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The Scheme of Arrangement as a Debt Restructuring Tool in India: Problems and Prospects

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THE SCHEME OF ARRANGEMENT AS A DEBT RESTRUCTURING TOOL IN INDIA: PROBLEMS AND PROSPECTS

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Abstract

The goal of this paper is to analyse the scheme of arrangement as a debt restructuring tool in India and the extent to which it has been utilised. It finds that the scheme has been used sparingly for debt restructuring in India, and primarily in large and complex transactions. This is contrary to jurisdictions such as the United Kingdom and Singapore that have witnessed a rise in the use of this mechanism. This trend clearly indicates that the presence of an efficient restructuring mechanism in the legal rules is by itself inadequate to ensure its full utilisation. Apart from law on the statute books, necessary regard must be had to other legal and institutional considerations as well as a complex web of other factors, including historical and business considerations, which ultimately determine the success (or failure) of a mechanism such as the scheme of arrangement in each jurisdiction. In India, the scheme has been overshadowed by other mechanisms (both informal and formal), and that wide-ranging reforms to the law relating to corporate resolution have paid short shrift to the scheme. The paper concludes with some recommendations to rejuvenate the use of schemes in India to exploit its full potential as an effective tool for debt restructuring.

Key words: Scheme of arrangement, corporate debt restructuring, bankruptcy, insolvency

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I. INTRODUCTION

Several countries around the world, India including, have experienced an increase in recent times in the number of financially distressed companies, which has been exacerbated by the global financial crisis. This has tested the robustness of the insolvency framework in these countries, and its ability to engender a culture of rescue and rehabilitation of such companies where appropriate. In these circumstances, the principal objective of the legal framework is to weed out nonviable firms from viable ones, thereby leading to the liquidation of nonviable firms and the rescue and rehabilitation of the viable ones.[1] If the option of rescue or rehabilitation is chosen, then restructuring the debt of such a firm becomes an imperative. Debt restructuring is essentially financial in nature and could involve "rescheduling (extension of maturities), lower interest rates, debt-for-equity swaps, debt forgiveness, indexing of interest payments to earnings, and so on."[2] Such a financial restructuring may also be coupled with a broader corporate restructuring that involves a sale of the business or assets of the company in distress.

From a legal and regulatory perspective, a firm can accomplish a debt restructuring in several different ways. At one end of the spectrum lie purely contractual or informal arrangements that are comparatively simpler to implement, while at the other end lie the more formal liquidation or reorganisation procedures.[3] In this continuum, there could be a number of intermediate options whereby contractual arrangements are supported by well-recognised principles for restructuring or are implemented through the intervention of courts or administrative authorities.[4] A scheme of arrangement (SoA) is a hybrid mechanism that lies along the spectrum mentioned above as it provides greater sanctity to a contractual arrangement among creditors and the debtor, but at the same time falls short of a formal insolvency proceeding. Due to its peculiar features, the SoA has come to play a significant role in debt restructuring in jurisdictions that recognise the concept.

The SoA is a creature of English law, and has been exported to other jurisdictions in the Commonwealth and has increasingly influenced the development of similar mechanisms in

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[1] Jennifer Payne, "Debt Restructuring in English Law: Lessons from the US and the Need for Reform", University of Oxford legal Research Paper Series (February 2014), available at https://ssrn.com/abstract=2321615.

[2] Stijn Claessens, "Policy Approaches to Corporate Restructuring Around the World: What Worked, What Failed?", available at http://siteresources.worldbank.org/INTAFRSUMAFTPS/Resources/Policy_Approach_to_Corporate_Restrustrin_World_background.pdf.

[3] Jose Maria Garrido, "Out-of-Court Debt Restructuring" (December 2011), available at http://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-8983-6.

[4] Ibid.

Continental legal systems.[5] As part of this process, the SoA found its way into company law in India as well, principally because early company law in India essentially constituted a transplant of English law.[6] Substantially designed along the lines of English law, the concept of SoA has since been well entrenched under Indian company law, and is an important tool for both corporate restructuring in general and debt restructuring in particular. Carrying some features of English law,[7] the SoA in India can be resorted to for both solvent and insolvent companies, the debtor can continue to be in possession of the business and operate the same, the debtor can enjoy a moratorium on application to the court and at its discretion,[8] and finally, upon sanction of the court, the scheme can be made binding on different classes of creditors so long as a majority of each class has approved the scheme.

My goal in this paper is to analyse the SoA as a debt restructuring tool in India, and the extent to which it has been utilised. I find that despite strong similarities with English law, the SoA has been used sparingly for debt restructuring in India, and primarily in large and complex transactions. This is contrary to the rising wave of SoAs for debt restructuring not only in the origin country (i.e. United Kingdom (UK)), but also in other countries such as Singapore that have adopted the concept.[9] This trend clearly indicates that the presence of an efficient restructuring mechanism in the legal rules is by itself inadequate to ensure its full utilisation. Apart from law on the statute books, necessary regard must be had to other legal and institutional considerations as well as a complex web of other factors, including historical and business considerations as well as regulatory incentives, which ultimately determine the success (or failure) of a mechanism such as the SoA in a given jurisdiction.[10] Conventional

[5] Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge: Cambridge University Press, 2014), p. xiii.

[6] Umakanth Varottil, “The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony” (2016) 31 American University International Law Review 253.

[7] See Payne, “Debt Restructuring in English Law” (n. 1) at pp. 3-4.

[8] However, as discussed later, the moratorium provision that was available under the earlier version of companies’ legislation in India has now been retreated.

[9] For the growth of the SoA in the UK and Singapore, see Payne, *Schemes of Arrangement* (n. 5) pp. 178-179; Christian Pilkington, *Schemes of Arrangement in Corporate Restructuring* (London: Sweet & Maxwell, 2013), pp. 1-3; Adam Gallagher, “The Growth of Schemes of Arrangement as the Tool of Choice in Complex Restructurings” (2010) 29-Oct American Bankruptcy Institute Journal 36; David Milman, “Schemes of arrangement and other restructuring regimes under UK company law in context” (2011) 301 Company Law Newsletter 1; Tracey Evans Chan, “Schemes of Arrangement as a Corporate Rescue Mechanism: The Singapore Experience” (2009) 18 International Insolvency Review 37; Lee Eng Beng, “Recent Developments in Insolvency Laws and Business Rehabilitations – National and Cross-Border Issues” (on file with author).

[10] For a broader analysis of insolvency frameworks along these lines, see Gerard McCormack, “Control and Corporate Rescue—An Anglo-American Evaluation” (2007) 56 International & Comparative Law Quarterly 515; Nathalie Martin, “Common-Law Bankruptcy Systems: Similarities and Differences” (2003) 11 ABI Law Review 367.

wisdom attributes the scant use of SoA as a restructuring device in India due to the excessive delays and costs involved in the process, principally because it requires the intervention of the courts.[11] Colossal delays in Indian courts are part of academic lore,[12] and have contributed substantially to the hesitation in the use of SoA in India. But, as I argue in this paper, this is only part of the story. For instance, this fails to explain why schemes of arrangement are popular in India when it comes to corporate restructuring in the form of amalgamations, demergers and the like,[13] but not to debt restructuring.

I find that although the SoA was the oldest legal mechanism for debt restructuring, it has been overshadowed by the introduction of two alternative debt restructuring processes that, despite their own inefficiencies, have found favour with creditors and debtors.[14] The first is a corporate debt restructuring (CDR) mechanism prescribed by India's central bank, the Reserve Bank of India (RBI) and set up on the lines of the "London approach".[15] Although the CDR mechanism encompasses banks and certain other specified financial institutions rather than all creditors, it has remained popular as it can be implemented without recourse to the overburdened Indian courts. Moreover, creditors such as banks have great incentive to rely on the CDR mechanism, as it allows them to obtain regulatory forbearance when it comes to treatment of non-performing assets (NPAs) on their balance sheets.[16] Given that the ballooning NPAs, particularly among state-owned banks in India is an issue of considerable political sensitivity, it is not surprising that large banks are resorting to the CDR mechanism to restructure their loans.[17]

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[11] Ministry of Finance, Government of India, *Interim Report of the Bankruptcy Law Reform Committee* (February 2015), available at http://finmin.nic.in/reports/Interim_Report_BLRC.pdf at p. 77 (hereinafter the "BLRC Interim Report").

[12] For example, see Jayanth K. Krishnan, "Globetrotting Law Firms", (2010) 23 Georgetown Journal of Legal Ethics 57 at 70; John Armour & Priya Lele, "Law, Finance, and Politics: The Case of India" (2009) 43 Law & Society Review 491 at 496.

[13] Umakanth Varottil, "Corporate Governance in M&A Transactions" (2013) 24 National Law School of India Review 50 at 56-57.

[14] Similarly, it has been found that the voluntary administration procedure introduced in Australia has superceded the use of the SoA in the insolvency sphere in that jurisdiction. Rebecca Langley, "The future role of creditors' schemes of arrangement in Australia after the rise of voluntary administrations" (2009) 27 Company and Securities Law Journal 70 at 71.

[15] Rajeswari Sengupta, Anjali Sharma & Susan Thomas, "Evolution of the insolvency framework for non-financial firms in India" (June 2016), available at http://www.igidr.ac.in/pdf/publication/WP-2016-018.pdf, at 11.

[16] Reserve Bank of India, *Report of the working group to Review the existing prudential guidelines on restructuring of advances by banks/ financial institutions* (July 2012), available at https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/WRPN180712FL.pdf.

[17] Sengupta, Sharma & Thomas, "Evolution of the insolvency framework" (n. 15) at 11.

The second alternative mechanism was the use of a rescue and rehabilitation mechanism under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). The SICA was enacted with a view to rescuing distressed industrial companies in a swift manner through the establishment of the Board for Industrial and Financial Reconstruction (BIFR).[18] But, over a period, SICA itself turned out to be inefficient due to delays.[19] In this case, though, due to the presence of a moratorium and the fact that the debtor continued to be in possession, the SICA provided incentives to debtors to submit to the BIFR. The inefficiencies and delays of the BIFR process worked to the advantage of recalcitrant debtors.[20] One option would have been to combine the SoA with rehabilitation under SICA so that the benefits of both types of rescue mechanisms could be enjoyed. But, here it was the judiciary which put paid to such an approach by clearly stating that the SICA process superceded the SoA mechanism under company law.[21] Hence, the SoA was not an option for sick industrial companies that were within the purview of the BIFR. For these reasons, the CDR mechanism prescribed by the RBI and the SICA process both turned out to be more advantageous to creditors and debtors respectively, due to which they remained sceptical about the SoA process, which did not find many takers.

