NLUJ Law Review

Renuka Mishra & Avishek Mehrotra, *Section 29A Of The Indian Insolvency Regime: Aid Or Impediment To Corporate Governance?*, 9(1) NLUJ L. REV. 193 (2022).

SECTION 29A OF THE INDIAN INSOLVENCY REGIME: AID OR IMPEDIMENT TO CORPORATE GOVERNANCE?

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ABSTRACT

The Insolvency and Bankruptcy Code, 2016 was introduced to act as a single legislation for dealing with insolvency issues. It safeguards the interest of all stakeholders related to the corporate debtor as well as ensures good returns to the creditors. The code also focuses on the management of the corporate debtor post-resolution. The key provision in this respect is Section 29A of the Code, which prevents the promoters, incumbent management of the corporate debtor as well as certain other undesirable persons, from taking over the corporate debtor, so that charge can be taken by better management. While the intent behind the legislation was bonafide, there appears to be a lack of foreseeability on the part of the legislature on the far-reaching consequences of Section 29A. Through this piece, the authors aim to address the gap between the legislative intent and the actual effect of the provision, which might not aid but diminish corporate governance. For doing so, this article would firstly elaborate upon corporate governance and its interlink with IBC, with emphasis on Section 29A of the

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Code. It then brings to the fore the intention-outcome asymmetry in the impugned provision. The article then focuses on the non-alignment of Section 29A with certain key objectives of the Code. The authors point out that the scheme of Section 29A is broad enough to exclude even genuine promoters and incumbent management. Accordingly, the authors advocate for narrowing the ambit of Section 29A to prevent the exclusion of genuine promoters and incumbent management from submitting a resolution plan. Finally, the authors suggest a middle path preventing the blanket ban on incumbent management and promoters as well as other desirable persons while still achieving the objectives of the Code.

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I. INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 ("**the Code**" or "**IBC**") was enacted with the intention to rehabilitate a distressed company while maximizing the value of its assets.[1] The Code protects the value of a distressed company by continuing its functioning as a going concern.[2] When the Corporate Insolvency Resolution Process ("**CIRP**") commences, the management of the distressed corporation is taken over by its creditors.[3] The Code follows a creditor-in-possession model, which resembles the process of insolvency administration in the UK.[4] The creditors, forming part of the Committee of Creditors ("**CoC**") are given primacy in decision-making for the approval of the resolution plan with little scrutiny from the adjudicating authorities.[5] Thus, the creditors themselves have to decide the plan most suitable in terms of the financial viability and future administration of the distressed corporation. By doing so, the Code seeks to protect the interest of all stakeholders involved in the process while also bearing in mind the future administration of the Corporate Debtor ("**CD**"). This aids in ensuring good corporate governance during the entire process.

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[1] *Understanding the IBC: Key jurisprudential and practical considerations*, IBBI (Nov. 18, 2019), https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf. (*hereinafter* "**IBBI Paper**"); Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

[2] Pratik Datta, *Value Destruction and Wealth Transfer under the Insolvency and Bankruptcy Code, 2016*, NATIONAL INSTITUTE OF PUBLIC FINANCE AND POLICY, WORKING PAPER NO. 247 (2018), at 20.

[3] IBBI paper, *supra* note 1, at 14.

[4] The Insolvency Act, 1986, c 45, sch. B1 (U.K.).

[5] Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., 2021 SCC OnLine SC 204; Ghanashyam Mishra & Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. through the Director, 2021 SCC OnLine SC 313.

The rationale behind following the creditor-in-possession model is derived from the skepticism by which the incumbent management of the CD is viewed.[6] Moving a step further, the Code even restricts the incumbent management from regaining possession of the CD post-resolution by way of Section 29A.[7] While the aim of the said provision was to prevent the incumbent management and promoters responsible for the CDs' insolvency as well as certain other undesirable persons from retaining control,[8] the contours of the section go much beyond the targeted persons. The authors, through this piece, aim to address the gap between the legislative intent and the actual effect of the provision, which essentially might not aid but diminish corporate governance.

For doing so, Part I of this article would elaborate upon corporate governance and its interlink with IBC with an emphasis on Section 29A of the Code. Part II – brings to the fore the intention-outcome asymmetry as exists with respect to the impugned provision. Part III – focuses on the non-alignment of Section 29A with certain key objectives of the Code. Part IV – advocates for the exclusion of genuine promoters and incumbent management from the scheme of Section 29A. Part V – provides feasible suggestions for issues highlighted in this article. Part VI – the authors present their concluding remarks.

