations to obscurity. The Cork Committee likewise thought about that the receivership methodology was of restricted use as it required the earlier presence of a skimming charge so as to select a beneficiary. The scheme of arrangements process, which was available under the Companies Act 1948 (and its later successors of 1985 and 2006), could save some companies, but it was time-consuming, requiring the involvement of specialists, the preparation of meticulous (and expensive) documentation, and at least two court dates. Furthermore, it was thought at the time that the plan method was not intended for companies on the brink of insolvency. As a result, the Cork Committee's methodology was to conduct a comparative analysis to draw inspiration from the experience of a number of other countries that had, at that time, established processes aimed at providing mechanisms for company rescue. The Cork Committee cited Chapter 11 in the United States as an example of this process, which was seen as the precursor of corporate rescue. It was viewed as providing a broad and flexible framework with virtually infinite options for debtor company reorganisation and eventual rescue. The company is currently in the possession of the debtor, and a stay was imposed to prevent any claims on the company's assets from being issued. The formulation and adoption of a plan agreed upon by the debtor's creditors to modify and restructure the debtor's obligations, and, if appropriate, to award the debtor a discharge, was defined as the end goal of a Chapter 11 proceeding. Though the Chapter 11 model was appealing to those entrusted with changing British insolvency law, it included a practise that the UK did not

want to emulate: it left the debtor in command of his company rather than appointing an official of some sort. Because of the distrust it was considered to generate, the "debtor in possession" approach was usually unacceptable to the British attitude on insolvency. Other jurisdictions were also taken into account. In reality, despite the high praise typically accorded to the United States for its revolutionary rescue programme, France was the first to embrace rescue, which is essential for European concerns. The Law of 1967 reforms created a court settlement mechanism that permitted the company to continue operating by allowing a composition with creditors. It was, however, a court-led approach, which set it apart from the American system. Since the Companies Act 1973 (the legislative successor to the 1926 predecessor), South Africa had reorganisation procedures in place, which provided a mechanism for corporate reorganisation by which company debt could be compromised with creditors and/or a moratorium on enforcement put in place. A reorganisation might be accomplished in a variety of ways, according to the text. The Cork Report mirrored the observed experience of these processes in a range of countries, indicating that rescue may be a feasible option for a number of companies.

Enterprises Act, 2002: A paramount shift in the Rescue Process

The Enterprises Act of 2002 came up with a number of reforms that helped the financially distressed companies to come back (revive) to the economy. The primary thing the Act gets rid of was the Crown's preferential rights as creditor. It further cut short the role of administrative receivership which was widely criticized post the enactment of Insolvency Act 1986. It further made changes to the system of administration. It also came up with another remedy that is to be made available to the companies that is the Scheme of Arrangement under the Companies Act 1985. The Enterprise Act pioneers no new dogma, therefore, but rather seeks to apply an existing ideology more effectively. As is evident from the White Paper preceding the Act, its main objectives are to promote, in no particular order, corporate rescue, collectivity, the maximization of realizations from the corporate estate and overall fairness as between creditors.[37]

Rescue culture in the United Kingdom at present

[37] Frisby, Sandra. "In Search of a Rescue Regime: The Enterprise Act 2002." *The Modern Law Review* 67, no. 2 (2004): 247-72. Accessed September 2, 2021. www.jstor.org/stable/3699143.

The oil crisis and the economic crisis that led to fall of the world economy in the 1970s led to the propagation of proper norms of insolvency in and around the globe. The notion or the initial conception of corporate rescue as an exclusive topic came up with the Cork Report no doubt, but the concept was bridled into the system of United Kingdom back from the 19th century but the rescue mechanism was never seen as an alternative to the process of liquidation. Here, we look into how the rescue culture developed in the United Kingdom since its enactment of the Insolvency Act 1986 and its evolution through the pages of the Cork Committee Report and The Enterprise Act, 2002. Before explaining the same, the four known conceptions of rescue culture in the United Kingdom are explained herein below.

1. ADMINISTRATION

The concept of Administration in the United Kingdom has drawn its inspiration from the Chapter 11 of the United States Code but with significant number of changes made. It is one of the most preferred and the major process under the Insolvency Laws in the UK. It was majorly introduced because of the Cork Committee Report. Under this system, the company continues to trade owing to the fact that a moratorium comes into effect (statutory moratorium). Thus, the company is relieved (temporarily) from the obligation to pay off the debts of its creditors. The procedure can be opened by Courts and is envisaged under Part III of the Insolvency Rules 2016. The Cork Report had underlined the requirement for another rescue method that would permit the business to proceed, along these lines protecting trade, exchanging and the age of benefits and profits to the company, just as the possible fulfillment of the greater part of the company's debtors. This ethos brought about the second rescue strategy, organization, which was more formal and presented a suspension of obligation requirement procedures under the security of a ban. The organization method necessitated that it would prompt one of four potential results, indicated in the organization request; however, there was no chain of command or need applied to these targets.

The results incorporated the endurance of the organization or a piece of it as a going concern; the endorsement of a CVA; the authorizing of a plan of course of action; or for some more beneficial acknowledgment of the organization's property than may be achieved in a straight liquidation. Administration was seen as going somewhere, not only to the company's rescue, but also, because the administrator was in charge of the company's management, to the successful implementation

of some other possibly rehabilitative method. The administrator was required to submit a report to the court in order for the court to consider whether an administration order should be issued. The company, directors, or creditors then need to file an application for an order. The impact of the request was to present a ban with any regulatory beneficiaries being required to abandon office. Upon the conceding of the request, a certified indebtedness specialist would be designated as chairman, blessed with wide powers to research and determine the organization's issues. The director assumed administrative responsibility for the organization and managed its benefits as he saw important to the presentation of his obligation. The overseer was required to distribute an announcement of his recommendations to be considered at a loan bosses' gathering. Leasers were likewise qualified for data from the head through a lenders' advisory group until they were in the long run given the recuperation plan. Despite the fact that the reception of the recuperation plan was typically affirmed during a gathering called by the chairman, contradicting investors or loan bosses could look for cures in court if they saw that they had endured uncalled for partiality in the arrangement. The recovery plan typically resulted in the administrator selling the whole company or individual business units as a continuing concern, with the shell (with any remaining) being wound up, and the administrator being discharged.

Administration had other motives too- not just of the revival of the company but the long-term motive of company continuing its business as a going concern. Thus, the insolvency practitioner who is appointed as the administrator is envisaged with wide powers. Under Section 8(3), there was lack of hierarchy among the objectives. This also aggravated the fact that Court supervision under this method of rescue is vital. Two working groups were created by the Insolvency Service to independently look at CVAs and administration that came up with reports in 1995[38] and 2000.[39] This did not mean that no reforms to insolvency law occurred: two statutes were passed in 1994[40] effecting minor, but necessary changes, although it was clear that these were not intended to be by way of far-reaching reforms.

[38] *Revised Proposals for a New Company Voluntary Arrangement Procedure: A Consultative Document* (Insolvency Service, April 1995).
[39] *Review of Company Rescue and Business Reconstruction Mechanisms: A Consultation Paper* (Insolvency Service, May 2000). This was followed in short order by the White Paper, titled Insolvency – a Second Chance (Insolvency Service, 2001) (Cm 5234), which set out what was to become the EA 2002.
[40] Insolvency (Amendment) Act 1994 (1994 c. 7); Insolvency (Amendment) (No. 2) Act 1994 (1994 c. 12).

Administration and Pre-Packs: A new Feature of the Enterprises Act

An empowering arrangement was accommodated in the Enterprises Act 2002, which makes another Section 8 of the Insolvency Act 1986 applying Schedule B1 containing the new-look administration strategy and the rights and obligations of directors. This, however, revoked the whole of Part II of the IA 1986 (the old organization arrangements). Be that as it may, and possibly confusingly, Part II is as yet safeguarded for unique organization systems relating to water and sewage organizations, railroad organizations, air traffic administration organizations, open private association organizations, and building social orders, among others. In general, if one ignores the content of the new-look method, which is far more complex than before, administration has remained mostly same, save in two key areas: the increased importance of rescue and the nomination of the insolvency practitioner. The straightening out of the schedule and presentation of an assumption that methods should last no longer than a year additionally helps focus consideration on advancing quick and proficient salvages. The main incredible change impacts on the direction of the technique and spots salvage in a clearer manner as the essential target. Section 3 of Schedule B1 states explicitly that rescue has to be an essential element of the administration method. In contrast, the basic administration method in the IA 1986 specified four potential options from which an insolvency practitioner might pick as the aim of the specific administration process. This left every choice on a degree of equivalent significance – safeguarding the organization was an equivalent option in contrast to accommodating a superior outcome than in a straight liquidation.

The new motivation behind organization accommodated three various leveled targets, those being to safeguard the organization as a going concern, and if that is beyond the realm of imagination, to accomplish a superior outcome than would be accomplished in liquidation. As a result, unless a rescue is not beneficial or the creditors' outcome is no better than it would be in liquidation, the practitioner is obligated to prioritise rescue. The choice of the word "company" rather than "business" in this clause is intended to address concerns about the hive-down process and to make the procedure far more appealing to the directors, who might otherwise fear their company being dismantled, as well as incentivize them to move fast. Second, if a protracted continuance of business is not generally an option, there is the possibility of improving on the result that may be

the consequence of liquidation. This improved liquidation is also advantageous since it prevents a hasty "fire-sale" and the potential loss of the company's or assets' value. Finally, if the previous two options were unavailable, the administrator might attempt to realise property in order to pay distributions to secured and/or preferential creditors, just like a receiver would. However, the practitioner would have to explain this by citing the collective good and demonstrating that it would not be permanently harmed if this choice were chosen. In this light, the focus is on the fact that the administrator should act in the best interests of all of the company's creditors, therefore shifting the burden from a principal creditor to a collective responsibility. The revisions also aim to improve efficiency and speed in the process, as seen by the addition of an explicit command for an administrator to fulfil his responsibilities as fast and efficiently as reasonably practicable, making this a legal duty that may be enforced in reality. The primacy of the practitioner is also enshrined in the new hierarchy of aims, since the court is obligated to follow his expert opinion and will not overrule it unless extraordinary circumstances arise.[41]

The second significant change is in the appointment procedure, which was formerly controlled by the court and required either the debtor or a creditor to file a petition. Out-of-court appointments were introduced as part of the reforms, and this option was extended to the corporation as well as some secured creditors. If a provisional liquidator or administrative receiver has not previously been appointed, the holder of a qualifying enforceable floating charge can appoint an administrator. A qualifying charge should specify that Schedule B1 applies; purport to authorise the holder to designate an administrator over the company; or appear to empower the holder to set up an appointment that would otherwise be made by an administrative receiver. Certain restrictions apply to the definition of a qualified floating charge, requiring the creditor to have security over all or a major portion of the company's assets. A notice of appointment as well as other prescribed documents should be filed with the court once the administrator has been appointed, including a statutory declaration that the person going to appoint the administrator is the holder of a qualifying enforceable floating charge; that the appointment was legally made; that the administrator consents to his appointment; and that he believes the administration's purpose is. Underpinning creditor primacy in the nomination process, in instances when the business wishes to appoint itself, the

[41] Schedule B1, para 76-78- Enterprises Act 2002.

directors must notify the secured creditor, who then has the option to suggest someone else. In the event of a conflict, the court must favour the creditor's decision. This reflects a belief that the creditor has a unique understanding of the debtor's financial situation and will be more inclined to act in the face of the directors' potential inaction.[42]

