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Submitted By

[Anand Mani Tewari]

[UNIVERSITY ROLL NO. 1200990004]

School of Legal Studies

UNDER THE GUIDANCE

OF

[Dr. Gunjan Srivastava]

[Assistant Professor]

School of Legal Studies

BBD UNIVERSITY

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CERTIFICATE

This is to certify that the dissertation titled, "Insolvency and Bankruptcy Code: A Study" is the work done by **Anand Mani Tewari** under my guidance and supervision for the partial fulfilment of the requirement for the Degree of **Master of Laws** in School of Legal Studies Babu Banarasi Das University, Lucknow, Uttar Pradesh.

I wish him success in life.

Date: August 3, 2021
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-Dr. Gunjan Srivastava
Assistant Professor,
SoLS, BBDU

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Anand Mani Tewari
Roll No. 1200990004
L.L.M. (2020-21)
(Corporate& Commercial Law)

Chapter 1: Introduction to Insolvency Law and Its Historical Underpinnings

In India, the beginning of insolvency regime can be traced to the Britishers. It was Sec.23 and Sec.24 of the Government of India Act 1800, through which insolvency jurisdiction came to be conferred upon the Courts.

The first step in establishing insolvency law regime in the country was the enactment of the Indian Insolvency Act 1848. However, soon realization dawned that the 1848 Act was not enough to cure the malady. Later on, Presidency Towns Insolvency Act 1909 and Provincial Insolvency Act 1920 came to be enacted. As the name suggests, while the former dealt with Presidencies, the latter dealt with areas of British India lying outside Bombay, Calcutta and Madras Presidencies. Though the provisions of the two enactments are quite similar, yet their area of application varied significantly.

In the Indian Constitution, the distribution of powers between the Centre and the States, has been delineated in the Seventh Schedule. The entry pertaining to insolvency can be traced to the Concurrent List. Prior to the present I&B Code, insolvency of companies was sought to be regulated through two enactments: (1) Companies Act (2) SICA

Transformation in Insolvency Regime

The advent of globalization has ensured that India now occupies centre-stage in economic progress. Inflow of foreign capital in humongous amounts has ensured that Indian policy-makers modify the regulatory landscape in a manner that is in tune with international standards.

The Origins

Sickness in Indian industry can be traced to structural factors and had begun even before the nation had attained independence.

To ameliorate the situation, Mrs. Indira Gandhi’s government took drastic step of nationalising the banks.

The RBI took upon itself the responsibility of studying the genesis of the problem and accordingly constituted the Tandon Committee in 1975.

This was followed by constitution of H.N.Ray committee in 1976.

This was followed by setting up of Tiwari Committee in 1981. The remit of the Committee was to lay down a special law that would tackle the problem of industrial sickness and take measures to ensure revival of the same.

The Tiwari Committee examined the problem threadbare and made a set of recommendations. It underscored the need for a new law. Accordingly, Sick Industrial Companies Act was enacted in 1985. It also suggested setting up of a quasi-judicial body. Accordingly, BIFR was set up in 1987.

Eradi Committee

The government set up a committee under the chairmanship of Justice Eradi. The terms of reference of the Committee were to identify changes that were required in the law relating to winding up of companies, the overall objective being to usher in transparency and ensure that ultimate liquidation of companies was expedited. Justice Eradi committee was alive to the need for revival and rehabilitation of companies, and was conscious that liquidation was to be resorted to, only as a last measure. The Eradi Committee recommended vesting the powers in a new body, called as the NCLT and felt that High Court should be divested of the responsibility of winding up of companies as it had not proved itself upto the task.

The Committee noted with anguish that there were presently three institutions vested with the task of overseeing liquidation/revival and rehabilitation of companies i.e. the jurisdictional High Court, the Board of Company Law Administration and the Board of Industrial and Financial Reconstruction. There was enormous overlapping of function with disastrous consequences on their efficacy. The Committee also noted that in India it took close to 25 years fro winding up of a company.

Conclusions of NL Mitra Committee

The NL Mitra group recognized that tribunals are n integral part of civil law system, whereas India was a common law jurisdiction. However, the India Constitution, by

means of Art.323 and Art.323A had given sanctity to Tribunals as a potent means to dispense justice. The trend towards tribunalisation was attacked in the celebrated judgment of L. Chandrakumar vs. Union of India. The Supreme Court, in giving its imprimatur to the setting up of Tribunals cautioned that the Tribunal must be appropriately manned and should serve as bastions of justice dispensation. Further, the power of judicial review, which is part of the basic structure of the Constitution and which can be invoked by means of Art. 226 and 227 can not be scuttled.

JJ Irani Committee Recommendations

The Irani Committee's conception of an Insolvency Tribunal was that of an institution which had a supervisory role in the insolvency proceedings initiated qua the company. Further, an element of fairness ought to characterize the whole process, which should be based on commercial principles.

The personnel who would be required to man the Tribunal must be known for their technical competence, grasp of the law and impartiality.

Not only certain educational criterion must be prescribed qua the members, but arrangements must be made for their continuous training.

A mechanism must be put in place so that those interested can access court records, court hearings etc.

Institutional mechanism must be put in place to gauge the performance of the Tribunals at regular intervals, so that corrective measures may be taken, as and when the situation so demands.

A Tribunal which only pronounces judgments but does not have the wherewithal to implement it, is worthless.

Vishwanathan Committee Report

The origins of the Vishwanathan Committee can be traced to the speech of the Finance Minister in 2014, when he said that an insolvency and bankruptcy framework was the

need of the hour and the government intended to set up a committee to explore the possibility of enacting the same.

Salient Points of Committee Report

The objective guiding the Committee was that resolution of companies were to take place in a manner so that not much time rolled by and the loss incurred in recovery was comparatively less.

The Committee felt that multiplicity of laws in this space was an obstacle in speedy insolvency resolution. Consequently, it recommended repealing of Presidency Towns Insolvency Act and Provincial Insolvency Act. Further, to put in place a robust framework for insolvency resolution, it recommended amendment to SICA, RDDBFI Act, Companies Act and SARFAESI Act.

So as to attain insolvency resolution expeditiously, the Committee suggested setting up of a Committee of Creditors. In the said committee, creditors who had lent money to the corporate debtors would be members. Further, their vote power would be in proportion to the debt owed to them. The objective of the Committee, in the first instance would be rehabilitation of the Corporate Debtor and in that regard, negotiations, if required, were to take place with the Corporate Debtor.

Further, the Committee envisaged a dual situation for insolvency resolution process i.e. the process could be kick-started either by the debtor or the creditors.

Prior to the constitution of the Vishwanathan Committee, the legal position obtaining qua initiation of liquidation of a company was that only a financial creditor could apply for declaring a company as “sick”. It did so, as in lieu of the loan it had extended, it held assets of the corporate debtor as collateral security. However, the Vishwanathan Committee recommended that even those who had supplied goods and services to the company i.e. operational creditors too were entitled to start the insolvency resolution process.

During the time the insolvency resolution process was underway, the entire operation was to be managed by an Insolvency Resolution Professional. He was to be the supervisor of the operations of the company and custodian of its assets. He was to be a

qualified person, who would be granted a license to do so, by the proposed Insolvency and Bankruptcy Board of India.

The Committee had envisaged setting up of professional collective bodies of insolvency professionals. Such bodies were to operate in accordance with a code of conduct.

The Committee stressed upon the fact that insolvency resolution, if it were to be effective, must be completed within a stipulated timeframe. In any case, not more than 180 days was envisioned, for completion of insolvency resolution process. If, However, the process was complicated, then an additional period of 90 days could be granted. This could however be done only if 755 of the creditors concurred with the proposal of time extension.

The Committee was alive to the fact that a prominent causal factor in delaying of insolvency resolution process was the lack of data qua companies. To tackle this problem, the Committee proposed setting up of Information Utilities which was to serve as the repository of all data qua companies.

The Committee felt that given the canvas of activities that would take place with respect to insolvency and liquidation of companies, it was important that a regulator be set up. Accordingly, it recommended setting up of Insolvency and Bankruptcy Board of India. The Board was to frame regulations qua insolvency and liquidation. Further, it was also required to regulate insolvency professional entities and information utilities.

With respect to judicial fora, that would be the court of first instance for initiation of insolvency resolution process, and if this was not accomplished, the ultimate liquidation. The National Company Law Tribunal was proposed for companies and LLP and DRT for individuals.

The Timelines

Interim report was published in February 2015. Further, the Final Report was published in November 2015

The draft Insolvency and Bankruptcy Bill, which was prepared consequent to the recommendations of the Vishwanathan Committee was put in public domain by the Finance Ministry and comments were sought from the informed citizenry.

The IBC 2016 was introduced in Lok Sabha. It was then referred to the Joint Committee. The Joint Committee deliberated upon the same, and thereafter it was laid in Lok Sabha and Rajya Sabha.

The Code mustered the requisite support from both the Lok Sabha and Rajya Sabha members. Ultimately, it received President's assent and was notified in the Gazette.

Chapter2: Salient Features of the IBC Code 2016

The objective of the I&B Code is to consolidate the entire corpus of law pertaining to insolvency of individuals and companies. The objective being to maximize the value of assets and to promote entrepreneurship. The code covers within its ambit the insolvency of individuals, LLPs and companies.

The mechanism provided in the IBC for insolvency resolution of individuals and unlimited liability partnerships varies from that of companies and Limited Liability Partnerships. The Adjudicating Authority with respect to individuals and unlimited liability partnerships are Debt Recovery Tribunals. An appeal from Debt Recovery Tribunals shall lie to the Debt Recovery Appellate Tribunal. Further, in case of companies and LLP, the Adjudicating Authority would be the NCLT. Appeal from NCLT would lie to the NCL Appellate Tribunal.

Further, the IBC envisages the establishment of the Insolvency and Bankruptcy Board of India, which would serve as the regulator for (1) Insolvency professionals (2) Insolvency Professional entities (3) Information Utilities.

The IBC aims to regulate insolvency professionals, by developing a Code of Ethics to which they would be required to adhere to. Further, member who violate the code of professional ethics are liable to be proceeded against by the IBBI.

The IBC envisioned setting up of Information Utilities. The agencies would serve as the data bank of all information pertaining to financial data of companies. Apart from data pertaining to companies, the responsibility for collection of which is entrusted to Information Utilities, an individual insolvency database was also envisaged, wherein, data pertaining to individuals would be stored.

The Insolvency and Bankruptcy Code is premised on the belief that an endless insolvency resolution process would end up reviving the maladies, that the previous legal framework was afflicted with. Consequently, it proposed a 180 day period for

completion of IRP. In case, the process can not be completed within the said 180 day period, then it could be extended by another 90 day period. During this period, the management of the Corporate Debtor would be in the hands of the Insolvency Resolution Professional.

