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DISSENT AND DEBT: A COMPARATIVE JOURNEY THROUGH THE INDIA RESURGENCE ARC AND DBS BANK WITH INTERNATIONAL PERSPECTIVES

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I. Introduction

The Insolvency and Bankruptcy Code ('IBC') was enacted in 2016[910] with the intention of streamlining and easing out the process of insolvency, winding up, or liquidation of a company. The 2019 amendments to this code introduced significant changes to crucial sections, including Sections 7, 12, 25A, 30, 31, 33, and 240. Notably, these amendments enhanced protections for dissenting financial creditors, ensuring their interests are safeguarded. Though the purpose of the legislature behind the amendments is clear, the practical application of these provisions has been very controversial and problematic. One such legal issue remains pending before the Supreme Court of India, concerning the determination of the minimum amount a dissenting financial creditor is entitled to when an adjudicating authority accepts a resolution plan.

[910] The Insolvency and Bankruptcy Code of 2016, Act 31 of 2016 (prior to the 2019 amendment).

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There are two significant but opposing judgments addressing the same legal question. The first is the 2019 judgment in ***India Resurgence ARC Private Limited v. Amit Metaliks Limited & Another***[911] *('India Resurgence ARC')*, where the court held that the entitlement of a dissenting financial creditor under Section 30(2)(b) of the IBC[912] is not unlimited and is limited to the amount specified in the resolution plan. In contrast, the 2024 judgment in ***DBS Bank Limited Singapore v. Ruchi Soya Industries Ltd. and Another***[913] *('DBS Bank')* addressed the same issue but reached a different conclusion. The court in DBS Bank ruled that there is no cap on the amount a dissenting financial creditor can receive under Section 30(2)(b). Notably, both judgments were delivered by the Supreme Court's division bench of the same strength. Consequently, in the DBS Bank case, after expressing its view on the matter, the Supreme Court referred the issue to a larger bench for a final decision.[914]

While this issue is yet to be decided by the Supreme Court, this article tries to give insight into the technical concepts revolving around the issue that need to be accounted for before coming to any final decision on the matter such as the interpretation of the meaning of section 30(2)(b) and constitutional validity of explanation to Section 30(2). This article also examines how various jurisdictions, including the likes of the United Kingdom, the United States, Singapore, and the European Union, approach the issue of entitlement for dissenting financial creditor. Lastly, based on the insights considered and the analysis of different jurisdictions, a suggested framework is given towards the end to deal with the entitlement of dissenting financial creditor, which is both equitable to the dissenting class and other classes and is practically enforceable at the same time.

II. The Position of Dissenting Financial Creditors under IBC before 2019 Amendment

IBC, introduced in December 2016, serves as the central legislation governing insolvency and bankruptcy proceedings in India. It was enacted to address numerous issues, such as the highly fragmented legal framework and the division of creditor and debtor rights across various judicial fora. One of the IBC's key achievements was the clear definition of "financial creditor."

Under the IBC, a creditor is defined as "any person to whom a debt is owed and includes a financial creditor, an operational creditor, a second creditor, an unsecured creditor, and a decree-holder".[915] This marked the first instance where different types of creditors were distinctly categorized, as the Companies Act of 2016, previously used the general term "creditor" without further distinction. According to Section 5(8) of the IBC, any person who extends financial debt is considered a financial creditor.

Since its introduction, the IBC has undergone significant amendments, and various judicial pronouncements have further refined and streamlined the insolvency resolution process. These developments have played a crucial role in protecting the rights of creditors and debtors alike. The evolving jurisprudence surrounding the IBC, shaped by landmark case laws and statutory amendments, has been instrumental in ensuring equitable and just outcomes for all stakeholders involved in insolvency proceedings.

Central Bank of India v. Sirpur Paper Mills.[916]

The National Company Law Appellate Tribunal ('NCLAT') in its judgment of *Central Bank of India v. Sirpur Paper Mills Ltd.*, protected the rights of the dissenting financial creditors while invalidating sub-clause (b) and sub-clause (c)

[911] India Resurgence ARC Private Limited v. Amit Metaliks Limited & Another 2021 SCC OnLine SC 409.
[912] *Id.*
[913] DBS Bank Limited Singapore v. Ruchi Soya Industries Ltd. and Another 2024 SCC OnLine SC 3.
[914] *Id.*
[915] Supra 1, at § 2(10).
[916] Central Bank of India v. Resolution Professional of the Sirpur Paper Mills Ltd., 2018 SCC OnLine NCLAT 1034.

