"DEBTOR-IN-POSSESSION" OR "CREDITOR IN POSSESSION" – TRENDS IN INSOLVENCY LAW AND WHERE THE RIGHT BALANCE COULD LIE

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TABLE OF CONTENTS

Introduction: Why this debate is not a foregone conclusion

Any insolvency regime is a very careful balancing of interests of stakeholders. When enacting an insolvency regime countries try to carefully weigh whether it should adopt a debtor-in-possession regime or a creditor-in-possession regime. These phrases are well understood and have wide reaching implications. This debate can exhibit itself in various forms, none more importantly than whether and till when should the debtor's owners or their connected persons be permitted to acquire assets of a debtor or be given a chance to resolve the insolvency of the debtor.

While I have tried to rely on relevant international materials, this question first came to mind because of recent changes in India. In 2016, India enacted a paradigm shifting new Insolvency & Bankruptcy Code, 2016 (***IBC***). Section 29A of the IBC barred erstwhile management and owners from proposing a resolution plan for the debtor. In doing so it swung the pendulum dramatically from being a historically (and I might add, extremely) debtor friendly and debtor-in-possession jurisdiction to becoming a creditor friendly one. Has the pendulum swung too far? It made me wonder what the situation is internationally, and my hope is that this body of work will contribute to the debate in India on this issue.

During this research, I found it interesting that while the US has been a staunch supporter of a debtor-in-possession regime, other countries have differing approaches. For eg, the UK, being a financial center, has traditionally adopted tools that make it a creditor friendly jurisdiction. Even so, by May 2020 the UK may (but unlikely) revisit its position on whether sales to connected persons should be permitted/regulated. There are other jurisdictions as well which are either re-tooling their insolvency law kits or enacting new ones, for e.g. Netherlands and Singapore.

Therefore, it is important to <u>not assume</u> that this debate of debtor-in-possession versus creditor-in-possession is a foregone conclusion. Keeping in mind recent changes in India, Singapore, UK and the Netherlands, in this paper I try to explore the debate on debtor-in-possession versus creditor-in-possession from the following perspectives:

1. A historical perspective;
2. Comparing Section 29A to the restrictions in the UK and US;
3. Automatic stay/moratorium – implications;
4. The onset of private debt and hedge funds and what it foretells for this debate;
5. Business recovery – implications,

with the hope to understand recent developments and where the right balance may lie.

A historical perspective

The historical perspective as to why and how the US, UK and Indian regimes have evolved to where they are today is not merely academic. It is critical understanding and showcases itself in everyday implementation of these laws, particularly in India.

A US historical perspective

In the US, the distress in the railroads and the fear that these assets would be enforced upon on a piecemeal basis by creditors, resulted in a need to protect management and the debtor. Even so, under the New Deal following the great depression management was replaced by a trustee under Chapter X of the Chandler Act. This was intended to facilitate large restructurings. However, the introduction of the trustee resulted in few insolvency cases. Thus, in the reforms in 1978, management was allowed to be in place, and which has since then gone on to become the cornerstone of US bankruptcy law[1].

A UK perspective

As mentioned previously, the UK has generally remained a creditor friendly jurisdiction. However, a tilt towards debtor-in-possession and its benefits arose with the evolution of connected party sales under the prepack regime. The *Graham report* first studied these and found that prepacks in general have several benefits, albeit with a few challenges such as transparency and price discovery. However, in case of connected person sales the Graham report recommendation was to have such sales reviewed by a prepack panel of eminent persons. Thereafter, the Small Business Enterprises and Employment Act, 2015 created a reserve power for the Secretary of State to legislate if necessary, on this issue. In 2011 UK Insolvency Service surveyed that nearly 20% cases went ahead with a prepack sale and within this 80% sales were to connected persons[2].

The House of Commons Briefing Paper number 5035 dated 9 December 2019 quotes as follows:

> "*Many creditors who are owed money by a failed company are outraged to find that the directors of these companies may suffer little personal loss and are often able to start up a new business in the same field. To some extent this is an inevitable consequence of limited liability. However, there are rules prescribed to prevent an abuse of this privilege of limited liability*."

