CORPORATE RESCUE REGIME: PERSPECTIVES, ANALYSIS AND LESSONS

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1. INTRODUCTION

"Corporate insolvency law is not merely concerned with the death and burial of the company".[1]

Traditional insolvency regimes aimed at the liquidation of the company once it seemed to be bankrupt. However, in the arena of modern insolvency regimes, it is thought advisable that before dumping the company for liquidation, a consideration must be made as to whether it can be brought back to life. If the insolvency is not fatal, rescue should be resorted to, to avert corporate death and liquidation.[2]

Rescue culture finds its roots back to the Report of the Review Committee on Insolvency Law and Practice (also known as the Cork Committee Report), a report submitted in 1982 by a committee headed by Sir Kenneth Cork, which had been given

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[1] VANESSA FINCH, CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLE, 4 (2d ed. Cambridge University Press 2009).

[2] *Id.*

the task to study the erstwhile insolvency laws of the United Kingdom.

According to Cork, a business concern has a lot of stake holders like the creditors, employees who are dependent on it for livelihood, capital contributors etc. Thus the liquidation of the company can lead to a sort of 'chain reaction', which can have a plethora of unpredicted consequences on the society.[3] Therefore a robust insolvency law should necessarily provide a mechanism which saves 'viable corporate enterprises'[4] from the scourge of liquidation.

Cork report had a significant impact on the English legislators and the concept of corporate rescue was included in the Insolvency Act, 1986.[5] The process of recue was renamed as the process of **'**Administration', as it is popularly known in most jurisdictions**.**

In India, the scheme of corporate rescue in India has been inculcated in the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'the Code'), enacted recently and has been mentioned in Part II Chapter I of the Code. The concept has been renamed as the 'Corporate Insolvency Resolution

[3] *Report of the Review Committee on Insolvency Law and Practice*, 1982, Cmnd.8558, ¶ 204, (U.K.)
[4] *Id.* at ¶ 198.
[5] Insolvency Act, Part II (Eng.), (1986).

Process'. It is the brainchild of numerous reports and study of various administration regimes. The procedure adopted is somewhat same as typical administration process as discussed earlier, but with certain differences most of which are noteworthy and unique.

One of the major requirements for an economy which is resolving to grow is the availability of funds for the business, the cardinal principles to make sure that the funds flow consistently and considerably is to make sure that the entry as well as exit options are efficient and easy. Tedious and never ending bankruptcy proceedings make the investment from local as well as foreign investors go down. *"Where I can't exit, I shan't enter."*[6]

The World Bank's report *Doing Business 2016, Measuring Regulatory Quality and Efficiency* ranked India 130 out of 189 countries[7] on the basis of various indicators which include time, costs, returns to the creditors, participation and strength of the insolvency regimes, India is ranked 137 in terms of

[6] Omkar Goswami, *The Urgent Need for the Fast Bankruptcy*, THE INDIAN EXPRESS, March 16, 2015, http://indianexpress.com/article/opinion/columns/the-urgent-need-for-fast-bankruptcy/.

[7] *Doing Business 2016, Measuring Regulatory Quality and Efficiency*, WORLD BANK GROUP, 208 (2016), http://www.doingbusiness.org/Doing%20Business/Documents/Annual-Reports/English/DB16-Full-Report.pdf [hereinafter *Doing Business Report 2016*].

Resolving Insolvency[8], with recovery rate of mere 25.7 cents per dollar[9], which when compared to Singapore (89.7 cents per dollar)[10], U.K. (88.6 cents per dollar)[11] and U.S.A. (80.4 cents per dollar)[12] highlights the plight of the Indian scenario. However, the then existing legal, political and social schemes did not provide the framework for efficient resolution of insolvency cases and thus considerably slowed down the pace of the industrial restructuring.[13]The two major reasons which appear for the failure of insolvency regimes. The first reason is the presence of multiple layers of laws which provide a mechanism of their own and therefore lead to presence of multiple cases in parallel legaluniverse.[14] Second, the pro rehabilitation attitude shown by the High Courts and the Supreme Court along with the laws which allowed prolonged liquidation proceeding.[15]

[8] *Id.*
[9] *Id.*
[10] *Id.* at 232.
[11] *Id.* at 242.
[12] *Id.* at 243.
[13]Nimrit Kang & Nitin Nayar, *The Evolution of Corporate Bankruptcy Law in India*, I.C.R.A. Bulletin: Money and Finance 37, (Oct. 2003 - Mar. 2004).
[14] *Bharat Heavy Electricals Limited v. Arunachalam Sugar Mills Ltd.*, 2011 S.C.C. OnLine Mad. 581.
[15] Aparna Ravi, *The Indian Insolvency Regime in Practice – An Analysis of Insolvency and Debt Recovery Proceedings*, 3 INDIRA GANDHI INSTITUTE OF DEVELOPMENT RESEARCH, Working Paper No. 2015-027 (2015), *http://www.igidr.ac.in/pdf/publication/WP-2015-027.pdf.*

A number of countries have corporate rescue or restructuring regimes in place so that the going concern value of the company in distress can be preserved. The principle which guides the same is that business would have a lot more worth if it is preserved rather than if it is sold in pieces.[16] The Code was enacted with the view to resolve these issues and provide for a mechanism which deals with the rehabilitation and if needed liquidation of a company or other institutions in a fast and efficient manner, so as to maximize the gains of everyone.

The present work would focus upon the process of Corporate Rescue Regime as provided in the Code. The paper would discuss the procedure of rescue as envisaged in the code, in the backdrop of which the arrangement of the provisions and the intention of the framers thereby would be duly dealt with. This exercise would set the foundations for comparison of the Code with erstwhile Indian and the foreign rescue regimes, which would include the regimes from Singapore, the United Kingdom and the United States of America. The framer of the Code have attempted to make it very robust and infallible, and more importantly comprehensible in nature, so as to undo all the tribulations resulting from the sloppy and scattered

[16] Omer Tene, *Revisiting the Creditors' Bargain: The Entitlement to the Going-Concern Surplus in Corporate Bankruptcy Reorganisations*, 19 Bankr. Dev. J. 287, 295 (2002-2003).

insolvency regime, existing prior to the enactment of the Code. However, it suffers from some frail characteristics which must be focused upon, so that the redressed problems do not recur. The paper would focus on the grey patches as are left in the Code and what more can be learnt from the above regimes so as to make the rescue regime better.

2. INSOLVENCY RESOLUTION PROCESS – UNDERSTANDING THE NUANCES OF THE PROCEDURE

To have the critical analysis of the Code and also to enable the reader to appreciate the grey areas of the Code, it is a primary requirement that the procedure of reviving a company, as envisaged in the Code, is properly understood. A cursory look at the Sections in the code in the linear manner would not be sufficient to know the practical application of the procedure. Therefore a simplified bird-eye view of the procedure has been described as under to enhance the readability of the process:

2.1. Application for initiation of process

The basic pre-requisite for initiation of process, which is common for all types of applicants, is occurrence of 'default' on part of the company. Default means inability to pay whole

or any part of debt[17], but such default should not be less than Rs. 1 lakh.[18] The adjudicating authority before whom the application is moved i.e. the National Company Law Tribunal (hereinafter referred to as 'NCLT')[19] would check the veracity of such default.

