Cite as:

(2024) I(2) Solventia

PUBLISHED BY
The Registrar
National Law University, Jodhpur (INDIA)

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Liquidation Sale as a Going Concern under the Indian Insolvency Regime

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I. INTRODUCTION

It is trite that in the trajectory of entrepreneurship, not all the business ships reach the shore. Thus, it becomes extremely crucial not just to have a robust legal framework providing for freedom of entry and freedom of

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doing business to the corporate entity, but also one that provides them with the freedom to make an exit and discontinue. The framework should be of such nature so as to be comprehensive enough to cover each stage of the business while providing for a smooth transition between the stages. In the Indian context, the Insolvency and Bankruptcy Code, 2016 ("**Code**") provides for the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms, and individuals in a time-bound manner. As per the Code, the business operations of the corporate as a going concern shall be carried on by the Interim Resolution Professional until the committee of creditors proposes a resolution plan that would keep the business going after insolvency resolution. The erstwhile liquidation provisions, prior to the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2018 ("**Amendment**"), provided for liquidation on a slump sale, piecemeal basis etc. It was only through the Amendment that the provision for the liquidation process was amended, from Manner of Sale to Sale of Assets etc, imbibing the 'going concern' clauses under Regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Through the current piece, the authors have tried to elucidate the concept of liquidation sale as a going concern and the amendments made in the Indian insolvency regime in relation to that. In the last leg, the paper delves into the potential issues attached with the concept vis-à-vis the objective of the Code.

II. GOING CONCERN SALE AS A CONCEPT

A. Prior to the Enactment of the Code

Originally, the insolvency framework did not prescribe for the liquidation sale of a corporate debtor as a going concern. However, if looked across the timeline, transfer of a company under liquidation on a going concern basis is not a new concept introduced to the Code. In fact, cues were taken from other statutes in understanding the concept of a going concern even prior to amendments being made to the Code/Regulations.

There was a spate of industrial closures during the 1980s and ergo, the Calcutta High Court was faced with high number of winding up cases.[1] From the analysis of the rulings on the said cases, it becomes pellucid that the underlying rationale for the judges deciding for going concern sale was preserving the interest of the workers along with the interest of the company.

In certain cases, where the corporate debtor had been non-functional, the idea of going concern sales in liquidation was a tough proposition, especially when on the obverse side were the labour force employed and their passing on to the acquirer. In the case of ***Allahabad Bank v. ARC Holding Limited***,[2] it was stated by the creditors that the factory had been lying dormant and non-functional for more than ten years, and thus, an order that was passed in execution proceedings for the sale of the plant, movables lying around, and the machinery of the factory, would not be very difficult to be implemented given the situation of the corporate debtor. However, as per the creditors, any order directing sale of the

[1] Kamaljeet Rattan, 'Ancillary Units and Workers Languish in West Bengal' *India Today* (15 November 1988).
[2] *Allahabad Bank v ARC Holding Limited* [2000] AIR 2000 SC 3098.

entire assets of the company as a "going concern" would be difficult. According to the creditors:

> "6. *This means revive the company first to make it operational, re-employ its employees, which would involve huge investment by the prospective buyer, a Herculean task, making execution practically infructuous".*[3]

The Supreme Court, irrespective of the prior order directing sale of the machinery of the entity and the blanket arguments raised by the creditors, permitted the sales as a going concern owing to the fond hopes expressed by the employees. However, the court took note of the hassles involved in the process due to the entity being non-functional, and therefore, added a timeline for the successful completion of the said sale as a going concern.

B. After the Enactment of the Code

Post the enactment of the Code, the jurisprudence around the sale of corporate debtor in liquidation as a going concern is scant and scattered despite there being numerous case laws where the National Company Law Tribunal (**"NCLT"**) has directed for liquidation on a going concern basis. One of the foremost cases, where the going concern sale as a concept was expounded upon was the NCLT Mumbai Bench's order in the case of ***Alchemist Asset Reconstruction Company Ltd. v.***

[3] ibid.

Abhijeet MADC Nagpur Energy Pvt. Ltd.[4] In the said case, the bench defined a going concern as a sale where the acquirer gets all rights, interests, along with the title, and every part of the undertaking, sans any security interest, encumbrance, claim, counter claim or any demur. However, in a similar case, of ***Gupta Global Resources Pvt Ltd***,[5] (involving liquidation sale as a going concern), the NCLT Mumbai bench, had made certain contrary observations. Irrespective of the fact that one of the parties raised the contention that the meaning of the term "going concern" was not clear, the NCLT ruled that when the business of the corporate debtor is being sold on going concern basis, it is presumed that the liabilities of the debtor will be tagged along with its assets. It essentially meant that the sale will not be with a clean slate status, rather the previous liabilities come along with the assets of the corporate debtor.

III. THE CASE OF *GUJARAT NRE COKE* AND THE SUBSEQUENT AMENDMENT

Irrespective of no provision, at the time, prescribing for liquidation on a going concern in the insolvency framework, the NCLT Kolkata directed the liquidator in the case of ***Gujarat NRE Coke Limited***[6] to dispose of the corporate debtor as a going concern. As per the order, the power to issue such directions were derived from the Regulation 32(b)(i) of the Liquidation Process Regulations, which dealt with the liquidator effectuating assets of a corporate debtor sale on a slump sale basis. It was

[4] National Company Law Tribunal [2018] MA 1343/2018 IN CP (IB)-1315/MB/2017.
[5] National Company Law Tribunal [2019] CP(IB) 1239(MB)/2017, MA 654/2018.
[6] National Company Law Tribunal [2018] CP (IB) No. 182/KB/2017.

only after the NCLT's decision that an amendment was made to the Liquidation Process Regulations on March 27, 2018, whereby a new sub-clause (e) was inserted in Regulation 32.[7] The newly inserted sub-clause permitted the sale of corporate debtor as a going concern. Post the amendment made in March, Regulation 32 was substituted on October 22, 2018, whereby it was prescribed that the liquidator may sell the corporate debtor as a going concern or the business(es) of the corporate debtor as a going concern.[8] In the discussion paper released subsequent to the above changes, the ambit and definition of the going concern sale were extensively discussed.[9]

The discussion paper expounded that Regulation 32(e) was to ascribe such a meaning that in the situations involving going concern sale, the corporate debtor will not be dissolved, rather it will form part of the liquidation estate.[10] As per the paper, the business, assets and liabilities of the corporate debtor were to be transferred along with the debtor. The paper elucidated the definition of 'Going Concern Sale' while stating that

[7] IBBI (Liquidation Process) (Amendment) Regulations 2018.
[8] IBBI (Liquidation Process) (Second Amendment) Regulations, 2018.
[9] Insolvency and Bankruptcy Board of India, *Discussion Paper on Corporate Liquidation Process along with Draft Regulations* (April 27 2019).
[10] IBBI (Liquidation Process) Regulations 2016 (Regulations), Regulation 32. Sale of Assets, etc.
The liquidator may sell –
(a) an asset on a standalone basis;
(b) the assets in a slump sale;
(c) a set of assets collectively;
(d) the assets in parcels;
(e) the corporate debtor as a going concern; or
(f) the business(s) of the corporate debtor as a going concern;
Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate. (emphasis supplied).

the said sale implied that the corporate debtor would stay functional as it was prior to the initiation of the insolvency proceedings.[11] Further, as per the paper, the term "going concern" meant that the consideration received for the sale was for the transfer of the business of the debtor in entirety, comprising of all the assets and the liabilities which constituted an integral business. It mentioned that any buyer of a corporate debtor under liquidation sale as a going concern must be able to run without any disruption, and such transfer should be of a running business along with its employees.[12] The buyer of the corporate debtor is required to take over the entire operations and business affairs along with the assets, licenses, trademarks etc.

The suggestions provided in the paper were formalized with the Corporate Insolvency Resolution Process ("**CIRP**") Regulation and Liquidation Process amendments with effect from July 25, 2019.[13] The obvious consequence ensuing from the amendment was that the company which was sold off as a going concern, was now provided with an opportunity to preserve its legal identity. Hitherto, under the erstwhile unamended framework, a CIRP had to be completed within a set time frame to be successful. Once the timeline for the said completion of the CIRP was over, the corporate debtor was pushed to the gallows of compulsory liquidation, ergo becoming legally non-existent.[14] However, post the amendment, the situation changed where now, even in cases of

[11] Discussion Paper on Corporate Liquidation Process along with Draft Regulations n 9.
[12] ibid.
[13] ibid.
[14] Insolvency and Bankruptcy Code 2016, s 12.

timeline failures, the identity of the corporate debtor is not dusted completely and is preserved by being sold as a going concern.[15]

IV. MONETARY LIABILITIES VIS-À-VIS LIQUIDATION SALE AS A GOING CONCERN

In reference to the orders passed by the courts, prior to the Code coming into play, it becomes apparent that while giving the direction of liquidation sale as a going concern, the liabilities of the company were generally not tagged along. It was only in cases like ***AOP (India) Pvt. Ltd. v. OL***,[16] by the Calcutta High Court, and ***Allahabad Bank v. ARC Holding Limited***,[17] by the Hon'ble Supreme Court, wherein it was noted respectively that the purchaser was required to discharge the liabilities of the company under the liquidation and all the liabilities of the company in liquidation will have to be taken over by the purchaser. In every other ruling prior to the insolvency regime, there has been issuance of direction to ensure that the transfer of the company is done as a running unit, while providing a specific undertaking to employ the existing workforce. While none of the cases dealt specifically with the obligation of the purchaser towards the existing liabilities of the company, there was just a direction issued to ensure that the company be transferred as a running unit, with specific undertaking to keep the existing workforce employed.

[15] Since, now the liquidation will again be having a safety net in the form of sale as a going concern due to which the identity of the corporate debtor and the synergies of a running business would not be lost.
[16] *AOP (India) Pvt. Ltd. v OL* CA NO.162 of 2012.
[17] *Allahabad* (n 2).

The scenario related to liabilities in a going concern sale did not become less murky even with the introduction of the Code. It may not be out of place to mention that a review application against the order passed by the Mumbai NCLT in the case of ***Gupta Global Resources Pvt Ltd*** was made,[18] wherein it was contended by the applicant that the order relating to going concern sale that also included liabilities:

> "*was either an obiter dicta, or refers to sales on going concern basis outside of liquidation, and does not refer to going concern sale in terms of Regulation 32 of the IBBI (Liquidation process) Regulations, 2016, or is otherwise not binding in respect of the going concern sale under Liquidation Regulations*."

The Mumbai bench, however, refused to interfere with the impugned order, noting that it did not have the power to review its own order, especially when the order was passed on merits.

It must be taken note of that neither the Insolvency Law Committee in 2018[19] nor the Bankruptcy Law Reforms Committee in 2015[20] made the transfer of liability a part of sales as a going concern. In fact, in one of the paras, it was noted by the Insolvency Law Committee, that the phrase "as a going concern" would mean that the corporate debtor will continue to operate in the same manner as it would have been before the initiation of CIRP, other than the restrictions imposed by the Code.[21] The framework of identifying liabilities and assets that are to be transferred as part of the

[18] National Company Law Tribunal [2017] CP(IB) 1239(MB)/2017.
[19] Insolvency Law Committee, *Report of the Insolvency Law Committee* (March 2018).
[20] Bankruptcy Law Reforms Committee, *Report of the Bankruptcy Law Reforms Committee* (November 2015).
[21] Report (n 19) pp 8.1.

going concern sale came into picture only after the release of the discussion paper and the subsequent amendments to the CIRP Regulation and Liquidation Process Regulations.

The transfer of liabilities during sales as a going concern becomes problematic when seen against the backdrop of the fact that what is needed for a unit to stay functional as a going concern is the availability of relevant manpower, licenses, and approvals. It is nowhere contingent on the transfer of liabilities. In fact, the transfer of monetary liabilities as contemplated under going concern sales by case laws carries the risk of creating a parallel mechanism to the waterfall as specified under Section 53 of the Code,[22] an issue that was also highlighted during the arguments in the case of ***Gupta Global***.[23] If the buyer of the going concern is to be saddled with the liabilities, then the claimants of the liquidation estate, in essence, would be having dual claims i.e., a claim on the liquidation estate, and also a claim on the acquirer of the going concern. In a situation of going concern sale in liquidation, there should not be an issue about liabilities being a part of the undertaking since that will no longer remain a liquidation case but will become a case of business transfer. In liquidation, the settling of liabilities must be from the realisations made and in accordance with the priority mentioned in Section 53 i.e., the waterfall mechanism, and once the distribution is made to the best possible extent, the liabilities should stand extinguished.

V. APPLICABILITY OF THE CLEAN SLATE THEORY

[22] The Insolvency and Bankruptcy Code 2016, s 53.
[23] n 18.

In a catena of cases, including the landmark judgement of ***Ghanashyam Mishra & Sons Pvt Ltd v. Edelweiss Asset Reconstruction Company Limited***,[24] issues of government departments pressing their claims against the corporate debtor after the insolvency process cropped up time and again. In *Ghanshyam Mishra*, the government departments and tax authorities pressed claims against the corporate debtor after the approval of the resolution plan by the Adjudicating Authority. It was contended that the claims which were being pressed against the corporate debtor did not form part of the resolution plan and yet it was urged to be considered. In fact, in one of the matters, the appeal was dismissed by the National Company Law Appellate Tribunal ("**NCLAT**"), while leaving the creditors open to press their claims before an appropriate forum.[25] The Apex Court while setting aside the findings of NCLAT reiterated the law laid down in the case of ***Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta***,[26] wherein it was ruled that all the claims stand extinguished once the corporate debtor is handed over to the resolution applicant. The corporate debtor is given as a clean slate to the resolution applicant. It was further highlighted that the claims included in the resolution plan have to be dealt with as per the resolution plan, while the claims not a part of the resolution plan will stand extinguished. The rationale behind the clean

[24] *Ghanashyam Mishra & Sons Pvt Ltd v Edelweiss Asset Reconstruction Company Limited* [2021] 9 SCC 657.
[25] *Edelweiss Asset Reconstruction Company Limited v Orissa Manganese and Minerals Limited & Ors*. Company Appeal (AT) (Insolvency) No. 437 of 2018 & I.A. No. 1830 of 2018.
[26] *Essar Steel (India) Ltd. (CoC) v Satish Kumar Gupta* [2020] 8 SCC 531.

slate doctrine is to ensure that the corporate debtor remains viable, lest it would be impacted adversely after resolution.

In the case of ***Binani Industries Limited v. Bank of Baroda***,[27] it was expounded by the NCLAT that a 'resolution' as provided under the Code is not a 'sale', since there is no buying of the corporate debtor by the successful resolution applicant. However, it needs to be noted that the primary goal of a resolution plan and a liquidation sale as a going concern remain the same i.e., the corporate debtor's business revival.[28] The issues faced by a successful resolution applicant and sale of a corporate debtor as a going concern are similar, if not the same, and hence, similar reliefs are required to be granted in both the cases.[29] Thus, the beneficial doctrine of clean slate as laid down in *Ghanshyam Mishra* ought to be extended to the cases involving liquidation sale as a going concern.

More clarity on the issue of tagging along liabilities with the assets during liquidation sale as a going concern and applicability of the clean slate theory can be provided by taking cue from the case of ***KKR India Financial Services Private Limited v. Kwality Limited***,[30] decided by NCLT Delhi. In the said case, Kwality Limited was engaged in the business of milk and dairy products, and also had milk processing units in the States of Uttar Pradesh and Haryana. There was initiation of CIRP against Kwality by one of its financial creditors by way of filing a

[27] National Company Law Tribunal [2018] Company Appeal (AT)(Insolvency) No. 82 of 2018.
[28] *Sauria Construction v Kohinoor Pulp & Paper (P) Ltd*. 2024 SCC OnLine NCLT 235.
[29] ibid.
[30] National Company Law Tribunal [2018] Order dated 21.12.2021 in I.A.5208 of 2021 in I.B. 1440(ND)/2018.

Company Petition. The corporate debtor was sold on a "going concern" basis, and the purchaser in the said case filed an interlocutory application before NCLT Delhi seeking, *inter-alia*, consequential reliefs, in order to enable the purchaser to run the business of the corporate debtor on a going concern basis. Some of the reliefs asked for by the purchaser were that any demands, inquiries, finances and pecuniary liabilities prior to the transfer date be abated. The NCLT did allow the relief to the purchaser as a matter of clean slate status of the corporate debtor, which was deemed necessary and appropriate for the sale of the business and the corporate debtor on a going concern basis. As per the order, it was emphatically clear that a re-constructed company which has undergone liquidation on a "going concern" basis under the Code is free from all encumbrances of the past. In reference thereto, the corporate debtor legally gets a fresh lease of life and all previous dues and encumbrances get resolved and cannot hinder the re-constructed company once it has gone through the process of liquidation as a going concern under the provisions of the Code.

VI. CONCLUSION

The concept of liquidation as a going concern falls in line with the Code's objective of asset maximization and minimal loss to the substratum of the corporate debtor. It is a workable solution especially against the backdrop of loss to workmen employed and the loss to synergy in case the entity is dusted completely. It needs to be taken note of the fact that the vanquishing of the entire entity leads to a domino effect on all the stakeholders, including the business community. Though the statute initially mentioned liquidation as a last resort, the concept of sale as a

going concern provides a breather to the parties involved by giving a second chance to revive the corporate debtor. In the initial cases there was not much clarity with regards to the treatment of liabilities in relation to a liquidation on a going concern basis. The law has since been broadly settled by the NCLTs/NCLATs wherein it has been established that liabilities stand extinguished once the Corporate Debtor is sold on a going concern basis.

However, this should not lead to discounting of the multiple potential challenges which the concept of 'liquidation sale as a going concern' might pose, thereby potentially undermining the very objective of the Code. Firstly, 'liquidation sale as a going concern' might come off as a better pay off for the prospective acquirers. The much obvious reasons for the same are that an acquisition through a going concern sale may happen for a price that is lower as compared to a revival of the corporate debtor by way of a resolution plan. Secondly, there is no intense and elaborate level of negotiation as there is no committee of creditors in liquidation as opposed to a CIRP process, which in turn creates scope for the prospective buyers vying for the second chance to acquire the debtor at a much more favourable deal to them. Lastly, the practical issue that still remains is that, despite the corporate debtor having been acquired on a going concern basis, at times, statutory/government authorities still raise and contest their pending claims (as standing against the corporate debtor) against the successful bidder/acquirer, which is counterproductive to the letter and spirit of the Code.

Dilip B. Jiwrajka v. Union of India & Others: Ushering in Greater Recovery for Creditors

Varsha S. Banta[*] *& Daksh Aggarwal*[**]

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I. INTRODUCTION

In a recent landmark ruling handed down on 9 November, 2023, in the case of *Dilip B. Jiwrajka v. Union of India* ("**Dilip Jiwrajka**"), the Supreme Court of India ("**SC**") clarified the extent of rights and liabilities of 'personal guarantors' ("**PGs**") to corporate debtors ("**CD**"), in relation to a corporate debtor undergoing insolvency proceedings in accordance

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with the provisions of the Insolvency and Bankruptcy Code, 2016 ("**Code**").

