V. PUBLIC INTEREST v. CONTRACTUAL WAIVER DEEP DIVE INTO INTERCREDITOR AGREEMENTS UNDER THE IBC

Kushagra Dwivedi [*]

ABSTRACT

This paper provides an in-depth analysis of the legal and policy implications of enforcing Intercreditor Agreements (ICAs) under the Insolvency and Bankruptcy Code, 2016 (IBC), focusing on the tension between contractual waivers and statutory rights. ICAs, agreements among creditors to coordinate their actions in cases of debtor default, have become a critical tool in India's evolving insolvency landscape. However, their enforceability, particularly regarding the waiver of a creditor's right to initiate insolvency proceedings under Section 7 of the IBC, raises important legal questions. Section 7 allows financial creditors to file for insolvency against a defaulting debtor, a right grounded in the public interest to maintain financial order and creditor protection. The paper investigates key judicial decisions, including *Rakshit Dhirajlal Doshi v. IDBI Bank Ltd*. and *Amitabh Kumar Jha v. Bank of India*, to illustrate the courts' treatment of ICAs and their implications for creditor rights. In Rakshit, the court rejected the Section 7 application, citing obligations under a Security Trustee Agreement, demonstrating that consortium loan agreements can bind creditors to collective action, limiting individual recourse. This reflects a nuanced approach to statutory rights, recognizing the complexity of loan arrangements while balancing contractual freedom with the public interest objectives of the IBC. Additionally, the paper examines the doctrine of waiver in the context of insolvency, considering whether the right to file for bankruptcy can be waived and if such waivers conflict with the IBC's goals of asset maximization and equitable treatment of creditors. The study highlights concern about protecting the interests of junior creditors, who may lack negotiating power in ICAs and suffer disproportionately high losses during insolvency proceedings. The paper proposes a factor-based approach for assessing ICA enforceability, focusing on considerations such as equitable treatment, the duration of restrictions, and the separation of debtor involvement. By navigating these legal complexities, the study aims to contribute to the broader debate on balancing creditor autonomy with public interest in India's insolvency regime.

Keywords: Contracts Law, Insolvency Law, Section 7, Doctrine of Waiver.

[*] Kushagra Dwivedi is a second-year student at Dr. Ram Manohar Lohia National Law University, Lucknow. Views stated in this paper are personal.

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I. INTRODUCTION

The Insolvency & Bankruptcy Code, 2016 (**'IBC'**) was introduced with the intent to bolster entrepreneurship and raise the overall rate of recovery from failing and bankrupt companies. While it has succeeded in raising the rate of recovery, there have been concerns about the IBC being abused to further monopolistic practices and the Significant reductions in the repayment amounts (or 'haircuts') have led to concerns for creditors have warranted a closer look into other means of corporate debt restructuring.

Intercreditor Agreements ('**ICAs**') play a crucial role in the landscape of corporate finance and insolvency, particularly in the context of India's Insolvency and Bankruptcy Code, 2016 (IBC). These agreements, which are typically entered into by creditors of a common debtor, seek to regulate the rights and obligations of the parties in situations of financial distress. ICAs are designed to provide a structured framework for resolving conflicts among creditors, thereby facilitating smoother debt restructuring processes.

However, the enforceability of ICAs, particularly about the rights of creditors under Section 7 of the IBC, has emerged as a contentious issue. Section 7 allows financial creditors to initiate insolvency proceedings against a defaulting debtor, a right that is often seen as fundamental to the creditor's protection. The question then arises: to what extent can creditors, through ICAs, waive or limit this statutory right without contravening the public interest objectives embedded within the IBC?

This paper seeks to explore the legal and policy considerations surrounding the enforceability of ICAs under the IBC. It will examine key judicial decisions that have shaped the discourse on this issue, analyse the potential conflicts between contractual freedom and statutory rights, and propose a framework for evaluating the validity of ICAs in the context of insolvency proceedings. By doing so, the paper aims to contribute to the ongoing debate on how best to balance the interests of creditors while ensuring the broader goals of the IBC are upheld.