What is even more surprising is that while India introduced recent reforms that brought about a paradigm shift in its approach towards corporate insolvency, the SoA did not receive any attention whatsoever as part of the process. Apart from making some minor changes to the rules relating to SoA,[22] the concept remained largely untouched, signifying its isolation as a corporate rescue mechanism in India. While both the UK and Singapore have recently undertaken consultation efforts to enhance the use of SoA in debt restructuring,[23] the Indian legislators and policy makers have paid short shrift to the SoA as a debt restructuring tool,

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[18] Kristin van Zwieten, "Corporate Rescue in India: The Influence of the Courts" (2015) Journal of Corporate Law Studies 1 at 3; Sunil Kumar Gupta, "Corporate rescue in India: trends and prospects" (2014) International Company and Commercial Law Review 241 at 243.

[19] van Zwieten, "Corporate Rescue in India" (n. 18) at 3.

[20] BLRC Interim Report (n. 11) at 20-21.

[21] See Part IIID below.

[22] See e.g., Ministry of Company Affairs, Government of India, *Report on Company Law* (May 2005), available at http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf (hereinafter the "JJ Irani Report") at ch. X, paras. 24-25; BLRC Interim Report (n. 11) at paras. 4.2, 4.3K;

[23] See e.g., The Insolvency Service (UK), *A Review of the Corporate Insolvency Framework: A consultation on options for reform* (May 2016), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf; Ministry of Law, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (April 2016), available at https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf.

and have instead trained their efforts on other mechanisms. More importantly, the recent reforms resulted in the repeal of SICA and the establishment of a corporate insolvency resolution process (CIRP) under the recently enacted Insolvency and Bankruptcy Code, 2016. The CIRP is a time-bound process triggered for defaulting companies that can undergo debt restructuring through the intervention of an insolvency professional acting under the overall supervision of the National Company Law Tribunal (NCLT). The CIRP allows a cramdown across all classes (as the requirement is a 75% majority of all financial creditors without the requirement of classification) and a limited moratorium, but it largely displaces existing management by handing over the business affairs of the company into the hands of an insolvency professional. By making the process largely creditor-driven, the CIRP seeks to rectify the problems created by the erstwhile SICA. This leaves the SoA as the principal mechanism under Indian law that permits restructuring while maintaining the debtor in possession of the business of the company. Moreover, given that the CIRP is within the realm of insolvency, it still caters for the SoA to act as a suitable mechanism for restructuring the debts of a solvent company. For these reasons, it is too early to sound the death knell of the SoA. However, as this paper elucidates, it is necessary for the policymakers in India to introduce appropriate reforms to the law relating to the SoA so as to make it a more attractive option for restructuring of debts in addition the recently introduced CIRP process.

Part II of this paper discusses the scope and process of the SoA as a debt restructuring tool, and highlights its benefits and disadvantages. Part III compares the SoA with the other two forms of restructuring that were available in India, namely the RBI's CDR mechanism and the rehabilitation of companies under the SICA, finding that the incentive of the creditors and debtors respectively to resort to those alternative mechanisms consigned the SoA into near oblivion. The courts supported this through their interpretation that preferred SICA to the Companies Act. Part IV discusses the impact of recent reforms on debt restructuring, including in terms of the company law reform as well as the introduction of a new insolvency law. Part V contains a normative discussion and makes some recommendations for specific reforms to the law surrounding SoA to ensure that its benefits are fully extracted. Part VI concludes.

II. SCHEME OF ARRANGEMENT: SCOPE AND PROCESS

The SoA as a mechanism of debt restructuring has been available under Indian law for over a century,[24] although its use by companies in winding up was permissible even earlier.[25] This mechanism has continued to exist in the statute books to the present day without significant alterations to its basic nature.[26] Although the current law relating to SoA is contained in the

[24] Companies Act, 1913, s. 153.

[25] See e.g. The Indian Companies Act, 1882, s. 202.

[26] Companies Act, 2013, s. 230.

Companies Act, 2013 (the CA 2013), its provisions relating to this topic came into effect only as recently as 15 December 2016.[27] Until then, the SoA was governed under sections 391 to 394 of the Companies Act, 1956 (the CA 1956). Under this legislation that endured nearly half a century, courts developed substantial jurisprudence surrounding the SoA.[28]

A. The Scheme Process

The SoA process begins with the board of directors of a debtor company proposing a compromise or arrangement between itself and its creditors or shareholders. To operationalise such a compromise or arrangement, the company makes an application to the High Court to convene meetings of the respective classes of creditors.[29] One issue that has exercised the minds of Indian courts relates to the classification of creditors. This is because the requisite majority of each class of creditors must approve the scheme separately. The Indian courts have generally followed the English jurisprudence relating to classification in that a class "must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult each together with a view to their common interest".[30] At the same time, the courts have found it "obvious that unless a separate and different type of Scheme of Compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such sub-class of the main class of members or creditors is required to be convened."[31] Hence, while the courts place considerable emphasis on classification of creditors, they are not swayed by minute differences among creditors that result in artificial distinctions among creditors.[32]

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[27] Ministry of Corporate Affairs, Government of India, Notification No. S.O. 3677(E) dated 7 December 2016.

[28] Hence, in this part I focus on the Companies Act, 1956, and discuss the more recent reforms culminating in the Companies Act, 2013 in Part IVA below. However, for sake of convenience, while discussing the provisions of the Companies Act, 1956, I include references to parallel provisions under the CA 2013.

[29] Companies Act, 1956, s. 391(1); Companies Act, 2013, s. 230(1). Under the CA 1956, the jurisdiction to convene class meetings was with the High Court that exercises jurisdiction over the state in which the company is incorporated.

[30] *In Re Maneckchowk and Ahmedabad Manufacturing Co. Ltd.*, (1970) 40 Comp. Cas. 819 (Guj) at para. 41, relying on *Sovereign Life Assurance Co. v. Dodd*, (1892) 2 QB 573 (CA).

[31] *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, (1996) 87 Comp. Cas. 792 (SC).

[32] For example, foreign lenders were not treated as a separate class (*In Re Arvind Mills Ltd*, (2002) 111 Comp. Cas. 118 (Guj)), a debentureholder by virtue of a creation of a debenture redemption reserve was held not to constitute a separate class (*In Re Spartek Ceramics India Ltd.*, (2007) 7 SCL 548 (AP)), and a related creditor was held to be like any other creditor in a scheme that did not confer any higher rights than those conferred upon other creditors (*In Re Mather and Platt Fire Systems Limited*, MANU/MH/0286/2007 (Bom)).

Once the requisite meetings are convened,[33] the scheme must be approved by a majority in number (i.e., over 50%) representing 75% in value of *each class* of shareholders present and voting, in separate meetings for each class.[34] Once approval is obtained, the company must again approach the High Court for sanction of the scheme. The High Court will hold hearings in which interested parties may represent themselves and, if satisfied, issue an order sanctioning the scheme.[35] Here, the Indian judiciary has played a trailblazing role in developing the jurisprudence on SoA by clearly defining the role of the court in sanctioning a scheme. In *Miheer Mafatlal*, the Supreme Court laid down the broad contours of the court's jurisdiction in reviewing the SoA and clarified that such jurisdiction is "peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire."[36] Exercising this jurisdiction, once the High Court sanctions the scheme, it must be filed with the Registrar of Companies to make it effective.

B. Key Benefits and Concerns of the Scheme

The SoA offers several advantages in the context of debt restructuring. The first is its wide scope. Courts have generally interpreted the terms "compromise" and "arrangement" broadly to encompass various types of transactions that include financial restructuring, as well as corporate restructuring that might involve the sale of assets or business of the debtor company or its amalgamation with another company.[37] This provides sufficient flexibility to the debtor company and its creditors to negotiate using various types of restructuring options.[38]

Second, the SoA can be utilised in the context of both solvent and insolvent companies. By enabling an early restructuring of a company's debtor that helps avoid insolvency, the use of

[33] In convening the class meetings, the debtor company must provide adequate information to the members of each class, and non-disclosure of material information could be fatal to the scheme. *In Re TCI Infrastructure Finance Ltd.*, (2008) 146 Comp. Cas. 113 (Raj); *In Re Mather and Platt Fire Systems Limited* (n. 32).

[34] Companies Act, 1956, s. 391(2); Companies Act, 2013, s. 230(6).

[35] Companies Act, 1956, s. 391(2); Companies Act, 2013, s. 230(5),(6).

[36] *Miheer Mafatlal* (n. 31) at para. 28. See also, *Hindustan Lever Employees' Union v. Hindustan Lever Limited*, AIR 1995 SC 470.

[37] A. Ramaiya, *A Guide to the Companies Act*, 18th ed (Gurgaon: LexisNexis, 2015), at p. 3692.

[38] This may entail some similarities with the "pre-pack" restructuring option. See e.g., John Armour, "The Rise of the 'Pre-Pack': Corporate Restructuring in the UK and Proposals for Reform" in RP Austin and Fady JG Aoun, *Restructuring Companies in Troubled Times: Director and Creditor Perspectives* (Sydney: Ross Parsons Centre, 2012) at p. 43.

the SoA prevents not only any stigma associated with defaults or insolvency,[39] but also protects against potential cross-defaults that might render the company's financial situation even graver.[40] At the same time, companies that are already in the process of winding up may resort to the SoA as a form of corporate rescue.[41] In these circumstances, courts tend to balance the two alternatives before them, namely to sanction the scheme and rescue the company, or to reject the scheme and as a corollary put the company into winding up.[42] This involves a consideration of competing interests of creditors and shareholders.[43] Furthermore, the court's power in a SoA extends even to restructure the debts of a company where a winding up has been ordered and the liquidator appointed, so long as the ultimate step of disposal of the assets is yet to be undertaken.[44]

Third, and perhaps the most advantageous feature of the SoA, is that the scheme has a binding effect on the debtor company as well as all the creditors who come within its purview. This avoids the "hold out" problem that tends to be common when there are many small creditors, some of who may seek to realise a better deal by staying outside the scheme.[45] However, due to the classification requirements under Indian law as discussed earlier in this Part, it is possible to "cram down" the scheme only on minorities forming part of each class. Consequently, it is not possible to cram down one or more classes as whole, which diminishes the utility of the binding nature of the scheme.[46] Hence, while holdouts within each class cannot impinge upon the effectiveness of a SoA, a class that holds out can stymie the restructuring.