Under Section 5(22) of the Code, PGs are defined to mean an "*individual who is the surety in a contract of guarantee to a corporate debtor*". It is relevant to note that an insolvency resolution framework that exists for CDs was made applicable to PGs by way of Notification No. S.O. 4126 dated 15 November, 2019 ("**PG Notification**")[30] by enforcing Section 2(e) of the Code.[31] This PG Notification permitted the creditors to initiate insolvency proceedings against PGs, independent of any such proceedings initiated by the CD under the Code. Though the PG Notification was held to be legally valid in the matter of *Lalit Kumar Jain v. Union of India* ("**Lalit Kumar Jain**"),[32] some provisions of the Code it intended to operationalise – Sections 95 to 100 – remained embroiled in a legal challenge.

With this background, *Dilip Jiwrajka* can be considered a natural sequel to *Lalit Kumar Jain,* as it goes a step further and determines whether the provisions of the Code made applicable to PGs are constitutionally sound. Here, the primary issue under consideration was the constitutionality of Sections 95 to 100 of Part III of the Code ("**Impugned Provisions**"), in view of the role of the adjudicatory authority ("**AA**") and the manner of application and stage of application of principles of natural justice.

[30] Ministry of Corporate Affairs, *Notification No SO 4126 dated 15 November 2019*, https://www.mca.gov.in/Ministry/pdf/Notification_18112019.pdf.
[31] *"The provisions of this Code shall apply to— (e) personal guarantors to corporate debtors…"*
[32] *Lalit Kumar Jain v Union of India* [2021] 9 SCC 321.

II. SUMMARY OF ARGUMENTS

The petitioners challenged the constitutionality of the above-stated provisions of the Code on various grounds, presenting threefold contentions. Principally, the petitioners' counsels stoutly argued that the existing framework, as envisaged under the Impugned Provisions, allows a resolution professional ("**RP**") to usurp the adjudicatory function of the AA. The RP is entrusted with the decision-making tasks, including examining the application,[33] demanding information in connection with the application,[34] and providing the AA with a report containing their recommendations on the acceptance or rejection of the application.[35] Ideally, it must be the duty of the AA to make a ruling on (i) whether the debt exists, and (ii) whether the debtor has paid off the debt. Thus, granting the RP such unfettered powers jeopardises the sanctity of the insolvency resolution process. In its present form, the process deprives the debtor of the right to 'access remedies of an adjudicatory nature' thereby offending the principles of natural justice.

Access to such remedies, particularly in the nature of judicial (here, quasi-judicial) intervention is recognised under precedent, particularly for applications before an AA made under Sections 7 and 9 of the Code. In the matter of ***Innoventive Industries Limited v. ICICI Bank & Another***,[36] the SC held that specifically for Section 7 applications, the application of the FC must be admitted the moment the AA is satisfied

[33] Insolvency and Bankruptcy Code 2016, s 99(1).
[34] Insolvency and Bankruptcy Code 2016, s 99(4).
[35] Insolvency and Bankruptcy Code 2016, s 99(7).
[36] *See paras 43 and 53, Innoventive Industries Limited v ICICI Bank & Another,* [2018] 1 SCC 407.

with occurrence of default. In the event that such application is incomplete, the AA must abide by principles of natural justice by giving notice to the applicant to rectify the errors within seven days of receipt of such notice. Notably, the position of the apex court has been taken earlier by tribunals at the appellate levels. The principal bench of the National Company Law Appellate Tribunal ("**NCLAT**"), in its order in ***M/s. Starlog Enterprises Limited v. ICICI Bank Limited***[37], in specific reference to Section 9 applications, also underscored the general obligation of the National Company Law Tribunals ("**NCLTs**") and appellate tribunals (NCLATs) constituted under the Companies Act, 2013 to remain guided by the principles of natural justice during the conduct of proceedings.[38]

Second, the automatic activation of some actions following the filing of an insolvency application, such as the imposition of an interim moratorium under Section 96 and the appointment of a resolution professional under Section 97, must be done away with. These actions are irreversible and thus, must be introduced only after judicial adjudication.

Third and above all, enabling the RP to determine the issues of fact and law based on the hearing before them and disregarding the AA's role in judicial determination at the beginning of the process contravenes Article 14. The delayed entry of the AA, depriving the debtor and guarantor of an 'adjudicatory hearing' in Part III, is *'unreasonably distinguished'* from the model stipulated under Sections 7 and 9, which allows for judicial

[37] See para 6, *M/s Starlog Enterprises Limited v ICICI Bank Limited* Company Appeal (AT) (Insolvency) No 5 of 2017.
[38] Companies Act, 2013, s 424(1).

intervention by an AA at the very threshold. It may be noted that the latter model entrenches the principle of natural justice through obligations on the AA to, specifically, the right to a fair hearing.

Rebutting these submissions, the respondents asserted that there is no violation of Article 14 of the Indian Constitution, 1950,[39] as the distinction between individual insolvency and corporate insolvency is founded on an '*intelligible differentia'*. Specifically, it was argued that a Section 96 moratorium is distinct from a Section 14 moratorium. While the former operates on the debtor, the latter operates on the debt and hence, does not impinge on the *'beneficial interests of the debtor'*. Counsel for the respondents also argued that the two preconditions to *'reasonable classification'* of groups under statute stand fulfilled by the Code. *First*, it was submitted that Part II and Part III of the Code, comprising provisions on moratorium and interim moratorium respectively, are distinct in their objectives while being arguably aligned with the overall intent of the Code. On the one hand, Part II envisages the exclusion of the existing management from the affairs of the corporate debtor and a more pervasive moratorium on assets. On the other hand, Part III contemplates, at the outset, an examination by an RP on the existence of a debt, of repayment, and the repayment plan in case of continuing defaults. Second, it was submitted that both the moratorium under

[39] Article 14 of the Indian Constitution, 1950, states as follows: *"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*." Specifically, '*intelligible differentia*' is one of the preconditions to '*reasonable classification*' of groups, under statute. '*Intelligible differentia*' requires that such classification be anchored in distinguishable characteristics, between such grouped persons. The other precondition is that such differentiation in group, be both rational and linkable to the overall objective of the statute.

Section 14 and Section 96 cater to differentiable groups, being corporate entities and individuals, respectively. Therefore, there exists a valid classification in law for the insolvency resolution process across subjects in these two distinct groups.[40]

As regards the role of the RP, they emphatically stated that the role is of a recommendatory and not a discretionary nature. Their job is limited to collating claims and submitting their recommendation to the AA regarding the application. Under no circumstances can they bind the AA with their advice. Besides, the RP, while examining the application, upholds the principles of natural justice by offering an adequate opportunity to the debtor to present their case.[41]

III. HOLDING & ANALYSIS OF THE VERDICT

A. Maintaining the Sanctity of the Principle of Natural Justice

Though the doctrine of natural justice encompasses three legal precepts,[42] two of them were the focus of attention in the verdict – *audi alteram partem* and reasoned decisions. The 3-judge bench, in this matter, opined that Section 99(2) of the Code expressly recognises the *audi alteram partem* rule, which states that no concerned party should be condemned without first being heard. Notably, the plain interpretation of the

[40] See paras 32 and 35 of the *Dilip Jiwrajka* decision.
[41] Insolvency and Bankruptcy Code 2016, s 99(2).
[42] The three pillars of the principle of natural justice are *nemo judex in causa sua* (a person cannot be a judge in their own cause), *audi alteram partem,* and reasoned orders. See *The Chairman, State Bank of India and Anr v MJ James* [2021] SCC Online SC 1061.

expression *"may require the debtor to prove repayment of the debt"*[43] signifies that the debtor is granted the 'right of hearing', i.e., they are allowed to furnish an explanation regarding the repayment of the debt. Interestingly, unlike Section 99(2), Section 100 does not explicitly provide the debtor with the opportunity of a fair hearing. However, the Court read such a condition into the provision to mean that the AA arrives at a decision only after allowing the debtor to make representations and assessing all relevant evidence presented before it.[44] Equally important, the rule of reasoned order is contained in Section 99(9), which postulates that the RP must submit a report with the reasons supporting either acceptance or rejection of the application. Therefore, it can be concluded that the provisions of Part III called into question in the matter safeguard the principles of natural justice by complying with the aforementioned legal requirements.

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[43] Insolvency and Bankruptcy Code 2016, s 99(2) states that: "*Where the application has been filed under section 95, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing - (a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor; (b) evidence of encashment of a cheque issued by the debtor; or (c) a signed acknowledgment by the creditor accepting receipt of dues.*"

[44] It is hornbook law that judicial, quasi-judicial, and administrative authorities are duty-bound to construe a statute in such a manner that the affected party is afforded a hearing unless it specifically states otherwise. For instance, in *Mangilal v State of Madhya Pradesh* [2004] 2 SCC 447, the apex court held: "*Even if a statute is silent and there are no positive words in the Act or the Rules made thereunder, there could be nothing wrong in spelling out the need to hear the parties whose rights and interest are likely to be affected by the orders that may be passed, and making it a requirement to follow a fair procedure before taking a decision, unless the statute provides otherwise. The principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary. No form or procedure should ever be permitted to exclude the presentation of a litigant's defence or stand.*"

There is one more crucial aspect of the principles of natural justice that is enshrined in the Code, yet goes unaddressed in the judgement – the right to copies of documents. Section 99(10) of the Code prescribes a requirement for the RP to provide a copy of the report, containing its recommendations, to the debtor or the creditor. Interpreting this section, the Bombay High Court, in *Surendra B. Jiwrajka v. Omkara Assets Reconstruction*,[45] held that the RP abides by the principle of natural justice by supplying the debtor or the creditor with a copy of the report. That said, one may argue that a literal interpretation of sub-section (10) may imply that the RP will furnish the copy to the debtor only when the application is filed by the debtor under Section 94. To dispel confusion, the Insolvency and Bankruptcy Board of India ("**IBBI**") recently clarified that the RP must give a copy of the report to both the debtor and creditor, regardless of who files the application.[46]

B. Role of Resolution Professional

At the outset, it is important to highlight that the SC ruled that the argument that an RP nominated by the creditor is biased against the debtor, thereby compromising the fairness of the insolvency resolution process, is untenable. Notably, Section 98(1) provides that a debtor retains the right to replace the RP appointed under Section 97, enabling them to request a different RP, if necessary. This

[45] *Surendra B Jiwrajka v Omkara Assets Reconstruction* Writ Petition [2021] 6 Bom CR 177.
[46] Insolvency and Bankruptcy Board of India, Circular No IBBI/II/66/2024, <https://ibbi.gov.in/uploads/legalframwork/0ed6df8b1d8f1ef6bb762a375645a02b.pdf>

provision, thus, removes the element of bias and preserves the impartiality of the process.

On the role of the RP, the SC made it abundantly clear that the RP is vested with non-adjudicatory power and is primarily responsible for collating facts relevant to the application. They perform only a facilitative exercise that ultimately culminates in a report having only a recommendatory value and not the judicial function of ascertaining the existence of the debt. Therefore, the question of unjustness does not even arise. Alongside, the Court discarded the assertion that, for the purposes of Section 99(4), an RP is empowered to conduct a *'roving enquiry'* into the dealings and transactions of the debtor or personal guarantor without granting them a prior hearing. Specifically, the Court referenced Section 99(4), in the context of Parliament's legislative intention to limit scope, in the grant of powers to the RP. It was held that such grant of enquiry powers is limited to facilitate the RP's ultimate recommendation in the report on the nature of the insolvency application itself, and not on other ancillary matters even in cases of third-party requests. Such enquiry must be pointed and specific to the resolution application. Therefore, it is evident from the construction of the section that the RP limits the enquiry's scope to the application filed under Section 94 or 95 alone. It also expressed its disagreement with the petitioner's stand that the RP seeking information concerning the application is tantamount to an invasion of the privacy of the debtor and the personal guarantor. The SC observed that the activity of *'soliciting information pertaining to application'* falls under one of the exceptions to the right to privacy as

carved out in *K.S. Puttaswamy v. Union of India*[47] – '*the pursuit of a legitimate aim*'. Here, the task of obtaining particulars is undisputedly a prerequisite for achieving the '*legitimate aim*' of smooth and successful functioning of the individual insolvency resolution process.

C. Role of Adjudicatory Authority

The SC agreed with the respondents' submission that the AA performs the *'true adjudicatory function'* under Section 100 of the Code upon receiving the report prepared by the RP as per Section 99. Under no circumstances can an RP bind the AA with their recommendation, and the AA can always exercise its discretion to admit or reject an application. The Court also noted that the provisions of Section 99 do not carry any dire civil consequences for the debtor. *In Mohinder Singh Gill v. Chief Election Commissioner*,[48] the apex court defined the phrase '*civil consequences*'. It entails *"infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages"*. Indubitably, none of these are a result of the actions undertaken by the RP in accordance with the provision. More importantly, a person is deemed a '*debtor*' before Section 100 only for the purposes of initiating the insolvency resolution process. Since a person is not regarded as a

[47] *KS Puttaswamy v Union of India* [2017] 10 SCC 1: The Supreme Court established the three-fold requirement to strike a balance between the right to privacy and legitimate state interests: (a) legality, i.e., the requirement that the action is sanctioned by law; (b) action is necessary to accomplish a legitimate aim; and (c) proportionality, i.e., the rational nexus between the legitimate aims and the methods to achieve them.

[48] *Mohinder Singh Gill v Chief Election Commissioner* [1978] 1 SCC 405.

debtor in the real sense until the AA makes its final decision, no injury can be inflicted on the debtor at the Section 99 stage.[49]

IV. POTENTIAL IMPACT OF THE RULING

The SC, while deciding whether Sections 95 to 100 violate Articles 14 and 21 of the Constitution, rejected a batch of 384 petitions. In one of these matters, later tagged with the batch of appeal petitions,[50] the SC issued a stay order in an erstwhile ongoing insolvency proceeding against PGs. Specifically, the apex court refrained the petitioner from transferring or disposing of assets and restrained the resolution professional from taking further action. In the wake of the much-needed clarification provided by *Dilip Jiwrajka*, we may expect the resumption of proceedings against PGs in AA.

Another positive impact of the verdict is that it can result in a rise in bank realisations of corporate dues from PGs. According to the latest data published by IBBI,[51] till March 2024, only 383 applications were admitted out of the 2,800 applications filed. The amount of corporate debt involved in the admitted applications is approximately ₹ 4767 crores. However, the realised amount is only ₹ 102.78 crores, implying that the realisation rate

[49] The Court distinguished the instant case from *State Bank of India v Rajesh Agarwal* [2023] SCC Online SC 342. In that case, the apex court observed that the classification of the borrower's account as fraud without allowing them to be heard entailed material civil consequences for them, including blacklisting them for being 'unworthy' of credit.

[50] *Dilip Jiwrajka v Union of India* WP (C) No 307/2022.

[51] Insolvency and Bankruptcy Board of India Quarterly Newsletter (January - March, 2024), Vol 30, <https://ibbi.gov.in/uploads/publication/b4ce3516920836e9ff9b1e816137bf97.pdf>

is abysmally low at a mere 2.16%. With the pronouncement of the *Dilip Jiwrajka* ruling, it is reasonable to expect that the recovery rate will substantially improve as the creditors will be able to utilise the assets of PGs for the outstanding balance.

Lastly, the judgement may also serve as judicial backing for the Central Government to bring into force the provisions of the Code pertaining to other categories of individuals, including partnership firms, proprietorship firms, and other individuals. Put simply, the upholding of the constitutional validity of Sections 95 to 100 clears the path for the implementation of the insolvency regime for these entities. The debt settlement procedure prescribed under Part III will facilitate a timely and effective resolution to over-indebtedness by enabling the above-named categories to formulate a structured repayment plan. This framework will allow them to restructure their debt and ultimately achieve financial rehabilitation.

An Analytical Study on NCLT's Power and Restrictions under the Insolvency and Bankruptcy Code

Devendra Saikumar[*] *& Yamini Reddy*[**]

ABSTRACT

The current insolvency system in India can be traced back to the period of colonial authority. The framework has experienced several revisions over the past two centuries, resulting in a multitude of overlapping and contradictory decisions made by the adjudicating bodies. There were many attempts made in the past to reorganise the sick industries, and make the process time-efficient through reconciliation of various Acts such as the Companies Act, 2013, RDDBFI Act, and SARFAESI Act. However, these efforts fell short of expectations, prompting the legislature to introduce the IBC Code. One of the primary objectives of the Code is to ensure a time-bound resolution process. To achieve this, quasi-judicial bodies like the NCLT have been vested with extensive jurisdictional powers over all aspects of the CIRP and corporate debtors. The paper is structured into two parts. The first part focuses on significant amendments regarding the powers of courts and tribunals in resolving insolvency disputes throughout India's legal history, leading to the current bankruptcy framework. The second part

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examines how the objectives of the Insolvency and Bankruptcy Code have been achieved by empowering quasi-judicial authorities to determine the future of insolvent companies.

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I. HISTORICAL EVOLUTION OF INSOLVENCY COURTS: JURISDICTION & PROCEDURES

The insolvency law in India is based on the English law. The understanding of the need for a legal framework to deal with insolvency

first emerged in India's three Presidency towns of Bombay, Calcutta, and Madras during British colonialism, when they were engaged in trade and commerce. The initial regulations on insolvency are outlined in Sections 23 and 24 of the Government of India Act, 1800[52], the Indian Insolvency Act, 1848[53], and the Presidency-towns Insolvency Act, 1909.[54]

The Presidency-towns Insolvency Act, 1909, remained in force in Bombay, Calcutta, and Madras, governing insolvency proceedings for individuals, partnerships, and groups of individuals. In 1828, legislation was enacted to establish insolvency courts in these Presidency towns, primarily to assist those unable to repay their debts.[55] These courts functioned both as independent courts and appellate bodies. If individuals were dissatisfied with the rulings of these courts, they had the option to appeal to the Supreme Court, which held the authority to review and transfer cases it deemed reasonable and significant.

The Supreme Court delegated the responsibility of overseeing the insolvency courts to its officials, one of whom was referred to as a "common appointee." Before 1907, there was no legal framework specifically addressing insolvency outside the Presidency towns. To address this gap, the Provincial Insolvency Act of 1907 was enacted, which was later replaced by the Provincial Insolvency Act of 1920.

[52] Statute 9 of the Government of India Act 1828.
[53] The Indian Insolvency Act, 1848.
[54] The Presidency Towns Act, 1909.
[55] The Provincial Insolvency Act, 1920.