The chance of sustaining a strategic distance from legal investigation of arrangements has likewise, without question, encouraged the arrangement in the year that followed the changes, particularly in the pre-pack setting, whose numbers till now have kept on expanding. The straightforward point of a pre-pack is to ensure the account holder organization by staying away from the reputational disgrace and the loss of certainty of its contracting accomplices when moving toward the limit of indebtedness. So as to accomplish a turnaround with these assurances set up, the specialist attempts to assemble an offer of advantages or of the matter of the organization to a pre-chosen purchaser. The pre-pack in the United Kingdom depends on a procedure that advanced in the United States, alluded to as a "following pony offer", which alludes to an offer or offer intended to test the market preceding a conventional sale, basically setting a hold cost for a benefit deal. If the assets or company are not sold for a higher price than the offer, the third party that made the offer is obligated to complete the transaction. In the United Kingdom, the practitioner and the primary creditor work together to negotiate with a buyer who is generally found through the practitioner's network of connections. The primary issue is to protect the debtor's reputation and, for publicly traded companies, the value of their stock by avoiding competition from other creditors, particularly unsecured creditors, until the contract is signed by the purchasing company and authorised by the court in a last-minute administration procedure.[43]

The major flaw with pre-packs is that other creditors (especially unsecured ones) are kept out of the loop throughout the process and frequently have no idea what is going on until a practitioner is appointed to handle the subsequent administration. The secured creditor's ability to choose the administrator, who is generally the same person that handled the pre-pack, aids in ensuring a rapid

[42] "Corporate Rescue in the UK: Ten Years after the Enterprise Act 2002 Reforms", given by Paul Omar to the Colloquium on "Benchmarking Voluntary Administration on its 20-Year Anniversary" organised by the Bankruptcy and Insolvency Law Scholarship Unit at the Adelaide Law School, Adelaide, Australia on 26 July 2013.
[43] Omar, Dr & Gant, Dr Jennifer 'Corporate Rescue in the United Kingdom: Ten Years after the Enterprise Act 2002 Reforms' (2016).

turnaround of sales while maintaining a high level of confidentiality. However, the issue arises as to whether such a sale risks a return of the phoenix syndrome, which elicited such fear prior to the implementation of the Insolvency Act 1986. In practise, part of the answer may be found in the practitioner's above-mentioned obligation to the general body of creditors, but perhaps more importantly, in the necessity of the insurance policy to which all practitioners are obligated to subscribe. The unsecured are also protected by the JIC's Statement of Insolvency Practice 16 ("SIP 16"), which was initially published in 2008 and has been amended twice, the most recently in 2015. It addresses practitioners' responsibilities in the context of a pre-pack sale and establishes essential compliance criteria. Transparency, the public interest, and the communal nature of proceedings are all mandated as important considerations for practitioners to keep in mind when conducting the procedure.[44]

2. COMPANY VOLUNTARY ARRANGEMENT

Company Voluntary Arrangement is termed as a compromise between the company and its creditors with regards to the payment of debts. In case of CVA, directors of a company can commence the proceedings of a company voluntary agreement or if the company is already amid either administration or liquidation then the administrator appointed or the liquidator can commence the said proceedings of Company Voluntary Arrangement. Under the said arrangement, it is not necessary to show that the company is insolvent or moving towards insolvency before the initiation of the proceedings. The starting of the Company Voluntary Arrangement is made by a proposal which has to be accepted by at least 75% of creditors. The court has to approve of the proposal. There is no specific time limit for the same.

Under Insolvency Act 1986[45]-

CVA is contained in Part- I of the Insolvency Act, 1986 which is further divided into two parts- the first part being the proposal part and the second part being the consideration and implementation of proposal. Under the Insolvency Act, 1986 it is stated that the proposal is to be put forward by the directors of the company or to the creditors with regard to the compromise of

[44] Ben Luxford, England and Wales SIPS, R3 (Aug. 20, 2021, 08:00 PM), https://www.r3.org.uk/technical-library/england-wales/sips/.
[45] Part I (sections 1-7) of IA 1986.

the unpaid debts. The objective of the proposal has to be either of the two- compromise or the settlement of claims. Section 1(3) of the Act also mentions that an administrator or a liquidator can also initiate the CVA provided the administration process or the liquidation has started respectively. The person who initiates the same (nominee) shall further submit the report to the Court regarding whether a meeting of creditors should be held, etc.

Cork Report-

The Cork Report of 1982 stated that the Company Voluntary Arrangement shall be inexpensive, less-time consuming and an efficient means of dealing with financial distress through the informal means.[46] The major aim of the Cork Committee to bring up the statement regarding CVA was because CVA was initially made to get rid of the lengthy formal procedures of rescuing. CVA was found to be beneficial for companies can approach with a proposal (informal) even before the clue of any potential threat of insolvency and this ensured that this process had more flexibility. But there were various burdens connected to the system. The shortcomings were featured in a report distributed by the Insolvency Service in 1993, which noticed a few obstructions to its utilization. The absence of a moratorium made guaranteeing fruitful arrangements troublesome. There were likewise issues related with monetary help for the rebuilding of the debtor's organisation. Creditors regularly have a preference to designate a receiver, which kept them in charge of the circumstance. It was likewise underutilized as there was vulnerability as to what may occur if the organization defaulted following the CVA with a concern that creditors may end up in a not-so-beneficial position. Most importantly, it was a tedious method, during which a creditor could in any case request for liquidation, despite the fact that this has now changed after the promulgation of the Insolvency Act 2000 and the accessibility of a moratorium. These drawbacks offer a clarification as to why the CVA was underutilized at first, driving rather to the new organization methodology getting more mainstream in comparison to other alternatives.

Insolvency Act, 2000-

The major impact that the Insolvency Act 2000 bought was to introduce a paradigm shift in the previous CVA models as under Insolvency Act 1986 and this change was to aim the small and

[46] Cork Report, para 204.

medium enterprises ("SMEs").[47] They can now save themselves from the action of creditors for a certain period of time owing to the fact that a moratorium has been fixed.

3. ADMINISTRATIVE RECEIVERSHIP: ABOLITION AND ISSUES

Administrative Receivership was introduced in the late 19th century and was majorly a "creditor-oriented process" that was formed to keep the interest of the floating charge holder. It is the scenario wherein a receiver is appointed at any time by any of the creditor (floating charge holder) and the said receiver then takes over the affairs of the company. A creditor benefiting from a debt secured by a floating charge might designate a receiver to assume charge of the assets subject to the security, essentially taking control of the firm, using the receivership procedure. The receiver's main goal was to realise his client's security by using funds freed from the liquidation of debtor firm assets of equal value. A receiver's primary responsibility was to do everything possible to ensure that the company's obligations were paid in this manner. The directors took ownership of the company in whatever situation it was in after the receiver completed his work. Companies seldom survive this method since it was designed to maximise profits to creditors, particularly the principal creditor who held the floating charge, rather than to ensure the company's existence. Insolvency work was mostly performed by accountants at the time, however some attorneys advised clients on how to avoid worst-case scenarios and their legal ramifications. However, unlike France, the United Kingdom did not have a regulated profession of bankruptcy practitioners, which had existed since 1967. While the bankruptcy system in the United Kingdom was not entirely antiquated when the Cork Committee was created, it was not suited to the demands of modern industry.

3.3 MAJOR ISSUES AND CRITICISMS

The major aim of the Enterprises Act, 2002 and the Insolvency Act 2000 was to introduce a paradigm shift in the insolvency and rescue proceedings in the United Kingdom. Although these Acts have contributed to the success of rescue procedure to an extent but majority portions are still uncertain.

[47] Enterprises Act, 2002 Schedule A1.

1. The administrative receivership has been done away with but still the complete abolition has not been made possible. The reality of the rejection according to pre-EA 2002 agreements can be found in the insights mirroring the arrangements from 2003 onwards, despite the fact that the statistics for the time of the ongoing worldwide money related emergency must be taken to contain a high component of cases in which one of the exemptions to the overall denial applies. "More recently, it can be seen that the statistics for the number of receiverships shows a drop, which might suggest an important reorientation in favor of administration as the principal choice for rescue. To what extent this may be despite the creditors' wishes cannot be known with certainty, although a conclusion might be that the statistics still evidence some competition between both procedures, but not one that is as clear cut as under the pre-EA 2002 paradigm. Should further reforms be undertaken?

   It seems as if, more recently, numbers continue to reduce and the procedure is in decline. Perhaps the best outcome is to simply leave the procedure where it is and to draw attention once more to those procedures that have a true rescue vocation. The question does arise, however, as to what type of rescue it is likely to be, given that the shape of rescue itself is changing, driven by developments in North America. In fact, there is a movement in practice, reflected in the literature, towards a reconsideration of the aim of rescue, given that, in the United States, there are many procedures that conclude in a sale under section 363 of Chapter 11. The idea of rescue has been recently referred to as including the recycling of assets in order to return those assets to a state of economic productivity, such that others who are better placed might maximize the "use-value" of those assets.[48] That is a description that could also have been used in the context of receivership, where recovery on behalf of the creditor, although usually followed by a liquidation of the corporate shell, was viewed as contributing to the creditor's ability to re-use these assets, especially in being able to recycle them (or their value) with view to further lending."[49]

[48] See J. Girgis, "Corporate Reorganisation and the Economic Theory of the Firm", Chapter 8 in B. Wessels and P. Omar (eds), *Insolvency and Groups of Companies* (INSOL Europe, 2011), pages 108-9, and the references cited in footnotes 1 and 24 of that work.
[49] Suo Moto Writ Petition (Civil) No. 3 of 2020.

2. Only slight changes have been made to the CVA in recent reforms. CVA Proceedings are considered to be time consuming. Thus, CVA is more debtors oriented and "inimical to creditors, particularly in the event that shareholder challenges under section 4A of the IA 1986 are successful."[50]

[50] *Ibid.*

CHAPTER- 4

RESOLUTION PLAN IN INDIA: ISSUES AND CHALLENGES

Insolvency regime in India has gone a sweeping transformation in the recent years especially with the upcoming of the unified code for Insolvency in India that is, The Insolvency and the Bankruptcy Code, 2016. This particular law shifted and changed the entire realm of insolvency procedures in the country. The law ensures a speedy process and not a cumbersome one like the previous legislations that envisaged the law of insolvency. The whole of the Corporate Insolvency Resolution Process is contained in Chapter II of the Insolvency and Bankruptcy Code, 2016 from Sections 6-32. It provides that where a corporate debtor has defaulted in paying a debt that has become due and payable but not been repaid, the corporate resolution process may be initiated as stated in chapter II of the Act. The Act clearly emphasises the need of early detection of financial distress for prompt resolution, and it states that the resolution procedure may be started by a financial creditor, an operational creditor, or the corporate debtor. The financial creditor can submit an application to the National Company Law Tribunal (NCLT) along with evidence of default and the name of a resolution professional proposed to act as the interim resolution professional. Once the adjudicating authority is satisfied as to the existence of default, it will proceed further. In case of operational creditor, the process is different from that of the financial creditor because the operational debts tend to be smaller in amount than the financial debts and are recurring in nature.[51] Once a default occurs, the operational creditor has to deliver a demand notice or a copy of an invoice demanding payment of the default debt. This ensures that operational creditors, whose debt claims are mostly lesser in amount are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations.[52] The chapter also draws a time limit of 180 days extendable to a further of 90 days for the completion of corporate insolvency process. Within the fourteen days of the admitting of the application, the adjudicating authority then appoints an interim resolution professional who is

[51] Roy Goode, Principles of Corporate Insolvency Law (4th ed, Sweet & Maxwell 2011) [2-22].