II. RAKSHIT DHIRAJLAL DOSHI AND OTHER JUDGEMENTS

In the case of *Rakshit Dhirajlal Doshi v. IDBI Bank Ltd (**'Rakshit'**)*[1] a consortium of four banks gave a loan to the lendee - Doshion and entered into a Security Trustee Agreement with Infrastructure Leasing & Financial Services (**'IL&FS'**) Trustee Company Ltd. The banks also entered into an inter-se agreement with each other regarding their obligations and priority of debt amongst other details relevant to inter-creditor relations. Doshion was lent a sum to the tune of 422 crores by the banks and ended up defaulting on the amount due towards IDBI Bank, which was a member of the consortium of lenders. IDBI Bank, therefore, ended up sending a notice to Doshion and

[1] Rakshit Dhirajlal Doshi v. IDBI Bank Ltd [2022] NCLAT SCC OnLine 4579.

its guarantor - Fivebro International Private Limited (**'FIPL'**), and subsequently filed for the initiation of Section 7 Insolvency proceedings against Doshion. The NCLAT in its order set aside a prior judgement of the NCLT where the Section 7 application against FIPL was admitted and set aside IDBI Bank's application. This enforcement of an inter-se agreement to reject the initiation of insolvency was in stark contrast to the court's previous stance. In judgements like *Bank of India v. TD Toll Road Ltd*[2] and *Amitabh Kumar Jha v. Bank of India*[3] (**'Amitabh'**), the NCLT and the NCLAT have refused to recognize the enforceability of an inter-se agreement to trump their statutory right to file for Section 7 when a default can be reasonably gleaned. A deeper analysis of the court's reasoning may be necessary to clarify this issue. The determining factor in the Rakshit judgement is the Security Trustee Agreement (**'STA'**) between IL&FS and the consortium of banks. A Security Trustee holds the charge on assets that have been put up as collateral by the debtor, essentially functioning as the sole representative on behalf of the creditors.

In the Rakshit case, the court denied the Section 7 application filed by IDBI Bank because it was in contravention of the STA. According to the court, by not notifying the Trustee before filing the Section 7 application, IDBI Bank effectively initiated the Corporate Insolvency Resolution Process (CIRP) on behalf of all members of the consortium. This was because the STA made the rights of all participants interdependent, and the assets held in trust by IL&FS were to be managed collectively. The court observed that IDBI Bank, by agreeing to IL&FS managing the secured assets, had essentially committed to

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[2] Bank of India v. TD Toll Road (P) Ltd *(NCLAT Mumbai*, 25 November 2019) CP (IB) 2803/MB/2019.

[3] Amitabh Kumar Jha v. Bank of India (NCLAT Delhi, 22 May 2020) Company Appeal (AT) (Insolvency) No 1392 of 2019.

a structure where filing for Section 7 would amount to filing on behalf of all participants of the STA. Consequently, this involuntary filing of a joint Section 7 led to the rejection of the Rakshit application.

Traditionally, the denial of such contractual waivers is based on the principle that the statutory right to initiate insolvency proceedings is in the public interest and therefore cannot be waived. However, the Rakshit decision reflects a more nuanced scenario. Here, the court's rejection of the Section 7 application was not merely about the non-waivable nature of the right but was deeply tied to the specific obligations under the STA. The court's decision underscores the complexity of managing rights and obligations within a consortium structure, where actions by one party can inadvertently bind others. This case demonstrates the importance of adhering to the procedural requirements set out in agreements like the STA, especially when dealing with collective rights and responsibilities. As we discuss the nature of the right to initiate insolvency proceedings later, it's crucial to recognize that the Rakshit decision hinges on the particularities of the consortium arrangement rather than a broader principle of the right being non-waivable.

A. Enforcing a personal right v. Enforcing rights non-consensually

The court's reasoning in the cases of Rakshit and Amitabh can be further understood through the decision in *IDBI Bank Ltd. v. Textrade International Ltd.*[4] In Textrade, the court upheld the Section 7 application filed by the applicant because the consortium of banks did not object to the filing. The court determined the consortium's consent towards the application through their behaviour. The court noted that:

[4] IDBI Bank Ltd v. Textrade International Ltd. (NCLT Mumbai, 4 July 2023) CP (IB) 166/MB-IV/2023.

When the lead bank, on behalf of the consortium, served the debtor with a demand notice, and upon the debtor's default, symbolic possession was taken of the debtor's assets.

- The recall notice delineated the amount of default for each participant of the consortium.
- While a formal event of default had not been declared according to the Common Rupee Agreement, the banks' behaviour emphatically demonstrated such a default.