These two legislations were in force until recently, when they were repealed by the new code.[56] The Concurrent List of the Indian Constitution, enacted in 1950, included definitions for bankruptcy and insolvency, while the Union List addressed the formation, regulation, and winding up of corporations. In line with this, the Parliament passed the Companies Act of 1956, granting it jurisdiction over these matters. The Act covered all aspects of a company's business, including its liquidation. However, it did not define insolvency and bankruptcy, instead focusing on an individual's "inability to pay debts."[57] Enacted during the early stages of India's industrialization, the Act prioritized the payment of workers and government dues over secured creditors. The Companies Act was re-enacted in 2013, with many provisions closely resembling those introduced in the 2002 amendment.

Following independence, the government made initial steps to prioritise the establishment of industrial sectors to stimulate the economy. This endeavour necessitated significant financial investments. The government channelled these investments through large Development Financing Institutions ("**DFIs**"), established to promote industrial growth, as was common in other developing countries. DFIs served as key decision-making bodies, and in exchange for providing funding, they were granted board seats in the companies they financed.[58].

[56] The Insolvency and Bankruptcy Code, 2016.
[57] The Companies Act 1956.
[58] 'Development finance institutions and private sector development' OECD, <https://www.oecd.org/>

This led to a subsequent inequitable allocation of economic resources. The Sick Industrial Companies Act ("**SICA**"), enacted in 1985, aimed to identify and revive industrial enterprises that were classified as sick. The establishment of the Board of Industrial and Financial Reconstruction ("**BIFR**") and the Appellate Authority for Industrial and Financial Reconstruction was intended to provide support for the Act. The SICA was the inaugural legislation that largely focused on corporate reorganisation.

An inherent limitation of SICA was its exclusive applicability to sick industrial enterprises, thereby excluding trade, service, and other commercial entities. Moreover, it imposed certain restrictions, including its inapplicability to non-industrial firms or small and ancillary businesses. The Companies Act Amendment of 2003 was designed to revoke SICA; however, the notification of this Amendment faced delays due to legal complexities.

In 2001, the RBI formed the Advisory Group on Bankruptcy Laws, which provided many proposals for modifications to the bankruptcy legislation. One particularly noteworthy suggestion was the consolidation of various bankruptcy court statutes into a single unified code.

Prior to the implementation of the Insolvency and Bankruptcy Code ("**IBC**"), India did not have a comprehensive legislation that dealt with the complexities of financially troubled firms. A variety of laws, each applicable to particular situations, businesses, or groups of lenders, complicated the legal framework. SICA had a **specific objective of exclusively rehabilitating industrial enterprises, whilst the**

Companies Act, 1956 dealt with the **processes of liquidation and winding-up**. Simultaneously, legislations such as the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI**") and Recovery of Debts Due to Banks and Financial Institutions Act ("**RDBFI**") have facilitated the ability of financial institutions to enforce security and recover debts. The fragmented legal system led to delays, confusion, and conflicts among the various laws and forums. Additionally, many of these legislations, such as SICA, failed to facilitate timely restructuring while balancing the interests of both creditors and debtors. India's consistent poor performance in the World Bank's Ease of Doing Business Index, particularly in terms of resolving insolvencies, highlights these difficulties.

A. Need of new Consolidated law- IBC 2016

While there were several factors contributing to the establishment of the new IBC Code, this paper focuses specifically on the jurisdictional issues that prompted its creation.

There are many instances of overlapping jurisdictions between the Companies Act, 1956, and the SARFAESI Act. In the case of ***Transcore v. Union of India***,[59] the court ruled that the RDDBFI Act takes precedence over the SARFAESI Act, asserting a complementary jurisdiction. Similarly, in ***Kingfisher Airlines v. State Bank of India***,[60] the court found that the RDBFI legislation had overlapping jurisdiction with the Companies Act, 1956, and the SARFAESI Act.

[59] *Transcore v Union of India* (2008) 1SCC 125.
[60] *Kingfisher Airlines v State Bank of India* (2015) 130 SCL378.

Although the SARFAESI Act was intended to have a dominant role in addressing company winding-up issues, it ultimately fell short. Furthermore, the average time required to settle a debt under the Act was around 2 to 4 years, undermining the intended efficiency of the resolution process and hindering a company's potential for revival.

Despite the RDBFI Act's significant authority, there are several discrepancies in the law concerning the extent of its powers. In the case of ***Jeevan Diesels and Electricals v. HSBC***,[61] the court examined the authority of banks or financial institutions to initiate the liquidation process under the Companies Act. A winding-up order was issued against the appellant company, which contested this on the grounds that, according to the RDBFI Act,[62] the Company Court does not have the authority to consider winding-up proceedings initiated by a bank or financial institution. The appellant referenced the precedent set in ***Allahabad Bank v. Canara Bank***,[63] which established that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, takes precedence over winding-up procedures under the Companies Act. However, the judgment concluded that a Debt Recovery Tribunal lacks the authority to liquidate a company. The purpose of the Recovery of Debts and Bankruptcy Act is solely to facilitate debt recovery, and thus, it cannot be argued before a Company Court that a petition for winding up should be dismissed for a company that has become commercially insolvent.

[61] *Jeevan Diesels and Electricals v HSBC* (2015) 188 Comp Cas 451.
[62] Recovery of Debts and Bankruptcy Act 1993, s 17.
[63] *Allahabad Bank v Canara Bank* (2008) 4 SCC 406.

Hence, the delays in procedures, the lack of a proper forum, and the confusion among SICA, SARFAESI, and RDBFI have led to ongoing conflicts over authority, resulting in overlapping rights and liabilities among entities that may not possess the requisite legal expertise in insolvency proceedings. These issues ultimately contributed to the establishment of the new IBC Code. The IBC was designed to address these shortcomings by creating a committee of creditors ("**CoC**"), specialized adjudicating authorities ("**AAs**"), and a new regulatory body known as the Insolvency and Bankruptcy Board of India ("**IBBI**"). The National Company Law Tribunal ("**NCLT**") was specifically formed to manage corporate insolvency resolution and liquidation processes. However, excessive workloads, particularly in major urban centers like Delhi and Mumbai, have caused delays in dispute resolution. The tribunal's capacity to handle the increasing workload remains a concern due to vacancies and impending retirements among judicial and technical members, despite efforts to strengthen benches and establish regional offices. To gain a deeper understanding of the tribunals' mechanisms and their challenges, the next section examines the major objectives of the new IBC Code.

B. Objectives of the New Code

The following are the objectives of the insolvency code as listed by the IBBI board:[64]

a. Unify and consolidate the legislation concerning bankruptcy, reorganisation, and liquidation for all entities, such as

[64] 'Understanding the IBC', IBBI Handbook on Insolvency <www.ibbi.gov.in>.

businesses, people, partnership firms, and limited liability partnerships ("**LLPs**"), under a single legal framework, while making necessary changes to existing laws.

b. Promptly resolving defaults within a specified timeframe and efficiently executing liquidation or bankruptcy processes to maximise the value of assets. Hence, its main intention is time bound procedure
c. Promote the use of resolution as the primary method over recovery. Addressing the vulnerabilities in the current debt recovery protocols.
d. The Code aims to achieve a fair distribution of interests among all stakeholders, including changes in the order of priority for payment of Government dues.
e. Encouraging entrepreneurship, ensuring access to capital, and simplifying corporate operations.
f. NCLT, IRPAs, IPs, and IUs aims to eliminate inefficiencies in the bankruptcy process by developing a robust infrastructure. Wherein we would be focussing only on objective b & f in detail throughout the project.
g. Streamline the implementation of uniform regulations for various stakeholders impacted by business insolvency and the incapacity to repay debts.
h. Discuss the obstacles encountered in achieving prompt and efficient bankruptcy settlement.

i. Enhance India's position in terms of the ease of conducting business.[65]
j. Foster the growth of a dynamic loan market by enhancing the lending capacity of banks and decrease the interest rate.

II. CURRENT TRENDS & PRACTICES OF NCLT UNDER IBC CODE

The IBC implements a process that promptly initiates insolvency resolution when there is a payment default of more than INR 1,00,000 for corporate debtors and INR 1,000 for individuals or partnership entities.[66]

The Adjudicating Authority functions as a quasi-judicial body empowered to interpret and enforce the articles of the code, determine liabilities, and resolve disputes arising from the enforcement of the code. The primary objective of establishing such AA is to provide a fair and just resolution by achieving a harmonious equilibrium among the interests of all relevant parties.

A. Adjudicating authority NCLT

The Adjudicating Authority functions as a quasi-judicial body empowered to interpret and enforce the provisions of the code, determine liabilities, and resolve disputes arising from its implementation. The primary

[65] 'India at 77 Rank in World Bank's Doing Business Report 2022' Ministry of Corporate Affairs <www.pib.gov.in>
[66] Pallavi Mishra 'Threshold limit for initiation of CIRP Process' (LiveLaw, 10 April 2023) <https://www.livelaw.in/news-updates/nclat-petition-under-section-9-ibc-subsequent-registration-of-petition->

objective is to provide a fair and just resolution by achieving a harmonious compromise that takes into account the interests of all relevant parties.

AAs are judicial bodies responsible for resolving disputes under the IBC.[67] The NCLT, established under Section 408 of the Companies Act, 2013, is designated as the authority for handling corporate resolution and liquidation matters. Both the IBC and other relevant laws, including the Companies Act, grant the NCLT exclusive authority to execute and carry out the functions assigned to it.[68] Section 408 of the Companies Act provides the NCLT with the jurisdiction to perform any duties conferred upon it by the Companies Act or any other legislation, including the IBC. Additionally, Section 430 of the Companies Act, in line with Section 63 of the IBC, restricts the jurisdiction of civil courts in matters that fall under the purview of the NCLT and National Company Law Appellate Tribunal ("**NCLAT**") for adjudication.

According to Section 60(1) of the IBC, territorial jurisdiction for the purposes of insolvency resolution and liquidation will belong to the appropriate bench of the NCLT, which is located where the corporate person's registered office is. In addition, the NCLT may consider "any questions of law or fact arising out of or in relation to the corporate debtor's insolvency resolution or liquidation under IBC" due to its residuary jurisdiction under section 60(5) of the IBC.[69] Section 60(5)

[67] Insolvency and Bankruptcy Code 2016, s 5(1).
[68] Companies Act 2013, s 408.
[69] *Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta* (2020) 8 SCC 531.

guarantees that the NCLT alone has jurisdiction to resolve applications and procedures by or against a Corporate Debtor ("**CD**"), suggesting that no other body has the authority to hear such applications or proceedings. Section 60(5) begins with a non-obstante provision.

The NCLT has multiple benches situated around India, each with authority over the state in which it is based, and in certain situations, over other states. Speaking of territorial jurisdictions according to the Code, the specific division of the NCLT that has jurisdiction over the area where the corporate entity's registered office is situated is responsible for handling matters related to insolvency resolution and liquidation. The main seat of the NCLT is located in New Delhi.

The NCLT was established by the Central Government in June 2016, following the suggestions of the Justice Eradi Committee & BLRC reports.[70] The NCLT benches assumed authority previously held by the former Company Law Board, the Board for Industrial and Financial Reconstruction, and the High Courts in matters pertaining to company law. The Bankruptcy Law Reforms Committee, in its November 2015 report, said that NCLT benches should have the authority to make decisions regarding corporate insolvency and liquidation, while the NCLAT should have the power to review and decide on appeals.

The Debt Recovery Tribunal, established under the Recovery of Debts Due to Banks and Financial Institution Act, 1993, is designated by the

[70] Report of the High-Level Committee on Law relating to Insolvency and Winding up of Companies, Ministry of Corporate Affairs, 2000. (Eradi Committee)

code as the appropriate authority for handling ***individual or partnership insolvency and bankruptcy cases***, as stated in section 79(1) of the IBC. In the event of the personal guarantor of the CD becoming insolvent or bankrupt, section 60(1) of the IBC states that the NCLT bench where the CD is registered is the appropriate authority. As previously mentioned, the provisions of the code pertaining to the settlement of insolvency and bankruptcy for partnership firms and individuals, with the exception of personal guarantors to Certificates of Deposit, are not currently in effect. Therefore, Debt Recovery Tribunals currently do not have the authority to act as Appellate Authorities under the Insolvency and Bankruptcy Code.

B. Appeal to NCLAT

The IBC establishes the existence of the NCLAT, which serves as an authoritative body. Additionally, the IBC outlines a specific process for lodging appeals against the rulings made by the AAs. NCLAT was established in accordance with section 410 of the Companies Act, 2013. Its purpose is to adjudicate appeals filed against the decisions made by the NCLTs.

Under Section 61 of the IBC, any individual who is dissatisfied with a decision made by an AA has the right to appeal to the NCLAT. However, it is important to note that the appeal must be submitted within 30 days of obtaining the ruling. The NCLAT has the authority to prolong the deadline by up to 15 days if it is convinced that the appellant had valid justifications for not being able to submit the required documents within the initial 30-day timeframe. An appeal is permitted if it is believed that

the resolution plan violates any provision of the IBC or any other legislation, or if there has been any significant irregularity or fraud committed by the RP while carrying out their duties throughout the Corporate Insolvency Resolution Process ("**CIRP**") or liquidation process.

C. Appeal to Supreme court

If an individual remains dissatisfied with the judgement made by the NCLAT, they have the option to submit an appeal to the Supreme Court of India under section 62 of the IBC. However, this appeal may only be made if the dissatisfaction is rooted in a legal issue that has emerged from the ruling. The appeal must be submitted within a period of 45 days from the date of receiving the order. If the Supreme Court determines that the appellant has valid grounds for not being able to file within the first 45-day period, it may grant an additional time of up to 15 days.

III. ROLE AND FUNCTIONS OF THE ADJUDICATING AUTHORITY NCLT

In the case of ***Gujarat Urja Vikas Nigam Limited v. Mr. Amit Gupta***[71] the apex court found that the NCLT's residuary powers under the IBC are restricted and that it can only arbitrate contractual issues related to the CD's settlement procedure. The dispute included an ***ipso facto provision*** (allowing contract termination on failure, including insolvency). Gujarat Urja entered into a Power Purchase Agreement (PPA) with Astonfield Solar Field (Gujarat) Pvt. Ltd. (Astonfield) to

[71] *Gujarat Urja Vikas Nigam Limited v Mr. Amit Gupta* (2021) 7 SCC 209.

establish a photovoltaic power plant in Gujarat. However, the project faced frequent delays due to heavy rains and adverse weather conditions soon after its commencement. Astonfield subsequently went bankrupt due to significant losses. Following Astonfield's failure to rectify the default after the initiation of the CIRP, Gujarat Urja issued termination notices for the contract.

The NCLT and NCLAT granted an injunction on the notice application. The Supreme Court subsequently reviewed the appeal, focusing on the authority of the NCLT/NCLAT in matters involving contractual obligations and the regulation under the IBC. The Apex Court held that the powers of the tribunal must be derived strictly from the statute and cannot be expanded to strike a balance between debtor rescue and contractual autonomy. Section 60(5) of the IBC confers broad jurisdiction on the NCLT/NCLAT over matters concerning the CIRP.

The Apex Court held that the NCLT and NCLAT may intervene to halt contract termination notices under Section 60(5) of the IBC, particularly when the Power Purchase Agreement ("**PPA**") plays a crucial role in the Corporate Debtor's CIRP. The Court emphasized that such broad discretionary powers should only be exercised for issues directly related to the CIRP and not for unrelated matters. It clarified that this ruling does not establish a general principle regarding the NCLT's residual jurisdiction under Section 60(5) of the IBC. The Court further noted that the NCLT cannot extend its jurisdiction to matters outside of insolvency proceedings, as these fall outside the scope of the IBC.

In ***Tata Consultancy Services v. SK Wheels (P) Ltd,***[72] the Supreme Court, citing the *Gujarat Urja* case, reaffirmed that the NCLT was granted wide-ranging authority, particularly when insolvency is considered an event of default without further breaches by the Corporate Debtor. Tata Consultancy Services Private Limited (TCS) had issued termination notices to SK Wheels Pvt. Ltd. for multiple violations of the facilities agreement related to conducting examinations in educational institutions. However, after the CIRP was initiated, the NCLT, invoking Section 14 of the IBC, suspended the termination letters to preserve the debtor's status as a 'going concern'.

The court noted that the Gujarat Urja precedent cannot apply to the TCS case since the termination of ground facilities was unrelated to the CIRP. The NCLT should not intervene in contract termination unless it is essential to the process and would kill the CD.

IV. NCLT'S QUASI-JUDICIAL POWER VS JUDICIAL REVIEW POWER

In the case ***Embassy Property Developments (Private) Limited v. State of Karnataka***[73] which was also referenced by the Supreme Court in the *Gujarat Urja* case, the State of Karnataka had granted a mining lease to the Corporate Debtor. Following the CD's insolvency, the Resolution Professional (RP) requested an extension of the lease from the government. However, the extension was denied due to breaches

[72] *Tata Consultancy Services v SK Wheels (P) Ltd* (2022) 2 SCC 583.
[73] *Embassy Property Developments* (*P*) *Ltd. v State of Karnataka*, 2019 SCC OnLine SC 1542.

committed by the CD. The NCLT subsequently allowed a motion to quash the government's order and extended the lease. Upon appeal, the High Court remanded the case back to the NCLT for reconsideration.

The primary issue in the dispute was whether the High Court had the authority to overrule the NCLT's decision. Since the contract between the Corporate Debtor and the state involved matters of public interest and was governed by the relevant statutory framework, only an appropriate judicial body could adjudicate on such issues. The NCLT, being a quasi-judicial body created by statute, cannot be elevated to the status of a superior court with the power of judicial review. It is well-established that quasi-judicial authorities do not have the jurisdiction to decide on matters of public law.

In the case of ***Shri Lalit Aggarwal***,[74] it was observed that the power of review is not an inherent power of the court. The NCLAT can only use its inherent powers to correct typographical errors in review applications, but discussing evidence and arguments within the review application is beyond its authority. The NCLAT emphasized that the power of "review" is not intrinsic unless explicitly granted by statute or arises through necessary implication. Therefore, the tribunal's power to review decisions must be established by statute, which has not yet been conferred by the court.

A. The Conundrum of Insolvency Forum: IBBI

[74] *Shri Lalit Aggarwal v Shree Bihari Forgings Private Limited, Comp. Appeal (AT) No 380 of 2018.*

The IBBI concurrently performs executive, quasi-judicial, and quasi-legislative duties. It also aims to raise the standard of transactions and the profession. It is a fundamental component of the framework that carries out the IBC's implementation.

Section 196(1) of the IBC provides a clear definition of the IBBI's duties.[75] The Central Government's overarching directives govern their exercise. They consist of registering insolvency professional agencies ("**IPAs**"), insolvency professionals ("**IPs**"), and information utilities ("**IUs**") and renewing, withdrawing, suspending, or cancelling their registration; establishing minimum eligibility requirements and rules for them; and, if necessary, checking and looking into them.

