VI. BID-RIGGING IN INSOLVENCY RESOLUTION APPLICATIONS: HARMONIZING COMPETITION LAW WITH INSOLVENCY LAW

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ABSTRACT

The Corporate Insolvency Resolution Process ("CIRP") determines the fate of the Corporate Debtor wherein third-party entities can acquire the debtor in order to revive it. Some opportunistic notorious entities may indulge in bid-rigging in insolvency resolution applications. Now as the economy is revitalizing again after insolvency initiations being barred for a year, India may witness such bid-rigging. The insolvency jurisprudence of the USA has seen a few such cases of which India can take cognizance. This misconduct can be in form of bid-suppression, collusive joint-bidding, multiple bidding & collective boycotts. To tackle this issue, there is a need to make the CIRP process fairer & more transparent for all the stakeholders. The Committee of Creditors ("CoC") must be made accountable for their powers & decision-making. The acts of bid-withdrawals, bid-revisions & bid-suppressions can spark suspicion of bid-rigging. This paper attempts to explain how bid-rigging can happen in Insolvency Resolution Applications, how it can be suspected & how a harmonious construction between the Insolvency and Bankruptcy Code, 2016 and Competition Law can be made to penalize & regulate this misconduct.

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I. INTRODUCTION

When an entity announces Insolvency or Bankruptcy, the existence of the company depends on the Corporate Insolvency Resolution Process (**"CIRP"**), along with the fate of all the workers, employees, financers and other stakeholders. The insolvent company (Corporate Debtor or **"CD"***)* can be revived by another company which shows interest to acquire the debtor by submitting their plan to resolve the insolvency of the debtor (Resolution Plan).[1] However, this process can be manipulated by some dominant or notorious players in the market by Bid-Rigging, which puts the interests of all other stakeholders of the debtor company in jeopardy. Even though there are very few resolution plan applicants in a CIRP, there are rare chances of bid-rigging in insolvency resolution plans. Although the developing Indian insolvency law regime has not witnessed any case of such bid-rigging, it can take cognizance of the partly-similar[2] American (**"USA"**) insolvency law

[1] The Insolvency & Bankruptcy Code 2016, No. 31, Acts of Parliament, 2016 (India), § 30 [hereinafter *The Insolvency & Bankruptcy Code 2016*].
[2] Prof. Rashid Shamim, *Bankruptcy Laws: A Comparative Study of India and USA,* 6(2) J. O. MG'MENT 247, 252 (2019). See also NISHITH DESAI ASSOCIATES, https://nishithdesai.com/fileadmin/user_upload/pdfs/Bankruptcy_Laws_-_A_Comparative_analysis_-_United_States_and_India.pdf (last visited July 22, 2021).

regime which might be the only developed regime to have witnessed a few cases of this form of bid-rigging.

The US Bankruptcy Model follows a Debtor-in-Possession system wherein the directors and management stay in control of the bankrupt debtor company unless a bankruptcy trustee is appointed under Section 322[3] of Chapter 11 US Bankruptcy Code (**"USBC"**). The debtor has the sole right to formulate a reorganization plan (resolution plan in Indian parlance) pursuant to Section 1121[4] of USBC within a period of 120 days of the announcement of bankruptcy, which can be extended till 18 months. Pursuant to Section 341[5] of USBC, the debtor can negotiate the terms of the plan with senior creditors (secured creditors in Indian parlance), with the trustee (if any) chairing this meeting. Similar to the 'waterfall mechanism' given under Section 53 of the Indian Insolvency and Bankruptcy Code, 2016 (**"IBC"**),[6] the US model also divides creditors into different classes according to the nature and priority of their credit wherein senior creditors are prioritized over other junior creditors pursuant to the 'Absolute Priority' rule explained in Section 1129[7] of USBC. Both regimes provide some protections to debts to waged labourers and employees.

The reorganization plan proposed by the debtor is required to be approved by all the impaired classes of creditors by a minimum voting requirement before courts can pass a 'confirmation order' to implement the

[3] The United States Bankruptcy Code 1978, https://www.govinfo.gov/content/pkg/USCODE-2011-title11/pdf/USCODE-2011-title11.pdf, § 322 [hereinafter *The United States Bankruptcy Code 1978*].
[4] The United States Bankruptcy Code 1978, § 1121.
[5] The United States Bankruptcy Code 1978, § 341.
[6] The Insolvency & Bankruptcy Code 2016, § 53.
[7] The United States Bankruptcy Code 1978, § 1129.

plan under Section 1129 of USBC. Even if some impaired classes of creditors dissent in approval of the plan, either the court can still approve the plan if it finds the plan 'fair and equitable', or it can modify the plan to resolve the grievances of dissenting creditors. The court passes the confirmation order for implementing such plans only when certain requirements mentioned in Section 1129, such as compliance to all laws being in force, compliance to the 'absolute priority' rule, submission of plans in good faith by a debtor, etc. are fulfilled. This is similar to the conditions mandated to be satisfied before the approval of a plan under Sections 30 and 31 of IBC,[8] which the resolution professional is obligated to check before the adjudicating authority approves the resolution plan. In the US, the plan can be amended, modified or withdrawn by the debtor at any time before it gets the court's 'confirmation order',[9] subject to Sections 1122 and 1123 of USBC.[10] This mechanism of amending the plan can be said to be partly similar to the Indian procedure, which allows withdrawal of resolution plans till the CoC approval.