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[1] Paterson Sarah (2015), 'Rethinking Corporate Bankruptcy Theory in the Twenty-First Century', Oxford Journal of Legal Studies, p. 15

[2] House of Commons Briefing Paper, 'Pre-pack administration', Number 5035, Dated 9 December 2019, p. 2.

While the connected person sales and its comparison to Section 29A are further debated later; what is clear is that the UK, with prepacks, has adopted a more debtor friendly approach possibly with the intention to maximize the value of the debtor. Bear in mind that in a prepack the consent of secured creditors is still required, and so to that extent it remains a creditor friendly proposition.

Contrast this with India's experience and the reasons for a different approach lay bare.[3] In India the IBC approved and enacted by Parliament initially contained no mention of Section 29A. In fact, the notes to the law when introduced in Parliament expressly clarified that incumbent management and owners are also permitted to submit a resolution plan in the corporate insolvency of a debtor.

The IBC became effective from December 2016. However, there were few cases during its initial days. Finally, in June 2017, the Reserve Bank of India, ordered Indian banks to resolve or perish, and pushed Indian banks to mandatorily file the twelve largest defaulters (popularly called the "dirty dozen") into insolvency under the IBC. Indian banks soon realized that there was great information asymmetry and that Indian controlling shareholders would continue to be best placed to take the debtors back with substantially debt haircuts for banks. Indian banks also felt that the information asymmetry would dissuade genuine resolution applicants from coming forward. There were also several debtors where there were strong suggestions of avoidance transactions having been implemented. This could be one of the reasons that Indian banks were slow to take insolvency action against defaulters other than those that the RBI mandated must be filed into insolvency.

The Indian Government felt the need to amend the IBC else they feared that the new law would be exclusively used for the benefit of those who caused strife and potentially siphoned out funds. This resulted in the Indian Parliament amending the IBC in November 2017 and introducing Section 29A and even applying it retrospectively. The Section 29A ineligibility attaches not just in expected cases like where there was clear management failure or where there are strong suggestions of avoidance transactions, but also to a much broader situation-set. In doing so, Section 29A become an important feature of the IBC and made it effectively a law for third party M&A. Section 29A was challenged as unconstitutional before the Indian Supreme Court and the Indian Supreme Court in *Arcelor Mittal*[4] upheld its constitutionality arguing that economic legislations deserve a long rope by courts. With this, the transformation of Indian law from debtor-in-possession to creditor-in-control was complete.

Comparing Section 29A to the restrictions in the UK and US

[3] Pre-IBC, the Indian insolvency regime was known for its delay and bias towards debtors. Kristin Van Zwieten (2016), 'The Demise of Corporate Insolvency Law in India: The Role of Courts', D. Phil in Law thesis, University of Oxford, p 2.

[4] *ArcelorMittal India Private Limited v. Satish Kumar Gupta*, (2019) 2 SCC 1.

In this section I present a broad contour of Section 29A, compare it to connected person sales in the UK and plan submissions in the US Chapter 11.

India: Section 29A

Under the IBC, the insolvency professional is mandated to "shop" the debtor and invite resolution plans for all the businesses of the debtor.

Under Section 29A, if (i) a bidder or persons connected to the bidder (see "*Who all are covered*" below); (ii) fail certain disqualification norms (see "*What are the grounds for disqualification*" below), then neither that bidder nor any of its connected persons is eligible to submit a resolution plan for any company undergoing insolvency resolution process ("**CIRP**") in India.

Who all are covered?

- Any bidder who is intending to submit a resolution plan
- Any person acting in concert with such a bidder
- Any connected person to the bidder. Connected person is defined to mean (i) any person who controls the bidder or is in the management of the bidder; (ii) any person who shall be in control of or in the management of the debtor once the bidder acquires it; and (iii) any holding company, subsidiary company, associate company or related party of any of the persons referred to in (i) and (ii) above.