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of Regulation 38(1) of the IBBI ('IRPCP').[917] Prior to its amendment in 2018, Regulation 38(1) required that a resolution plan clearly specify the sources of funds allocated for various payments, including the costs of the insolvency resolution process, which were to be given priority over payments to any other creditors. The regulation also mandated that the resolution plan ensure payment of the liquidation value due to operational creditors before any payments to financial creditors, with such payments to be made within thirty days of the Adjudicating Authority's approval of the plan. Furthermore, the resolution plan had to provide for the payment of the liquidation value owed to dissenting financial creditors, ensuring that these payments were made before any recoveries were distributed to financial creditors who supported the plan.

Sub-clause (b) required that operational creditors be paid the liquidation value, while sub-clause (c) mandated that financial creditors ensure the payment of the liquidation value to dissenting creditors. However, due to the discriminatory nature of these provisions towards operational creditors and dissenting creditors, the NCLAT found the clause to be inconsistent with the IBC and consequently invalidated it.

***Notification dated 5th October, 2018. [No. IBBI/2018-19/GN/REG032.]*[918]**

The notification dated 5th October 2018 was issued following the NCLAT's judgment in *Central Bank of India v. Sirupur Paper Mills Ltd.* Under the Section 2(1)(f) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, a dissenting financial creditor has been defined as "*a financial creditor who voted against or abstained from voting on the resolution plan approved by the committee.*"

The notification removed this definition of dissenting financial creditor (Regulation 2(1)(f)) and eliminated the mandatory requirement to pay the liquidation value to dissenting financial creditor and operational creditors as provided under Regulation 38(1)(b) and Regulation 38(1)(c) respectively. Another significant change was the prioritization of payments to operational creditors over financial creditors, whereas previously, such payments were required to be made within 30 days of the resolution plan's approval by the NCLAT.

Despite these ongoing amendments to the Insolvency Law, there remained a lack of clarity regarding the rights and obligations of dissenting financial creditor. This was addressed by the 2019 amendment, which ensured that dissenting financial creditor would receive the liquidation value of their secured assets upon the approval of a resolution plan. Further details of this amendment will be discussed in the next section.

III. The Current conundrum on the position of dissenting financial creditors after 2019 Amendment

Having reviewed the approach to dissenting financial creditors in the pre-IBC era, we now turn our attention to the amendments introduced to the IBC in 2019 and their impact on Indian jurisprudence. Before the 2019 amendment to section 30(2)(b), this section only discussed about operational creditors and no mention of the dissenting financial creditors was there. This sub-section specifically examines the ramifications of the 2019 Amendment by analyzing two pivotal judgments: **DBS Bank Ltd. v. State Bank of India & Ors.** and **India Resurgence ARC Pvt. Ltd. v. Amit Metaliks Ltd. & Anr.** These cases provide critical insights into how the amendment has influenced the treatment of dissenting financial creditors within the Indian insolvency framework.

In 2019, the Ministry of Corporate Affairs came out with an amendment to the IBC, which amended seven sections of the IBC, namely

[917] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 38(1) (amended 2018).
[918] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, IBBI/2018-19/GN/REG032 (Issued on 5th October, 2018).

sections 6, 7, 12, 25A, 30, 31, 33, and 240.[919] For this subsection, we are limiting our analysis to sections 6 and 30 and their impact, including the ones on pending insolvency proceedings.

The revised Section 30(2)(b) requires them to be paid the amount that would be awarded to operational creditors in the event of the corporate debtor's liquidation under Section 53, or the amount that would have been awarded if the resolution plan's proceeds distribution followed the priority outlined in Subsection (1) of Section 53, whichever is greater.[920] Section 53 of IBC deals with the calculation of the amount to be paid to the creditors in case of liquidation of the corporate debtor along with the order of priority in which it will be paid.[921]

The conundrum that we are trying to address in this article pertains to the interpretation of the meaning of Section 30(2)(b) of the code and the position of dissenting financial creditor in terms of their entitlements, which started with the case of **India Resurgence ARC**[922] This judgment came out in the year 2021 wherein a bench of two judges opined on the issue of satisfaction of the prerequisite or criterions of Section 30(2)(b) after the 2019 amendment. The judgment stated that:

"In case of a valid security, interest is held by a dissenting financial creditor, the entitlement of such dissenting financial creditor to receive the amount could be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him and in order of priority available to him, and thereby satisfying the requirement of section 30(2)(b) of the code."[923]

The judgment relied on the case of ***Jaypee Kensington Boulevard Apartments Welfare Association & Others v. NBCC (India) Limited & Others***[924] *('Jaypee Kensington')* to hold the above-produced text. Following the ruling in *India Resurgence ARC*, Section 30(2)(b) was interpreted to mean that the amount paid to a dissenting financial creditor, in order to satisfy their right to enforce the security interest, would be limited to the value specified in the resolution plan as approved by the Committee of Creditors ('CoC'). This remained unchallenged and unquestioned until January 2024, which is when the judgment in the case of **DBS Bank**[925] came out.

