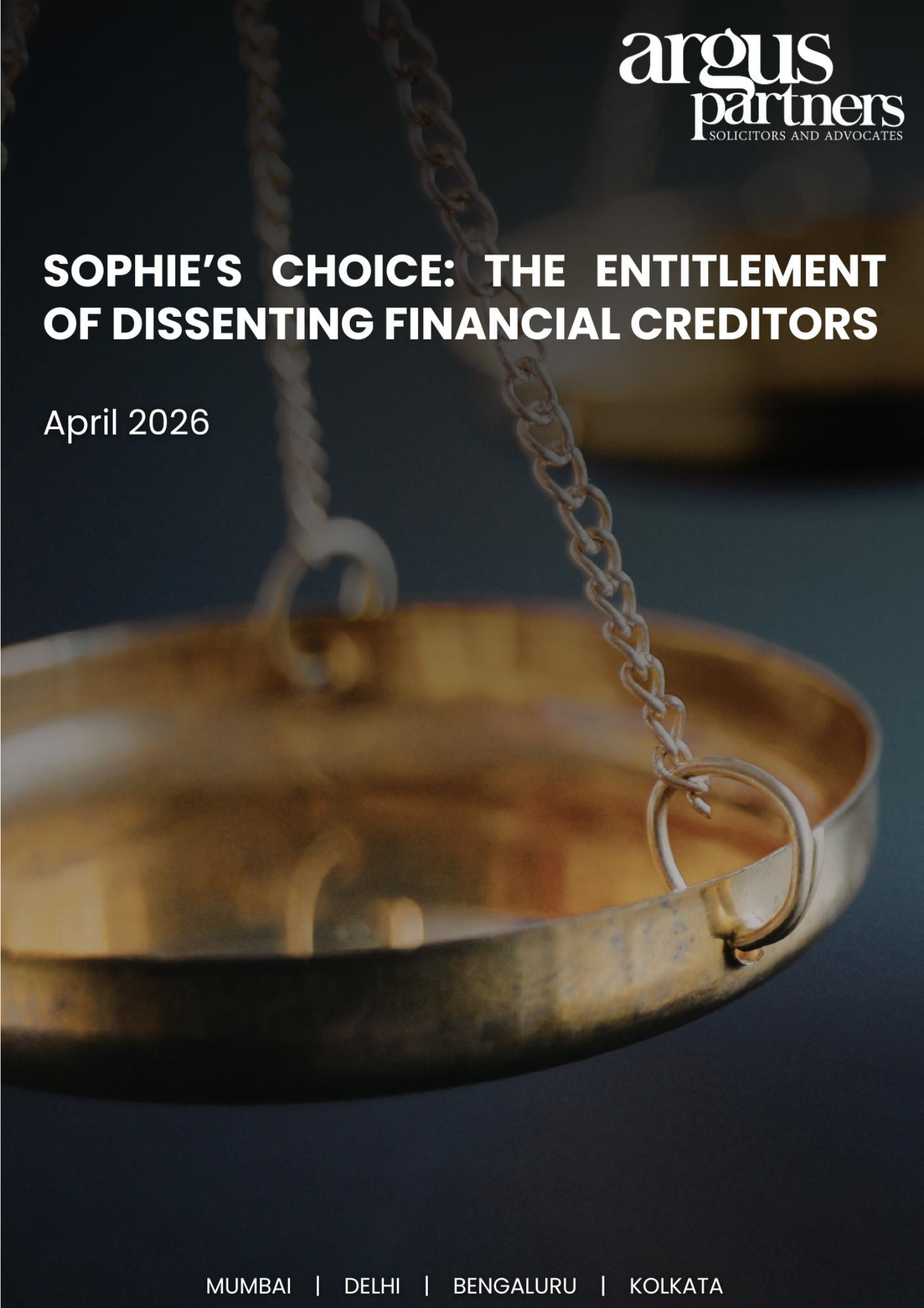

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SOLICITORS AND ADVOCATES

SOPHIE'S CHOICE: THE ENTITLEMENT OF DISSENTING FINANCIAL CREDITORS

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1. Introduction

The jurisprudence on protecting dissenting financial creditors under the Insolvency and Bankruptcy Code, 2016 ("**IBC**") is rooted in a fundamental structural concern that a majoritarian framework cannot operate so as to unfairly prejudice the rights and interests of a dissenting minority. Insolvency resolution is a collective remedy designed to find the optimum solution for all stakeholders connected with the corporate debtor, and not solely for the corporate debtor itself or solely for its creditors.[1] As the Supreme Court recognised in the landmark *Essar Steel* judgment [2], protecting creditors in general is an important objective as is *protecting creditors from each other*.