The process can be initiated and application for such can be moved by three categories of persons (applicants): a) financial creditors; b) operational creditors; c) the company itself.[20] However the manner in which the applicants would trigger the process[21] and the evidence required in order to prove 'default' differs for the three categories of applicants[22]and is provided under Sections 7, 9 and 10 respectively.

2.1.1. *Financial Creditors*

A financial creditor is a creditor who has lent money in form of loan and debt contracts[23] to the company and hence, to whom a

[17] The Insolvency and Bankruptcy Code, 2016, § 3(12).
[18] The Insolvency and Bankruptcy Code, 2016, § 4 (1).
[19] The Insolvency and Bankruptcy Code, 2016, § 5(1).
[20] The Insolvency and Bankruptcy Code, 2016, § 6.
[21] Bankruptcy Law Reforms Committee, *Volume I: Rationale and Design*, 117 (2015) [hereinafter *BLRC: Rationale and Design*].
[22] *Id.* at 76.
[23] *Id*. at 22.

financial debt is owed by the company.[24]The financial creditors have to adduce direct evidences of the default. The best evidence in this regard is the information supplied to Information Utilities and the accounts.

2.1.2. *Operational Creditors*:

"Operational creditors are those whose liability from the entity comes from a transaction on operations."[25]In simpler words an operational creditor is that who provided goods or services to the corporate debtor and the payment for them is due[26], like supplier, employees etc. The legislature presumes that in case of operational creditors, there might not be any direct evidence of default and hence the procedure followed to prove the debt is what is practiced in UK as the *process of proving default by 'statutory demand'*.[27] This procedure is two-fold. Firstly the creditor sends demand notice of the alleged debt to the creditor. The debtor is supposed to reply within a certain time frame. If he disputes the claim, then the court has to decide upon the veracity of the claim as if it is a suit and in this suit the creditor

[24] L.V.V. Iyer, *Is Bankruptcy Code flawed*, The Hindu (May 28, 2016), http://www.thehindu.com/business/Industry/is-bankruptcy-code-flawed/article8660821.ece.

[25] BLRC: Rationale and Design, *supra* note 21, at 77.

[26] IYER, *supra* note 24.

[27]https://www.gov.uk/statutory-demands(portal of government services and information).

becomes a necessary party. If he accepts the claim or fails to dispute within the time frame, then that itself would serve as evidence of default. A somewhat same two fold procedure is provided in Sections 8 and 9.

2.2. **Admission of Application and order thereby (Section 13):**

If all the formalities in the respective sections are complied with and the NCLT is satisfied that there has been a default it would admit the application and would issue the process to the applicant. Now the order of issue of process comprises of three orders:

a) Declaration of moratorium (Section 14)*:*

This is one of the most sacrosanct features of administration[28] which differentiates it from all the other insolvency procedures. Moratorium means an authorized postponement in deadline for paying a debt or performing an obligation.[29] In this, the court puts a bar on all the other recovery-related actions, to preclude them from activities like enforcement of security interest or filing civil suit of recovery or execution proceedings for recovery or winding-

[28] Ian Fletcheret al., Corporate Administration and Rescue Procedures, 50 (2d ed. Lexis Nexis UK 2004).
[29] BLACK'S LAW DICTIONARY 1101 (9th ed. 2009).

up petitions.[30] This gives what is called as a 'breathing space for the company'[31], by keeping the assets, contracts and goodwill intact and by preventing labour and fund wastage in litigation. The first implication of this would be that the creditors would not be able to file a suit for recovery of the debts.[32] In addition to this the suits which have already been filed before the issue of moratorium would also come to an end.[33] Not only this, even the successful suits of recovery whose execution is pending would also come to an end, and the execution couldn't be resorted to.[34] Secondly, no enforcement of security interest *in any form* can take place whether it is an action for selling of mortgaged/pledged property or enforcement of security interest under the SARFAESI act.

a) *Public announcement (Section 15):*

There should be a public announcement of the fact that the company has gone into the resolution process. The most important reason for this is to intimate to the creditors such fact. This is so because rescue procedure, in all

[30] Insolvency Act, 1986, c. 2, § 11 (3), sch. B1 (Eng.).
[31] David Pollard, *Corporate Insolvency: Employment and Pension Rights*, 21 (2d ed., Butterworths 2000).
[32] The Insolvency and Bankruptcy Code, 2016, § 14.
[33] *Id.*
[34] *Id.*

jurisdictions, involves full-fledged participation of creditors in the process, because it is very self-evident that creditors are the ones who stand to gain or lose the most in administration.[35] All the creditors who get intimated must, therefore, submit their claims.

b) Appointment of interim resolution professional (Section 16):

While submitting the application to the NCLT the applicant must also state the insolvency resolution professional (IRP) which it wants to appoint as the interim resolution professional and the NCLT appoints such IRP. It is this professional who conducts the administration proceedings until a permanent resolution professional (hereinafter 'permanent RP') is appointed. The duties of the interim resolution profession (hereinafter 'interim RP') can be divided into two categories (though no such bifurcation has been contemplated in the Code):

i. Functions relating to the process (Section 18):The interim RP set the foundations of the resolution process. Interim means 'for the time being'. His primary aim is to form a committee of creditors[36]

[35] Fletcher, *supra* note 28, at 94.
[36] The Insolvency and Bankruptcy Code, 2016, § 18 (c).

which in turn would appoint the permanent committee of creditors. For this purpose he collects all the claims which are received thanks to the public announcement. One of the other duties he has is what is called in the English law to prepare a 'statement of affairs'[37] of the company. A statement of affairs is a document that must be prepared by the debtors when a bankruptcy order has been passed against him, which contains details like assets, debts, liabilities, details of creditors and what security they hold.[38] It contains information [as prescribed by Section 18(a)], which would help in determining the financial status of the company.

ii. Functions relating to the business (Section 20): These functions are such which are entrusted to the interim RP for management and operations of the company *as a going concern*. It must be noted that the when a company goes into administration its business operations do not come to a standstill. The only difference being that the affairs of the company, which earlier delve over the board of directors, pass

[37] Insolvency Act, 1986, c. 7, § 47, sch. B1 (Eng.).
[38] M.K. Pithasaria& Mukesh Pithasaria, *Tax Law Dictionary*, 687 (Lexis Nexis 2013).

into the hands of the administrator[39] and it is the duty of the administrator to manage the operations of the enterprise as a going concern[40] and in that regard he has the authority to take such actions as the management of the company would have taken[41], like entering into contracts and human resource management and raising finance.[42]

3. **FORMATION OF THE COMMITTEE OF CREDITORS:**

After the collation of claims, the interim RP forms a committee of creditors, with the help of the claims collected.