In the DBS Bank case, the issue of interpretation of the meaning of section 30(2)(b) of IBC came up among other issues. And here the bench giving a contrary opinion held that:

"In our opinion, the provisions of section 30(2)(b)(ii) by law provides assurance to the dissenting creditors that they will receive as money the amount they would have received in the liquidation proceedings" further in the judgment the court says that "India Resurgence is incorrect to state that the dissenting financial creditor would not be entitled to receive the liquidation value, the amount payable to him in the terms of section 53(1) of the IBC."[926]

The above paragraph indicates that the judgment grants a dissenting financial creditor the right to receive the liquidation value, and this right is not limited to the amount determined by the CoC. This judgment also relied on **Jaypee Kensington** and held that:

"What the dissenting financial creditor is entitled to is the payment, which should not be less than the amount/value of the security interest held by them."[927]

A bare reading of the **India Resurgence ARC** judgment would establish that it also relied on **Jaypee Kensington,** but it has wrongly applied the reasoning of that case as has been stated in the **DBS case**.[928]

This calls into question the entirety of the reasoning behind the interpretation of section

[919] Supra 2.
[920] The Insolvency and Bankruptcy Code of 2016, Act 31 of 2016, S 30(2)(b).
[921] Supra 1, at § 53.
[922] Supra 4.
[923] id.
[924] Jaypee Kensington Boulevard Apartments Welfare Association & Others v. NBCC (India) Limited & Others [2021] 12 S.C.R. 603.
[925] Supra 4.
[926] id.
[927] Supra 15, at ¶ 28.
[928] Supra 4, at ¶ 31.

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30(2)(b) in **India Resurgence ARC judgment** and hence the interpretation becomes questionable and unreliable. The reason why we have this conundrum before us is the fact that both the India Resurgence ARC and DBS Bank judgments are pronounced by a supreme court bench of the same strength, implying that the later judgment i.e. DBS Bank, cannot overrule the India Resurgence ARC case, and hence the bench had no other option but to refer the issue to a larger supreme court bench for deciding the issue and finally settling the matter.[929]

This article discusses numerous factors surrounding this issue that the Supreme Court of India should consider or reconcile with before reaching a decision on this matter. Some of these aspects include examining the constitutional validity of explanation 2 of Section 30(2)(b), the existence of any limit to the value to be received by a dissenting class of creditor, and the application of Section 30(2)(b) of the IBC. These aspects are covered in detail in later subsections of this article.

IV. Critical Considerations in the Application of Section 30(2)(b) of the IBC

Now that we are well acquainted with what the whole paradox is about the discussion can advance to an examination of the technical concepts related to the interpretation of the meaning of Section 30(2)(b). All the ideas discussed under this subsection need to be taken into account by the Supreme Court of India while deciding to give a final judgment on this matter. This sub-section is divided into five parts for ease of understanding of the reader.

A. The Constitutional Validity of Explanation 2 of Section 30(2)(b)

Explanation 2 of Section 30(2)(b) provides that the provisions of the IBC (Amendment) Act, 2019, shall take effect from the date when the provisions relating to the corporate insolvency resolution process ('CIRP') under the IBC become operative. This applies in three specific situations: (i) where the Adjudicating Authority has not yet approved or rejected a resolution plan; (ii) Where an appeal has been lodged under Sections 61 or 62, or if the period for filing an appeal has not yet expired; and (iii) if legal actions have been filed in any court against the adjudicating authority's judgment on the resolution plan.[930] Essentially, it ensures that the amended provisions govern ongoing and pending CIRP cases under these circumstances.

The constitutional validity of this explanation was challenged in the case of ***the Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors***[931] *('Essar Steel')*. Petitioners argued against the application of this explanation claiming that the amendment to Section 30(2)(b) and Section 30(4) of IBC were deliberately made to reverse the judgment of NCLAT. It was alleged that this was done to reduce the debt due to Standard Chartered Bank from about INR 2,100 crores to about INR 61 crores and increase the share available to nationalised banks and other government-controlled institutions.[932] The petitioner's case is that such legislation is an intrusion into the separation of powers as it amounts to adjudicating upon the facts of a given case. Therefore, the amendment explanation should be unconstitutional.