Fourth, the SoA process does not affect the management of the debtor company. The current management continues to operate the business without interference from an administrator or insolvency practitioner. By following the debtor-in-possession approach, the SoA enables the management of companies which are suffering a downturn in business to take recourse to the

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39 See Chan, "Schemes of Arrangement as a Corporate Rescue Mechanism" (n. 9) at 42; Gallagher, "The Growth of Schemes of Arrangement" (n. 9) at p. 86.

40 Pilkington, *Schemes of Arrangement* (n. 9) at pp. 11-12.

41 This applies where the company is being wound up under the provisions of the Companies Act or under special legislation such as the Reserve Bank of India Act, 1934. For an instance of the latter, see *Reserve Bank of India v. CRB Capital Markets Ltd.*, (2013) 117 SCL 427 (Del).

42 *In Re Maneckchowk and Ahmedabad Manufacturing Co. Ltd.* (n. 30) at para. 79.

43 Ibid. See also, *S. Krishna Murthy v. Hoysala Building Development Company Pvt. Ltd.*, MANU/KA/0679/2012 at para. 18.

44 *Meghal Homes Pvt. Ltd. v. Shree Niwas Girni K.K. Samithi*, (2007) 139 Comp. Cas. 418 (SC).

45 Pilkington, *Schemes of Arrangement* (n. 9) at p. 13.

46 Payne, "Debt Restructuring in English Law" (n. 1) at p. 12.

restructuring process sooner rather than later, as they have no reason to fear a loss of control over the business.[47] However, in case of companies in distress due to mismanagement or self-serving behaviour on the part of the management or promoters, the debtor-in-possession regime may exacerbate the situation further, exposing the creditors to further peril.[48]

Finally, under the CA 1956, a limited moratorium was available whereby the court reviewing a SoA was entitled to "stay the commencement or continuation of any suit or proceeding against the company" pending disposal of the scheme application.[49] Although not automatic in nature, such a moratorium imposed at the discretion of the court would help prevent enforcement actions against the company by creditors (particularly holdouts) that might interfere with negotiation and implementation of a SoA.[50] At the same time, the available evidence indicates that the use of the moratorium was limited due to the careful exercise of discretion by the courts in awarding them.[51] For example, courts would impose a time-bound implementation of a scheme where a stay is pending, so that the debtor company is deprived of any undue advantage arising out of the stay.[52] Moreover, such a stay was available only in respect of certain proceedings, and not to criminal proceedings[53] or recovery proceedings under special legislation benefiting certain types of creditors.[54]

Despite several benefits discussed above, schemes have also suffered from significant disadvantages. The procedural requirements are onerous, and there was often a lack of clarity and certainty on certain aspects of the SoA. For instance, the classification requirements in large schemes could be complex, thereby exposing them to challenge by disgruntled creditors. Moreover, much as the Indian courts have sought to define their role in sanctioning a scheme, they do possess considerable discretion that leaves parties with some level of uncertainty as to their ability to successfully accomplish the implementation of the SoA. Most

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47 Chan, "Schemes of Arrangement as a Corporate Rescue Mechanism" (n. 9) at p. 52.

48 See e.g., Armour, "The Rise of the 'Pre-Pack'" (n. 38) at p. 29 (noting that it "puts the 'fox in charge of the henhouse': that is, it leaves control of the firm in the hands of those who may have been responsible for its demise").

49 Companies Act, 1956, s. 391(6). Note the absence of such a moratorium provision under the CA 2013, a matter that I discuss in Part IVA below.

50 Payne, *Schemes of Arrangement* (n. 5) at p. 216.

51 Ramaiya, *A Guide to the Companies Act* (n. 37) at pp. 3788-91.

52 *The Peerless General Finance and Investment Co. Ltd. v. Essar Oil Limited*, MANU/GJ/0043/2005 (Guj). See also, *In Re Agnite Education Ltd.*, (2013) 177 Comp. Cas. 60 (Mad) (holding that a stay cannot be granted in respect of winding up proceedings unless prior notice is provided to the petitioner in such proceedings).

53 *Krishna Texport Industries Ltd. v. DCM Ltd.*, MANU/DE/0787/2008 (Del).

54 For a more detailed discussion on this issue, see Part IIID below.

importantly, the SoA requires multiple court hearings, especially in cases that are contested, resulting in considerable delays. This was principally due to the fact that under the CA 1956, the High Court had jurisdiction to consider and approve schemes. Given that various High Courts across the country were involved in scheme oversight, and that they were subject to considerable backlogs, not only was there less limited coordination among the various High Courts on key substantive issues relating to the SoA, but the process of implementing the SoA could take several months, if not years, to accomplish. For instance, while some High Courts such as Bombay, Gujarat and Delhi experienced a reasonable flow of cases relating to SoA and hence their judges developed expertise in this area (primarily because several large companies are incorporated within the territorial jurisdiction of these courts), matters were somewhat different in other states. These delays, added costs and uncertainties arguably led to the relative unpopularity of the SoA as a method of debt restructuring.

At the same time, the SoA process has been invoked in a handful of high-profile debt restructuring cases such as Arvind Mills Limited,[55] BPL Limited[56] and Essar Oil Limited,[57] among others.[58] Given that there are well over 20 High Courts in India, it is not possible to obtain accurate data regarding the number of debt restructurings that have been implemented through SoA, but anecdotal evidence indicates that they have been only a few in comparison with the total number of debt restructurings effected in India. This suggests that companies are resorting to other mechanisms available in India law to restructure their debts. I now turn to these other mechanisms that have acquired considerable popularity in India, and have effectively overshadowed the SoA.

III. COMPARING SCHEMES WITH OTHER FORMS OF DEBT RESTRUCTURING

In order to analyse the effectiveness of the SoA as a debt restructuring tool in India, it would be necessary to place the SoA in the context of parallel developments in India's banking and financial markets. Although the SoA was the earliest mechanism available for debt restructuring and corporate rescue and rehabilitation, rapid developments that occurred beginning the 1980s have had a considerable impact on the utility of schemes. In this Part, I first summarise the key developments relating to enforcement of creditors' rights and then

[55] *In Re Arvind Mills Ltd*, (2002) 111 Comp. Cas. 118 (Guj); "Court upholds Arvind debt recast plan", *The Hindu Business Line* (10 April 2002).

[56] *Infrastructure Leasing and Financial Services Ltd. v. B.P.L. Ltd.*, (2015) 189 Comp. Cas. 1 (SC); Venkatesha Babu, "Can BPL Claw Back Up?", *Business Today* (26 September 2004).

[57] *The Peerless General Finance and Investment Co. Ltd. v. Essar Oil Limited*, MANU/GJ/0043/2005 (Guj); "Scheme of arrangement for Essar Oil debenture holders", *The Hindu Business Line* (25 April 2003).

[58] Notably, these were effected at the turn of the century.

discuss two mechanisms for restructuring debts and rehabilitation of distressed companies that have acquired prominence in India during the last three decades, primarily with a view to comparing those mechanisms with the scheme. Finally, I examine the role of the judiciary, which reveals a distinct preference for the more novel methods of creditor enforcement and debt restructuring over that of the SoA that is embedded in company law that might explain the gradual decline of the SoA.

A. Evolution of the Law Relating to Creditors' Rights and Corporate Rescue

Given that the insolvency process set out in the Companies Act, 1956 was found to be inadequate and that there was a general acknowledgement of the lack of adequate avenues available to creditors to enforce their rights against errant borrowers, there was considerable momentum beginning the 1990s to strengthen the recovery rights of banks and financial institutions in India.[59] Based on various committee reports, Parliament first enacted the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI Act). In order to obviate the use of the overburdened court system for recoveries, the RDDBFI Act envisaged the establishment of specialised tribunals in the form of Debt Recovery Tribunals (DRTs) for speedy recoveries by banks and financial institutions. As it was applicable only to banks and financial institutions, it excluded other types of creditors (including foreign banks) from its purview. Subsequently, Parliament enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), which provided for recoveries by banks and financial institutions without resort to the courts or the DRT, thereby implicitly recognising a failure of the DRT system. Here too, the special recovery mechanism was available only to banks and large financial institutions, which discriminated against other creditors who did not enjoy these benefits.

In the sphere of debt restructuring and corporate rehabilitation too, significant reforms were introduced to establish alternatives to the SoA prescribed in company law. In 2001, the RBI established the CDR framework as an out-of-court mechanism that allowed banks to restructure the debts of distressed borrowers through a less formal process and under the broad supervision of the central bank. This has since become hugely popular, and has been refined further by the inclusion of additional restructuring options. Even earlier, Parliament enacted SICA as a special legislation in 1985 to enable the timely revival and rehabilitation of distressed industrial companies under the aegis of the BIFR. Since their establishment, creditors and debtors have gravitated towards either the RBI's CDR framework or SICA, due to which the SoA has attracted much less attention than in other jurisdictions such as the UK and Singapore. Hence, it would be imperative to compare the SoA against these two frameworks, to which I now turn.

B. Debt Restructuring Through RBI Frameworks

[59] Sengupta, Sharma & Thomas, "Evolution of the insolvency framework" (n. 15) at 8.

In 2001, the RBI introduced the CDR mechanism to "ensure a timely and transparent mechanism for the restructuring of corporate debts of viable corporate entities affected by internal or external factors, outside the purview of BIFR, DRT and other legal proceedings".[60] This was based on the experience of other countries such as the UK as well as those such as Thailand, Korea and Malaysia that were recovering from the effects of the Asian financial crisis of the late 1990s.[61] Based largely on the "London approach"[62] and the INSOL principles,[63] the CDR framework provides for an informal and out-of-court workout among the creditors and debtor. The RBI has set out an elaborate mechanism for coordination among banks in order to implement the CDR framework. The legal basis for the framework consists of the debtor-creditor agreement (DCA) and the inter-creditor agreement (ICA) under which the parties undertake the restructuring. This documentation may either be entered into at the time of the original lending transaction or later at the time of reference to the CDR process.[64] To address collective action problems among the creditors, decisions may be taken by the creditor group through a super-majority vote consisting of those representing 60 percent of lenders in number holding not less than 75% of the aggregate principal outstanding financial assistance pertaining to the debtor company. The CDR framework also provides for contractual standstill provisions by which participating banks and financial institutions agree not to commence any civil action against the debtor company for a period of 90 days from commencement of the CDR process, which may be extended to 180 days with specific approvals in the manner provided under the framework.