While the IBC places significant reliance on the commercial wisdom of the committee of creditors ("**CoC**"), it has also evolved to incorporate minimum safeguards for dissenting financial creditors. This first found statutory expression in the Insolvency and Bankruptcy Code (Amendment), 2019 ("**2019 Amendment**"), which amended Section 30(2), to ensure that dissenting creditors would receive at least the amount payable to them in liquidation.

However, the recent Insolvency and Bankruptcy Code (Amendment), 2026 ("**2026 Amendment**"), recalibrates that position by introducing a "lower of" test, under which the minimum entitlement of dissenting creditors is confined to the lesser of the amount payable to them in liquidation and the amount payable under the resolution plan if distributed in accordance with the order of priority specified in Section 53 of the IBC. Although intended to address concerns of strategic dissent, the amendment raises important questions as to whether dissent continues to offer any meaningful economic protection, or whether it leaves creditors with little practical choice between assent and dissent.

2. The Entitlement of Dissenting Creditors

Rationale for protection

The UNCITRAL Legislative Guide, while discussing the key objectives and structure of an effective and efficient insolvency law, states that '*to the extent that a plan can be approved and enforced upon dissenting parties, there will be a need to ensure that the content of the plan provides appropriate protection for those dissenting parties and, in particular, that their rights are not unfairly affected*'.

It is also useful to consider the position in other jurisdictions, particularly those which similarly seek to reconcile majority-driven restructuring processes with minimum safeguards for dissenting creditors.

I. United Kingdom

Although Part 26A of the UK Companies Act, 2006 ("**UK Act**") is not a direct equivalent of the corporate insolvency resolution process under the IBC, it is, for present purposes, the closest modern restructuring mechanism in English law, given that it enables a court-sanctioned compromise or arrangement to be imposed upon dissenting classes through a cross-class cram down.

Under Part 26A, Section 901G provides that a compromise or an arrangement may be sanctioned by the court notwithstanding the dissent of an entire class of creditors or members if two conditions are met: firstly, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (typically administration, liquidation or another likely insolvency scenario); and secondly, the plan has been approved by at least one class of creditors or members that would receive a payment, or have a genuine economic interest, in that relevant alternative.

[1] American Jurisprudence, 2d, Volume 9.
[2] *Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta,* (2020) 8 SCC 531.

The UK model is therefore directed to a 'no worse off' protection at the class level, rather than a statutory minimum for each individual dissenting creditor. While discussing the 'no worse off' test, the UK Court of Appeal[3] has observed that the obvious logic for this test is that '*if a scheme is proposed as an alternative to a winding up but would be likely to result in a class of creditors being worse off than in a winding up, the decision of the majority in that class to vote in favour could be seen as irrational*'. The court, thus, treated the likely outcome in the alternative winding up as the floor, below which the outcome under the scheme should not go.

II. United States

Similarly, Chapter 11 of the U.S. Bankruptcy Code incorporates what is commonly described as the 'best interests of creditors' test, which requires that each dissenting creditor must receive or retain under the plan, property of a value that is not less than the amount that such creditor would so receive or retain in a Chapter 7 liquidation.

In addition, where a plan is crammed down on a dissenting class of secured creditors, it must satisfy the 'fair and equitable' standard, including by preserving liens and ensuring payments equivalent to the present value of the secured claim or its indubitable equivalent.

Pre-amendment position

In the Indian context, however, the position has evolved differently. Unlike the UK and the US, where the protection of dissenting creditors is structured around a 'no worse off' or liquidation-comparison standard within a broader court-supervised cramdown framework, the IBC, as originally enacted, did not expressly confer any distinct minimum entitlement upon dissenting financial creditors. The Bankruptcy Law Reform Committee ("**BLRC**"), which was set up by the Ministry of Finance to study the corporate bankruptcy legal framework in India and submit a report to the Government for reforming the system, had in its interim report noted that international best practices indicate that in insolvency proceedings dissenting creditors should at least get as much as they would in liquidation[4]. However, the final report issued by the BLRC did not include any recommendation for protection of dissenting creditors.

Thereafter, the 2019 Amendment was brought in which provided that a resolution plan must ensure that dissenting creditors would receive at least the amount payable to them in liquidation. The constitutional validity of this amendment was challenged before the Supreme Court in the *Essar Steel* judgment. While upholding the constitutional validity of the 2019 Amendment, specifically the protection offered to dissenting creditors, the Supreme Court observed that a bankruptcy law should not be read so as to imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under the general law, unless it is to serve some bankruptcy purpose.

