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Asset wise resolution of Corporate Debtor: Liquidation in the garb of Resolution?

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1. INTRODUCTION

One of the crucial aim of insolvency laws around the world, which also reflects in the preamble to the Insolvency and Bankruptcy Code, 2016 ("**IBC**") is maximization of the value of the assets of the Corporate Debtor ("**CD**") undergoing insolvency.[2] However, a CD reaching the stage of Corporate Insolvency Resolution Process ("**CIRP**"), will often have functional and non-functional aspects to its business and related undertakings. The key variance in functionality of the assets has the potential of reducing the number of Prospective Resolution Applicants ("**PRAs**") who may be interested in the resolution of the CD as a whole. However, there are also PRAs who may be interested in select business units or assets of the CD rather than the entire business.[3] This could translate into superior commercial outcomes as it has been argued that the sum of parts may be larger than the whole. This means that the sale of individual assets or business of the CD might be economically more efficient than the sale or CIRP of the CD as a whole. An increase in these types of scenarios and business models, has led to the increase in asset-wise resolution method of the CD.[4]

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[2] The preamble to the Insolvency and Bankruptcy Code, 2016 states: "*An act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto* "; Donald S Bernstein, Timothy Graulich, Christopher S Robertson and Mary Kudolo, 'The Insolvency Review: USA' *The Law Reviews* (October 25, 2022); Horst Eidenmueller, 'Comparative Corporate Insolvency Law' European Corporate Governance Institute (ECGI) – Law Working Paper No. 319/2016, Oxford Legal Studies Research Paper No. 30/2017 (June 28, 2016).

[3] 'Implementation of Insolvency and Bankruptcy Code – Pitfalls and Solutions', Standing Committee on Finance (2020-21) (32nd Report), Ministry of Corporate Affairs, 2021.

[4] Hon. Justice (Dr.) Nnamdi Dimgba, *et al*., - Troubled Asset Resolution: In Search of the Best Approach – The Gravitas Review of Business & Property Law March 2018 9(1).

However, while the above-mentioned method of resolution ensures maximization in the value of the assets of the CD, it also breaks apart the CD. This goes against the principle of keeping the CD as a going concern during CIRP and the principles of corporate personality on the basis of which companies across jurisdictions operate. Balancing the twin objectives of maximization in the value of the assets on one hand, and keeping the CD as a going concern on the other hand, is a precarious exercise, which merits a meticulous approach. Without the same, it is easy to forego one at the cost of the other, which will ultimately not align with the foundational principles on which insolvency law and companies law have been founded.

Against this background, the goal of this paper is to build upon the discourse on intersection of insolvency law and companies' law. The goals and foundational principles of each law have the potential of impacting the other.[5] Therefore, it is necessary to align and balance them in situations where they might seem to be at cross-roads with each other. One such illustration would be in case of asset-wise resolutions, as the essence of a distinct corporate personality of an entity would be lost upon a piecemeal sale of assets.[6]

In this paper, we argue that the asset wise method of resolution, even though seemingly at crossroads with the foundational principles of insolvency law and companies law, is here to stay. The next logical step then, is to identify and address issues to ensure alignment with the foundational principles, while also preserving the commercial rationale of this method.

In Part II, we highlight the amendment in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") and the Ministry of Corporate Affairs consultation paper dated January 18, 2023 on asset wise resolution ("**MCA Consultation Paper**") and discuss their impact on the existing insolvency regime in the given context. In the next section, we analyse the discordance between the concepts of keeping the company as a going concern during insolvency and the spirit of the Indian insolvency law regime with the asset wise resolution method of insolvency. However, we also appreciate situations and business models where this

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[5] Bob Wessels, 'Corporate Groups: Bringing Insolvency Law and Corporate Law Together' 15 Eur. Company L. 41 (2018).

[6] Please see Part III of the paper.

method of resolution might be beneficial and warranted. In Part IV, taking note of the business models and corporate structures where asset wise resolution might be required, we analyse issues that would need to be addressed to ensure efficient and practical implementation of this model. We offer concluding remarks in Part V of the paper.

2. TRACING THE BACKGROUND OF THE AMENDMENT

In this part, we trace the existing insolvency law on the issue of asset wise resolution and discuss the recent amendments. We aim to highlight the rationale behind the same, keeping in mind the various conflicts that may arise during its application.

2.1. Amendment in the CIRP Regulations

On September 16, 2022, the Insolvency and Bankruptcy Board of India ("**IBBI**") modified the CIRP Regulations ("**Amendment**").[7] The CIRP Regulations were overhauled from a variety of angles as a result of the Amendment. The most significant change, however, continues to be the addition of provisions regarding the sale of one or more assets of the corporate debtor through resolution plans.[8] The previous regime only allowed for resolution plans to be submitted for the corporate debtor's CIRP as a whole. The new regime proposes a significant departure from the previous status quo by allowing the assets of the CD to be resolved through different resolution plans submitted by numerous resolution applicants.[9] This allows for several resolution processes to be conducted for each of a corporate debtor's individual assets.