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 added a new sub-clause to section 196(1), expanding the purview of the IBBI's duties to include encouraging the growth and overseeing the operations and procedures of IPs, IPAs, and IUs.

Section 196(2) of the IBC also gives the IBBI the authority to create model bye-laws that IPAs are required to abide by. These bye-laws specify the minimal requirements for professional competence, the professional and ethical behaviour of members, the process for enrolling new members, monitoring and reviewing existing members, and other related topics.

In general, the IBBI is charged with extensive powers and duties under section 196 of the IBC code. It ensures the smooth operation of markets

[75] Insolvency and Bankruptcy Code 2016, s 196(1).

and service providers, overseeing various aspects such as regulation and development of market processes and practices relating to the CIRP, liquidation process, individual insolvency and bankruptcy. The IBBI is also responsible for the registration and regulation of IP, IPAs, and IUs. Additionally, it conducts market oversight through surveillance and investigation, addresses grievances, enforces regulations, and, where necessary, engages in adjudication.

When trying a lawsuit, the IBBI is granted powers under Section 196(3) of the IBC that are comparable to those of a civil court under the Code of Civil Procedure, 1908. These include the authority to issue a commission to question witnesses or documents, to summon and compel the attendance of individuals it wishes to question under oath, and to seek the discovery and production of any person's books of accounts and other registers and documents at any time or location the IBBI designates.

B. Adherence of AA's time bound procedures under the Code

As of 31 January 2023, the government informed parliament that 21,205 cases were pending across various benches of the NCLT. Of these unresolved cases, 12,963 pertain to the IBC, 1,181 are related to mergers and amalgamations, and 7,061 fall under other categories. The delays in resolving IBC cases are frequently attributed to the NCLT being understaffed. This highlights a clear gap in achieving the intended objectives of the IBC, as the code's goal of efficient resolution remains unachieved.

V. CONCLUSION & SUGGESTIONS

The IBC signifies a significant leap forward in streamlining insolvency and bankruptcy procedures in India. Its provisions offer an early trigger for resolution and provide a clear framework for insolvency professionals. However, its effectiveness hinges on regulatory development, particularly the establishment of a proficient cadre of insolvency professionals. It has established a more structured and effective framework for resolving insolvency cases. However, challenges related to delays, judicial interpretation, and structural issues in the adjudicating authorities remain to be addressed for the IBC to fully realize its transformative potential.

As the IBC embarks on its journey of implementation, its role in transforming India's insolvency landscape will become more evident, offering businesses and creditors an avenue for more efficient resolution and liquidation processes. Frequent amendments and proactive responses by the government, the Supreme Court and IBBI indicate a commitment to refining the legislation and making it more effective in the years to come.

No law is complete without a sufficient legislative authority to monitor its efficient and effective execution. The law provides a specialised authority to solve practical issues during enforcement and application and secure justice for victims.

The Indian government must safeguard the interests of debt recovery stakeholders when creating insolvency and bankruptcy legislation ensuring that no particular group is favoured. In situations where an

individual or company takes out a loan but fails to repay it as agreed, the reasons behind such defaults can vary. When debt obligations arise, equity holders must take swift action as soon as a borrower defaults; otherwise, they risk losing control. Consequently, both creditors and debtors often scramble to recover their dues following a default. However, instead of this rush to collect, lenders and borrowers should work towards negotiating a financial restructuring to save the company, business, or firm. To maintain a healthy credit market, there needs to be a uniform legal framework that encompasses all creditors and debtors and clearly defines lenders' rights in cases of insolvency. Previous regulations have been inadequate in addressing insolvency and bankruptcy effectively. Therefore, while the goal of the IBC is to ensure swift debt recovery, the challenge of achieving this objective persists.

Internationalising the IBC: Calibrating Indian Insolvency Landscape for Cross Border Insolvencies

Yash Arjariya & Aishwarya Tiwari[*]

ABSTRACT

Through the past three decades, the economic integration of India with the global value chain has drastically transformed. This surge has intricately woven domestic businesses into the global supply chain and thus exposed them to external influences. The Insolvency and Bankruptcy Code, 2016 (IBC) of India does not provide a comprehensive framework for effective cross-border bankruptcy administration, and the evolving jurisprudence has encountered difficulties, as demonstrated by the cases of Jet Airways, Bhushan Steel, and Go Airlines, highlighting the requirement for stronger cross-border procedures. The geopolitical factors, including the Russia-Ukraine conflict, the post-COVID recovery, and diminishing globalisation, have led to contemporary supply chain issues like increased freight prices, material scarcity, energy shortages, etc. Inevitably, insolvency cases with cross-border dimensions are bound to increasingly arise, necessitating a comprehensive framework to navigate these complexities under the IBC. The essay critically analyses the proposed addition of Draft Part Z to the IBC. The authors attempt a comparative study between the Draft Part Z and the United Nations Commission on

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International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency based on the four main pillars of cross-border insolvency, i.e., access, recognition, relief, and cooperation. The essay deals with each of these pillars in detail and identifies the issues arising and possible solutions to the same. First, the essay discusses the issue of temporality in cross-border insolvency and then the scope of public policy considerations to refuse recognition of foreign proceedings. Further, arguments are made for the incorporation of provisions for interim relief in cross-border insolvency cases. Finally, the authors analyse problems related to the enforcement of insolvency-related judgments in the proposed scheme, and after analysing the inherent powers of the NCLT, it is recommended that a specific provision enabling enforcement of insolvency-related judgments be incorporated into Draft Part Z.

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I. INTRODUCTION

The idea of cross-border insolvency is premised on the principle of universalism. This principle suggests that there must be a single bankruptcy proceeding that applies universally to all the bankrupt's assets and receives worldwide recognition.[76] This principle is based upon the idea of equity that no creditor should be at an unfair advantage or disadvantage because of his domicile – be it concurrent with or different from that of the debtor's estate. Thus, the creditors are viewed as a single community, and the debtor's estate is administered in a way that is value-maximising and for the benefit of creditors as a whole. The UNCITRAL Model Law on Cross-Border Insolvency[77] ("**Model Law**") and the European Insolvency Regulation (Recast)[78] ("**EIR**") have been the two major international legal instruments codifying the procedures for the administration of cross-border insolvencies. These international legal instruments have also endorsed the 'collective' nature of cross-border insolvency, i.e., the rights and obligations of all the debtor's creditors must be considered in cross-border insolvency.[79]

The mechanism of administration of cross-border insolvency is based on the 'Centre of Main Interests' ("**COMI**") of the corporate debtor or the place of habitual residence in the case of an individual. COMI is the place where the debtor regularly administers its interest and is ascertainable by

[76] *Re HIH Casualty and General Insurance ltd* (HIH Casualty) [2008] UKHL 21.
[77] UNCITRAL, 'UNCITRAL Model Law on Cross-Border Insolvency' (30 May 1997) (Model Law).
[78] Council Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141 (Council Regulation).
[79] Model Law (n 77), art 2(a); Council Regulation (n 76), art 1 read with art 2.

third parties.[80] Such administration of interest for determining COMI may include the place from which the decisions on purchasing and sales policy, marketing, staff, and treasury management functions, including accounts payable, were directed[81] or the location of debtor's management[82] or the location of debtor's primary assets,[83] etc. There is a rebuttable presumption that a debtor's COMI is at the place of its registered office.[84] Thus, this COMI construct is the focal point to ascertain the court's jurisdiction to administer the debtor's estate distributed across countries, the kinds of reliefs that can be sought, and other corollary matters in cross-border insolvency proceedings. A more comprehensive discussion on COMI and its determinants are discussed in the later in this essay.

The Model Law primarily focuses on four necessary pillars for cross-border insolvency cases.[85] These are: (a) access, (b) recognition, (c) relief,

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[80] Miguel Virgos and Etienne Schmit, *Report on the Convention on Insolvency Proceedings* (EU Council of the EU Document 1996) para 75 (Virgos-Schmit report).
[81] *Re Angiotech Pharmaceuticals Ltd* [2011] BCSC 115.
[82] *Re Sphinx, Ltd* 351 B.R. 103 (Bankr. S.D.N.Y. 2006) 117; *Re Fairfield Sentry Ltd* (Fairfield) 714 F.3d 127 (2d Cir. 2013) 130; *Re Gerova Fin Grp, Ltd* 482 BR 86 (Bankr SDNY 2012) 91; *Re Millennium Global Emerging Credit Master Fund Ltd*, 474 BR 88 (SDNY 2012); United Nations Commission on International Trade Law, 'Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency', Chapter III para 21 < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf > accessed December 29, 2023 (Digest).
[83] ibid.
[84] Model Law (n 77) art 16(3); *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another* [2012] Bus LR 1582 [51]-[53] (Interedil).
[85] United Nations Commission on International Trade Law, 'UNCITRAL Model Law on Cross-Border Insolvency (1997)' (*UNCITRAL*, May 30, 1997) < https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency> accessed July 21, 2024.

and (d) cooperation.[86] These pillars fortify a sacrosanct framework enabling the foreign representative the right to access domestic courts to seek recognition of the foreign insolvency proceedings against the debtor, requesting appropriate reliefs to ensure a value-maximising insolvency process, while the idea of cooperation between courts of different jurisdictions underlines the whole framework.[87]

As we transition to discussing the practical challenges within the Indian insolvency landscape, including case studies like Jet Airways and Go Airlines Insolvency, the need for robust legal frameworks becomes evident. Each subsequent section will delve deeper into the intricacies of cross-border insolvency while charting the potential pathways for India's insolvency regime to evolve.

II. PRACTICAL PROBLEMS IN THE INDIAN INSOLVENCY LANDSCAPE

In India, the Insolvency and Bankruptcy Code 2016 ("**IBC**") does not contain an exclusive mechanism for the efficient administration of cross-border insolvencies. However, Section 234 empowers the central government to enter into bilateral agreements with foreign jurisdictions to address cross-border insolvency-related issues. Additionally, Section 235 empowers the adjudicating authority[88] to issue letters of request to the courts of the country with which a bilateral arrangement has been

[86] ibid.
[87] Model Law (n 77) art. 19, art. 21, art. 22.
[88] As per the framework laid by the IBC, the National Company Law Tribunal is the adjudicating authority for the matters governed by the Code.

entered under Section 234. A letter of request is a document that may be issued by the adjudicating authority to foreign courts or other relevant authorities in the context of cross-border insolvency. It can be sent for a various reason, including: gathering evidence, taking action on assets owned by a foreign entity, and locating debtors.

The implementation of the IBC, since its enactment in 2016, has been plagued by the lack of appropriate mechanisms for administering cross-border insolvency. The instance of the Jet Airways Insolvency may be useful to examine.

In *State Bank of India v. Jet Airways (India) Limited* (Jet Airways),[89] the National Company Law Tribunal ("**NCLT**") refused an application by a Dutch foreign representative[90] seeking recognition of the Dutch insolvency proceedings. It noted that there was no effective mechanism to administer concurrent proceedings under the IBC, thus refusing to recognize the Dutch insolvency proceedings.[91] On appeal, the National Company Law Appellate Tribunal ("**NCLAT**") set aside the NCLT order and directed the resolution professional, in India, and the Dutch foreign representative to observe the spirit of cooperation and not

[89] *Jet Airways (India) Ltd v State Bank of India* [2019] IA No 3223 of 2019 in CA (AT) (Ins) No 707 of 2019.
[90] Model Law (n 77) art 2(d)- 'Foreign Representative' is defined as "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."
[91] Jet Airways (n 89) [21], [42].

take any step that would prejudice the rights and interests of the creditors concerned.[92]

While this could be considered an instructive order by the NCLAT, neither could the Dutch foreign proceedings be recognised nor could any procedure for concurrent proceedings be devised. At best, what was achieved was a measure of good faith and protocol,[93] but in no way were the foreign proceedings administered in a strict 'collective' sense, as understood in the cross-border insolvency landscape. This may be attributed to the lack of a clear and definitive framework in the IBC for administering cross-border insolvencies, as the insolvency proceedings of two different jurisdictions (India and the Netherlands) were not governed by a robust statutory framework but by the mere virtue of an agreement entered into between the resolution professional in India and the Dutch insolvency administrator. A similar issue has been faced by the NCLT in the matter of ***Go Airlines Insolvency.***[94] In this backdrop, the authors examine the proposed Draft Part Z to the IBC,[95] Insolvency Law Committee ("**ILC**") October 2018 report on "*Cross Border Insolvency*"[96]

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[92] *Jet Airways (India) Ltd v State Bank of India and Anr*. [2019] SCC OnLine NCLAT 1216.
[93] ibid.
[94] *Re Go Airlines (India) Ltd* [2023] SCC OnLine NCLT 197- The NCLT was burdened to sketch the first of its kind litmus test to administer insolvency against the airlines whose issues would require a pan-jurisdictional outlook and cooperation.
[95] Ministry of Corporate Affairs, 'Draft Part Z' (June 2018) <https://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf> accessed December 29 2023 (Draft Part Z).
[96] Insolvency Law Committee, 'Report of the Insolvency Law Committee on Cross Border Insolvency' (October 2018) <https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf> accessed December 29, 2023 (ILC).

and the Cross Border Insolvency Rules and Regulations Committee ("**CBIRC**") June 2020 "*Report on the rules and regulations for cross-border insolvency resolution*"[97] to better calibrate India's insolvency landscape in administering cross-border insolvency.

III. RECOGNITION OF FOREIGN PROCEEDINGS

Under the Model Law, recognition of a foreign proceeding can be as a 'foreign main proceeding' or a 'foreign non-main proceeding'.[98] The former refers to a foreign proceeding pending in a jurisdiction in which the debtor has its COMI.[99] On the other hand, a foreign non-main proceeding refers to one pending in a jurisdiction in which the debtor has its establishment.[100] The difference between recognition of a proceeding as main or non-main lies in the reliefs available post-recognition, i.e., a foreign main proceeding enjoys a wider ambit of reliefs as compared to a foreign non-main proceeding.[101] A similar distinction has also been maintained in Draft Part Z.[102]

Thus, the recognition of foreign proceedings as 'foreign main proceeding' is dependent upon COMI determination. Both the Model Law and Draft Part Z provide for the rebuttable registered office presumption of

[97] Cross Border Insolvency Rules/Regulations Committee, 'Report on the rules and regulations for cross-border insolvency resolution' (June 2020) <https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd01382116409941 27c27.pdf> accessed December 29, 2023 (CBIRC).
[98] Model Law (n 77) art 17(20).
[99] Model Law (n 77) art 2(b).
[100] ibid art 2(c).
[101] ibid art 20.
[102] Draft Part Z (n 95) clause 2(e) and (f).

COMI.[103] However, the Draft Part Z has made a significant deviation from the Model Law by incorporating a look-back period of three months for accepting registered office presumption, i.e., the registered office of the corporate debtor should not have changed within three months before the application for recognition.[104] This provision for the lookback period is similar to the one provided in the EIR. [105]

A. Registered Office Presumption of COMI

The evidentiary value of the registered office presumption can be examined from two standpoints. The first, under the Model Law and the second, under the EIR.

The position under the Model Law is best described by Lifland J. in *Re Bear Stearns Ltd.*,[106] who explained that the registered office presumption does not have any special evidentiary value and is just one of the factors for the assessment of COMI.[107] The EIR, in contrast, lays a very strong registered office presumption and there exists a very strict burden of proof for its rebuttal.[108] The approach under Draft Part Z appears to be more aligned with the approach followed by the Model Law as the adjudicating authority is required to carry out a proactive

[103] ibid clause 14; Model Law (n 77) art 16(3).
[104] ibid clause 14(2).
[105] Article 3 of the EIR provides, "That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings."
[106] *Re Bear Stearns High-Grade Structured Credit* 374 BR 122 (Bankr SDNY 2007).
[107] ibid 127-128.
[108] Interedil (n 84).

assessment of COMI.[109] Thus, it is envisaged that the functional realities are capable of displacing purely formal criteria of registered office presumption.

Draft Part Z has made the location where the debtor's central administration takes place and which is readily ascertainable by third parties factors for assessing the debtor's COMI.[110] In global jurisprudence, rebutting the registered office presumption of COMI or establishing COMI at a place other than the registered office presumption has always been made on the yardstick of third-party ascertainability, i.e., where third parties, primarily creditors, think the COMI is.[111] Of all the factors considered for the assessment of the debtor's COMI, the 'nerve centre test', which refers to the location from which the debtor maintained its headquarters and performed the head office functions such as directing, controlling, and coordinating the corporation's activities, is the most crucial.[112]

B. Time of COMI Determination

Ascertainment of the time at which the COMI is to be determined with respect to a foreign proceeding is of utmost importance. The different

[109] ILC (n 96) para11.4.
[110] Draft Part Z (n 95) clause 14(3).
[111] *Re Eurofood IFSC Ltd* [2006] Ch 508 [118]-[122]; Virgos-Schmit report (n 5); United Nations Commission On International Trade Law, 'Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency', para 145 < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf > accessed December 29, 2023 (GEI).
[112] Sphinx (n 82); Gerova (n 82); Millenium (n 82); *Massachusetts Elephant & Castle Group, Inc.* 2011 ONSC 4201 (Ont. SCJ) [Commercial List]; Digest (n 82).

dates and times of COMI determination may yield varied results to the effect of recognising foreign proceedings as 'main proceeding' or 'non-main proceeding' or neither. For example, a receiving country may determine the COMI of an entity against which insolvency proceedings are pending at the date at which the proceedings were filed in a foreign country or at the date when ancillary proceedings seeking recognition are filed or while deciding ancillary proceedings and given the fact that an entity's COMI may change at any of these dates, may change the result of the ancillary proceeding seeking recognition.

The Model Law does not prescribe any specific time at which the determination of COMI with respect to foreign proceedings seeking recognition is to be carried out. There can be said to be three approaches that have developed with respect to the time of determination of COMI: the legal position in the United States of America, the legal position in the European Union, and the legal position in Australia, of which the positions in the United States of America and the European Union have received the most acceptance and are thus discussed herein in detail.

i. The Legal Position in the United States of America

The courts have interpreted the use of present tense 'is pending' in the definition of a foreign proceeding in the Model Law (enacted as 11 U.S.C. § 1501 et seq.) to mean that courts are required to view the COMI determination in the present, i.e., at the time when the petition seeking recognition of the foreign proceedings is filed.[113]

[113] *Lavie v Ran (Re Ran)* 607 F.3d 1017 (5th Cir. 2010) 1025; Fairfield (n 82) 134; *Re Betcorp Ltd* (Betcorp) 400 B.R. 266, 290-292; *Re British American*

However, this 'filing' based approach has attracted criticism on the aspect that it enables the debtor to engineer jurisdiction in the most favourable jurisdiction to defeat the claims of the creditors.[114] For example, a debtor may initiate voluntary insolvency proceedings in a jurisdiction that does not have its COMI at the date of filing of proceedings and subsequently engineer its operations to move its COMI to the jurisdiction and file ancillary proceedings seeking recognition of the proceeding as the main proceeding. Since the court will only determine COMI at the date of filing of ancillary proceeding, it will be satisfied with the existence of COMI in the jurisdiction at that relevant date of recognition.[115]

Thus, this problem of 'bad faith' in the COMI shift remains a major problem with the American approach. Tracing jurisprudential development in this regard, the federal circuit courts in *Re Ran*[116] and *re Fairfield Sentry*[117] have tried to address this problem albeit cursorily by reserving that while determining COMI, courts may take into account any recent shift of operations by the debtor to avoid insolvency proceedings yielding different results, in contrast to the approach taken in *Re Betcorp*[118] where the court rejected any analysis of any past operational history.