The Resolution Plan that would be prepared by the Insolvency Professional would be aimed at reviving the company. The said Plan, for it to succeed, would require the affirmative vote of at least 75% of the voters constituting the Committee of Creditors. Once the Resolution Plan gains the approval of the Committee of Creditors, it would be presented before the Adjudicating Authority (NCLT OR DRT). In the event, no Resolution plan finds approval of the Committee of Creditors of the Adjudicating Authority, then liquidation will be ordered by the NCLT.

However, for companies that are not comparatively large, a smaller time-frame has been stipulated to attain quicker resolution. Thus, the resolution has to be attained within 90 days, which can be extended by a further period of 45 days, if 75% of the financial creditors agree to such a proposal.

INSOLVENCY LAWS IN UK AND US

1. Regulatory Framework in UK

The Cork Committee in the U.K. had recommended the adoption of a consolidated insolvency law. Consequently, the Insolvency Act was enacted by the British Parliament in 1986. It provides for initiating insolvency resolution of companies and were that to fail, ultimate liquidation of companies. However, the over-arching objective continues to be the rescue of companies from bankruptcy by rehabilitating them. The Act takes within its fold, insolvency of both companies as well as individuals.

The companies that go into a financial tailspin are put into administration. If, however, the creditor or customer of the company approaches the court and obtains an order from the court mandating liquidation of the company, then the company necessarily will have to be liquidated.

There are three broad procedures envisaged in the Insolvency Act 1986, with the objective of reviving a company: Company Arrangement, Administration, Administrative Receivership.

In a Company Voluntary Arrangement, the company which is in dire financial straits attempts to arrive at an arrangement with its creditors. Such an agreement is binding in nature.

The second option is that of “administration”. In this, and administrator is appointed, who is entrusted the task of preparing and putting forward proposals for revival of the company. During this time, the creditors cannot proceed against the assets of the company.

The third option envisaged in the Insolvency Act 1986, is that of Administrative Receivership. In this, a receiver is appointed by the creditors. The responsibility of the receiver is to ensure that the debts owed by the corporate debtor to the creditor are cleared.

US Bankruptcy Laws

TheEnglishbankruptcysystemwasthemodelforbankruptcylawsintheEnglishcoloniesinAmericaandinthe American states after independence from England in1776.

Early American bankruptcy laws were only available to merchants and generally involved imprisonment until debts were paid or until property was liquidated or creditors agreed to the release of the debtor. The laws were enacted by each individual state and were inconsistent and discriminatory. For example, the laws and courts of one state might not enforce debts owed to citizens of other states or debts of certain types. The system was not uniform and some states became known as debtor’s havens because of their unwillingness to enforce commercial obligations.

The lack of uniformity in bankruptcy and debt enforcement laws hindered business and commerce between the states. The United States Constitution as adopted in1789 provides in Article I, Section8, Clause4 that the states granted to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States.

However, until 1898 there was no bankruptcy law in continuous effect in the United States. The Congress enacted temporary bankruptcy statutes in 1800, 1841 and 1867 to deal with economic downturns. However, those laws were temporary measures and were repealed as soon as economic conditions stabilized. The Act of 1800 was

repealed in 1803. The Act of 1841 was repealed in 1843 and the Act of 1867 only lasted until 1878.

These early laws only permitted merchants, traders, bankers and factors to be placed in bankruptcy proceedings. The Acts of 1800 and 1841 vested jurisdiction in the federal district courts. The district court judges were given the power to appoint commissioners or assignees to take charge of and liquidate a debtor's property.

A permanent bankruptcy statute was not enacted until 1898. The National Bankruptcy Act of 1898 was based uponthe liquidation of a debtor's non-exempt assets to pay creditors. In 1938 the law was amended to provide for the rehabilitation or reorganization of a debtor as an alternative to liquidation of assets. The Bankruptcy Act of 1898, together with its amendments, was known as the Bankruptcy Act. Under the Bankruptcy Act, the district court had jurisdiction over bankruptcy cases, but could appoint a referee in bankruptcy to oversee the administration of bankruptcy cases, the allowance of claims and the distribution of payments to creditors. The Bankruptcy Act governed bankruptcy in the United States for 80 years.

After a series of critical studies and review of the then existing law and practice, Congress passed the Bankruptcy Reform Act of 1978.

Since 1978

The US Congress enacted the "Bankruptcy Code" in 1978. The Bankruptcy Code, which is codified as title 11 of the United States Code, has been amended several times since its enactment. It is the uniform federal law that governs all bankruptcy cases.

The procedural aspects of the bankruptcy process are governed by the Federal Rules of Bankruptcy Procedure (often called the "Bankruptcy Rules") and local rules of each bankruptcy court. The Bankruptcy Rules contain a set of official forms for use in bankruptcy cases. The Bankruptcy Code and Bankruptcy Rules (and local rules) set forth the formal legal procedures for dealing with the debt problems of individuals and businesses.

Six basic types of bankruptcy cases are provided for under the Bankruptcy Code.

- Chapter 7 bankruptcy leading to liquidation. In this type of bankruptcy, a court-appointed trustee or administrator takes possession of any nonexempt assets, liquidates these assets (for example, by selling at an auction), and then uses the proceeds to pay creditors.
- Chapter 9, entitled Adjustment of Debts of a Municipality, provides essentially for reorganization. Only a"municipality"mayfileunderchapter9,which includes cities and towns, as well as villages, counties, taxing districts, municipal utilities, and school districts.
- Chapter11entitledReorganization,ordinarilyisusedbycommercialenterprisesthatdesiretocontinue

  Operating a business and repay creditors concurrently through a court-approved plan of reorganization.
- Chapter12 allows a family farmer or fisher man to continue to operate the business while the planis

  being carried out.
- Chapter13 enables individuals with regular income to develop a plant or epayallorpart of their debts. Under this chapter, debtors propose a repayment plan to make installments to creditors over three to five years.
- Chapter15istoprovideeffectivemechanismsfordealingwithinsolvencycasesinvolvingdebtors, assets, claimants, and other parties of interest involving more than one country.

The words "Insolvency" and "Bankruptcy" are generally used interchangeably in common parlance but there is a marked distinction between the two. Insolvency and bankruptcy are not synonymous.

The term **"insolvency"** notes the state of one whose assets are insufficient to pay his debts; or his general inability to pay his debts. The term "insolvency" is used in a restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business.

The word "**bankruptcy"** the condition of insolvency. It is a legal status of a person or an entity who cannot repay debts to creditors. The bankruptcy process begins with filing of a petition in a court or before an appropriate authority designated for this purpose. The debtor's assets are then evaluated and used to pay the creditors in accordance with law.

Therefore, while insolvency is the inability of debtors to repay their debts, the bankruptcy, on the other hand, is a formal declaration of insolvency in accordance with law of the land. Insolvency describes a situation where the debt or is unable to meet his/her obligations and bankruptcy occurs when a court determines insolvency, and gives legal orders for it to be resolved. Thus insolvency is a state and bankruptcy is the conclusion.

The term insolvency is used for individuals as well as organisations/corporates. If

insolvency is not resolved, it leads to **bankruptcy** in case of individuals and **liquidation** in case of corporates.

Liquidation, on the other hand, in its general sense, means closure or winding up of an corporation or an incorporated entity through legal process on account of its inability to meet its obligations or to pay its debts. In order to clear the indebtedness, the assets are sold at the most reasonable rates by a competent liquidator appointed in this regard.

Historical Developments of Insolvency Laws in India

The law of Insolvency in India owes its origin to English law. India being a colony of the United Kingdom, followed the English insolvency system. In India, the earliest provisions relating to insolvency can be traced to sections 23 and 24 of the Government of India Act, 1800. These sections conferred insolvency jurisdiction on Supreme

Court at Fort Williams (Calcutta), Madras and Recorder's Court at Bombay as the need for an insolvency law was first felt in Presidency Towns of Calcutta, Bombay and Madras where the British majorly carried on their trade. These Courts were empowered to make rules and grant relief to insolvent debtors.

Later insolvency courts were established in the Presidency-towns whenStatute9(Geo.IVc.73)was passed in 1828.This Act of 1828 marks the beginning of special insolvency legislation in India. The insolvency court had a distinct existence although the court was presided over by a Judge of the Supreme Court. The Act of 1828 was originally intended to remain in force for a period of four years but subsequent legislation extended its duration up to 1848. The Provisions of the Indian Insolvency Act was passed in 1848 and remained in force until the enactment of the Presidency Towns Insolvency Act ,1909. Later Provisional Insolvency Act was passed in 1920.

Under the Constitution of India 'Bankruptcy & Insolvency' is provided in Entry 9 of List III (Concurrent List) in the Seventh Schedule to the Constitution. Hence both the Centre and State

Government committees on bankruptcy reforms

Various committees were constituted from time to time by the Government to review the existing bankruptcy and insolvency laws in India. These committees analysed the laws and suggested reforms to bring the law in tune with ever evolving circumstances. Following is a snapshot of various committees constituted along with the outcome.

The Insolvency and Bankruptcy Code, 2016 is one of the biggest economic reforms which provides a uniform and comprehensive insolvency legislation covering corporates, partnerships and individuals (other than financial firms).The Code gives both the creditors and debtors the power to initiate proceeding. It has helped India achieve a historic 30-spot jump in the ease of doing

Chapter 3: Objects and Aims of the IBC Code 2006 And Its Relevance in Present Day Business Scenario

Aims of the Insolvency and Bankruptcy Code, 2016

The aims of the Insolvency law are the following:

1. The IBC aims at codifying the law, which was previously spread across disparate statutes, into one law that would deal with insolvency, reorganization of corporate entities as well as individuals.
2. The IBC also aims at ensuring that rehabilitation of companies through the CIRP process takes place in a well-defined time-limit, so that the object of the Code does not get frustrated.
3. The Code aims at attaining the maximum amount from the sale of assets, consequent to the company entering into liquidation.
4. The Code aims at ensuring that businesses are willing to take risks and the spirit of entrepreneurship is not dissipated.
5. The Code aims at ensuring that the flow of credit is not interrupted in any manner, as credit is the life blood of business and also to ensure that expansion of business is

facilitated.

6. The Code aims at ensuring that the outstanding debts of the government are paid off al also that of other stakeholders.
7. The Code also enjoins that the IBBI may stipulate the procedure to govern issues in future that may arise.

The Insolvency statute comprises of 255 sections, as originally enacted. These sections are classified into 5 parts. While part 2 focuses on insolvency resolution of corporate entities, Part3 focuses on insolvency resolution of partnerships and individuals. Part 4 lays down the regulatory framework for insolvency professionals, insolvency professional entities and information utilities. Part 5 deals with miscellaneous matters alone. Further, close to 11 schedules have been annexed to the Code.

