REORGANIZATION UNDER THE IBC: ALTERING THE ROLE OF RESOLUTION PROFESSIONALS IN THE CHANGING TIMES

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Reorganization as a practice in bankruptcy has been provided for in the bare text of the Insolvency and Bankruptcy Code, 2016 ("the Code"), but the execution of the said practice is found to be nearly non-existent in India and when executed, it is due to the lack of alternative solutions. This paper aims to establish the importance of recognizing reorganization as a relevant practice that needs to be reflected in the text of the Code. Evidence to prove that reorganization is a relevant and successful practice has been provided for in the paper by drawing analogies with the United States of America's ("USA") bankruptcy practice. The paper is also aimed at defining the role of the Resolution Professionals, who are statutory officers created by the Code with the aim of facilitating insolvency proceedings, and how the proposed definition will result in expeditious resolution of the same. A special focus is placed on reorganization proceedings and how the practice in India should not revolve around liquidation, but should accept reorganization as a viable solution to insolvency and not merely as a last resort.

I. INTRODUCTION

The shifting paradigm of the global economy from a bank oriented to a market-oriented approach marks the necessity of change in the Indian market as well. This change should ideally be kick started by the government by providing protection to corporations against contingencies that lead to winding up, including bankruptcy. In India, the rules related to bankruptcy are embedded in the Code. The objective of the Code, as given in its preamble, is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, individuals, etc., with an emphasis on expeditious resolution and maximization of assets.[1]

The Bankruptcy Legislative Reform Committee, which was constituted in 2014 under the leadership of T.K. Vishwanathan, drafted this legislation.[2] The aim was to bring about the above-mentioned changes with respect to the "Corporate Insolvency Resolution Process" ("CIRP") while giving a comprehensive role to "Insolvency Professionals" ("IP") during the process.

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[1] Insolvency and Bankruptcy Code (Act No. 31/2016) (India), Preamble.
[2] Ashish Pandey, *The Indian Insolvency and Bankruptcy Bill: Sixty years in the Making*, 8 IMJ, 26, 26-27 (2016).

This paper aims to critically analyze the role given to the IP and provide solutions as to how changes should be brought about in this role to achieve a more holistic understanding and realization of the true objective of the Code, i.e. reorganization of corporate persons, partnership firms and individuals to maximize the value of assets and additionally create value.

Chapter II of the Code deals with CIRP. The chapter provides that in instances where any corporate debtor commits a default, a financial creditor, an operational creditor, or the corporate debtor itself may initiate CIRP in respect of such debtor. To initiate this process, the above-mentioned class of people can file an application to the adjudicating authority with details of the default i.e. a misfeasance with respect to financial debt.[3]

The adjudicating authority, which is the National Company Law Tribunal, ("NCLT")[4] for any dispute under this Code, shall examine the details of the application within 14 days and admit it, if it is satisfied that a default exists on the debtor's behalf.[5] Upon such admission by the NCLT, the insolvency process commences.

Once the application has been admitted, the NCLT, by way of an order, will declare a 'Moratorium'[6] which, apart from prohibiting business transactions such as payment for goods, etc., bars all legal proceedings with respect to recovery of financial debts.[7]Moratorium on proceedings against the debtor's assets is one of the few protections in favor of the debtor found within the Code. However, the same is a standard practice across jurisdictions, including the debtor-centric USA.[8] Hence, the adequacy of a moratorium alone, as a protection, needs to be reconsidered. A few additional changes need to be made in order to protect these corporations which, in turn, will help the economy.

The Code, in accordance with its object of expeditious resolution of disputes, has given a statutory limit of 180 days from the date of admission of application to initiate such a process. It has also given

[3] Insolvency and Bankruptcy Code (Act No. 31/2016) (India), §7-10.
[4] Insolvency and Bankruptcy Code (Act No. 31/2016) (India), §5(1).
[5] Insolvency and Bankruptcy Code (Act No. 31/2016) (India), §7 (4).
[6] Insolvency and Bankruptcy Code (Act No. 31/2016) (India), §13.
[7] Insolvency and Bankruptcy Code (Act No. 31/2016) (India), §14.
[8] 16 U.S.C. §.5154(2016) (Moratorium).

some leeway in the time limit with an extension of up to 90 days, permissible with the majority approval of the Committee of Creditors ("CoC') along with the approval of the NCLT.[9]