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[6] Genard McCormack, *Control and Corporate Rescue: An Anglo-American Evaluation*, 56 ICLQ 515, 515 (2007).

[7] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India).

[8] AKAANT KUMAR MITTAL, INSOLVENCY AND BANKRUPTCY CODE: LAW AND PRACTICE 751 (EBC, 1st ed. 2021) (*hereinafter* "**AKAANT MITTAL**").

II. IBC AND CORPORATE GOVERNANCE

The Cadbury Committee defined corporate governance as "the framework by which organizations are coordinated and controlled ".[9] The corporate governance of an entity determines its method of decision-making and the distribution of rights amongst various stakeholders. It impacts the framing and planning of the corporate entity's goal and monitoring thereof.[10] The significance of good corporate governance lies in the fact that it aids in bringing transparency in the functioning of the corporate setup, thereby preventing fraudulent practices; it helps in building a positive image amongst the masses, making the business more sustainable.[11]

When it comes to a corporate entity, one of the cardinal principles associated with it is its perpetuity.[12] But the reality starkly differs from the perceived notion. As per a study published by the Royal Society, half-life of a listed company is about 10 years.[13] It is imperative to keep a company alive, as the company, with its capital, generates value and shares the same with various stakeholders, through its corporate governance framework. On these lines, the Organisation for Economic Co-operation and Development ("**OECD**") has advocated for an effective insolvency regime

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[9] Bhumesh Verma and Himanshi Singh, *Evolution of Corporate Governance,* SCC ONLINE (Nov. 13, 2019), https://www.scconline.com/blog/post/2019/11/13/evolution-of-corporate-governance-in-india/.

[10] OECD, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE, OECD PUBLISHING (2015), https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf (*hereinafter* "**OECD PRINCIPLES**").

[11] *Id.*; SECURITIES AND EXCHANGE BOARD OF INDIA, REPORT OF THE KUMAR MANGALAM BIRLA COMMITTEE ON CORPORATE GOVERNANCE (1999).

[12] Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO-WASH-L.REV 764, 766 (2012).

[13] Daepp MIG, Hamilton MJ, et. al., *The Mortality of Companies,* 12 JRSI 106 (2015).

to complement corporate governance.[14] The IBC aids in keeping an organization alive by facilitating debt resolution and avoiding liquidation. The Code gains further eminence as the rights of all stakeholders of the CD like its employees, suppliers, contracting parties, etc. are solely dependent on the resolution plan approved by the adjudicating authority per the provisions of the Code.[15]

It is the IBC regime that decides the showrunners of the re-incarnated company. It is *sine qua non* to have strong and professional management that can restore the company to its previous glory or take it further by following good corporate governance practices. To ensure the capability of the management, determination of both who can and who cannot be put in charge of the company is quintessential. To ascertain the latter, Section 29A has been included within the Code.

III. THE SCHEME OF SECTION 29A

As discussed above, the resolution plan forms a very crucial aspect of debt resolution under IBC. In its original form, a resolution plan was defined by the legislature as "a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern".[16] There was no restriction upon anyone from being a resolution applicant. As innocuous as this may seem, instances surfaced where the liberty was being misused by the defaulting management to regain control of the company by paying a

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[14] OECD PRINCIPLES, *supra* note 10.

[15] MS Sahoo, *Here's how IBC 2016 has taken corporate governance to new heights*, FINANCIAL EXPRESS (Feb.13, 2020), https://www.financialexpress.com/opinion/heres-how-ibc-2016-has-taken-corporate-governance-to-new-heights/1866199/.

[16] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India).

minuscule portion of the total debt owed by them.[17] Recognizing this vulnerability of the Code, *inter alia,* Section 29A was added through the IBC (Amendment) Act, 2017.[18] Further, post the amendment, the definition of resolution applicant has been clamped down from "any person" submitting the resolution plan to only those who are invited by the resolution professional pursuant to invitation under Section 25(2)(h) to submit such resolution plan. Another beneficial effect of this change is the permissibility to jointly submit a resolution plan with any other person, which might facilitate the acquisition of larger stressed assets.[19]

Under Section 29A, several classes of persons and those "*acting jointly or in concert with such persons"* are not eligible to submit the resolution plan.[20] Some of such ineligibilities are linked to default in payment of dues namely - an undischarged insolvent, a willful defaulter and those having control over the Non-Performing-Asset ("**NPA**") account for a period exceeding one year at the time of commencement of the CIRP. Additionally, the guarantor of the CD against whom insolvency resolution application stands admitted and the guarantee on being invoked remains unpaid also falls under this category.[21] Other disabilities are linked to personal antecedents determined by commercial laws. These ineligibilities

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[17] Edelweiss Asset Reconstruction Company Ltd v. Synergies Dooray Automotive Ltd., 2018 SCC OnLine NCLAT 845 (India).