The Textrade judgement reinforces the court's original reasoning in Rakshit where the rejection was based on the non-consensual enforcement of the entire consortium's debt due to the Security Trustee Agreement, which made the participants' rights interdependent. The court observed that the participant banks had not objected, indicating implicit consent to the Section 7 filing. The Textrade judgement shows the importance of proper calculation and delineation of each party's contractual liabilities and rights. While this may seem redundant in situations like the Rakshit case—where the purpose of a Security Trustee Agreement is to simplify the management of charges on assets for a large debtor—it highlights how different loan structures interact with insolvency frameworks. In the Rakshit decision, it might appear that the court was moving towards recognizing the contractual waiving of Section 7. However, this interpretation is a result of the mingled rights and interests created by loan structuring conventions and the miscommunication among loan participants. The NCLAT has consistently held that the right to file for Section 7 is a statutory right intended for public benefit, which cannot be subject to the doctrine of waiver.[5] Therefore, an analysis of Section 7 through

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[5] Amitabh Kumar Jha v. Bank of India (NCLAT Delhi, 22 May 2020) Company Appeal (AT) (Insolvency) No 1392 of 2019.

the lens of the doctrine of waiver is warranted to determine whether the courts are not endorsing the contractual waiving of this right but are rather navigating complex loan arrangements where the rights and obligations of participants are tightly interwoven.

B. The Doctrine of Waiver & The For-Public-Benefit Nature of Section 7

The doctrine of waiver essentially means that a person may waive a right available to them in return for some consideration, provided that they have full knowledge of the right they are about to waive and have full intention to do so. It has long been established in cases like *Shalimar Tar Product Ltd. v. H.C. Sharma*[6] and *Lachoo Mal v. Radhe Shyam*[7] that in order for a statutory right to be waived, it must be a right solely for the benefit of the individual waiving such right, and not for the benefit of the public or be a matter of public policy. Such a waiver must directly benefit the individual waiving such right.

While the court's approach towards admitting Section 7 applications has been concrete and unwavering, contractual restrictions upon such rights have not been discussed upon much. The standing on the matter mirrors the court's standing on the validity of *ipso facto* clauses. In *Gujarat Urja Vikas Nigam Ltd. v. Mr. Amit Gupta & Ors*.[8] (**'*Urja*'**), the court expressed its concerns over the wide overriding power of the now-replaced Sick Industrial Companies Act, 1985 that allowed for a wide-ranging suspension of contracts applicable to the insolvent company. The SICA Act was the precursor to the IBC, a major reason for the overhaul of the SICA Act into the IBC was the rampant abuse of Section 22(3) of the act that allowed for the suspension of

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[6] Shalimar Tar Products India Ltd v. H C Sharma (Delhi 1973) SCC OnLine 205.
[7] Lachoo Mal v. Radhey Shyam (1971) 1 SCC 619.
[8] Gujarat Urja Vikas Nigam Ltd v. Mr Amit Gupta & Ors (SC, 8 March 2021) Civil Appeal No 9241 of 2019.

contracts if a scheme under Section 17 was pending or an inquiry into the feasibility of the company was ongoing under Section 16 of the act.[9] This served as a medium for companies to wiggle out of contractual obligations by initiating insolvency proceedings. While the main question of law in *Urja* was not based around the legal validity of such clauses, the court recognises the complex problem of determining whether conditional terminations upon insolvency through *ipso facto* clauses is a point worth discussing.

Section 14 intends to halt all legal proceedings and forbids the operational creditors from ceasing the supply of essential goods so that the company does not die as a result of the initiation of insolvency. It also places a halt on any legal proceedings going on against the insolvent subject. The legislative intent behind Section 14 is managing the operations of the insolvent firm as a going concern.[10] While *ipso facto* clauses directly contravene the legislative intent behind Section 14 of the IBC which imposes a moratorium upon the insolvent companies, the enforcement of ICAs does not contravene so directly upon the base intent behind the IBC. In Vidarbha Industries[11], the Supreme Court recognised that the intent of the IBC is not to penalise defaulting companies but rather to help recover the defaulted amount. While in the same judgement, the court also states that the adjudicating authority has little discretion in choosing to admit a Section 7 application. There is no mandate on necessarily filing a Section 7 application by the creditor. ICAs focus primarily on the pre-petition stage of the default. They ensure that, when a Section 7 application is filed, creditors act with unity and fairness, ensuring a speedy resolution.

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[9] ibid.

[10] Innoventive Industries Ltd v. ICICI Bank Ltd [2017] (11) SCALE 4.

[11] Vidarbha Industries Power Ltd v. Axis Bank Ltd (SC, 2022) SCC OnLine SC 841.