In order to appreciate the scale and impact of the changes brought forth by the amendment, it is necessary to understand the manner in which it affects the status quo. The CIRP Regulations prescribe the procedure to be carried out for CIRPs in addition to the IBC. A request for resolution plans ("**RFRP**") must be issued by the resolution professional ("**RP**") in accordance with Regulation 36B(1) of the CIRP Regulations.[10] This may be issued to PRAs on the provisional list or to those who have appealed the RP's decision to exclude them from the

[7] Insolvency and Bankruptcy Board of India amends the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2016.

[8] Insolvency and Bankruptcy Board of India amends the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2016

[9] https://www.lexology.com/library/detail.aspx?g=c3a1e936-f8c9-4f01-a471-f1b74e96bd81

[10] Regulation 36B(1), Insolvency and Bankruptcy Board of India (Insolvency Resolution Procedure for Corporate Persons) Regulations 2016.

provisional list of prospective resolution applicants.[11] After the RP's request for expressions of interest ("**EOI**") for the CD as a whole, the RP issues the RFRP that covers all assets of the corporate debtor.[12]

The RP is allowed, with the committee of creditors' ("**CoC"**) authorization, to re-issue the RFRP if the resolution plans submitted in response to the RFRP are unsatisfactory, provided that the request is made to each prospective resolution applicants on the final list of prospective resolution applicants as specified in Regulation 36B(7) of the CIRP Regulations.[13] If the RFRP were to be issued again, it would indicate that the previous procedure is still being followed (i.e., a request for resolution plans for the Corporate Debtor as a whole).[14]

According to the newly introduced Regulation 36B(6A) of the CIRP Regulations, which was introduced on September 16, 2022, the RP is permitted, with the approval of the CoC, to issue an RFRP for the sale of one or more assets of the Corporate Debtor if he does not receive a resolution plan in response to the RFRP (as against resolution plans being found unsatisfactory).

"If the resolution professional, does not receive a resolution plan in response to the request under this regulation, he may, with the approval of the committee, issue request for resolution plan for sale of one or more of assets of the corporate debtor."

2.2. Change in Status Quo?

Traditionally, in a CIRP, all of the assets of the CD would be resolved together through the resolution plan which is usually required to provide for treatment of assets and liabilities of the CD.[15] It has been noted, over the course of the implementation of the IBC, that the diversity and difference in functionality of assets owned by the CD has impacted the PRAs decision of submitting a resolution plan making the pool of resolution applicants fairly narrow.[16] For

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[11] Regulation 36B, Insolvency and Bankruptcy Board of India (Insolvency Resolution Procedure for Corporate Persons) Regulations 2016.

[12] Insolvency and Bankruptcy Board of India (Insolvency Resolution Procedure for Corporate Persons) Regulations 2016.

[13] Regulation 36B(7), Insolvency and Bankruptcy Board of India (Insolvency Resolution Procedure for Corporate Persons) Regulations 2016.

[14] Insolvency and Bankruptcy Board of India (Insolvency Resolution Procedure for Corporate Persons) Regulations 2016.

[15] Frequently Asked Questions on Corporate Insolvency Resolution Process, Insolvency and Bankruptcy Board of India, available at https://ibbi.gov.in/uploads/faqs/CIRPFAQs%20Final2408.pdf.

[16] Frequently Asked Questions on Corporate Insolvency Resolution Process, Insolvency and Bankruptcy Board of India, available at https://ibbi.gov.in/uploads/faqs/CIRPFAQs%20Final2408.pdf.

instance, this may be demonstrated in cases where during the resolution of an entity, PRAs are only interested in specific assets of the CD. Research has evidenced that loosening the requirement of having PRAs bid for the combination of assets together may encourage PRAs to submit resolution plans aimed at particular assets based on location, functionality, and nature.[17]

This can be traced back to the 32nd Standing Committee Report on Finance,[18] where it has been noted that bidders may be more interested in certain company divisions or assets than the Corporate Debtor's whole enterprise. If allowed, this would produce holistically better commercial results than those which are the outcome of a single bidder acquiring the entirety of the Corporate Debtor. The Report, as quoted below, can be seen to already allow partial sale of assets of the Corporate Debtor with the insertion of the following provision in the Code:

"More Flexible Resolution Plans

7. Sec 5(26) of IBC defines a resolution plan as a plan proposed by RA for insolvency resolution of the CD as a going concern. RPs, CoCs, and certain orders of the NCLT indicate that the term 'going concern' implies that the resolution plan must result in disposal of the entire business & and operation of CD under 1 plan. Actual experience has shown that bidders may be interested in selected business units or assets, rather than the entire business…. However, the RP does not currently have the flexibility within the IBC to dispose of the CD across multiple bidders."