Following things are worth noting about committee of creditors:

a) It only comprises of the financial creditors and not operational creditors. (The reason has been explained later).

b) Voting rights: Since creditors play a pivotal role in the administration process 'the collective will'[43] of the creditors must be ascertained for any approval. For that purpose voting is the instrument. One creditor one vote is not the policy. Concept of voting share is that each creditor

[39] Pollard, *supra* note 31, at 24.
[40] The Insolvency and Bankruptcy Code, 2016, § 20(1).
[41] Finch, *supra* note 1, at 21.
[42] The Insolvency and Bankruptcy Code, 2016, § 20(2).
[43] Fletcher, *supra* note 28, at94.

has votes in proportion of the financial debt the company owes to him.[44] Every approval requires majority of 75 percent of the total voting shares.[45]

c) First meeting must be held within 7 days of formation.[46]

3.1. **Appointment of permanent resolution professional:**

The first and the foremost task of the committee is to appoint a permanent RP. It has the option to continue with the interim RP as the permanent RP, or to appoint a new RP.

The permanent RP has more or less the same functions as the interim RP. He convenes the meeting of the committee of creditors.[47] However the difference is the functions which the interim RP was earlier authorized to perform independently, especially the functions under Section 20, now become subject to the scrutiny of the committee of creditors, under Section 28 and hence cannot be performed by the interim RP without its approval. Thus, the committee of creditors attains a *de facto* control over the enterprise.

[44] The Insolvency and Bankruptcy Code, 2016, § 5 (28).
[45] Shishir Mehta et al., *The Insolvency and Bankruptcy Code, 2016-New Road and Challenges,*Practical Lawyer, July 2016, at 76. (2016) PL (CL) July 76.
[46] The Insolvency and Bankruptcy Code, 2016, § 22 (1).
[47] The Insolvency and Bankruptcy Code, 2016, § 24(2). `

3.2. Formation and approval of the resolution plan:

The permanent RP is to play a vital role in formation of the resolution plan. Resolution plan is the revival plan which has to be made in order to help the enterprise attain the purpose for which the rescue procedure has been undertaken. It has to be noted that the objectives of the purpose of administration are:

a) The company can possibly regain its financial health and can restart its functioning *'as a going concern'.*[48] This is the primary objective which the rescue plan should seek to achieve.

b) Even if the company is unable to get back to its original health and liquidation is inevitable, the creditors would recover a better value for their claims than they would have been if the company would have been liquidated without the attempt of rescuing it.[49]

The plan so made provides as to how the affairs of the company would be managed after the approval of the plan.

How resolution plan is prepared and who is to prepare it:

[48] Insolvency Act, 1986, c. 1, § 3, sch. B1 (Eng.).
[49] *Id.*

The RP makes an information memorandum on the basis of which the plans for revival has to be made.[50] A very interesting feature of the Code is that it gives rights to a wide variety of people to submit their respective resolution plans, and not merely to creditors and the IRPs. The RP has the duty to invite such plans from *'prospective lenders, investors, and any other person'*.[51]The persons who submit a resolution plan are called resolution applicants. Who all can be invited to submit a resolution plan would be subject to judicial interpretation of the term *'prospective lenders, investors, and any other person'*.

It is also pertinent to mention that the act does not detail about what should be the contents of the resolution plan. It does not guide as to the possible resolution techniques which can be adopted for revival and kept it open-ended. The only requirement is that whatever technique is adopted must contain should not be violative of any law.[52]

3.3. **Approval of the plan:**

The resolution plans so submitted have to pass thorough three stages of approval:

[50] The Insolvency and Bankruptcy Code, 2016, § 29(1).
[51] The Insolvency and Bankruptcy Code, 2016, § 25(2)(h).
[52] The Insolvency and Bankruptcy Code, 2016, § 30(2)(e).

3.3.1. *Approval by the RP*

The RP who receives all the plans forwards them to the committee of creditors. Only such plans are forwarded which (a) conform to the information memorandum and (b) fulfills conditions mentioned in Section 30(2). Section 30(2) only mentions what all things *must* be included in the plan.

3.3.2. *Approval by the committee of creditors*

The committee which receives all the short listed plans would choose *one* of the plans by 75 percent votes. This plan so selected would be forwarded to the NCLT.

3.3.3. *Approval by NCLT (Section 31)*

The scrutiny of NCLT at this stage is limited. It does not deliberate on the commercial viability or whether some different plan would be preferable for creditors.[53] Instead the court satisfies itself that the decision of the creditors has been properly obtained and the conditions as mentioned in Section 30 (2) are complied with.

[53] World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights System*, 51 (2001) [hereinafter *World Bank Report: Principles of Insolvency*].

4. RESULTS OF THE PROCESS

There are three possible results of the Insolvency Resolution Process once it has been initiated:

4.1. CASE 1: It may happen that the consensus is not reached as to a revival plan.

Following recourses are there:

a) If 180 days (after the admission of application) elapse and the adjudicating authority does not receive the resolution plan it can order liquidation.[54]

b) Even before the elapse of 180 days, the committee of creditors may intimate to NCLT that since no consensus is reached as to a workable resolution plan, the company should be liquidated[55], but such application cannot be made after the approval of the plan. Once approved the company has to go through that plan for the period remaining.

4.2. CASE 2: Consensus is reached as to plan but the Adjudicating Authority rejects the plan.

In such case NCLT will order liquidation.[56]

[54] The Insolvency and Bankruptcy Code, 2016, § 12(1) r/w. § 33(1) (a).
[55] Mehta, *supra* note 45, at 79.
[56] The Insolvency and Bankruptcy Code, 2016, § 33(1) (b).

4.3. CASE 3: Adjudicating authority accepts the plan.

In such case the company has to comply with the plan for the remaining period, i.e., till the completion of 180 days because once NCLT approves it, the plan cannot be revoked. However the Code fails to enact the various possibilities that can befall if the company completes its administration process of 180 days. After 180 days, two possibilities are there:

a) It is felt that a company cannot operate as a going concern, if the claims of the creditors are to be satisfied, then in that case, the company has to be put to liquidation, after the period of administration ends. Here it may be a possibility that after the revival attempt, the company regains such financial health so as to satisfy all the claims *in full*. Otherwise, it may be so that it is unable to regain adequate financial health and the creditors can realize their claims only *in part*.

b) If the consensus is reached as to the revival plan, and after taking recourse to that plan for the period of administration, it is felt that a company can operate as a going concern even after satisfying all the claims of the creditors then in such case, the company is not put for liquidation. Though

the 'success' of the process of administration is said to be this very state, it is highly unlikely.[57]

5. COMPARISONS WITH ERSTWHILE RESCUE REGIMES OF INDIA

It must be noted that the 2016 code is not the first attempt to imbibe the rescue culture in India. Prior to this, two other legislations namely- the Sick Industrial Companies (Special Provisions Act), 1985 and the Companies Act, 2013 also prescribed rescue and revival procedures.

5.1. The Companies Act, 2013.

The Companies Act, 2013 (hereinafter referred to as 'the Act') prescribes its rescue procedure under the heading **Revival and Rehabilitation of Sick Companies**.[58] This ranges from sections 253 to 269. However, the new code has repealed this part and substituted it with its own.[59] In such a scenario it is imperative to remark the differences between the two regimes.

5.1.1. *Increasing the power of Unsecured Creditors*

The first remarkable difference is that the Act and the Code is that whereas the former provides only for the secured creditors to initiate the administration proceedings, the latter creates no

[57] Finch, *supra* note 1, at 243.
[58] The Companies Act, 2013, Chapter XIX.
[59] The Insolvency and Bankruptcy Code, 2016, sch. 11, § 8.

such difference between the two. So apart from secured creditors, even the unsecured creditors and the company itself can initiate the process.