In both jurisdictions, either the debtor can announce bankruptcy voluntarily, or a group of creditors can file a petition to initiate bankruptcy proceedings. These petitions for initiating bankruptcy can be withdrawn by courts approval. After the bankruptcy is admitted by the courts, Section 362 of USBC[11] imposes an 'automatic stay' on all proceedings pending against the debtor, resembling the imposition of a 'moratorium' under Section 14 of

[8] The Insolvency & Bankruptcy Code 2016, §§30, 31.
[9] In Re. Delta Petroleum Corporation, et al., Case No. 11-14006 (KJC), https://www.sec.gov/Archives/edgar/data/821483/000119312512385136/d408010dex21.htm (Last visited Sept. 4, 2021).
[10] The United States Bankruptcy Code 1978, §§1122, 1123.
[11] The United States Bankruptcy Code 1978, § 362.

IBC.[12] Thus, in addition to the imposition of moratorium and withdrawal of resolution plans, the bargaining power and priority given to secured creditors is what makes the Indian and American regimes partly similar in spite of some differences, which make a case for an intriguing comparison, which the author attempts to make in this paper.

This article shall deal with what bid-rigging is, why it can happen in insolvency resolution applications, how can it happen & what can be the reforms made by the Insolvency & Bankruptcy Board of India (**"IBBI"**) and the Competition Commission of India (**"CCI"**) to tackle this antitrust issue.

II. BID-RIGGING FROM A COMPETITION LAW PERSPECTIVE

Bid-rigging is a type of Anti-Competitive Agreement under Section 3 of the Competition Act, 2002 (**"Act"**), which is presumed to have an Appreciable Adverse Effect on Competition (**"AAEC"**) in the market. The explanation to Section 3(3)(d) of the act defines bid-rigging as an agreement between entities engaged in similar or identical production or trading of goods which has the effect of reducing or eliminating the competition for bids, which adversely affects the process of bidding.[13] These agreements are a result of collusion amongst bidders to keep the bid money at pre-determined levels and collaborate over the response to invitations of tenders, whereby individual bidders surrender the autonomy to file bids.[14] Thus, the entire process of free-

[12] The Insolvency & Bankruptcy Code 2016, § 14.
[13] The Competition Act 2002, No. 12, Acts of Parliament, 2003 (India), § 3(3)(d).
[14] VERSHA VAHINI, INDIAN COMPETITION LAW 96, (Lexis Nexis 2016).

bidding is manipulated. Bid-rigging can be in many forms such as bid-suppression, collective boycotts, collusive joint-bidding & cover-bidding.[15]

The main object sought by the IBC is to secure the most feasible and viable resolution plan benefiting all the stakeholders in CIRP to financially revive the corporate debtor and keep it a going concern.[16] This is synchronous with the object sought by competition law in competitive bidding i.e., enabling procurement at the most suitable terms and conditions. Collusive bid-rigging by resolution applicants negates and defeats this very goal of securing the most feasible resolution plan for the corporate debtor, making bid-rigging inherently anti-competitive.[17] Further, while such procurement by tenders has a huge impact on the GDP of the country and bid-rigging or corruption in this activity may have adverse ramifications, effective enforcement of competition law is a key solution.[18]

III. POSSIBLE REASONS FOR BID-RIGGING IN INSOLVENCY RESOLUTION APPLICATIONS

There are many possible reasons why entities may indulge in anti-competitive practices like bid-rigging in insolvency resolution applications. An ongoing CIRP only means that the debtor is loss-making & it cannot pay off its debts. Although an entity announces insolvency or bankruptcy, the

[15] John Handol, *Establishing breach of Section 3 of the Competition Act: The Indian Bid-rigging cases*, 27 NLSI REV. 147, 150-51 (2015), https://nlsir.com/wp-content/uploads/2020/07/John-Handoll.pdf.
[16] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India, 2019 SCC OnLine SC 73, (27, 73).
[17] PROVISIONS RELATING TO BID-RIGGING, CCI ADVOCACY SERIES- 3, Pg. 5 (2020), https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Bid%20Rigging.pdf (last visited Jul. 23, 2021).
[18] M/s Jupiter Gaming Solutions Pvt. Ltd. v. Secretary, Finance, Government of Goa & Anr., 2011 SCC OnLine CCI 23, 71.

entity may still have a wide consumer base, valuable assets in form of machinery, factories, land, etc., a strong supply chain, or good production capacity. Due to the aforementioned factors, the debtor may remain a viable entity to invest in. The well-organised and settled system of manufacturing & supply, certain fixed employees & workplace make the debtor attract other entities to acquire the debtor.

Hence, owing to the commercial ambition of other entities, the entities submitting a resolution plan have some vertical or horizontal overlap in their operations and the nature of products. From a competition law perspective, the acquiring entity may fall in the same 'Relevant Product Market'[19] or 'Relevant Geographical Market'[20] of the debtor. Also, in some cases, a commercially strong entity may submit a plan to enter into other product or geographical markets.

For instance, if a beverage manufacturing company 'A' is insolvent, but it has a wide consumer base, organised supply chain, production units, workforce in North India & another beverage manufacturing company and a bottle-making company 'B' has the same in South India, 'B' may submit a resolution plan to acquire 'A' to enter into the market in North India. Here, the operations of A & B may overlap with respect to the products, vertically or horizontally. In other cases, the investing entity may be a group of companies engaged in different businesses, with an ambition to start another field of business. Thus, to invest in 'A', there can be more such entities like 'B' which may submit a resolution plan.

[19] The Competition Act 2002, No. 12, Acts of Parliament, 2003 (India), §2(s).
[20] *Id.* § 2(f).