2.3. Proposed Discussion Paper

The Discussion paper dated June 27, 2022,[19] noted that a CD would have both functional and non-functional assets which can be distinguished by geographic locations and utility for businesses. This can also translate into situations where PRAs are interested in one of these assets based on their functionality, location or utility. In such a scenario, the requirement for additional investment from the prospective resolution applicant's end may be so high that it deters them from applying for resolution of the corporate debtor. The Paper provides that owing

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[17] Ilya Kokorin, 'The Rise of 'Group Solution' in Insolvency Law and Bank Resolution' 22 European Business Organization Law Review 781-811 (2021).

[18] 'Implementation of Insolvency and Bankruptcy Code – Pitfalls and Solutions', Standing Committee on Finance (2020-21) (32nd Report), Ministry of Corporate Affairs, 2021, ¶7.

[19] Discussion paper on changes in the corporate insolvency resolution process to reduce delays and improve the resolution value (27 th June, 2022) https://ibbi.gov.in/uploads/whatsnew/9a71f15c9b21a7dd626a8ca47846a113.pdf

to the fact that CIRP Regulations provide for the possibility of re-issue of RFRP,[20] the RP and CoC should be permitted to delve into the possibility of resolving the corporate debtor through resolution of part assets and businesses by allowing submission of different resolution plans for these part assets and businesses, while a revised RFRP is issued. The Paper notes that there may arise a need to revise the evaluation matrix accordingly and highlights that this may be done when the PRA indicated interest at the EoI stage but no resolution plan has been received to the CoC's satisfaction.[21] Accordingly, the Paper proposed the following amendment to the CIRP Regulation:

"37A Resolution of assets of the corporate debtor (1) The resolution professional and the creditor may in cases where there were prospective resolution applicants expressing interest in the corporate debtor but no resolution plan was received after the time for submission of resolution plan has lapsed explore to resolve part of the assets of the corporate debtor. (2) A resolution under this regulation shall be enabled by modification of the request for resolution plan issued as provided in regulation 36B."

2.4. Tracing the Impact of the Amendment

However, instead of amending the regulation as proposed by the Discussion Paper, the IBBI Press release amended the existing Regulation 36B. The Regulation 36B(6A) was conceptualized with the aim and objective of maximising the value of realizable assets in CIRP, according to the IBBI press release dated September 2022. It allows for the possibility of one or more assets of the Corporate Debtor assets being sold under a plan to one or more prospective resolution applicants who will then submit resolution plans for those assets. Regulation 37(1)(m) was also introduced. It provided that resolution plan may accommodate for the possibility of sale of one or more assets of CD to one or more successful resolution applicants, and the manner of dealing with the remaining assets.

While these were heralded as a step forward in the complex landscape of asset resolution, it is imperative to take into account that the insolvency regime in India never expressly barred sale of assets as a part of the Resolution process. While Regulation 29 provided for sale of assets that lie outside the ordinary course of business with a vote of 66% of the CoC, it does

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[20] Regulation 37, Insolvency and Bankruptcy Board of India (Insolvency Resolution Procedure for Corporate Persons) Regulations 2016.

[21] Discussion paper on changes in the corporate insolvency resolution process to reduce delays and improve the resolution value (27 th June, 2022) https://ibbi.gov.in/uploads/whatsnew/9a71f15c9b21a7dd626a8ca47846a113.pdf

not provide for distribution of the proceeds to the lenders. Thus, it can be viewed as a sale outside of the Resolution plan. In the Jet Airways case, such a sale was even affirmed.[22] Further, even Regulation 37 provides that resolution plans may accommodate for business transfer, partially or in entirety, sale of assets, etc.[23]

2.5. **MCA Consultation Paper**

The MCA issued a call for comments on the proposed IBC modifications on January 18, 2023.[24] The MCA Paper confirms that resolution plans may be requested for specific assets of the Corporate Debtor, either individually or collectively, but clarifies that at least one (1) resolution plan must call for the Corporate Debtor to be resolved insolvently as a going concern, which may include provisions for its corporate restructuring and other necessary conditions under the IBC and CIRP.[25]

This highlights that the primary objective of such a change was to ensure that the CD undergoes resolution in a manner that its value and the value of its assets are maximized as opposed to its liquidation. Thus, prospective resolution applicants should have the flexibility to engage in an asset-wise resolution.