The court in the case was of contrary opinion and agreed with the respondent's argument which relied on the case of Arcelormittal India Private Limited v. Satish Kumar Gupta[933] and Swiss Ribbons Pvt. Ltd. v. Union of India [934] to establish that an appeal being a continuation of the proceedings, there is nothing wrong with applying the amended law in the three scenarios mentioned in Explanation 2[935]. The court in the present case further relied on the judgments of the Supreme Court in

[929] Supra 4, at ¶ 49.

[930] Supra 11, at § 30(2)(b) Explanation II.

[931] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors. (2020) 8 SCC 531.

[932] id.

[933] Arcelormittal India Private Limited v. Satish Kumar Gupta AIR 2018 SC 5646.

[934] Swiss Ribbons Pvt. Ltd. v. Union of India AIR 2019 SC 739.

[935] Supra 22.

Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri[936], and the Supreme Court in **Shiv Shakti Coop. Housing Society**[937], **Nagpur v. Swaraj Developers & Ors.**[938], that an appeal proceeding is a continuation of the original proceeding. The court finally held that:

"This being so, a change in law can always be applied to an original or appellate proceeding. For this reason, also, Explanation 2 is constitutionally valid, not having any retrospective operation so as to impair vested rights."[939]

Therefore, explanation 2 of Section 30(2)(b) was held to be constitutionally valid.

B. Does section 30(2)(b) of the IBC place a cap on the amount that a dissenting financial creditor may collect?

By citing the Jaypee Kensington ruling, the court in the India Resurgence ARC case determined that, should a class of financial creditors with dissenting interests hold legitimate security, their right to receive the money could be fulfilled by enabling them to enforce the security interest, but only to the extent of the value receivable and in the priority determined by a CoC.[940] This very opinion of the court led to the question of whether it was legally right for the court to limit the extent of the entitlement of dissenting financial creditor.

In the DBS Bank case, the court addressed the issue and determined that there is a contradiction in the reasoning presented in the judgments of India Resurgence ARC and Jaypee Kensington.[941] The emphasis was laid on the assurance that is provided by Section 30(2)(b)(ii) that dissenting financial creditors would receive as money the amount they would have received in case of liquidation of the corporate debtor[942]

And finally, the court held that:

"In Jaypee Kensington (supra), it has been held that the dissenting financial creditor, if the occasion arises, is entitled to receive the extent of value in money equal to the security interest held by him. It would not be proper to read Jaypee Kensington (supra), as laying down that the dissenting financial creditor would be entitled to the extent of amounts receivable by him in the resolution plan. This would undo the very object and purpose of the amendment. It would make the portion of Section 30(2)(b)(ii) specifying the amount to be paid to such creditor in accordance with Section 53(1), redundant and meaningless."[943]

The Supreme Court of India should take this very observation into account while deciding finally on this issue, apply the correct reasoning laid out in Jaypee Kensington, and rectify the erroneous reasoning in the case of the India Resurgence ARC.

C. Applicability of Section 30(2)(b)(ii) of the IBC: Does It Include Only Section 53 or Also Section 52?

Section 30(2)(b)(ii) states that the amount distributed to creditors under the resolution plan should align with the priority order specified in Section 53(1) of the IBC.[944] There is one school of thought that says that the application of this section is limited only to section 53 of the code and does not extend to section 52.[945] This restrictive interpretation was deemed necessary to limit a secured creditor's right to distribution under Section 53(1)(b)(ii) to circumstances where the secured creditor has surrendered its security interest in accordance with Section 52 of the Code. It is argued that Section 30(2)(b)(ii) of the Code references Section 53 for a specific purpose, which should be considered in the context of the Act. Consequently, Section 30(2)(b)(ii) should be applied solely in conjunction with Section 53.[946]

[936] Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri AIR 1941 FC 5.
[937] Shiv Shakti Coop. Housing Society. v. M/S. Swaraj Developers & Ors AIR 2003 SC 2434.
[938] Nagpur v. Swaraj Developers & Ors 2003 6 SCC 659, para 16 and 17.
[939] Supra 22.
[940] Supra 2, at ¶ 18.
[941] Supra 4, at ¶ 31.
[942] Supra 4, at ¶ 33.
[943] Supra 4, at ¶ 37.
[944] Supra 11, at § 30(2)(b)(ii).
[945] Supra 4, at ¶ 40.
[946] id.