The commercial ambition of entities may urge them to eliminate competition in bids, to move ahead in the line. Some commercially strong entities can engage in side-agreements with other bidders to prevent them from bidding or withdrawing their bid, resulting in bid-suppression. Also, bidders can indulge in collusive bidding to geographically allocate or divide the products of the debtor by inviting tenders within themselves. Such allocative bidding was also seen in the case of *Rajasthan Cylinders & Containers v. Union of India,*[21] where nineteen-cylinder manufacturers had colluded in Hotel Sahara Star, Mumbai to discuss & fix prices of bids & had allocated geographical territories amongst themselves. It was found that bidders bidding for Western India had not quoted bids for Eastern India and so on. The CCI found a cartel-like behaviour in this case of bid-rigging.[22]

Adding to the competition law jurisprudence, Supreme Court held that the necessary ingredients of bid-rigging are: (i) An agreement between competing bidders; (ii) Parties must be engaged in identical or similar production of goods and services; and (c) the agreement effects in elimination or reduction of competition, or adversely affects or manipulates the bidding process.[23] Further, it can be observed that there may not be direct evidence to prove the existence of agreements as they are secretive in nature, the standard of proof required is one of probability.[24] In the absence of a formal agreement, mere practical cooperation or concerted actions risking competition would amount to anti-competitive practices.[25] Further, although "collusive bidding"

[21] Rajasthan Cylinders & Containers Ltd. v. Union of India, 2018 SCC OnLine SC 1718.
[22] *Id.* at ¶8-9.
[23] *Id.* at ¶ 77.
[24] *Id.* at ¶ 81.
[25] *Id.* at ¶ 84.

is not defined in the Act, "bid-rigging" and "collusive bidding" are overlapping concepts[26] and have been used interchangeably by various competition authorities.[27]

Among other reasons, the possibility of such bid-rigging was even recognized by Educomp Solutions Ltd.,[28] when it invited insolvency resolution plans while undergoing CIRP. The invitation request explicitly ordered the CoC and Resolution Professional to observe "highest ethics" and avoid all "coercive", "corrupt" or "collusive" practices,[29] which included bid-rigging[30] in their respective definitions as given in the public invitation. Still, no further deliberations were made as to how such collusive practice must be diagnosed and tackled. Hence, the threat of bid-rigging remains an unexplored area in insolvency law jurisprudence, which this paper shall deliberate on.

IV. TYPES OF POTENTIAL BID-RIGGING

A. Bid-Suppression & Withdrawals of Resolution Plans

As mentioned earlier, bid-suppression is a form of bid-rigging wherein one or more entities, who would otherwise submit a bid, agree to refrain from bidding or withdraw the previously submitted bid in exchange for a 'pay-off' or making a side deal benefiting the entity as the consideration incentivizing

[26] *Id.* at ¶ 78.
[27] Excel Crop Care Ltd. v. Competition Commission of India & Anr., (2017) 8 SCC 47, 40-41.2.
[28] Committee of Creditors of Educomp Solutions Ltd. v. Ebix Singapore Pte. Ltd. & Anr., 2020 SCC OnLine NCLAT 592.
[29] EDUCOMP SOLUTIONS LTD., *Invitation for Submission of Resolution Plans for Educomp Solutions Limited*, 36-37, http://www.educomp.com/Data/ESL-RFRP-17012018.pdf (last visited Jul. 23, 2021).
[30] *Id.* at 50.

such abstinence,[31] so that the designated winning competitor's bid will be accepted unchallenged.[32] This can result in a reduction of the number of competitors bidding, thereby adversely affecting the process of bidding, violating Section 3(3)(d) of the Act.

I. Analysing the Sagecrest II Bankruptcy case

Although the CCI may not have seen cases of bid suppression, this type of misconduct was punished by the Bankruptcy Court of Connecticut (United States) in the case of *In Re. Sagecrest II LLC et al.*[33] (**"Sagecrest II case"**). In 2004, two entities named Sagecrest LLC (**"SCII"**) and Jean-Daniel Cohen (**"Cohen"**) submitted separate insolvency resolution plans after a Canada based Corporate Debtor filed for insolvency under Canada's Companies Creditors' Arrangement Act, 1985.[34] After the bids were submitted, a creditor filed a case in the Canadian Court for re-opening of bids due to the possibility of better offers in the interests of creditors, to which the Canadian Court agreed. After this, SCII approached Cohen asking the latter to withdraw the bid & support the former in exchange for the latter receiving a 'pay-off' benefiting Cohen. Cohen then withdrew its bid and the two bidders made a secretive 'Settlement Agreement'. Finally, the Bankruptcy Court of Connecticut on a complaint, held that this collusive side deal was

[31] In re. Sagecrest II LLC and Sagecrest Holding Limited, No. 3:16-cv-00021 (VAB), Pg. 5, 12, https://www.govinfo.gov/content/pkg/USCOURTS-ctd-3_16-cv-00021/pdf/USCOURTS-ctd-3_16-cv-00021-0.pdf (last visited Jul. 23, 2021).
[32] VERSHA VAHINI, INDIAN COMPETITION LAW 96, (Lexis Nexis 2016).
[33] In re. Sagecrest II LLC et al., Case No. 08/50754, (Bankr. D. Conn. Dec. 23, 2015), bankrupt.com/misc/SageCrestII.DS.pdf.
[34] The Canada Company Creditors' Arrangement Act 1985, R.S.G. 1985, c. C-36, laws-lois.justice.gc.ca/eng/acts/c-36/FullText.html.

unenforceable & that this agreement amounted to 'bid-suppression' due to the collusive thwarting of a rival bid.

The argument that bid-rigging is very rare due to very low number of insolvency resolution applicants can be made. But in the *Sagecrest II case*, although there were only 2 resolution applicants, bid-rigging was shown. This proves the mere low number of resolution applicants in CIRP does not eliminate the chances of such anti-competitive practices like bid-rigging.

It was the sudden bid-withdrawal of Cohen that sparked suspicion of collusion, which helped to prove bid-rigging. A solution to counter this issue is to make parties withdrawing their bids submit the reason behind their withdrawal. An abnormal reason submitted by parties can spark suspicion of collusion. The subsequent part of the paper shall highlight lessons from the facts seen in the *Sagecrest II case* of which the Indian insolvency law jurisprudence can take cognizance.