3. UNDERSTANDING THE IMPACT OF THE AMENDMENT

One of the key objectives of the insolvency regime in India, that has been given more emphasis through the IBC, is the resolution of an entity as a going concern.[26] This is to be done in order to maximize the value of the assets and ensure minimum deterioration of the business of the

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[22] Regulation 29, Insolvency and Bankruptcy Board of India (Insolvency Resolution Procedure for Corporate Persons) Regulations 2016.

[23] Regulation 37, Insolvency and Bankruptcy Board of India (Insolvency Resolution Procedure for Corporate Persons) Regulations 2016.

[24] Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016 available at https://www.mca.gov.in/content/dam/mca/pdf/IBC-2016-20230118.pdf

[25] Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016 available at https://www.mca.gov.in/content/dam/mca/pdf/IBC-2016-20230118.pdf

[26] Understanding the IBC, Key Jurisprudence and Practical Considerations, Insolvency and Bankruptcy Board of India, available at https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf. See also NCLT Mumbai order in the matter Edelweiss Asset Reconstruction Company Ltd. vs, Bharati Defence and Infrastructure Ltd. dated January 14, 2019 (CP292/I&B/NCLT/MAH/2017). The NCLT emphasised that the resolution plan should be a plan for insolvency resolution of the CD as a going concern and not for the addition of value and intended to sale the CD. The NCLT rejected the Edelweiss ARC resolution plan due to multiple reasons and directed the CoC and RP to initiate the process of sale of the CD unit as a whole, on a going concern basis.

corporate debtor.[27] The notion of value maximization of entities undergoing resolution ties in with the larger macroeconomic principles of economic growth and development of the country.[28]

The CIRP mechanism was devised in order to resolve companies that are undergoing financial distress, in contrast to liquidation, which is targeted at maximizing the value of realizable assets as received by creditors.[29] The key difference between the two processes is the resolution of the entity as a going concern.

The Bankruptcy Law Reforms Committee cited that the 'key economic question' relating to modalities in which the assets of the corporate debtor shall be disposed is one that is for the sole consideration of the creditors and the law cannot be 'prescriptive' of the same.[30] The policy intent of the lawmakers in relation to resolution plans, as evidenced by Notes on the Clause 31 of the IBC Bill, state that "…a resolution plan may provide for any proposal for its insolvency resolution including sale of the business as a going concern…".[31] This highlights the inclination towards resolution of the entity as a going concern or reorganization of its business and capital structure as opposed to liquidation and piecemeal sale of assets.[32]

The resolution of an entity as a going concern, in contrast to liquidation, significantly results in reduction of exposure to 'ex ante uncertainty '[33] for new investors. This is an intended and positive outcome for creditors as well, who may be able to yield a higher value of return.

However, the recent change is not consistent with this key principle. The concept of corporate personality of entities in companies law is intertwined with that of entities as going concern in insolvency law.[34] The former implies that each entity has its independent legal personality. The

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[27] Understanding the IBC, Key Jurisprudence and Practical Considerations, Insolvency and Bankruptcy Board of India, available at https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf

[28] Understanding the IBC, Key Jurisprudence and Practical Considerations, Insolvency and Bankruptcy Board of India, available at https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf

[29] M.S. Sahoo & A. Guru 'Indian Insolvency Law' 45 Vikalpa: The Journal for Decision Makers 2, 69–78 (2020).

[30] The report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design, Bankruptcy law Reforms Committee (2015).

[31] Debanshu Mukherjee & Oitihjya Sen, IBC and the On-Going Crisis: A Case for Allowing Going Concern Sales in Resolution, available at https://vidhilegalpolicy.in/blog/ibc-and-the-on-going-crisis-a-case-for-allowing-going-concern-sales-in-resolution/ (September 11, 2020).

[32] Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016 available at https://www.mca.gov.in/content/dam/mca/pdf/IBC-2016-20230118.pdf

[33] Debanshu Mukherjee & Oitihjya Sen, IBC and the On-Going Crisis: A Case for Allowing Going Concern Sales in Resolution, available at https://vidhilegalpolicy.in/blog/ibc-and-the-on-going-crisis-a-case-for-allowing-going-concern-sales-in-resolution/ (September 11, 2020).

[34] Lynn M. LoPucki & Joseph W. Doherty 'Bankruptcy Fire Sales' 106 Michigan Law Review 1.

latter is based on this principle that an entity must be rescued and reorganised, but in doing so, it shall not lose its own corporate identity. As per Goode on Principles of Corporate Insolvency Law, the subject of insolvency proceedings is the particular corporate entity that has become insolvent, and this focus is accentuated by the reluctance of English law to pierce the corporate veil.[35] However, by allowing for split sale of assets, the objectives of insolvency and companies law get defeated as it is only aimed at maximization of value of assets and not at preserving the entity itself.

An entity may have multiple going concerns with stand-alone businesses and assets. The amendment does not address the interconnected nature of the businesses and the assets. Furthermore, the complex nature of businesses in economies today means that they may have undertakings in different countries or situations where they are housed in different or common vehicles.