[52] Mobilox Innovations Private Limited Vs. Kirusa Software, LATEST LAWS.COM (last visited Aug. 31, 2021), https://www.latestlaws.com/latest-caselaw/2017/september/2017-latest-caselaw-700-sc/.

a significant factor in the corporate resolution process. He undertakes a variety of tasks, including collecting claims, gathering information on the corporate debtor, forming a committee of creditors, interim management of the company's activities, and asset monitoring until a resolution expert is appointed. Once the resolution professional is appointed, he may chart to prepare an information memorandum, which shall enable a resolution applicant to prepare a resolution plan. Such an information memorandum is envisaged to be prepared in order for the market participants to provide solutions for resolving the insolvency of the corporate debtor. There are no limitations with regarding to who can file a resolution application, subject to compliance with the applicable laws. The resolution professional must present each resolution plan that has been submitted to him to the creditors' committee, which will approve or disapprove it. If it is approved, it shall further be submitted to the adjudicating authority for its approval else if it is disapproved, the company shall move into liquidation.

The Court held, "The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, 'trial' having led to repeated errors, ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster."[53]

A profoundly persuasive economic perspective on the job of indebtedness law is that it is imitates a speculative deal between leasers which they would have come to on the off chance that they had arranged an answer ahead of time of their issues with the account holder and under which they would perceive the requirement for singular authorization activity to be remained for the benefit of everyone. The legislation is intended to assist the conclusion that a lone owner of the business would decide is in his best interests, but to do so in the best interests of the firm and its creditors as a whole. Because a lone owner would employ assets in the most cost-effective manner, creditors would receive the best possible returns. Credit extension is encouraged by rules that provide the

[53] *Swiss Ribbons* Pvt. Ltd. v. Union of India, Writ Petition (Civil) No. 99 of 2018 decided on 25 Jan 2019.

highest returns for creditors.[54] A more refined version of this approach recognises the function of insolvency law in ensuring that capital is directed to the most productive uses in the economy.[55]

4.1 SICA AND THE FAILED RESCUE PLANS

India has a long history of companies that couldn't revive back and ultimately went onto liquidation. That is when the Tiwari Committee was appointed by the Reserve Bank of India to enquire on the barriers that hindered the revival of companies. For a developing economy like India, ever increasing liquidation/winding up company statistics were not a good symbol. Owing to this fact, Tiwari Committee elaborated in its report, few methods for revival of the companies, which were-

- Takeover of the company management
- Debt Reorganization
- Mergers with other firms
- Sale of the business

Other than these methods of revival, Tiwari Committee also recommended enactment of extraordinary legislations to facilitate prompt and effectual course of action. Thus, the Sick Industrial Companies Act was enacted keeping in view all the suggestions of the Tiwari Committee and it received the President's assent on the 8th of January 1986. Sick Industrial Companies Act was literally confined to the measures and suggestions of the Tiwari Committee. Sick Industrial Companies Act also established a quasi-judicial body to administer and rescue the "sick industries." The quasi-judicial body was known as The Board for Industrial and Financial Reconstruction (BIFR). Sick Industrial Companies Act also restricted civil courts' interference in the matter of BIFR. All the appeals from BIFR were administered by the Appellant authority for Industrial and financial reconstruction. The initiation of the BIFR proceedings would be after the reference from the director of the company. To initiate a proceeding, BIFR makes sure the company is "sick." Sick Industrial Companies Act uses the work sickness instead of Insolvency or Bankruptcy. Sickness under Sick Industrial Companies Act is a very narrow term and it engulfs

[54] A useful review of empirical evidence in this respect is provided in A Menezes, 'Debt Resolution and BusinessExit:https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/debtresolution-and-business-exit/upload/VIEWPOINT_343_Debt_Resolution.pdf.

[55] KM Ayotte and D Skeel, 'Bankruptcy as a Liquidity Provider' 80 U Chi L Rev 1557 (2013).

only two circumstances wherein a company could be termed as "sick"- Firstly, the company has to be registered for a minimum of five years or if the company has more liabilities (accumulated losses) than assets. The reason for the insertion of the first condition is owing to the fact that a company should be given reasonable times to make its stand in the economy.[56]But the second clause suggests insolvency as a precursor but by making insolvency a pre-condition, the said clause is itself infringing the motive for why the Sick Industrial Companies Act came into force- "immediate measures for revival." Insolvency is a stage of almost no hope, so rather than moving on to the process of interference into the sick companies after they get into "mortuary," it is important to revive them anticipating their financial distressing condition. Sick Industrial Companies Act also has framework for moratorium but Sick Industrial Companies Act's moratorium was highly controversial and criticized pertaining to the fact that in case of pendency of proceedings, the moratorium restricts creditors from exercising their rights that they would generally have.[57] Sick Industrial Companies Act has more inclination towards the "debtor in possession" and in contrast to the administration procedure in the United Kingdom Insolvency Act 1986, the Sick Industrial Companies Act proceedings do not displace the management of the company.

Analyzing the powers of BIFR, it exercised wide powers under the Sick Industrial Companies Act and the major decision that BIFR had to take was regarding the rehabilitation process that is, BIFR has the rights to decide whether a company needs rehabilitation or not.[58] In *Nasik People's Co-Operative Bank Ltd v Data Switchgear*[59] and *VDCS Enterprises Ltd v Union of India*[60] it was held that BIFR has wide powers. To decide whether a company needs rehabilitation or not, BIFR follows a two-step process- Primarily BIFR must assess whether the company can revive on its own and if it founds that the company has the ability of revival, it will allot the company necessary time for the same {Section 17(1)} and Secondarily, in case BIFR founds out that the company cannot be rehabilitated on its own, it will analyze whether the company needs to be rehabilitated

[56] Lok Sabha Debate on Sick Industries Bill.
[57] Real Value Appliances v. Canara Bank.
[58] Upper India Couper Paper Mills Company Limited v. AAIFR (1992) 75 Comp. Case 653.
[59] Nasik People's Co-Operative Bank Ltd v Data Switchgear unreported decision of a divisional bench of the Delhi High Court, 31 October 2007.
[60] VDCS Enterprises Ltd v Union of India 125 (2005) DLT 385 (Delhi).

in "public interest" and it will further order the agency (operating agency) to draft the scheme. The public interest notion and the wide powers of BIFR has always been a matter for criticism.

Sick Industrial Companies Act had the main objective of revival of the companies but not only did it fail miserably but during the 1990s there was a paradigm shift from revival under BIFR to liquidation. Goswami Committee in the 2000s, came up with a report wherein it suggested the alternative to Sick Industrial Companies Act as the United Kingdom's Administration process.

"In the proceedings initiated under [SICA], the effort should always be to achieve the goal of revival of the sick company concerned. Even if an approved revival scheme is likely to take quite a long time to ensure real turnaround… it should not be considered as a negative aspect, although in the process, of course, the creditors may at times have to accept a longer time for recovery of their dues. In a social welfare State that we are, it is the collective duty and responsibility of all… to ensure social and economic protection for the weaker Section, and there can perhaps be no dispute that the lower echelons of the working class in private sector industries… belong to the class." (Jayanta Kumar Biswas J, Kanoria Jute and Industries Ltd v AAIFR (2008).

4.2 INSOLVENCY AND THE BANKRUPTCY CODE, 2016 AND THE RESCUE CULTURE

The Insolvency and Bankruptcy Code, 2016 (IBC) was the foremost consolidated code that engulfed the provisions of insolvency exclusively. With the advent of the IBC, the resolution plan also came up providing a solution to distressed companies and corporate debtors. It came as a relief to many. Section 5(26) of the Code defines the term "resolution plan."

The Insolvency and Bankruptcy (Second Amendment) Act, carried with it lucidity on the admissibility of corporate resolution plans to be remembered for the goal plan, maintaining matchless quality of money related loan bosses with respect to appropriation of assets proposed by the goal candidate, and explaining the relevance of the goal plan on every single legal position. A significant success for the Corporate Debtors and Resolution Applicants was the point at which the alteration clarified that the goal plan ponders rebuilding of the corporate account holder by method of merger, amalgamation or demerger, the corporate indebted person ought not be required to consent to the Merger Framework as recorded in Organizations Act 2013 and Rules made there under. One of the significant worries in execution of Resolution Plans has to manage disagreeing money related loan bosses. Under Section 30(4) of the Code, a goal plan needs endorsement of

sixty-six percent of the democratic portion of the budgetary loan bosses, so as to be affirmed by the Adjudicating Authority. The Indebtedness and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 initially characterized "contradicting monetary banks" as monetary lenders who have casted a ballot against the goal plan affirmed by the panel of loan bosses. From that point, the Insolvency and Chapter 11 Board of India (Insolvency Resolution Process for Corporate People) Regulations, 2016 were corrected to show that "money related lenders who… avoided deciding in favor of the goal plan" would be viewed as disagreeing money related lenders also. The Insolvency and Bankruptcy Board of India (Vide its roundabout dated fourteenth September, 2018) explained those money related loan bosses who are not individuals from the Committee of Creditors, don't have any casting a ballot rights and in this manner, they can't be considered either contradicting or declining leasers with regards to favoring a goal procedure. As is obvious from the abovementioned, all the specialists including the Adjudicating Specialists (NCLT/NCLAT), the controlling power (IBBI) and the members have a point of smooth endorsement and execution of the Goal Plan. According to most recent IBBI bulletin, IBC accommodates a market system where the world everywhere contends to give the best an incentive for the organization through a goal plan. The goal plans have yielded about 200% of the liquidation esteem.

To understand the rescue culture in India, it is vital to understand the process of CIRP which is Corporate Insolvency Resolution Process that is envisaged under Chapter II of the Code. The whole of the Corporate Insolvency Resolution Process is contained in Chapter II of the Insolvency and Bankruptcy Code, 2016 from Sections 6-32. It provides that where a corporate debtor has defaulted in paying a debt that has become due and payable but not been repaid, the corporate resolution process may be initiated as stated in chapter II of the Act. The Act clearly emphasises the need of early detection of financial distress for prompt resolution, and it states that the resolution procedure may be started by a financial creditor, an operational creditor, or the corporate debtor. The financial creditor can submit an application with the National Company Law Tribunal, accompanied by proof of default and the name of a resolution expert who will function as interim resolution professional.[61] Once the adjudicating authority is satisfied as to the existence of default,

[61] Mobilox Innovations Private Limited Vs. Kirusa Software, LATEST LAWS.COM (last visited Aug. 31, 2021, 12:13 PM) https://www.latestlaws.com/latest-caselaw/2017/september/2017-latest-caselaw-700-sc/.

it will proceed further. In case of operational creditor, the process is different from that of the financial creditor because the operational debts tend to be smaller in amount than the financial debts and are recurring in nature. Once a default occurs, the operational creditor has to deliver a demand notice or a copy of an invoice demanding payment of the default debt. This ensures that operational creditors, whose debt claims are usually smaller in amount are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. The chapter also draws a time limit of 180 days extendable to a further of 90 days for the completion of corporate insolvency process. Within the fourteen days of the admitting of the application, the adjudicating authority then appoints an interim resolution professional who is a significant actor in the corporate resolution process. He undertakes a variety of tasks, including collecting claims, gathering information on the corporate debtor, forming a committee of creditors, interim management of the company's activities, and asset monitoring until a resolution expert is appointed. Once the resolution professional is appointed, he may chart to prepare an information memorandum, which shall enable a resolution applicant to prepare a resolution plan. Such an information memorandum is envisaged to be prepared in order for the market participants to provide solutions for resolving the insolvency of the corporate debtor. There are no limitations as to who is able to institute a resolution application, subject to compliance with the applicable laws. The resolution professional must present each resolution plan that has been submitted to him to the creditors' committee, which will approve or disapprove it. If it is approved, it shall further be submitted to the adjudicating authority for its approval else if it is disapproved, the company shall move into liquidation.

The Court held, "The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, 'trial' having led to repeated errors, ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster."[62]

[62] *Swiss Ribbons* Pvt. Ltd. v. Union of India, Writ Petition (Civil) No. 99 of 2018 decided on 25 Jan 2019.