Since creditors would derive gain in the form of contractual consideration if such waivers were allowed, our goal lies in determining whether the right to file for insolvency under Section 7 is a right for the benefit of the public or simply for the benefit of the individual. By determining this, we can check if the right to file for bankruptcy is waivable or not. The Apex court has held in *Innoventive Industries Limited v. ICICI Bank Limited*[12] (**'Innoventive'**) that the threshold for successful admission of Section 7 must only be the existence of a debt and the existence of a default towards the repayment of that debt because the legislative intent of the IBC was the protection of the interests of the creditors and the availability of credit and maximisation of value. However, the nature of this right has not been discussed much. Having explored the theoretical underpinnings of the doctrine of waiver, particularly its application to statutory rights like those under Section 7 of the IBC, it becomes evident that these principles are not merely abstract. They directly inform the practical challenges faced by courts when determining the enforceability of ICAs. As we move into Part III, we will examine how these theoretical considerations manifest in real-world scenarios, particularly when balancing the rights of creditors against the broader objectives of the IBC.

III. PRIMARY CONCERNS REGARDING SUCH ENFORCEMENT

One important observation from these judgements is that in each case, the Corporate Debtor ("**CD**") uses the inter-se agreement to invalidate the creditor's Section 7 application. As a result, we do not have an explicit statement as to the court's reasoning for not enforcing such agreements. We only have the court's decision to not let the CD use an agreement between the

[12] Innoventive Industries Ltd v. ICICI Bank Ltd [2017] (11) SCALE 4.

creditors to enforce the debt. However, from the aforementioned case laws, the common lines of reasoning that can be gleaned are:

A. Section 238 of the IBC would override any inter-se agreement

B. Enforcing such agreements would be contrary to public benefit and would defeat the legislative purpose of the IBC

The concerns of the court can be satiated by applying a factor-based approach towards determining what a rightful waiver of the right to initiate CIRP would be, similar to how a true sale and derecognition of assets is governed by the RBI[13]. Such an approach would allow the courts to revert agreements that seem in contravention to the IBC's intent while empowering creditors with potential for much more unambiguous inter-se relations. But first, we must discuss the aforementioned issues and how the rights of creditors across the entire industry may be balanced.

A. The overriding effect of Section 238

The overriding effect of Section 238 has been talked about in judgements like Amitabh, however, the main contention of the court has focused upon the *locus standi* of the party trying to invalidate the Section 7 application. To date, only CDs have tried to use prior inter-se agreements to escape contractual liability. The court's rationale for not granting a consortium of creditors the right to refute an application filed in contravention of the ICA by a consortium participant remains unclear. However, cases like *B. K. Educational Services Pvt Ltd v. Parag Gupta & Associates*[14] show that the overriding effect of Section 238 does have reasonable restrictions and that it does not serve as a blanket to override any and all provisions it encounters.

[13] Chiraag Agarwal, 'Bankruptcy Remoteness in Indian Securitisation/Direct Assignment Transactions' in *Legal Research on Structured Finance* (2023) 18.

[14] B K Edu Services Pvt Ltd v. Parag Gupta & Associates (SC October 11 2018) Civil Appeal No 23988 of 2017.

The apex court in Parag Gupta recognized the need for the Limitations Act to be applicable to Section 7 and 9 of the IBC in order to ensure that the limitation periods followed in such cases are logically consistent. Additionally, in the case of *Securities and Exchange Board of India v. Rajkumar Nagpal*,[15] the Apex court has held that such reasonable restrictions can also be implemented in the interest of asset maximisation and enhancing credit availability. In the context of Section 238 of the IBC, which grants overriding effect to the provisions of the IBC over any other law in force, the courts have recognized that this provision is not an automatic or blanket exception to all contractual or legal rights. The overriding effect of Section 238 is intended to further the objectives of the IBC, particularly in the insolvency resolution process, but this power must be exercised in a way that respects and upholds the fundamental legal rights and interests of parties to an agreement, including bona fide purchasers.

The decision in Rajkumar Nagpal elaborates on the limitations of Section 238, particularly where there is a conflict between the statutory provisions of the IBC and prioritising speedy resolution and safeguarding the statutory rights of creditors. In certain situations, like the case of *Sobha Limited v. Pancard Clubs Ltd*.[16] the court has recognized that the intent of the parties and the protection of bona fide purchaser rights can outweigh the automatic application of Section 238. In *Sobha Limited v. Pancard Clubs Ltd*., the court gave priority to the enforcement of the specific performance of a real estate contract, reflecting the intention of the parties and safeguarding the rights of Sobha Limited as a bona fide purchaser. The court held that despite

[15] Securities and Exchange Board of India v. Rajkumar Nagpal & Ors (SC August 30 2022) Civil Appeal No 5247 of 2022.