Notwithstanding the above, it is imperative to note that there might still be scenarios where asset wise resolution is the best suited method. This may involve situations where the sale of assets of the business is conducted without determining the rights of repayment to each class of creditors. Thus, the assets may be sold separately, without being influenced by inter creditor negotiations etc. This may occur where the value of assets would deteriorate significantly over a period of time as may be characterized by insolvency proceedings. This is in furtherance of the melting ice-cube theory,[36] which provides that if the risk of reduction in value is higher for creditors, then they might engage in asset wise resolution. This may also be illustrated through the recent insolvency proceedings of Videoconn and Reliance Capital. In the former, the individual nuances and diversity in each of the businesses of the entity only furthered the case for an asset wise resolution. Whereas, in the case of Reliance Capital, it was observed that the holding company merely existed in a capacity where it held shares of its subsidiary companies and did not have a business or inherent personality of its own as the various businesses were distinct and did not have an element of interconnectedness.[37] Thus, allowing for asset wise resolution in limited scenarios, such as these, where this entails preservation of value of the

[35] Goode on Principles of Corporate Insolvency Law, Fifth Edition, by Kristin Van Zwieten, pg. 29-30 (2020).
[36] Melissa B. Jacoby & Edward J. Janger 'Ice Cube Bonds: Allocating the Price of Process in Chapter ii Bankruptcy' 123 Yale Law Journal 862 (2014).
[37] Priyanka Gawande, NCLT Stays Reliance Capital Debt Resolution process, available at https://www.livemint.com/companies/news/nclt-stays-reliance-capital-debt-resolution-process-11672769801090.html (January 4, 2023).

assets, does not defeat the objectives of insolvency law. However, it is essential that such scenarios be carefully meted out before such sales are undertaken.

Thus, despite the principles of resolution of an entity as a going concern and maximization of value of assets being at crossroads, it is crucial that these are reconciled in a manner that is consistent with the principles and objectives of the insolvency law regime as well as company law. The next section addresses this situation by highlighting a few issues that need to be addressed to ensure this reconciliation.

4. ISSUES THAT NEED TO BE ADDRESSED

The previous section highlighted the disconnect between the proposed asset wise method of resolution of a CD with the goals of insolvency law and corporate personality and going concern concept of a company. We also appreciated situations and business models where asset wise resolution of the CD might be more beneficial.

However, even in these situations there will be issues in the implementation and interpretation of the law which will have to be clarified. While this method of resolution is a laudable step, its practice may need formulation of other guidelines which prescribe objective criteria for taking such a process forward. The amendment does little to address the intricacies associated with the change, This section identifies some of these intricacies and potential ways in which they can be dealt with.

4.1 Trigger for asset wise resolution

The amendment in the CIRP regulations mentions "re-issue" of the RFRP for sale of part of the assets of CD, where no resolution plan has been received for a CD as a whole.[38] However, there is merit in allowing asset wise resolution from the beginning. If upon auditing the balance sheets and computing the liabilities of the business, it becomes apparent that a split sale of assets would be beneficial, then an entity might not need to wait to receive resolution plans in the following manner as it will lead to deterioration in the value of the assets.[39]

[38] CIRP Regulations, Regulation 36B(7).
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Additionally, even in situations where the Expression of Interests' ("**EOIs**") are not received for the CD in its entirety, there should be provisions which allow EOIs to be invited for specific assets of the CD. This may be done in addition to the pursuit of inviting EOIs for the entity as a whole. Since CIRP is a time bound process, a delay in the process may be caused by receiving EOIs in a scattered manner or reissuing the EOIs where they are not received for the CD as a whole. In such situations, the CoC should have the flexibility to assess the interest of prospective resolution applicants.

Therefore, in light of the above, an entity should at the least have the option to invite EOIs and resolution plans for specific business and assets of the entity, from the inception of the CIRP. CIRP in the Indian insolvency landscape can culminate in becoming a time consuming process[40] and allowing for asset wise resolution from the beginning, in situations where it is needed, would help in the maximization of value of assets. Additionally, it would also ensure minimal erosion in the value of assets which is also in tandem with the foundational principle of insolvency law.[41]

It can be contended that allowing for asset wise resolution from the very beginning without requesting for resolution plans for the CD as a whole would result in situations where no attempts are made to preserve the entity as a going concern concept. However, the consultation paper to an extent addresses this issue by requiring at least one of the resolution plans to provide for insolvency resolution of the CD as a going concern, including provisions for its corporate restructuring and management of affairs of the CD.