Insurance Company Limited 425 B.R. 884, 909-910; *Re Ocean Rig UDW Inc* 570 B.R. 687, 704; *Flynn v Wallace* 538 B.R. 692, 697.

[114]*See Re Millenium Global Emerging Credit Master Fund Limited 458 B.R. 64, 75* (Bankr. S.D.N.Y. 2011); *See also Re Kemsley* 489 BR 346 (Bankr SDNY 2013) 359-360.

[115]*See* Bear Stearn (n 111); *Re Basis Yield Alpha Fund* 381 B.R. 37.

[116] Re Ran (n 113).

[117] Fairfield (n 82) 134.

[118] Betcorp (n 113) 290-292.

ii. The Legal Position in Australia

The approach adopted by the Australian courts is a modified version of the law followed in the USA. Unlike the US courts, which anchor the time of determination of COMI when the ancillary proceeding seeking recognition of foreign proceeding is filed, the Australian courts determine COMI when considering such application.[119] This approach ensures an accurate determination of the COMI, whose determination is not fixed at the time when the proceeding was filed but rather where the COMI is when the court is considering or deciding the ancillary proceeding seeking recognition of foreign proceedings.

iii. The Legal Position in the European Approach

The legal position in the European Union is aimed at preventing the problem which plagues the law developed in the United States of America, i.e., possibility of debtor engineering jurisdiction to some other jurisdiction so as to defeat the claims of creditors or get favourable insolvency proceeding. Thus, it lays that the COMI determination is to be made when the foreign insolvency proceedings were filed against the debtor.[120] English courts have adopted this 'commencement approach,' i.e., while deciding ancillary proceeding seeking recognition of foreign proceeding the court will look whether at the timing of filing of such

[119] *Kellow, in the matter of Advanced Building & Construction Limited (in liq) v Advanced Building & Construction Limited (in liq)* (No 2) [2022] FCA 781 [27]; *Re Legend International Holdings Inc.* [2016] VSC 308 [96].
[120] *Susanne Staubitz-Schreiber* [2006] ECR I-701 [25] – [26].

foreign proceeding, for which recognition is sought, the debtor had its COMI in the jurisdiction or not.[121]

This approach has also received some support in American jurisprudence.[122] Amongst all authorities voicing support for 'Commencement Approach' in USA, Gropper J. in *Re Millennium Global Emerging Credit Master Fund*[123] has articulated most cogent reasons for deviating from the generally accepted 'filing approach' in USA. He justifies it owing to two reasons. Firstly, that the 'filing approach' would lead to recognition being given to change of COMI between filing of foreign insolvency proceedings and then subsequent application seeking recognition of such foreign proceedings.[124]

Secondly, this change of COMI can also be made in bad faith to defeat claims of creditors by gaining recognition for proceedings started in the most favourable jurisdiction which though did not have debtor's COMI at the date of filing. Further, it is patently clear from Gerber J.'s analysis in *re Creative Finance Ltd*.[125] that the 'filing approach' leads to ready recognitions being given to foreign proceedings emanating from 'letterbox jurisdictions' – referring to countries which did not have debtor's COMI at the time of filing of insolvency but later the COMI was engineered to seek recognition of such proceedings.

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[121] *Re Li Shu Chung* [2021] EWHC 3346 (Ch), [2021] 12 WLUK 158 [37] – [38]; *Stanford International Bank Ltd (In Receivership), Re* [2010] EWCA Civ 137, [2011] Ch. 33 [30]; *Re Videology Ltd,* [2018] EWHC 2186 (Ch).
[122] *Millenium (n 82)*; *Kemsley (n 114)*; *See also* Gerova (n 82) 92-93.
[123] ibid.
[124]*See Re Suntech Power Holdings Co.* 520 B.R. 399, 417.
[125] *Re Creative Finance Ltd* 543 B.R. 498, 518.

Through the 2013 amendment, this 'commencement approach' has also been incorporated and endorsed by the UNCITRAL Guide to Enactment and Interpretation on Model Law on Cross-Border Insolvency.[126] It can also be advanced that the Model Law does not intend COMI shift after the filing of a foreign insolvency proceeding,[127] and thus the 'commencement approach' is the most suited to the intent of Model Law as it forbids any consideration given to change of COMI after filing of the foreign insolvency proceeding.

However, Abdullah J. in *Re Zetta Jet Pte Ltd.*,[128] upon a comparative analysis of the 'filing approach' and 'commencement approach' has favoured the former majorly on the ground that an entity's discretion/autonomy to select the most favourable jurisdiction to achieve an effective restricting or insolvency cannot be objected to.[129] Furthermore, he adopted similar justifications to Markell J. in *Re Betcorp Ltd.*,[130] stating that considering the operational history of the debtor rather than contemporary realities will lead to conflicting COMI determinations as it would lead each jurisdiction to weigh various factors in the past differently, thus frustrating the goals of harmonisation and consistency in COMI determination. More problematic will be that such

[126] GEI (n 111) para 30, 159.
[127] United Nations Commission on International Trade Law, 'Report of Working Group V (Insolvency Law) on the work of its forty-first session' para 60 (May 8, 2012) < https://documents.un.org/doc/undoc/gen/v12/534/46/pdf/v1253446.pdf?token=oqGuKDgnc3eS1zl1lp&fe=true > accessed December 29, 2024.
[128] *Re Zetta Jet Pte Ltd.* [2019] SGHC 53 [53].
[129] ibid [57].
[130] Betcorp (n 113) 291.

COMI determinations will lead to denial of the proceeding emanating from the jurisdiction in which the debtor's interests are truly centred, keeping in view past considerations.[131]

iv. Indian Position: Decision with Limited Consideration

The ILC, in its report, chose not to specify any particular date for the determination of COMI for the purposes of deciding the ancillary proceeding seeking recognition of foreign proceedings.[132] It simply left the pertinent issue to be decided by the adjudicating authority. Thus, the ILC preferred not to decide on the issue, aware of the diverse international approaches in this regard.

The CBIRC, for better or worse, has chosen to address the issue and has recommended the adoption of the 'commencement approach', as followed in Europe.[133] However, CBIRC's reasoning for the same has simply been the incorporation of the same in the UNCITRAL Guide to Enactment and Interpretation, without an independent analysis of alternatives. As already explained earlier in this part, the 'commencement approach' as recommended by CBIRC is aimed at preventing the practice of forum shopping or engineering of jurisdiction by the debtor to avoid claims of the creditors. It has also been envisaged that the adjudicating authority undertakes proactive enquiry in the process of COMI determination.[134] Further, Clause 6 of Draft Part Z requires observance of

[131] ibid; *See* Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm* (32 BROOK. J. INT'L 2007).
[132] ILC (n 96) clause 11.8.
[133] CBIRC (n 97) clause 4.6.
[134] ILC (n 96) clause 11.4.

good faith. Thus, the proposed scheme of Draft Part Z currently can be said to have been calibrated to avoid the problem of forum shopping by the debtor made in bad faith. The authors suggest that a provision relating to the timing of determination of COMI of a debtor must be added in the Draft Part Z to maintain uniformity in the exercise of COMI determination by the adjudicating authority.

IV. PUBLIC POLICY

Article 6 of the Model Law empowers the receiving state to deny recognition of a foreign proceeding if it is 'manifestly contrary to its public policy'. The usage of the word 'manifestly' in Article 6 brings forth the intention of the law that the exception is to be invoked only in exceptional circumstances.[135] What constitutes public policy has, however, not been explained in the Model Law.[136]

The global jurisprudence on this point has borne out that the public policy exception can only be invoked in matters concerning 'fundamental principles' of the state.[137] The U.S. Bankruptcy Court in *Re Tri-continental Exchange Ltd.,*[138] explained the 'fundamental principles' of a state to cover procedural fairness, constitutional rights and liberties, and statutory rights of the state.

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[135] GEI (n 111) para 21(e), 104.
[136] HIH Casualty (n 76) [30].
[137] Re Ran (n 113)1021; *Re Ernst Young, Inc.* 383 B.R. 773, 781; *Re ABC Learning Centres* (ABC Learning) 728 F.3d 301 (3d Cir. 2013), 309; *Re Ephedra Products Liability Litigation* (Ephedra) 349 B.R. 333, 336; *Ackermann v Levine* (Ackermann) 788 F.2d 830 (2d Cir.1986), 842; *Re Tri–Continental Exchange Ltd.* 349 B.R. 627, 633–34.
[138] *Re Tri-continental Exchange Ltd* 349 B.R. 627, 633–34.

The scope of public policy as explained in *Tri-continental Exchange* has been maintained in a catena of judgements.[139] However, a combined reading of the cases brings forth that the invocation of the public policy exception is primarily concerned with the question of whether the foreign proceeding seeking recognition has complied with the standards of procedural fairness of the receiving state, i.e., whether principles of natural justice have been followed, fair opportunity of participation to every creditor has been given or not, etc.[140]

There can thus be two general principles of law that can be ascertained from the scholarship of jurisprudence on public policy exception. First, that the exception is primarily concerned with procedural fairness. And second, that the exception needs to be invoked very restrictively, and rarely to refuse recognition.[141]

A. Indian Interpretation of the 'Public Policy' Exception: at Loggerheads with the Model Law

The ILC has provided that to determine what constitutes a public policy exception, the adjudicating authority may consider domestic

[139] *See Re Toft* 453 B.R. 186, 194; *Re Gold & Honey* 410 B.R. 357, 371-372; *Jaffe v Samsung Elecs. Co.* 737 F.3d 14 (4th Cir. 2013), 18, 22-28; *Ad Hoc Group of Vitro Noteholders v Vitro S.A.B de C.V.* 701 F.3d 1031 (5th Cir. 2012), 1069.
[140] Ephedra (n 62); *Re Metcalfe & Mansfield Alternative Investments* 421 B.R. 685, 697; ABC Learning (n 62); *Cunard Steamship Co. v Salen Reefer Services* AB 773 F.2d 452 (2d Cir. 1985), 457; *Re Qimonda AG Bankruptcy Litigation* 433 B.R. 547, 568.
[141] GEI (n 111) para 21(e), 29, 30, 103 and 104.

interpretations of public policy.[142] Thus, it is relevant to account for major pronouncements by the Supreme Court of India (**SC**), which, while dealing with the enforcement of arbitral awards, have interpreted the principles of private international law and thus laid a general principle of law with respect to the application of the 'public policy' exception in India.

A full bench judgment of the SC in *Renusagar,*[143] though dealing with the scope of 'public policy' appearing in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, has generally interpreted the doctrine of public policy as applied in private international law. As per the court, the invocation of a public policy exception to refuse recognition can be justified in three scenarios: "if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."[144] The stance taken by the SC in *Shri Lal Mahal*[145] is more aligned with global jurisprudence in the aspect that the court entered the public policy inquiry around the procedural proprietary of the foreign proceeding; it explained the grounds for invoking the 'public policy exception' as "....so unfair and unreasonable that it shocks the conscience of the court."

However, the stance taken by the SC in *Saw Pipes*[146] implicated giving a wider import to public policy exception. In doing so, the rationale advanced was that if wide meaning is accorded to such an exception, the

[142] ILC (n 96) clause 3.5.
[143] *Renusagar Power Co. Ltd. v General Electric Co*., [1994] Supp (1) SCC 644, [66].
[144] ibid.
[145] *Shri Lal Mahal Ltd. v Progetto Grano SpA*, [2014] 2 SCC 433, [25].
[146] *ONGC Ltd. v Saw Pipes Ltd.,* [2003] 5 SCC 705.

enforcement of *patently illegal awards* may be avoided.[147] It is curious to compare the word 'patently' as used by the SC to qualify 'illegal awards' and thus making a ground for refusal of recognition with 'manifestly' as appearing under Article 6 of the Model Law (which requires the foreign proceeding to be manifestly contrary to the public policy of a nation to deny recognition). It can be said that while Model law has qualified the invocation of the public policy exception when the foreign proceeding is 'manifestly' contrary to public policy and thus restricting its application in routine matters, the SC postulated a bigger import to the meaning of the exception (refusing to accept a narrow construct of the exception) and in turn refusal of recognition every time the provisions of the Arbitration act were violated. Thus, while the Model Law intends refusal of recognition in exceptional matters, the SC ruling warrants refusal of recognition every time a statutory provision is violated.

B. Call for Restrictive Application of the Exception

However, if the law laid in *Saw Pipes*[148] is imported into the terrain of cross-border insolvency in India, it would have the effect of frustrating the cooperation and harmony in administering cross-border insolvencies, as mere difference in laws would be sufficient to invoke the public policy exception.

This, the author submits, is against the spirit of the Model Law, as per which mere difference in the scheme of domestic insolvency laws does not

[147] ibid [22].
[148] ibid.

qualify as being 'manifestly' contrary to a nation's public policy.[149] The pronouncement by the House of Lords in *Re HIH Casualty & General Insurance ltd.*[150] indicates the general stance of global jurisprudence in this regard: that the spirit of universalism and cooperation needs to be always guarded in administering cross-border insolvencies, and thus, mere differences in the insolvency laws of the foreign country and those of the receiving country cannot become ground for refusal of recognition on the basis of public policy violation. Similarly, an instructive judgment by Cardozo J. in *Ackermann v. Levine*[151] while reaffirming the narrowness of the public policy exception, has perfectly summarised that courts must not have a provincial outlook to say that every solution to a problem is wrong because it is dealt with otherwise at home.

It needs to be underlined that the ILC has recommended an exact import of Article 6 of the Model Law into the Draft Part Z.[152] Thus, Article 4 of the Draft Part Z prescribes the refusal of foreign proceedings if they are 'manifestly' contrary to the public policy of India. Similarly, Guideline 4 of the CBIRC Report also postulates a refusal to take action when the effects would be manifestly contrary to the public policy of India. Hence, the intent of the ILC is clear: this exception is to be invoked exceptionally in line with global jurisprudence in this regard.[153]

V. ACCESS TO FOREIGN REPRESENTATIVES

[149] GEI (n 111) para 30.
[150] HIH Casualty (n 76).
[151] Ackermann (n 137).
[152] ILC (n 96) clause 3.4.
[153] CBIRC (n 97) clause 3.5 and 3.6.

The Model Law envisages the right of direct access to foreign representatives to courts in the enacting country.[154] In essence, it is intended that the formal requirements such as registration, licence etc. as required by domestic law to be dispensed for foreign representatives.[155] Thus, this right to direct access accorded to foreign representatives is to enable them to approach courts or appropriate fora, and to avail necessary remedies in relation to foreign proceedings. However, there are two crucial aspects to be dealt with respect to this right to access to the foreign representatives. First, whether foreign representatives will be able to overcome bar imposed on certain foreign professionals to practice in India? And second, what will be the extent of the right of direct access to the foreign representatives?

In India, as per the law laid down by the SC in *Bar Council of India v. A.K. Balaji*,[156] foreign lawyers and law firms are not allowed to participate in litigation and non-litigation matters, and, thus not allowed to practise. The 2023 Bar Council of India guidelines only allow limited exemptions to foreign lawyers based on the principle of reciprocity that the Indian lawyers enjoy same rights in their country.[157] Similarly, foreign chartered accountants are not allowed to practise in India.[158] Thus, it appears likely

[154] Model Law (n 77) art 9.
[155] GEI (n 111) para 108.
[156] *Bar Council of India v A.K. Balaji,* [2018] 5 SCC 379 [42]-[43].
[157] Bar Council of India, 'Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India' (March 2023) <https://www.livelaw.in/pdf_upload/bar-council-of-india-rules-for-registration-and-regulation-of-foreign-lawyers-and-foreign-law-firms-in-india-2022-463531.pdf> accessed March 7, 2024.
[158] The Chartered Accountants Act 1949, s. 29.

that in line with such restrictions, foreign lawyers *qua* foreign representatives will not be permitted direct access to courts in India.[159]

However, this understanding is flawed owing to two reasons. First, the access to such foreign lawyers and professionals is in their capacity of a 'foreign representative', thus forming a distinct class. Second, the Draft Part Z deviates from the Model Law that it allows direct access to foreign representatives only with respect to proceedings under the IBC,[160] as against access given to foreign representative in any proceeding against the debtor by the latter.[161]

In light of foregoing considerations, it will be untenable to say that allowing a foreign professional to participate as foreign representative will amount to allowing them to practise in India. To arrive at this claim, the CBIRC report drew comparative analogy with the legal system of Bahrain and South Africa, which being similar to India, do not allow foreign lawyers to practise in their jurisdiction but have allowed them to access court as foreign representatives.[162] Additionally, the CBIRC also tried to justify the right to access on the basis that, in principle, the foreign professionals as foreign representatives will invariably depend upon local insolvency professionals, local counsels etc. and thus would result in increased co-operation between stakeholders.[163]

A. Extent of Right of Direct Access

[159] *See* ILC (n 96) clause 5.3.
[160] Draft Part Z (n 95) clause 7.
[161] Model Law (n 77) art 9.
[162] CBIRC (n 97) clause 4.3.1.
[163] ibid.

With respect to the extent of right to direct access to the foreign representatives, as noted earlier, Draft Part Z proposes to accord the right to access only with respect to proceedings under IBC,[164] clearly restricting the scope when compared to the Model Law which allows such right with respect to every proceeding against the debtor.[165] However, the ILC and CBIRC differ on the scope of right to access as given by Draft Z. The ILC has favoured a conservative approach, i.e., arguing that such rights only to be exercisable by the foreign representative through domestic insolvency representatives and also that the extent of such right to be decided.[166] However, the CBIRC has argued for a direct exercise of the right to access by the foreign representative including right to appear before NCLT.[167] The stance taken by CBIRC is more coherent with the Model Law, while the ILC has sought to restrict the right without an underlying reason, as there appears no reason that, even after restricting the right to direct access with respect to only proceedings under the Code, there needs to be further restriction on the foreign representative's right to access.

The ILC in its report has left the issue of access to foreign representative to be decided by the Central Government through subordinate legislation,[168] and thus has not conclusively recommended any regulation mechanism, penalty provisions etc., for the foreign representatives enjoying the right to direct access. The ILC could not agree on whether

[164] Draft Part Z (n 95) clause 7.
[165] Model Law (n 77) art 9.
[166] ILC (n 96) clause 5.4.
[167] CBIRC (n 97) clause 4.3.1.
[168] *See* ILC (n 96) clause 6.3.

registration recommended a code of conduct and a penalty provision similar to those applicable on insolvency professionals in India.