What are the grounds for disqualification?

- Being an undischarged insolvent.
- Being declared a "willful defaulter" in accordance with Indian guidelines.
- Having a loan which has been a non-performing loan for more than a year.
- Having been convicted of certain prescribed offences punishable with imprisonment.
- Being disqualified to act as a director in India.
- Prohibited by India's securities market regulator (SEBI) from trading in securities or accessing the securities markets.
- Has been in the management or control of a debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by a bankruptcy court under the IBC.

- Has executed a guarantee in favour of a creditor in respect of a debtor against which an application for insolvency has been made by such creditor and been admitted into insolvency in India and such guarantee has been invoked and remains unpaid.
- Is subject to any disability, corresponding to (1) to (8) above, under any law outside India.

The breadth of Section 29A is broad which has the following implications:

- There is no exception for matters outside the reasonable control of the owner or management. So, this means the current management and owners, even though, have (potentially) no 'fault' for the debtor's default, cannot submit a resolution plan for the debtor.
- The Indian Supreme Court[5] ruled that Section 29A applies retrospectively.
- Provision of guarantees is ground for trigger. It is difficult to argue against disqualification of a defaulting guarantor. Till date corporate guarantees formed the bedrock of lending by nationalized banks in India. It is quite likely that this will change going forward, and it is only fair that anyone giving a guarantee should carefully read the fine print.

United Kingdom: Sales to Connected Parties

Although the term "connected party" is defined in the Insolvency Act 1986 (IA 1986), the Graham report does not adopt this definition. Instead, a "connected party" is taken to mean: (a) a director, shadow director or company officer of the insolvent company; (b) an associate of a director, shadow director or company officer of the insolvent company; and (c) an associate of the insolvent who becomes:

(a) a director, shadow director, company officer of the new company;

(b) exercises control over the new company

(c) an associate of a director, shadow director or company officer of the new company; and

(d) an associate of the new company[6].

A review of the six Graham report recommendations on connected party prepacks presents the following interesting points of contrast with India

1. There are similarities in the definitions of "connected party" under Graham report and Section 29A. However, Indian law disqualifies owners and management if they have been at the helm of default by *any* company and not just the debtor. In that sense, Section 29A is more an

[5] *Ibid*.
[6] *Supra*, note 2, p. 11.

"unscrupulous person" test rather than a "connected party" test and subsumes "connected parties" within "unscrupulous persons". [7]

2. Far from disqualifying connected parties, the Graham report recommended that they be subjected to a voluntary regime. In this, the connected person may submit its proposal to the prepack panel for scrutiny. Therefore, unlike Section 29A which bars connected persons with the attendant disqualifications, the Graham report does not.

3. The Graham report and, more so, the scheme of the prepack regime is one of self-regulation. On the other hand, the Indian regime has been notably suspicious of giving too much description to insolvency professionals for fear of influence by connected parties. Therefore, Section 29A is not a self-regulatory regime and is a blanket ban.

4. Interestingly, drafters of the law realized that Section 29A effectively means that every debtor must undergo a change in ownership else be liquidated. The impact this has had on recoveries are discussed later. However, a realization has settled that there may not be so many buyers for distressed assets in India especially for relatively smaller debtors. Accordingly, Section 29A was amended and the most stringent provisions disapplied for small debtors.

United States: Debtor-in-possession and submissions of resolutions plans

The US debtor-in-possession regime was first memorialized in the voluntary equity receivership of Wabash, St Louis and Pacific Railways in 1884.[8] It is the foremost legislation for fresh start. In fact, the US Code gives the debtor an exclusive period of 120 days to propose a resolution plan, except in certain exceptional cases. In days gone by, US courts would extend this period extensively; however, since 2005, the US Code cuts of extensions after 18 months[9].

A review presents the following interesting points of contrast between US and India:

1. The concept of equity receivership emerged in the US in the backdrop of distress in the railroads industry, widely recognized as fundamental to the US economy. Contrast that with India. At the time of enacting the IBC, the largest cause of distress was the "dirty dozen" companies. These companies were primarily in real estate, power, steel and cement sectors.