Salient Features of IBC

1) It is a unique enactment in that it provides the statutory framework for insolvency resolution of individuals, partnerships (whether of limited liability or unlimited liability) and companies. The provisions pertaining to insolvency resolution and bankruptcy qua individuals, are yet to be notified by the Central Government. However, financial companies are excluded from the scope of this legislation.
2) The law, envisages setting up of a regulator and a slew of distinct entities to aid in insolvency resolution process. The regulator envisaged is IBBI. Apart from IBBI, the Act envisages the institution of Insolvency Professionals, a collective of IPs known as Insolvency Professional Entities and Information Utilities.

3) The class of Insolvency Professionals as envisaged in the Act are to serve as the mainstay of the Act, and would serve as intermediaries in carrying out the purposes of the Act. They are expected to be endowed with minimum professional qualifications and to adhere to a code of ethics and professional conduct.
4) The Insolvency Professional is endowed with a slew of functions by virtue of the framework of the Act. Upon acceptance of the petition by the Adjudicating Authority i.e. the NCLT, the Insolvency Professional is appointed and he looks after the assets of the Corporate Debtor. He forms the Committee of Creditor, ensures that the Resolution Plan attains approval and during the currency of the moratorium is tasked with the additional responsibility of running the company. Regulations have been framed by the IBBI to regulate the functioning of Insolvency Professionals.
5) While the Insolvency Professionals form the lynchpin of the entire Insolvency Resolution process, their functioning is facilitated by the ready availability of accurate financial data with respect to the Corporate Debtor. Collection of the latter and building a databank is the function of Information Utility, as envisaged in the Code. The IBBI has formulated Regulations for governing the Information Utilities as well.
6) An independent regulator has been set up for the sector, known as IBBI. The regulator not only lays down regulations for IP, IU, IPE but also regulates the Valuer. The Board of the IBBI comprises representatives from the Central Government and RBI.
7) For initiation of insolvency resolution process, two sets of forums have been envisaged in the Code. While for individuals and partnership firms, the forum envisaged is Debt Recovery Tribunal, whereas for companies and LLP, the forum envisages for initiation of insolvency resolution process is NCLT.

Appeal from DRT would lie to the Debt Recovery Appellate Tribunal and thereafter to the Supreme Court. Similarly, appeal from NCLT would lie to the NCLAT and thereafter to the Supreme Court. In the event, insolvency resolution does not work, triggering of liquidation proceedings is the only option available.

8) A creditor is entitled to kick-start the corporate insolvency resolution process in the event of default exceeding Rs. 1crore. Previously, the limit was Rs. 1 lakh, however the same was enhanced by way of an amendment. So far as individuals and unlimited partnerships are concerned, the insolvency resolution process can be initiated if the default is above Rs. 1000.

9) While the first objective of the Code remains resolution and ultimate rehabilitation, however in the event the same cannot be attained, liquidation is perforce resorted to wherein the assets of the corporate debtor are liquidated to pay off the creditors (both secured and unsecured)

10) So far as individuals and unlimited partnerships are concerned, there are two processes envisaged under the Code i.e. Fresh Start process, akin to a new beginning and Insolvency Resolution.

11) In the Fresh Start Process, individual debtors who approach the Debt Recovery Tribunal are entitled to a waiver of their debt subject to a limit of Rs.35000. However, the said waiver is available, subject to certain terms and conditions.

12) In case of corporations, the insolvency resolution process may be initiated by the operational creditor or financial creditor. An operational creditor is one who supplied goods and services to the corporate debtor. A financial creditor is one who has loaned funds to the corporate debtor in lieu of interest/consideration. Further, the corporate debtor can on its own initiative, kick-start the corporate insolvency resolution process. First, the Adjudicating

Authority, which in the case of a corporate debtor, is the National Company Law Tribunal, has to be approached.

However, in case of an individual or partnership with unlimited liability the procedure varies, in that, first the Debt Recovery Tribunal will have to be approached with a Resolution Plan. Under the terms of the resolution plan, the debtor undertakes to pay off the creditor. The plan is binding on both the parties, that in the event of failure on the part of the debtor to honour it, the same may entitle the creditor to approach the DRT again for a bankruptcy order.

13) The biggest merit of the Code is that it ensures that insolvency resolution takes place within a stipulated timeframe. Thus 180-day time-limit is set for CIRP, and in the event the same cannot be adhered to, a 90-day extension is envisaged and no more. If however, a resolution plan is not able to attain approval of the NCLT or DRT, then the liquidation proceeding would be kick-started.

14) The manner in which proceeds generated from sale of assets of the corporate debtor were to be distributed, underwent a change in the IBC. The order in which payment is to be made are as follows:

(a) The expenses incurred qua the resolution of the company would be reimbursed first along with the remuneration payable to insolvency professional.

(b) The outstanding dues of the workers and of the secured creditors.

(c) The outstanding wages of the employees.

(d) Unsecured creditors

(e) Shareholders

Chapter4: Corporate Insolvency Reolution Process

1. ***Creditors –***

The insolvency law regime envisages two situations, where resolution process of a company may be initiated: it can be started by any of the creditor, whether financial or operational, or it can be started by the company itself, known as the Corporate Applicant

A Corporate Debtor may owe funds to two types of creditors, as envisaged under the IBC viz. operational creditors and financial creditors.

Operational creditors are regarded as those who have supplied goods and services to the company and whose dues remain unpaid. However, the rider is that for operational creditors to start insolvency process, the debt must be undisputed. Similarly, an employee or employees who have worked for the company and whose remuneration remains unpaid qualify as operational creditors.

Financial creditors, in terms of IBC, lend money to the company in lieu of a consideration, and whose dues remain unpaid. There is no question of any

dispute with regard to the dues of financial creditors. The Code, places the Financial Creditors on a higher pedestal qua the Operational Creditors. The Supreme Court, following the judgment in Pioneer Urban case, has held that homebuyers too would be regarded as financial creditors qua real estate companies.

The IBC is a potent tool in the hands of the creditors. Upon a corporate debtor committing a default of Rs. 1 crore or more (previously the limit was Rs. 1 lakh, however, it has now been raised to Rs. 1crore), the creditor can approach the NCLT by filing an application under Section 7 of IBC. The NCLT, upon being satisfied about the completeness of the application, and genuineness of the claim, may proceed to admit the application. Once the application is admitted, the CIRP starts and moratorium on claims of the creditors against the assets of the company is ignited. With respect to default by a real estate company, 10% of the allottees or 100 homebuyers may approach the NCLT to start CIRP.

While, in case of an insolvency application by a financial creditor, the going is pretty smooth and straight, in case of Operational Creditors, it has to first serve a Demand Notice upon the Corporate Debtor demanding payment of the debt. Upon receipt of the notice, the Corporate Debtor may object to the claim and raise a dispute. If, however, the notice remains unanswered and the debt is also not discharged by the Corporate Debtor, then the Operational Creditor can approach the Adjudicating Authority i.e. the NCLT, for initiating the CIRP. The NCLT, after satisfying itself about the completeness of documents, proof of claim may either admit or reject the application.

2.Corporate Applicant –

The IBC provides two distinct routes for initiation of insolvency resolution process. While the first is the oft-treaded route i.e. by the creditors, the second is by the Corporate Debtor itself. The Corporate Debtor when it itself applies for insolvency resolution, is known as Corporate Applicant. Upon default by the Corporate Debtor, and a subsequent special resolution passed by the company, an application for kicking-off the CIRP may be filed before the NCLT. In case of a LLP, three-fourth of the partners must consent to the same.

Steps involved in the Corporate Insolvency Resolution Process –

The statutory provisions in this regard, namely Section 59 which deals with voluntary liquidation of corporate persons may, at the outset be noted:

"(1) A corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of this Chapter.

(2) The voluntary liquidation of a corporate person under sub-section (1) shall meet such conditions and procedural requirements as may be specified by the Board.

(3) Without prejudice to sub-section (2), voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions, namely:—

(a) a declaration from majority of the directors of the company verified by an affidavit stating that—

(i) they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and

(ii) the company is not being liquidated to defraud any person;

(b) the declaration under sub-clause (a) shall be accompanied with the following documents, namely:—

(i) audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;

(ii) a report of the valuation of the assets of the company, if any prepared by a **registered valuer**;

(c) within four weeks of a declaration under sub-clause (a), there shall be—

(i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or

(ii) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator:

Provided that the company owes any debt to any person, creditors representing two thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

(4) The company shall notify the Registrar of Companies and the Board about the resolution under sub-section (3) to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

(5) Subject to approval of the creditors under sub-section (3), the voluntary liquidation proceedings in respect of a company shall be deemed to have commenced from the date of passing of the resolution under sub-clause (c) of sub-section (3).

(6) The provisions of sections 35 to 53 of Chapter III and Chapter VII shall apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary.

(7) Where the affairs of the corporate person have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate person.

(8) The Adjudicating Authority shall on an application filed by the liquidator under sub-section (7), pass an order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

(9) A copy of an order under sub-section (8) shall within fourteen days from the date of such order, be forwarded to the authority with which the corporate person is registered."

Corporate Insolvency Resolution Process is multi-staged in nature, and the various steps right upto the acceptance of the Resolution Plan are as follows –

Moratorium

No sooner, an insolvency application is filed by a financial creditor before the Adjudicating Authority i.e. the NCLT, the moratorium can be said to have started.

The legal effect of the said moratorium is that any suit or legal proceeding lodged against the corporate debtor is injuncted. However, companies supplying essential goods or services to the Corporate Debtor are not allowed to terminate their supply. But companies supplying non-essential goods or services may do so, if they so wish to. Further, Interim Resolution professional is appointed.

Interim Resolution Professional

It is quite possible that the Interim Resolution Professional proposed by the Committee of Creditors may find approval of the Adjudicating Authority i.e. National Company Law Tribunal. In case, no suggestion has been made by the Committee of Creditors or the Interim Resolution Professional proposed by the Committee of Creditors is unacceptable to the Adjudicating Authority i.e. the National Company Law Tribunal, then in that event, the Insolvency and Bankruptcy Board of India may be directed by the National Company Law Tribunal to propose an Insolvency Professional. The Insolvency and Bankruptcy Board of India keeps a list of Insolvency Professionals with it from which Insolvency Professionals are drafted to work as Interim Resolution Professionals.