However, the CBIRC recommended a 'principle-based light-touch code of conduct' for foreign representatives. Two aspects of CBIRC's recommendations needs to be highlighted. First, that it deemed fit to extend the applicability of regulations contained in First Schedule of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 *mutatis mutandis* to the foreign representatives.[169] Second, it vouched for a 'deemed authorisation model' for foreign representatives, i.e., unless the application for authorisation to foreign representative to exercise their right of access is denied by Insolvency Board of India ("**IBBI**") within ten days, it will be deemed to be approved.[170]

B. Case of Misfeasance by Foreign Representative

It has been left to the IBBI to decide the cases of misfeasance by foreign representatives or actions in bad faith by foreign representatives etc.[171] Thus, Clause 8 of the Draft Part Z enables the board to impose penalties in this regard. The ILC report, though discussed a penalty provision as existent in U.K.[172] which provides for a similar penalty for misfeasance by foreign representatives as applicable to domestic professionals. However, the ILC has made a departure with respect to the position in the U.K. in

[169] CBIRC (n 97) clause 4.3.2.
[170] ibid clause 4.3.2.
[171] ibid clause 4.3.2; ILC (n 96) clause 6.3.
[172] Cross-Border Insolvency Regulations 2006, Schedule 2, reg 29.

the sense that in the U.K., courts are required to determine punishment/penalty for misfeasance, while in the Draft Part Z the Indian regulator (IBBI) has been entrusted with such functions.

Next, it needs to be ascertained as to what would be the impact on decision to recognise and enforce foreign proceeding in case of misfeasance by foreign representative. It can gainfully be referred to the position in the U.S. (which has enacted the Model Law as 11 U.S.C. § 1501 et seq.), where it appears to be settled after the ruling in *SNP Boat Services S.A. v. Hotel Le St. James*[173] that any action against the foreign representative for his misfeasance or actions taken in bad faith, cannot lead to de-recognition of the foreign proceeding, i.e., to let any action taken against the foreign representative have an impact on the status of recognition or enforcement of foreign proceeding is of extreme nature and appropriate only as a last resort.

Though, Draft Part Z does not conclusively provide for this issue, it is hoped that any decision on foreign representative to not have an impact on the recognition and enforcement of foreign proceeding not only on the lines of the settled position in U.S. but also on the basis of limited help that the CBIRC report provides in this regard[174], which has recommended to separate the IBBI's decision of authorisation of foreign representative and any consequential effect it may have on proceeding under the code.

VI. INTERIM RELIEF

[173] *SNP Boat Services S.A. v Hotel Le St. James* 483 B.R. 776, 787-788.
[174] CBIRC (n 97) clause 4.3.2.

Interim relief refers to any provisional relief that a domestic court may grant from the time of the filing of the application for recognition of foreign proceedings until this application is decided upon. Upon a comparative reading of Article 20 of the Model Law, which deals with relief upon recognition as a foreign main proceeding, and Article 19 of the Model Law, dealing with interim relief, it becomes manifestly clear that the relief available under Article 19 is at the total discretion of the domestic court which receives the application of recognition. The interim relief so granted by the domestic court may include staying execution against the debtor's assets, suspending the right to transfer or encumber the debtor's estate, entrusting the debtor's assets to a foreign representative to protect the value of the assets, etc. The ambit of interim reliefs post-recognition of foreign proceedings also includes a stay on litigation against the debtor.

The list of interim relief under the Model Law is a non-exhaustive one, and any additional relief compatible with the laws of the enacting state can also be granted. Heath J. in *Steven John Williams v. Alan Geraint Simpson*,[175] has elucidated the purpose of the usage of the word 'including' as appearing in Article 19 of the Model Law in the instant case that "it would be odd if the ability to grant such relief extended only to property known to exist and readily locatable", thus broadening the interpretative scope of the permissible reliefs available to a foreign representative.

A. Draft Part Z and Interim Relief: A Skewed Approach?

[175] *Steven John Williams v Alan Geraint Simpson* CIV 2010-419-1174.

Draft Part Z has only provisioned for reliefs post-recognition of a foreign proceeding.[176] Thus, it has made a conscious attempt to deviate from the two broad categories of reliefs available under the Model Law, omitting any scope for interim relief before recognition. The ILC has rationalized this omission as an attempt to limit the discretion available to the adjudicating authority.[177] Further, the existing framework under the IBC also does not provide for any interim relief in cases of domestic insolvency; this can better be understood as a reason for not creating a separate class of reliefs for cross-border insolvency that are not provided in the domestic framework.

It will be unreasonable to operationalise the administration of cross-border insolvency without provision for interim reliefs, as the debtor may dispose of the assets to the disadvantage of the community of creditors as a whole while the application for recognition of a foreign proceeding is pending before the adjudicating authority. A similar concern has also been voiced by the ILC in its February 2020 report,[178] albeit in a domestic framework. The ILC itself recommended incorporating a provision providing for an 'interim moratorium' heeding to the concern that creditors of the corporate debtor may race to enforce their debts in the period leading up to the commencement of the corporate insolvency resolution process.[179] It recommended the following:

[176] Model Law (n 77) Art. 19, 20, 21- all provision the reliefs to be granted upon recognition of a foreign proceeding.
[177] ILC (n 96) clause 13.4.
[178] Ministry of Corporate Affairs, 'Report of the Insolvency Law Committee' (February 2020) <https://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf>
[179] ibid clause 5.3.

> Requisite amendments should be made to introduce a provision allowing for an 'interim moratorium' to be put in place after an application for initiation of CIRP has been filed but before it has been admitted, in the interests of having a collective insolvency resolution process that is value-maximizing in the interests of all stakeholders.[180]

The CBIRC has limited itself on the issue under the pretext that since there is no provision for interim relief in cases of domestic insolvency, there can be none for cross-border insolvency cases as well. Similarly, it was of the view that it would require simultaneous and parallel amendments in the IBC along with Draft Part Z to incorporate such relief. However, even in the absence of a specific provision in Draft Part Z enabling the adjudicating authority to grant interim relief while administering cross-border insolvency, some scope for such relief can be carved out in the NCLT Rules, 2016. Rule 11 of the said rules provides for the inherent powers of the adjudicating authority, empowering it to "make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of process." Interestingly, in *NUI Pulp and Paper Industries Pvt. Ltd. v. Roxcel Trading GMBH*[181] the NCLAT had used this inherent power to prohibit the corporate debtor from alienating the assets and had provided interim relief at the pre-admission stage. In light of the above order, the CBIRC report, which mentioned the lack of availability of such interim reliefs in cases of domestic proceedings as a reason for not

[180] ibid Annexure II.
[181] *NUI Pulp and Paper Industries Pvt. Ltd. v Roxcel Trading GMBH* Company Appeal (AT) (Insolvency) No. 664 of 2019.

making such a parallel provision in cases of cross-border proceedings, needs a revisit.[182]

However, the Draft Part Z is not wholly without substance in this regard. Clause 15(4) dealing with cross-border cases prescribes a maximum of fourteen (14) days from the day of application that may be taken for deciding on recognition. This departure from the Model Law seems to have been specifically incorporated to fill in the gaps created by the omission of interim relief as it endeavours for a decision upon the recognition at the earliest time possible, which then shall lead to the application of relief post-recognition reliefs. It is submitted that even after such a specified timeline, the process of law can be dodged before the decision is made. This may be understood with the following illustration.

Suppose there is a company named XYZ Pvt. Ltd. incorporated in Spain, which is also its COMI. It has business in several different countries, including India, and consequently, owns some assets in these countries. Then, XYZ Pvt. Ltd. becomes insolvent, and the Spanish bankruptcy court admits its insolvency application. The Spanish court then appoints a foreign representative who applies for recognition of the Spanish proceedings before the NCLT in India. The tribunal will now decide, as per Clause 15(4) of Draft Part Z, upon the recognition within fourteen days. It may be that between the date of application and the end of fourteen days, creditors in India may enforce their security against the company's assets based in India, or the company itself may sell off assets

[182] CBIRC (n 97) clause 4.7.

based in India, resulting in an overall diminution of the value that may be derived for all the creditors participating in the insolvency process.

Thus, a provision for interim relief can prevent the disposal of assets by the debtor while the application for recognition of foreign proceedings in India is pending and upholds the interests of having a collective insolvency resolution process that is value-maximizing in the interests of all stakeholders. In this backdrop it shall only be prudent to incorporate provisions relating to interim relief in the Draft Part Z to serve the interests of justice.

VII. RELIEF POST-RECOGNITION

Upon the decision to recognise a foreign proceeding, two types of relief become applicable: (a) mandatory relief[183] and (b) discretionary relief.[184] Mandatory relief becomes automatically applicable in cases where a foreign proceeding is recognised as the main proceeding, and such relief is not dependent upon the discretion of the court.[185] One issue which needs to be addressed specifically is the uncertainty concerning the enforcement of the judgment of the foreign proceeding as 'appropriate relief' under Article 21 of Model Law (Clause 18 of Draft Part Z).

[183] See Draft Part Z (n 95) clause 17- It provides for mandatory reliefs post-recognition of foreign proceedings as foreign main proceedings. The mandatory relief provides for the prohibition on any commencement or continuance of suits against the debtor, prohibition on alienation or transfer of the debtor's estate, etc.
[184] ibid clause 18.
[185] ibid clause 17.

A. The 'Appropriate Relief' Under Discretionary Relief and the Enforcement of Judgement of Foreign Proceeding: the Looming Uncertainty

Recognition and enforcement, though usually understood as simulative terms, are two different processes. Recognition in effect creates a legal fiction of deeming the foreign judgment as a local judgment, which, later, following the procedures prescribed in the local law, may be enforced.[186] There might be some judgments that have their purpose served upon mere recognition, and enforcement may not be needed. An illustration of such a judgment may be that of a foreign court holding that the defendant did not owe any money to the plaintiff. Here, the domestic court may instead simply recognise that finding if the plaintiff were to sue the defendant again on the same claim before that court.

Article 21(1) of the Model Law (Clause 18(1) of Draft Part Z) enables the granting of any appropriate relief by the court based on the discretion of the court. It is interesting to note that there is no express provision entitling a court to enforce a judgment in the Model Law on cross-border insolvency, and thus, similar lacunae occur in Draft Part Z, which is primarily based on the Model Law. The enforcement of the foreign judgments has been carried out by adopting a purposive interpretation of Article 21 of Model Law and the phrase *any appropriate relief* occurring thereunder.

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[186] United Nations Commission on International Trade Law, 'UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment' para 26 < https://uncitral.un.org/sites/uncitral.un.org/files/ml_recognition-gte.pdf> accessed December 29, 2023.

This absence of an express provision in this regard creates uncertainty, which has been recently manifested by the English decision in the case of *Rubin v. Eurofinance* ("**Eurofinance**"),[187] where the UK Supreme Court, despite giving recognition to the foreign judgment, refused to enforce the same judgment since there is no express provision in this regard in Model Law. Similar was the problem in the case of *Azabu Tatemono*,[188] where the court recognized the foreign judgment but did not enforce it. This approach makes the Model Law (and Draft Part Z) a toothless tiger, which facilitates merely the recognition but not the enforcement of the judgment.

The UNCITRAL tried to remedy this shortcoming of uncertainty associated with the recognition and enforcement of insolvency-related judgments by adopting the Model Law on Recognition and Enforcement of Insolvency-Related ("**MLREIJ**"). Article X of MLREIJ provided a clarification that the language of Article 21 is broad enough to include enforcement of a judgment as a discretionary relief, thus putting to rest the havoc created by *Eurofinance*. However, MLREIJ is of a very nascent origin and has not been incorporated into the domestic statutory frameworks of countries including India. Thus, in the absence of specific provisions contained in Draft Part Z providing for the enforcement of foreign judgments, the framework to enforce insolvency-related

[187] *Rubin v Eurofinance* [2012] UKSC 46.
[188] *Azabu Tatemono*, *Tokyo District Court*, 3 February 2006; Irit Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' (2021) 22 Eur Bus Org L Rev 283, 292.

judgments in India will be solely based on the purposive interpretation of Clause 18(1) of Draft Part Z.

B. Enforcing Insolvency-Related Judgements

Under the common law, two schools of thought have emerged on the question of the enforcement of a foreign insolvency judgment. The first school of thought is led by Lord Hoffman, who in the cases of *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holding PLC and others)*[189] and *Re HIH Casualty & General Insurance*[190] has emphasised the value of universalism in the administration of cross-border insolvency cases, and that comity must be granted to the proceedings pending or judgments delivered in other nations. The main rationale here is that creditors must not be at a disadvantage because of the difference in their place of residence and the location of the debtor's assets.

Whereas, the second school of thought, as vouched by Lord Collins in *Eurofinance*, has held that the Model Law is silent and not prescriptive upon enforcement of foreign judgments related to judgments. Per this view, courts cannot, on their motion, provide for universal operation of insolvency in the absence of a corresponding mandate in rules and regulations.

[189] *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holding PLC and others* [2006] UKPC 26.
[190] HIH Casualty (n 76).

In India, the Draft Part Z contains no specific provision for enforcement of insolvency-related judgments; thus, the problem highlighted in *Eurofinance* may plague the Indian administration of cross-border insolvencies. It has already been noted in the earlier part that in absence of any specific provision for enforcing insolvency-related judgments in Draft Part Z, much will depend on the purposive interpretation of Clause 18(1). The authors in this part try to sketch a mechanism for enforcement of insolvency-related judgments and aid in the adoption of such purposive interpretation of Clause 18(1), thus enabling the enforcement of insolvency-related judgments. Though it is to be understood that such a mechanism doesn't necessarily bring uniformity among cases and thus the authors are of the opinion that a specific provision enabling enforcement of insolvency-related judgments be incorporated in the Draft Part Z.

The principle of comity of courts postulates that judicial acts are mutually recognized. This principle can be said to have been recently endorsed by the High Court of Delhi in *Toshiaki AIBA v. Vipan Kumar Sharma*,[191] where the court entertained an application filed by a Japanese bankruptcy trustee seeking an injunction based on Japanese judgment. The Court highlighted the need to treat foreign creditors at par with domestic ones given the increasingly globalized world and also stressed the importance of cooperating with foreign bankruptcy courts. The legitimacy of this power to grant comity to the proceedings and judgments of the foreign court stems from the common law doctrine that courts have inherent powers to assist other courts. Thus, there arise two

[191] *Toshiaki AIBA v Vipan Kumar Sharma* 2022 SCC OnLine Del 1260.

points of consideration: (a) what is the scope of this inherent power, and (b) does NCLT have this inherent power?

i. Scope of the Inherent Power

The scope of this power is best represented by the principle of modified universalism, which may be said to be an "abated form of universalism that tries to fit in with the current legal reality."[192] In this respect, the original insolvency proceeding does not have an automatic and direct effect in the ancillary countries, and the local courts are at their discretion to evaluate compliance with certain criteria (Daft Part Z in this case). Draft Part Z may be resorted to understand the Indian position, which provides for enforcement actions, only if they are not manifestly contrary to the public policy of India. Thus, given this, the scope of this inherent power in the Indian courts seems to be operational until the fundamental policies of the nation are not manifestly violated.

ii. Does NCLT have this Inherent Power?

It has been observed that the NCLT and the NCLAT have limited jurisdiction, cannot act as a court of equity,[193] and thus cannot do what the IBC expressly does not provide them to do. As a corollary, the NCLT has exclusive jurisdiction in matters that arise under the IBC. Since none of the provisions currently in the IBC deal with the power of adjudicating authority for recognition or assistance in cross-border insolvency cases, the NCLT is not an appropriate forum for the same. Therefore, the

[192] Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98:7 Mich L Rev 2276, 2299 – 2302.
[193] *K. Sashidhar v Indian Overseas Bank & Ors* [2019] 12 SCC 150.

enforcement regime of the foreign judgments dealing with insolvency-related matters remains uncertain.

However, after the adoption of Draft Part Z, clause 18(1) may serve as the source of the inherent power of the NCLT to enforce insolvency-related judgments and also to render assistance. The intent of the ILC has also been the same, which has accepted that Article 21 of the Model Law may include enforcement of judgments as a relief if deemed fit by the Adjudicating Authority and therefore clause 18(1), which is the analogous provision in the Draft Part Z may be interpreted to include enforcement. However, as also advanced earlier, the enforcement of cross-border insolvency judgments should not be left to the mere purposive interpretation of clause 18(1) of Draft Part Z without any statutory prescription as this may yield the same result as in *Eurofinance*. Thus, an explicit statutory provision may be inserted in Draft Part Z to prescribe the enforcement of such judgments.

VIII. CONCLUSION

The authors have appreciated the recommendations and contributions of the ILC and the CBIRC reports while highlighting the gaps in the current proposed Draft Part Z framework and the possible solutions. The authors are of the suggestive stance that the following changes are required in Draft Part Z in its current form to harmonize it with the international practice and restrict potential loopholes: first, a case has been made out for the insertion of a provision for interim relief; second, a specific provision enabling enforcement of insolvency-related judgments is desirable to be incorporated; third, acting upon CBIRC's stance, an

explicit mention of the adoption of the 'commencement approach' with reference to the time of determination of COMI must be incorporated so as to curb forum shopping or engineering of jurisdiction.

The authors have also considered the policy question concerning the invocation of public policy exception to refuse the enforcement of foreign insolvency-related judgment ought to be considered. Authors have highlighted the divergent Indian jurisprudence with that of the global approach in this regard. Thus, as the time is trite and the adjudicating authority is deciding the matter, the adjudicating authority ought to take an independent approach (from the Indian jurisprudence) based on established international practices to invoke or not to invoke such exception for refusing the enforcement of insolvency-related judgments.

Critically Analysing Insolvency of Virtual Digital Assets vis-à-vis a Cross-Jurisdictional Comparison

Tanvi Jain[*] *& Sanjeesha Agarwal*[**]

ABSTRACT

The emergence of crypto assets has become a harbinger of novel opportunities and complexities. The occurrence of insolvency in the crypto industry is one such complexity. Understanding the probable effects of insolvency on digital assets is crucial owing to the increasing popularity and usage of cryptocurrencies. Owing to the absence of any comprehensive legislation or judicial authorities concerning the specific subject matter in the country, it is to be noted that the present research article is an introductory study. Through this article, the authors aim to provide an overall view into the nature of virtual digital assets- whether they fall under the category of property or not for initiating insolvency and what the cross-jurisdictional progress is instead of the insolvency of these virtual digital assets. The aim is also to identify the several potential issues that might arise in the insolvency process of such virtual assets and what can be the possible solutions to overcome those hurdles.