To achieve the objective of expeditious insolvency proceedings, the Code has given sanction to statutory officers. IPs are recommended by the applicant while filing an application before the NCLT to initiate CIRP. The NCLT, upon admitting such application, kick starts the process and appoints the interim IP recommended by the applicant. Such appointment shall be done within 14 days from the date of commencement. In instances where no recommendation for an IP is made in the application, the NCLT along with the Insolvency and Bankruptcy Board of India ("IBBI") appoints an IP.[10]

The duties of an IP are quite expansive with regard to the role and responsibility cast upon them.[11] Before the appointment of the permanent Resolution Professional ("RP) by the CoC, an intermediary is appointed who is also assigned duties. The duties of an interim IP encompass the duties of the permanent RP.[12] Such duties include, but are not limited to:

- Public announcement of CIRP proceedings being initiated.
- Management of affairs of corporate debtor as the debtor's powers are suspended by the Code.[13]
- The officers, managers and the executive body of the corporations, which include directors of the corporate debtor, shall report to the interim resolution professional.
- The professionals have access to the records, documents and accounts of the debtor.
- IP has custody over the assets of the debtor.
- The IP also has to make endeavours to *protect and preserve the value of the property* of the debtor and manage the company as a *going concern.*[14] As a part of those functions, the IP can enter into contracts, hire accountants, amend contracts, raise finances and take over the day to day management of a company.

[9] Insolvency and Bankruptcy Code (Act No. 31/2016) (India), §12.
[10] Insolvency and Bankruptcy Code (Act No. 31/2016) (India), §16.
[11] Insolvency and Bankruptcy Code (Act No. 31/2016) (India), §§17-18.
[12] Dhananjay Kumar & Gautam Sundaresh, *Insolvency Professionals under India's new Insolvency Regime*, 8 Emerging Markets Restructuring Journal, (2019).
[13] Insolvency and Bankruptcy Code (Act No. 31/2016) (India), §17 (b).
[14] Insolvency and Bankruptcy Code (Act No. 31/2016) (India), §20.

- The interim IP shall bring the creditors together constituting the CoC in accordance with S.21 of the Code and this ends the duties of the interim IP as the CoC, in their first meeting, appoints the RP.
- RP appointed by CoC shall conduct the CIRP and take over the management of the corporate debtor from the interim IP.
- Maintaining transparency during the process by filing the necessary information with the information authority.
- S.29 mandates the RP to prepare an information memorandum in a manner prescribed by the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("Regulations, 2016").
- A preliminary memorandum is to be prepared by the interim RP as per the 2016 Regulations to provide the CoC with sufficient information subsequent to their first meeting. This information memorandum is to contain details as given in Regulation 36(2) of Regulations, 2016 which lays down the groundwork for a resolution plan.
- To facilitate a resolution plan.

A resolution plan is the plan of action drawn up by the RP and this plan of action needs to meet the minimum requirements laid down in S.30 of the Code read with Regulation 38(2) of the Regulations, 2016. These requirements enlist that the plan provides for:

- Payment of insolvency resolution process costs as a priority over fulfillment of debts.
- Repayment of operational creditors' debt, which is not to be less than the liquidation value and is to be done within 30 days from the approval of the resolution plan.
- A preference is to be given to dissenting financial creditors.
- Management and control of the affairs of the corporate debtor after receiving approval.
- Implementation and supervision of the plan.
- No contravention with existing laws.

An overlook of all the duties of the interim IP and RP highlight how the Code directs them towards maintaining the value of assets and for speedy disposal of such assets which, much like the Code, is creditor driven.

The duties and roles of these professionals give them the power to take over the functioning of the company. The professionals, after taking over the company, are directed by the Code to *protect and preserve the value of the property of the corporate debtor*. The Code has not provided for the IP to act in a way to *aggrandize the value of the property of the debtor,* neither have there been any efforts made by the legislators of the Code to direct the IP to help in reorganization whenever possible, rather than liquidation. This is not in accordance with the concept of *going concern.*

Going concern has no set definition, but the most accepted definition is, "in the absence of evidence to the contrary, the entity is viewed as remaining in operation indefinitely".[15] This definition works well with how bankruptcy proceedings are dealt with in the US and the freedom given to corporate debtors, all of which will be elucidated further in this paper. However, this definition cannot be adopted in India as the law does not give the freedom to debtors to operate their corporation, but rather focuses on the satisfaction of the creditors.