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[7] Preamble to the Ordinance introduced to amend the IBC dated 23rd November 2017 states:

> "*Whereas in order to strengthen further the insolvency resolution process, it has been considered necessary to provide for prohibition of certain persons from submitting a resolution plan who, on account of their antecedents, may adversely impact the credibility of the process under the Code*."

[8] Harvey R. Miller and Shai Y. Waisman (2004), 'Does Chapter 11 reorganization remain a viable option for distressed businesses for the twenty-first century', American Bankruptcy Law Journal, Vol 78, p. 163.

[9] *Supra*, note 1, p 3.

Subsequently, telecom and non-bank credit have also come under severe stress. These are arguable the backbone of India's economy similar to the railroads in the 19th century US. However, the greater availability of credit and investments to take over and run businesses in these sectors in India, probably gave the Indian Government greater confidence in implementing a provision such as Section 29A even in these sectors.

2. While the US debtor-in-possession gives a period of exclusivity to the debtor to propose a plan of restructuring, Indian law belatedly introduced Section 12A which allows the debtor to withdraw from insolvency with the consent of 90% of the committee of creditors. This effectively gives the debtor and its owners and management a 'right to match' the highest bidder in insolvency. It also does not address the root cause of the insolvency, since only the bank creditors get to sit in the committee of creditors and so long as they recover better value under a 'withdrawal proposal' than a resolution plan under IBC from a third party, they should vote to allow a withdrawal. Economists will be best placed to comment as to which is more anti-competitive, a period of exclusivity to the incumbent with a right to match for third parties, or vice-versa. Given, alternate pools of capital (such as private equity and hedge funds) prefer to put their money to work where there is greater deal certainty, it is more likely that they will prefer the US approach rather than the Indian approach.

Briefly trends in other countries – Netherlands & Singapore

Netherlands

The new proposed law in the Netherlands seeks to bring its laws closer to that in the US and UK. With this law Netherlands is also hoping to become a debtor-in-possession regime. Under the new law, save certain cases, the first right to offer a resolution plan is given to the debtor. Where the debtor does not so make a proposal or his proposal is found to be an unviable attempt, then the financial creditors have the right to propose a resolution plan[10].

The new Dutch law also seeks to introduce the "Dutch scheme" which allows court confirmation of an extrajudicial restructuring plan agreed between the company and its creditors and shareholders, if this can prevent the debtor from going into bankruptcy[11].

Singapore

[10] Kastrinou Alexandra & Vullings Stef (2018),' 'No Evil is Without Good': A Comparative Analysis of Pre-pack Sales in the UK and the Netherlands', *International Insolvency Review*, 27, pp. 320–339.

[11] De Brauw Blackstone Westbroek, 'Review of the Unofficial Translation of the Explanatory Statement', https://www.debrauw.com/wp-content/uploads/2014/10/20140814-WCO-II-Draft-Bill-14-August-2014-Statute-Text-Unofficial-English-Translation-2.pdf.

Singapore's new insolvency regime borrows significantly from US Chapter 11. It also brings in a new prepackaged schemes of arrangement. The provisions tend to follow those in the US under Chapter 11 rather than the prepackaged administration in the UK. Also, interestingly, the new Singapore regime, appears, does not cram down the veto rights of shareholders[12]. These appear to make the Singapore regime more debtor friendly than before. If you consider that Singapore is a similar financial center to the UK, it will be interesting to see how this regime evolves.

Automatic stay

US bankruptcy scholars have traditionally described the role of corporate bankruptcy law as designed to preserve the assets of the debtor from creditor enforcement action so that it can be sold (to the extent possible) as a going concern[13]. Critical to this discussion is the automatic stay afforded under US bankruptcy law. Therefore, US bankruptcy law is debtor friendly by being debtor-in-possession while at the same time affording an automatic stay from filing date.

The UK prepack regime while affording the debtor the first opportunity to restructure does not contain an automatic stay.