In the Insolvency and Bankruptcy Code, 2016 the resolution plan is primarily a plan that helps the distressed company to revive back to economy. The plan is submitted by the resolution applicant (who is not ineligible under Section 29 A) to the resolution professional who in turn has to make sure that it doesn't infringes any of the provisions and that the said resolution plan complies with Section 30(2) of the Code. In the case of *Binani Industries Limited v Bank of Baroda & Anr*,[63]the Hon'ble Court has laid down certain regulations that should follow a resolution plan which includes-

a) a) The Resolution Plan is essentially a resolution of the Corporate Debtor as a going concern, rather than a sale, auction, recovery, or liquidation.
b) The major aim of the Resolution plan is to eliminate the risk of insolvency by maximizing profits and improving the balanced interest of debtors and creditors.
c) Resolution plan is to be differentiated from the concept of recovery. The Insolvency and Bankruptcy Code prohibits recovery but encourages the resolution plan.
d) Resolution plan requires application of mind and it needs to be differentiated from the concept of liquidation also. Resolution plan is required to have an ever-growing economy,
e) Resolution plan should keep everyone on the same footing, a resolution plan if discriminates among any financial creditor or operational creditor then it would infringe the basic aim of the promulgation of Section 5(26) to the Code.

OTHER IMPORTANT CASE DISCUSSING RESOLUTION PLAN

CASE NAME	HELD
Arcelormittal India Private Limited v. Satish Kumar Gupta and Ors. (4th September 2018)	Resolution plan is the basic norm for revival of a company and resolution plan under the Indian Insolvency Regime holds a special place for redirecting the Indian economy to achieve greater heights.
Vijay Kumar Jain v. Standard Chartered Bank Ltd. &Ors. (August 2018)	Resolution plans are confidential and is integrated to the company primarily.

[63] Binani Industries Limited v Bank of Baroda & Anr (Company Appeal (AT) (Insolvency) No. 82 of 2018)

Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta &Ors. (November 2019)	The major aim of the resolution plan shall be to maximize the business profits by returning the business back to the economy.
Maharashtra Seamless Steel Ltd. v. Padmanabhan Venkatesh & Ors.(2020)	The court upheld the primary wisdom of "resolution plan"

4.3 PRE-PACKS- THE RESCUE INNOVATION IN INDIA?

Pre-packaged administration of insolvency is a rescue innovation in India but is not unknown to other global economies. The United Kingdom has evolved the concept of pre-packs in the late 20th century itself but in India, it seems that the prepackages cannot fully evolve to the concept. A pre-packaged administration has been defined as:

'*an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment'*.[64]

Black's Law Dictionary defines a '*pre-pack bankruptcy'* as, '*Bankruptcy where the debtor agrees to terms reducing the time it takes to handle the business at hand*.'[65] If brought in India prepackaged administration could change the realm of Indian insolvency laws.

1. Initiating Pre-Packaged Administration

The initiation of Pre-Packaged Administration has to be done prior to the proceedings of insolvency. Because the insolvency proceedings haven't yet started, the debtor will be in a better position to analyze the resolution under pre- packs and in case a creditor anticipates any such thing of "pre-default" he can seek to have the debtor restructure the debt under pre packs.

[64] Lorraine Conway, 'Pre-pack Administrations, House of Commons Library, Briefing Paper Number CBP5035' (2017) House of Commons Library, at http:// researchbriefings.files.parliament.uk/documents/SN05035/SN05035.pdf (last visited 24 May 2020).
[65] Black's Law Dictionary, Free Online Legal Dictionary 2nd Ed., The Law Dictionary, at https://thelawdictionary.org/prepackaged-bankruptcy/.

2. Working of Pre-packs

A pre-pack basically includes rebuilding of the obligation of the organization. The method of rebuilding that is attempted as per a pre-pack versus the debtor's company, would rely inter- alia upon the idea of movement or business that is essentially embraced by such borrower organization, the quantum and nature of obligation that is caused and remaining alive, and the phase of pain that the borrower organization is confronting, subsequently requiring rebuilding. This could likewise incorporate corporate rebuilding being considered as a piece of such rebuilding exercise. When the method of rebuilding and the particulars of the equivalent have been concluded between the gatherings, the pre-pack is executed speedily as the organization documents for indebtedness. Strikingly, under certain European laws, a pre-pack is effectuated on a similar day as the arrangement of the Insolvency Professional (IP) itself, that is, a prompt handover of the business to the potential buyer.[66]

Retaining business in the possession of existing administration:

A significant job is played by the current administration of the organization as the arrangements and bartering happen before the beginning of bankruptcy procedures. It can boost the current administration and advertisers of the organization to start the pre-pack procedures before the event of a default or at a prior phase of default. It can assist the business with retaining its present administration and would be concurred by the banks as they for the most part consent to clutch the current administration.

Expedient and Cheaper Resolution:

Pre-packs are typically a less expensive and less tedious strategy than the best possible indebtedness and chapter 11 procedures as all the fundamentals of the CIRP are done in advance like the exchange and acknowledgment of goal plan and furthermore deciding on the equivalent. It decreases the lawful cost engaged with the proper method and furthermore the bankruptcy proficient expense. Further, there is no or negligible mediation by the courts (in the Indian situation, whenever executed at that point, NCLT).

Certainty:

[66] AdrianCohen,'A Guide to EuropeanRestructuring and Insolvency Procedures'(2015) Clifford Chance, at https://www.cliffordchance.com/briefings/2015/09/a_guide_to_ europeanrestructuringandinsolvenc.html.

Creditors are sure about reimbursement of the sum given as advances to the indebted person which isn't for the situation where CIRP is started, and the offer to every bank relies on the goal plan presented by the fruitful goal candidate. Privacy: pre-pack exchanges are private to such an extent that it doesn't hurt or decreases the estimation of the matter of the Corporate Debtor, and in this manner, it stays a going-concern.

Going Concern:

Under this procedure, the matter of the corporate account holder stays as a going heavily influenced by the current administration, which isn't the situation when the goal happens after the recording of the application as there exists a probability of the organization been sent for the liquidation if there is no fruitful goal plan for rebuilding or revamping of the matter of the corporate borrower. Further, no ban is forced on the corporate indebted person as on account of an application under segment 7,9 or 10.

Final Authority of Courts:

For a pre-packaged arrangement (be it for pre-pack bankruptcy goal or pre-organized deals) to be official, it requires the endorsement of the proper expert (in Indian situation, whenever executed at that point, NCLT). Thus, just that goal plan will get endorsement and will be restricting which fulfills the fundamentals of the goal plan given under the law. In the Indian situation, whenever actualized, just those plans will get endorsement from the NCLT which fulfills the prerequisites given under Section 30 of the Code.

Decrease of the burden on the NCLT:

Whenever executed in India, the pre-pack plans will diminish the effectively troubled NCLT's as of now there will exist a goal plan.

4.3 RESOLUTION APPLICANT

Section 29A of the Insolvency and Bankruptcy Code, 2016 ("**Code**") enumerates a list of persons who cannot be a resolution applicant. Persons who, by their misconduct, contributed to the corporate debtor's defaults or are otherwise undesirable are barred from acquiring or regaining

control of the corporate debtor under this provision.[67] The Supreme Court in Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta[68] interpreted the scope and application of Section 29A to make it free from any ambiguities. Further, the constitutional validity of this section was also upheld by the Supreme Court in Swiss Ribbons Pvt. Ltd. v. Union of India[69]. However, the question which arises is, what led to the insertion of section 29A into the Code. As per the originally enacted Code, a resolution applicant might have been any person, a creditor, a promoter, a prospective investor, an employee or any other person[70]. This was a major fallout in the Code. Promoters, guarantors and persons who were once a part of the ex- management were able to bid for their own assets and buy them back at meagre prices which thereby hampered the interests of the creditors. It was thus felt that there must be provisions in the Code which would disqualify certain categories of persons from submitting their resolution plans and hence section 29A was inserted into the Code. However, it was felt that this section had a very wide scope and any person even if he was remotely related to the corporate debtor was unable to submit a resolution plan. Hence, some changes were recommended by the Insolvency Law Committee which were later incorporated into the section. The main aim of the Code is resolution of an ailing company. It seeks to find out ways for the revival and restructuring of the corporate debtor and at the same time provide effective measures for the implementation of the resolution of the company.

The Code provides for inviting applications by prospective resolution applicants for submission of their resolution plans for the corporate debtor. Earlier a resolution applicant might have been any person, a creditor, a promoter, a prospective investor, an employee or any other person. The promoters, guarantors and/or persons who were once a part of the ex- management of the corporate debtor were able to bid for their own assets and buy them back at very meagre prices at the cost of the lenders. Thus, it was realised that there was a need for a provision in the Code which would disqualify a certain category or class of persons from submitting their resolution plans for the corporate debtor. As a result, section 29A was inserted into the Code. Section 29A was added first by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 and later by Insolvency

[67] Statement of Objects and Reasons of the Insolvency and Bankruptcy Code (Amendment) Bill, 2018.
[68] Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta, 2018 SCC OnLine SC 1733.
[69] Swiss Ribbons Pvt. Ltd. v. Union of India, 2019 SCC OnLine SC 73.
[70] Sikha Bansal & Richa Saraf, INELIGIBILITY CRITERIA U/S 29A OF IBC: A NET TOO WIDE? Vinod Kothari Consultants (2018), http://vinodkothari.com/wp-content/uploads/2019/06/Ineligibility-Criteria-under-sec.-29A-of-IBC.pdf.

and Bankruptcy Code (Amendment) Act, 2018 (6 of 2018) ("Amendment Act")[71]. This section provides a list of persons who cannot be a resolution applicant[72]. However, it was observed that section 29A had a very wide scope and any person even if he was remotely related to the corporate debtor was barred from submitting a resolution plan. This was seen as an impediment in the Corporate Insolvency Resolution Process ("CIRP") of the corporate debtor. Section 29A was introduced, according to the Insolvency Law Committee of 2018, to reject only individuals who had directly or indirectly contributed to the corporate debtor's demise or who were disqualified to control the business due to their antecedents.[73] The Committee in its report recommended some changes to section 29A so as to limit the scope of the application of this section. These changes were then incorporated vide Insolvency and Bankruptcy Code (Second Amendment) Act 2018 ("Second Amendment Act"). The insertion of section 29A has been advantageous to the corporate debtor and the creditors in view of the objectives of the Code, i.e., restructuring and revival of the corporate debtor. However, there are some of the many disadvantages viz., hampering the interests of bonafide promoters, delay in the corporate insolvency resolution process, slow down of the economy etc.

The primary objective of this part is:

1) to study and analyze the provisions of section 29A and trace the jurisprudence behind the insertion of this section into the Code, further,

2) to discuss the ineligibility criteria of resolution applicants to submit their resolution plans as laid down under section 29A of the Code, in light of the judgment of the Supreme Court in *Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta*[74].

3) It would also be imperative to discuss what issues arose before, and how they were dealt by, the Supreme Court in *Swiss Ribbons Pvt. Ltd. v. Union of India* pertaining to the constitutional validity of section 29A

4) the conundrum regarding the retrospective application of section 29A. Section 29A was added first by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 and later by

[71] ASHISH MAKHIJA, INSOLVENCY AND BANKRUPTCY CODE OF INDIA (2018).
[72] *Ibid.*
[73] Report of The Insolvency Law Committee, March 2018.
[74] *M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr* [2018]. 1 SCC 407.

Insolvency and Bankruptcy Code (Amendment) Act, 2018 (6 of 2018)[75]. Before this amendment, there was no bar on the eligibility of a resolution applicant and any person could be a resolution applicant. This was seen as a major loophole in the Code, which gave a back door entry to defaulters to bid for the assets of a company undergoing CIRP and thereby defeating the very purpose of the Code[76].