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This same argument was put forward for consideration in the case of DBS Bank by the respondents, and the CoC. The court in this case disagreed with this interpretation of the section and the court was reluctant to accept the submission that Section 30(2)(b)(ii) of the Code needs to be read down.

Para 40 of the judgement uses these words-

"Reference to Section 53 of the Code in Section 30(2)(b)(ii) is made with a specific purpose and objective and accordingly, we have to understand and give a cogent and effective meaning to the words to effectuate the intent."[947]

Section 53 of the Code is inherently included in Section 52.[948] It would defeat the plain and patent legislative intent behind the amendment to isolate Section 53 when referring to Section 30(2)(b)(ii). Every time a reference is made to Section 53, Section 52 also has to be considered to interpret Section 30(2)(b)(ii) properly.

Unless the resolution plan provides an amount that is at least equivalent to the secured interest of a dissenting financial creditor, the creditor may withdraw from the process at any time. Should the corporate debtor enter liquidation, the amount owed to the dissenting financial creditor must be in accordance with Section 53(1). A dissenting financial creditor is entitled to receive at least the value of their secured interest. It is incorrect to assert that dissenting financial creditors are not entitled to rely on Section 53(1)(b)(ii) of the statute, as this provision applies to secured creditors irrespective of whether they have surrendered their security interest under Section 52.[949]

D. Potential Conflict Between Sections 30(4) and 30(2)(b) of the 2019 Amendment

Another crucial issue that needs to be examined by the court on this matter is the potential conflict that might exist between sections 30(4) and 30(2)(b) of the IBC. In fact, this very contraction was used as one of the lines of argumentation by the respondents in the case of DBS Bank.[950] Scholars belonging to this school of thought strongly believe that since section 30(4) gives a lot of value to the commercial wisdom of the CoC it renders the effect of 30(2)(b) which guarantees a minimum amount to be paid to dissenting financial creditor null and void.[951] This line of reasoning is fundamentally flawed because, although Section 30(4) mandates that the CoC consider the viability and feasibility of the proposed distribution method, taking into account the priority and value of secured creditors' security interests and other requirements specified by the Board, the resolution plan can only be approved by a vote of at least 66% of the financial creditors' voting share.[952] This in no way suggests that a secured creditor who does not agree with the resolution plan cannot vote against it, become a dissenting financial creditor, and be entitled to the liquidation amount as per Section 30(b)(2).

There is no apparent conflict between section 30(4) with sub-clause (ii) of clause (b) to sub-section (2) of Section 30, as section 30(2)(b) is about a minimum payment to be made to an operational creditor or dissenting financial creditor.[953] While operational creditors do not have voting rights, a dissenting financial creditor is the one who votes against the plan, and section 30(4) deals with creditors who have assented to the resolution plan. This very conclusion was upheld by the Supreme Court in the case of DBS Bank.[954]

E. Enforceability or Monetary Entitlement of Security Interest for Dissenting Financial Creditor

The issue of enforceability of security interest by dissenting financial creditor needs to be looked into because, if allowed, the act of enforcement

[947] id.
[948] id.
[949] Supra 4 at ¶ 41.
[950] Supra 4 at ¶ 48.
[951] id.
[952] id.
[953] id.
[954] id.

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of security interest by dissenting financial creditor might lead to the failure of the whole resolution plan, and the whole plan would then ultimately be rendered unworkable. This enforceability issue was elaborately explored in the judgment of Jaypee Kensington, where the court came to the conclusion that:

"A dissenting financial creditor, is only entitled to the monetary value of the assets. The dissenting financial creditor loses the security interest, that is, it relinquishes the security interest. Dissenting financial creditor, therefore, cannot enforce the security interest."[955]

After the resolution plan is accepted, the dissenting financial creditor is required by law to relinquish and forfeit their security interest. After willingly giving up their security interest, they become a secured creditor and are obligated to pay under Section 53(1)(b)(ii) of the Code.[956] Therefore, it is safe to conclude that the dissenting financial creditor is entitled to the monetary value of the assets.

To summarize, these are critical considerations that ensue from the application of Section 30(2)(b) of the IBC. The constitutional validity of Explanation 2 has been upheld. It has been held that amended provisions apply to pending cases. It is also affirmed that the dissenting financial creditor are entitled to a monetary value equivalent to the security interest. It has been elaborated that Sections 52 and 53 have to be read harmoniously under Section 30(2)(b)(ii) to serve the legislative purpose. Conflicts between Sections 30(4) and 30(2)(b) have been ironed out, making it clear that decisions of the Committee of Creditors do not exhaust the minimum amount payable. Finally, dissenting financial creditors are paid off by the monetary value of the assets, not by way of enforcing their security interest. These considerations therefore ensure that Section 30(2)(b) is applied fairly and that the interests of all stakeholders in insolvency are duly taken into account.