No system is perfect and one cannot be used in place of the other. However, India needs to develop its law with the aim of helping corporations which face bankruptcy as a hard reality in light of the failing economy.[16] The Code, in its wordings, should reflect the legislature's effort to view "as an entity operating indefinitely" when the authorities (NCLT in the Indian Context) have recognized that the entity can operate after being treated as a *going concern* under the Code.

II. USA SCENARIO

The USA has been referred to as the 'land of opportunity' by many renowned scholars such as Christopher Hitchens and Bruce Campbell to name a few and, reflective of such an ideal and community, the laws have been engrained with the concept of giving opportunities to succeed. A legal system which is considerably different than the Indian system is being recommended here. This will help to adapt a proven and successful model whereby focus has been given to reorganization of companies rather than liquidation of their assets which is essential to ensure that small businesses as well as huge companies do not just go into oblivion in the present situation. Such support shown to

[15] James M. Fremgen, *The Going Concern Assumption: A critical appraisal*, 43 Accounting Rev. 649, 649-650 (1968).
[16] Reuters, India faces revenue fall as Coronavirus bites economy, THE ECONOMIC TIMES (Mar. 16, 2020, 4:20 P.M.), https://economictimes.indiatimes.com/news/economy/finance/india-faces-revenue-fall-as-coronavirus-bites-economy-sources/articleshow/74593407.cms.

keeping business alive will have a positive impact on attracting more opportunities to India. A practice such as insolvency can be translated in India considering the need for businesses to stay alive in India.

Title 11 of the United States Code is also referred to as the US Bankruptcy Code. This code was initially legislated and passed in 1800, but as time passed, amendments had to be made and the code was changed in accordance with the necessities of the society. The most recent amendment to the code came in the form of the Bankruptcy Abuse Prevention and Consumer Protection Act, 2005 with the aim to protect credit card companies from losing out on money as more and more individuals filed for bankruptcy to evade their dues.

Before analysing the debtor driven provisions, it is necessary to take into account how a debtor centric code incorporated the abovementioned amendment to protect credit card companies, while the Indian code, which is creditor driven, has not provided an inch of protection to debtors- a change that is necessary.

Chapter 11 of the US Bankruptcy Code deals with a form of bankruptcy proceeding that involves reorganization of corporate debtor's business affairs, debts and assets to ensure that the corporations continue operations. The chapter envisages doing that by allowing debtors to compromise with creditors to come up with a resolution plan. This chapter is generally utilized by corporations only when they are positive that reorganization will be successful due to the exorbitant fees to be paid for a Chapter 11 proceeding.

A Chapter 11 proceeding begins with the filing of an application. To file an application under this chapter, the applicant, during the preceding 180 days, should not have a prior bankruptcy petition dismissed due to debtor's willful failure to appear before the court or failure to comply with orders of the court.[17] In addition, no applicant may be a debtor under this Chapter or under this code, unless the applicant, within 180 days before filing, has received credit counseling from an approved credit counseling agency.[18]

[17] Bankruptcy Act, 11 U.S.C. §§ 109(g), 362(d)-(e) (1978).
[18] Bankruptcy Act, 11 U.S.C. §§ 109, 111 (1978).

After the acceptance of this application, the corporate debtor is given possession of his/her company and is allowed to form a reorganization plan with the protection offered by a moratorium.[19] In situations where the debtor has not been able to draw up a reorganization plan in the stipulated period, the creditors are directed to form a reorganization plan rather than initiating liquidation proceedings.

S.1107 of the US Bankruptcy Code provides for the debtor in possession to be in a fiduciary position , with the rights and powers over the affairs of the company placed in the hands of the statutory official known as the U.S. Trustee in cases where the debtor has defaulted in the process or cheated the creditors.[20] The duties set forth entail accounting for property and examining and objecting to claims and filing informational reports as required by the court and U.S. Trustee, such as monthly operating reports. The debtor has other rights, which are subject to the court's approval, to employ attorneys, accountants, appraisers or other professionals for assistance during the insolvency proceedings. Other duties of the debtor include filing tax returns and reports that are deemed necessary by the court.

The U.S. Trustee or bankruptcy administrator's role is very much similar to the role of an IP in India, but he is not appointed at the beginning of the proceedings. As stated above, only in certain cases where the court deems it necessary, a trustee is appointed. His role is more of a supervisory and administrative one than the hands on deck role given to the IP in India. His duties include monitoring the debtor in possession's operation of the business and submission of operating reports and fees.[21] He also monitors applications for compensation and reimbursement by professionals and conducts the CoC meetings.[22] The monitoring done by a trustee includes making the debtor report its monthly income, operating expenses, establishing bank accounts, paying current employees and also taxes of the company.