A case under the Code was cited to the Insolvency Law Committee to demonstrate how promoters of a corporate debtor are indirectly gaining control of the Committee of Creditors ("CoC") by arranging for the debt of the corporate debtor to be assigned to them[77]. Allegedly such promoters sabotage the CoC and pass resolution plans that entail a massive haircut to the creditors[78]. The case referred to here, is of Synergies Dooray Automative Limited ("SDAL")[79], an automative parts maker. The instant case was the first case to be resolved under the newly enacted Code, it stirred up many controversies and gave rise to many Court cases and in consequence making way for amendments to the Code.

In 2005, SDAL had leased its assets to its SPV, Synergies Castings Ltd. ("SCL") for the purpose of isolating its financial risk. However, within 2 years of the said lease agreement in 2007, SDAL was declared a sick company under the then existing Sick Industrial Companies Act ("SICA"). The original lenders to SDAL moved out by assigning their debts to SCL. Later, two large Asset Reconstruction Companies, Alchemist ARC and Edelweiss ARC took over the papers. On 24th Nov. 2016, SCL sold 92% of the aforementioned debts to an NBFC named Millennium Finance Ltd. ("MFL"). After two days of this debt assignment, SICA was repealed on 26th Nov. 2016 and

[75] Ashish Makhija, *Insolvency And Bankruptcy Code Of India* (1st edn, Lexis Nexis 2018).

[76] Dhir and Dhir Associates, Section 29A- Under The Ambiguity Lens? MONDAQ (last visited Sep. 20, 2021) http://www.mondaq.com/a/3746/Insolvency+and+Restructuring/Section+29A+Under+The+Ambiguity+Lens.

[77] Veena Mani and Ishan Bakshi, The curious case of Synergies Dooray & its implications on insolvency code, Business Standard (Sept. 20, 2017), https://www.business-standard.com/article/companies/flaws-in-the-insolvency-code-117091900999_1.html.

[78] C Scott Pryor and Risham Garg, 'Differential Treatment among Creditors under India's Insolvency and Bankruptcy Code, 2016: Issues and Solutions' (2020) 94 Am Bankr LJ 123.

[79] Synergies-Dooray Automative Ltd. v. Edelweiss Asset Reconstruction Company Ltd., C.A. No. 123/2017 in CP (IB) No. 01/HDB/2017.

then the Board of SDAL filed an insolvency application under section 10 of the Code. Ms. Mamta Binani acted as the Interim Resolution Professional and filed the Corporate Insolvency Resolution Process application at National Company Law Tribunal ("NCLT"), Hyderabad. Ms. Mamta Binani started controlling the management of the corporate debtor, i.e., SDAL. A CoC was formed with the major creditors of the corporate debtor. The CoC comprised of Synergies Castings Ltd., Millennium Finance Ltd., Alchemist ARC and Edelweiss ARC. The CoC by majority confirmed the appointment of Ms. Mamta Binani as the Resolution Professional. She published an Information Memorandum and invited resolution plans. The resolution plans were submitted by SMB Ashes Industries, Suiyas Industries Pvt. Ltd. and SCL. The CoC accepted the resolution plan provided by SCL; however, Edelweiss ARC abstained from voting and opposed to the resolution plan submitted by SCL. As per the approved resolution plan, SDAL was to be amalgamated into its SPV, Synergies Casting Ltd. This was the first case of CIRP to be decided under the Code and the resolution scheme was successfully implemented under the order of NCLT, Hyderabad. One of the creditors, Edelweiss ARC objected to the decision of NCLT at National Company Law Appellate Tribunal ("NCLAT") saying that the transfer of debt from Synergies Castings to Millennium Finance was done with the aim of influencing voting power in the CoC.[80] In the case, *Edelweiss Asset Reconstruction Company Ltd. v. Synergies Dooray Automotive Ltd.*, it was noted that:

"*Synergies Castings Limited which held approximately 78.03% of the total financial debt of the 'Corporate Debtor' was, and is, ineligible to be a member of the 'Committee of Creditors' of the 'Corporate Debtor' in view of the mandate of Section 21 of the 'I&B Code' since 'Synergies Castings Limited' is a related party of the 'Corporate Debtor' within the meaning of Section 5(24) of the 'I&B Code'. It is stated that 'Synergies Castings Limited' is a Special Purpose Vehicle that was established by the 'Corporate Debtor', and 'Synergies Castings Limited' has been listed as a related party of the 'Corporate Debtor' in the 'Corporate Debtor's' audited financial statements for the financial year ending 31st March, 2015 and 31st March, 2016"*.[81]

[80] Payaswini Upadhyay,
Has India's First Insolvency Resolution Approval Set A (last visited Aug. 31, 2021)
https://www.bloombergquint.com/law-and-policy/has-indias-first-insolvency-resolution-approval-set-a-dangerousprecedent.
[81] Edelweiss Asset Reconstruction Company Ltd. v. Synergies Dooray Automotive Ltd., Company Appeal (AT)(Ins) No. 169-173 of 2017.

Hence SDAL, to ensure control over the insolvency process, had the debt transferred from Synergies Castings to Millennium Finance who got a seat in the committee of creditors[82]. However, NCLAT found no merit in the arguments raised by Edelweiss ARC pertaining to the assignment of debt by SCL to MFL, the appeal was dismissed and the decision of NCLT, Hyderabad remained unchanged. This being the very first case under the Code, much less was known to those who were in the business and the legislature and judiciary both, independently were trying to remove and/or interpret the ambiguities present in, and provisions of the Code. A lot of debates and discussions revolved around this case. On 16th Nov 2017, the Insolvency Law Committee was constituted, with the mandate, *"to take stock of the functioning and implementation of the Code, identify the issues that may impact the efficiency of the CIRP*."[83] It was proposed to the Committee that creditors who acquired debt through any type of debt assignment within a year of the insolvency's start date be excluded from the CoC. That is Millennium Finance would have been excluded from the CoC of Synergies Dooray[84]. The Insolvency Law Committee did make a couple of relevant recommendations on the basis of the learnings from the specific case. In particular the provision pertaining to related party required to be amended,

"financial creditors that are regulated by a financial sector regulator and have become a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares of the corporate debtor, prior to the insolvency commencement date."[85].

And, hence section 29A was inserted in the Code which laid down in detail the criteria for debarring certain set of persons from participating in CIRP. This would close the doors for erring promoters who are looking out for alternate routes to regain control of the corporate debtor. In the

[82] Insolvency Law update - Edelweiss ARC challenges the first insolvency resolution scheme under IBC before the NCLT, KING STUBB & KASIVA - ADVOCATES & ATTORNEYS, INDIA (last visited, Sep. 20, 2021) http://kingstubbandkasiva.blogspot.com/2017/09/insolvency-law-update-edelweissarc.html.
[83] Sanjay Dongre, Insolvency Case Study, TAXGURU (last visited Aug. 31, 2021), https://taxguru.in/company-law/insolvency-case-study-synergy-explosive-controversial-beginning.html.
[84] *Fowler v. Padget* [1789] 7 Term Rep 509;101 ER 1103.
[85] C Scott Pryor and Risham Garg, 'Differential Treatment among Creditors under India's Insolvency and Bankruptcy Code, 2016: Issues and Solutions' (2020) 94 Am Bankr LJ 123.

case of *Wig Associates Pvt. Ltd.*[86] before the Mumbai bench of NCLT: In August 2017, Wig Associates, the corporate debtor, itself had filed an insolvency petition under section 10 of the code. Mr. Mahindra Wig who was a relative of the director of Wig Associates submitted a resolution plan with regard to the ongoing CIRP of Wig Associates. However, this was pursuant to the insertion of section 29A into the code. The question which, therefore, arose before NCLT, Mumbai was whether the resolution plan of Mr. Mahindra Wig can hold good in light of the provisions of section 29A of the Code. As per the provisions of section 29A, Mr. Mahendra Wig was a 'connected person' and as a result he would be ineligible to submit a plan as a resolution applicant. The bench, on the other hand, noted that corporate insolvency resolution proceedings are ongoing, beginning with admission and ending only when an order is issued, either authorising a resolution plan or starting liquidation against the corporate debtor. As a result, once the process of corporate insolvency resolution has begun, it cannot be stopped, amended, or modified until it is completed. The bench relied upon various recent Supreme Court cases such as *Zile Singh v. The State of Haryana*[87] *and Videocon International Ltd v. SEBI*[88], wherein it was held that a statute which has affected the substantive/legal rights of an individual is presumed to be prospective in operation unless expressly and/or impliedly made retrospective.[89] In light of the above-mentioned cases, the bench decided that the provisions of the amendment act will not apply to the present situation and therefore the resolution plan submitted by the resolution applicant (Mahendra Wig), despite being related to the promoter directors of Wig Associates may be accepted and approved, even after the insertion of section 29A[90].This meant that all resolution plans submitted before the 2017 ordinance was enacted, i.e. before November 23, 2017, would be considered by the committee of creditors to be undertaken for the revival of the company, and resolution applicants who had submitted resolution plans would not be subject to the ineligibility provisions of section 29A.[91] In *Chitra Sharma v. Union of India*[92], the Supreme Court in particular reference to the matter in *Jaypee Infratech Ltd.* settled the confusion regarding the application of section 29A and

[86] Wig Associates Pvt. Ltd., CP No. 1214/I&BC/NCLT/MB/MAH/2017.
[87] Zile Singh v. The State of Haryana, 2016 SCC OnLine SC 558.
[88] Videocon International Ltd v. SEBI, 2015 SCC OnLine SC 24.
[89] Dhir and Dhir Associates, Section 29A- Under The Ambiguity Lens? MONDAQ (last visited Sep. 20, 2021) http://www.mondaq.com/a/3746/Insolvency+and+Restructuring/Section+29A+Under+The+Ambiguity+Lens.
[90] *L'Histoire du Droit Commercial* [1904].
[91] Surabhi Jaju, Section 29A of IBC: Impact and Recent Developments, Lakshmikumaran & Sridharan attorneys, https://www.lakshmisri.com/News-and-Publications/Publications/Articles/Corporate/section-29a-of-ibc-impact-and-recent-developments.
[92] Chitra Sharma v. Union of India, 2017 SCC Online SC 1656.

held that section 29A would apply retrospectively. The Supreme Court stated that section 29A was intended for the greater public good and to make corporate governance easier.[93] Since the amendment to insert section 29A was introduced to close the loophole, the court has stated that it is intended to apply not only prospectively, but also, to a certain limit, retrospectively to resolution plans that may have been submitted prior to the ordinance's promulgation but were not approved.[94] Accordingly, the Wig Associates rationale may not stand since the legislature is clear that it intended the amendment to apply retrospectively[95]. An assiduous analysis of Section 29A reveals that the section imposes four layers of ineligibility, as mentioned below-

– First layer ineligibility, where the person itself is ineligible;
– Second layer ineligibility, i.e., where a "connected person" is ineligible;
– Third layer ineligibility, i.e., being a "related party" of connected persons; and
– Fourth layer ineligibility, where a person acting jointly/in concert with a person suffering from first layer/second layer/third layer ineligibility, becomes ineligible[96].