The Indian insolvency law is strangely poised in this context. As previously discussed, the IBC is a creditor-in-control model where the existing management is replaced by a resolution professional who needs creditors committee approval for various decision items. Furthermore, under the IBC even a USD 1400 payment default entitles the creditor to initiate insolvency proceedings and there is no balance sheet test or test as to inability to pay debts as they fall due. Therefore, under the Indian regime given Section 29A in most cases the debtor's management or owners will not be incentivized to file for insolvency and get the benefit of the moratorium that is available under the IBC. Thus placing a perverse incentive to continue to trade in insolvency.

The onset of private debt and hedge funds and what it foretells for this debate

Harvey Miller writes that secondary loan trades were never expected to reach the proportions they have reached today at the time the US Code was redrafted as part of the New Deal. In the pre-distress era there was a more symbiotic relationship between debtors and their creditors. However, the incentives for distressed debt traders are different given that they enter the debt at a discount[14].

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[12] McCormack Gerard & Wan Y.W.(2018), 'Transplanting Chapter 11 of the US Bankruptcy Code into Singapore's restructuring and insolvency laws: opportunities and challenges', *Journal of Corporate Law Studies,* p 27.
[13] *Supra*, note 1, p. 18.
[14] *Supra*, note 8, p. 170.

David Skeel states that the control given to the debtor under a US Chapter 11 has over the years diluted because of the rights given to DIP financiers under their contracts[15]. To this extent, the arrival of alternative sources of capital and debt traders has altered the debtor-in-possession regime that existed previously.

In India too, the delay in concluding the largest of the dirty dozen cases (Essar Steel), caused bankers and distress funds to look to a pre-IBC solutions. India's federal reserve did release a voluntary restructuring mechanism (popularly called the "7th June Circular"). However, unlike the US the arrival of alternative capital providers is expected to result in more debtor friendly outcomes as more pre-IBC restructurings are expected. This has a lot to do with the cultural nuances of India where corporations continue to be closely run and with a fair amount of the risk and reward borne by one large group of shareholders (or promoters, as they are referred to in India). The promoter relationship with key regulators and key suppliers and customers, are also reasons why debt providers may consider doing debtor friendly deals especially in highly regulated sectors.

Business recovery – implications

The Graham report did empirically consider and record that sales to connected parties were more likely to result in distress in the near future. The prepack pool annual report 2016-17 notes that at least half of all prepacks were connected party sales in the UK. Therefore, it remains a powerful tool in the UK and various organizations support it (for eg R3). A survey conducted by R3 revealed that 89% of those surveyed were opposed to the UK Government exercising reserve powers to ban/regulate connected party sales[16]. Therefore, clearly creditors saw greater recovery potential in a prepack sale to a connected party. This presents an interesting dichotomy. While connected party sales may present a timely maximization of value for creditors, does the greater likelihood of the business failing in future mean that it is not the best maximization of value of the debtor? Are these necessarily at crossroads with each other?

The Indian law though enacted in December 2016, only really became active (and how!) from June 2017. The latest statistics ending 31 December 2019[17] reveal the following about the IBC:

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[15] Bratton W.W. & Skeel D.A (2018), 'Bankruptcy's new and old frontiers', University of Pennsylvania Law Review, 166(7), pp. 1573-1589.

[16] R3 - the Association of Business Recovery Professionals (2018), 'Submission to the Insolvency Service: Evaluation of industry measures to improve connected party pre-pack administration sales' p. 7 at http://vm1.r3.org.uk/media/documents/policy/consultation_subs/Pre-pack_Review_May_2018_R3_Comments_FINAL.pdf .

[17] Insolvency & Bankruptcy Board of Indian (Oct – Dec, 2019), 'The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India', Vol 13, p. 15.