5. Voting by CoC on resolution plans for assets of CD

A very crucial consideration in asset wise method of resolution, stems from the question of which creditors should be allowed to vote during the resolution of specific assets. This issue becomes pertinent due to the fact that different creditors finance different assets and would accordingly hold security over different assets. Another sub-issue that arises following this

[40] Dr. Vijay Kumar Singh – Modern Corporate Insolvency Regime in India: A Review – NLS Business Law Review – 22 (2021)
[41] Id to footnote 1.

assessment relates to the voting threshold which would be required in the resolution of these assets. Both of these issues have been discussed in greater nuance below.

(i) Which CoC should vote for which assets: Split decision in Lanco Amarkantak Power Limited

The issue of which creditors should be allowed to vote in the CIRP of a particular asset is a crucial one, which if left shrouded in ambiguity could become a bone of contention giving rise to inter-creditor disputes, further delaying the CIRP process of the concerned asset. This issue strikes at the core of the question of the primacy to be accorded to charge ranking, inter se priority and value of security interest of the (secured) creditors.

This issue was discussed at length in the recent matter of Lanco Amarkantak Power Limited ("**Lanco judgement**") and the ultimately, in view of divergent opinions, the applications were sent to the Hon'ble President for further consideration in accordance with Section 419(5) of the Companies Act, 2013.[42] It is important to highlight the facts in the present case before elaborating on the rationale for the divergent opinions expressed. In the instant case, there was a demarcation between the different phases (I, II and III) of the CD. Financial assistance was taken by the CD for each phase separately which was provided against security created over assets and cash flows of each phase, in favour of the respective lenders who lent for the respective phase. Out of the three phases, only phase- I had been fully commissioned and was generating revenue. All the commercial agreements and bargains between the CD and the creditors, had been designed and entered into keeping this in mind.

Per Justice Dr. Venkata Ramakrishna, in the Lanco judgement, the commercial wisdom of the CoC is to be given primacy in deciding the manner of distribution of the cash

[42] In the matter of M/s Lanco Amarkantak Power Limited, NCLT Hyderabad Bench- II – C.P. (IB) No. 420/7/HDB/2018 – Order dated October 19, 2022.

and receivables of the CD in light of, *firstly*, the post 2019 amendment to Section 30 of IBC[43] and, *secondly*, several rulings of the Hon'ble Supreme Court of India[44].

However, Justice Sri Veera Brahma differed from the above opinion. In addition to relying on the specific facts of the case as highlighted above, he too relied on the Essar judgement.[45] Interestingly, special reference was also made to international guides on insolvency such as the IMF paper on Development of Standards for Security and Interest and the "Principles of International Insolvency", authored by Philip R. Wood. TA collective reading of these yields a finding as to the need to value the security interest of creditors and distinguish it from creditors who do not have security. This is based on the understanding principle that the security of a (secured) creditor must stand up and come to their rescue, when it is most needed, one of the situations being insolvency.[46]

Therefore, the issue of which creditors should be allowed to vote in the resolution of specific assets, essentially becomes a question of balance between primacy of commercial wisdom of CoC and security interest and charge ranking of creditors. The guidance from the authorities on this could suggest that if the creditors while financing the asset are aware of the phase in which the asset is and the expected returns from the asset, then the security interest of the creditors can be demarcated and maintained during the CIRP of the asset. However, this scenario is more suitable for a situation where the operational assets and revenue generating phases can be clearly distinguished. In the event that this is interfused, the possibility of creditors receiving a

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[43] Section 30(4) of the IBC reads, "*The committee of creditors may approve a resolution plan by a vote of not less than sixty-six percent, of voting share of the financial creditors, after considering its feasibility and viability the manner of distribution proposed, which **may** take into account the order of priority amongst creditors as laid down in sub-section (1) of secti0on 53, including the priority and value of security interest of a secured creditor, and such other requirements as may be specified by the Board*." (The word "may" is directory in nature, and not mandatory, the provision only being an enabling provision which does not impose any mandate on the CoC to distribute payments to the creditors based on the value of security held by them).

[44] In the decisions of *India Resurgence* and *Essar Steel*, it was held that the amount to be paid to the different classes or subclasses of creditors in accordance with the provisions of IBC and the Regulations ultimately lies with the commercial wisdom of the CoC. A dissenting secured creditor cannot suggest that a higher amount be paid to it drawing reference from the value of security being held by them.

[45] The Supreme Court in Essar Steel emphasised that equitable treatment of creditors is equitable only within the same class. Citing from American jurisprudence, the SC opined that the IB Code has dual objectives of not just protecting the creditors in general but also protecting creditors from each other. The latter is meant to highlight that the IBC should not be read so as to imbue creditors with greater rights in bankruptcy proceeding than they would enjoy under the general law, unless it is to serve some bankruptcy purpose [para 49].

[46] *Id*.

portion from the CIRP of assets, which did not become operational or generate revenue because the previous interdependent asset did not do so, should not be completely removed.