The very purpose of innovation of the process of administration is to take into account and focus on the claims of the unsecured creditors, who at the end receive nothing in the liquidation process.[60] The secured creditors mostly managed to realize their claim by liquidating the assets and by enforcement of security interest, thereby leaving only a few crumbs of bread for the unsecured creditors to nibble. Disallowing the unsecured creditors to initiate the rescue proceedings may have following disadvantages:

a) The very initiation of process would become rare, because secured creditors would prefer the process of liquidation which would lead to quicker realization of their claims, especially if the assets are enough to realize the secured debt.
b) The economic chain effect of not allowing the unsecured creditors to initiate the insolvency proceedings would be that the supply of unsecured credit would decrease in the market.[61] It has to be kept in mind that apart from equity (capital), debt is also one of the important modes of finance

[60] Finch, *supra* note 1, at 21.
[61] Bankruptcy Law Reforms Committee, *Interim Report*, 50 (2015) [hereinafter *BLRC: Interim Report*].

of companies business, and unsecured debt forms a large part of total debt. Moreover, due to strains in the economy, the secured credit which is mostly in the form of loans from bank and financial institutions is not always readily available.[62]

5.1.2. *Criterion to determine sickness*

According to the Act, the criterion to trigger the administration process is that a demand for it should be made by a collegiums of secured creditors who represent at least fifty percent of total debt of the Company[63], i.e., when a company defaults on major portion of its debt. However, the Banking Law Reform Committee (BLRC) that submitted its interim report in February 2015 was of the opinion that this criterion for initiating rescue proceedings by creditors may not facilitate early intervention and timely rescue. If a company has already defaulted on a major portion of its debt, it is quite likely that its financial condition has deteriorated to such an extent that it cannot be revived.[64]In pursuance of this recommendation, the Code simplified the test and allowed filing of applications *"if*

[62] *Id.*
[63] The Companies Act, 2013, § 253.
[64] BLRC: Interim Report, *supra* note 61, at 14.

the company is unable to repay a single undisputed debt exceeding one lakh rupees".[65]

Now as the definition of the term default suggests, default need not be of a particular magnitude. It can be any magnitude. Therefore a creditor representing even a miniscule part of total debt of the corporate debtor can also entitle a creditor to initiate the proceedings, even if the default is regarding a part of the debt owed to him, which is payable in installments. It is submitted that such a low threshold is not healthy as defaults so contemplated keep on happening in normal course of business. The BLRC assured that there would be less chances of frivolous filing of applications *"they would prefer individual enforcement over the collective rescue procedure"*.[66]This logic could have been valid in case of the Act. However it is flawed in present scenario as the Code, unlike the Act, also allows unsecured creditors to initiate the process. Thus premature and needless filing of petitions would take place as soon as the company defaults, as the unsecured creditors would be apprehensive of the secured creditors resorting to enforcement of security interest and former would be desperate to attain the moratorium order, to prevent the latter from doing so.

[65] *Id.*
[66] *Id.* at 15.

5.1.3. *Making the Rescue Procedure mandatory*

As discussed in point (i), a very peculiar feature of this code is that liquidation can be resorted to only after the administration process either ends or fails.[67] Therefore liquidation, as per the spirit of the Code, is the 'lender of last resort'. However, the spirit of the Act is somewhat different in the sense that liquidation is not the last option but is 'one of the options'. It was upon creditors (and that too only the secured creditors) to choose either liquidation or enforcement of security interest, or going for the revival and rehabilitation of the company. This code, on the contrary, makes it imperative for the liquidation to be preceded by rehabilitation or at-least an attempt of rehabilitation. It is obvious that giving of 'options' is not very wise if it is quite evident from practice and common sense that only one of the options would be taken recourse to. Consequently, provision of revival process under Chapter XIX of the Act would have been a dead letter, winding up and enforcement of security interest, being one of the other options. *However, how healthy is it to mandate the revival process is also a question to be taken into consideration.*

[67] The Insolvency and Bankruptcy Code, 2016, § 33 (1).

The BLRC was of the opinion that *"liquidation should not be seen as the measure of last resort"*.[68] The long-drawn and somewhat an extravagant process of revival should only be resorted to if the adjudicating authority is of the opinion that there are fair changes of revival; otherwise revival would prove to be a prodigal option. The most practical test so as to ensure whether or not there are fair chances of revival is *viability.*[69]Thus it is submitted that the revival process should be initiated if and only if the court *prima facie* believes that the company is viable.

Neither the code nor Act provided for such *prima facie* test. As per the Act, the court while allowing the petition for revival of companies under Section 256 is to only consider the factum of the sickness of the company, and only on that count can the court dismiss the petition *in limine.* However once admitted, the task of determining whether the company is viable enough to be revived or not is given to the committee of creditors. The decision of the committee of creditors is to be heard by the Tribunal under Section 258, on a date which may extend to as much as *ninety days* from the date of receipt of application under 256.[70]

[68] BLRC: Interim Report, *supra* note, at 17.
[69] *Id.*
[70] The Companies Act, 2013, § 258.

Under the Code, there is absolutely no provision of the *viability test*. The adjudicating authority while considering the applications for resolution, would not look into and reject the petitions *in limine* on the basis of the unviability; it can only do so on the failure to establish default or to complete procedural requirements.

A look at some of the robust foreign rescue regimes would suggest that the viability of the administration over and above liquidation is one of the tests which the court has to undertake at the threshold before ordering the initiation of administration.

5.1.4. *No distinction between Financial and Operational creditors*

As discussed earlier the Code, creates a clear divide between the financial and operation creditors. Their standing is different in two ways:

Firstly, they have to comply with different procedures in order to apply to the court for making order, the reason for which has been amply provided in preceding chapter.

Secondly, as it has been discussed earlier, operational creditors are not included in the committee of creditors. There are two reasons for such exclusion. The operational creditors are not well-versed in the art of handling insolvency. Secondly, they are unwilling to take the risk of postponing payments or

altering the terms of contracts so as to reduce debts.[71] Including them in the committee would retard the process. For example, it is more likely for a bank to reduce the interest rate but it is less likely for a supplier of goods to reduce price per capita for goods supplied.

6. THE SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985

The Sick Industrial Companies (Special Provisions) Act, 1985, (hereinafter referred to as the 'SICA') was enacted in order to provide a preventive as well as remedial and revival measures as the period of 1980s saw an unprecedented increasing in the sickness of the industries. It is a special legislation. **References, Inquiries and Schemes**[72] which runs from Section 15 to Section 22 deals with information and determination of insolvency and the steps which follow. There are several distinctions between the Code and the SICA, as follows:

6.1. Nature of the Company:

The very fundamental of the differences between the SICA and the Code is that the former had only a limited scope and

[71] BLRC: Rationale and Design, *supra* note 21, at 22.
[72] The Sick Industrial Companies (Special Provisions) Act, 1985, Chapter III.

applied only to the industrial companies, moreover this was also limited to the test of complete erosion of their net worth, whereas the latter encompasses all types of corporate debtors.