While the RBI has refined the CDR framework over the years,[65] it has supplemented the CDR with other mechanisms that strengthen the hands of eligible creditors. In 2014, the RBI introduced guidelines on the joint lenders' forum (JLF),[66] supplemented in 2015 by the Strategic Debt Restructuring (SDR) scheme,[67] by which a consortium of lenders could

60 Reserve Bank of India, *Corporate Debt Restructuring (CDR)* (23 August 2001).

61 Ibid.

62 Rajeswari Sengupta & Anjali Sharma, "Corporate Insolvency Resolution in India: Lessons from a cross-country comparison" (January 2016), available at https://mpra.ub.uni-muenchen.de/69130/1/MPRA_paper_69130.pdf. See also, Payne, "Debt Restructuring in English Law" (n. 1) at p. 5.

63 INSOL International, *Statement of Principles for a Global Approach to Multi-Creditor Workouts* (October 2000).

64 Reserve Bank of India, *Corporate Debt Restructuring (CDR)* (n. 60), para. 4.2.

65 Sengupta, Sharma & Thomas, "Evolution of the insolvency framework" (n. 15) at 8.

66 Reserve Bank of India, *Framework for Revitalising Distressed Assets in the Economy – Guidelines on Joint Lenders' Forum (JLF) and Corrective Action Plan (CAP)* (26 February 2014).

67 Reserve Bank of India, *Strategic Debt Restructuring Scheme* (8 June 2015).

convert a part of their stressed loans into equity of the debtor company, with the consortium holding at least a 51% stake.[68] Further, in 2016, the RBI introduced the Scheme for Sustainable Structuring of Stressed Assets (S4A),[69] which allows banks to bifurcate the debt of the debtor company into two parts, namely the sustainable portion based on the debt servicing capability of the debtor company (which would be classified as a standard asset) and the unsustainable portion, which would be converted into equity or quasi equity instruments.[70]

The frameworks introduced by the RBI for debt restructuring carry distinct advantages. First, and most importantly, they involving out-of-court restructuring and hence overcome some of the most difficult problems faced by the SoA. This would singlehandedly act as a great attraction towards the RBI frameworks and away from the SoA. Second, the RBI frameworks provide for a wider cramdown as all eligible lenders are pooled together for determining the requisite majority for approval the restructuring without the requirement of classification of creditors. Hence, it is not possible for individual creditors or classes thereof to hold out on their own. Third, restructuring through the RBI frameworks comes with the benefit of a contractual moratorium that enables parties to negotiate and effect a restructuring without the fear of enforcement actions by one or more creditors. Finally, although the eligible creditors are entitled to exercise significant control over the restructuring process, the debtor continues to be in management of the company and its business, due to which this represents a "debtor-in-possession" approach.[71]

The principal disadvantage of the RBI frameworks is their limited coverage, as they encompass only banks and financial institutions that are within the supervision of the RBI.[72] However, it is possible for other banks and financial institutions to accede to the RBI frameworks on a transaction-to-transaction basis. This effectively excludes various categories

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[68] Neelasha Nemani, "Attempt at Easing Out the NPA Crisis: An Analysis of the RBI's Reform Efforts", *IndiaCorpLaw Blog* (31 October 2016), available at http://indiacorplaw.blogspot.sg/2016/10/attempt-at-easing-out-npa-crisis.html.

[69] Reserve Bank of India, *Scheme for Sustainable Structuring of Stressed Assets* (13 June 2016).

[70] Nemani, "Attempt at Easing Out the NPA Crisis" (n. 68).

[71] However, in case of some restructuring schemes such as the SDR, lenders could potentially acquire control over the debtor company by converting their debt into equity, but that is a consequence of the restructuring rather than exercise of control over the business while the restructuring is still underway.

[72] Currently, a total of 50 banks and financial institutions are members of the CDR mechanism. These include 21 public sector banks, 5 associate banks of the State Bank of India, 11 financial institutions, 1 asset reconstruction company and 12 private sector banks. Information available at http://www.cdrindia.org/downloads/CDR%20Members.pdf.

of creditors such as foreign banks, bondholders and operational creditors such as suppliers and employees.[73]

Despite the availability of the RBI frameworks only to banks and financial institutions, they have acquired tremendous popularity. Data indicate that since its inception, the CDR framework has received a substantial number of references, which it has dealt with over the years. A summary of the data as of 30 September 2016 is as follows:

Table 1

Overall Status of CDR Cases Since Inception[74]

Total references received by CDR Cell	No. of cases	655
	Aggregate debt (in Rs. Trillion)	4.74
Cases rejected before admission or approval	No. of cases	125
	Aggregate debt (in Rs. Trillion)	.71
Total cases approved	No. of cases	530
	Aggregate debt (in Rs. Trillion)	4.03
Cases withdrawn on account of package failure	No. of cases	248
	Aggregate debt (in Rs. Trillion)	1.1
Cases successfully exited	No. of cases	97
	Aggregate debt (in Rs. Trillion)	.71
Packages implemented	No. of cases	185
	Aggregate debt (in Rs. Trillion)	2.22

Although similar data are not available for SoA, anecdotal evidence indicates that the number of debt restructurings implemented through schemes pales in comparison with those implemented through RBI's CDR framework. Hence, since its inception in 2001, there has been tremendous reliance on the RBI framework to the exclusion of SoA, barring exceptional transactions.[75]

[73] Discussions with corporate restructuring practitioners in India indicate that these creditors are either excluded from the restructuring process, or the debtor company negotiates bilateral arrangements with some or all of them on the lines of the CDR.

[74] Source: Corporate Debt Restructuring Mechanism (30 September 2016), available at http://www.cdrindia.org/pdf/cdr-performance-sep-2016.pdf.

[75] See Anant Khandelwal, "The phenomenon of corporate debt restructuring in India: How far can it go to prevent insolvency", *Eurofenix* (winter 2014/2015), available at http://globalinsolvency.com/sites/all/files/the_phenomenon_of_corporate_debt_restructuring_in_india_-_how_far_can_it_go_to_prevent_insolvency_.pdf (noting that "Indian Banks sought to restructure over $40 billion in the last two fiscal years from April 2012 to March 2014. This debt, restructured through the CDR

Despite its attractiveness and popularity, the RBI frameworks for debt restructuring raise many unanswered questions. For instance, its narrow coverage discriminates against non-participating creditors who remain outside the framework, and hence a complete and meaningful resolution becomes impossible.[76] More importantly, the CDR framework provides distorted incentives to eligible creditors to resort to the system. It has been criticised on the ground that banks and financial institutions have used the system for restructuring principally to address their own NPA problems by reducing the number of distressed assets on their balance sheets, and taking advantage of loan classification norms and regulatory forbearance available through this mechanism.[77] Moreover, the SDR mechanism has been criticised on account of its propensity to postpone the NPA problem rather than to cure it.[78] This has come to the attention of the RBI, which appointed a committee to look into the issue and provide recommendations.[79] Given these incentives on the part of banks and financial institutions, it is clear that they invoke the RBI frameworks for debt restructuring with a view to manage their own balance sheets through the asset classification and provisioning norms and regulatory forbearance, rather than to bring about a restructuring that results in a revival or rehabilitation of the debtor company. In other words, banks and financial institutions are more likely to gravitate towards this approach rather than the SoA, a fact that is borne out by the available data.

C. Framework Governing Sick Industrial Companies

Along the spectrum of methods that can be utilised to implement debt restructuring,[80] the RBI framework leans towards one end, namely that of informal arrangements to achieve debt restructuring without the involvement of courts or tribunals. However, even before the RBI

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forum, was greater than the cumulative amount of debt restructured under the forum since its inception in 2001”).

76 Gupta, “Corporate rescue in India” (n. 18) at 244.

77 Pankaj Sevta, “Corporate Debt Restructuring in India: An Overview of the Scheme” (2014) 2 International Journal of Research and Analysis 299 at 311; Fariyal Tahseen, “Corporate Debt Restructuring, the Current Scenario and Evaluation of Times Ahead”, *Indian Lawyer 250* (1 November 2013), available at http://indianlawyer250.com/features/article/260/corporate-debt-restructuring-current-scenario-evaluation-times-ahead/.

78 Sunny Verma, “Strategic Debt Restructuring scheme: ‘A solution with its own problems’”, *Indian Express* (26 January 2016); George Mathew, “SDR Loopholes: Loan conversion may hit banks”, *Indian Express* (8 March 2016). See also, Religare Institutional Research, “India Banks – SDR: A band-aid for a bullet wound” (4 January 2016), available at http://research.religarecm.com/INDIA/India%20Banks%20-%20Sector%20Report%204Jan16.pdf.

79 Reserve Bank of India, *Report of the working group to Review the existing prudential guidelines* (n. 16).

80 See nn. 3-4 and accompanying text.

frameworks were initiated, India had established an alternative to the Companies Act to deal with revival and rehabilitation in the context of insolvency, which addressed issues at the other end of the spectrum, namely restructuring through a formal insolvency process. In view of an acute spate of industrial sickness in the early 1980s, the Government of India appointed an expert committee to recommend a regime for revival and rehabilitation of distressed corporate entities. Based on the recommendation of the committee,[81] Parliament enacted SICA in 1985, substantially in the form proposed by the committee. SICA established a new body in the form of the BIFR to handle references made to it. However, SICA had a narrow scope in that it applied only "industrial companies" as defined therein, which excluded a wide range of companies such as services companies. SICA placed the burden of making a reference to the BIFR on the boards of companies who were determined to be "sick" under the legislation.[82] Once a reference was made, an elaborate process was required to be followed by the BIFR in order to determine the future of the company, including to decide whether the company ought to be rehabilitated or liquidated.[83] One of the most significant aspects of SICA was that it provided an automatic moratorium of a wide nature against enforcement actions by creditors from the time a reference was registered with the BIFR and during the pendency of a proceeding before the body.[84] Moreover, SICA enabled a "debtor-in-possession" approach that allowed the management of the company to continue to run the business while a reference was pending before the BIFR.[85]

Here, it would be useful to compare the SoA with the revival and rehabilitation process under SICA. A common feature of the two processes is that both involved a "debtor-in-possession" regime. The similarity ends there. While the SoA is available for both solvent and insolvent companies, the SICA regime was triggered only when the requirement of sickness (as discussed earlier) was satisfied. One of the reasons for the failure of SICA was that the requirement to make references to the BIFR was so delayed that rescue was virtually impossible.[86] Moreover, while the SoA under the CA 1956 was limited and subject to the discretion of the court, the moratorium under SICA was wide in nature and automatic.