(ii) Voting threshold

Regulation 36B(6A) does not specify whether the approval of the CoC holding fifty-one percent (51%) or sixty-six percent (66%) of the voting share will be required for issuance of an RFRP in terms of the said regulation. According to Section 21(8) of the IBC, save as otherwise provided in the IBC, all decisions of the CoC are required to be taken by a vote of not less than fifty-one percent (51%) of the voting share of the CoC. Given this, it appears that an approval of the CoC holding fifty-one percent (51%) of the voting share should suffice.[47] However, given that approval of the CoC holding sixty-six percent (66%) voting share is required for approving resolution plans and to undertake a sale of unencumbered assets under Regulation 29 of the CIRP Regulations, it should be possible to take the view that the higher threshold of sixty-six percent (66%) of the voting share, will apply.

Clarifications will be needed in this regard once the scope of the question of which creditors will be allowed to vote on resolution of specific assets is determined .

6. Resolution plan received for only few assets / Treatment of remaining assets for which resolution plans not received

In asset wise resolution of a CD, the possibility that there exist PRAs and resolution plans for only a few assets of the CD and not all is likely. This is irrespective of the fact whether asset wise resolution of the CD is initiated in the beginning or in the phase of re-issue, when no resolution plan for resolution of the CD as a whole has been received.

In such a situation, the remaining assets should be subject to liquidation. However, the current construct of the IBC does not provide for partial resolution and liquidation of assets of a CD. The MCA Consultation paper mentions that the CIRP of the CD will conclude once the

[47] Manik Dev, 'Analysis of Insolvency and Bankruptcy Code, 2016 – Procedures, Jurisprudence and Latest Amendment of 2021' 26 Supremo Amicus 225 (2021).

National Company Law Tribunal ("**NCLT**") approves resolution plans for **all** assets of the CD (including, for insolvency resolution of the CD as a going concern). This proposal in the consultation paper, however, does not provide for a situation where no resolution plans are received for certain assets of the CD.

Illustratively, the impact of this can be understood through entity XYZ which is undergoing resolution with the following business and portfolios:

Entity XYZ:	Business A	Business B	Business C	Total
Value of Assets	1200	2000	2500	5700
Secured Creditors	800	1100	2000	3900
Unsecured Creditors	500	700	1300	2500
Net Asset Value	- 100	200	-800	-700

In the previous regime which did not allow for resolution of piecemeal entities, Businesses A, B and C would have to be resolved together resulting in a negative asset value. The current regime allows for businesses such as Business B, which are healthy and have a positive net asset value to be hived off. This is considered to be a more desirable scenario than resolving the entire entity together as it will lead to value erosion. However, it is unclear as to what the status of Businesses A and C shall remain after Business B is hived off. The scenario in this illustration is a representation of the issue that will arise in a variety of businesses which have certain active operating segments along with certain non-functional ones.

The insolvency regime in India can extrapolate findings and learnings of other jurisdictions in including clear restrictions and requirements on treatment of remaining liabilities. For instance, the UNCITRAL Legislative Guide which mentions various forms of reorganization, including sale of non-core assets.[48] Therefore, addressing this issue will be crucial to the

[48] United Nations Commission on International Trade Law, *Legislative Guide on Insolvency*.

implementation of asset wise resolution of the CD as it is unclear what the status of such businesses shall be if the active parts and assets are resolved through partial sale of assets, and other parts of the business are left behind.

7. Payment of CIRP costs and Attribution of liabilities of the CD

In a scenario of resolution of a CD as a whole, on a going concern basis, the resolution plans have to account for the settlement and treatment of outstanding liabilities of the CD. These include costs and expenses arising out of or related to the assets of the CD and also the CIRP costs. In the case of asset wise resolution, attribution of these liabilities and costs (unless they specifically attach to assets), is complex. Therefore, it should be possible to determine a methodology to attribute liabilities across assets.

The MCA Consultation paper requires at least one resolution plan to provide for corporate restructuring and management of affairs of the CD. This resolution plan could highlight the internal and external interdependencies between the assets which are critical to the maintenance of operational continuity, and outline the financing requirements and financing sources necessary for the implementation of the resolution strategy. This will assist in attribution of the liabilities of the CD, if they attach to specific assets. This becomes crucial in the situation where not all of the assets are undergoing CIRP or resolution plans have been received for only a few assets.

8. Which resolution plan should provide for resolution of CD as a going concern

The MCA Consultation paper mandates that at least one of the resolution plans should provide for insolvency resolution of the CD as a going concern, which may include provisions for its corporate restructuring and other mandatory requirements such as management of affairs of the CD after approval by the AA. However, it is unclear whether one of the resolution plans which have been proposed for resolution of one or more assets of the CD should have this provision for resolution of CD as a going concern or this can be a part of an entirely different plan which stitches together or combines resolution plans pertaining to different assets.