This position was then considered further in the *Jaypee Kensington*[5] case, where the Supreme Court observed that the entitlement of dissenting creditors to receive the 'amount payable' could also be satisfied by allowing them to enforce the security interest, to the extent of the value receivable by them and in the order of priority available to them.

The controversy, therefore, was not as to whether dissenting creditors were entitled to a statutory minimum, but the proper construction of that minimum. The key question was whether 'the amount payable in liquidation' was confined to the dissenting creditor's notional entitlement under the Section 53 waterfall, or whether it was capable of reflecting the value of the creditor's underlying

[3] *Strategic Value Capital Solutions Master Fund LP* v. *AGPS Bondco Plc.,* [2024] EWCA Civ 24.
[4] Interim Report of The Bankruptcy Law Reform Committee, dated February, 2015.
[5] *Jaypee Kensington Boulevard Apartments Welfare Association* v. *NBCC (India) Limited,* (2022) 1 SCC 401.

security interest. This interpretive conflict became central in the judgments of the Supreme Court in the *Amit Metaliks*[6] case and the *DBS*[7] case.

In the *Amit Metaliks* case, the Supreme Court declined to link a dissenting secured creditor's entitlement under a resolution plan to the full value of its individual security interest merely because it was a secured creditor, and upheld a *pro rata* distribution based on admitted claims, so long as it provided a fair and equitable treatment to all creditors. This effectively limited the ability of dissenting secured creditors to insist on recovery aligned with the value of their underlying collateral.

In contrast, the subsequent decision of the Supreme Court in the *DBS* case, adopted a more creditor-protective reading of Section 30(2). The Court emphasised that while the CoC retains discretion in determining the manner of distribution, such discretion cannot be exercised in a way that undermines the statutory safeguard available to a dissenting financial creditor. The provision was treated as preserving the 'minority autonomy' of dissenting creditors and requiring that their minimum entitlement not be diluted by an interpretation that collapses liquidation entitlement into whatever the plan itself chooses to distribute.

The apparent divergence between the *Amit Metaliks* case and the *DBS* case has since led to the issue being referred to a larger bench, and the matter remains without a conclusive resolution till date. In the meantime, the approach in the *Amit Metaliks* case has largely continued to guide the courts, with the NCLAT[8] holding in various subsequent decisions that a dissenting financial creditor cannot insist on recovery based on the full value of its security once the statutory minimum has been met.

Post-amendment position

The 2026 Amendment marks a noticeable shift in approach by introducing a "lower of" test, under which the minimum entitlement of dissenting financial creditors is the lesser of: (i) the amount receivable in liquidation; or (ii) the amount that would be receivable if the resolution proceeds were distributed in accordance with the priority under Section 53.

The Select Committee of the Lok Sabha, constituted to examine the implications of the 2026 Amendment prior to its enactment, was of the view that the existing protection for dissenting creditors had begun to create an incentive for strategic dissent, particularly in cases where liquidation value exceeded the value available under a feasible resolution plan. On that basis, it accepted the Government's proposal that the statutory minimum for dissenting financial creditors should be the lower of liquidation value and resolution-plan value, so as to discourage creditors from withholding approval merely to secure a higher payout or push the corporate debtor toward liquidation.

This analysis is understandable when viewed through the lens of the IBC's resolution-first design. If the statutory minimum available to dissenting financial creditors is set at a level that, in some cases, exceeds the value available under a viable resolution plan, there is a legitimate concern that dissent may become economically attractive even where the plan is otherwise feasible and value-preserving.

At the same time, the issue admits of a more nuanced legal debate. The difficulty is not merely whether dissent may sometimes be incentivised, but whether the earlier framework was doing more than merely creating an incentive, namely, whether it was recognising that in a majoritarian insolvency process, dissent must carry some meaningful protection if it is to remain a legally significant option at all. On this view, the concern with the 2026 Amendment is not that it seeks to discourage opportunistic dissent, but that the legislative intent appears to proceed on the premise that any economic advantage attached to dissent is necessarily distortive. That premise may be open

[6] *India Resurgence ARC Private Limited* v. *Amit Metaliks Limited*, (2021) 19 SCC 672.
[7] *DBS Bank Limited, Singapore* v. *Ruchi Soya Industries Limited*, (2024) 3 SCC 752.
[8] *Paridhi Finvest Private Limited* v. *Value Infracon Buyers Association*, Company Appeal (AT) (Insolvency) No. 654 of 2022; *Beacon Trusteeship Limited* v. *Jayesh Sanghrajka*, Company Appeal (AT) (Insolvency) Nos. 1494, 1495 of 2022, 99 of 2023, I.A. No. 409 of 2023, Company Appeal (AT) (Insolvency) Nos. 107 of 2023 and 108 of 2023.

to question, because a statutory minimum in favour of dissenting creditors also needs to be viewed as an integral safeguard against the compulsory subordination of minority interests.