[18] Insolvency and Bankruptcy Code(Amendment) Act, 2017, No. 8, Acts of Parliament, 2018 (India).

[19] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.5(25).

[20] Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, §. 2(o), No. 54, Acts of Parliament, 2002 (India).

[21] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.29A (a), (b), (c), (h).

include a bar from trading or accessing the securities market by the Securities and Exchange Board of India, those disqualified to be directors under the Companies Act, 2013 and those convicted for an offence punishable with imprisonment of a minimum of two years (for offences specified under schedule 12) or seven years (any other offence).[22]

Besides the persons explicitly subject to the above disabilities, persons related to or connected with such persons are also subject to the same.[23] However, exceptions have been carved out for certain persons under the said provision.[24] The rationale behind its inclusion is to further the public interest and corporate governance.[25] Through this, it would be ensured that the company goes into the hands of persons who would be better suited for the company's future prospects post-resolution.

IV. SECTION 29A: A CLASSIC CASE OF INTENTION – OUTCOME ASYMMETRY

In the case of Edelweiss Asset Reconstruction Company Ltd. v Synergies Doorey Automotive Ltd.[26], Edelweiss being one of the financial creditors of Synergies Doorey Automotive Ltd. ("**Doorey**") had preferred an appeal against the order of National Company Law Tribunal ("**NCLT**") Hyderabad approving the resolution plan of Synergies Castings Ltd.

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[22] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.29A (d), (e), (f).
[23] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.29A(j) r.w. Explanation 1.
[24] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.29A.
[25] Chitra Sharma v. Union of India, (2017) 143 SCL 680 (India).
[26] Edelweiss Asset Reconstruction Company Ltd. v. Synergies Dooray Automotive Ltd., 2018 SCC OnLine NCLAT 845 (India).

("**SCL**") The successful resolution applicant was a related party of the corporate debtor. Interestingly, the majority portion of the debt was also owed to SCL. This debt was assigned to a third-party Millennium Finance Limited ("**MFL**") by SCL through an assignment deed. While SCL being a related party was barred from being a part of the Committee of Creditors ("**CoC**"), MFL got a seat with more than 75% of the voting share. The appellant alleged that the assignment was illegal as it had been done with the ulterior motive of giving a seat to a related party in the CoC thereby ensuring the outcome of the process. The allegations were turned down on the grounds that *firstly*, the assignments were fairly executed and *secondly*, MFL was not a related party of the corporate debtor.

Although legally viable, the legislature was triggered by the unscrupulous management regaining control of the corporate debtor at a heavy discount. This can also be evident from the speech of then Finance Minister Mr. Arun Jaitley while introducing the ordinance on the floor of the house from the use of phrases such as "*who are in management and on account of whom*" and "*discounted rate*".[27] To address this issue urgently and prevent its misuse in all pending resolutions, Section 29A of the Code was introduced.[28] The ulterior motive behind the introduction of Section 29A appears to be the achievement of better corporate governance of the resurrected debtor.

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[27] Statutory Resolution Re: Disapproval of Insolvency and Bankruptcy (Amendment) Ordinance, 2017, LOK SABHA, http://loksabhadocs.nic.in/debatestextmk/16/XIII/29.12.2017.pdf (*hereinafter* "**Statutory Regulation**").

[28] M.S. Sahoo, *Dooray paved Doorway,* IBC LAW REPORTER, https://ibclawreporter.in/wp-content/uploads/2020/07/dooray-paved-doorway-in-publication-insolvency-and-bankruptcy-code-a-miscellany-of-perspectives.pdf (2020).