II. Lessons for Indian Insolvency Law regime

Although Indian law prohibits withdrawal of bids after the resolution plan gets the approval of the CoC, an issue here is that the withdrawing resolution applicants are not demanded to give a reason behind withdrawing their bids. Hence, bid-withdrawals in furtherance of collusive agreements can be done by parties without being held accountable to give a reason behind such withdrawal. In a progressive step, NCLAT in *Kundan Care v. Amit Gupta*[35] held that a resolution applicant whose resolution plan is approved by CoC is not at liberty to alter his stand and withdraw the resolution plan as it would sabotage the CIRP, thereby frustrating the object sought by the IBC. The

[35] Kundan Care Products Ltd. v. Mr. Amit Gupta & Ors., 2020 SCC OnLine NCLAT 670, 7.

NCLAT reasoned that there is no provision in IBC allowing successful resolution applicants to withdraw their bids; the approved resolution plan is contractually binding on the resolution applicant; and that the resolution applicant is bound by estoppel. This judgement overruled NCLAT's verdict in *Metalyst Forgings v. Consortium of Deccan Value Investors*[36] holding that 'unwilling' successful resolution applicants cannot be estopped to obey the approved resolution plan. However, here, the issue is the reason behind such withdrawal of resolution plans.

While the absence of a provision in IBC dealing with the withdrawal of resolution plans can give courts the liberty to decide the issue as per the merits of each case, this can also result in resolution applicants using this as a tool to 'wiggle out' of CIRP as seen in *Metalyst Forgings*.[37] To tackle this issue, the stance taken in *Kundan Care*[38] can be cemented by amending the IBC by prohibiting such withdrawal of resolution plans in late stages, which will also prevent resolution applicants from colluding and withdrawing their resolution plan. Further, a provision empowering the CoC to demand a reason behind such withdrawal may also be added to make withdrawing resolution applicants accountable for their decision. Furthermore, many successful resolution applicants claim 'renegotiation' with CoC to alter the resolution plan or to 'wriggle' out of CIRP.[39]

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[36] Committee of Creditors of Metalyst Forging Ltd. v. Deccan Value Investors LP & Ors., 2020 SCC OnLine NCLAT 837, 39.
[37] *Id.*
[38] *Supra* note 27.
[39] Joel Rebello & Satish John, *IBC Process faces new challenges as some winners look to wriggle out*, ET PRIME, (April 28, 2020, 07:29 AM), https://economictimes.indiatimes.com/industry/banking/finance/banking/ibc-process-faces-new-challenges-as-some-winners-look-to-wriggle-out/articleshow/75415737.cms (last visited Jul. 26, 2021).

Another solution can be to enforce time-bound electronic bidding of resolution plans. Presently, resolution applicants are allowed to negotiate with CoC and submit revised bids. This not only delays the final bid for CoC's consideration but also increases associated litigation which delays CIRP.[40] Such instances of revised multiple-bidding seen in *Jay Overseas v. George Samuel,*[41] in *Ruchi Soya Bankruptcy,*[42] and the *Bhushan Steel Insolvency*[43] have been discussed in the subsequent part of the paper. Now, physical or in-person submission and negotiation of bids enables bidders to identify competing bidders and increases communication between competing bidders during the tendering process.[44] Time-bound electronic bidding prevents this communication, thus reducing potential collusion and reducing the 'participation cost' of bidding which is convenient for many genuine bidders.[45] On similar lines, a part of such a process of time-bound electronic bidding was proposed by the government.[46] Thus, Section 30 of the IBC can be amended to allow time-bound electronic bidding.

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[40] Karunjit Singh, *Time Bound e-bidding to speed up IBC resolution*, THE ECONOMIC TIMES, (February 24, 2021, 18:35 PM), https://economictimes.indiatimes.com/news/economy/policy/time-bound-e-bidding-to-speed-up-ibc-resolution/articleshow/71496833.cms#:~:text=Time%2Dbound%20e%2Dbidding%20to%20speed%20up%20IBC%20resolution,SECTIONS&text=The%20government%20amended%20the%20Insolvency,the%20time%20taken%20for%20litigation (last visited Jul. 26, 2021).

[41] Jay Overseas Pvt. Ltd. v. George Samuel Resolution Professional of Jason Décor Pvt. Ltd. & Anr., 2020 SCC OnLine NCLAT 835.

[42] *Infra* note 39.

[43] *Infra* note 41.

[44] Ken Danger & Antonio Capabianco, *Guidelines for Fighting Bid Rigging in Public Procurement*, ORGANISATION OF ECONOMIC CO-OPERATION & DEVELOPMENT (OECD), Pg. 7, https://www.oecd.org/competition/cartels/42851044.pdf (last visited Jul. 26, 2021).

[45] *Id.* at Pg. 4. See also *Designing Tenders to Reduce Bid Rigging*, OECD, Pg. 9, https://www.oecd.org/daf/competition/cartels/42594504.pdf (Last visited Jul. 26, 2021).

[46] *Supra* note 32.

Apart from the sudden withdrawal of a bid, even multiple bids can spark suspicions of a collusion. The subsequent chapter shall explain the same.

B. Suspicions arising from Multiple-Bidding

Multiple bidding means when a bidder places another bid subsequently after withdrawing the previously submitted resolution plan or revises the bid originally submitted. In most cases, the new bid submitted provides for a bigger amount than the amount quoted in the previous bid. The question arises whether such revisions should be allowed. The principle of 'maximization of assets', which is one of the main objectives sought by IBC,[47] can be argued to allow such revisions, but it may give leisure to many bidders to re-bid, further slowing the CIRP. This can be considered another reason why IBC can be amended to introduce time-bound electronic bidding as argued previously.