[16] Sobha Limited v. Pancard Clubs Ltd SC, 4 December 2017) Company Appeal (AT) (Insolvency) No 162 of 2017.

the potential conflict with other legal provisions, including the IBC, it was important to respect the contractual obligations and the rights that arise out of those obligations, especially where one party has acted in good faith and fulfilled their part of the agreement. The key takeaway here is that Section 238 of the IBC should not be used indiscriminately to override every other legal provision or agreement, especially where the legislative intent of the IBC is not compromised and the rights of bona fide purchasers or innocent parties are at stake. Courts, therefore, have recognized that the wide powers granted under Section 238 need to be tempered with judicial discretion and should not override legitimate contractual rights, especially when enforcing the intent of the parties to a contract.

While Section 238 of the IBC is designed to ensure that the insolvency resolution process is not hindered by conflicting laws, courts have also emphasized that the legal intent of the parties to a contract is a critical factor. If the enforcement of an agreement, such as a contract for the sale of property, is consistent with the legitimate intent of the parties and does not obstruct the objectives of the IBC, then the application of Section 238 may be restricted. In Rajkumar Nagpal, the courts essentially highlighted that Section 238 should not be used as a "blanket provision" to override all other laws, especially when it could undermine important legal protections such as the enforcement of contracts or the rights of bona fide purchasers. This is consistent with the idea that the legislative intent of the IBC should be respected, but it should not be used to unjustifiably negate other significant legal protections.

Given this ambiguity in the court's stance, it is essential to examine how public benefit and creditor rights are balanced in such agreements. In this context, several key concerns arise, particularly regarding the protection of creditor interests, which will be explored in the following section.

B. Public Benefit and Creditor Rights

Agreements that allow CDs to negotiate with creditors to waive rights would be blatantly harmful for creditor's rights because of an imbalance in negotiating power between the two and therefore are excluded from the ambit of this paper. Therefore this paper focuses on the enforceability of ICAs when there is a dispute between the participants of that ICA i.e. like in the Rakshit case where IDBI Bank's application was disputed by the other participants of the consortium of banks that had entered into an inter-se agreement with them. The concerns regarding creditor rights in such arrangements are threefold.

Firstly, and primarily, will the interests of the junior lenders be protected and will it be ensured that senior lenders do not get away with imposing their will upon the junior lenders?

The interests of all creditors are not rightly protected in the current form of CIRP. Cases like Committee of Creditors of *Essar Steel India Limited v. Satish Kumar Gupta*[17] (**'Essar Steel'**) and India Resurgence *ARC Pvt. Ltd. v. Amit Metaliks*[18], elucidate how the rights of junior lenders can often be sidelined and trampled upon due to their lack of voting share in the Committee of Creditors ('**CoC**'). Additionally, the wisdom of the CoC has been considered supreme and more often than not, cannot be subject to judicial review, as has been held in judgements like *Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd*.[19] There is no way for creditors belonging to a junior class to dispute the decisions of the CoC and plans approved in such cases often lead to a higher haircut for smaller lenders.

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[17] Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta (SC, 15 November 2019) Civil Appeal Nos 8766-67 of 2019.

[18] India Resurgence ARC Pvt Ltd v Amit Metaliks (SC May 13, 2021) Civil Appeal No 1700 of 2021.

[19] Jaypee Kensington Boulevard Apartments Welfare Association v NBCC (India) Ltd (SC 2021) SCC OnLine 253.

If the enforceability of such ICAs would be recognized, being subject to a factor-based analysis of the agreement if a dispute were to arise, junior lenders would have newer avenues for consideration in exchange for waivers. The approach discussed in Part IV would provide enough elasticity so that each dispute can be judged on its own merits while accounting for the necessary nuance in the differing relations between creditors across industries. While the CoC's supremacy is well-established, this raises a further question: if Security Trustee Agreements already provide similar enforceability, why should additional recognition of ICAs be necessary? The next concern addresses this issue by exploring the costs and benefits associated with such recognition.

Secondly, if Security Trustee Agreements allow creditors to get essentially the same legal enforceability as seen in the Rakshit case, then why is the recognition of ICAs needed and whether the costs are worth the benefits provided by such recognition?