In its current form, the prohibition under Section 29A does not merely single out the responsible management and promoters but spreads a wider net to filter out other undesirable persons from submitting the resolution plan. The restrictions extend to four layers of persons.[29] *Firstly* the ineligible person, *secondly* persons connected to the ineligible person, *thirdly* persons related to the ineligible connected person and *lastly* persons acting jointly with or in concert with the ineligible person. The nature of restrictions is such that it excludes almost all promoters and the incumbent management irrespective of the fact that they had any role in leading the company to insolvency or not.[30] This is problematic due to the fact that instead of fulfilling the objective of better corporate governance of the company post-resolution and reaping fair values to the creditors, the wide nature of restrictions might hamper these objectives.

The absence of attention to detail regarding the effects of Section 29A can well be attributed to the urgency with which the provision was thought of and drafted.[31] Although the drafters made their best efforts to achieve their objective without having to exclude all the promoters, they ended up not only doing what they sought to avoid but also overlooking some key objectives of the IBC regime in their endeavour while not essentially achieving their end objective.

A. THE WIDE CONTOURS OF SECTION 29A

[29] AKAANT MITTAL, *supra* note 8, at 752.
[30] M.P. Ram Mohan and Vishakha Raj, *Section 29A of India's Insolvency and Bankruptcy Code: An Instance of Hard Cases Making Bad Law*?, IIMA WORKING PAPER NO. 2021-07-01 JOURNAL OF CORPORATE LAW STUDIES.
[31] INJENTI SRINIVAS, THE STORY BEHIND SECTION 29A of IBC in INSOLVENCY AND BANKRUPTCY REGIME IN INDIA - A NARRATIVE 100 (Insolvency and Bankruptcy Board of India 2020).

1) Ousting incumbent management and promoters

As mentioned, the bar under Section 29A was primarily intended to target the incumbent management and promoters, responsible for the insolvency of the CD.[32] Quite interestingly, the concern regarding its much wider reach began to surface at the stage of its introduction in the House itself. Minister Jayadev Galla, opined and rightly so that the ousting of persons holding accounts classified as an NPA for a period of more than a year is unjustified.[33] In a similar vein, the Insolvency Law Committee ("**ILC**"), suggested an increase in the designated time period.[34] The reason behind these concerns was the fact that downturns in businesses usually extends to a period beyond one year,[35] which leads to effectively barring almost all the promoters and incumbent managements of any CD holding an NPA account. However, none of the above was paid heed to. Additionally, the Apex Court in *Swiss Ribbons v Union of India,* concurred with the Code and also stated that a period of one year in addition to the elapse of 90 days needed before an asset is classified as an NPA was sufficient to clear the dues.[36]

The authors are in concurrence with the views staged by the Hon'ble Minister and the ILC. As the restriction is very broad and overlooks the fact that an organization subjecting itself to insolvency, in all probability will have NPA accounts. This leads to an exclusion of almost

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[32] Insolvency and Bankruptcy Code (Amendment) Bill, 2017, No. 280 of 2017 (India), Statement of objects and reasons of the bill.
[33] Statutory Resolution, *supra* note 27.
[34] MINISTRY OF CORPORATE AFFAIRS, REPORT OF THE INSOLVENCY LAW COMMITTEE, at 50 (2018) (*hereinafter* "**ILC REPORT**").
[35] *Id.*
[36] Swiss Ribbons v. Union of India, (2019) 4 SCC 17 (India).

every management and promoter of the CD notwithstanding any intention or antecedents bringing into question the credibility of the person submitting the resolution plan. Thus, it goes contrary to the intent of restricting only unscrupulous management and promoters.

2) Extending reach to remotely related parties

The contours of the impugned provision extend to persons far beyond the intended reach. Besides covering the management and promoters of almost all CDs, it also extends to bona fide resolution applicants. The use of the phrase "*persons acting jointly or in concert with such person*" at the beginning of Section 29A increases its scope of exclusions.[37] The term has not been defined within the Code and borrows its meaning from the definition provided under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.[38]

Further, no indication is provided as to whether the ambit of the term is limited to those acting in concert with the CD or even extends to the connected party of the CD.[39] The ambiguity around the application of the term has the potential to cover several persons despite being remotely related to the CD.[40] This curative step is a rather bit too harsh.