It is pertinent to discuss few of the many clauses of section 29A pertaining to the ineligibility criteria of resolution applicants to submit resolution plans. This clause debars a person or a person acting jointly or in concert with such person who-

(i) has an account classified as NPA;
(ii) a promoter of a corporate debtor the account of which has been classified as NPA;
(iii) is in the management of a corporate debtor the account of which has been classified as NPA;
(iv) is in control of a corporate debtor the account of which has been classified as NPA[97].
At least a period of 1 (One) year should have elapsed from the date of classification till the insolvency commencement date. Therefore, any company (including the promoters/persons in the management of or control of such company) which has its account classified as NPA for last 1 (One) year will not be able to file a resolution plan however, the Code provides for a carve out that

[93] Shivani Saxena, IBC: Section 29A- The Ghost Of Retrospective Past, BLOOMBERG (Aug. 22, 2021), https://www.bloombergquint.com/law-and-policy/ibc-section-29a-the-ghost-of-retrospective-past.
[94] *Ibid.*
[95] *Ibid.*
[96] Sandra Frisby, *Corporate Rescue: Law and Practice (Contemporary Studies in Corporate Law)* (2017).
[97] *Ibid*

such person shall be eligible to submit the resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan[98].

The clause talks in particular about those persons whose account has been classified as a non-performing asset and/or persons who are directly/indirectly related to such persons having non-performing asset accounts. Any person whose account has been classified as a non-performing asset in accordance with Reserve Bank of India guidelines issued under the Banking Regulation Act, 1949, or guidelines issued by a financial sector regulator issued under any other law currently in force, and a period of one year or and who has failed to make the payment of all overdue amounts with interest thereon and charges relating to non-performing asset before submission of the resolution plan is not eligible to be a resolution applicant.[99]. However, such a person would be considered as an eligible resolution applicant if prior to the submission of the resolution plan, he/she clears of all the debts due with regard to the NPA.

With reference to this particular clause of section 29A, it would be relevant to discuss the case of Arcelor Mittal Pvt. Ltd. v. Satish Kumar Gupta[100] where the Supreme Court interpreted this clause with regard to the ongoing CIRP of Essar Steel. As per the earlier clause (h) which existed under section 29A prior to the Second Amendment Act, a resolution applicant could not be a person who has executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under the Code[101]. With the assistance of the illustration below, this may be explained.;
E.g.: "X" is the surety for the loans taken by "A Ltd.". "Y" is the creditor. "Y" initiates corporate insolvency resolution process against "A Ltd.", and the application is admitted by NCLT. "X" is disqualified from submitting resolution plan for another corporate debtor "B"[102]. In *RBL Bank Ltd. v. MBL Infrastructures Ltd.*[103], the Tribunal opined that clause (h) had a very wide scope and it

[98] *Ibid.*
[99] Sumant Batra, *Corporate Insolvency Law and Practice* (2017).
[100] Sandra Frisby, *Corporate Rescue: Law and Practice (Contemporary Studies in Corporate Law)* (2017).
[101] *Ibid.*
[102] *Ibid.*
[103] RBL Bank Ltd. v. MBL Infrastructures Ltd., C.A. (I.B.) NO. 270/K.B./2017.

would therefore be necessary to study its application in light of the statement and objectives of the Ordinance that inserted section 29A into the code. The statement and objectives read as:

"to prohibit certain persons from submitting a Resolution Plan who, on account of their antecedents, may adversely impact the credibility of the processes under the Code".[104]

The Tribunal took a view that there was no intent of the Government to debar all the promoters, only for the reason for issuing a guarantee which is enforceable, unless such guarantee has been invoked and not paid for, or the guarantor suffers from any other antecedent listed in clauses (a) to (g)[105]. The intention of the legislature has not been to disqualify the entire class of guarantors as it would be discriminatory and violative of Article 14 of the Constitution of India[106].
"The guarantors in respect of whom, a creditor has not invoked the guarantee or made a demand under guarantee should not be prohibited. Therefore, no default in the payment of dues by the guarantor has occurred, cannot be covered under clause (h) of Section 29(A). It cannot be the intent of clause (h) to penalize those guarantors who have not been offered an opportunity to pay by calling upon them to pay the dues, by invoking the guarantee. Therefore, the words "enforceable guarantee" appearing in clause (h) are not to be understood by their ordinary meaning or in the context of enforceability of the guarantee as a legal and binding contract, but in the context of the objectives of the Code and Ordinance in general and clause (h) in particular"[107].

The Insolvency Law Committee, in its March 2018 report, agreed with the Tribunal and proposed changes to clause (h) of section 29A, including the deletion of the term "enforceable" and the requirement that the guarantee be invoked by the creditor and then remain unpaid in part or in full for disqualification under this clause to be invoked. Clause (h) of section 29A was amended vide the Second Amendment Act. It now reads as:

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[104] Changes & Impact Under IBC Through Changes By Ordinance, AMLEGALS (last visited by Aug. 31, 2021) https://amlegals.com/changes-impact-ibc-changes-ordinance/.
[105] Vallari Dubey, Rights of Defaulting Promoters to submit Resolution Plan, VINOD KOTHARI CONSULTANTS (Sep. 11, 2021), http://vinodkothari.com/2018/01/rights-of-defaulting-promoters/.
[106] RBL Bank Ltd. v. MBL Infrastructures Ltd., C.A. (I.B.) NO. 270/K.B./2017.
[107] *Ibid.*

"has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part"[108].

With the assistance of the illustration below, this may be explained; For example, "X" is the surety for "A Ltd.'s" loans. The creditor is "Y." "Y" starts a corporate insolvency resolution action against "A Ltd.," and NCLT accepts the application. The resolution plan for "B" will not be rejected if "X" submits it. However, say if "Y" invokes guarantee but "X" defaults, then "X" becomes ineligible to be a resolution applicant[109]. This clause states that any person who is a 'connected person' and is disqualified under sub clauses (a) to (i) shall also be disqualified from filing a resolution application[110]. This adds even another layer of ineligible people to the mix. A connected person is defined as a person who is a promoter, in management or control of the resolution applicant, or will be a promoter, in management or control of the corporate debtor during the implementation of the resolution plan, according to the explanation provided for the above sub-clause. A subsidiary business, a holding company, an associate firm, or a related party to such person would also be regarded a connected party, thereby adding another layer to the group of rejected candidates, according to the explanation. Further, the term 'related party' within the context of the above provision has not been defined and has been left open to interpretation, once again leaving ample scope for litigation[111]. "Related party" has been defined in Section 5 (24); however, the definition is specific to corporate debtor, i.e., the definition specifies the persons who shall be treated as "related party' of the corporate debtor. Hence, where the persons referred to in clauses (i) and (ii) of the Explanation are persons other than the corporate debtor, the definition under section 5(24) becomes irrelevant, and the following may be noted-

– Where one of the persons is a company, "related party" shall be interpreted in terms of section 2(76) of the Companies Act, 2013;

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[108] The Insolvency and Bankruptcy Code, 2016, § 29A (h), No. 31, Acts of Parliament, 2016 (India).
[109] Sandra Frisby, *Corporate Rescue: Law and Practice (Contemporary Studies in Corporate Law)* (2017).
[110] Garima Mehra & D Sharma, Section 29A of the Insolvency and Bankruptcy Code: A Pandora's Box, INDIACORPLAW, (last visited Sep.25, 2021) https://indiacorplaw.in/2018/06/section-29a-insolvency-bankruptcy-code-pandoras-box.html
[111] *Ibid.*

– Where none of the persons is a company, the definition of the term "related party" has been left open. In the context of natural persons, generally the term "relative" is used.[112]

Scheduled banks, asset reconstruction firms, and alternative investment funds, on the other hand, are specifically excluded from the purview of section 29A.[113] The constitutional validity of section 29A was challenged before the Supreme Court in *Swiss Ribbons Pvt. Ltd. v. Union of India*[114]. The Supreme Court found no merit in the argument that the rights of the erstwhile promoters have been infringed by the retrospective application of section 29A as the fundamental assumption that the promoters had a vested right to be considered as resolution applicants had already been negated in the case of Arcelor Mittal India Pvt. Ltd. v. Satish Gupta[115]. The Supreme Court opined that the ineligibility criterion mentioned under section 29A is not based on fault-based liability principle, therefore there arises no question that there should be any difference between the treatment meted out to genuine & bonafide promoters and the defaulting promoters. The contention that unequals are being treated equally thus falls weak here. An entity which is unable to service its own debt within a period of one year or more, such entity should be prevented from submitting a resolution plan. This is well in accordance with the RBI guidelines pertaining to the treatment of NPAs. It would be bad in law to oust a person from submitting a resolution plan who is otherwise eligible because of the mere fact that he is the relative of an ineligible person. Restriction of such a nature would be applicable only in those circumstances where the relative who is the prospective resolution applicant is related through some business activity.

The primary objective of inserting section 29A into the code was to implement an effective and efficient resolution plan for the corporate debtor without the interference of those who were once a part of the management or in control of the corporate debtor. In other words, it was the promoters of the corporate debtor who were kept outside the ambit of those people who could submit a resolution plan for the revival of the corporate debtor. The very basic idea behind this being that those persons who have in one way or the other contributed to the downfall of the corporate debtor

[112] Sandra Frisby, *Corporate Rescue: Law and Practice (Contemporary Studies in Corporate Law)* (2017).
[113] "Corporate Rescue in the UK: Ten Years after the Enterprise Act 2002 Reforms", given by Paul Omar to the Colloquium on "Benchmarking Voluntary Administration on its 20-Year Anniversary" organised by the Bankruptcy and Insolvency Law Scholarship Unit at the Adelaide Law School, Adelaide, Australia on 26 July 2013.
[114] Belcher (n 1).
[115] *M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr* [2018]. 1 SCC 407.

are disqualified from being resolution applicants. However, it is not always the case that the corporate debtor's promoters had committed a default before to the CIRP's start and are now resorting to unscrupulous methods in order to purchase back the corporate debtor's assets at reduced rates. It is not usually the promoters' fault if a firm is subjected to a CIRP. There are promoters who with a bonafide intention wish to regain the control of the corporate debtor so that they are able to implement a resolution plan efficaciously. In cases where the promoters are willing to offer to the lenders a price higher than the bid of the highest bidder, there seems no ground for eliminating such a promoter from the bidding process. The lenders would be in a better position and would have to suffer a much lesser haircut. The ineligibility criteria under section 29A have cast a net so wide that even those persons who wish to positively contribute towards the revival of the corporate debtor have been barred from submitting their resolution plans. There is a blanket ban on all the promoters - bonafide and erring, both. This seems to go against the stated achievements of the Banking Law Reforms Committee ("BLRC") Report of drawing a line between the cases of malfeasance and business failure. Section 29A was inserted with the primary aim of fulfilling the objective of the code, i.e., achieving the corporate resolution of the ailing company and avoiding liquidation.

The interests of all the stakeholders are being protected and the company is prevented from falling into the hands of the erring persons. The process of inviting resolution plans from prospective resolution applicants is quite competitive and involves a system of bids. Due to the increasing competition in the bidding process, the prospective resolution applicants are forced to make higher bids for the ailing company, as a result of which the lenders are benefitting because they are getting lesser haircuts in the debts owed to them by the ailing company. In the early days of its insertion into the Code, section 29A led to a plethora of legislations regarding its scope, application, ineligibility criteria, constitutional validity etc. The Supreme Court played an instrumental role in analysing the provisions of and thereby clearing ambiguities from the interpretation of the provisions of section 29A. It is seen that the application of this section casts a wide net and includes within its ambit a wide range of persons who are debarred from submitting their resolution plans. Pursuant to the recommendations of the Insolvency Law Committee in its March 2018 Report and then an amendment, the scope has reduced to some extent thereby going one step closer in

achieving one of the objectives of the BLRC Report of drawing a line between malfeasance and business failure.