While the Insolvency Law Committee (ILC) has discussed the enforcement of ICAs with respect to an inter-se agreement determining the priority of debts beforehand, the current paper focuses solely on the initiation of insolvency proceedings and majorly on the pre-petition stage. The ILC has stated that valid ICAs under Section 53 of the IBC can be enforced to change the priority of debts during the liquidation stage.[20] Therefore, if subordination agreements and ICAs are already valid under Section 53 of the IBC, then extending that enforceability to the pre-petition stage seems to be the only logically consistent choice. Just like how Section 53 cardinally states that any contractual agreement disturbing the stated order of priority would be disregarded, the same prohibition can be imposed upon ICAs that significantly

[20] Insolvency Law Committee, *Report of the Insolvency Law Committee* (March 2018) para 21.6.

curb a junior creditor's right to initiate a Section 7 application. The method proposed by the second concern, while it has been recognized by the court in Rakshit, simply ends up being a much more uneconomical and tedious way of ending up with the same result. Not to mention that entering into a Security Trustee Agreement would require additional costs from lenders, which would end up being out of reach for junior lenders that want the same uniformity of approach towards resolving the debt and maximising value in complex bankruptcies. It would also provide industry lenders a whole new avenue of cooperation and help reduce the multiplicity of bankruptcy proceedings in the country. Creditors would also be empowered with more control over their rights and can waive them as they see fit in return for fair consideration. Additionally, such agreements can serve as a much-needed out-of-court corporate debt restructuring mechanism for Indian players. The RBI already mandates entering into an ICA for RBI-regulated entities if they want to opt for an informal method of resolution.[21] The Supreme Court in *Securities and Exchange Board of India v. Rajkumar Nagpal & Others*[22] also upholds the legal validity of the RBI's mandate passed via a circular released by them. Even in the circular, the interests of dissenting creditors are preserved and the CD is not allowed to repay an amount lesser than that demanded by them. Such judgements only serve to show that the court is even willing to recognise the validity of an enforced waiver onto creditors, provided that the value of the asset subject to insolvency is maximised and as long as the interests of all parties are preserved.

[21] Reserve Bank of India, '*Prudential Framework for Resolution of Stressed Assets*' (RBI/2018-19/203, 7 June 2019).

[22] Securities and Exchange Board of India v. Rajkumar Nagpal & Ors (SC August 30, 2022) Civil Appeal No 5247 of 2022.

The enforcement of such ICAs could also lead to a better medium for enforcing the rights of junior lenders because as can be seen in judgments like *Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Others*[23] here is very little power of judicial review provided to the courts once the Resolution Plan (**'RP'**) is passed. The fate of dissenting creditors is often left to the hands of senior creditors with greater voting share and they are often only left with protection guaranteed up to a percentage of their claim proportionate to their class of creditors. Such agreements can provide junior creditors with a way to demand fairer compensation even before insolvency as consideration for temporary waivers. Such agreements can also be subject to the review of the court much easier when compared to their jurisdiction over a passed Resolution Plan therefore, giving junior creditors a better avenue to enforce their rights.

Such agreements could also revive the Pre-Packaged Insolvency Resolution Process (**'PPIRP'**) in India. PPIRPs are an informal plan worked out between the debtor and the creditor before the filing of insolvency. The main intent behind such plans being that the approval process would be expedited if a plan had already been agreed upon by both parties. Inter-se agreements between creditors would allow them to come up with a mutually approved insolvency plan much faster which is one of the main reasons for the failure of PPIRP implementation in India. The same can be seen in the case of Enn Tee International Limited[24] where the approval from the CoC took more than a year. The approval from the CoC would be much faster if the insolvency had arisen from a united front of creditors that had ample time to calculate

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[23] Maharashtra Seamless Ltd v. Padmanabhan Venkatesh and Ors (SC January 22 2020) Civil Appeal No 4242 of 2019.

[24] ENN TEE Intl Ltd v. Ritu Rastogi Resolution Professional of ENN TEE Intl Ltd (NCLT Delhi October 19 2023) IA NO 4313 (PB)/2023.

them inter se relations. The initiation of insolvency from the unilateral action of any one creditor naturally leads to a time constraint on all other creditors to calculate their claims and take further action. Granting ICAs legal enforceability would ensure inter-creditor relations are taken more seriously, allowing restructuring plans to form more efficiently. While this would allow provide for a much more uniform and even-footed start to insolvency proceedings in general, in the case of widespread PPIRP implementation ICAs could pave the way for an expedited plan of approval since a preliminary consortium of creditors would already exist therefore eliminating the deliberation phase of the CoC ensuring faster approval. Given these potential benefits, it becomes crucial to establish a framework for determining when an ICA aligns with legislative intent and public policy. This leads us to consider a factor-based approach that courts may use to evaluate the validity and enforceability of such agreements.