[81] Reserve Bank of India, *Report of the Committee to Examine the Legal and Other Difficulties Faced by Banks in the Rehabilitation of Sick Industrial Undertakings and Suggest Remedial Changes in the Law* (1984).

[82] A sick industrial company was defined to mean an industrial company registered for at least five years, which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth. Sick Industrial Companies (Special Provisions) Act, 1985, ss. 3(1)(o), 3(1)(ga).

[83] For a detailed account of the procedure, see van Zwieten, "Corporate Rescue in India" (n. 18) at 9-11.

[84] Sick Industrial Companies (Special Provisions) Act, 1985, s. 22(1). van Zwieten, "Corporate Rescue in India" (n. 18) at 11.

[85] van Zwieten, "Corporate Rescue in India" (n. 18) at 11.

[86] BLRC Interim Report (n. 11) at 40; Ministry of Finance, Government of India, *Report of the Committee on Industrial Sickness and Corporate Restructuring* (July 1993) (hereinafter the "Goswami Committee Report).

Finally, there was a significant difference when it came to the binding nature of the processes. While the SoA provides for cramdown with respect to each class, SICA operated on a requirement that was premised on unanimity. Any scheme required the consent of every bank or financial institution whose financial assistance was required under the scheme.[87] Any hold out situation therefore resulted in the BIFR having to take extreme measures as putting the company into the winding up process.[88]

Despite differences between the SoA and SICA proceedings, there were several incentives for industrial sickness to be dealt with through the SICA process rather than a SoA. This time, the choice was driven by the debtor companies due to the presence of a cocktail of factors that enabled them to take shelter against creditor enforcement. Existing literature suggests that a combination of the wide moratorium and the "debtor-in-possession" approach allowed debtor companies to make a reference to the BIFR and enjoy immunity from pressure mounted by creditors through legal enforcement.[89] In the same vein, it was in the interests of the managers of debtor companies to delay the SICA process, and even indulge in siphoning of the assets of the debtor companies.[90] Therefore, it is not at all surprising that debtor companies flooded the BIFR with references for revival and rehabilitation and, even where they had an option, largely failed to look in the direction of SoA.

Compared to the sparse use of the SoA, there was a constant flow of cases to the BIFR for revival and rehabilitation. One study analysing "BIFR cases between 1987 to 2014 shows that a total of 5,800 cases were reported to the BIFR. 53% of these cases were either dismissed or abated, 22% of the cases were recommended for liquidation, in 9% of the cases a rehabilitation plan was implemented and the remaining 15% remain pending in BIFR. The average time taken for the closure of a case is around 5.8 years."[91] However, due to the poor implementation of SICA, numerous efforts were undertaken to reform the process. Several committees were appointed to review the insolvency process in India, including the Goswami Committee,[92] the Eradi Committee[93] and the N.L. Mitra Committee.[94] In response to the

87 Sick Industrial Companies (Special Provisions) Act, 1985, s. 19(1)

88 van Zwieten, "Corporate Rescue in India" (n. 18) at 11. Alternatively, companies continued to remain in suspended animation due to the operation of the moratorium, which effectively stymied the efforts of the creditors to enforce their debt.

89 Ibid.

90 Ibid at 12.

91 Sengupta, Sharma & Thomas, "Evolution of the insolvency framework" (n. 15) at 8.

92 See n. 86.

93 Department of Company Affairs, Government of India, *Report of the High Level Committee on Law Relating to Insolvency and Winding Up of Companies* (2000) (hereinafter "Eradi Committee Report").

94 Reserve Bank of India, *Report of the Advisory Group on Bankruptcy Laws* (May 2001).

recommendations, Parliament enacted the Companies (Second Amendment) Act, 2002 to repeal SICA and also to consolidate all insolvency and winding up proceedings before the NCLT. However, the repeal of SICA was not notified until recently, and the legislation suffered its death knell on 1 December 2016.[95] Consequently, all proceedings before the BIFR would abate, and parties would be entitled to proceed under the newly enacted Insolvency & Bankruptcy Code, 2016 (the I&B Code).[96]

Before concluding the discussion on SICA, it would be useful to consider the possibility of combining a SoA with a proceeding under SICA so as to avail of the advantages of both process. For instance, while the SoA provides for a cramdown within each class, the SICA proceeding could provide the debtor with protection in the form of the automatic moratorium. In any event, both proceedings follow the "debtor-in-possession" approach. Such a combined use of multiple options to exploit the advantage of each is not without precedent. For example, in the UK, it is common to use a twinning approach by which a SoA is combined with administration so as to extract benefits that would not be available if each of the processes were to be used individually.[97] Although such a structural arbitrage using the twinning approach has been attempted in India, curiously enough, it is the judiciary that has stepped in prevent such a combination. This it has done so through interpretation in resolving conflicts between different legislation such as the Companies Act and SICA. Here, the courts have tended to decide on the basis that one legislation would supercede the other as opposed to attempting to harmonise the two legislation, which may have opened the door for twinning schemes in the Indian context. This leads to a discussion of the way the judiciary has dealt with attempts by creditors and debtor companies to adopt a combination of the SoA and the SICA process to exploit the benefits of both.

D. Conflicting Legislation and the Role of the Judiciary

Burgeoning academic literature has emphasised the influence of the Indian courts in perpetuating some of the inefficiencies and delays faced by the restructuring and insolvency processes in India. Through her review of a total of 1,066 judgments from a range of courts and tribunals (other than the BIFR) rendered between 1987 and 2010, van Zwieten analyses the provisions of SICA and its interpretation by courts that contributed to the tardy and costly nature of the process.[98] More recently, through her review of 45 judgments of various High

[95] Ministry of Finance, Government of India, Notifications S.O. 3568(E) and 3569(E) dated 25 November 2016.

[96] See Part IVB below.

[97] See e.g., Payne, *Schemes of Arrangement* (n. 5) pp. 247, 267. In the UK, the twinning procedure has been adopted to achieve cramdown of a kind that would not be possible under either individual method.

[98] van Zwieten, "Corporate Rescue in India" (n. 18).

Courts and 15 judgments from the DRTs (and its appellate body), Ravi seeks to obtain a better understanding of the delays and bottlenecks in India's insolvency system.[99] Among others, she finds "significant inefficiencies and conflicts that have resulted from having a number of different laws and legal forums to govern companies in distress".[100] Extrapolating their findings to the context of SoA, and based on my analysis of the case law relating to SoA in debt restructuring, I find that (i) the judiciary has contributed to the scant use of the SoA as a tool for restructuring, and (ii) the unpopularity of the SoA is the result of fragmentation in India's laws relating to insolvency and corporate rescue, coupled with the Indian courts' display of a stated preference in favour of special debt recovery legislation (such as the RDDBI Act and the SARFAESI Act) and rescue legislation (such as SICA) over the SoA that is contained in the Companies Act, which the courts treat as a general legislation. As I seek to demonstrate below, that courts have treated the Companies Act to be subservient to all the legislation mentioned above has severely undermined the use of the SoA.

A significant question before the Indian courts related to whether the SoA process could be undertaken in respect of company that has already been referred to the BIFR under SICA. An early line of judgments held that the pendency of proceedings before the BIFR was not a bar to the initiation of a SoA under the Companies Act, 1956. In *National Organic Chemical Industries Ltd. v. Nocil Employees Union*,[101] the Bombay High Court held that SICA and the SoA provided for different methods of revival of a company, and that they were not inconsistent with each other.[102] Moreover, while SICA related to an insolvency situation where a company's net worth had become negative, the SoA process could be undertaken for solvent companies that wished to rearrange their business or financial affairs.[103] This line was adopted by other judgments of the Bombay High Court[104] as well as the Delhi High Court.[105] However, this brief status quo was disrupted by a two-judge bench of the Bombay High Court in *Ashok Organic Industries Ltd. v. Asset Reconstruction Company (India) Limited (ARCIL)*,[106] where the court categorically held that once a debtor became a sick company under SICA, the provisions of that legislation alone would be applicable, and to the extent

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[99] Aparna Ravi, "Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings" (2015) 51 *Economic and Political Weekly* 46.

[100] Ibid at 47.

[101] (2005) 62 SCL 373 (Bom).

[102] Ibid at para. 8.

[103] Ibid.

[104] *In Re Sharp Industries Ltd.*, MANU/MH/1428/2005 (Bom); *In Re Pharmaceutical Products of India Ltd.*, (2006) 131 Comp. Cas. 747 (Bom).

[105] *Kotak Mahindra Bank Ltd. v. AAIFR*, (2008) 144 Comp. Cas. 588 (Del).

[106] (2008) 114 Comp. Cas. 144 (Bom).

that provisions of the Companies Act are inconsistent, they would stand excluded.[107] The Court further held:

> … SICA 1985 can be said to be a complete Code intended to be exhaustive in all matters concerning sick industrial companies (whether potentially viable or non-viable) and the provisions thereof and the objects and reasons thereof clearly indicates the legislative intent that SICA 1985 covers the whole field as regarding sick industrial companies. The correct test then to be applied is not whether it is open to or possible for a sick industrial company to present a Scheme under Section 391 even whilst its reference is registered with BIFR. The correct question is whether since the SICA 1985 is a complete and exhaustive Code, an inconsistency is deemed to arise and whether such inconsistency may be resolved by applying the well settled principle that the special and later Act prevails over the general and prior Act.
>
> Once SICA 1985 is held to be a complete code, the intent of Parliament is that the subject matter, i.e. sick industrial company, is covered in all aspects by the provisions of SICA 1985 and by these provisions alone.[108]

This difference of opinion was put to rest by the Supreme Court in *Tata Motors Ltd. v. Pharmaceutical Products of India Ltd*,[109] wherein it held that SICA is a special statute and a self-contained code, due to which its provisions will prevail over the provisions of the Companies Act,[110] and that it is not possible to harmonise the provisions of sections 391 to 394 of the CA 1956 dealing with SoA with the provisions of SICA.[111] This is now indubitably the accepted position of law in India and has been followed by other courts as well.[112] Hence, it is not possible to combine the effects of SoA and the BIFR process. Moreover, sick industrial companies are deprived of obtaining the benefit of SoA, thereby ruling out a vast corporate population that might otherwise have resorted to the scheme.