Illustratively, if one A has been barred from acting as a director, and B is a director of one of the subsidiary companies of which A was a director. Then technically, C, the wife of B's male cousin would also be excluded as

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[37] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.29A.
[38] SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Gazette of India, pt. III reg. 2(1)(q) (Sep. 23, 2011) (India).
[39] ILC REPORT, *supra* note 34, at 48.
[40] *Id.*

a result of being a 'connected party' of the person acting in concert. This would be an absurd result and might exclude a capable prospective applicant. In this regard, the ILC has suggested omitting the impugned phrase and limiting the scrutiny of Section 29A to expand the pool of applicants.[41]

B. REDUCING HAIRCUTS

The major purpose behind Section 29A was to minimize the trend of promoters regaining control of the CD at substantial haircuts[42] i.e., at a much lower price than the total claim. Albeit the provision has successfully eliminated the promoters but has that resulted in fewer haircuts by ensuring the submission of plans by genuine resolution applicants, is a point to consider. The average amount the creditors are able to retrieve is 24%,[43] while instances still frequently surface where substantial amounts of haircuts are taken.[44] In some of these instances, the promoters were paying substantially more than the eventually approved resolution plans but were excluded due to the embargo created by the said provision.[45] The wide range of exclusions also poses a hindrance to competitive bidding by

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[41] *Id.*

[42] M.S. Sahoo, *Getting the perfect haircut from the IBC,* THE INDIAN EXPRESS (August 8, 2021), https://indianexpress.com/article/opinion/columns/getting-the-perfect-haircut-from-the-ibc-7460418/.

[43] TT Ram Mohan, *Bankruptcy process needs a re-look*, THE BUSINESS STANDARD (July 8, 2021), http://www.business-standard.com.iima.remotexs.in/article/opinion/bankruptcy-process-needs-a-re-look121070801514_1.html.

[44] PTI, *Videocon insolvency: Creditors to take 96% haircut on dues; NCLT requests increase in pay-out*, ECONOMIC TIMES (June 16, 2021), https://economictimes.indiatimes.com/news/company/corporate-trends/videocon-insolvency-creditors-to-take-96-haircut-on-dues-nclt-requests-increase-in-pay-out/articleshow/83561586.cms?from=mdr.

[45] R.C. Dhandapaani v. Vengarai Seshadri Sowrirajan, 2018 SCC OnLine NCLAT 1061 (India); R. Vijay Kumar v. Kasi Viswanathan, 2019 SCC OnLine NCLAT 227 (India).

reducing the pool of prospective resolution applicants often giving the resolution professional very limited (in some cases none) options to choose from.

This trend is a setback to corporate governance. The businesses especially at the initial stages are in a dire need of capital, which is often provided by the creditors. This capital aids in the proper functioning and day-to-day operations of the business towards its vision. Fewer rates of recoveries are a predicament as it has the potential to reduce the confidence of the creditors in recovery mechanisms, which might deter them from lending funds.

V. DEPARTING FROM THE FUNDAMENTAL OBJECTIVES OF IBC

Besides non-alignment with the objectives behind its introduction, Section 29A poses a challenge to some of the key objectives of the Code itself.

A. MORE TOWARDS LIQUIDATION THAN RESOLUTION

One of the foremost objectives of the Code is to give primacy to resolution over liquidation.[46] This is owed to the fact that liquidation puts the life of the corporation to an end and destroys the capital of the organization. Also, on liquidation the claim of the stakeholders is met only to a small extent, while most of them have to take a heavy haircut; others have to bear their entire debt given as a loss.

[46] Vishnu Tandi, *Resolution v. Liquidation: The Real Spirit of Insolvency and Bankruptcy Code, 2016*, TAX GURU, (Sep. 30, 2018), https://taxguru.in/corporate-law/resolution-liquidation-real-spirit-insolvency-bankruptcy-code-2016.html.

Better corporate governance of an indebted corporation is another central objective around which, the Code is built. For this reason, Section 29A holds much significance as it furthers this very objective.[47] However, there would be no question of improving a company's governance post-resolution, if there is no resolution at all and the company ends up in liquidation. Due to this, post the introduction of the Code, it seems that rarely would the company undergo liquidation as it is more of a double-whammy for the company as well as its creditors. However, the reality starkly differs - as of September 2022, out of the total 3946 CIRPs closed, a meagre of 553 have ended in approval of resolution plans while 1807 have ended in orders for liquidation.[48] With the low rate of resolutions, such wide prohibitions as under Section 29A might further worsen the rate of resolutions.