[955] Supra 4, at ¶ 42.
[956] id.

V. Foreign Jurisprudence

As the Supreme Court judgment regarding the right of a dissenting financial creditor is pending, it is important for us to consider the rights of this class as per the laws prevailing in foreign jurisdictions. This would provide us with insights as to what is accepted as common practice in these foreign jurisdictions. This subsection therefore discusses the rights of a dissenting financial creditor in jurisdictions that have a similar type of insolvency law as India, with special reference to the United States and the United Kingdom.

A. European Union[957]

The European Union provides a framework for safeguard proceedings, offering solvent debtors the opportunity to restructure under court supervision. These proceedings begin with an observation period of six months, which can be extended once for an additional six months. During this time, the debtor's financial situation is assessed, and a safeguard plan is developed. Upon the commencement of the proceedings, payments to pre-filing creditors and enforcement actions are generally suspended, subject to limited exceptions, particularly concerning secured claims.

Stakeholders affected by the proposed plan are organized into classes based on their homogeneous economic interests. The plan is then subjected to a vote, requiring a two-thirds majority within each class for approval. Notably, secured creditors must vote in a separate class from unsecured creditors. If the plan is accepted by all classes, the court will review it to ensure that there is no unequal treatment among classes, that the best interests of the creditors are protected, and that any new financing is necessary, before granting approval of the plan.[958]

[957] DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).
[958] DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on preventive restructuring

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In cases where one or more classes of creditors reject the plan, the court has the discretion to "cram down" the dissenting classes, provided certain conditions are met. Specifically, the plan must be approved by a majority of classes, including at least one class of secured creditors and one class of unsecured creditors. Additionally, the absolute priority rule must be adhered to. This procedure ensures a balanced and equitable approach to addressing dissenting financial creditors within the EU's safeguard proceedings.

B. United States of America

The cross "Cram Down" is a prevalent principle in the field of insolvency, especially in the USA. Cram Down in insolvency law means a situation where a certain class of creditors fail to give their acceptance to the resolution plan therefore, putting it on halt. In this scenario, the debtor company can ask the court to sanction their resolution plan and the court could order to proceed ahead with the restructuring with the approval of 75% of the committee of creditors.

To protect the right of the dissenting class, Section 1129(b)(1) of the Title 11 of the United States Code also known as the United States Bankruptcy Code[959] states:

"Notwithstanding section 510(a)[960] of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

The subsection clearly states that the court can proceed to accept such a resolution only if it keeps in mind the rights of the parties that dissent to the resolution. Any instance of unfair treatment of the dissenting financial creditor would not be sustained and the fair and equitable treatment of every class is must for the acceptance of the resolution.

For a cram down to effectively bind the dissenting class it is necessary for the resolution plan to ensure that the dissenting secured creditors receive as much recovery as it would get in the case of Liquidation under Chapter 7 of the Code.[961] The amount should be equal to the current value of the assets secured and further, even the lien should be retained.

C. United Kingdom

The principle of Scheme of Arrangement stated in Chapter 26 of the Companies Act 2006[962] is the method used in the United Kingdoms for restructuring of a company. This principle states that the Debtor company should decide a plan for the restructuring of its debt allowing it to be in control of the company's operations.[963] The creditors of the company are then divided into classes, separating each class of creditor based on their rights which are so dissimilar that it wouldn't be possible for them to be arranged in a similar class.[964] Further, the court can sanction a resolution plan even if it fails to get a unanimous vote by all of its creditors using the principle called "cross-class cram down".[965] The principle of cross-class cram down requires that 75% of the present and voting members vote in favour of the resolution plan.[966] The section regarding this principle is Section 901G of the Companies Act, 2006[967]. The court can

frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), rule 57.

[959] Bankruptcy Reform Act of 1978, 11 U.S.C. § 1129(b)(1) (1980).

[960] Bankruptcy Reform Act of 1978, 11 U.S.C. § 510(a) (1980).

[961] Bankruptcy Reform Act of 1978, 11 U.S.C. §701-784 (1980).

[962] Companies Act 2006, c. 26 (Eng.).