1. Analysing the Ruchi Soya Insolvency case

In the *Ruchi Soya Industries Bankruptcy case*,[48] the NCLT allowed Patanjali Ayurveda Ltd. and Adani Wilmar Ltd. to submit multiple bids before the former won the tender for the final bid of Rs. 4350 Crore. Again, it is reiterated that the authority must demand a reason behind such re-submission of bids if the revision was not in furtherance of a negotiation between the bidder and the CoC. Also, such revisions can arise when bidders collude after the original submission and designate one entity as the winner and the winner increases the bid by a revision. It is convenient for one bidder to increase the bid than all other colluders reducing their bids. It is to be noted that there have

[47] Committee of Creditors of Essar Steel India Ltd. thr. Authorised Signatory v. Satish Kumar Gupta & Ors., 2019 SCC OnLine SC 1478, ¶ 45.
[48] Standard Chartered Bank & Anr. v. Ruchi Soya Industries Ltd., 2017 SCC OnLine NCLT 12689.

been instances of bidders colluding after the original bid, as in the *Sagecrest II case* in the US.[49] Considering a low number of bidders, the collusion can be easier.

2. The Bhushan Steel Insolvency case

In the *Bhushan Steel Bankruptcy case*,[50] the NCLAT accepted a late bid by Liberty House. This multiplicity in bids creates an informality, which is sufficient to create suspicion of collusion between competing bidders if such revisions are without reason or explanation. Such revisions should only be accepted when they are in the interests of creditors, which is the objective of the IBC.

Such informalities, however, adversely affect the CIRP, highlighting the need to amend IBC to have more a consolidated & organised system for the submission, withdrawal & revision of bids under IBC. This can be a cause for instigating investigations on the bidders if more evidence is obtained. From an antitrust perspective, the CCI uses the test of 'preponderance of probabilities' or 'beyond reasonable doubt'[51] to start investigations. Factors like price parallelism,[52] similarity in time of bid submission & other circumstantial evidence may be used to impose penalties for proven misconduct.[53] If such bid-rigging agreements are proven, the damage on the

[49] *Supra* note 23; (In re. Sagecrest II LLC).
[50] Tata Steel Ltd. v. Liberty House Group Pvt. Ltd., 2019 SCC OnLine NCLAT 13.
[51] Director General (Supplies & Disposals) v. Puja Enterprises, 2013 SCC OnLine CCI 55, 25.
[52] In Re. Builders Association of India v. Cement Manufacturers' Association & Ors., 2016 SCC OnLine CCI 46.
[53] In Re. Aluminium Phosphide Tablets Manufacturers, 2012 SCC OnLine CCI 25.

market need not be proven as such agreements are presumed to have an AAEC.[54]

Collusion in bidding has been at the centre of this discussion. Now, joint bids can also spark suspicion because competing bidders submitting joint bids have an opportunity to collude between themselves. This can also be a cause for investigation for bid-rigging. The subsequent chapter shall deal with the same.

C. Collusive Joint-Bidding

Joint-bidding is another form of potential collusive bid-rigging in the CIRP. In the US case of *Grand Union Company Bankruptcy*,[55] Grand Union filed for a Chapter 11 Bankruptcy in the New Jersey Bankruptcy Court. C&S Wholesale Grocers Inc. submitted a joint bid along with several other small players, and the bid outnumbered all other bids. Hence, another bidder Great Atlantic & Pacific Tea Co. (**"A&P"**) objected stating that such collusive bidding *per se* violated the Sherman Act (US Competition Law). Also, Section 363(n) of the USBC[56] states that the sale of a company can be avoided if it results from an agreement between bidders in bad faith. This makes collusive bid-rigging in insolvency resolution bids null & void.[57]

The Court found collusion in the bid by C&S but allowed the sale of assets of the debtor because all the necessary disclosures of collusion were made to the CoC. The court held that such collusive bidding did not violate antitrust laws because disclosures were made to all the stakeholders & that the

[54] The Competition Act 2002, No. 12, Acts of Parliament, 2003 (India), § 3(3)(d).
[55] In Re. The Grand Union Company, et al. Debtors, 266 B.R. 621 (2001).
[56] The United States Bankruptcy Code 1978, § 363(n).
[57] In Re. Abbots Dairies of Pennsylvania, Inc., 788 F.2d 143, 149-50 (3d Cir. 1986).

conduct did not depress the process of bid-rigging. Relying on the *New York Trap Rock Corp. v. Compania Naviera Perez,*[58] the court held that joint-bids are not collusive when they are done in good faith in public interest. Thus, not all forms of bid-rigging can affect the insolvency resolution process.

The abovementioned were potential forms of bid-rigging by insolvency resolution applicants, in which only the applicants/bidders are a part of the agreement. However, bid-rigging means manipulating or controlling the outcome of bids, and it is not necessary that only the applicants can manipulate or control bids. In some cases, the outcome of bids can also be controlled by the committee which approves or rejects bids. The subsequent chapter shall emphasize on the unchecked discretion of the CoC & how these powers can be abused to manipulate bids. Again, India has not seen such cases but can take cognizance of the facts seen in the afore-cited *Grand Union Company Bankruptcy* to tackle such circumstances if they arise in India.