Once the National Company Law Tribunal admits the Insolvency Application, it proceeds to issue an advertisement through which prospective bidders for the assets of the company are required to submit their bids. The prospective bidders are required to submit a plan for the revival/rehabilitation of the Corporate Debtor, which will be examined by the Committee of Creditors with respect to its pros and cons. It may be

noted that the Committee of Creditors is comprised only of Financial Creditors. It would be worthy to note that once the Insolvency petition is admitted in the Adjudicating Authority i.e. the National Company Law Tribunal an Interim Resolution Professional is appointed (either the one that is proposed by the Committee of Creditors or the one suggested by Insolvency and Bankruptcy Board of India) the incumbent Board of Directors is divested of the management of the company and it vests thereafter in the hands of the Interim Resolution Professional. Henceforth, the efficient running of the Corporate Debtor is the sole responsibility of the Interim Resolution Professional.

Further, Section 60 of the Insolvency and Bankruptcy Code may also be noted in this regard:

"[(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process

or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of--

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.]"

Committee of Creditors –

When the first meeting of the Committee of Creditors is convened, the first order of business for it, is to, either retain the Insolvency Resolution Professional as Insolvency Professional or opt for the one suggested by Insolvency and Bankruptcy Board of India. The Insolvency Professional is required to collate the claims of the creditors, conduct the meeting of Committee of Creditors, preparing the Information Memorandum that contains the data qua the financial position of the Corporate Debtor, so that the Resolution Applicant gets a fair idea of the financial status of the Corporate Debtor. The Committee of Creditors is not under any obligation to continue with the Interim Resolution Professional or the one suggested by the Insolvency and Bankruptcy Board of India. It may instead appoint another Insolvency Professional.

As per Section 28 of Insolvency and Bankruptcy Code, important decisions taken by the Committee of Creditors pass muster only when 66% give their consent. Such decision would include getting finance so that Corporate Insolvency Resolution Process goes unhindered, changes brought about in the capital structure, for entering into any related party transaction. The tasks mentioned in Section 28 if taken, by the Resolution Professional without the consent of the Committee of Creditors, would be null and void.

It may be noted that the Resolution Plan submitted before the Committee of Creditors would be considered to have been passed only when creditors holding 75% of the debt give their assent.

It may be noted that initiation of CIRP is not an irreversible process in that, the creditors holding 90% of the debt constituting the Committee of Creditors may withdraw from the Corporate Insolvency Resolution Process, after obtaining approval of the Adjudicating Authority i.e. the National Company Law Tribunal.

Ineligibility of the Resolution Applicant –

Section 29A provides that certain categories of persons are not eligible to submit a Resolution Plan. These include, an insolvent person, a wilful defaulter who has done so knowingly, the promoter of corporate debtor, or a person who was involved in managing the corporate debtor for the past one year. It may be noted that such prohibition was originally not a part of the Insolvency and Bankruptcy Code, however, it was inserted by an amendment later on, so as to prevent unscrupulous persons from somehow gaining control over the company who were earlier responsible for running the company to the ground in the first place. Consequent to this request, inserted by way of an amendment, a prospective Resolution Applicant is required to submit, along with the Resolution Plan, an affidavit espousing that he is eligible to submit the Resolution Plan and is not rendered ineligible in terms of the provisions of the Code.

Waterfall Mechanism

The Insolvency and Bankruptcy Code is unique in that it puts in place a pecking order, in which the outstanding claims against the corporate debtor are to be honoured. The Insolvency and Bankruptcy Code has termed it as waterfall mechanism, and the claims are honoured accordingly.

As stated earlier, the liquidation of the Corporate Debtor may take place either voluntarily or upon the failure of the Corporate Insolvency Resolution Process. The Waterfall mechanism, as envisaged in the Code, is nothing but an order of precedence

according to which the proceeds realized from the sale of assets of the company are to be distributed. In contrast to liquidation by way of sale of assets, in Corporate Insolvency Resolution Process, the successful Resolution Applicant invariably invests a substantial amount of funds which then is distributed as per the Waterfall mechanism among the various creditors in a particular order of precedence. This helps in preventing abuse of process.

According to Section 53 of the Code, the waterfall mechanism is as follows (starting from the topmost priority and the boxes at the same level shall rank equally amongst themselves) –

It is pertinent to be noted that the costs incurred in conducting the CIRP, like the fees payable to the RP, interim finance raised by the RP, amounts due to the suppliers of essential goods and services, etc. and similarly the costs incurred in conducting liquidation like the fees payable to the liquidator attain the top most priority in distribution of proceeds. Likewise, the owners of the corporate debtor or the equity and preference shareholders attain the least priority in such a distribution.

Fast track corporation insolvency resolution process

According to Section 55 of the Insolvency and Bankruptcy Code, 2016, a corporate insolvency resolution process carried out in accordance with this Chapter IV of Part II of the Code shall be called as fast track corporate insolvency resolution process.

An application for fast track corporate insolvency resolution process may be made in respect of the following corporate debtors, namely: -

- A corporate debt or with assets and income below a level as may be notified by the Central Government;

  or

- A corporate debt or with such class of creditors or such amount of debt as may be notified by the Central

  Government; or

- such other category of corporate persons as may be notified by the Central Government.

Time period for completion of fast track corporate insolvency resolution process

Section 56(1) provides that subject to the provisions of sub-section (3), the fast track corporate insolvency resolution process shall be completed within a period of ninety days from the insolvency commencement date.

Section 56(2) states that the resolution professional shall file an application to the Adjudicating Authority to extendtheperiodofthefasttrackcorporateinsolvencyresolutionprocessbeyondninetydaysifinstructedtodo sobywayofaresolutionpassedatameetingofthecommitteeofcreditorsandsupportedbyavoteofseventy- five per cent. of the voting share.

As per Section 56(3) on receipt of an application under sub-section(2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that fast track corporate insolvency resolution process cannot be completed within ninety days, it may, by order, extend the duration of such process beyond the said

period ninety days by such further period, as it thinks fit, but not exceeding forty-five days.

It may be noted that any extension of the fast track corporate insolvency resolution process under this section shall not be granted more than once.

In this regard, Section 61 of Insolvency and Bankruptcy Code may be noted:

"Section 61 : Appeals and Appellate Authority

(1) Notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed **within thirty days** before the National Company Law Appellate Tribunal:

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.

(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:-

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.

(4) An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order."

Manner of initiating fast track corporate insolvency resolution process

According to Section 57 of the Code, an application for fast track corporate insolvency resolution process may

be filed by a creditor or corporate debtor as the case may be, along with-

- the proof of the existence of default as evidenced by records available with an information utility or such

  other means as may be specified by the Board; and

- such other information as may be specified by the Board to establish that the corporate debtor is eligible for fast track corporate insolvency resolution process. Manner of initiating fast track corporate insolvency resolution process.

Pre-pack Insolvency Resolution Process

Recently, by means of an ordinance promulgated on April 4, 2021, the Insolvency and Bankruptcy Code came to be amended in a significant manner. By means of the Ordinance, a special resolution process for Micro, Small and Medium Enterprises is envisaged. It is known as Pre-packaged Insolvency Resolution Process (PIRP for short). The distinction between PIRP and CIRP is that while CIRP can be kick-started by either the creditor or debtor, while PIRP can be started by the debtor alone. Further, at the time of starting of PIRP, the corporate debtor must have prepared a Base Resolution Plan, for the purpose of revival of the company. The important distinction between CIRP and PIRP is that while in the former, the incumbent Board of Directors gets suspended and the management of the company gets transferred to the hands of the Resolution Professional, in the latter, the running of the company continues to vest in the hands of the current management and it is not divested of it. In

other words, pre-packaged insolvency resolution process opts for debtor-in-possession route.

A Corporate Debtor, may initiate the pre-packaged insolvency resolution process in case of default of Rs. 1 lakh. However, this limit may be enhanced by the Central government by means of a notification, subject to an upper limit of Rs.1 crore.

At this point, only Micro, Small and Medium Enterprises are entitled to initiate the PIRP. Such MSME, must be so, as per the provisions of the MSME Act 2006. As per the MSME Act 2006, an enterprise to qualify as MSME must have an annual turnover of Rs. 250 crore or plant and machinery of upto Rs. 50 crores. In case the aforesaid limits are exceeded, it ceases to be a MSME in terms of the 2006 Act and would not therefore be entitled to embrace the PIRP process. In case of PIRP, the corporate debtor has to apply to the National Company Law Tribunal, the Adjudicating Authority designated in the Act. Further, the NCLT may either accept or reject the said application.

While the PIRP may be initiated by the corporate debtor itself, the company has to first submit the Base Resolution Plan to the Committee of Creditors for approval. If members holding 66% or more of the debt, acquiesce to the said Plan, then the NLT may be approached. Further, the debtor is also required to propose a Resolution Professional. The name of the said Resolution Professional must be approved by 66% or more of the Committee of Creditors.

After the process of PIRP is started, the corporate debtor is expected to submit the Base Resolution Plan to the Resolution Professional within two days. Further, this will lead to setting up of a Committee of Creditors. The said Committee of Creditors will consider the Base Resolution Plan. The Committee may also request the corporate debtor to revisit the Plan. The Resolution Professional has also the discretion of inviting the Resolution Plans from other debtors. The Resolution Professional may choose to adopt this route, if the Base Resolution Plan does not find

favour with the committee or the base resolution plan as envisaged, is not able to honour the debts of the operational creditors. Operational Creditors are those who have supplied goods and services to the company.

As soon as the PIRP is kick-started, a moratorium is imposed, during which, initiating certain types of actions are strictly prohibited. Such actions include filing or continuation of suits, taking action for recovery of property and execution of orders of the Court. In PIRP, ideally the management of the company continues to vest with the management of the corporate debtor. However, if the management is involved in perpetration of fraud, then the management would vest in the hands of the Resolution Professional.

After the initiation of PIRP and prior to acceptance of the Resolution Plan, if the Committee of Creditors feels that the PIRP need to be terminated, it may proceed to do so. It may further opt for CIRP, provided 66% of the Committee of Creditors are agreeable to the same.

It must be remembered that pre-packaged insolvency resolution process is more or less in accordance with the PIRP framework suggested by the Insolvency Law Sub-Committee in 2020, with the difference that while PIRP as promulgated is available only to MSME, as defined in MSME Act 2006, the Sub- Committee had suggested bringing all corporate debtors within its ambit.

The PIRP has been specifically developed for MSME, in view of the special needs, during pandemic times, and the need to attain expedition.

For invocation of the PIRP process, the Central Government has stipulated a minimum threshold of Rs. 10 lakhs.