[963] James Stonebridge, 'DeepOcean - The first UK cross-class cram-down case under the Corporate Insolvency and Governance Act 2020' (Norton Rose Fulbnght, Q2 2021).

[964] Re Sovereign Life Assurance Company v. Dodd [1892] 2 Q.B. 573.

[965] Timothy Ang, *The Race to Rescue: Evaluating the Rollout of Cross-Class Cramdowns in the UK and Singapore*, 2023 SING. COMP. L. REV. 110 (2023).

[966] Companies Act 2006, s 26 (Eng.).

[967] Companies Act 2006, s 901G (Eng.).

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sanction a plan despite the opposition by certain creditors if it follows two conditions stated in the section:

Condition A: The sanctioned agreement must not put opposing parties in a worse condition than they would be in the case of the "relevant alternative", according to the court's satisfaction. In this instance, the term "relevant alternative" refers to a circumstance that the court determines is most likely to occur in the event that the settlement plan is not approved. Furthermore, evidence that the situation is on the balance of probabilities—that is, that the likelihood of the event is greater than zero—must be provided by the individual proposing the "relevant alternative."

Condition B: The resolution plan must be sanctioned by 75% of the present and voting members.

The principle used in Condition A is called the "no worse off test" and is the primary method used in the UK to protect the rights of dissenting creditors. In the landmark case of Virgin Active[968], Justice Snowden stated the method of applying the "no worse off test". The test requires three mandatory elements:

1. The relevant alternative must be decided by the court.
2. The consequences of such relevant authority on the dissenting creditors.
3. Comparison between the outcome of the resolution plan and the relevant alternative.

D. Singapore

The Insolvency, Restructuring and Dissolution Act, 2018 ('IRDA') of Singapore uses the "cross-class cram down" principle similar to that of the UK to sanction plans that are rejected by a dissenting class. The creditors are divided into different classes based on the rights they inherit and an approval threshold is to be met by each class before the plan can be approved by the court[969]. The requirement to form separate classes of creditors and match the approval threshold for all these classes are the necessary requirements to approve a restructuring plan. Singapore though, through the Companies (Amendment) Act 2014[970] removed the headcount requirement which protected the majority creditors from the minority dissenting creditors who diluted their share and increased their headcount to reject a resolution plan.

The cross-cram down principle is stated in Section 70 of the IRDA[971] and allows the court to sanction a resolution plan despite the headcount and value requirements not being met in one or more classes of creditors.[972] Section 70 outlines four conditions that must be satisfied to bind entire classes of dissenting creditors:

1. Creditors must convene a scheme meeting to vote on the debtor company's proposed resolution plan.

2. Creditors subject to the binding plan must be categorized into two or more classes based on their respective rights.

3. The approval thresholds regarding headcount and value requirements, as specified under Section 210(3AB) (a) and (b) of the Companies Act 1967[973], must be met in at least one class of creditors.

4. According to Section 210(3AB) (a) and (b) of the Companies Act 1967, at least one class of creditors, referred to as the dissident class, fails to satisfy any or both of the headcount and value requirements.

When and if all the four conditions mentioned in Section 70(1) of IRDA are fulfilled, the court has the discretion to approve a scheme and hence, bind all dissenting creditors as per sub-section 70(3)(a) to 70(3)(c) if:

(a) The majority of all intended creditors, irrespective of class, have approved the

[968] *Virgin Active* [2021] EWHC 1246.
[969] The Royal Bank of Scotland NV v. TT International Ltd [2012] 2 SLR 213.
[970] Act 36 of 2014. The Companies (Amendment) Act 2014.
[971] Insolvency, Restructuring and Dissolution Act 2018, s.70 (Sing.).
[972] Wilson Zhu, Cross-Class Cramdowns in Singapore and Lessons from the UK, 35 SACLJ 530 (2023).
[973] Companies Act 1967, s210(3AB) (a) and (b) (Sing.).

plan overall, accounting for three-fourths of the debt's value; and

(b) the court is satisfied that the plan does not unfairly discriminate between two or more classes of creditors and is just and equitable to each dissenting class.