D. Abuse of Power by Creditors

The IBC regime has received many criticisms with respect to the formation of the CoC, the rights & powers of CoC in the resolution plan approval process. Thus, the creditors, by virtue of their dominance can abuse this power to affect the resolution plan bidding process. In the *Neiman Markus Group Insolvency case* in the USA,[59] the co-chair of the committee of unsecured creditors was held guilty of manipulating the bids by abusing his position as co-chair for the individual profit of the creditor company. Due to

[58] In re. New York Trap Rock Corp. v. Compania Naviera Perez Companc, S.A. 42 F.3d 747 (2d Cir. 1994).
[59] In re. Neiman Marcus Group Ltd LLC, No. 20-32519 (Bankr. S.D. Tex. 2020), https://cases.stretto.com/public/X064/10214/PLEADINGS/1021405072080000000221.pdf.

incurring huge losses during COVID-19, Neiman Markus Group (**"NMG"**) filed for a Chapter 11 Bankruptcy Proceedings in Texas on May 7, 2020. Damien Kamensky (**"DK"**), the Managing Partner of Markie Ridge, an unsecured creditor, was appointed as the co-chair of the Committee of Unsecured Creditors. The Texas Bankruptcy Court later found that DK abused his position as the co-chair to pressurize rival bidders not to bid for resolution plans because Markie Ridge wanted to buy the assets of NMG. DK had also faced a criminal prosecution by the U.S. Securities and Exchange Commission[60] in which the District Court of Southern New York sentenced him to imprisonment for six months.[61]

I. The Decision in the Neiman-Marcus Group Insolvency case

The court further held that each member of the CoC has a fiduciary obligation to other members & this duty supersedes the personal economic interests of individual members.[62] Also, it became a well-established rule in US Insolvency Law that creditors can make economically opportunistic bids/moves in regard to the insolvency resolution, but this must not be a result of them taking unfair advantage of their committee membership.[63] It is also notable that even though creditors have qualified immunity in insolvency proceedings, this immunity does not apply to wild misconduct ultra-vires their

[60] U.S. Securities and Exchange Commission, *SEC Charges Fund Manager for Fraud in Securities Offering in Neiman Markus Bankruptcy*, Press Release No. 2020-203, https://www.sec.gov/news/press-release/2020-203 (last visited Jul. 26, 2021).
[61] Jonathan Stempel, *New York hedge fund founder Kamensky sentenced to prison in Neiman Marcus fraud*, REUTERS (May 7, 2021, 10:18 PM), https://www.reuters.com/world/us/new-york-hedge-fund-founder-kamensky-sentenced-prison-neiman-marcus-fraud-2021-05-07/ (Last visited Jul. 27, 2021).
[62] In re. Rickel & Assocs., Inc., 272 B.R. 74, 100 (Bankr. S.D.N.Y. 2002).
[63] In re. El Paso Refinery, L.P., 196 B.R. 58, 75 (Bankr. W.D. Tex. 1996).

rights.[64] Thus, the Insolvency resolution process needs to be made more transparent.

II. Making CIRP more Inclusive & Transparent

The importance of the duties of the CoC & IRP in CIRP is not disputed. The IBBI advisory charter on the rights of the CoC[65] states that the CoC has the fate of not only the debtor but also other stakeholders. Hence, they automatically have a fiduciary duty as mentioned in the *Neiman-Marcus Group Insolvency case.* But the charter, referring to the *K. Sashikar v. Indian Overseas Bank case*, also says that the NCLT does not have the jurisdiction to question or evaluate the commercial decision of the CoC due to their 'commercial wisdom'.[66] This was recently reiterated by the Supreme Court of India in *Kalparaj Dharamshi v. Kotak Investment Advisors.*[67]

III. Decisional Accountability of the CoC to Ensure Transparency

The power of the CoC to not be answerable for their commercial decisions made after deliberations in the CoC meetings will thwart accountability & transparency in the CIRP. Although the 'Commercial Wisdom' of the CoC is undisputed, this does not excuse them from being accountable for reasons behind their decisions pertaining to resolution plans.

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[64] In re. PWS Holding Corp., 228 F.3d 224, 246 (3d Cir. 2000).

[65] *In aid of Insolvency Professionals and Committee of Creditors involved in the Corporate Insolvency Resolution Process*, INSOLVENCY & BANKRUPTCY BOARD OF INDIA, Press Release dated 1st March, 2019, (February 25, 2021, 18:45 PM), 3, https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2019/Mar/Charter%20IP-CoC_2019-03-01%2021:55:28.pdf.

[66] K. Sashikar v. Indian Overseas Bank Ltd. & Ors., (2019) 12 SCC 150, 33 & 52.

[67] Kalapraj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Ors., C.A. No. 002943-002944/2020, ¶ 155, https://main.sci.gov.in/supremecourt/2020/16649/16649_2020_33_1501_26784_Judgement_10-Mar-2021.pdf.

This is because the IBC intended the CIRP to ensure the revival of the Corporate Debtor & keep it afloat.[68] Hence, if not the court, at least the stakeholders in the CIRP have a right to know whether the plan is genuinely aimed at reviving the debtor and if the revival conforms to larger public interest and commercial morality[69] to fulfil the conditions in Section 30(2) of the Code.[70] While the concept of 'commercial morality' has not been deliberated upon at length, but the SC states that to strike a balance between abuse of discretionary powers & public interest, it becomes essential to raise commercial morality.[71] Further, a proper reason by the CoC will persuade the stakeholders in the CIRP about the legitimacy of the decision more effectively, rendering such decisions of the CoC to be more acceptable.[72]

The CoC must have decisional accountability, at least to justify their decision to other stakeholders in CIRP, which will ensure transparency and keep a check on arbitrariness.[73] Further, in an event organized by IBBI, while the IBBI stated that the IBC assigns the role of a 'saviour' on the CoC and that the CoC's commercial wisdom is supreme, it also recognized that firstly, with this tremendous responsibility and power comes accountability; and secondly, because the commercial decisions made by CoC affects the life of the corporate debtor and other stakeholders in CIRP, the CoC must be 'fair and