The reason why PIRP was felt necessary is because it combines both formal and informal process. It combines the speed that is generally characteristic of an informal process with the binding nature of a formal process. Most of the actions that are

integral part of an insolvency resolution process, are completed even before the exercise is sought to be started at the Adjudicating Authority (NCLT)

At the outset, it may be noted that PIRP may be initiated only if three-fourth of the members pass a resolution to that effect. This is followed by the preparation of a Base Resolution Plan. Further, the Plan is required to be filed with the Adjudicating Authority, along with declaration of the Board of Directors certifying the fact that:

(a) That PIRP application shall be filed within 90 days

(b) The PIRP is not being started with the purpose of perpetrating a fraud.

(c) The particulars of the Resolution Professional intended to be appointed.

(d) The nomination process has attained completion.

As per the Pre-packaged Insolvency Resolution Process, the corporate debtor is expected to convene a meeting of the Financial Creditors, in which approval with respect to the following will be sought from the Financial Creditors:

(a) 66% or above of the Financial Creditors must give their consent to the application. Further, even before the approval of the Committee of Creditors is sought, the debtor is expected to provide the following to the Financial Creditors: (1) Declaration (2) Base Resolution Plan.

Further, in the event the Corporate Debtor has not contracted any financial debt, then the Corporate Debtor would be required to obtain the consent of the Operational Creditors. The said consent may be obtained by convening a meeting of the Operational Creditors. The said consent may be obtained by convening a meeting of Operational Creditors.

Declaration of Moratorium and Appointment of Resolution Professional

Once the insolvency application gets admitted in the NCLT, it shall proceed to declare a moratorium. It may also be noted that PIRP excludes the application of Sec. 14(3) of the IBC. It may be fruitful to recall that Sec. 14(3) of IBC stipulates that

during the period of moratorium, the supply of goods and services of essential nature will not be brought to an end.

Chapter 5: Intertwining of GST and IBC - A Critical Analysis

Insolvency is indeed a black-swan event in the life of a company. When a company goes belly-up, the ramifications are wide and impact all. The government while

formulating the IBC attempted to foresee the challenges that would arise in the event of liquidation of a company. However, it seems that the intertwining of IBC and GST seems to have missed the radar of the Government, and it is to that we now turn.

The companies are in a quandary because of Section 39(10) of the CGST Act. Due to the conflict between the provisions of IBC and Sec.39 (10) of CGST Act, the companies are constrained to knock on the doors of the Court.

Sharing of proceeds as envisaged under the IBC

The IBC has laid down elaborate provisions regarding the distribution of proceeds in the event of winding up of a company. In the event of a company going insolvent, the liability would exceed the assets. The liquidator is responsible for selling the assets at maximum realizable value and then distributing the proceeds as per the provisions of the IBC. Further, in case a company is sold, on a going concern basis, the Liquidator who is an Insolvency Professional, continues to be responsible for paying off the liabilities, as the buyer only purchases the assets.

The IBC was introduced as a result of the report of the Banking Law Reform Committee. It has been amended on numerous occasions.

A conflict exists between the provisions of IBC and CGST Act. The conflict is on these lines: When an application for insolvency is admitted in the NCLT, a moratorium kicks in, and creditors are forbidden from making any claims on the assets of the company.

However, Sec.39 (10) of CGST Act provides that a registered dealer will not be permitted to file GST returns for the current year, if he is also not filing simultaneously, the outstanding returns of the previous years. Further, Sec. 82 provides that tax will be the first charge on the assets of the company.

Herein lies the conflict. While the IBC talks of a moratorium and exempts the buyer from paying past dues, the CGST Act mandates that returns of current year will be accepted only when it is accompanied with returns of previous year.

The result is that many buyers have approached the Courts to resolve this irreconcilable conflict between the two central legislations.

Cross Border Insolvency:

The chapter initially studies the current insolvency regime which provides for Section 234 and 235 for dealing with the cross-border insolvency issues. The law has to be amended in order to provide a better resolution mechanism for the same. The Report as provided by the Insolvency Law Committee on Cross Border Insolvency has been examined in detail and the existing ambiguities have been highlighted.

AN ANALYSIS OF THE CROSS-BORDER INSOLVENCY AS PER THE INSOLVENCY AND BANKRUPTCY CODE (IBC), 2016 OF INDIA:

As per the provisions of the Code, the Central Government is allowed to enter into an agreement with any other Country by enforcing the cross border insolvency provisions of Code. *Section 234* provides for the mechanism for entering into such reciprocal agreements to deal with the such disputes. These agreements provide directions for matters related with the administration of the assets of the corporate debtor and the personal guarantor of the corporate debtor, situated at any country outside India with which such a reciprocal agreement is pre-existing.[1]

As per *Section 235*[2] the central government is empowered to enter into bilateral agreements to enforce the provisions of the Code. The Insolvency Professionals can issue letters to the Courts or to the adjudicating authorities

of those countries with which there reciprocal agreements existing to request actions against the defaulting debtor and to seek the required information in regard with the assets of the debtor located in that particular country.

These Sections lack to form an appropriate regime which will result in

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unpredictability. The Sections lack in providing clarity in the position of moratorium and the manner of resolving any deadlock between the foreign courts and domestic courts. There has to be cost reduction provided to the proceedings instituted under the Code and in the position of those countries wherein there are foreign creditors but no reciprocal agreement has been entered with that country.

THE REPORT ON INSOLVENCY LAW COMMITTEE ON CROSS BORDER INSOLVENCY:

The "*Report on Insolvency Law Committee on Cross Border Insolvency as published by Ministry of Corporate Affairs, Government of India"*[3] in October, 2018 provides for adoption of the Model Law in the IBC. It seeks to address the major issues that the Committee is facing in relation with the preliminary version of the Code which deals with cross-border insolvency. The relevant Section 234 and 235[4] do not comprehensively deal with the cross-border insolvency matters. Recommendations and modifications have been put forth by the Committee in adequately adopting the Model Law in the Indian Context. The proposed Draft Z has been examined below:

GENREAL PROVISIONS (Section 1- Section 6)

1. SCOPE OF APPLICATION OF THIS PART

The provisions of this Draft are applicable on all corporate debtors. This Code shall be invoked when the foreign and domestic proceedings are initiated against the same corporate debtor having assets located across several nations and claimants present in different jurisdictions. These proceedings may be instituted concurrently. In situations

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[3] MCA REPORT ON INSOLVENCY LAW COMMITTEE ON CROSS BORDER INSOLVENCY (2018) https://ibbi.gov.in/Report%20on%20Cross%20Border%20Insolvency.pdf (last visited Feb. 28, 2019)

[4] *Id.*

where the creditors belonging to a foreign state have an interest in an ongoing domestic proceeding, they may request *participation in such proceeding.* The terms of the reciprocal agreement that are entered with this foreign state shall be applicable in such proceedings. The Draft Z provisions are to be applied only on those States that have adopted the UNCITRAL Model Law or to those States that are notified by the Central Government as specified in Part B of the schedule.

This Part also provides for the definitions in Section 2 of the proposed Draft Z. Some of the basic definitions have been stated below:

- The *National Company Law Tribunal and the National Company Law Appellate Tribunal* shall constitute the "*adjudicating authority***"**.
- A strict criterion has been determined by the Code for the foreign main and foreign non-main proceedings. The former corresponds to the *"Centre of Main Interest"* while the later to the "*establishmen*t".
- "*foreign proceeding*" means a "*collective judicial or administrative proceeding in a foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the corporate debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.*"
- *"foreign representative*" means a person or body authorized in a foreign proceeding to carry out the reorganization or the liquidation of the corporate debtor's assets or affairs or to act as a representative of the foreign proceeding. Such a person shall be appointed at an interim basis as well.

2. PUBLIC POLICY

The Code vests such power with the respective Adjudicating Authority which upon its discretion may refuse any application for recognition as it may be "*manifestly contrary*

to the public policy of India." For the same purpose, a notice informing of this infirmity has to be made to the Central Government prior to making such an order.

ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO THE ADJUDICATING AUTHORITY (Section 7- Section 11)

1. RIGHT OF ACCESS BY FOREIGN REPRESENTATIVE

It is mandatory for a foreign representative to apply to the adjudicating authority prior to exercising powers and functions vested in him under this Part. The foreign representative has to adhere to the code of conduct that will subsequently be notified by the Central Government.

2. LIMITED JURISDICTION

An application made to the Adjudicating Authority by a foreign representative herein does not bring the foreign representative or the assets located in a foreign State and affairs of the corporate debtor to the jurisdiction of courts in India.

The Code also provides for penalty provisions for the foreign representatives when any loss of assets or any unlawful gain takes place.

3. PARTICIPATION BY A FOREING REPRESENTATIVE

IN PROCEEDINGS UNDER THIS CODE

As per Section 9 of the Draft, when the recognition application of a foreign proceeding is granted, the foreign representative is entitled to participate in a proceeding that has been initiated against the corporate debtor under this Code.

4. **ACCESS OF FOREIGN CREDITORS TO A PROCEEDING UNDER THIS CODE**

The rights of the domestic and foreign creditors in regard with the institution or participation in the proceeding under the Code shall be equal. This shall not affect the

priority waterfall. The Draft excludes the proceedings related with the foreign tax and social security claims that arise from such a proceeding.

5. **NOTICE TO THE FOREIGN CREDITORS OF A PROCEEDING UNDER THIS CODE**

Whenever a notice is provided to a domestic creditor, the same shall be provided to the foreign creditor as well. The manner shall be notified by the Central Government. The notice shall contain the time period, the place of filing of claims and the mandatory requirement of secured creditors to file their claims.

RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF (Section 12- Section 20)

1. **APPLICATION FOR RECOGNITION OF A FOREIGN PROCEEDING.**

A foreign representative may apply to the Adjudicating Authority for recognition of the foreign proceeding in which the same has been appointed. The documents that the application should accompany are provided for in Section 12 (2). Emphasis has also been laid on the translation of documents in the application for recognition in English.

2. CENTRE OF MAIN INTERESTS

The corporate debtor's registered office is presumed to be the corporate debtor's centre of main interests in the absence of the contrary as per Section 14 of the Draft. The registered office of the corporate debtor should not have moved to another country within the *three month period* prior to the filing of application for institution of insolvency proceedings in such country.

3. FOREIGN MAIN AND FOREIGN NON-MAIN PROCEEDINGS

As per Section 15(2) of the Draft, the Adjudicating Authority has to recognize the proceeding as: (1) foreign main proceeding: when it is taking place in the country where the corporate debtor has the *centre of its main interests* under clause 14 of this Part; (2)

foreign non-main proceeding: when it is taking place in a country where the corporate debtor has an *establishment* as defined in clause 2(c) of this Part.

The Adjudicating Authority has to be informed by the foreign representative within a period of *three* days of any substantial change made in relation with the recognition of the foreign proceeding or the status of the foreign representative's appointment; and any other foreign proceeding or proceeding under this Code regarding the same corporate debtor.