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I. INTRODUCTION

The virtual currency market, especially cryptocurrencies, has managed to disrupt the traditional financial landscape in India, attracting over 115 million active users.[194] Virtual digital currency is a digitally tradable type of value that employs encryption to verify transactions denominated in the given currency and is used as a platform of exchange or a repository of wealth. Some of its characteristics include being decentralised, expeditious, and innominate. Most transactions in India occur on virtual currency exchanges like Coin DCX, Wazir X, Unocoin, ZebPay, etc. These exchanges function as trading platforms where participants can either buy new VC using paper currency or bring their existing VCs to the site for trade. With the country's economy standing firmly poised on the doorstep of a digital revolution, the Union Finance Minister, in the 2022 budget session, announced the launch of Central Bank Digital Currency by the Reserve Bank of India.[195] It is described as a digital alternative to the fiat physical currency based on blockchain and other technologies and is supposed to provide a 'boost to the digital economy' and 'result in a more efficient currency management system'.

[194] Shashank Bharadwaj, '33 percent of the estimated 115 mn crypto users in India are worried about regulations' (forbesindia.com) <https://www.forbesindia.com/article/crypto-made-easy/33-percent-of-the-estimated-115-mn-crypto-users-in-india-are-worried-about-regulations/79243/1> accessed 19 February 2023.

[195] Subrata Panda, 'Union Budget 2022 proposes to introduce digital rupee to be issued by RBI' *Business Standard* (Mumbai, 1 February 2022 <https://www.business-standard.com/budget/article/union-budget-2022-proposes-to-introduce-digital-rupee-to-be-issued-by-rbi-122020100982_1.html> accessed 17 February 2022.

Legal and regulatory control of crypto assets is generally regarded to be lagging. Having said that, lawmakers are quickly strengthening current or creating new legal and regulatory regimes in response to the crypto asset market's exponential expansion and capitalisation. For instance, the government recently acknowledged the application of anti-money laundering provisions on cryptocurrencies or virtual assets through a gazette notification. Recognising the possible effects of insolvency and bankruptcy on digital currencies and their owners is crucial as cryptocurrencies increase in popularity and application.

II. NATURE OF VIRTUAL DIGITAL ASSETS – PROPERTY OR NOT?

Before examining the procedural implications of insolvency proceedings concerning digital assets, it is imperative to determine the preliminary question of the application of the Code on the said assets. Digital assets must first be acknowledged as an item of property to be regarded as the subject of insolvency. Section 3(27) of the Insolvency and Bankruptcy Code, 2016[196] ("**IBC**") defines "property" to *"include money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property"*. This reflects the wide amplitude of the expression as also highlighted in the Report of the Insolvency Law Committee dated 20-02-2020.[197]

[196] Insolvency and Bankruptcy Code 2016 (IBC 2016) s 3(27).
[197] Insolvency Law Committee, 'Report of the Insolvency Law Committee' (2020) para 8.5.

Moreover, traces of deliberation upon this contention can be found in international jurisprudence. The House of Lords established the property litmus test in ***National Provincial Bank Ltd v. Ainsworth*** (**Ainsworth case**).[198] It was decided that every interest or right must first meet the following criteria in order to be considered as property:

(i) *"definiteness;*
(ii) *identifiable by third parties;*
(iii) *capable, by nature, of being assumed by third parties; and*
(iv) *capable of some degree of permanence."*

The Ainsworth tests have been reiterated by courts in a multitude of jurisdictions to establish that virtual assets are a type of property. In ***Quoine Pte Ltd v. B2C2 Ltd***[199], the Singapore International Commercial Court held that digital assets might assume the form of property under the golden rule outlined in Ainsworth. Quoine (the virtual currency exchange platform) was sued by trader B2C2 for alleged breaches of contract and confidence. B2C2 started trading Ethereum against the market rate of one Ethereum for 0.04 of a Bitcoin in exchange for 10 Bitcoins. Quoine reversed the trades after discerning that B2C2 had sold Ethereum for an amount above two hundred and fifty times its original market value, which sparked the disagreement. In light of the factual matrix, the Court observed that digital assets cannot be termed legal tender because they are not money issued by the government.

[198] *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472 [Ainsworth].
[199] *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02.

Ainsworth[200] was also cited in ***AA v. Persons Unknown & Others Re Bitcoin***,[201] wherein an insurance business' IT system was compromised, and a Bitcoin ransom was requested before the company could regain access to its data. 96 Bitcoins were transferred as ransom out of the 109.25 Bitcoins demanded, and they were transmitted to a wallet connected to the Bitfinex cryptocurrency exchange. Regarding Bitcoins that served as ransom money, Bitfinex was the target of a private injunction. The High Court of Justice decided that owing to the fulfilment of the criteria, Bitcoin can be designated as property and thereby, granted an interim injunction. It was made absolute that believing there are just two types of properties, "choices in possession" and "choices in action" would be incorrect. Even if Bitcoin does not fit into one of these categories, it is still considered property, and more specifically, an intangible type of property.

The standing in India is unclear but not untested. In ***Internet and Mobile Association of India v. Reserve Bank of India***[202] ("**IMAI**"), an RBI circular "ring-fencing" Digital Assets, ie, advising financial entities not to deal with Digital Asset related services, was set aside by the Supreme Court following an analysis of the nature of Digital Assets. The verdict, which deals with Digital Asset regulation rather than insolvency or liquidation, gives a thorough analysis of how Digital Assets are handled internationally. Although describing virtual currencies as 'commodity', 'property', 'non-traditional currency', or 'money' may be accurate descriptions, the Court ruled that none of these constitutes the

[200] *Ainsworth* (n 198).
[201] *AA v Persons Unknown & Others Re Bitcoin* [2019] EWHC 3665 (Comm).
[202] *Internet & Mobile Assn of India v RBI* (2020) 10 SCC 274.

complete truth. Although the Court agreed with the notion that digital assets are property, it also recognised that their nature can vary in different circumstances.

In my opinion, digital assets must be handled similarly to intangible property in insolvency or liquidation situations. As they can be identified, exchanged on a platform, transferred, and are sufficiently stable to have their history made available via blockchain technology, (ie, while the values of cryptocurrencies can change, the actual units behind the values are the same and cannot change in character. The blockchain is a permanent record of transparent, transactions that have involved a cryptocurrency unit, building up its provenance and chain of ownership), digital assets display the qualities of the property. The four conditions outlined in Ainsworth are met by Digital Assets. The existence of the phrase 'any description', which permits Digital Assets to be incorporated into the definition of property, further broadens the reach of Section 3(27) of the IBC. Digital Assets are thus recognised as property under the IBC and common law.

III. SCENARIO IN DIFFERENT COUNTRIES WITH REGARDS TO INSOLVENCY OF VIRTUAL DIGITAL ASSETS

A. Russia

Courts are compelled to deal with actual disputes while regulatory and legislative agencies take their time establishing legal frameworks for the operation of the cryptocurrency market. This is especially true in the context of insolvency cases, where several questions could come up. For

instance, how should different kinds of the debtor's digital assets be handled and tracked in situations when the debtor refuses to acknowledge their existence, transfers them to third parties, or merely denies the insolvency practitioner or court access to them? Additionally, how should they be disposed of, and at what rate of exchange, if any?

Several of the aforementioned concerns were raised in Mr Tsarkov's most recent bankruptcy case, which was heard by the Commercial Court of Moscow (Russia) in March 2018.[203] The insolvency practitioner ("**IP**") in this case submitted a motion to the court requesting that it be ordered that the contents of Mr Tsarkov's allegedly owned cryptocurrency wallet at www.blockchain.info be included in the insolvency estate. The IP additionally asked for the wallet's key to be given to him. The IP claimed that Bitcoin was an asset and that it should be included in the insolvency estate because the main goal of the bankruptcy process was to sell the debtor's assets and maximise the value to creditors. Mr Tsarkov objected, arguing that bitcoin relationships were not covered by current Russian legislation and that cryptocurrencies could not be considered an object of property (civil) rights.

The court essentially presented two arguments, resolving the conflict and declining to recognise Bitcoin as an asset for insolvency law. First, it stated that it is impossible to determine the legal status of cryptocurrencies through analogy. The decentralised structure of most cryptocurrencies, operating without a central authority, does not align

[203] *The case of Mr Tsarkov* Case No A40-124668/17-71-160, Case No A40-124668/2017 [Tsarkov].

well with traditional financial assets or currencies that are typically regulated by central banks or governments. The underlying blockchain technology and cryptographic principles behind cryptocurrencies are fundamentally different from other forms of property or assets, making direct comparisons difficult. The cryptocurrency ecosystem is evolving rapidly, with new types of tokens and use cases emerging regularly. This fast pace of change makes it challenging to apply static legal analogies.

Second, and more problematic from a practical standpoint, the court correctly noted that it is difficult to determine who owns the cryptocurrency stored in a wallet because of the inherent anonymity in the use of (some) crypto wallets (for instance, registration at www.blockchain.info is free and only requires email verification). Contrary to popular belief, Mr Tsarkov did not contest ownership of the relevant Bitcoins in the current case; there was no disagreement over this. Yet the court remained unconvinced.

B. New Zealand

The most recent authority on the matter is ***David Ruscoe and Malcolm Moore v. Cryptopia Ltd***[204] ("**Cryptopia case**"). After 14% of its bitcoin was stolen, the cryptocurrency exchange platform Cryptopia Ltd was put into liquidation.

[204] *David Ian Ruscoe and Malcolm Russell Moore v Cryptopia Limited* [2020] NZHC 728 [Cryptopia].

Following a thorough examination of the aforementioned cases, the Court determined that:

(i) VCs are property because they meet all of the requirements outlined in the *Ainsworth* case[205] and,
(ii) Account holders are the actual owners of the VCs traded on Cryptopia, having held those VCs in "trust" for them.

Using terminology from Cryptopia's Terms and Conditions, such as "your coin balances", "your cryptocurrency coins", and "control back of their money", it was determined that the company intended to establish a trust where *"account holders would be depositing, buying, selling, and owning their cryptocurrency"*.[206] As a result, cryptocurrencies were dispersed to account holders upon liquidation and could not be classified as the company's assets.

C. Singapore

The Bored Ape Yacht Club[207] ("**BAYC"**), the Singapore High Court's latest ruling concerned a particular collection of Ethereum-based Bored Ape NFTs. The Court considered whether the BAYC can create proprietary rights that can be injuncted. The court stressed that blockchain-stored virtual assets are only a system of codes that are considered information. Intangible assets are not "things in possession"

[205] *Ainsworth* (n 198).
[206] *Ainsworth* (n 198), paras 27, 176-178, 191.
[207] *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 [Janesh].

because they cannot be owned like chattels. Consensus and smart contracts power their decentralised system. Bitcoin assets are not "things in action".

Common law courts rarely treat simple information as property since it is not a "thing in possession" or "thing in action". After considering judicial precedents and opinions on property, the Court expanded its position and declared that information has been referred to as a piece of knowledge that informs the reader. The Court proceeded to analyse the nature of Non-Fungible Tokens ("**NFTs**") in detail. It noted that each NFT is characterised by a unique identification code and associated metadata, which together define its distinct attributes. The Court explained the technical aspects of NFT ownership and control, highlighting that digital wallets are used to store and manage NFTs. These wallets employ a system of private keys that are linked to specific blockchain addresses, allowing the wallet owner to access and control their NFTs. The Court emphasised the significance of private keys in the NFT ecosystem. It clarified that possession of the private key equates to control over the asset, much like physical possession of cash. This private key enables the owner to initiate transfers of NFTs between digital wallets. The Court underscored the permanence and irreversibility of these transfers, comparing them to cash transactions. In its legal analysis, the Court applied the criteria established in the National Provincial Bank v Ainsworth.[208] case to determine whether NFTs could be considered property. After careful consideration, the Court concluded that NFTs satisfied all the necessary conditions outlined in Ainsworth. This

[208] *Ainsworth* (n 198).

conclusion formed the basis for the Court's decision to grant a proprietary injunction, effectively recognising NFTs as a form of property that can be subject to legal protection and enforcement.

Approaches of the judiciary to cryptocurrency and other digital assets arising in the context of insolvency proceedings vary widely between jurisdictions, including the following: In Russia, the Moscow Commercial Court took a conservative stance when it refused to recognise Bitcoin as an asset for insolvency. The court cited both the inability to determine the legal status of cryptocurrency by analogy and practical difficulties in establishing ownership given wallet anonymity.[209] In New Zealand, The court's approach in the case of Cryptopia[210] was more progressive. It identified virtual currencies as property under the Ainsworth criteria, defining account holders and not the exchange platform as the true owners of the cryptocurrencies. What that did in substance was to treat the cryptocurrencies as trust property. In Singapore, The High Court gave a fairly balanced judgment in the case of the Bored Ape Yacht Club.[211] The court, although at first considering blockchain-stored assets simply as information, eventually regarded NFTs as a type of property that could be subject to proprietary injunction. Private keys, it underlined, played a role in establishing control and ownership. These divergent approaches tend to underscore the challenge that courts everywhere are still confronted with in how to apply traditional legal frameworks to unique-characteristic digital assets. Indeed, such evolving scenes in cryptocurrency will probably inform future legislative and regulatory efforts toward the

[209] *Mr Tsarkov* (n 203).
[210] *Cryptopia Limited* (n 204).
[211] *Janesh s/o Rajkumar* (n 207).

achievement of consistent, internationally recognised frameworks on how to handle digital assets when there is an insolvency proceeding.

IV. ISSUES IDENTIFIED IN THE INSOLVENCY OF VIRTUAL DIGITAL ASSETS

A. Traceability of owner

One of the primary complications identified in the *Cryptopia* case is tracing the ownership of digital assets during CIRP. This issue is rooted in the anonymity attached to the owner of such assets and specifically, ascertaining the actual or corporate person owning them. Umpteen virtual currency exchange platforms in India, upon acknowledging this issue, have imposed Know-Your-Customer and other identification mechanisms, seen evidently in their terms and conditions. The said measures are aimed towards preventing financial crimes linked to the anonymity that VCs offer. Apart from this, they also allow a quick fix for any traceability problems that are likely to occur during the resolution or liquidation procedure.

B. *Cross-border insolvency*

A weighty problem that the Indian courts or the Adjudicating Authority may run into is cross-border insolvency. Users and account holders on virtual currency exchanges are spread worldwide and a majority of cryptocurrencies function on distributed ledger technology. This means that the blockchain is not concentrated and further engenders concerns regarding jurisdiction. The key inquiries in this regard are: firstly, place

of initiation of insolvency proceedings, and secondly, which nation's insolvency laws would be relevant?

The English courts have considered that crypto assets are located where the person or company who owns the crypto asset is domiciled,[212] but it is possible that other courts would do otherwise. For instance, a foreign court might nonetheless uphold the validity of a security even though under English law it was illegitimate because it had not been registered over crypto assets in England. It may be required to enforce judgements across borders, possibly against parties whose identities are only publicly related through social media accounts, even in the absence of competing processes.

Moreover, finding a corporate debtor's Centre of Main Interest ("**COMI**") is necessary to allay these worries. Due to the global reach of blockchain technology, determining a digital exchange's COMI might be challenging. The existing cross-border process in India is much less effective and takes longer since it necessitates bilateral agreements between India and other nations[213] or letters of request from the Adjudicating Authority to the judicial bodies in countries where the assets in dispute are located.[214]

C. *Identification of assets*

Numerous factors such as the number of bank accounts, the volume and frequency of cash transactions, as well as transfers including terms or

[212] *Osbourne v Persons Unknown & Ors* [2023] EWHC 340 (KB).
[213] IBC 2016, s 234.
[214] IBC 2016, s 235.

transactions indicative of crypto exchange, are mandated to be reviewed by insolvency practitioners during the process of identifying cryptocurrency among insolvency assets. Additionally, the presence of software related to the usage of virtual currency, huge files indicating blockchain download, and evidence of cloud technology use, are to be sought to substantiate the claims advanced.

D. *Preservation of assets*

Practitioners would have to take control of discovered crypto assets right away by transferring them to a dedicated cold wallet. Nonetheless, regardless of whether the wallet is hot or cold, practitioners should take precautions to prevent hacking, and it should only be available to the relevant parties. The risk of the asset being lost exists if someone else has access to the wallet's key. Since it is immutable and cannot be returned, extra caution is to be exercised to ensure transfer to the right wallet.

E. *Insolvency Resolution Process*

In the case of bankruptcy of a cryptocurrency exchange, one of the most important questions is whether owners of accounts at the exchange should return the digital assets to their owners or use them for the repayment of creditors to the exchange. The two categories of creditors furthered by the Code are – Financial and Operational creditors. It can be alluded that a digital asset exchange does not embody a financial debt, given the absence of debt being disbursed against the consideration for the time value of money between the account holders and exchanges.

Further, with regards to operational debt, the two below-mentioned arguments can be advanced:

(i) According to Section 5(21) of the IBC,[215] a claim regarding the provision of goods or services is referred to as "operational debt". According to the Sale of Goods Act, 1930,[216] "goods" are *"all kinds of moveable property, excluding money and actionable claims."*[217] Furthermore, since the definition explicitly excludes any type of "movable property" that shares the characteristics of actionable claims and money, goods are a distinct subset of "property". Because they are both movable property and financial instruments, virtual currencies have a hybrid nature that has also been duly sanctioned by the Apex Court in *IMAI*. Hence, since digital assets cannot be regarded as "goods", claiming them as operational debt is incorrect.

(ii) Secondly, it is to be noted that such assets are not owned by the VC exchange, but by the account holders. The 'Terms of Use' between VC companies and account holders are solely contractual agreements. The usage of phrases like "lose your cryptocurrency assets", "your digital assets", and "your cryptocurrency assets" by the aforementioned VC exchanges in their "Terms and Conditions of Use" emphasises that VCs only belong to account holders and users.

[215] IBC 2016, s 5(21).
[216] Sale of Goods Act 1930 (SoGA 1930).
[217] SoGA 1930, s 2(7).

In ***M/s Embassy Property Developments Pvt Ltd v. State of Karnataka and Ors***,[218] the highest court ruled that the definition of "assets" under the Explanation to Section 18 explicitly excludes an asset owned by a third party but not in the corporate debtor's possession due to contractual agreements. Contractual agreements, as described in Section 3(6) of the IBC, are particularly important in this context because they give birth to the "right to payment", which is an essential component of a claim. Account holders, users, and consumers can lodge claims about the CIRP and are required to receive what they genuinely possess. It should be highlighted that unlike creditors, who are paid from an insolvent party's property, VC exchanges are handicapped from paying the account holders because they do not have cryptocurrency.