[68] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India, 2019 SCC OnLine SC 73, 28.
[69] Meghal Homes Pvt. Ltd. v. Shree Niwas Girni K.K. Samiti & Ors., (2007) 7 SCC 753, 51. Also see Shebani Bhargava, *Schemes of Compromise or Arrangement during Liquidation*, (2020) PL June 76, 80.
[70] The Insolvency and Bankruptcy Code 2016, § 30(2).
[71] Jasbhai Motabhai Desai v. Roshan Kumar & Ors., (1976) 1 SCC 671, 50.
[72] Makoto Hong Cheng, *Shaping a Common Law Duty to Give Reasons in Singapore*, 28 SINGAPORE ACAD. OF L. J. 24, 26 (2016).
[73] Avinash Bhagi, Judicial Accountability in India: An Illusion or Reality?, 8 GNLU J. OF LAW, DEV. & POL. 145, 149 (2018).

transparent' in its decisions.[74] Furthermore, on similar lines, the England & Wales Court, in the case of *Flannery v. Halifax Estate Agencies Ltd.*,[75] held that in cases of disputes involving an intellectual exchange, it is a general duty of the Judge to state reasons for his views or decision on the particular issue, along with the analysis of the reason, because this ensures 'fairness' in the trial.

Also, some creditors in the CoC may have larger voting rights in comparison to other creditors owing to a larger debt share. Therefore, the creditor having a higher debt share can easily control a substantial portion of the required 66% approval from the CoC, and accountability becomes important here. Hence, to control unilateral & arbitrary misconduct by the CoC, the CoC must be made accountable for stating the rationale behind the approval or rejection of a resolution plan.

Now, the subsequent chapter shall deal with steps the regulators can take to tackle & penalize such offences.

V. PENALTIES FOR PROVEN BID-RIGGING CASES IN RESOLUTION APPLICATIONS.

Similar to the Indian model which mandates resolution applicants to get prior clearance from the CCI under Section 31(4) of IBC[76] read with Section 5 of Competition Act, 2002,[77] the US Federal Trade Commission

[74] Committee of Creditors: An Institution of Public Trust?, IBBI, Pg. 2, https://www.ibbi.gov.in/uploads/whatsnew/cf377e43c2fbd827d74419f2ca1afe8b.pdf (last visited Jul. 26, 2021).
[75] Flannery & Anr. v. Halifax Estate Agencies Ltd., [2000] 1 All ER 373.
[76] The Insolvency & Bankruptcy Code 2016, No. 31, Acts of Parliament, 2016 (India), § 31(4).
[77] The Competition Act 2002, No. 12, Acts of Parliament, 2003 (India), § 5.

(**"FTC"**) also mandates a 'pre-merger' notification and merger review process[78] for bankruptcy-driven mergers/acquisitions under Section 363(b)(2) of the USBC[79] and the Hart-Scott-Rodino Antitrust Improvements Act, 1976[80] (**"HSR Act"**). Now, the IBC does not specifically deal with bid-rigging in Insolvency Resolution Applications, and hence, the US model can be referred to. Following the US model, bid-rigging in Insolvency resolution plans can be invalidated due to its violation of the US Antitrust law under Section 363(n) of the USBC, provided that collusion was done in a bad faith. Thus, although the pre-merger clearance may have been obtained by the resolution applicant, the successful resolution plan can be invalidated if bid-rigging is proved later.

Now, in such cases to defend bid-rigging, a larger public interest can be a valid defence. The Indian Competition Act makes bid-rigging illegal *per se* under Section 3(4) of the Act. The CCI has imposed heavy penalties on parties charged for bid-rigging,[81] along with making the bids invalid in some cases. However, the erstwhile Monopolistic & Restrictive Trade Practices (**"MRTP"**) Commission had excused the parties for bid-rigging due to a larger public interest in the *Swastic Laminating Industries case.*[82] The MRTP Commission had held that the bid-rigging was not prejudicial to public interest, as pursuant to the erstwhile MRTP Act, 1969, before issuing any

[78] FEDERAL TRADE COMMISSION, *Premerger Notification and the Merger Review Process,* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review, (Last visited Jul. 27, 2021).
[79] The United States Bankruptcy Code 1978, § 363(b)(2).
[80] The Hart-Scott-Rodino Antitrust Improvements Act, 1976, 15 U.S.C. § 18a.
[81] The Competition Act 2002, § 27(b).
[82] In Re. Swastic Laminating Industries & Ors., R.T.P. Inquiry No. 81/1984. *See also* CUTS International & National Law University, Jodhpur, *Study of Cartel Case Laws in Select Jurisdictions- Learnings for the Competition Commission of India,* CCI ADVOCACY- MARKET RESEARCH (2008), 97, https://www.cci.gov.in/sites/default/files/cartel_report1_20080812115152.pdf.

order, it had to determine whether any restrictive trade practice was prejudicial to public interest. Hence, parties would claim public interest defending bid-rigging, as seen in *Peico Electronics v. Union of India,*[83] where this defence was rejected both by the MRTP Commission and the SC subsequently. However, the CCI has never discussed public interest vis-à-vis bid-rigging citing the *Swastic Laminating* case. It will be interesting to see subsequent developments in this regard.