4. EFFECTS OF A FOREIGN MAIN PROCEEDING

As per Section 17 of the Draft, after the recognition of such foreign proceeding is made, the moratorium has to be duly declared. The exemptions provided in Section 14 shall be extracted. This section shall not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the corporate debtor and the right to request commencement of a proceeding or to file a claim under this Code.

5. RELIEF THAT MAY BE GRANTED UPON RECOGNITION OF A FOREIGN PROCEEDING

As per Section 18 of the Drat Z, upon the recognition of a foreign proceeding, the Adjudicating Authority may by an order on the request of a foreign representative, grant any appropriate relief. Upon recognition of a foreign proceeding, whether main or non- main, the Adjudicating Authority may, at the request of the foreign representative, entrust the distribution of all or part of the corporate debtor's assets located in India with the foreign representative or another person designated by the Adjudicating Authority.

6. PROTECTION OF CREDITORS AND OTHER INTERESTED PERSONS

It has to be ensured by the Adjudicating Authority satisfy itself that the interests of the creditors and other interested persons, including the corporate debtor, are adequately protected. The insolvency commencement date of the foreign proceeding shall be determined in accordance with the law of the country in which the foreign proceeding is taking place, including any law by virtue of which the foreign proceeding is deemed to have opened at an earlier time. When the foreign proceeding is a foreign non-main

proceeding, the Adjudicating Authority shall be satisfied that the action relates to assets that, under the laws of India, should be administered in the foreign non-main proceeding.

COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES (Section 21 –Section 23)

1. COOPERATION AND COMMUNICATION BETWEEN THE ADJUDICATING AUTHORITY AND FOREIGN COURTS OR FOREIGN REPRESENTATIVES.

The Central Government in consultation with the Adjudicating Authority, shall notify guidelines for communication and cooperation between the Adjudicating Authority and foreign courts. The Adjudicating Authority may conduct a joint hearing with another foreign court in a concurrent proceeding, and may communicate directly with, or request information or assistance directly from foreign representatives. The Central Government shall notify the relevant authority to assist the Adjudicating Authority in facilitating transmission of notices and other communications between the Adjudicating Authority and foreign courts.

2. COOPERATION AND DIRECT COMMUNICATION BETWEEN THE RESOLUTION PROFESSIONALS AND LIQUIDATORS AND FOREIGN COURTS OR FOREIGN REPRESENTATIVES.

As per Section 22 of the Draft, the resolution professional or liquidator shall, as the case may be, cooperate to the maximum extent possible with foreign courts or foreign representatives. The resolution professional or liquidator,

as the case may be, shall be entitled, in the exercise of its functions and subject to the supervision of the Adjudicating Authority, to communicate directly with foreign courts or foreign representatives.

3. FORMS OF COOPERATION

As per Section 23 of the Draft, cooperation can be done by the means of (a) appointment of a person or body to act at the direction of the Adjudicating Authority; (b)

communication of information by any means considered appropriate by the Adjudicating Authority; (c) coordination of the administration and supervision of the corporate debtor's assets and affairs; (d) approval or implementation by courts of agreements concerning the coordination of proceedings; (e) coordination of concurrent proceedings regarding the same corporate debtor.

CONCURRENT PROCEEDINGS (Section 24- Section 28)

1. COMMENCEMENT OF A PROCEEDING UNDER THIS CODE AFTER RECOGNITION OF A FOREIGN MAIN PROCEEDING.

After recognition of a foreign main proceeding, (a) any proceeding under this Code may be commenced only if the corporate debtor has assets in India. Where a foreign proceeding and a proceeding under this Code are taking place concurrently regarding the same corporate debtor, the Adjudicating Authority shall seek cooperation and coordination. In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the Adjudicating Authority shall be satisfied that the relief

relates to assets that, under the laws of India, should be administered in the foreign non- main proceeding or concerns information required in that proceeding.

2. COORDINATION OF MORE THAN ONE FOREIGN PROCEEDING:

The Adjudicating Authority shall in respect of more than one foreign proceeding regarding the same corporate debtor, seek cooperation and coordination in granting reliefs. If a foreign main proceeding is recognised after recognition of a foreign non-main proceeding, any relief in effect under of this Part shall be reviewed by the Adjudicating Authority and shall be modified or terminated if inconsistent with the foreign main proceeding. The Code also provides for presumption of insolvency based on recognition of a foreign main proceeding. For recognition of a foreign main proceeding under this Code, proof that the corporate debtor inability to pay debts or pursuant to a state of insolvency of the corporate debtor is sufficient.

3. RULE OF PAYMENT IN CONCURRENT PROCEEDINGS:

As per Section 28, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign country, may not receive a payment for the same claim in such liquidation proceeding regarding the same corporate debtor, so long as the payment to the other creditors of the same class and ranking is proportionately less than the payment the creditor has already received.

CHAPTER VI: MISCELLANEOUS (Section 29- Section 31)

Any person aggrieved by the order of the Adjudicating Authority under this Part may prefer an appeal to the National Company Law Appellate Tribunal

and a further appeal (if required) may be filed to the Supreme Court on a question of law within the time period of thirty days. The period shall be extended after establishing sufficient cause for a period of fifteen days. The period shall be extended after establishing sufficient cause for a period of fifteen days.

OBSERVING THE LOOPHOLES PRESENT IN THE DRAFT Z:

The UNCITRAL Model Law is an attempt to resolve the complexities outlined above through rationalizing the *process* in dealing with cross-border insolvency. It cannot though be treated as a a *substantive*, *unified* insolvency law. This is done by providing a framework for *access* to the representatives in the matters of insolvency to the appointed professionals in the courts having different jurisdictions, by permitting them to participate or initiate proceedings in that particular jurisdiction. In the Indian context, this may need to be modified as the Indian courts require foreign insolvency professionals to appoint an Indian insolvency professional to represent them in Indian proceedings.

- The initiation of proceedings against an Indian corporate entity when the COMI lies in India itself makes these proceedings the "*foreign main proceedings"* for a foreign creditor. Recognition of the proceedings as a *main proceeding* will result

in automatic relief such as a *stay* or *moratorium* on domestic proceedings in relation to the debtor.[5]

- The Indian insolvency professional has to be provided same rights as a foreign representative of a foreign main proceeding is provided with before the courts of contracting states to the UNCITRAL Model Law, when actions regarding the stay parallel main proceedings, or commencement of secondary proceedings in relation to the Indian debtor's assets which may be located overseas is carried out.

- In the event that it is possible that the COMI of an *Indian* debtor is determined to fall outside India *foreign main proceedings* shall ensue in that jurisdiction, and the Code, having no extra-territorial effect as of now, shall cease to apply. In such circumstances, relief available to Indian creditors in that jurisdiction will be subject to the laws of where the foreign main proceedings are initiated and the provision of the Code, shall be applicable, only in so far as it is consistent with, or otherwise, at the discretion of the court, in which jurisdiction the foreign main proceedings are commenced.

- Provision to provide a leave of court should be inserted. The foreign representative shall be granted leave by an appropriate court for the conditions that are to also be specified in the Draft.

- Certain administrative issues also need to be dealt with. The Central Government shall provide a particular code of conduct for those professionals that are accessing foreign courts and for those foreign representatives that are accessing the Indian Courts. The form of 'additional assistance' mentioned in Article 7 of the model law has

not been explained in the Draft.

- No provision regarding the exercise of the right to set-off has been provided for regarding the claims of the foreign representatives and the corporate debtor. The Draft has also failed in identifying the rights of the corporate debtor, the domestic and foreign creditors.

- The criterion to be used to appoint the domestic insolvency representatives has not been laid out. The penalty provisions are yet to be drafted and the qualifications to be fulfilled by the foreign representatives to be met in order to gain access to the Indian Courts have to be drafted.

- The Draft should inculcate checks to ensure that the interests of the local creditors are not hampered while providing access and assistance to the foreign creditors. Also, a clear prevention of preferential and fraudulent disposition to the property of the debtor has to be ensured. Just treatment and protection to all the stakeholders have to be emphasized on.

- The Draft should also provide for pre-insolvency proceedings in regard with the voluntary arrangements of the individuals and with relation to the debt repayment scheme. The equal rights and protection to the domestic as well as the foreign creditors shall be provided herein.

- The facet dealing with avoidance actions has not be provided in the Draft which is a major frailty of the same. Clarifications regarding the

stage at which communications shall be made between foreign representatives and the Indian Courts have to be made. The content of the notice has be provided in the form of annexure attached to the Code.

- The priority waterfall has to be determined and established for the payments that the creditors are entitled to. There should a proper mechanism for valuation of assets of the debtor that are located outside the territory of India.

- The timelines for the implementation of the cross-border insolvency proceedings and the various stages that these proceedings go through have need to be clearly

  laid out to ensure that the objective of the Code of ensuring time-effectiveness is upheld.

To conclude the present chapter, the researcher has thoroughly examined the current provisions of the Insolvency and Bankruptcy Code (IBC), 2016 of India to deduce the infirmities that are prevalent. The law is ambiguous in nature and does not possess the requisite structure to adjudicate disputes arising for the same. The Ministry of Corporate Affairs has suggested a Report in which the incorporation of the Model Law in the form of Draft Z has been carried out. The Draft Z also has certain loopholes that need to be addressed to keep the State from implementing a faulty law. They have been duly provided in this chapter.

ANALYZING THE STRUCTURE OF CROSS BORDER INSOLVENCY FOLLOWED IN UNITED KINGDOM AND UNITED STATES OF AMERICA

The present chapter provides for the analysis of the cross border insolvency structure that is followed in United Kingdom and United States of America. The purpose for doing the same is the determinations of the best practices that are followed there and to take into account the practical issues and adjudicatory errors that were undertaken by them in order to ensure that India does not follow the same.

PUBLIC POLICY

Article 6 of the Model Law provides the receiving State to refuse the grant to any recognition of foreign proceedings on the pretext of the same being "*manifestly contrary to the public policy*" of that country. A broad interpretation of the same will have a severe detrimental effect as arbitrary as arbitrary inclusion of subjects shall be made to the prevalent public policy of a country.[1] The majoritarian view upholds the invocation of this provision. In USA, it has to be invoked in "*exceptional circumstances concerning matters of fundamental importance for the United States*."[2] In certain cases, the identification of a contrary statute to US public policy is insufficient as it must be manifestly contrary to the US public policy.[3] Thus, the courts are inclined towards providing a *narrow interpretation* to the term 'manifestly' while referring to any violation of the public policy of the country. In US,

the courts have used this provision only when an abuse of the automatic stay on such an order of recognition by foreign

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[1] In Re Zetta Jet Pte Ltd. and others [2018] SGHC 16(High Court of The Republic of Singapore)
[2] In Re Ran, 607 F 3rd 1017,1021 (2010) (United States Court of Appeals for the Fifth Circuit)
[3] In Re ABC Learning Centres Ltd. 728 F 3rd 301, 309 (2013) (United States Court of Appeals, Third Circuit)

proceedings has taken place[4]; there has been a clear violation of the country's privacy laws and criminal laws; or when a detrimental effect on the technological innovation in relation with intellectual property has taken place.[5]

ACCESS

The Model Law in Article 9 provides the foreign representative with the right to access to the court of the Enacting State. As per Article 13 and 14, the foreign creditors are to be treated at the same footing as the domestic creditors in relation with the rights vested with them.