In view of the courts' treatment of the SoA and the SICA process as being inconsistent with each other, it is not possible to combine the benefits of SICA (such as moratorium) with those of the SoA (such as cramdown, albeit within respective classes of creditors). In fact, courts have observed that a company cannot circumvent the unanimity requirement among creditors

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[107] Ibid at para. 8. For a similar line adopted by another High Court, see *In Re Modern Syntex (India) Ltd.*, MANU/RH/0692/2006 (Raj).

[108] *Ashok Organic Industries Ltd.*, at para. 13.

[109] (2008) 114 Comp. Cas. 178 (SC).

[110] Ibid at paras. 20, 21.

[111] Ibid at para. 26.

[112] See e.g., *Axis Bank Limited v. Naturol Bioenergy Limited*, MANU/AP/0378/2012 (AP).

providing financial assistance under SICA to implement a rehabilitation scheme by seeking a majority as required for a SoA under the Companies Act.[113] In that sense, any type of twinning option is a non-starter under the SoA in India.

The aforesaid outcome is a result of a broader philosophy underpinning the Indian judiciary's consideration of the conflicts between the Companies Act and SICA beyond those relating to rescue and rehabilitation. For example, in relation to winding up proceedings too, the Supreme Court has categorically stated that SICA overrides the Companies Act. In *NGEF Ltd. v. Chandra Developers Pvt. Ltd.*,[114] it held that BIFR and the High Court cannot exercise concurrent jurisdiction for winding up a sick company, and that the High Court obtains powers only when the BIFR arrives at a finding recommending a winding up.[115] In a somewhat converse situation that arose in *Madura Coats Limited v. Modi Rubber Ltd.*,[116] the court held that when a company which is in the process of being wound up makes a reference to the BIFR, the proceedings under the Companies Act must give way to those under SICA.[117]

Apart from conflicts between the Companies Act and SICA, the courts have been called upon to resolve conflicts between the Companies Act and other special legislation. In each case, those other legislations prevailed over the Companies Act. *In Re IMP Powers Ltd.*,[118] the Bombay High Court was concerned with a SoA under the Companies Act where one of the creditors had initiated proceedings before the DRT under the RDDBI Act. The Court held that the Companies Act is a general enactment that must give way to the special provisions contained in the RDDBI Act and that sanctioning the scheme against such a creditor would clearly curtail the jurisdiction of the DRT under the special legislation.[119] Hence, the Court sanctioned the scheme by modifying it to exclude its applicability vis-à-vis the creditor that had initiated proceeding before the DRT. Similarly, in another case,[120] it was held that a court considering a SoA under the Companies Act is not permitted to grant a stay against proceedings before the DRT under the RDDBI Act as the latter is a special legislation. Finally, the Supreme Court has effectively held that the SARFAESI Act overrides the Companies Act by stating that a court dealing with the liquidation of a company cannot

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113 *Canara Bank v. Shimoga Steels Limited*, MANU/KA/1295/2011 (Kar).

114 (2005) 127 Comp. Cas. 822 (SC).

115 Ibid at para. 31.

116 (2016) Comp. Cas. 261 (SC).

117 Ibid at para. 27.

118 MANU/MH/1322/2007 (Bom).

119 Ibid at para. 8.

120 *Mafatlal Denim Limited v. Sicom Limited*, MANU/GJ/0938/2009 (Guj).

interfere with the rights of a secured creditor to realise secured interests out of the court process in accordance with the SARFAESI Act.[121]

Due to the prevalent legal position as enunciated above, the SoA has had to yield to the revival and rehabilitation mechanism under SICA and to the enforcement powers of creditors recognised under special legislation such as the RDDBI Act and the SARFAESI Act. Apart from the complaints pertaining to the lengthy delays and costs associated with SoA, the fact that the Indian judiciary has underplayed its prominence may have had a significant (but unstated) effect on its sparing usage.

While the discussion thus far relates to the position that prevailed over the last few decades, significant legislative reforms have taken place more recently that could potentially have an impact on the use of SoA in India. In the following section, I discuss these reforms with a view to analysing how that might alter the attractiveness of the SoA as a debt restructuring tool in India.

IV. IMPACT OF RECENT REFORMS ON THE SCHEME OF ARRANGEMENT

Over the last two decades, there were calls for reforming both company law and insolvency law. Because of various committee reports and consultation exercises, the company law reform efforts culminated in the enactment of the CA 2013 and the insolvency law reform exercise in the I&B Code 2016. While the CA 2013 effected rather minimal changes to the SoA, the I&B Code 2016 brought about sea change in the insolvency resolution process in India. Here, it would be useful to compare the SoA under the CA 2013 with the insolvency resolution process established under the I&B Code, which might provide some indication as to the possible future utility of the SoA in India.

A. Scheme Under the Companies Act, 2013

Since the early 1990s, efforts had been underway to revamp the companies' legislation in India due to the difficulties encountered in the implementation of the CA 1956, which had to be amended several times. Although several proposals were made and Bills drafted and presented in Parliament over the last two decades (specifically in 1993, 1997 and 2003),[122] it was the appointment of an Expert Committee on Company Law in 2004 under the chairmanship of Mr. J.J. Irani that triggered the shaping of the current legislation. The Irani Committee issued a concept paper based on which it conducted a public consultation,

[121] *Pegasus Assets Reconstruction P. Ltd. v. Haryana Concast Limited*, MANU/SC/1489/2015 (SC).

[122] Aparna Viswanathan, "Reinventing the Company in India: the Expert Committee Report on Corporate Form and Governance: Part 1" (2006) 17 International Company & Commercial Law Review 1.

following which it issued its report for drafting a new legislation.[123] Several draft bills were presented in Parliament, which were subject to scrutiny by the Parliamentary Standing Committee on Finance, following which the CA 2013 was passed by both Houses of Parliament and received the assent of the President of India on 31 August 2013.[124] The legislative provisions were brought into effect in stages, with the provisions relating to SoA taking effect as recently as 15 December 2016.[125]

The broad contours of the SoA present in the CA 1956 were retained in the CA 2013. However, certain changes were introduced. First, there was express recognition of schemes involving debt restructuring in the companies' legislation. For example, the CA 2013 provided for a company to present a SoA in case a scheme of corporate debt restructuring has been consented to by not less than 75 percent of the secured creditors in value.[126] Such a scheme is to be accompanied by a creditor's responsibility statement in the prescribed form, safeguards for protection of other secured and unsecured creditors, an auditor's report stating that the restructuring conforms to the liquidity test and a valuation report.[127] In addition, where the company proposes to adopt the CDR guidelines prescribed by the RBI, a statement must be included to that effect.[128] All of this suggests the desire to include greater clarity for schemes involving debt restructuring, particularly when initiated through the RBI process. In other words, it is now clarified that a restructuring carried out through the RBI framework can be implemented through the SoA in order to bind creditors who stand outside the RBI framework (such as debentureholders and foreign lenders).[129] Additionally, where creditors having at least 90 percent in value within a class consent to a SoA, then it would be possible to dispense with calling a meeting of such class, thereby somewhat easing the approval process.[130] Finally, in order to guard against frivolous claims by holdouts, the new legislation states that an objection to a SoA can be made only by a creditor holding an outstanding debt of at least 5 percent of the total outstanding debt as per the latest audited financial statement. These changes, though arguably marginal in nature, will help enhance the attractiveness of the SoA.

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[123] JJ Irani Report (n. 22).

[124] For a detailed account of the manner in which the CA 2013 was enacted and the various debates surrounding it, see Varottil, "The Evolution of Corporate Law in Post-Colonial India" (n. 6) at 287-93.

[125] Ministry of Corporate Affairs, Government of India, Notification No. 3677(E) dated 7 December 2016.

[126] Companies Act, 2013, s. 230(2)(c).

[127] Ibid.

[128] Ibid.

[129] Even prior to the CA 2013, courts had recognised the ability of debtors to extend a restructuring under the RBI's framework to non-participating creditors through the SoA. See *In Re Spartek Ceramics India Ltd.* (n. 32) at para. 20.

[130] Companies Act, 2013, s. 230(7)(d).

However, a glaring and inexplicable omission in the CA 2013 is the absence of a provision allowing the court to grant a stay that was available under the CA 1956, albeit at the discretion of the court.[131] There has been no debate whatsoever on this aspect in the various committee reports and other proceedings that led to the enactment of the CA 2013. It is not entirely clear whether the absence of the moratorium provision was a deliberate choice or an inadvertent omission. In any event, this is likely to adversely affect the choice of SoA by parties to effect a debt restructuring.

Although not solely related to SoA, a significant change in the CA 2013 relates to the transition of the scheme jurisdiction from the High Courts to the newly established NCLT. The NCLT will also be responsible for exercising jurisdiction over other matters relating to company law such as oppression and winding up and matters relating to insolvency resolution under the I&B Code. The NCLT will function through benches across the country, each of which will be staffed through a combination of a judicial member and a technical member.[132] A judicial member is a person who is or has been a judge of a High Court, a District judge for at least five years or an advocate of a court for at least ten years.[133] A technical member is one who is an experienced member of the Indian Corporate Law Service or Indian Legal Service or a chartered accountant, cost account or company secretary (in each case with practice experience of at least 15 years) or person with other special knowledge.[134] While the NCLT has special powers, it is not bound by the tedious procedures applicable to a civil court.[135] Appeals from the NLCT may be preferred to the National Company Law Appellate Tribunal (NCLAT) consisting of judicial and technical members of appropriate qualification.[136] Further appeals are channeled directly to the Supreme Court.[137] Although the concept of the NCLT was introduced by way of amendments in 2002 to the CA 1956, the amendments were not brought into effect as they were mired in legal challenge, which continued in respect of the provisions of the CA 2013. Ultimately, in 2015 the Supreme Court

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[131] Companies Act, 1956, s. 391(6).

[132] Companies Act, 2013, s. 419.

[133] Ibid, s. 409(2).

[134] Ibid, s. 409(3).

[135] Ibid, s. 424.

[136] Ibid, s. 411.