IV. A FACTOR-BASED APPROACH

In determining whether an ICA runs astray of the legislative intent of the IBC and is contrary to public benefit, the courts would need to consider all the nuances and context of each agreement. However, through an analysis of the doctrine of waiver and the legislative purpose of the IBC, some determining factors can be gleaned. The Vidarbha judgement already grants the court discretionary powers over admitting a Section 7 application.[25] Moreover, a possible safe harbour provision could also be enacted to prima facie avoid an increase in litigations surrounding the enforceability of ICAs. Priority can be given to quantifiable factors like the consideration agreed upon and the scope, duration, and purpose of the ICA, and only if the ICA is not conducive to normal market practices and is seen to be exploitative or

[25] Vidarbha Industries Power Ltd v. Axis Bank Ltd (SC 2022) SCC OnLine SC 841.

encroaching upon the statutory right of either side should the Adjudicating Authority step in to inquire about the ICA. The primary factors that the courts must consider may be as follows.

A. Separation of debtor

Due to the imbalance of bargaining power between the two, the separation of the debtor from the ICA negotiations is crucial in order to prevent the proliferation of unfair credit agreements where junior creditors may be required to waive their right to file for bankruptcy. The complete absence of the debtor in the negotiation of the ICA is needed or the agreement must be entered into by the creditors after the debt agreement has been completed. The inter se agreement must be solely within the creditors and must only govern the relations between them, the debtor must not be a party with any locus rooted in the ICA. As seen in cases like Amitabh and Textrade, the courts have repeatedly emphasised the non-existence of any locus arising on part of the debtor with regards to an ICA between the creditors.

B. Material advantage over junior creditors

The level of control and imbalance in bargaining power needs to be a key consideration in whether the junior debtor's rights were encroached upon or if they were forced into a waiver. The agreement must not be less economically viable for the creditor at a lower standing than a traditional choice like a secured loan. The RBI circular mandating that creditors enter into ICAs if they want to opt for an out-of-court restructuring[26] and the court's standing in Essar Steel both echo the reasoning where it is mandated that the junior creditors must be guaranteed an amount equal to the amount owed to

[26] Reserve Bank of India, '*Prudential Framework for Resolution of Stressed Assets*' (RBI/2018-19/203, 7 June 2019).

them in proportion with the percentage amount recovered by the same class of creditors. While this approach does have its flaws and often ends up leading to huge haircuts for junior creditors, it does give some clarity as to how the economic outcome for the junior creditors can be calculated if the traditional CIRP was to be initiated. The ICA, therefore, must guarantee an outcome that is proportionate to the economic outcome for the senior lenders. There must be no inequity in the material gain enjoyed by different classes of participant creditors.

C. Scope & duration

The courts have often relied upon the overriding effect of Section 238 to invalidate any contract or prior arrangement to supersede the right to initiate bankruptcy. Therefore, the scope of the restraint and the duration of how long the restraint upon the creditor's rights is imposed needs to be reasonable. An agreement that permanently waives the creditor's right to file for bankruptcy or in general puts them in a detrimental position for an unreasonable amount of time would run aground of the legislative intent of the IBC to maximise value and boost credit availability. This is because of the negative effect the enforcement of such agreements would produce on the credit market in general. The scope of restriction of the agreement also needs to be taken into consideration. While standstill agreements that restrain the ability to initiate insolvency for certain reasonable periods of time may be accepted, or restrict the filing till the completion of a certain project or in the event of the failing of a risky business move may be considered valid after considering all other determinants, a blanket ban on the right to initiate CIRP would certainly be too restrictive and unreasonable in the eyes of the law.

D. Equitable consideration

The consideration that the junior lender receives must be equitable and at the very least must be greater than the mean economic outcome for the creditor. The mean economic outcome is the amount that the creditor would, on average, recover had the CIRP been initiated. This can be calculated by estimating the percentage that the creditor would receive based on what class of creditors they fall into. Since the rate of recovery via conventional CIRP is already low for dissenting debtors, they must be given a sum that is visibly greater than such amount to compensate for the waiver of such right. The consideration received is to play a key role since it is the main driving force for waiving the right from the creditor's side. The NCLAT has in Avil Menezes[27] recognized the importance of equitable distribution of assets between secured creditors and there is no realm of possibility that the same would not continue regarding such waivers.