B. INHIBITING TIME-BOUND RESOLUTION

The importance of time-bound resolution has been emphasized by the Supreme Court in *Innoventive Industries Ltd. v. ICICI Bank and Anr.*[49] There is a limit to which a company can sustain itself without proper leadership and management. While undergoing the resolution process, the progress of the company is at a standstill and no significant decisions are made as the control of the organization shifts from the CD to the creditors. Thus, time becomes of the essence for the resolution of the debtor. Delay

[47] Chitra Sharma v. Union of India, (2017) 143 SCL 680 (India).
[48] THE QUARTERLY NEWSLETTER OF INSOLVENCY AND BANKRUPTCY BOARD OF INDIA JULY-SEPTEMEBR 2022, Vol. 24, https://ibbi.gov.in/uploads/publication/f3ddc90d7391bcae84ef2f87f793eb3c.pdf (2022).
[49] Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 (India).

in all probability leads to liquidation of the CD while also depreciating the value of its assets.

Since a person can only be a resolution applicant if he falls/it is outside the wide gauge of Section 29A, the resolution professional is under an obligation to scrutinize every resolution applicant to ensure compliance with the said provision. This means ensuring that the person is not disqualified in India as well as any other jurisdiction. This inevitably is a time taking process, which might detrimentally impact the CD and the value of its assets in the event of liquidation.

VI. MAKING A CASE FOR GENUINE PROMOTERS

The Bankruptcy Law Reform Committee Report ("**BLRC report**") comprehensively captures the nature and elements that the framers wanted to imbibe in the Code.[50] *Inter alia*, the drafters enumerated the elements that a "sound bankruptcy law" can achieve. One such key element is to separate malfeasance from business failure.[51] The BLRC report cautions against the stereotypical trend of attributing business failure to the malfeasance of the promoters. The effect of such an assumption would deter the businesses from taking risks, as any business failure on account of the risk would be linked to the promoters. This hampers the economy and diminishes the principle of limited liability, which protects the stakeholders of the company from being held personally liable whenever anything goes wrong with the company/ in any and every event of default.[52] Even in the UK,

[50] TK VISHWANATHAN ET. EL., THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE – VOLUME 1: RATIONALE AND DESIGN, at 22-23 (2015).
[51] *Id.* at 23.
[52] *Id.*

sales to connected parties though viewed with a cynical perspective, have not been completely barred.[53]

The losses incurred by a business cannot always be attributed solely to its incumbent management and/or promoters. There are multiple external factors like changes in the market, technological changes, and government policies which can lead to the downfall or excessive losses in a business and push the entity to the verge of insolvency.[54] Around the year 2011, there were bans on iron ore mining imposed by the Courts, leading to a significant reduction in iron ore shipments.[55] Such a blow to the downfall in production adversely impacted companies like Essar Steel and Bhushan Steel which were albeit prepared for the future demand but turned insolvent due to factors much beyond the control of the management of the entity itself.[56]

Going by the rationale of Section 29A, the bankruptcy of public sector undertakings such as Air India should also be attributable to malfeasance on the part of the government, which is not the case. Thus, it is safe to say that holding all promoters and/or incumbent management liable for the insolvency of the corporate is inherently fallacious. On the contrary, the incumbent management of the CD, with its vision and

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[53] TERESA GRAHAM, GRAHAM REVIEW INTO PRE-PACK ADMINISTRATION: REPORT TO THE RT HON VINCE CABLE MP, At 26 (2014) (UK).

[54] Shailesh Menon and Rakhi Mazumdar, IBC Ordinance: *End of the road for dishonest promoters, but has anyone thought of the collateral damage?*, ECONOMIC TIMES (Nov. 30, 2017), https://economictimes.indiatimes.com/news/economy/policy/ibc-ordinance-end-of-the-road-for-dishonest-promoters-but-has-anyone-thought-of-the-collateral-damage/articleshow/61856357.cms.

[55] *Id.*

[56] *Id.*

expertise of the enterprise is often the best judge for determining the way out for the corporate entity from insolvency.[57]

Additionally, the provision fails to permit the promoters and the incumbent management to put forth a resolution plan even if that leads the company to liquidation or forces the creditors to take massive haircuts. For instance, when the resolution professional did not receive any resolution plan except the promoter of the debtor, the tribunal preferred to liquidate the company than accept the resolution plan which was proposed by the promoter.[58] Similarly, in *R. Vijay Kumar v. Kasi Viswanathan*, the promoters were willing to offer Rs. 30 crore as opposed to Rs. 3 crore which was receivable on liquidation. The resolution plan of the promoter was still not accepted.[59] These cases testify to the fact that the embargo created by Section 29A goes against the spirit of the Code itself which promotes resolution over liquidation and value maximization. Thus, it can be deduced that the remedy against the incumbent management taking over the CD at a lower price, has led to more harm than good.