4.4 IMPLEMENTATION OF THE RESOLUTION PLAN DURING THE UNPRECEDENTED PANDEMIC

The ongoing flare-up of the Novel Coronavirus 2019 ("COVID-19") has caused significant disturbances in the World, influencing even the most evolved countries, for example, United States of America. The effect on the economy is more extreme than the 2008-2009 downturn, in under about a month. In these unprecedented situations, Governments across countries have risen up to give food and sanctuary, also additionally presented different administrative and legal relaxations with the end goal that residents don't confront penal consequence of their incidental non-compliance. A portion of these is (1) extension of last date for documenting IT Returns and GST Annual Returns for FY 2018-19 from 31-March-2020 to 30-June-2020 (2) expansion of compulsory prerequisite to hold Board Meetings by a time of 60 days till next two quarters i.e., till 30-Sep-2020 (3) expansion of timetables for filings under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and so on.

After promulgation of across the nation-wide lockdown[116] and different warnings by Central and State Government thereto, physical recording of pleadings in Courts turned out to be unimaginable. Hon'ble Supreme Court of India took *suo moto* insight and passed a request dated 23-March 2020[117] broadening the confinement endorsed under broad law, regardless of whether condonable or not, with impact from 15 March 2020 till further requests. In regard of insolvency matters, Hon'ble NCLT notified that all NCLT seats will stay shut from 23-March-2020 to 31-March-2020 and just pressing issues would be taken up as per the said notice. The said warning makes a straight out note that "As respect to the IBC-2016 issues expansion of time, endorsement of goal plan and liquidation won't be interpreted as dire issues". After burden of the national lockdown, the above notice was stretched out to 14-April-2020 by another notification. Depending on the request passed by the Hon'ble Supreme Court, the Hon'ble NCLAT vide request dated 30-Mar-2020, prohibited

[116] Order dated 24 March 2020 issued by Ministry of Home Affairs, Government of India.
[117] Suo Moto Writ Petition (Civil) No. 3 of 2020.

the lockdown time frame to check of the period for 'Goal Process under Section 12 of the Code, 2016, in all situations where 'Corporate Insolvency Resolution Process' has been started. Noteworthy relief additionally originated from the 29-Mar-2020 change to Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the "CIRP Regulations"), wherein *Regulation 40C* was presented which gives that time of lockdown forced by the Central Government in the wake of COVID19 episode will not be counted for the course of events for any action that couldn't be finished because of such lockdown, according to a corporate insolvency resolution process. Since the procedure to be executed after endorsement of the Resolution Plan by Adjudicating Authority doesn't fall inside the importance of "CIRP" under the surviving bankruptcy laws, the request dated 30-Mar-2020 by NCLAT and Regulation 40C would not help the Resolution Applicant for any extra time. The exclusion is not helpful to the point that if the last date of usage of a Resolution Plan falls inside the lockdown timeframe, at that point the Successfully Resolution Applicant is authoritatively and legitimately required to actualize the Resolution Plan. Normally, a Resolution Plan requires store of Earnest Money Deposit ("EMD") by all Resolution Applicant(s) at the hour of presenting their Resolution Plan, which is discounted to all Resolution Applicant(s), with the exception of clearly to the Successful Resolution Applicant.

The subsequent stage/case of store is at following endorsement of Resolution Plan by the CoC, which is usually alluded to as Performance Deposit or Performance Security. The IBBI revised the CIRP Regulations to present Regulation 36B (4)[118], which requires the solicitation for Resolution Plans ("RFRP") to accommodate a proviso obligatorily requiring the Successful Resolution Applicant to give a Performance endless supply of its Resolution Plan by CoC and bombing usage of the said Resolution Plan, such Performance Security to be relinquished. The standard practice is that the Resolution Applicant stores Performance Security by method of a Performance Bank Guarantee, notwithstanding, some CoCs require bank store of the Performance Security in the

[118] **Regulation 36B: Request for Resolution Plan** (4A) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.

records of the Corporate Debtor. The Performance Security and EMD all in all adds up to approx. 10-20% of the Resolution Plan Value, if the Resolution Plan Value runs in a large number of Crores and almost 30%, if the Resolution Plan Value is not as much as Rs. 500 Crores (in light of expansive estimations). For example, the Resolution Plan relating to Euro Pallets Pvt. Ltd., required EMD of Rs. 40 Lakh comprising 12.9% of the Resolution Plan.

The significance of featuring the above is that disappointment in execution of the Resolution Plan could prompt an expected misfortune to the Successful Resolution Applicant. This budgetary loss of EMD and Performance Security is combined with the guidance and warning charges spent in drafting and arranging the Resolution Plan, alongside loss of chance expense. Disappointment in usage likewise brings about contradiction of Section 74 (3) of the Code, 201624, which is culpable with detainment of 1-5 years or fine of least Rs. 1 Lakh-1 Crore or both. Aside from financial misfortune, the Resolution Applicant likewise languish lost notoriety over not having the option to execute the Plan. Every single future obtaining endeavored by that Resolution Applicant would be seen through the focal points of this disappointment and investors will be unable to rest in confidence in future. Guideline 36 (1B) of the CIRP Regulations requires an announcement in the Resolution Plan expressing if the Resolution Applicant or any of its connected gatherings has neglected to actualize or added to the disappointment of usage of some other goal plan endorsed by the Adjudicating Authority whenever before.

The requirement for prohibition of this timeframe is fundamental since receipt of installment to the Creditors and change of the board of the Corporate Debtor is a definitive objective of goal process. The execution of different understandings as referenced before require between se consideration between consultants/guidance of the Successful Resolution Applicant just as among the counselors/direction of CoC and the Successful Resolution Applicant. The execution requires stamp papers, obtaining of which has gotten very troublesome, if certainly feasible. In numerous goals, the Successful Resolution Applicant connects with banks to subsidize the securing, which assets are on occasion found abroad. The worldwide progress of assets turns into another test. The obstacles can be as basic as printing of records to organizing the assets, which would differ from the means conceived during the usage time frame. It is sure that proclaiming penetrate of Resolution Plan by the Successful Resolution Applicant would bring about money related loss of the CoC, given that in practically all cases, almost the entirety of the authorized CIRP Period of

270 days (extendable to 330 days) is spent in looking for endorsement of one Resolution Plan, henceforth the rebelliousness of an affirmed Resolution Plan would probably bring about liquidation of the Corporate Debtor. In any event, confronting this danger of money related misfortune, the CoC in not a situation to singularly expand the timeframe since the timespan is endorsed by Adjudicating Authority in Resolution Plan endorsement request.

The typical response left with the Successful Resolution Applicant is moving toward the Adjudicating Authority looking for expansion of time under Section 60 (5) of the Code, 2016, notwithstanding, with the 22-Mar-2020 notification of the Hon'ble NCLT expressing "augmentation of time" would not be considered as critical, it may not be judicious advance to move toward the Adjudicating Authority and be left with either no structure broadening the time span or dismissal of supplication. Another response which the Successful Resolution Applicant may consider receiving is conjuring the Force Majeure statement under the Resolution Plan (assuming any) with the guide of Section 56 of the Indian Contract Act, 1872, and argue difficulty in execution of the exchange. The progression of summoning Force Majeure is a troublesome street to go for the Successful Resolution Applicant needs to set up real difficulty in executing the Resolution Plan. As of late, the Hon'ble High Court of Kerala vide request dated 19-Mar-2020 in Writ Petition No. 8231/2020 and Hon'ble High Court of Judicature at Allahabad in Writ Petition No. 7014 of 2020 had passed which requests had adequately conceded the recuperation of all charges till April 6 considering the Covid-19 flare-up, as announced. The Hon'ble Supreme Court of India vide request dated 20-Mar-2020 have allowed transitory ex-parte remain on both previously mentioned orders expressing the stand taken by the Government of India through educated Solicitor General that the Government is completely aware of the common circumstance and would itself develop a legitimate component to mollify concerns and difficulties of each one. Along these lines, to state that there is supreme inconceivability in executing the Resolution Plan taking guide of Force Majeure would be hard to build up in a Court of law. The expansion of this time span isn't bizarre since the two Courts and Legislature have perceived development limitations and have accordingly, prohibited lockdown period from CIRP Period and furthermore loosened up the courses of events recommended under the laws.

4.5 AMENDMENTS TO INSOLVENCY AND BANKRUPTCY CODE 2016 IN LIGHT OF COVID - 19

The Code aims to consolidate and amend the existing insolvency laws in addition to simplifying and expediting the process of insolvency proceedings. Prior to the enactment of the IBC, there were various scattered laws relating to insolvency and bankruptcy which resulted in inadequate and ineffective results with undue delays. In fact, prior to the enactment of the IBC, Insolvency resolution in India took 4.3 years (as of 2015) on an average against 1 year in the United Kingdom and 1.5 years in the United States of America.[119] Therefore, the legislature tried to remedy these mistakes with the enactment of the IBC by simplifying and speeding up the winding up/liquidation process. Timely resolution and the preservation of the value in underlying assets is one of the major objectives of the IBC. The Code has always been marketed as a law which seeks to complete the insolvency process in a timely manner. This objective of a speedy resolution process is rejected under the provisions of section 12 of the Code which envisages the completion of the insolvency process within 180+90 days. The Bankruptcy Law Reforms Committee provides the rationale for this objective of speedy resolution as "Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the 'calm period' can help keep an organization afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation. From the viewpoint of creditors, a good realization can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realization is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay."

[119] The report of the Bankruptcy Law Reforms Committee, 2015, (last visited Sep.25, 2021) https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

Despite the efforts taken for the implementation of the IBC, it is not without faults. Prior to the 2019 amendment, the earlier time period of 180+90 days for the insolvency process despite seeming to be an effective remedy prima facie, was not practical in India, given the slow regulatory process in by various government agencies such as the approval required by the Competition Commission of India (CCI). This resulted raised questions on the effectiveness of the IBC proceedings such as (1) whether the rescue operations envisioned under the IBC is used to avoid the CCI regulations and (2) whether the corporate debtor can use the loopholes in the law to prevent the CoC from taking the restructuring decisions.

The Insolvency and Bankruptcy Code (Amendment) Act, 2019 (Amendment Act), inserted two provisos to section 12(3) of the Code to increase the time limit for resolution process to 330 days. This period of 330 days includes (a) normal CIRP period of 180 days, (b) one-time extension, if any, up to 90 days of such CIRP period granted by the Adjudicating Authority, and (c) the time taken in legal proceedings in relation to the CIRP of the Corporate Debtor. This 330-day time period would be inclusive of both the time taken in legal proceedings any extensions granted by the adjudication authority. Upon the failure to complete the CIRP process within this time period would attract liquidation, which would be an unfeasible option for stakeholders involved.[120]

This amendment sought fill in the gaps of the regulatory time frame, especially with reference to the Competition Commission of India, as the 330-day time limit was in compliance with the Competition Commission's timeframe for the investigation process. Although, the government sought to protect the value of assets, which would go down if the CIRP process goes on for a long period of time, by laying down this non derivable time limit, they had clearly disregarded the fact that the non-compliance of this deadline, would forcefully push the Corporate Debtor into liquidation, which could be equally detrimental to his interests. This issue was raised in the case of Essar Steels.[121] In this case, it was held that the CIRP is to be concluded within 330 days, but this time period may be extended by the adjudicating authority where the short period of time left for the completion of the CIRP is attributable to the pendency of the action before or the

[120] Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta (2019) SCC OnLine SC 1478 (India).
[121] *Ibid.*

inefficiency of the adjudicating authority.31 Although the Essar Steels decision introduced some flexibility in the time period, it still failed to address two key issues which are as follows : (1) The standard that has to be satisfied in convincing the tribunal that they themselves have caused the delay in the CIRP process; and (2) whether they can be a limit to the extensions which can be granted beyond the 330 days limit. In the absence of a limitation, the objective of the 2019 amendment may not be fulfilled. Hence, it may be observed through various landmark IBC cases like Swiss Ribbon, Essar Steel, Binani Cements, etc., that one of the main intentions behind the implementation of the IBC is to protect the interests of the creditors. However, it may be interesting to note that during the current Covid-19 pandemic, the Insolvency law seems to have taken 180 degrees turn.