There is does not exist any requirement in UK that any foreign proceedings primarily have to be recognized prior to availing the right to access in the UK Courts.[6] The *safe conduct* provision has been adopted without making any severe modifications. This has been done to ensure that the enacting state does not assume jurisdiction and authority to administer the assets of the debtor merely on the ground that a recognition application has been duly made.[7]

"In *the absence of statutory authority, the UK courts cannot permit a foreign liquidator to carry out such activities that might have been done in a domestic insolvency".*[8] In the case of *Stanford International Bank,* the receiver that was appointed by United States was held not to be a foreign representative by the English court as "*no authorization was provided to this receiver to administer a liquidation or reorganization of the debtor company*."[9]

[4] In re Gold and Honey Ltd. , 410 B.R. 357 (2009) (United States Bankruptcy Court, E.D. New York)

[5] In re Qimonda AG, 462 B.R. 165 (2011) (United States Bankruptcy Court, E.D. Virginia)

[6] FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW, NATIONAL AND INTERNATIONAL APPROACHES, 473 (2009)

[7] UNCITRAL "*GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY*",A/CN.9/442/1997),https://www.uncitral.org/pdf/english/yearbooks/yb-1997- e/Yearbook_1997_e.pdf (last visited May 11, 2019).

[8] Re Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) at paras 90–92 (England and Wales Court of Appeal: Civil Division) ; Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36 (The Court of Appeal of Bermuda)

[9]In Re, Stanford International Bank EWHC 1441 (2009) (England and Wales High Court: Chancery Division)

The Law does not provide the definition of 'debtor'. In the case of *Rubin v. Eurofinance*[10], a particular trust was recognized as a legal body under the United States Law but not as per the English Law. When an application was made for recognition, it was argued that a trust is not a debtor as per the English Law. The judge gave a wider interpretation to the term 'debtor' holding that a 'parochial interpretation' of the term 'debtor' shall be perverse in nature. The matter has to be decided at the 'earliest time possible' for which the foreign representative's ability to seek an early recognition and the consequential ability to seek the requisite relief is essential in order to ensure effective protection of the assets of the debtor from any sort of debauchery and concealment.

In providing assistance, the courts have to ensure that it is in accordance with the principles of comity[11] and should also take into account the equal and just treatment of all holders of claims having interests in the debtor's property; protection is provided to the claim holders against prejudice and inconvenience while addressing the claims in such foreign proceedings; there has to be prevention of preferential or fraudulent dispositions of the debtor's estate; and if appropriate, the provisions for providing an opportunity for a fresh start for the debtor shall be provided.[12] Also, in the case of *Re Loy*[13], it has been established by the US Bankruptcy Courts that "*as each section of Chap.15 is based on a corresponding article in the Model Law, if a textual provision of Chap.15 is unclear or ambiguous, the Court may then consider the Model Law and foreign interpretations of it as part of its interpretive task."*

The USA code deduces *recognition in accordance with the principles of comity*. The US Bankruptcy Court has stated that "*once a foreign proceeding*

has been recognized, it is mandatory that US Courts grant comity to the foreign representatives unless request is in breach of the public policy."[14]

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[10] Rubin v. Eurofinance SA [2009] EWHC 2129 (Supreme Court of United Kingdom)
[11] CT Investment Management Co, LLC v. Carbonell, 2012 WL 92359 (Supreme Court, New York County, New York)
[12] 11 U.S. Code § 1507
[13] Re Loy, 432 BR 551, 561, (2010) (United States Bankruptcy Court, E.D. Virginia)
[14] Supra Note 11 at 44

PRINCIPLES OF RECOGNITION:

The foreign representative has to make an application under the Model Law to seek recognition of the foreign proceeding. The requirements are provided in Article 15 that the application is required to meet. The power to recognize these proceedings is derived from Article 17. Article 16 acts as the facilitating provision by creating presumptions relating with the authenticity of documents and of the order with initiates the foreign proceedings and appointing the foreign representative. Article 18 vests the duty of informing the receiving courts of any substantial changes that might take place upon the foreign representative.

Recognition is made as *foreign main and non-main proceedings*. The former takes place when the debtor has the place the centre of main interests in the receiving State while the latter indicates an 'establishment' in the receiving State. There can be scenarios where the proceedings do not fall under either of the categories which eventually leads to non recognition of such proceedings.[15] To have an establishment in a country, the debtor must conduct business in that country. It shall be considered to being the "seat for local business activity" for the debtor. The term "operations" and "economic activity" require proof of connection with a marketplace which is not merely the place of incorporation or record-keeping or used for the purpose of maintaining the property.[16]

The nature of the proceeding was discussed in *Lavie v Ran*[17] where it was held that *"a bankruptcy proceeding should be viewed as an industrial or professional activity. Further, though a bankruptcy proceeding does pertain to economic matters, it does not comport with traditional notions of economic activity in the marketplace."*For an 'establishment' under the EU

Insolvency Regulation, the English Court of Appeal had required *"external, market-facing activity and not merely the carrying out of a liquidation process*." [18]

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[15] In re Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd.374 B.R. 122 (2007)(United States Bankruptcy Court, New York.)
[16] Re British American Insurance Company Ltd 425 BR 844 (2010) (United States Bankruptcy Court,. Florida, West Palm Beach Division.)
[17] Lavie v Ran 406 BR 277, 286 (2009) (United States District Court. Texas, Houston Division.)
[18] Re Olympic Airlines SA UKSC 27 (2015) (Supreme Court of United Kingdom)

In order to exercise jurisdiction to wind up a foreign entity, [19]it is 'necessary to establish that a foreign company has a '*sufficient connection'* in UK. A traditional outlook has also been considered by the English courts wherein their winding up orders have to provide a world-wide view even though they may not be recognized under other States' rules of private international law.[20] In situations where a particular company is being wound up in two simultaneous jurisdictions then the English courts, in order to avoid unnecessary conflict, the winding up proceedings are to be treated ancillary to the respective principle proceedings of the other country. The place of liquidation shall by default be considered to be the placewhere the company was incorporated.[21] The courts may provide assistance to the foreign courts pursuant to the principles of comity provided English Law.[22] In the case of *Agbaje v. Akinnoye-Agbaje*[23], the Apex Court of UK gave the three aspects according to which 'comity' had to be read. The same being: *"presence of a reasonable relationship with UK; the non-charaterization of decisions of one country's court to the other and the recognition of foreign judgments."*

The definition of establishment has undergone a change as the term 'goods' has been replaced with that of 'assets' thereby covering the land and the intangible property.[24] The English Courts are vested with the power to order vest all the assets to a foreign liquidator if the domestic law of the liquidator provides for a pari passu distribution of these assets to the creditors.

CENTRE OF MAIN INTEREST:

For the determination of the application of recognition, the identification of the centre of main interest (COMI) is pertinent to proceed with insolvency

process. The principal responsibility thus is to determine the place where the commencement and further

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[19] Re Real Estate Development Co.BCLC 210, 217(1991)) (England and Wales High Court:Chancery Division)
[20] Re International Tin Council Ch. 419,446. (1987) (England and Wales High Court:Chancery Division)
[21] RICHARD SELDON ,CROSS BORDER INSOLVENCY 481-482 (2011)
[22] Schmitt v. Deichmann 2 All ER 1217, 1232-3 (2012) (England and Wales High Court:Chancery Division)
[23] Agbaje v. Akinnoye-Agbaje AC 628, 650-1.(2010) (Supreme Court of United Kingdom)
[24] ROY GOODE PRINCIPLES OF CORPORATE INSOLVENCY LAW 801 (2011).

institution of the proceedings will take place. The definition of the 'COMI' has not been provided by the Model Law deliberations have been carried out relation to determination of the place where the registered office is located as the main centre of business interests of the particular corporate debtor.[25]

This presumption is frequently made to ensure that the proceedings can be instituted without delay and conveniently. In a scenario where the contrary view, regarding such a consideration is present, the judicial bodies have to decide upon such disputes.

In a case where dispute arose between the insolvency regulations of USA and that of EU where the US bankruptcy court had to determine a particular foreign proceeding being main or non-main in nature. Taking into account that Chapter 15 does not provide a definition of COMI, the court examined its definition as per the EU regulations. The same being "*the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties".* Adopting this rule, the US court then found that the proceeding in the country *where the debtor had its principal office and primary concentration of employees was the COMI of the debtor*.[26]

Similarly, it was also held by the US bankruptcy court that the presumption that a "*debtor's COMI is in the location of its registered office may be rebutted particular[ly] in the case of a 'letterbox' company not carrying out any business in the territory of the [country] in which its registered office is situated*."[27] The COMI can be established of where the debtor carries out its business and has his assets located.[28]

In determining the definition of ‘establishment’, the courts at UK have stated three major ingredients: a place where it happens; sufficient things; sufficient quality happening there.

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[25] Article 16(2) of the Model Law (UNICTRAL)
[26] In re Tri-Continental Exchange Ltd., 349 B.R. 627 (2006) (Bankuptcy Court, California)
[27] I In Re Sphinx Ltd., 351 BR 103 (Bankr, S.D. N. Y, 2006) (United States Bankruptcy Court, S.D. New York)
[28] In Re Eurofood IFSC Ltd. Ch 508 (2006) (European Court Of Justice)

In *Olympic Airways SA*[29], the court of Appeal noted that "*the concept of an 'establishment' was the same as under the Model Law and that in considering whether there was an establishment the court should look for a location where there is still, at the critical date, a business operation such as will justify secondary proceedings in a State outside the State of the centre of main interests*."