This issue becomes pertinent in light of the ambiguity in relation to issues such as receiving resolution plans for only a few assets of the CD, which plan should provide for the payment of

CIRP costs and other liabilities of the CD, and operational difficulties in conducting the CIRP in the event a separate RFRP is needed for the plan which provides for resolution of the CD.

9. Operational difficulties in conducting the CIRP

In such corporate models where asset wise resolution of assets might be required and/or beneficial, it is likely that different assets of the CD will be differently placed. Some assets might be functional, operational some might be non-functional, and a few others might be in the middle stages of functionality and operability. In such a scenario, having a common RFRP for the different assets of the CD might discount the stages at which such assets are placed and invite sub optimal resolution plans from the prospective resolution applicants. Additionally, the MCA Consultation Paper also requires at least one resolution plan to provide for corporate restructuring and management of the affairs of the CD. Given the grey area with respect to the same, as highlighted in the issue above, a separate RFRP will be needed for inviting resolution plans covering this aspect from the PRAs.

It must be noted that the releasing of multiple RFRPs is not a roadblock in the implementation of asset wise resolution of the CD. However, multiple RFRPs, multiple resolution plans and PRAs, along with diverse eligibility requirements, evaluation matrices, and methodologies, and potential inter-creditor problems resulting from the sale of assets secured in the favour of particular creditors – this issue has the potential to create certain operational and logistical difficulties, further complicating the CIRP and leading to a delay in the resolution of the CD.

The Regulation of the European Parliament and of the Council on insolvency proceedings ("**EIR Recast"**) and the UNCITRAL Model Law on Enterprise Group Insolvency ("**Model Law 2019**"), which set out important insolvency principles. Given that the Indian insolvency law is in its nascent stages of formation, guidance from international developed sources can serve as a good benchmark and guidance for the direction the law should take. They provide guidance that insolvency practitioners and courts shall cooperate and communicate with each other to the maximum extent possible.[49] Similarly, in the Indian context, to resolve the above issue, cooperation and communication between parallel insolvency proceedings will help in

[49] Regulation (EU) 2015/484 of the European Parliament and of the Council of May 20, 2015 on insolvency proceedings [2015] OJ L 141/19 ("**EIR Recast**"), Articles 56-58; UNCITRAL Model Law on Enterprise Group Insolvency (2019) ("**Model Law 2019**"), Articles 9 and 14.

easing the operational difficulties associated with CIRP in a multiple asset wise resolution scenario. The resolution plan which has to provide for the corporate restructuring and management of the affairs of the CD could provide for coordination of parallel insolvency or restructuring proceedings for the purpose of preparing and executing a group reorganisation plan i.e., a combination of separate reorganisation plans.

The EIR Recast and Model Law also mentions appointment of the same insolvency practitioner (the IRP in the Indian scenario) in separate insolvency proceedings of the CD.[50] Such appointment greatly diminishes coordination problems, reduces transaction costs and may even stimulate the preparation of a group-wide strategy, including business rescue and the sale of an enterprise as a going concern.[51]

To summarise, this section highlighted the issues that could be faced while trying to implement an asset wise resolution of a CD. While some of these issues are major ones which could become roadblocks without addressing them, few others are only points which should be considered while devising a legislative guidance in order to increase the efficiency of asset wise resolution of CD.

10. CONCLUSION

The aim of this paper was to analyse the method of dealing with insolvency in companies i.e., asset wise resolution. Given the spirit of the insolvency framework in India, which prefers resolution over liquidation, this paper highlights how the asset wise method of resolution of CD might not align with the spirit of the Code, principles of going concern and corporate personality of companies principle of companies law. However, the paper also acknowledges corporate and business models where this method of resolution might be necessary given the structure. In situations where the asset wise model is warranted and/or beneficial, the paper analyses issues that will need guided legislation and attention by the authorities to ensure practical implementation of this method. The paper concludes, by suggesting, on how to

[50] EIR Recast, Recital 53; Model Law 2019, Article 17.

[51] Parallel for this can be drawn from the group solution under the EIR Recast and the Model Law 2019. It is a flexible concept that seeks to preserve group synergies and to safeguard and maximize the insolvency estate value to the advantage of creditors. It tries to solve the collective action problem triggered in insolvency by imposing group-level regulation and decision-making, aligning the economic self-interest of creditors with the goals of collective action on a group level and reducing cooperation costs and information asymmetries between separate proceedings. The achievement of a group solu- tion may be facilitated by various legal tools, ranging from the simple exchange of information between insolvency practitioners and courts to the opening of special proceedings

maintain a balance between allowing for asset wise resolution in certain corporate structures and maintaining the spirit of the code and principles enunciated above as well.