1. Since its commencement 3312 debtors have been admitted into insolvency in India under the IBC. As of 31 December 2019, 1351 cases have been resolved either by way of a settlement, a resolution plan or by admission into liquidation. Out of these 774 failed and went into liquidation. Therefore, about 57.74% cases which closed went into liquidation. This is obviously a high number! But that is not the complete picture.
2. Out of the 774 debtors that went into liquidation, 561 were companies that were languishing in courts under the erstwhile (very debtor friendly, time consuming and failed) insolvency regime. Quite likely that these debtors had no value left in them. If I take these out of the calculations (both numerator and denominator) out of the closed cases, 15% debtor cases went into liquidation. A more reasonable number.
3. Furthermore, out of the 1351 closed cases thus far, only 190 have been by way of a resolution plan, and the statistics do not reveal whether these were small business enterprises to which Section 29A does not apply.
4. If you exclude these, from the 1351 cases that did not go into liquidation, 381 were 'settled'. Ostensibly, these would have been settled with the existing owners and management, exhibiting a more debtor-in-possession outcome. This works out to be approx. 28% of the closed cases. **Nearly double the cases resolved by way of a resolution plan**!
5. However, these are still early days for the IBC. Do note that the IBC does not have a balance sheet test to admission into insolvency and a mere USD 1400 payment default is sufficient to be admitted into insolvency. This means that several of these 'settled' cases may not be 'insolvent' debtors and more likely disgruntled trade creditors using the IBC to settle their trade dues.
6. If you consider that 635 cases are already beyond the statutorily prescribed 270-day time period for resolution, there is a likelihood that the liquidation numbers will rise.
7. Of course, these statistics are by number of cases and not value of recovery. Bank creditors point to higher creditor recoveries, lower resolution timelines and costs when compared to the erstwhile regime as being clear signs that the new law has worked well when compared to the old law.

Conclusion

To paraphrase from Frank Borman, is the IBC a "good hell" or is it a "good heaven" from which to revive and be reborn? What is the right balance?

1. *Historical perspective*: Historically countries have oscillated between debtor-in-possession and creditor-in-possession and in doing so they possible respond to short sighted goals first before focusing on longer term benefits. In India too, given the high levels of bank NPLs, the present need

was for a creditor-in-control regime which over time evolves into a more debtor friendly regime. This is evidenced by, on the one hand, rising might of banks when negotiating with defaulting debtors using the threat of Section 29A, while at the same time rising number of "settled" cases with connected persons. In times to come, the right balance would be adding a debtor-in-possession (say a Chapter 11 prepack) law in the insolvency tool kit.

2. *Comparing India, US, UK, Singapore, Netherlands*: It seems that as businesses are more global, as insolvency regimes in countries mature, they try to compete with international regimes. Then they become more comfortable with debtor-in-possession (ie Singapore and Netherlands). They are also more influenced by the success of Chapter 11.
3. *Automatic stay*: Even more advanced jurisdictions have been reluctant to swing the pendulum the complete other way and recognize an automatic stay or moratorium on a prepack without good cause. This seems fair, as there needs to be confidence in the new law and the professionals and infrastructure implementing it before embarking on extending automatic stay.
4. *Alternate capital*: Large pools of alternate capital exist in the US/UK and they are comfortable with debtor-in-possession. If they are interested in a jurisdiction, this exhibits confidence in its laws/economy. In times of bank stress, they provide essential alternative (and sometimes only available) capital. So long as there is absence of fraud/avoidance in a debtor, letting such private capital "find its own path" is probably the right balance to attracting such capital, including by providing a debtor-in-possession alternative in the insolvency tool kit of a country.
5. *Business recovery*: It is early days, but it will be interesting to see how may cases are "settled" in times to come.

Therefore, consistent with how insolvency laws evolved in the US, UK, Singapore and Netherlands India has oscillated from debtor-in-possession to now firmly creditor-in-control, and with good historical reason as Indian debtors famously held out against creditors with laggard progress before erstwhile bankruptcy courts. However, in this strong creditor-in-control IBC times there are green shoots of a prepack debtor-in-possession regime visible. I would think in the new phase of evolution of this law, debtor-in-possession options will continue to rise but only with the overarching threat of Section 29A hanging as 'damocles sword'.

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