6.2. Determination of Sickness

Tests for determination of sickness of the company have also varied a great deal in the journey from the SICA to the Code. For a company to be declared sick under the SICA it needed to pass two tests –

a) that the said industrial company was registered for note less than 5 years, and

b) it accumulated losses exceeding its entire net worth at the end of the financial year.[73]

The Code however, has lowered the standard of this test, as per the provisions of the Code the corporate debtor falls 'sick' if the amount of default is one lakh or more, though the Central Government, under Sec. 4, has power to raise this limit but it needs to be less than one crore. As submitted earlier this approach is likely to do more harm than good.

[73] The Sick Industrial Companies (Special Provisions) Act, 1985, § 3 (o).

6.3. Initiation of Proceedings

The next distinction comes in form of as to who is deemed capable to ask for or trigger the whole process; the SICA has a very limited scope in this regards, as under Sec. 15 (1), it is Board of Directors of the company who have to make a reference within 60 days of finalisation of financial accounts of that year, or within 60 days when they have reasons to believe that company has gone sick before such finalization of accounts[74], and on several accounts to the Central Government, Reserve Bank, State Governments, Public Finance Institutions, State level Institution or a Scheduled Bank are also allowed to make reference to the Board, with the condition attached that they must have sufficient reasons.[75]. However in the present regime only the interested parties i.e. creditors and the debtor is only allowed to trigger the process and the other authorities which exercised powers to trigger the process under SICA are scraped.

6.4. Enquiry into chances of revival

According to SICA, the adjudicating authority i.e. the Board for Industrial and Financial Reconstruction (BIFR), after

[74] The Sick Industrial Companies (Special Provisions) Act, 1985, § 15, proviso 1.
[75] The Sick Industrial Companies (Special Provisions) Act, 1985, § 15 (2).

receiving reference under Section 15, would conduct a proper enquiry under Section 16. The subject matter of such enquiry would not only be to ascertain whether the company has become sick or not, but also to ensure that it is not *so* sick that it is beyond revival. When it is so, the court in place of ordering revival process, would, under Section 17(3) order liquidation, instead. The test to determine whether the company is *sick beyond revival* is that whether in a reasonable time, *'it is practicable for the company to make its net worth exceed its losses'*.

A very inherent problem with the Code is that the second test is missing. A look into foreign regimes such as Singapore and UK, would make it clear that for triggering the revival process the test it is not only necessary to determine whether or not the company is sick; rather, when this test is satisfied, it has also to determine that whether the company is not *so* sick that it is beyond reformation, and hence liquidation is the better option.

6.5. **Moratorium**

Both the regimes provide mechanism for protecting the interests of the company, by putting the bar instituting or proceedings in relation to winding up[76] or execution or

[76] *Church of South India Trust Association v. Wrapadis Ltd.*, (1990) Comp. Cas. 838.

realization of properties of the company; once the process to look into the sickness of the company is triggered, so as to protect the interests of the companies. The differences which arise are that the regime under the Code is time bound and moratorium lasts till the completion of corporate insolvency process, i.e.180 days which may be extended by 90 days more[77], whereas the SICA provided that the first declaration should not exceed two years which may be increased a year at a time, but not to exceed 7 years in total.[78] The regime under SICA also provides that with the prior permission of the Board, the proceedings can continue or be instituted[79], and even if the reference is registered before the board, provisions of moratorium are attracted.[80]

7. COMPARISON WITH FOREIGN RESCUE REGIMES

The present section deals with comparison of the present rescue regime in India with the pre-existing regimes in U.K., Singapore and U.S.A. Singapore and India both follow common law and have roots in English legal system; U.K. is place of origin of corporate insolvency laws, all the

[77] The Insolvency and Bankruptcy Code, 2016, § 12 (3).
[78] The Sick Industrial Companies (Special Provisions) Act, 1985, § 22 (3).
[79] *Gram Panchayat v. Shree Vallabh Glass Works Ltd.*, A.I.R. 1990 S.C. 1017.
[80] *Sponge Iron India Ltd. v. Neelima Steels Ltd.*, (1990) 68 Comp. Cas. 201.

three counties vis. India, U.K. and Singapore despite having the same roots of law are at different stages of development for the same. The regime in USA is one of the most efficient regimes, as US ranks 4 in matter of resolving insolvency and therefore is taken into consideration.

7.1. **United Kingdom**

The Schedule B1 of the Enterprises Act, 2002 prescribes the rescue procedure ('administration') of England. Since the 2016 Code, is based more or less on the same lines as the English law, a lot of parallels can be drawn between the two regimes:

a) Conditions of Moratorium.

b) Lack of provisions for amendment of revival plan in the execution period.

c) Allowing the corporate debtor (i.e. company itself to initiate the revival process).

It is difficult to mark material differences between the two regimes. Yet two differences are pointed out as follows.

7.1.1. *Determination of Insolvency*

In the English law, the threshold for determining whether a company is insolvent is whether the company 'is unable to pay

its debts' or 'is likely to become unable to pay its debts'.[81] The second phrase is added in order to facilitate timely intervention and not when the company is beyond the scope of revival.

The test is more or less subjective in nature unlike the very objective test of 'default' in India. Moreover the chance of triggering of the process is less than in the case of Indian code because the second phrase has been given a restrictive interpretation by courts.[82] The English Judiciary opines that it is very important to ascertain whether the process is genuinely required or not; unnecessarily subjecting the company to the risks and problems of administration and the expenses thereby is not wise.[83]

7.1.2. *Formation of revival plan*

In the English regime, the revival plan has to be formed primarily by the administrator and it has to be approved with or without modifications by the committee of creditors.[84] In the Indian regime, the plan can be formed by any corporate applicant like prospective creditors, lenders etc. and not necessarily the creditors and the IP who are participating in the process.

[81] The Enterprises Act, 2002, sch. B1, § 11.
[82] *Highberry Limited v. Colt Telecom Group*, [2002] E.W.H.C. 2815 (Ch.).
[83] In re *Primlaks (U.K.) Ltd.*, (1989) 5 B.C.C. 710.
[84] The Enterprises Act, 2002, sch. B1, § 49 r/w. § 53.

7.2. Singapore

The revival process is known in Singapore as the process of 'Judicial Management' and is prescribed under Chapter VIIIA of the Companies Act, 1967. This Chapter which had Sections ranging from 227A to 227X was added via amendment in 2006. Singapore ranks first in Ease of Doing Business list prepared by the World Bank[85], it becomes important to mark some remarkable differences between the Singaporean regime and the Indian insolvency regimes.

7.2.1. *Threshold for determining insolvency*

It has already been discussed previously that the criterion to determine insolvency, or more precisely, to define the criterion to trigger the insolvency resolution process, is very low and also vague. The Singaporean law is very smooth and clear in this regard. It provides that the company or the creditors can apply for the judicial management if and only if three conditions are satisfied[86]:

a) 'The Company is or will be unable to pay its *debts'*.

b) There is a reasonable possibility to rehabilitate the company so that it can continue as a going concern.

[85] Doing Business Report, *supra* note 7, at 232.
[86] Companies Act, 1967, § 227A.

c) The interests of the creditors are would be better served than by resorting to winding up.