The committee of creditors also plays a role in Chapter 11 bankruptcy proceedings. The committee is appointed by the trustee and the committee consults with the debtor about the operations and

[19] Bankruptcy Act, 16 U.S.C. §.5154 (1978).
[20] Bankruptcy Act, 11 U.S.C. §. 1106 (1978).
[21] Bankruptcy Act, 11 U.S.C. §. 1107 (1978).
[22] Bankruptcy Act, 11 U.S.C. §. 341 (1978).

investigates into the debtors' actions only in certain instances. The committee of creditors does not get involved in the operation of the debtor corporation but rather acts as a safeguard to ensure the proper management.[23] These roles assigned to the trustee and committee of creditors underscore how the provision acts in benefit of the debtor and allows the debtor to revitalize the corporation so that it can sustain in the future.

Committee of creditors, though seemingly a supervisory body, plays a huge part in formulating the plan as it needs the approval of 2/3rd of the CoC representing 60% of the debt owed. However, the dissent by the CoC can be overturned by the court which takes an initiative to ensure that reorganization takes place if there's no evidence to the contrary of the *going concern* assumption being applied.[24]

An understanding of the above practice adopted by the US legal system towards reorganization in bankruptcy proceedings highlights how their bankruptcy code is *debtor centric*. Such a law not only encourages investment but also encourages debtors to take initiative and be inventive, which has helped transform the US economy.[25]

Admittedly, this model, like any other model, has its drawbacks. However, it is important to highlight its efficacy with the rate of resolving insolvency in the USA, which ranks 2nd in the World Bank statistics on Insolvency framework, while India ranks 52nd. India's low ranking clearly creates a doubt among corporations if the insolvency costs will weigh them down financially. It also acts as a hindrance against ease of doing business in India, clearly reflective in the World Bank's "Ease of Doing business Index" with US ranking 6th whereas India's rank being 63rd.[26] Apart from the sense of protection offered in doing business, reorganization helps in preserving corporations whose dissolution will lead to a huge economic loss.

[23] Bankruptcy Act, 11 U.S.C. §§1102, 1103 (1978).
[24] Edward B. Shils, *A Review of Bankruptcy Law in the USA*, 60 ISSR 3, 13-14 (1985).
[25] Norman S. Buchanan, *The Economics of Corporate Reorganization*, 54 Quarterly Journal of Economics 28, 32-40 (1939).
[26] Doing business project, *Ease of Doing Business Index*, WORLD BANK, (Mar. 17, 2020, 5:00 PM), https://data.worldbank.org/indicator/IC.BUS.EASE.XQ.

The reorganization of corporate giants such as General Motors,[27] United Airlines, K-Mart to name a few, which are operating as of now, highlight how the system in the US provides a sense of safety to investors and inventors alike to set up their shop in USA.

III. SUGGESTIONS AND CONCLUSION

In light of the successful model analyzed above, there arises a need to alter the role of IP to facilitate reorganization of corporations in India. The Code, despite highlighting the importance of reorganization in its preamble, has not taken any effort anywhere else in the Code to promote such proceedings, and has instead directed efforts to ensure that CIRP ends in liquidation.

These efforts made by the Code to end in liquidation are not expeditious either, with the first major insolvency case of Essar steel being wrapped up after 3 years[28] since the passing of the Code. Another major insolvency case is the one of IVRCL which was wrapped up after 3 years as well, after becoming the first company under the Code to be sold as a *going concern*.[29] It is also interesting to observe how the recent Jet Airways bankruptcy case is being dealt with. NCLT, Mumbai has given the company an extension of 90 days, after the completion of 270 days period statutorily given,[30] to form a resolution plan as the CoC were not able to find any potential buyers, showing how much of an afterthought reorganization truly is in India.