In the current backdrop of Covid-19, new issues and challenges emerged on the Indian insolvency laws, some of which are unlikely to be solved by the courts. In June 2020, section 10A and section 66(3) has been inserted in the Code trough the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020.[122] This 2020 ordinance is more of a Covid-19 relief package. It primarily seeks to provide relief to the corporate debtor directly affected by the Covid-19 pandemic, which has disrupted business operations across the countries. It strives to prevent the companies which are experiencing distress on account of this unprecedented situation, from being pushed into insolvency proceedings under the IBC, 2016 thereby giving them a breather in which to recoup and resuscitate their business.[123] Section 10A makes it clear that creditors cannot drag any company to courts/insolvency proceedings, which will be in effect for the next six months and can be extended by up to one year. This clause overrides sections 7, 9 and 10 of the Code. Section 7 deals with financial creditors initiating insolvency action, Section 9 deals with operational creditors initiating action.[124] Section 10 allows a defaulting company to approach the National Company Law Tribunal (NCLT) to declare it insolvent. Therefore, fresh insolvency proceedings under the code would be suspended for and would exclude all Covid-19 related debts from the

[122] Anant Merathia & Poornima Devi, IBC Amendment Ordinance 2020: No fresh insolvency for default after lockdown declaration, https://www.newindianexpress.com/business/2020/jun/08/ibc-amendment-ordinance-2020-no-fresh-insolvency-for-default-after-lockdown-declaration-2153907.html.
[123] *Ibid.*
[124] Srivastava, Khare & Kishore, Insolvency And Bankruptcy Amendment Ordinance: June 2020, https://www.mondaq.com/india/insolvencybankruptcy/952306/insolvency-and-bankruptcy-amendment-ordinancejune-2020.

definition of 'default'. It is also a matter of concern that the 2020 ordinance also provides a relaxation to the corporate debtor from the wrongful trading provisions. As per the new section 66(3) of the Code the resolution professionals will be barred from initiating wrongful trading applications against directors of companies where the IBC process is suspended. Earlier, the minimum threshold for initiation of the insolvency proceedings was raised from the earlier one lakh rupees to one crore rupees. These measures clearly reflect the current need of the hour to prioritize the continuity of businesses over resolution under the Code, which is already in damp market conditions.[125] However, these measures inevitably place the creditors under a precarious situation. The combined effect of this measures and the ordinances foreclose the opportunity of the creditors to seek resolution under the Code for a significant period of time. Furthermore, these measures may also serve as an easy escape route for some corporate debtors who may have had impending insolvency proceedings even before the Covid-19 situation. Additionally, this measure could also negatively affect the interests of the companies as they would drastically reduce the possibilities of a company receiving any loans in this period. Furthermore, the Reserve Bank of India has already provided a moratorium for a period of six months which has already provided some relief to the corporate debtors.[126]

Covid 19 has stormed the world and has put the world on its knee. The impact has led to people believing that the world shall be known as before covid and after covid. Everything has come to a standstill with companies being at the edge of collapse. India is being acclaimed for its foresight in order to contain the virus by imposing a lockdown for over 2 months but it has led to companies filing for bankruptcy because of no income generation over the period. The government, while analysing how critical the situation is, has made sure that companies will be protected and thus amended and inserted laws under Insolvency and Bankruptcy Code 2016 to protect the corporate debtor/ companies from insolvency proceedings. During these troubled times the amendments made by the government are welcomed by companies with open arms. The government is taking steps to protect and help sustain the companies from going bankrupt. This article will provide you of all the amendments done in view of the circumstances created from coronavirus and in addition

[125] G.P. Madaan & Aditya Madaan, IBC Amendment Ordinance 2020: Ambiguities leave more questions than answers, https://www.livelaw.in/columns/ibc-amendment-ordinance-2020-ambiguities-leave-more-questions-thananswers-157916.
[126] RBI Circular dated 27 March 2020, https://m.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=11835.

to amendments done in the past year in order to restrain filing of any fresh corporate insolvency proceedings. The Insolvency and Bankruptcy Code 2016 was enacted to integrate and amend laws related to insolvency resolution of companies, partnership firms and individuals in a time restricted manner for maximization of value of assets in order to balance the interests of all the stakeholders. According to a survey the average time for completion of insolvency proceedings in India used to be 4.3 years but with the introduction of the Insolvency and Bankruptcy Code 2016 the average time has been curtailed to 340 days. The Code lays out specific time frames within which the insolvency proceeding of a company is to be resolved. Insolvency refers to a situation when a company is unable to repay its debt. Due to large-scale economic distress caused by the coronavirus, the government has decided to increase the threshold of default under Section 4 of the IBC 2016 to Rs 1 crore from the existing Rs 1 lakh to prevent the provoking of insolvency proceedings against small and medium enterprises. The government has decided to suspend any fresh insolvency proceedings against any company. With the insertion of Section 10 (A), the government has imposed a blanket ban on any application for corporate insolvency resolution proceedings of a corporate debtor for any default from 25th March 2020 for a period of 6 months extended to 1 year on the notification of the government. This section overshadows Sections 7, 9 which states initiation of corporate insolvency resolution process against a corporate debtor by a financial creditor or operational creditor. It also ceases the power of Section 10 which gives a right to corporate debtors to initiate a corporate insolvency resolution process against himself. In addition to this, there are significant amendments made to the Insolvency and Bankruptcy Code 2016 by clearing the ordinance bill 2019 in the parliament.

The Ordinance, 2019 recognizes;

- The status of allottees of a real estate project to be considered as of a financial creditor and to initiate a corporate resolution process against the project developer a minimum threshold of 100 or 10% of the homebuyers, whichever is lower is required to take a defaulting developer to the adjudicating authority which is National Company Law Tribunal
- It empowers resolution professionals to require suppliers to continue providing goods and services during the moratorium period.
- The voting threshold of the committee of creditors has been reduced down to 51% (percentage) from 75% (percentage) but in case of key decisions i.e., appointment of

resolution professional, approval of the resolution plan and increasing time limit for insolvency resolution process it has been restricted to 66% (percentage).

- The 2019 ordinance prohibits a person whose account has been declared as Non-Performing Asset for more than 1 (one) year or the person is the guarantor of the defaulter to be the resolution applicant. The resolution applicant is a person who submits the resolution plan.

CHAPTER -5

CONCLUSION AND SUGGESTIONS

The Insolvency and Bankruptcy Code (henceforth, "IBC') is considered to be milestone enactment. It authoritatively started on 28 May 2016. As shown in the World Bank's Doing Business report which was delivered in 2016, it made sure that creditors in India on a normal recouped just 20% of their whole obligation from a distressed firm towards the finish of the indebtedness procedures which was in glaring difference to nations where creditors recouped up to 72.3% of their obligation. Also, the administrative structures which existed in India before the authorization of the IBC were time expending as the entire procedure of recovery took about 4.3 years to close; however, it took just around 1.7 years in the OECD nations. For the reasons expressed above, India was positioned at a wretched 130 out of 189 nations at settling bankruptcy. With the presentation of the IBC, the current recuperation rate has expanded from 20 to 42%. The 2016 Code accommodates a period bound procedure to determine insolvency. The IBC certainly has a great deal of significance and importance in the current situation since it has redesigned the out-of-date system identifying with indebtedness and liquidation in India. It very well may be reasoned that now we have a united and far-reaching law that is at standard with the universal principles. Since the Code is still in its early stage, it is normal that the Code will be made utilitarian in such a manner to concentrate more on actualizing the law instead of speedily operationalizing it. With the new IBC in place, a new rescue mechanism also came into existence. This dissertation dealt with the detailed analysis of the rescue culture in India and the United Kingdom.

In case of procedural differences, the main component that needs to be highlighted is the case of Corporate Rescue, which is better achieved in UK than India owing to the fact that India has only one procedure for the rescue which is the “Resolution plan” but UK has many alternatives to save the company from slipping into the process of liquidation. In India the influences of the external entities on the corporate insolvency procedure are highly controversial and needs to be kept in check. Such as in a recent case wherein the UK based Liberty House who was the Amtek Auto’s biggest bidder by the committee of creditors backed off and in such a case the whole rescue procedure is completely dependent on a different entity altogether whereas in the United Kingdom,

the major focus is on rescue. In a UK insolvency case,[127] the Court held that the liquidation process is to be moved on only when all the other rescue ways have been blocked. But the issues with the UK Insolvency Law is that the formalities required by foreign courts and officials to prove the appointment of the liquidator have caused administrative burdens.[128] Despite the reforms instituted by the Enterprise Act 2002, controversies that arose prior to the new legislation remain and improvements are left to be made. In the decade following the reform, practice has not only developed in relation to pre-packs, but also in the design of reorganization driven by the developments from the United States and Canada. In light of the challenges that have confronted insolvency systems in the UK in the past, what challenges are to be expected for the future? There are two in particular that appear evident, the parlous state of the law itself and the potential for European influence on domestic insolvency. There is a need to contemplate, during any consideration of substantive reforms, the shape of the legal text that will embody future reforms.

The current shape is particularly mediocre and needs much reordering to make it clearer and more certain. The reason is that, following the reforms, the rescue procedures were contained substantially in the schedules making cross-referencing to the main Act provisions difficult. The fact that parts of the Act were "invisible", including the repealed Part II of IA 1986 that still applied to certain types of undertaking did not help coherence or clarity. Furthermore, much that is important to the practitioner is in the Insolvency Rules 1986, which have been undergoing a process of updating in the past few years under the aegis of the Insolvency Rules Committee. This is because the law itself, especially in personal insolvency, authorizes extensive rule-making to complete the operations of procedures. The balance between primary and secondary legislation may thus be said not to be where one might expect and, overall, a practitioner might find it on occasions difficult to navigate the labyrinth that is the UK insolvency system. In this case the hypotheses that implementing the various procedures of corporate rescue as stated under UK Insolvency Law into India's insolvency regime would increase the success rate of revival of Indian companies is partially true to the effect of efficiency which could be adopted by the Indian legislation and administration forum by taking inspiration from the United Kingdom.

[127] *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114.
[128] *Quicksons (South and West) Ltd v. Katz* [2004] 1 W.L.R 3240.

The research question of whether the current insolvency regime of India does justice to the concept of restructuring, is evident from the fact that IBC even though a toddler has helped a lot of financially distressed companies with its time-bound proper implementation. Now answering whether the UK Insolvency Law 1986 is far better in achieving corporate rescue than the Indian regime, it is understood that UK Insolvency Law is far more advanced owing to the fact that the element of third-party interference is much lower in the United Kingdom which is also one of the reasons why corporate rescue culture in India is not much successful. India could adapt to mechanisms such as the recent Act (UK Corporate Insolvency and Governance Act, 2020) of the United Kingdom. Just like the free-standing moratorium under the UK Act, a similar implementation of the like in India will enable the creditors "a breathing space" to analyze and implement the rescue plan. Further it is suggested that the "cross class cram down" provisions that is already applicable in India to be extended to the Companies Act provisions of the country too wherein operational creditor and shareholder shall be bound by the scheme even if they do not approve of it.

Apart from the above said provisions, it is pertinent to confer NCLT and NCLAT with the necessary powers to successfully implement the resolution plan. The reason for this is because public awareness of a breach of the resolution plan causes a massive damage to the corporate debtor's market position, which is difficult to recoup for a company that is already insolvent and burdened. However, there are occasions when the corporate debtor (together with its members and employees), creditors, and other relevant parties lose the struggle because the successful bidder fails to follow the Code's obligation. Stern and articulated provisions are the sole means by which this lacuna can be corrected.

CHAPTER-6

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APPENDIX

PLAGIARISM REPORT