However, if resolution bids are to be cancelled & re-invited, due to the need for a speedy CIRP process, orders for re-inviting bids can cause delays in resolution, affecting many stakeholders like workers, employees and other operational creditors as seen in the *Jaypee Infratech Insolvency case.*[84] Hence, even if bid-rigging violates the Act, this can be let go with certain civil and criminal penalties on the parties indulging in bid-rigging. The appropriate civil and criminal penalties can be determined by the competent authorities after scrutinizing several factors, for e.g., the gains and profits obtained by parties involved in bid-rigging; injustice caused or losses incurred to other stakeholders in CIRP; penalties given under Chapter VII of IBC, and Chapter VI of Competition Act, 2002 respectively, etc. This will be necessary to deter parties from indulging in bid-rigging and incentivizing them to follow the due process established by law rather than indulging in bid-rigging and paying the imposed fines. Placing reliance on using economic reasoning to determine optimal penalties for effective deterrence, it needs to be ensured that the expected penalty of the offender in event of being convicted for the offence

[83] Peico Electronics & Electricals & Anr. v. Union of India & Anr., (2004) 8 SCC 658, 18.
[84] Anuj Jain, Interim Resolution Professional of Jaypee Infratech Ltd. v. Axis Bank Ltd., 2020 SCC OnLine SC 237.

committed is more than the total expected gain of the offender from committing the offence.[85]

A. Harmonizing Interplay Between IBC & the Competition Act

Under the lens of Competition law, Section 3(3)(d) presumes bid-rigging to cause an AAEC. Thus, the bids of resolution applicants could be made void. But this will result in the debtor going into liquidation, which may hurt the interests of the creditors and debtors. However, under the lens of Insolvency Law, bid-rigging may be excused if it serves the purpose of maximization of assets. Here, we see a conflict between the interests of Competition Law and Insolvency Law. Thus, there can be a jurisdictional overlap between the CCI and the NCLT/IBBI. To address this, the verdict of the SC in *CCI v. Bharti Airtel*[86] can be referred to. The SC held that the Telecom Regulatory Authority of India (**"TRAI"**) being the subject matter regulator on Telecommunication, is better equipped to examine issues of Telecommunications and that the CCI is ill-equipped to exercise jurisdiction until TRAI concludes on the telecom issues. Thus, the CCI needs to wait for its turn. It can be argued that the NCLT shall have the primary jurisdiction to examine the viability of the resolution plan with respect to the interests of the creditors, the debtor & other stakeholders in CIRP.

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[85] GARY S. BECKER, ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 43-45, (National Bureau of Economic Research, 1974), https://www.nber.org/system/files/chapters/c3625/c3625.pdf (Last visited Jul. 27, 2021).

[86] Competition Commission of India v. Bharti Airtel Ltd. & Ors., 2018 SCC OnLine SC 2678, ¶¶104, 105, 109, 112 & 113. *See also* Star India Pvt. Ltd. & Anr. v. Competition Commission of India & Ors., 2019 SCC OnLine Bom 3038.

Both the Competition Act, 2002 and the IBC, 2016 are special laws, containing non-obstante clauses. Section 60[87] of the Competition Act gives it an overriding effect over other laws, and so does Section 238[88] of the latter to the IBC. Now in the *Pioneer Urban Lands case*,[89] the SC held that IBC would prevail over the Real Estate (Regulation and Development) Act, 2016 (**"RERA"**) because the former was enacted after the latter and that the parliament in enforcing the obstante clause in IBC (Section 238) clearly shows the intent to overrule all other laws being in force including Section 88 of RERA. In this case, the same argument can be made that the IBC was enacted after the Competition Act, 2002 and that the Parliament while enacting Section 238 clearly intended to give IBC an overriding effect over all laws, even Section 60 of the Competition Act. Also, Section 62[90] of the Competition Act states that the application of other laws is not barred. Thus, reading Sections 60 and 62 with Section 238 of the IBC in the light of the *Pioneer Urban Lands Case*, it is clear that IBC will prevail over the Competition Act, 2002. Thus, with these steps, a harmonious construction between the principles of Competition Law & Insolvency Law can be done.

Furthermore, in circumstances in which approving the second-best resolution plan, if any, also caters to the interests of all stakeholders in CIRP, the rigged bid can be set aside, and the subsequent best resolution plan can be

[87] The Competition Act 2002, No. 12, Acts of Parliament, 2003 (India), § 60.
[88] The Insolvency & Bankruptcy Code 2016, No. 31, Acts of Parliament, 2016 (India), § 238.
[89] Pioneer Urban Land & Infrastructure Pvt. Ltd. & Anr. v. Union of India, 2019 SCC OnLine SC 1005, ¶¶25, 27 & 29. *See also* KSL Industries Ltd. v. Arihant Threads Ltd. & Ors., 2014 SCC OnLine SC 846.
[90] The Competition Act 2002, No. 12, Acts of Parliament, 2003 (India), § 62.

approved by the adjudicator. This may be another solution to harmonize the objectives of the two laws.

VI. CONCLUSION

Thus, although Indian Jurisprudence has not seen cases of bid-rigging in Insolvency Resolution Application bids, the USA has seen a few such instances from which India can take lessons. Owing to the recession due to the pandemic, the initiation of CIRP was prohibited for a year from March 25, 2020.[91] Hence, such bid-rigging was out of the question then. But now as the economy has started recovering, we may see such issues in the future. To tackle the same, the author suggests the need to make CIRP more transparent & enforce more accountability on the CoC and the resolution applicants for their actions, to prevent, or diagnose this issue of bid-rigging. Further, sudden withdrawal of bids, multiple bidding, and joint bids create a suspicion of collusion, which may lead to bid-rigging.

The author also suggests that the applicants state reasons behind their actions, so as to curb this issue. Bid-rigging can also happen by abuse of discretionary powers by the members of the CoC, as seen in US cases. The paper asserts how a more transparent CIRP can curb this problem. Although the CIRP is a confidential process & not every information is privy to the public, the same does not exempt the stakeholders in the CIRP to ascertain whether the CIRP is fair and reasonable. In instances when bid-rigging is proved, the Competition Law & Insolvency Law regimes present conflicting approaches to punish offences. So as to strike a middle ground between these

[91] The Insolvency & Bankruptcy Code (Second Amendment) Bill 2020, Bill No. 31, Bills of Parliament, 2020, https://www.ibbi.gov.in/uploads/whatsnew/aa1ac00c9a594c699c71c2d34fb990f9.pdf.

conflicting regimes, this paper further opines a way of harmonizing these contrasting interests of both the laws.