F. *Treatment of creditors*

It is significant to note that digital asset platforms are characterised by the absence of safeguards such as investor protection funds. For instance, in the ***Celsius Network case***[219], according to the company's terms and conditions, terms such as "unsettled" and "unguaranteed" have been employed to describe the treatment of the digital assets of the clients during an insolvency proceeding. It further implies that such customers can be treated as unsecured creditors resulting in a complete loss of their respective assets. Further, a ruling furnished by a bankruptcy judge in the

[218] *Embassy Property Developments (P) Ltd v State of Karnataka* (2020) 13 SCC 308.
[219] *In re Celsius Network LLC* 22-10964 (MG) (Bankr SDNY Feb 29, 2024).

said company's case, provides that the deposits in yield-producing accounts belong to the form itself and not the separate account holders. Therefore, substantial ambiguities surrounding this matter can engender grave biases against the creditors.

V. POSSIBLE SOLUTIONS TO THE ISSUES IDENTIFIED IN THE INSOLVENCY OF VIRTUAL DIGITAL ASSETS

While conducting restructuring operations involving cryptocurrencies, insolvency professionals face many difficulties due to the absence of legislation and identification of cryptocurrencies. Determining whether the debtor has bitcoin assets is one of these issues. The Companies Act of 2013's Schedule III[220] now requires corporations to register their Bitcoin holdings, making it easier for insolvency specialists to locate them.

Crypto assets' bankruptcy is compounded by their offline storage on "cold wallets", where no central authority or bank may send you a notice of appointment to transfer or freeze them. "Hot wallets" store cryptocurrencies on exchanges, making them accessible to administrators, liquidators, and trustees. What happens if the wallet owner forgets the key? Many cryptocurrency assets are kept in decentralised wallets that are inaccessible to anyone since the key has been lost and cannot be restored. To secure and attempt to rekey crypto assets, it is necessary that the IP consults with experts.

[220] Companies Act 2013, sch III.

Once appointed, IPs must act proactively to identify any digital assets and their location by consulting with the company's directors, officers, and any service providers involved in the liquidation. Asset dissipation is a problem that exists regardless of the type of asset, but it is heightened by the ease with which crypto assets can be transferred. IPs have to:

i. Recognise and protect crypto assets, and should cooperate with the people in charge of the linked cryptocurrency wallets' private encryption keys.
ii. Transfer digital assets from private addresses (not, for instance, accounts owned by services or exchanges) to addresses for which the liquidators hold the private keys. By not doing this, IPs run the risk of others discovering the private keys to their addresses, allowing them to move the money without their knowledge and maybe exposing themselves to a future lawsuit.[221]

Without the owner's participation, it would be exceedingly difficult, if not impossible, to reclaim the money from a wallet, even if its physical location could be determined and it could be taken. A clear corporate governance law that prohibits a CEO or other executive of a crypto company from having exclusive access to the company's cryptocurrency funds may be the best option in this situation. When one person has sole access, there's no system of checks and balances to prevent misuse or

[221] Louise Abbott and Matthew Hennessy-Gibbs, 'Recovering Crypto Assets in Insolvency' (*keystonelaw.com*, 17 February 2023) <https://www.keystonelaw.com/keynotes/recovering-crypto-assets-in-insolvency> accessed 10 March 2023.

mistakes. If something happens to that individual (death, incapacitation, or criminal activity), the company could lose access to all its funds. Further, Exclusive control makes it difficult for other stakeholders, including investors and regulators, to verify the company's financial status. A trusted cryptocurrency custodian's service, using a digital wallet that operates with multiple signature addresses and needs more than one private key to authorise a transaction or other options that guarantee the open and secure accessibility of a company's funds could all be used for this purpose.

VI. CONCLUSION

When navigating the resolution process involving cryptocurrency, insolvency professionals around the world face significant hurdles due to the improper identification and regulation of crypto assets. The government has made an effort to create regulations for the cryptocurrency sector, but so far little real progress has been made.

The market will become more aware of the necessity for a comprehensive framework of law intended to address the insolvency or bankruptcy of corporate debtors trading in crypto assets as the use of cryptocurrency continues to rise. Hence, it would be beneficial for all parties involved if all nations developed strong obligations for handling such situations through careful consideration and active engagement of the legislative and judiciary. The prevalence of cases involving cryptocurrencies is expected to prompt the needed modifications to the rules and regulations currently in place. With this in mind, the main challenge is to strike a

balance between the effects of current legislation and the nuances of digital assets to create a steady regulatory framework for handling them.

Nonetheless, there has been a significant shift in how the world views global finance and its future. Someday, a worldwide framework may be created thanks to the speed with which international institutions and the World Bank are offering newer policy suggestions on cryptocurrencies.

PAYMENT OF GRATUITY AND PROVIDENT FUND TO THE OPERATIONAL CREDITORS AND WORKMEN UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Simran Walia[*]

ABSTRACT

*The Insolvency and Bankruptcy Code, 2016 ("**IBC, 2016**") is all-inclusive in nature which is enacted with the main intention to decide the insolvency and bankruptcy matters in a simpler and faster way. IBC, 2016 is comprehensive of all the rules and amendments related to insolvency and bankruptcy process in India. The main objective of this statute is to maximize the value of assets of the Corporate Debtor and to help the financially deficient companies to improve their business.*

*Workmen and employees, working in a company, are among the individuals who are protected by the provisions of IBC, 2016. However, the statute does not explicitly provide how all the elements included in the remuneration of the workmen and employees should be dealt with after the initiation of the Corporate Insolvency Resolution Process ("**CIRP**") under the IBC, 2016. Furthermore, it does not provide any guidelines as to how certain dues owed to the workmen and employees should be treated during the CIRP. The paper analyses deeply the important judgments which have cleared this grey area in determining the payment of dues owed to the workmen and employees by the Corporate Debtor.*

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Table of Content

I. INTRODUCTION

The Employees Provident Fund Act, 1952 ("**EPF Act**") was enacted by the Indian Parliament with the aim of providing a sense of social security to those individuals who are employed in a company. The statute was enacted to fulfill the Directive Principles of State Policy ("**DPSP**") provided under Articles 38,[222] and Article 43 of the Constitution of India.[223]

The Employees' Provident Fund and Miscellaneous Provisions Act, 1952 ("**EPF and MP Act**") mandates the employers to compulsorily make contributions under the Act, and the rights of the employees has statutory protection in case of non-compliance by employer fails to fulfill his obligation. *Illustratively*, if the contribution has been deducted from the

[222] Constitution of India 1950, art 38.
[223] Constitution of India 1950, art 43.

salaries of the employees but the employee fails to pay to the EPF, then the Employees Provident Fund Organization ("**EPFO**") can lodge a complaint with Police under Section 316 of the BNS.[224] However, when CIRP is initiated in any company, the EPF dues of the workmen and employees are treated differently. Therefore, on one side, the EPF and MP Act protected the rights of employees, and on the other, the dues owed to workmen and employees were treated in a complicated manner under the IBC, 2016.

The EPF and MP Act provide that, for safeguarding the interests of employees, separate funds for provident dues, pension dues, and deposit-link insurance dues shall be created. The contribution to the Provident Fund ("**PF**") is compulsory for employers as well as employees. The proportion of these contributions is decided by the central government.

Provident Fund dues mean those dues that the employer is mandated to pay into the PF account of his employees. It is a retirement beneficial scheme for all employees who are earning up to a particular amount. The employer is required to submit these dues to the EPFO within a certain period.

Gratuity is a benefit that is received by the employees in gratitude for their contributions to the development of the company. Therefore, Gratuity dues are those dues that employees receive from their employer at the time of their resignation or retirement from their services. Gratuity is determined by calculating the fifteen (15) day salary of an employee for

[224] Bharatiya Nyaya Sanhita 2023, s 316.

every completed year of his service, with a maximum limit of up to Rs. twenty (20) lakhs.

II. EXCLUSION OF PF AND GRATUITY DUES FROM THE LIQUIDATION ESTATE OF THE CD

Section 36 of the IBC, 2016 provides that liquidation estate is formed by the liquidator comprising of the assets (mentioned under sub-section 3) and it shall be called the liquidation estate in relation to the CD.[225] It is provided under Section 36 of the IBC, 2016 that the liquidation estate of the CD does not include certain assets, and these cannot be utilized for the purpose of recovery during the liquidation process.[226] Certain assets excluded from the liquidation estate are the dues owed to employees and workers by the employer, including PF and Gratuity. Section 36(4)(a)(iii) explicitly provides that the assets undergoing liquidation estate do not include PF, Pension Fund and Gratuity owed by the employer to his workmen and employees, and this amount cannot be used for the process of recovery during the liquidation process.[227]

Funds like PF, Pension Fund, and Gratuity are created to promote the welfare and rights of employees. Therefore, these sums are considered sacred and are kept outside the process of liquidation. This is done solely to make sure that the employees get their hard-earned money even during the liquidation of the company. In the important case of State Bank of

[225] Insolvency and Bankruptcy Code 2016 (IBC 2016) s 36.
[226] ibid.
[227] IBC 2016, s 36(4)(a)(iii).

India v. Moser Baer Karamchari Union,[228] NCLAT considered whether the sum consisting of PF, Pension Fund, and Gratuity shall be included under Section 53 of the IBC or not.[229] The instant case involved a liquidation proceeding, and the Adjudicatory Authority order the Liquidator to pay PF, Pension Fund and Gratuities due to workers and employees as per Section 36(4)(a)(iii) of the Code.[230] This decision was later upheld by the NCLAT on the ground that the term 'liquidation estate' does not include PF, Pension Fund, and Gratuity fund within its definition. Therefore, these sums are not included in those assets that are used for distribution among the creditors of the CD during liquidation.

i. Overriding conflict

It is provided under Section 238 of the IBC, 2016 that the IBC shall have overriding power over all the other statutes that are inconsistent with the provisions of this Code and are enforced in India.[231] Therefore, if there exists any provision under any other that is in conflict with the provisions of the IBC, then in that case, it is the provision mentioned under the IBC that will have the force of law. This section makes sure that the IBC takes precedence if there is a situation of disagreement with the provisions of other legislation. However, the provisions of EPF and MP Act, and IBC are not inconsistent with each other.

[228] *State Bank of India v Moser Baer Karamchari Union*, [2019] SCC OnLine NCLAT 447.
[229] IBC 2016, s 53.
[230] IBC 2016, s 36(4)(a)(iii).
[231] IBC 2016, s 238.

The NCLAT held in Sikander Singh Jamuwal v. Vinay Talwar Resolution Professional that the requirements of Section 17B of the Employees Provident Fund and Miscellaneous Requirements Act,[232] do not conflict with the IBC.[233] The Appellate Tribunal ordered the Successful Resolution Applicant ("**SRA**") to pay the amount of PF owed to the employees. Furthermore, the Tribunal held that the question regarding the application of Section 238 did not arise in the instant case as the provisions of the EPF and MP Act and the IBC Code are not inconsistent with each other.[234]

In deciding the above-mentioned case, the Tribunal referred to its earlier decision in Tourism Finance Corporation of India Ltd. v. Rainbow Papers Ltd.[235] In this case, the tribunal held that PF dues are not the assets of the CD as per Section 36(4)(a)(iii) of the Code.[236]

ii. Constitutional effect

The NCLT held in Precision Fasteners Ltd. v. EPFO that the sums owed to workmen and employees by the CD shall be treated as the first charge on the assets.[237] The EPF Act was enacted by the Indian Parliament to safeguard the interests of vulnerable sections of society, which is also mentioned in the DPSP enshrined under the Indian Constitution. An

[232]Employees Provident Fund and Miscellaneous Provisions Act 1952 (EPF & MP Act) s 17B.
[233]*Sikander Singh Jamuwal v Vinay Talwar,* [2022] SCC OnLine NCLAT 125.
[234]IBC 2016, s 238.
[235]*Tourism Finance Corporation of India Ltd. v Rainbow Papers Ltd.,* [2019] SCC OnLine NCLAT 910.
[236]IBC 2016, s 36(4)(a)(iii).
[237]*Precision Fasteners Ltd. v Employees Provident Fund Organization,* [2018] SCC OnLine NCLT 27284.

employee saves a part of his remuneration, which is earned after putting in his hard work, for later use in old age. Hence, the rights of workmen and employees, including the right to their PF dues, are interlinked with the right to life enshrined under Article 21 of the Constitution.[238] If these dues are treated at par with the amount owed to financial creditors is treated, it shall disbalance the right to life and right to property, which is inferior to the right to life provided under Article 21 of the Constitution.

The provisions of the EPF Act have been made stringent with the later amendments. Moreover, it has been expressly held under the IBC, 2016 that PF, Pension Fund, and Gratuity are not included under the assets of a liquidation estate. Furthermore, it has also been held that the employees are the owners of these fund, even though they may be in possession of the CD. Therefore, these dues should not be treated in the same manner in which the other dues are treated.

In the interesting case of SAS Autocom Engineers India (P.) Ltd. v. Office of the Recovery Officer, [239] the EPFO released a sale notice for selling a movable property that belonged to the CD for payment of dues amounting to Rs. 38,89,229. Due to this, the Liquidator filed an application in the NCLT contending that no claim was filed by the EPFO during the CIRP process or after the order allowing liquidation of the CD was passed by the Tribunal. The land, buildings, plants, and machinery belonging to the CD were auctioned by the Liquidator through e-auction, and certain money was also collected through this process. The sale of plant and

[238] Constitution of India 1950, art 21.
[239] *SAS Autocom Engineers India Private Limited, In re,* [2019] SCC OnLine NCLT 516.

machinery, however, was unable to be completed due to the status quo order issued by the Tribunal.

The Tribunal deeply analysed the meaning of the term 'claim' with respect to the CIRP and concluded that it has a broad definition and includes all claims to those individuals who have a right to receive payment from the CD, and similarly, the CD has a duty to pay the claimants. The Adjudicating Authority ("**AA**") also analysed that an IRP has the power to compile all the dues owed to the claimants, and it becomes aware of a claim when a claimant files his claim in furtherance of a notice published by the IRP. These compiled claims are then given to the CoC and are also kept for reconsideration during the resolution procedure.

However, the AA concluded that nothing in Section 11 of the EPF and MP Act,[240] and Section 36(4)(a)(iii) of the IBC exempts the EPF authorities from filing a claim before the Resolution Professional/ Liquidator with respect to the CD who is going through an insolvency or liquidation process.[241]

Therefore, it means that the EPF authorities have to first lodge a claim with the Resolution Professional, or Liquidator, who will then settle the liability of the CD by paying off these dues through money received by selling the property of the CD. This will be done in priority to settling the claims of other creditors.

[240]EPF & MP Act 1952, s 11.
[241]IBC 2016, s 36(4)(a)(iii).

iii. The landmark case of Jet Airways Ltd.

In the landmark case of Jet Aircraft Maintenance Engineers Welfare Association v. Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Ltd.,[242] the Committee of Creditors ("**CoC**") had approved the Resolution Plan, and the facts of the case did not deal with liquidation proceedings. It is mandatory for the CD to deposit the PF of its workmen with the EPFO under the EPF and MP Act, 1952. However, in the concerned case, the CD did not fulfill this obligation after February, 2019. The date of initiation of the CIRP was June 20th, 2019, and it was compulsory for the CD to deposit his PF contributions to the EPFO. The claim of the workers for a total of 24 months, including the PF and Gratuity amount, was accepted by the Resolution Professional.

The issues that arose in this case were whether the resolution plan shall provide for full payment of PF, Gratuity, and other allied benefits to the employees and workmen, as these sums are not included within the liquidation estate under Section 36(4)(b)(iii)[243] of the IBC, and whether their dues shall be paid as per the minimum liquidation value provided under Section 30(2)(b) of the IBC,[244] read with the waterfall mechanism mentioned under Section 53(1) of the Code.[245]

It was held by the NCLT that the workmen as well as employees are entitled to full payment of PF and Gratuity dues till the date of

[242] *Jet Aircraft Maintenance Engineers Welfare Assn. v Ashish Chhawchharia,* [2021] SCC OnLine NCLAT 5202.
[243] IBC 2016, s 36(4)(a)(iii).
[244] IBC 2016, s 30(2)(b).
[245] IBC 2016, s 53(1).

commencement of CIRP. As the CD had failed to fulfill his obligations under the EPF and MP Act of 1952, the SRA must make provision for fulfilling these liabilities.

Section 36(4)(a)(iii) of the IBC mostly deals with the liquidation proceedings.[246] If any fund is maintained by the CD for paying his dues to employees, including PF, Gratuity, and other allied benefits, the Interim Resolution Professional is required to take this fund into its possession. Therefore, the Information Memorandum of the Resolution Plan does not include these funds under the category of assets of the CD. Furthermore, the CD is under the obligation to make full use of these funds for paying PF, Gratuity, and other allied benefits to his employees and workmen.

III. CONCLUSION

The decision of the Adjudicating Authority in State Bank of India v. Moser Baer Karamchari Union has helped to clear a confusion regarding how PF, Gratuity, and other allied dues of the workmen and employees should be dealt with during the CIRP under the IBC, 2016. Now, it is a settled principle that PF and Gratuity dues are not included under the liquidation estate assets, and these cannot be utilized for the purpose of recovery under Section 36(4)(a)(iii) of the IBC.[247]

Furthermore, the NCLT has also provided more clarity in two different judgments. Firstly, it has held that PF, pension, and Gratuity dues shall be given priority and must be paid in full before making any other

[246] IBC 2016, s 36(4)(a)(iii).
[247] ibid.

payment under the Waterfall Mechanism as provided under Section 53 of the Code.[248] Section 53 provides a priority order under which the payment is to be distributed during the liquidation process. Such order is termed as the Waterfall Mechanism. The fact that the CD failed to maintain any separate fund for the fulfilment of these dues is irrelevant. Therefore, it can be explicitly said that the statutory dues shall be settled in priority to the other dues of the CD.

Secondly, if there are insufficient funds for fulfilling the statutory dues owed by the CD, then the Liquidator or Resolution Professional is obliged to provide more funds to remove this insufficiency before paying any other creditor as per the waterfall mechanism mentioned under Section 53 of the Code.[249] Therefore, the Liquidator cannot deny paying the dues owed to workmen and employees on the pretext of insufficiency in the separate funds maintained by the CD.

Employees will greatly benefit from this ruling, which also guarantees that they will be treated properly during the insolvency processes of the CD. The choice is a positive step towards attaining the goals of the IBC, which seeks to guarantee that insolvency and bankruptcy processes are resolved fairly and effectively for all parties.

However, at the same time, it is also necessary to remove inconsistencies in the statutory laws which undermine the protection of the rights of the employees in connection with their EPF dues. For Instance, on one hand,

[248] IBC 2016, s 53.
[249] ibid.

the courts have upheld that EPF, and other related dues of the employees are required to be paid in priority under IBC; whereas, on the other hand, Section 17B of the EPF Act allows a successful resolution applicant to carry on the business of the CD on a clean slate basis, wiping out any of the CD's previous encumbrances, if any.[250] Therefore, in order to address this issue, a harmonious construction of the statutes and a legislative clarification in this regard is necessary.

[250] EPF & MP Act 1952, s 17B.