E. Junior creditor rights

The rights of the junior creditors after the agreement are paramount to its legality. In *DBS Bank v. Ruchi Soya*,[28] the Apex Court recognized the need to protect the rights of junior financial creditors and operational creditors even after taking into consideration the supremacy of the commercial wisdom of the CoC. The same ratio, therefore, would carry over into judging the consortium of creditors in the ICA as acting like a pseudo-CoC i.e. in the capacity of a body of creditors defining the debt's relation towards each other. The junior creditors must always have the right to recover the amount of the

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[27] Avil Menezes v. Principal Chief Commissioner of Income Tax Mumbai (NCLAT July 12, 2024) Company Appeal (AT) (Insolvency) No 258 of 2024.

[28] DBS Bank Ltd v. Ruchi Soya Industries Ltd. (SC January 3 2024) Civ App No 9133 of 2019.

secured loan issued by them to the CD. While proportionate voting rights may not be guaranteed, the economic interest must always be secured.

F. Purpose & context

The purpose of the ICA and the context behind entering into such an agreement by each creditor must also be taken into account. If the facts surrounding the agreement point to the intention exclusively being to lead a creditor into waiving away their rights or put them at a disadvantageous position post hoc, the agreement may be subject to judicial review. The situations surrounding the ICA also need to be taken into consideration, such an agreement must be entered to account for a specific scenario and not as a blanket restriction upon the creditor's right. The restraint must be calculated and limited in nature in order for it to be valid. Intent plays a crucial role in determining the intent of the agreement.[29] It is imperative that such disputes be solved in the pre-CIRP stage because as seen in judgements like Kalpraj Dharamshi[30] the commercial wisdom of the CoC is held paramount and the extent of protection afforded by the Essar Steel judgement only exists up to the percentage recovered by the proportionate class of creditors, which can often be dominated by senior creditors through voting percentage.

G. Transparency

The intent and consideration for entering into such an agreement for all parties must be transparent in order to accurately determine that the intent of all parties was legal. Inspiration can be drawn from the international treatment of relational contracts like in the case of *D&G Cars Ltd v. Essex Police Authority*[31] to ensure that the agreement was entered into in good faith.

[29] G T Girish v. Y Subba Raju (SC January 18 2022) Civ App No 380 of 2022.
[30] Kalpraj Dharamshi v. Kotak Investment Advisors Ltd (SC March 10 2021) Civ App No 2943/-2944 of 2020.
[31] D&G Cars Ltd v. Essex Police Authority, [2015] EWHC 226 (QB).

The enforcement of such agreements can also follow the review process followed to scrutinise true sale transactions in India like *Reliance Nippon Life Asset Management Limited v. Dewan Housing Finance Corporation Limited* and Ors.[32] Judgements like *Infrastructure Leasing and Financial Services Ltd. v. Hdfc Bank Ltd. & Anr.*[33] provide a suitable approach for the post hoc analysis of an agreement with relation to such determinants.

V. CONCLUSION

The enforceability of ICAs within the framework of the Insolvency and Bankruptcy Code, 2016, represents a nuanced intersection of contractual freedom and public interest. The case law demonstrates that while courts have generally been reluctant to allow ICAs to override statutory rights, particularly the right to initiate insolvency proceedings under Section 7, they also acknowledge the complexities of creditor relations and the potential benefits of more structured, consensual agreements among creditors.

The primary challenge lies in balancing the statutory rights of creditors with the public policy objectives of the IBC, which aim to maximise asset value and ensure equitable treatment of all creditors. The doctrine of waiver, when applied to Section 7, must be carefully considered to avoid undermining these objectives. A factor-based approach, which considers the separation of debtor involvement, the protection of junior creditors, the reasonableness of the agreement's scope and duration, and the equitable nature of the consideration received, could provide a framework for assessing the validity of such agreements.

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[32] Reliance Nippon Life Asset Mgmt v. Dewan Housing Finance Corp (High Court Bombay November 13 2019) Commercial Suit(L) No 1034 Of 2019.

[33] Infrastructure Leasing & Financial Services Ltd v. HDFC Bank *Ltd* (SC October 19 2023) Civil Appeal No(S) 4708 of 2022.

Ultimately, while ICAs offer potential for more efficient and cooperative debt restructuring, their enforceability must be aligned with the overarching goals of the IBC. Courts must ensure that such agreements do not compromise the legislative intent of protecting creditor rights and fostering a healthy credit market. By adopting a nuanced and context-specific approach, the judiciary can strike a balance between contractual autonomy and public interest, paving the way for more robust and fair insolvency practices in India.