These delays occur due to the RP not being professional; this can be attributed to the lack of oversight by the adjudicating authority, CoC having excessive authority over the actions of the RP and the corporate debtor. The authority of the CoC's decision has been backed by the Supreme Court as well, in the Essar steel case decision.[31]No amount of consideration or discretion is given to the debtor

[27] Dan Bigman, *How General Motors was really saved: The untold story of the Most important Bankruptcy in US* history, FORBES (Mar. 12, 12;30 PM), https://www.forbes.com/sites/danbigman/2013/10/30/how-general-motors-was-really-saved-the-untold-true-story-of-the-most-important-bankruptcy-in-u-s-history/#2c19d0d27eea.
[28] Prince Mathew Thomas, *Essar Steel Insolvency Timeline: A saga of many twists and turns in IBC's biggest case,* MONEY CONTROL (Mar. 16, 2020, 5:45 PM), https://www.moneycontrol.com/news/business/companies/essar-steel-insolvency-timeline-a-saga-of-many-twists-and-turns-in-ibcs-biggest-case-4641971.html.
[29] Chitranjan Kumar, *IVRCL first IBC case to be sold as 'Going Concern,* BUSINESS TODAY (Mar. 18, 2020 6:00 PM), https://www.businesstoday.in/current/corporate/in-a-first-gabs-megacorp-acquires-ivrcl-rs-1654-crore-under-ibc/story/397464.html.
[30] MaulikVyas, *NCLT allows 90 more days to find out the revival plan for Jet airways,* ECONOMIC TIMES INDIA, (Aug. 27, 2020 11:51 A.M.), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/nclt-allows-90-more-days-to-find-out-the-revival-plan-for-jet-airways/articleshow/74707373.cms?from=mdr.
[31] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, Civil Appeal No. 8766-67 of 2019.

as the authority to make decisions is vested entirely with the RP and the CoC. It is to be noted that it becomes imperative to keep the debtor in loop with respect to reorganization so that the debtor may continue operations after the resolution of insolvency proceedings. To smoothen this process the following changes need to be made, some of which are inspired by the US model and can be translated into Indian law:

1. Power must be given to NCLT to determine whether reorganization or liquidation should be executed depending on the documents filed with the application. The application has to be attached with documents of the corporation, including their account statements, etc. If these prove that the corporation can exist as a *going concern*, then reorganization should be ordered to avoid further legal disputes, thus making it a speedier process than the existing system. This change will help in cases similar to Jet Airways bankruptcy case, as mentioned above, where the court can, in the initial steps, direct the company towards reorganization instead of waiting 270 days before the CoC comes to that realization. This highlights how, if the adjudicating authority takes over the reins, the process becomes more expeditious and can also help in stopping the process from leaning towards liquidation, while being fair.
2. Every CoC decision should come under review before the NCLT. If the CoC unfairly invalidates reorganization, even though there is a more than "fair and equitable" plan supported by evidence, then the court should favour reorganization depending on the facts and circumstances.[32]
3. In cases of reorganization, the power of RP should be supervisory in nature, reflective of the position of trustee in Chapter 11 cases of the US Bankruptcy Code. As part of his supervisory functions, he should act as an intermediary between the NCLT and the debtor corporation, helping in compliance related matters. This supervisory role gives a sense of protection to the creditors that the debtor is not acting in a malicious manner.
4. Also, in cases where the corporate debtors act in a malicious way and only when there is evidence to prove such actions, the RP should be told to take over all powers from the debtor as given in the existing code. However, the powers of RP should be altered in order to ensure that he works to aggrandize the value of the assets of the company rather than maintaining them, as it is impossible for the assets of an insolvent corporation to maintain their value. Efforts need to be made to increase their value.

[32] G. Randall Price, *Reorganization: Fair and Equitable Plan, 38, 5 Mich.L.R.* 695, 696-697 (1940).

These suggestions are made in light of the impracticality of mechanically adopting US practices into Indian law. Hence, the suggestions of the authors regarding the RP becoming a supervisory authority requires a detailed further discussion.

Unlike the US system, the Code cannot be made debtor centric due to the failure of the Sick Industrial Companies Act, 1985 ("SICA")[33] and the value given to protection of creditors. Hence, the RP in theory will be in charge of the company but the day to day operation should be left to the debtor, as the debtor needs to understand how the reorganized assets, debts and operations affect his company to enable him to operate it after a successful reorganization.

Even though these changes might seem like a call back to SICA, the changes suggested in this paper do not stand to make the Code *debtor centric* like the impugned legislation. Rather, they make it *debtor friendly* in what remains a very creditor driven code.

In the situation of a failing economy, offering hope to failing corporations should be the government's top priority and the changes suggested in this paper are a small step towards reviving our economy.

[33] Sick Industrial Companies Act (Act No. 1 of 1985) (India).