[137] Ibid, s. 423.

upheld the legal provisions pertaining to the tribunals,[138] after which they were made operational.[139]

Given that the delays and inefficiencies relating to the SoA were attributable to the overburdened court system, the transition of schemes to the NCLT could potentially make a difference. Since the NCLT is exclusively committed to dealing with cases relating to company law, including SoA and corporate insolvency, it is expected to be more timely and efficient that the regular court system. Moreover, the NCLT enjoys specialisation as it exclusively deals with issues pertaining to corporate law and is also staffed by members who possess the appropriate experience to build on that specialisation. However, some concerns have been expressed regarding the possible functioning of the NCLT, and much will depend upon its actual operation in the initial years. For instance, it has been argued that the NCLT will face challenges in its operation as it is likely to have taken over nearly 4,200 cases pertaining to various company law issues from the erstwhile Company Law Board (CLB) and about 4,500 cases relating to winding up from various High Courts.[140] Unless an appropriate number of benches are constituted and adequately staffed, the NCLT could suffer from the same pressures as under the previous regime. Moreover, if the judicial members are to be appointed from the judiciary, their approach towards corporate rescue could be influenced by their past experience on the judiciary, and could similarly influence the interpretation of the various legislation that might make it difficult for the NCLT system to shed the inefficiencies that crept into the corporate resolution mechanism under the erstwhile system.[141] For these reasons, while the NCLT system is poised to bring significant changes in the administration of SoA and other forms of corporate rescue, it would be too early to arrive at definitive conclusions until there is some evidence of operation of the new law in practice.

C. Corporate Insolvency Resolution Process Under the Insolvency and Bankruptcy Code, 2016

The erstwhile corporate insolvency process in India suffered from several inefficiencies, including due to fragmentation of the laws, delays and overburdening of the courts and tribunals and finally the distorted incentives of the borrowers to drag on the insolvency or rescue procedures as they were in control of the management of the debtor company while resting in the comfort of an automatic moratorium conferred under SICA.

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[138] *Madras Bar Association v. Union of India*, MANU/SC/0610/2015 (SC).

[139] Ministry of Corporate Affairs, Government of India, Notification Nos. S.O. 1934(E) and S.O. 1935(E) dated 1 June 2016. For an overview of the legal provisions and the evolution of the NCLT, see Shruti Khetan, “NCLT: Revolutionizing the Realm of Corporate Litigation”, *IndiaCorpLaw Blog* (15 October 2016), available at http://indiacorplaw.blogspot.sg/2016/10/nclt-revolutionizing-realm-of-corporate.html.

[140] Rajeswari Sengupta & Anjali Sharma, “Challenges in the Transition to the New Insolvency and Bankruptcy Code”, *The Wire* (15 December 2016).

[141] See van Zwieten, “Corporate Rescue in India” (n. 18) at 29-30.

I begin by discussing some of the theoretical and philosophical considerations that went into design of reforms relating to corporate insolvency. Hahn argues that a corporate insolvency regime is dependent on a number of "external factors that are nation sensitive" and that in case of different corporate ownership structures there could be differing bargaining power and leverage between the debtor and the creditors.[142] Consequently, he argues that the "debtor-in-possession" regime functions effectively under the Berle and Means model of corporate ownership, while he rejects management-driven reorganisations in the case of controlled ownership structures.[143] He argues:

> As a result, leaving incumbent management to run the corporation while in bankruptcy plays into the hands of the strong shareholders and exacerbates the risk of loss to the creditors. Because the corporation is insolvent, shareholders will tend to direct the management to engage in overly risky projects and gamble for a yield with the creditors' money. It follows then, that to neutralise this risk and better represent the creditors' interest in bankruptcy, management should be removed from control of the firm. Thus, it is my view that the trustee-controlled model of bankruptcy is more compatible with concentrated ownership systems.[144]

India's position on corporate insolvency was, however, antithetical to Hahn's elegant framework. Despite having concentrated ownership in companies, the framework largely engendered a "debtor-in-possession" regime. This regime came under severe attack during the several law reform efforts that led to the overhaul of the corporate insolvency regime wherein committee after committee assailed the prevailing regime that played into the hands of debtor managements.[145] They therefore called for an administrator- or trustee-controlled insolvency process for Indian companies. This concern reverberated quite strongly during the reform process and formed an important prong of the new corporate insolvency resolution process. The pendulum has swung from a broader "debtor-in-possession" regime to a creditor-controlled framework.

After considerable debate and based on the recommendation of the Bankruptcy Law Reforms Committee in its final report,[146] the I&B Code was enacted and its provisions relating to

[142] David Hahn, "Concentrated Ownership and Control of Corporate Reorganisations" (2004) 4 Journal of Corporate Law Studies 117 at 119.

[143] Ibid at 120.

[144] Ibid at 133.

[145] See Eradi Committee Report (n. 93) at pp. 37-38; BLRC Interim Report (n. 11) at pp. 40, 60, 64.

[146] Ministry of Finance, Government of India, *The report of the Bankruptcy Law Reform Committee* (November 2015), available at http://finmin.nic.in/reports/BLRCReportVol1_04112015.pdf (hereinafter the "BLRC Final Report").

CIRP came into effect on 1 December 2016.[147] This is intended to be the primary mechanism for corporate rescue in India. Under the CIRP, either a creditor or the debtor itself may initiate the resolution process before the NCLT[148] in case the debtor commits a default of at least Rs. 100,000.[149] Within 14 days of receiving an application, the NCLT shall ascertain the existence of a default.[150] After this, the NCLT shall admit the application, which signifies the commencement of the CIRP.[151] Thereafter, the NCLT shall appoint an interim resolution professional (IRP) who will manage the affairs of the corporate debtor until the appointment of a resolution professional by the committee of creditors (which remains in office until the end of the process),[152] and the NCLT shall also declare a moratorium that will operate for a period of 180 days from the commencement of the resolution process.[153] In exceptional cases, the moratorium may be extended for another 90 days.

The CIRP is a process that is essentially outside the purview of the corporate debtor because the management of the affairs of the corporate debtor shall vest in the IRP and that the powers of the board of directors shall stand suspended and be exercised by the IRP.[154] The IRP is required to collate claims made against the corporate debtor and constitute a committee of creditors. Regarding creditors, the I&B Code makes a distinction between financial creditors and operational creditors.[155] The creditors' committee comprises financial creditors who take decisions by a majority of 75 percent of the voting share of such creditors. The creditors' committee may either appoint the IRP as the resolution professional (IRP) or replace the IRP with another RP.[156] Following this, a resolution plan is required to be voted on by the creditors' committee that must provide for the operational creditors to be repaid at

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147 Ministry of Corporate Affairs, Government of India, Notification No. 3594(E) dated 30 November 2016.

148 The NCLT is the designated adjudicating authority for corporate resolution under the Insolvency and Bankruptcy Code, 2016, s. 5(1).

149 Insolvency and Bankruptcy Code, 2016, ss. 4, 6.

150 Ibid, s. 7(4).

151 Ibid, s. 7(6).

152 Ibid, s. 16.

153 Ibid, s. 14. The moratorium is quite wide and operates even against actions initiated by banks and financial institutions under the SARFAESI Act. Although the moratorium must be specifically declared by the NCLT, the use of the word "shall" in the provision suggests that the NCLT does not have any discretion, thereby making the moratorium virtually automatic.

154 Insolvency and Bankruptcy Code, 2016, s. 17.

155 Ibid, ss. 5(7), 5(20).

156 Ibid, s. 22.

least an amount equal to that which they would have received during liquidation.[157] Finally, the process will culminate with the approval of the NCLT to the resolution plan.[158]

The CIRP is based on certain key tenets.[159] The first is that time is of the essence, and hence the CIRP hinges on a strict time bound process. Second, it relies heavily on insolvency professionals to take the lead, and leaves the regulators and tribunals to perform rule-making functions or other limited oversight of the resolution process. Third, it focuses on altering the power-balance between creditors and debtors by placing the management of the firm with the insolvency professional (acting under the creditors' oversight) during the resolution process. Given the novelty of this approach in the Indian context, and its initial years of implementation, this system will be observed with great anticipation among market players, regulators and commentators.

However, throughout the reform process that led to the new corporate resolution process, there was minimal effort made to rejuvenate the SoA. For example, the BLRC noted that the SoA has not had many takers in India for debt restructuring, primarily due to the delays and costs involved in the court-driven process.[160] Although it found that the SoA can be an effective tool for restructuring, it obtained a preference for workouts more informally and outside the court system.[161] However, it found that the SoA would be helpful in facilitating complex and hybrid rescue mechanisms such as "pre-packaged rescues", similar to the practice that has evolved in the United States and the UK.[162] On this aspect the BLRC ascribed to the view that further consultation may be required.[163] For our present purposes, this represents a rather curious situation. While there is recognition of the benefits of the SoA as a debt restructuring tool, there has been no effort whatsoever to enhance its attractiveness. In other words, the mechanism has effectively been abandoned from a law reform perspective.

Having said that, it would be useful to compare the SoA with the CIRP, which now assumes the position of the dominant corporate resolution process. Since the CIRP is triggered only in

157 Ibid, s. 30.

158 Ibid, s. 31.

159 See BLRC Final Report (n. 146); Ajay Shah & Susan Thomas, "Indian bankruptcy reforms: Where we are and where we go next", *Ajay Shah's blog* (18 May 2016).

160 BLRC Interim Report (n. 11) at p. 78.

161 Ibid at p. 79.

162 Ibid.

163 The Eradi Committee Report (n. 93) recognised that the SoA was a useful tool for corporate reorganisation, but failed to make any specific recommendations on the ground that it was beyond the purview of the Committee's terms of reference.

a default situation, the SoA still has a role to play in the case of solvent companies that wish to embark on a debt restructuring process at an early stage. Moreover, the SoA continues to follow a "debtor-in-possession" approach, while the CIRP has introduced a creditor-controlled regime. However, when it comes to cramdown, the SoA suffers from certain disadvantages as the scheme would be binding on the minority within each class. However, under the CIRP, it would be possible to cram down across all classes of financial creditors.[164] Moreover, the CIRP does not make any distinction between banks and financial institutions and other creditors, and it encompasses both domestic and foreign creditors, thereby enlarging its scope. Similarly when it comes to the moratorium, the SoA suffers from a deficiency as the ability to seek a stay has been taken away, while the CIRP grants a nearly automatic moratorium that may be advantageous for a restructuring. In all, each process has its own shares of advantages and disadvantages and it remains to be seen how the incentives of creditors and debtors will operate to influence the choice of mechanism to be followed for debt restructuring.