Section 70(4) of IRDA replicates the "worst off" principle from the UK stating that no class of creditor should be left worse off than in the most likely scenario. Furthermore, the section protects the right of the secured creditor by assuring that the creditor receives payment equivalent to that of its secured asset or a charge over the proceeds of that asset.[974]

To summarize, the treatment of dissenting financial creditors is, undoubtedly, a critical issue across various jurisdictions. Indeed, structured frameworks in the European Union, the United States, the United Kingdom, and Singapore all make provisions for the "cram down" or "cross-class cram down" of dissenting creditors under specific conditions. Despite these frameworks, the respective legislation seeks to ensure there is fair and equitable treatment of dissenting creditors, while at the same time ensuring facilitation of the process of restructuring. A common thread across jurisdictions for protecting the rights of dissenting creditors is by making sure that any restructuring plan does not make the dissenting creditors worse off than they would in a scenario of liquidation or "relevant alternative" and making sure their interests are weighed and taken into account. It is in this regard that the judgments come at an important time when India's Supreme Court is set to adjudicate on petitions challenging the validity of the rights of dissenting financial creditors. As instrumental as the reviewed foreign practices are, they further underscore the fine balance that must be attained between facilitating corporate restructuring and protecting creditors' rights. On its part, the comparative analytical approach also demonstrates that explicit legal provisions are necessary to protect the interests of all stakeholders while ensuring efficient and equitable resolution of insolvency cases.

VI. Suggested Framework

After analyzing both the important judgments on the issue, namely, **DBS Bank** and **India Resurgence ARC,** and then analyzing the way in which different jurisdictions deal with the issue of dissenting financial creditors, we are inclined towards a method of treatment for the dissenting class of creditor, which is both fair towards them and other classes of creditor and practically also enforceable. The minimum entitlement of dissenting financial creditors should be equal to the amount of security interest that they will be entitled to in the case of liquidation, as this is the literal interpretation of Section 30(2)(b) of the IBC. This is precisely the opinion of the Supreme Court bench in the DBS Bank case. While this makes the issue of the interpretation of Section 30(2)(b) crystal clear, the effective implementation of this interpretation is something that we still need to deal with. For this, it should be made the responsibility of the adjudicating authority to ensure that dissenting financial creditors are dealt with in a fair and equitable manner as per the IBC.

India can also adopt some aspects of the "worse off" test used in the United Kingdom,[975] in which it is the responsibility of the court to ensure that the dissenting financial creditor is not left in a situation that is worse off than the relevant alternative decided. Since in India we don't have the concept of a relevant alternative, we can make sure that the dissenting class is not left off with less entitlement than they would get in case of liquidation as per Section 30(2)(b) instead. The central government can frame rules in this regard to streamline the whole process and rest this responsibility of enforcement of the above-mentioned suggestions on adjudicating authority. The reason for advocating for the adoption of some aspects of "worse off" test is because India and UK both are common law countries and their

[974] Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) S 70(4)(b)(i).

[975] Supra 59.

legislation governing insolvency is mostly on the same lines[976], so adoption of these would be better suited and easily to incorporate in Indian system.

VII. Conclusion

The meaning and application of Section 30(2)(b) of the IBC has been a subject matter of a lot of judicial controversy, more so when it comes to the rights and entitlements of dissenting financial creditors. The 2019 amendment to the IBC came to remove the ambiguity as to when payment to such creditors would begin and how much will be paid to them as a minimum, which had to be the liquidation value of their claim. Subsequent judicial interpretations have resulted in inconsistent opinions, most significantly between the judgments of India Resurgence and DBS Bank.

The DBS Bank judgment thus appears finally to lay the correct interpretation of Section 30(2)(b). However, the final word is ultimately that of the Supreme Court of India. How the apex court decides will have far-reaching consequences in laying the course for the future of the insolvency law in India and will go a long way in protecting the interest of all stakeholders, more particularly the dissenting financial creditors.

This article offers an in-depth discussion about topics related to dissenting financial creditor and aims to help shape the upcoming law of the land so that it is fair to all classes of creditors. The article also analyzed multiple jurisdictions and the way in which they deal with the issue and then suggested the most appropriate framework which the authors think would be better suited to Indian context. Authors suggested an adoption of "worse off" test with slight variation of replacing relevant alternative with the application principle laid out in section 30(2)(b) essentially entitling dissenting financial creditor to minimum amount equivalent to their security as per the section 30(2)(b).

These developments should be welcomed with an optimism as Insolvency and Bankruptcy law of India is very new legislation which needs to be updated to fix the lacunae which it has and allowing and encouraging discussions like these is one way to adopt the upcoming change in this field and keep the legislation up to date to tackle the challenges which might emerge with the passing time.

[976] Andrew Godwin, Risham Garg and Debaranjan Goswami, *Cross-border insolvency law in India: Are the principles of comity of courts and inherent common law jurisdiction relevant?* Wiley Online, 01 Aug 2023, https://doi.org/10.1002/iir.1500.