All States apart from UK have chosen to incorporate the preamble in their domestic legislations. There has been no reasoning provided for the same. The definition of "*British Insolvency officeholder*" has been provided. It refers to "*an official receiver (appointed by the Court), liquidator, provisional liquidator, trustee interim receiver or nominee or supervisor of a voluntary arrangement, the Accountant in Bankruptcy in Scotland and a person acting as an insolvency practitioner except as an administrative receiver."*[30] The English Supreme Court has stated that in those cases where neither the Model Law nor the EC Regulations has been extracted, the Court shall apply the principles of international comity to grant recognition as a matter of discretion to allow them to initiate issue proceedings under the UK insolvency law.[31] The requirement regarding the recognition of a foreign proceeding prior to exercising the right of access to the UK Courts. has not been provided.[32]The UK allows claims to be raised relating to the foreign tax and social security obligations and excludes those claims that are in relation with the penalties and other forms of debts not provided under the domestic laws. Under Article 15, the documents that need to be submitted in relation with the application for assistance have to be accompanied by a letter of request from a foreign court in UK.

In *Standford International Bank*[33], the Court held that "*the onus to prove the COMI lies with the person seeing to rebut the COMI by providing an alternate COMI with the help of objectives and facts. The test for COMI is the place where the debtor conducts the administration of his interests on a regular basis and is therefore, ascertainable by the third parties."*

[29] The Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme (Appellants) v Olympic Airlines SA (Respondent) [2013] EWCA Civil 643 (Supreme Court of United Kingdom)

[30] Article 2(b) , Receivership Act, 1993 s.2(1)

[31] Schmitt v. Deichmann [2012] All ER 1217, 1232-3 (England and Wales High Court: Chancery Division)

[32] FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW, NATIONAL AND INTERNATIONAL APPROACHES, 473 (2009)

[33]Supra Note. 9

In the case of *Pillar Securitisation S.a.r.l*[34], the interpretation of the law as per the UK standards was laid down, *"There is a presumption that the body's COMI is in the state where its registered office is located. The presumption can be rebutted only by factors which are both objective and ascertainable by third parties. Thus, the court is to have regard to factors already in the public domain, or which would be apparent to a typical third part doing business with the body, excluding such matters as might only be ascertained on inquiry. Accordingly, the place where the body's head office functions are carried out is only relevant if so ascertainable by third parties. Each body or individual has its own COMI; there is no COMI constituted by an aggregation of bodies or individuals."*

In the case of *Re Sanko Steamship Co Ltd*., "*The court has determined that a company's centre of main interest is where it was managed and its business was being conducted on its behalf as this was the address that the clients and creditors dealt with, as such, the presumption was rebutted*."[35] Leave of the court is to be provided to the foreign representative by an appropriate court prior to the commencement of any proceedings when there already are ongoing proceedings against the same debtor. In relation with the cooperation and direct communication between a court of this State and foreign courts or representatives, the UK courts have been vested with a discretionary power.

RELIEF FOR RECOGNITION:

For providing relief (interim/ final) to the recognition application, the foreign proceeding has to be an interim, final or administrative proceeding in another State and has been brought under the ambit of a domestic insolvency

law. These assets located within the territory of the State are placed under supervision of the foreign court and the proceeding so instituted is for the purpose for reorganization or liquidation. There exist three particular kinds of relief that are provided under the Model Law:

[34] Pillar Securitisation S.a.r.l v. Spencer [2011] BCC 338, 342 (England and Wales High Court: Chancery Division)
[35] Re Sanko Steamship Co Ltd (2015)EWHC 1031 (England and Wales High Court: Chancery Division)

Article 19 provides for *interim relief* that can be sought at any time after the application to recognize a foreign proceeding has been made.[36] Unless the Court allows the extension of such a relief, the same terminates when the Court finally decides upon the recognition of such foreign proceedings. This relief is not exhaustively provided. It cn b sought after a single ex-parte hearing as well.[37]

The relief may also include (a) grant of stay on execution of debtor's assets and transfer and disposal of the debtor's assets (b) entrusting of administration of debtor's assets to the foreign representatives or other designated person (c) providing for examination of witnesses and taking of evidence related to the debtor's property and providing any additional relief that is available with the insolvency professional in the enacting country.[38]

Article 20 provides for *automatic relief* which is provided subsequent to the recognition of the foreign proceeding as the 'main' proceeding.[39] The power to modify and terminate the relief is provided. The Model Law does not cover the effect of cessation of limitation period on the duration of the moratorium.

Article 21 provides for *discretionary relief* consequent upon the recognition as either a main or non-main proceeding.[40] It provides for an inclusive list of the relief that can be provided by various jurisdictions in the insolvency process. It vests the power with the foreign representative to examine witnesses and collect the required information and evidence in relation with the debtor. The Courts have been vested with the power to enable the foreign representatives or any other person so designated to carry out the distribution of the all or part of the debtor's assets located in the respective enabling

country. The relief that is given for the foreign non-main proceedings shall not interfere with the foreign main proceedings.

The Model Law under *Article 23* also provides for the *'avoidance action'*

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which basically is carried out by the Insolvency professional to ensure that debtor if has fraudulently

[36] Article 19, UNCITRAL Model Law.
[37] In Re Taisoo Suk [2016]5 SLR 787 (Supreme Court of The Republic of Singapore)
[38] Article 19 of the Model Law
[39] Article 20, UNCITRAL Model Law.
[40] Article 21, UNCITRAL Model Law.

transferred its property in order to place it beyond the reach of the creditors, then such antecedent transfers may be set aside when the foreign representative makes an recognition of the foreign proceedings as these transactions may be detrimental to the creditors.

In the case of *Fogarty v. Pertoquest Resources, Inc. In re. Condor Ltd.*, it has been clearly decided upon that a broad reading of the Article 23 has to be taken into account. It was stated that *"the relief may be granted when assets are dishonestly transferred by the debtor as the foreign representative could recover such assets even by making an application to the enacting state for grant of such relief based on a particular foreign law*."[41]

For the determination of the date since when the avoidance actions may be calculated, the UK regime has considered the date of opening for the demarcating the commencement for the purpose of avoidance actions. It is thus, upon the enacting country to apply its regulations in regard of conflict of laws takes place. USA has accepted this provision verbatim, without any modifications.

COOPERATION OF CONCURRENT PROCEEDINGS:

Articles 25 and 27 of the Model Law correspond to the objective of promoting cooperation between insolvency representatives dealing with proceedings instituted against the single debtor to ensure that the interests of all creditors are duly taken into account. This is done to ensure that dissipation of assets does not take place, the maximization of assets is ensured and the best solution to reorganize the enterprise can be sought.

Cooperation leads to coordination which further enables a better mechanism for dealing with the interests of the creditors.

The model law does not require a formal decision to be taken to ensure the coordination and cooperation has taken place. The how and when questions have been left to be dealt

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[41] Fogarty v. Pertoquest Resources, Inc. In re. Condor Ltd.), B.R. 314 (2009) (United States District Court,
S.D. Mississippi, Southern Division.)

with the supervision of the Courts. Direct Communication is encouraged to be used to prevent the unnecessary time consumption.[42] Several instances have taken place that reflect the presence of communication between courts and insolvency representatives has helped in coordinating multiple proceedings to provide speedy completion of management of the insolvent debtor's estates.

In re Maxwell Communication Corp , the U.S. and English judges, Brozman and Hoffmann, respectively, were of the view that the information they were receiving was incorrect in nature. The provided for the concept of a protocol between the two administrations to be helpful, not only to "*resolve an impasse, but also to facilitate better and more timely exchanges of information."* Cross border agreements to assist coordination of two sets of proceedings instituted in separate countries were to be negotiated in each country when such creditors have a single debtor by appointment of facilitators by the Courts. Thus, the cross border agreements to assist coordination of two sets of proceedings instituted in separate countries may be negotiated in each country when such creditors have a single debtor by appointment of facilitators by the Courts.[43]

Means of video link conference and telephonic communication have also been used involving judges and legal representatives of each jurisdiction. The substantive issues are duly discussed and an appropriate outcome in simultaneously carried out proceedings is reached.[44] Requests may also be made by Courts of one country in matters corresponding to the same debtor also being tried in another country to not make any formal orders that might be in conflict with those made by this Court. This is done to ensure conflicting decisions are not made in such cases.[45]

Article 26 ensures that the insolvency representatives while carrying out international cooperation for administering assets of insolvent debtors act under the supervision of the

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[42] In Re Babcock & Wilcox Canada Ltd. 18 C.B.R. 157 (2000) (United States Court of Appeals for the First Circuit)
[43] In re Maxwell Communication Corp., 91B 15741 (1992) United States Bankruptcy Court for the Southern District of New York)
[44] In re PSI Net Inc., Ontario Superior Court of Justice, Toronto, No. 01-CL-4155 (United States Bankruptcy Court for the Southern District of New York)
[45] Perpetual Trustee Company Ltd. v. Lehman Bros. Special Financing Inc. [2009] EWHC 2953 (England and Wales High Court: Chancery Division)

competent court. The Model Law permits multiple proceedings in various jurisdictions to take place simultaneously by enabling coordination and cooperation of these proceedings. *Articles 28 and 29* of the Model Law deal with the commencement of a proceeding when recognition of a foreign main proceeding is carried out. For institution of such proceedings, it is important that the debtor's assets are present in that particular asset. The restrictions in Article 28 are in relation with the affects of a local proceeding to assets that are located abroad. These include that there should be cooperation and coordination between these proceedings and the foreign assets in question are subject to laws of the enacting State.

Article 29 deals with those scenarios where actions against the same debtor, a local as well as a foreign main proceeding is instituted. It gives primacy to the local proceedings. Commencement of one shall not prevent recognition or termination of the other. A relief that is granted to a foreign proceeding should be modified, reviewed or terminated establishing consistency with the local proceeding. Automatic effects as provided under Article 20 may be enjoyed by the foreign proceedings when a local proceeding is not pending when the same was initiated.

As per Article 30, primacy is given to foreign proceedings as it outlines the scenario wherein the respective debtor is subject to insolvency proceedings instituted in more than one State and the application seeking recognition has been duly made. It has been designed to facilitate coordination in operating several proceedings. The relief is granted in Article 30 is subject to modification or termination if any other non main foreign main proceeding is instituted after such order is made.

Article 32 provides for the manner in which debt has to paid in presence of concurrent proceedings. It ensures that no creditor is given a preferential treatment by obtaining same claims under various insolvency proceedings under different jurisdictions. It does not provide a ranking of the claims but only ensures equivalent treatment to the creditors belonging to the same class. The expression 'secured claims' refers to claims that are guaranteed by certain assets while 'rights in rem' is used to indicate rights in a particular property enforceable against third parties. The right may fall under the ambit of either of the rights. This is solely dependent upon the terminology used by the enacting State.

In the present chapter, the manner in which United Kingdom and United States of America construe the founding principles of the cross-border insolvency laws has been examined with the help of the leading case laws. The same has been viewed against the structure provided by the Model Law and the deviations made by these states has been analysed. This has been done to suggest the ramifications that Draft Z has to undergo prior to its implementation to make the country well-equipped in adjudicating cross-border insolvency issues.

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