In condition (a), it must be noted that the term is *debts* and not debt. Therefore a company can only fall within the trap of this condition only when it has *generally defaulted* on a 'substantial' portion of its debts[87] and not when it has defaulted on a single debt whereby that debt does not even form a substantial portion of total debt. The legislation does not specify on what part of debt the company must default. Whether the company is unable to pay its debts or it will be unable to pay is a question of fact, left to be determined by the court. The conditions (b) and (c) are also questions of fact which require judge based scrutiny, wherein the judge has to choose between judicial management and winding up. Judicial management is only viable and preferable over liquidation when company is not 'hopelessly insolvent'.[88] This test is also a question of fact, wherein the court must delve upon into the financial position of the company, determinable from its accounts.

Therefore there is no condition which is capable of being empirically defined or determined. The judge would decide the requirement for administering the company on the same

[87] *Re Genesis Technologies International (S) Pvt. Ltd.*, [1994] 3 S.L.R. 390.
[88] *Id.*

conditions and if satisfied would then pass the judicial management order.[89]

The Insolvency Law Review Committee (hereinafter referred to as 'ILRC') of Singapore, in its 2013 report has, however, opined that the threshold provided in the Singaporean Law is way too high and is usually invoked when the condition of the company has deteriorated to such an extent that the company is beyond any reasonable hope of rehabilitation.[90] It pointed out high threshold was one of the reasons for failure of the regime. Thus the committee suggested replacing *"is or will be unable to pay its debts"* with *"is or is likely to become unable to pay its debts"*[91], it is in case of UK.

7.2.2. *Process of Election of Administrator*

In India, first the interim resolution professional is appointed and then the permanent resolution professional is appointed by committee of creditors thereafter.

In Singaporean law, the administrator (known as the judicial manager) is appointed by the applicant. The applicant who is

[89] Companies Act, 1967, § 227B.

[90] Insolvency Law Review Committee, *Final Report*, 84(2013) available at https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Revised%20Report%20of%20the%20Insolvency%20Law%20Review%20Committee.pdf [hereinafter *ILRC*].

[91] *Id.* at 95.

seeking the order of judicial management from the court has to specify in the application the person who it wants to appoint as the judicial manager. At this stage itself i.e. *before* the passing of judicial management order, if the creditors, who are in majority *in number as well as in value*, object the appointment, they can file such objection and they would be heard by the court in this behalf.[92]

The scheme in the Singaporean law seems to be simple since the issue of the appointment of administrator is resolved at the very stage of admission of application for judicial management. However, inviting of objections from creditors before the collection of claims and before advertising about the company going under administration[93] (all of which happens *after* passing of the judicial management order) could be a dead letter because most of the creditors, at this juncture, would not be aware of the company going into administration. Therefore it is unjustified.

The Indian scheme, though justified in this regard, is more or less long-drawn. Moreover, it has to be noted that there is no time-limit given within which the administrator has to form committee of creditors and summon a meeting unlike Singaporean law which prescribes period for 60 days. In

[92] Companies Act, 1967, § 227B (3) (c).
[93] Companies Act, 1967, § 227B (4).

addition to that, the Code entrusts plethora of functions to the interim profession apart from formation of committee of creditors which includes functions relating to human resource management, raising finance, entering into contracts etc. He, while handling the charge, has to explain all the affairs, documents and the work done up till the date, to the permanent resolution professional who is more or less a novice regarding the affairs of the company.[94] This can lead to two problems:

a) The permanent resolution professional, so appointed afterwards, may or may not approve of these decisions of the interim professional and provide for a different *modus operandi*, which would lead to the negation of previous work and wastage of man-power.

b) The permanent resolution professional even if he accepts the previous measures, would take time get himself aware of the substantial work already done in pursuance of administration. It is anomalous to remove a person who has already familiarized himself with the working of the company and has laid the foundations of the administration procedure, and replace him with totally an unfamiliar person.

[94] The Insolvency and Bankruptcy Code, 2016, § 23 (3).

7.2.3. *Veto to debenture holders*

This is another distinct and remarkable feature of the Singaporean regime. The court is *obliged* to dismiss an application for a judicial management order if the making of such an order is opposed by a debenture holder of debentures secured by a floating charge.[95] Whenever there in an application for judicial management the court must send notice and invite objections from such debenture holders.

At the very outset, it is imperative to mention that such condition in India could suffer the onslaughts of Article 14 (Right to Equality). It is so because debenture holders are nothing but holders of debt instruments. It would make unintelligible differentia between those debt instruments which are secured by floating charge and those which are secured by fixed charges. Creditors like banks which give loans on security on some specific assets would object the giving veto powers to debenture holders having a floating charge.

The ILRC has taken into arbitrariness of this power of the creditors and suggested diluting this power by rebalance of the relationship between judicial management and receivership. It opined that the decision whether to appoint a judicial manager or not, when there is such an objection, is to rest on the

[95] Companies Act, 1967, 227B (5).

discretion of court and the court would base its decision on criterion that which of the options would cause least prejudice.[96]

7.3. United States of America (USA)

USA had bankruptcy laws (It has to noted that, in the USA "bankruptcy" as a term is used for all the insolvency proceeding against legal or natural persons which is court administered) in force since long time, they changed with time to time, the present one being **Title 11 U.S.C. i.e. Bankruptcy Code**, this also entailed change in character with sometimes law being pro-debtor and other time pro-creditors; the present Chapter 11 is usually considered as pro-debtor rather than pro-creditor this label is because of several factors, chiefly because of the amount of control which is allowed after the company make an application under Chapter 11.[97] This however should not be taken to mean that it is against-creditor in nature. Chapter 11 allows the debtors, who wish to reorganize their

[96] ILRC, *supra* note 90, at 24.

[97] Gerard McCormack, Corporate Rescue Law In Singapore and The Appropriateness of Chapter 11 of the US Bankruptcy Code as a Model, 20 SAC L.J. 396, 406 (2008).

business certain advantages which are not available under Chapter 7.[98]

This section deals with analysis of Chapter 11 and allied provisions of the Title 11 of the United States Code i.e. U.S. Bankruptcy Code (hereinafter referred as Title) in the hindsight of the Insolvency and Bankruptcy Code, 2016.

7.3.1. *Initiation*

A case under Chapter 11 can commence in either a voluntary manner or by involuntary means. The voluntary process begins when the company files for reorganisation before a bankruptcy court. There is no requirement for a company to be 'insolvent' for being able to invoke the applicability and it is for this reason that deliberate insolvencies are prevalent in US. Chapter 11 is often used and regarded as strategic shield. *Manville*[99] case, provide best insights in this regards, where a solvent and profitable company filed for reorganization to reduce the liability it was facing due to asbestos-related claims, the court allowed the same and put a stay on claims as the company agreed to setup a trust to deal with future cases. The check though is that such company should have acted in good faith. If

[98] Martin A. Frey et al., *Introduction to Bankruptcy Law*, 452 (5th ed. Delmar Cengage Learning 2006).
[99] In re, *Johns-Manville Corp*., 26 B.R. 420 (1983).

bad faith is displayed, the recourse is not allowed, as happened in *SGL Carbon Corporation*[100]case, where the petition was dismissed. In India the Code however does not allow the filing of such petitions and corporate debtor moves forward only when default has already been committed.