VII. ADDRESSING THE PREDICAMENTS UNDERLYING SECTION 29A

Due to the multi-fold impacts of the exclusionary nature of Section 29A, there is an ardent need to rethink the contours of the said section. The ILC in its wisdom has recommended the submission of affidavits from the

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[57] V.S. DATEY, GUIDE TO INSOLVENCY AND BANKRUPTCY LAW (TAXMANN, 9th ed. 2020).
[58] Chandra Kalian Parkash v. Rajeev Mannadiar, 2018 SCC OnLine NCLAT 372 (India).
[59] R. Vijay Kumar v. Kasi Viswanathan, 2019 SCC OnLine NCLAT 227 (India).

resolution applicants confirming their eligibility.[60] However, this may not be a viable solution keeping sight of the fact that irrespective of the submission of such an affidavit, the resolution professional would have to verify each resolution applicant regarding their eligibility. It has also been opined that a body on the lines of the pre-pack pool as exists in the UK can be established that would be bestowed with the responsibility to review the purchases related to the promoters and connected party.[61] In the opinion of the authors, the need for having an additional body for the purpose may be superfluous.

To find a feasible suggestion, we must first reflect upon the issue that gave rise to the need for such exclusions. The issue was the taking over of a corporation by the incumbent management at the cost of the creditors by only paying a small portion of their debts. Taking from this the authors are of the view that while the restriction under Section 29A should exist, its reach should be restricted to the resolution applicant only and not connected parties. While further ineligibility should be decided based on the facts and circumstances of each case, which may involve scrutiny of factors like a position of authority that the CD enjoys due to their relationship or the existence of any agreement or transaction (mala-fide or coercive), etc. Further, the ambit of Section 29A should be curbed down by inculcating the recommendations given by the ILC regarding NPA

[60] ILC REPORT, *supra* note 34 at 53.

[61] Rudresh Mandal and Hardik Subedi, *Insolvency under Section 29A: Pre-Pack Pools & Independent Review of Connected Party Sales,* (April 3, 2018), https://indiacorplaw.in/2018/04/insolvency-section-29a-pre-pack-pools-independent-review-connected-party-sales.html.

account holders and omitting the phrase person acting jointly or in concert with.[62]

The authors accordingly propose that the resolution professional should only reject the plans when the resolution applicant directly falls under the ambit of Section 29A (post inclusion of ILC's recommendations), having regard to the circumstances leading to the failure of the business or when *malaise* on part of the resolution applicants other than those directly impacted by Section 29A is *prima facie* evident. Before moving to the role of CoC it is pertinent to take note of the fact that CDs have shown reluctance in filing for insolvency due to – fear of exclusion under the wide gamut of Section 29A, better resolution plans from external bidders, and the non-approval of any plan leading to liquidation.[63] The second reason here holds much significance. So, the CoC on receiving the resolution should merely focus on the financial viability of a plan and approve the best plan accordingly. This in all probability would exclude the non-genuine persons seeking to regain the corporate entity at a significantly discounted price.

Whereas even if connected persons of those responsible are able to provide significantly better value than liquidation value or other plans, then it should be preferred. Inculcation of this process would aid in fulfilling the objective of excluding non-genuine and malicious plans. It would aid in increasing the pool of resolution applicants, retrieving the best possible value of CDs, and aid in ensuring time-bound completion of CIRP.

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[62] ILC REPORT, *supra* note 34 at 50, 48.

[63] MINISTRY OF CORPORATE AFFAIRS, REPORT OF THE INSOLVENCY LAW COMMITTEE ON PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (2018).

VIII. CONCLUDING REMARKS

As discussed above, Section 29A in its current form threatens the exclusion of several potential applicants, the objects of value maximization and time-bound resolution. The cumulative effect of all these is to force the company into liquidation rather than its resolution. As a result, the corporate governance that the provision aims to behold also suffers a setback, as without resolution there can be no question of corporate governance of the CD. To resolve this anomaly, the authors suggest the pavement of a middle path that advocates against the blanket ban on incumbent management and promoters as well as other desirable persons while still achieving the objectives sought by the Code.