Moreover, the 2026 Amendment does not fully resolve the underlying ambiguity surrounding the meaning and computation of the dissenting creditor's liquidation-linked minimum. As noted earlier, the divergence between the *Amit Metaliks* case and the *DBS* case stems from fundamentally different understandings of what the statutory floor represents. The amended provision modifies the payment threshold, but still leaves unresolved the distinction between liquidation value as a valuation benchmark, the amount payable in liquidation under Section 53 as a distributional entitlement, and the economic value of the secured creditor's underlying security, especially given the options of realisation and relinquishment available to secured creditors in a liquidation scenario. As a result, the deeper jurisprudential conflict may persist notwithstanding the amendment.

The issue is not confined to fairness in distribution at the resolution stage, but extends to the need for systemic clarity. As recognised in the *Essar Steel* case, priority rules must be framed with sufficient clarity and predictability to permit creditors to understand, in advance, the practical worth of their security and the manner in which their claims are likely to be treated on insolvency. To the extent the present framework leaves unresolved the content of a dissenting creditor's minimum entitlement, it risks undermining that objective.

3. Concluding Remarks

The Indian insolvency framework, particularly post-amendment, effectively adopts a narrower approach by guaranteeing dissenting creditors the lower of two outcomes, thereby limiting the practical value of dissent. This leaves a creditor that does not wish to vote in favour of the proposed resolution plan in a difficult position: assent may entail accepting a recovery that does not reflect the value the creditor considers appropriate, while dissent confines it to a statutory minimum that may offer little incremental protection. To the extent the framework permits non-consensual impairment of creditor claims without adequate safeguards, particularly in the case of secured creditors, the implications may extend beyond the immediate resolution process and affect both the availability and cost of credit.

Seen in this light, the issue is not merely one of statutory interpretation, but of creditor confidence in the insolvency framework itself. While the objective of promoting resolution and curbing strategic dissent is consistent with the purpose of an insolvency regime, the current framework raises legitimate concerns as to whether the balance between collective decision-making and individual creditor rights has been appropriately struck.

This concern is particularly acute in the case of exclusive security holders who bargain for, and price their credit on the basis of, asset-specific protection, i.e., the expectation that the economic value of their identified collateral will be available primarily to them in a default scenario. The coercive nature of cramdown makes the quality of minority protection especially important. From that perspective, the amended framework may preserve the formal right to dissent while significantly diminishing the practical value of that choice.

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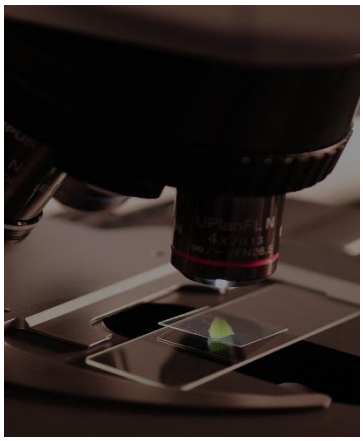

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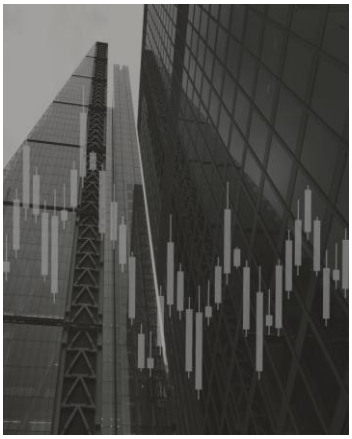

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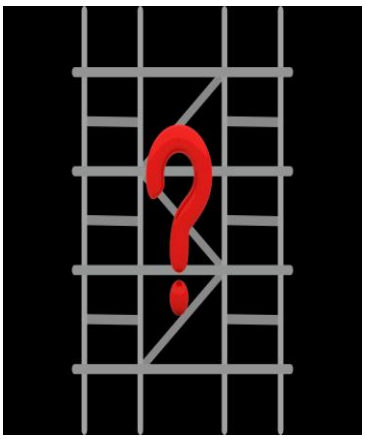

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