V. PROSPECTS FOR THE FUTURE: RECOMMENDATIONS

Even though the SoA has been superceded by other debt restructuring mechanisms in India and has received negligible attention in the recent round of legal reforms, it is premature to pen its obituary. The SoA continues to carry considerable advantages in that it remains to be the only formal method of solvent debt restructuring for Indian companies.[165] Moreover, creditors and debtors will have to resort to the SoA to give effect to "pre-pack rescue" options that involve a sale of the business or assets of the debtor company or its amalgamation or reconstruction with another company. In other words, the SoA offers the widest flexibility to parties to conduct debt restructuring coupled with other forms of corporate restructuring that is incapable of being implemented through other methods. Finally, it is reasonable to assume that the "debtor-in-possession" approach followed in the SoA will offer considerable attraction to parties to resort to that mechanism in contrast to the CIRP where the management gets divested of their ability to manage the business. Similar to Chapter 11 of the US Bankruptcy Code, this approach might offer "carrots" to the debtor company's management to submit itself for debt restructuring under the SoA method at an early stage when the company's business remains viable rather than to delay matters until the CIRP is invoked when they lose control over the affairs of the company.[166] Hence, it might very well be that in the future debtor company managements may be incentivised to focus their

[164] At the same time though, dissenting financial creditors are entitled to be paid liquidation value. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 38.

[165] The other (less formal) mechanism continues to be that set out in the RBI frameworks. See Part IIIB above.

[166] See McCormack, "Control and Corporate Rescue" (n. 10) at 526.

attention on the SoA in order to avoid the consequences of the CIRP, thereby creating greater demand for the SoA than available at present.

Given the lasting importance of the SoA as a debt restructuring option, the Indian policymakers cannot afford to ignore the mechanism while they bring about drastic changes to other forms of restructuring and rehabilitation. I argue that despite the culmination of a sweeping set of reforms to Indian law relating to insolvency and debt restructuring, it is still timely to rejuvenate the SoA so that to enable parties to derive the benefits of that enduring mechanism. In this light, I discuss some possible reforms and approaches that policymakers and adjudicators may adopt in considering the SoA.

First, the moratorium for SoA that existed under the CA 1956 must be reinstated, albeit with somewhat different features. Rather than to provide the court with the discretion to the NCLT to grant the moratorium, it could be made automatic for a short span of time, say 90 days.[167] Any extension thereof can be made at the discretion of the NCLT. This will enable companies to resort to workouts with creditors without fear of enforcement action by holdouts. At the same time, a temporary automatic moratorium coupled with extensions at the discretion of the NCLT would ensure that recalcitrant debtors do not abuse the protection. Moreover, guidelines may be formulated to stipulate the parameters on which NCLT exercises its discretion to extend the moratorium so that there is clarity and certainty to all players. Further, creditors may retain the right to approach the NCLT to vacate the moratorium granted. The scope of the moratorium can be like that set out in the I&B Code.[168] In the absence of a moratorium under the CA 2013 (which is altogether inexplicable), the SoA would continue to be the less preferred option for debtors in comparison with the CIRP under the I&B Code.

Second, the possibility of cramdown across all classes may be considered. Currently, the SoA is the only restructuring option that requires classification of creditors while seeking their approval to the scheme. Not only are classification issues complex and unwieldy, but also strengthens the hands of holdouts if they constitute a majority within a class, as that class can effectively hold up the entire scheme. Hence, suitable modifications may be considered in the cramdown provisions under which a class of creditors is not allowed to veto the scheme so long as all other classes approve it with the requisite majority and that the scheme enjoys the

[167] This proposal has been made in Singapore. See Meng Seng Wee, "Reforms to Strengthen Singapore as an International Centre for Debt Restructuring", *Oxford Business Law Blog* (15 November 2016), available at https://www.law.ox.ac.uk/research-subject-groups/commercial-law-centre/blog/2016/11/reforms-strengthen-singapore. Similar proposals have been made in the UK. The Insolvency Service (UK), *A Review of the Corporate Insolvency Framework* (n. 23).

[168] Insolvency & Bankruptcy Code, 2016, s. 17.

overall support of all the creditors as a whole.[169] Given that the classification requirements are a hurdle in the SoA and that the alternative option of the CIRP provides for cramdown across all classes, it is likely that parties will prefer to delay their restructuring until a default scenario (so as to invoke the I&B Code provisions) rather than to facilitate an early restructuring (by relying upon the SoA).

Third, greater clarity must be provided regarding the loan classification norms for restructuring arising out a SoA. As discussed earlier,[170] the reason for the popularity of the RBI frameworks for restructuring is the fact that banks and financial institutions may available regulatory forbearance and favourable treatment regarding recognition of NPAs in the case of debt restructuring following those frameworks. This has driven the creditor community in India towards the RBI frameworks, and caused them to obviate the scheme process. In order to address these distorted incentives of the banks and financial institutions, the RBI must clarify the loan classification norms for the SoA. To avoid any regulatory arbitrage, the RBI must clarify that the treatment provided to restructuring carried out under its frameworks would also be provided to restructuring under the SoA. This will enable the creditors to take advantage of several features of the scheme that are lacking in the RBI frameworks.

In considering these and other proposals, the policymakers in India may benefit from a study of the reforms that are occurring elsewhere in the Commonwealth. For example, both the UK and Singapore are undergoing significant reforms to their SoA mechanism, and have undertaken steps to consider the inclusion of the various recommendations discussed above.[171] To a large extent, these steps appear to shift the SoA regimes in these jurisdictions towards the rescue process in Chapter 11 in the US. In other words, the idea seems to be to incorporate the desirable features of Chapter 11 into their own systems.[172] At the same time, commentators have cautioned against simply transplanting the Chapter 11 provisions into their own systems, as legal systems could be sufficiently different so as to make a simple transplantation a dangerous exercise.[173] In a similar vein, while I discuss the recommendations above drawing from international experience, I do not advocate a wholesale adoption of reform proposals from those countries into India.

[169] In the case of either each class of creditors or all creditors as a whole, the majority may be determined in the usual way, i.e. majority in number representing 75% in value of those creditors present and voting.

[170] See Part IIIB.

[171] For details of these reform proposals, see n. 23 above.

[172] See Payne, "Debt Restructuring in English Law" (n. 1) at 24-27.

[173] Payne, *Schemes of Arrangement* (n. 5) at p. 263.

As we have seen, the law relating to debt restructuring in India has followed a trajectory that is considerably at variance with other jurisdictions in the Commonwealth. Even though substantive legislative provisions relating to SoA in India bear close resemblance with those in countries such as the UK and Singapore, their operation in practice has been vastly different. This is due to the different trajectory that restructuring and insolvency laws have taken in India over the law few years. Moreover, the institutional considerations and the efficiency of regulators and adjudicators in handling restructuring cases in an efficient manner have suffered from deficiencies in the Indian context. One cannot lose sight of these historical considerations while recommending proposals for the future. More importantly, the recent reforms culminating in the I&B Code have moved India towards a creditor-controlled insolvency regime. Hence, while countries such as the UK and Singapore are seeking to transition towards a regime that adopts features of Chapter 11 from the US, the Indian approach has been diametrically opposite as it has moved away from such an approach. Given this situation, rather than reverting to a system that borrows from Chapter 11, I argue that policymakers in India must consider an approach that brings about a rebalancing, whereby the interests of the debtors, creditors and other stakeholders are considered so as to establish an equitable regime that balances the various interests without conferring undue benefits or advantages over any particular category. In this context, Hahn's proposal for an "integrated co-determination model of control" appears attractive.[174] He proposes entrusting control of the debtor company "to the hands of both management *and* an appointed trustee."[175] In this proposal, the management would not be ousted, but would rather act together with the trustee to negotiate a restructuring with the creditors and to preserve the company's business and assets. The trustee would be co-opted on to the board of the debtor and would join its controlling team.[176] While this could be an elegant model, it would be necessary to iron out some operational matters, including possible conflicts of interest and information asymmetry between the trustee and the debtor's management.[177] Given the idiosyncrasies of the Indian restructuring and insolvency framework, it calls for novel solutions.

The reforms discussed above would require legislative intervention. However, pending that step, the adjudicatory bodies dealing with debt restructuring in India ought to interpret the existing legislation in a consolidated and harmonious manner rather than in a piecemeal or conflicting way that it has thus far done.[178] Under the preexisting disposition, not only was the legal regime dealing with debt restructuring rather fragmented in nature (spread across

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[174] Hahn, "Concentrated Ownership and Control of Corporate Reorganisations" (n. 142) at 147.

[175] Ibid [emphasis in original].

[176] Ibid at 148.

[177] See Chan, "Schemes of Arrangement as a Corporate Rescue Mechanism" (n. 9) at 54-55.

[178] See Part IIID above.

different legislation), but it was also being administered through different adjudicatory bodies such as the High Court, BIFR and the DRT. Following the recent reforms, however, there has been greater consolidation in the law as well as the adjudicatory mechanisms. Both the SoA under the CA 2013 as well as the CIRP under the I&B Code come within the purview of a common adjudicatory body, i.e. the NCLT. Here, the onus lies on the NCLT to interpret the two legislation harmoniously and in the interests of the various stakeholders involved in a corporate resolution towards achieving the goals of restructuring, namely the rescue of potentially viable firms and the timely liquidation of the non-viable ones. The NCLT must shy away from the approach hitherto followed by the Indian judiciary of resolving conflicts between different legislation by enabling some legislation to override others, thereby causing considerable confusion. This would permit parties to approach debt restructuring by combining the benefits of the various methods of restructuring to optimise the goals of the legal regime.

VI. CONCLUSION

The SoA has played a prominent role as a tool for debt restructuring in the various countries in the Commonwealth. However, the extent of its usage has varied dramatically. Despite the commonality of substantive legal provisions in the statute books of various countries, the disparate usage of the mechanism can be attributed to historical factors, shareholding and ownership structures of companies, local business practices, the availability of alternatives to the SoA that operate as functional substitutes and, most importantly, the robustness of legal institutions. These factors help explain why the SoA has reached near-dormancy in India although it shares substantially the same legal rules as other countries such as the UK and Singapore. Moreover, due to the rather curious trajectory adopted by the legal regime for insolvency and corporate resolution in India, the SoA has failed to garner much attention in any of the legal reforms, and has remained steadfast in its adherence to the broad contours of the companies' legislation adopted from English law during the colonial period.

At the same time, the SoA does play an important role among the menu of options available for debt restructuring in India. Legislators, policy-makers, practitioners and market players cannot afford to continue to ignore the importance of this tool. They would be well advised to pay close attention to developments that are occurring in this field in other jurisdictions, and to adopt suitable reforms to the SoA in India to fully utilise the benefits of this method in a manner that comports with the specific local factors that are at play in the country.

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