The involuntary process as under the Title 11 U.S.C. §363 requires three creditors holding the next claims worth more than $10,000 file a petition that the company fails to pay the debts they become due, and that such debts/dues are bona fide and not a matter of conflict. If the petition has been filed in bad faith punitive damages may be awarded to it; In India however the position is somewhat different as there is no minimum number of required to file a petition, though the limit in form of amount exists.

7.3.2. *Special Court*

The scheme of effects under the Title is that a petition for bankruptcy is initiated in a Unites States Bankruptcy Court; every district has its separate bankruptcy court.[101] The jurisdiction of these courts is conferred with the joint interpretation of the Title 28 U.S.C. § 1334 (e) and the Title 11

[100] In re, *SGL Carbon Corporation*, 200 F.3d 154 (3rd cir. 1999).
[101] Frey, *supra note* 98, at 27.

U.S.C. § 541.[102] A case comes before the court after an order is passed for the same by the respective district court, most of the districts courts, in this regards, have standing orders to transfer the case[103]; it has jurisdiction all over the property and property rights of the debtor i.e. all over the debtor estate[104], but, it loses when the property is legally transferred.[105]

The Indian scenario however was plagued with multiple forums and tussle for jurisdiction, the Code resolves this by demarcating the jurisdiction and making NCLT the appropriate forum in the present case.

7.3.3. *Debtor in Possession*

In Chapter 11 no trustee is appointed as is done in Chapter 7 proceedings, the Debtor in Possession or DIP is a person from debtor's management who also serves as the capacity of a trustee. He is the person responsible for taking control over the business and has the rights and powers of a trustee.[106] The

[102] Paul P. Daley & George W. Shuster Jr., *Bankruptcy Court Jurisdiction*, 3 DePaul Bus. & Comm. L.J. 383, 389-390 (2004).
[103] Board of the Governors of the Federal Reserve System, *Study on the Resolution of Financial Companies under the Bankruptcy Code*, 8(July 2011), available at http://www.federalreserve.gov/publications/other-reports/files/bankruptcy-financial-study-201107.pdf.
[104] *Gilchrist v. General Electric Capital Corp.*, 262 F.3d 295, 303-304 (4th Cir. 2001).
[105] In re, *Fedpak Systems Inc.*, 80 F.3d 207, 214 (7th Cir. 1996).
[106] Frey, *supra note* 98, at 467.

DIP's works is "premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee"[107] and also on the assumption that this would allow the opportunity to reorganize would go without disruption that would have resulted if the trustee would have been appointed.[108] This however doesn't bar the appointment of the trustee and the same can be appointed on the request of the party in interest in case of fraud or gross misconduct or any such ground as provided[109], however, the reasons need to be strong, simple mismanagement won't be a sufficient ground.[110]

The Indian Code is different as the appointment of an administrator or 'resolution professional' is mandatory.

7.3.4. *Automatic Stay*

The Automatic Stay or Moratorium, which stops any continuing or future litigation or execution of order passed against the debtor, commences as soon as the petition is filed under Chapter 11. It allows the corporate-debtor to have a

[107] *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 345 (1985).
[108] Frey, *supra* note 98, at 467.
[109] Bankruptcy Code, 11 U.S.C. §1104(a)(1) (1978).
[110] In re, *Anchorage Boat Sales*, 4 Bankr.635 (1980).

breathing spell from his creditors[111] during which the corporate-debtor has an opportunity to make appropriate arrangements with the interested parties.[112] This however does not puts to an end the action of governmental authorities to an end, for example, environmental cleanup orders etc; whereas in Indian scenario all actions are put to an end.

Automatic stay is unique in another aspect, a secured creditor, or any party in interest, who is affected by the statutory stay, can apply for lifting for the stay, the company is under obligation to provide "adequate protection" for those whose interests are adversely affected by the stay.[113] Burden of proof is on the person claiming relief from the stay to show that he has interest in the property[114]; there is no such concept in Indian scenario. The idea of adequate protection and thus allowing filing relief is derived from the Fifth Amendment protection of property interests as enunciated by the US Supreme Court.[115]

The Title it is stringent (read economically) as it provides for punitive damages too in case of a willful violation and for

[111] H.R. 595, 95th Cong. (1977).
[112] McCormack, *supra* note 97.
[113] Bankruptcy Code, 11 U.S.C. §361 (1978).
[114] Bankruptcy Code, 11 U.S.C. § 362(g)(1) (1978).
[115] *Wright v. Union Central Life Ins. Co.*,311 U.S. 273 (1940).

damages even if the violation was in good faith, whereas in India violations attract fine and imprisonment which may be between 1 to 3 years, thus both jurisdictions treat violations seriously and punish them albeit in different manners.

7.3.5. *The 'Cramdown'*

The scheme of reorganisation as contained under Chapter 11 is not limited to the creditors but also includes the committee of shareholders and other interest holder parties. The confirmation of the reorganisation plan does not require acceptance from all the parties whose rights gets modified.[116] This calls for the procedure like cramdown comes into the picture; it permits the confirmation of the plan even if any particular class was opposing the same[117], literally forcing them to accept the same.[118] The only conditions attached are that it must be fair and equitable[119], and one class of impaired creditors must have accepted the same.[120]

In India however the only requirement for acceptance of a plan is that it must be accepted by 75% of the voting share of the

[116] Issac M. Pachulski, *The Cram Down and Valuation Under Chapter 11 of The Bankruptcy Code*, 58 N.C.L. Rev. 925, 926 (1979).
[117] Frey, *supra* note 98, at 513.
[118] McCormack, *supra* note 97, at 434.
[119] Bankruptcy Code, 11 U.S.C. § 1129(b) (1) (1978).
[120] McCormack, *supra* note 97, at 434.

financial creditors, and hence no provision of cramming down exists.

8. SUGGESTED CHANGES TO THE PRESENT REGIME

At the beginning of this paper it had been remarked that there have been certain grey patches left in the Code, which need to be redressed. After discussing all the erstwhile Indian regimes as well as certain foreign regimes, attempt has been made to fill up the various lacunae which have been identified during the course of research. Following suggestion are made in order to rectify the grey patches and to improve the present regime.

8.1. As regards the threshold for determining insolvency

There is a serious need to overhaul the criteria for determining when to initiate the resolution process. The criterion in India is only 'default'. But as seen from foreign regimes and SICA, the criteria should be two-fold: 1) default and 2) chances of revival. The first test is to ensure whether the financial condition of the company is *weak enough* to make it go through an insolvency process. The second test is to ensure whether the financial condition of the company is not *so* weak that it cannot be rescued and hence liquidation is better option. The second test therefore is to determine which of the two processes is more viable.

As regards the first test, the criterion to determine 'default' needs overhauling because, as it has been discussed, it is too low and frequently-achievable. The Indian legislature or judiciary would need to limit the scope of the term 'default' to certain *kinds* or m*agnitude* of default which would enable a creditors or a class of creditors to initiate revival proceedings against a company. The English and Singaporean regimes, by laying down anecdotal and subjective test, have left much of the determination of default to the court to examine, but in India, which is already over-burdened with litigation such subjective test would lead to unnecessary delays because unlike the Companies Act, 2013, the Code does not contain any time frame within which it has to order on the application under Sections 7, 8 and 10. Therefore a more objective test has to be inculcated. The present test of default though subjective, is not feasible. The best example of an objective test which can be taken is from the SICA regime wherein the criterion to determine 'sickness' is that the accumulated losses at the end of any year must exceed the total net worth.[121]

However it has to be noted that there is no scope for judiciary to lay down other conditions for triggering the process in the veil of interpreting the provision as the law is very clear and

[121] The Sick Industrial Companies (Special Provisions) Act, 1985, § 3 (o).

unambiguous. Therefore, alternatively, what it can do is to suggest an amendment to Section 3(12) in order to change the definition of 'default'.

As regards the second test, it has been previously stated that no provision in the Code has been made regarding it. The necessity of inculcating this test has been already discussed and hence it is suggested that amendments should be made in this regard.

8.2. **As regards appointment of Resolution Professional and functions of interim RP**

While comparing the Indian and the Singaporean regimes it was pointed out that various problems like duplication and negation of work can occur due to the two-phased process of the appointment of the administrator i.e. first the interim RP and then the permanent RP.

It is suggested that a better regime would be to prescribe a fixed time period within which committee of creditors should be formed which should not be more than 20-30 days of the appointment of the interim RP. During this period the only functions which the interim RP must be entrusted are those mentioned in Section 18 i.e. framing of accounts, collection of claims and formation of committee of creditors and not those

mentioned in Section 20. In such case, the actual tasks of the administration would be initiated by the permanent professional. The functions specified in Section 20 should be the domain of the permanent resolution professional only.

8.3. As regards the differences created between operational and financial creditors

It is concluded from the discussion that there *is* an intelligible differentia between the two types of creditors and the Indian regime by differentiating between the two has created a purple patch in the arena of insolvency regimes. Yet, the total exclusion of operating creditors from the committee of creditors is not desirable. The argument for removing them is that they can inhibit the formation of consensus as to revival plan, has been discussed earlier. A better regime could be that operational creditors should be a part of committee of creditors, but at the stage of approval of revival plan, this committee should be dissected so as to form different committees for operational and financial creditors in a way such that i) for financial creditors 75 percent voting share is required for approval (which is already mandated by the Code), and ii) for operational creditors it must be reduced to 25 percent of the total voting share of the operating creditors. Therefore though the operational creditors would participate in the resolution

process, yet they would have comparatively less say in the approval of resolution plan.

8.4. **As regards the amendment of plan**

If after initiation of execution, the plan seems to be unworkable or impossible to implement either the amendment of the plan or for the debtor to be liquidated with immediate effect.[122] The Indian regimes provides for none of the options. Once approved by the adjudicating authority the plan has to be continued till the completion of 180 days and that too, unamended. According to the World Bank, 'a plan should be capable of amendment (by vote of the creditors) if it is in the interests of the creditors.'[123] Most of the robust insolvency regimes like Singapore, Finland and USA and Japan provide for amendment of the plan in the execution phase. Thus it is submitted that the 2016 should either provide for the amendment of the resolution in the execution period or option to apply for the court to order liquidation if in the execution period the plan proves to be unworkable.

[122] World Bank Report: Principles of Insolvency, *supra* note 53, at 52.
[123] *Id.*

8.5. **As regards the management of the company during administration process**

Once the process is triggered the Resolution Professional is transferred the control of the management of the company and he is vested with the powers of the board of directors. Though several foreign rescue regimes like one in the USA have provisions which lets the control of the company to vest in the existing management called debtor in possession (DIP), in whom as discussed above, duties and obligations of the trustee (equivalent to resolution professional in terms of the powers) vests and can be removed leading to appointment trustee, if he violates statutory provisions. This jurisprudence along with requisite checks can be brought to Indian context, as the DIP would have a better idea, than someone stranger, about the business and hence more chances of revival would be there.

8.6. **As regards to who submits the plan**

Resolution plan is most significant in regards of the present and future of the corporate debtor, in Indian context anyone related to the company can submit a resolution plan to the resolution professional, as the term ‘resolution applicant’ is defined as anyone who submits the plan to the resolution

professional[124], then the resolution professional checks them and places before the committee of the creditors to approve it. If the foreign regimes are looked into then though, there is no common consensus on as to who should propose the rescue plan, the US Code prescribes that first the corporate debtor should prepare the plan within 120 days and if it fails then others are allowed to propose the plans, whereas in UK the administrators proposes the resolution plan. There is a need to look into this aspect as there being no limit on who can propose the plans, there may a numerous numbers of plans being proposed as well as since no one can be said to be as deeply associated with the functioning of the company as management is the plans proposed may not take overall considerations of the circumstances which may later arise.

9. CONCLUSION

India is a developing country with a GDP around $2 trillion, which is growing at the rate of around 7% per annum.[125] The present government, in recent times, has shown keen determination to increase the industrial sector, for a market

[124] The Insolvency and Bankruptcy Code, 2016, § 5(25).

[125] ET Bureau, India's Q1 GDP growth slows to 7.1% in new worry for Modi government, The Economic Times, Sept. 1, 2016, http://economictimes.indiatimes.com/news/economy/indicators/indias-q1-gdp-growth-slows-to-7-1-in-new-worry-for-modi-government/articleshow/53946492.cms.

aspiring to grow the nexus between insolvency laws and credit availability is indisputable and so is need of a well functional insolvency regime. India was in critical need of a functional insolvency resolution framework, the present code is a step in achieving the same.

The UNCITRAL Legislative Guide on Insolvency flags out certain characteristics and objectives of insolvency regimes, the nine broad objectives are[126]:

a) *"Provision of certainty in the market to promote efficiency and growth.*

b) *Maximization of value of assets.*

c) *Striking a balance between liquidation and reorganisation.*

d) *Ensuring equitable treatment of similarly placed creditors.*

e) *Provisions of timely, effective and impartial resolution of insolvency.*

f) *Preservation of the insolvency estate to allow equitable distribution to creditors.*

[126] United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law, Part I*, 10-14 (2005), available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.

g) *Ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information.*

h) *Recognition of existing creditor rights and establishment of clear rules for ranking priority of claims.*

i) *Establishment of a framework for cross-border insolvency."*

Though there is a wide array of difference between the social, economic and market structures of various countries all around the world, but most of insolvency law regimes tend to adhere to model characteristics laid down by the United Nations. The Code tries to fulfill most of the above stated characteristics and provides a robust mechanism to solve the insolvency questions as and when they arise.

If the corporate rescue regime is taken in isolation, there are some significant differences in the present and past Indian regimes, and also with several well working foreign regimes. The Indian insolvency framework is in nascent stage and the thus should be open to the lessons from other regimes, such as providing for one more objective test so as to check about insolvency and deliberations on the matters that whether Resolution Professional should control the management of the company or the framework of US and idea of DIP can be

adopted as the reasoning that the management would be better positioned to make decisions make much sense, are needed.

Further deliberations on the options like the corporate debtor should be firstly allowed to submit the plan; amendments into the plans after acceptance; and giving operational creditors more say are needed.

Lastly, the purpose of the insolvency law is to provide sufficient incentives to the creditors so that they refer the collective insolvency proceedings over individualized debt realizing mechanisms[127] and the present law provides enough reason to them to do the same.

[127] Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements and Creditor's Bargain,* 91 Yale L.J. 857, 864 (1981-1982).