Interim Report of The Advisory Group on Bankruptcy Laws
January 2001

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Part - I
Interim Recommendations

The group has noted that the Government of India is actively considering the implementation of the recommendations of the Justice Eardi Committee by amending some provisions of the Companies Act. This Group had the privilege of studying the Justice Eradi Committee Report, which contains specific analysis of empirical data with respect to functioning of the present winding up/insolvency system. This Group decided that in view of the immediate step that the Govt. of India may take in reforming the law relating to corporate insolvency and restructuring of sick companies and the special mandate that this Group has in studying international bankruptcy practices, especially cross-border insolvency, an interim report shall be submitted immediately so that some of the recommendations which are already formulated by this Group can be brought quickly to the notice of the Government of India. This Group therefore, finalized the following recommendations to be included along with the first four chapters of the Part 1 of the Report of the Advisory Group on Bankruptcy laws.

I. Corporate Bankruptcy

1. This group recommends a specific comprehensive Bankruptcy Code to be introduced to deal with corporate bankruptcy :

   (a) Bankruptcy law and practice should encompass in itself the corporate restructuring possibilities preceding insolvency and winding up;
   (b) Bankruptcy proceeding needs to be based on the fundamental objective of asset value maximization and hence the law has to facilitate protection of assets against all risks of further diversion, decay and destruction ;
   (c) Bankruptcy law and practice should aim to create facilities for reorganization, restructuring on voluntary basis, empowering the stakeholders to agree on a new priority of future contractual obligations;

(d) Bankruptcy law and practice, therefore, has to be based not on adversarial process but to create a new ambience to either make a restructuring possible on renegotiations or initiating fast tract insolvency and winding up proceedings. Hence, the same is not to be a part of the Companies Act;

(e) Because of the fact that a wholesome Bankruptcy code shall facilitate corporate restructuring and fast track winding up on insolvency, only provisions relating to compromise, arrangement and reconstruction at the instance of creditors (under sections 391 to 395 of the Companies Act) and voluntary winding up by members may be kept under the Companies Act and other provisions relating to the whole of the rest of winding up system need to be transferred to the Bankruptcy code;

(f) Bankruptcy code has to deal with restructuring of the companies acceptable to all parties through renegotiations replacing Sick Industrial Companies Act; and

(g) In the changing situation of growing cross-border investment, trade and commerce, cross-border insolvency problems are bound to increase both for Indian Companies having cross-boundary entities or ventures as well as foreign entities having Indian subsidiaries and ventures. A comprehensive Bankruptcy code is bound to address such issues taking into consideration international practices.

2. This Group recommends a Special Bankruptcy Bench in each High Court sitting all days as the workload demands, because :

(a) In spite of the fact that tribunalisation of justice is now a settled fact especially after L. Chandarkumar {1997 3 SCC, 261}, there is a philosophical debate going on as to the nature, extent, structure and power. Justice Eardi Committee also commented that in order to make National Tribunal able to quicken the dispute resolution, Article 323A & B of the Constitution is to be amended. This Group does not think that such a step, by -passing the judiciary, is necessary or desirable;

(b) A special bench of the High Court as a full time Bankruptcy Court shall serve all purposes as well as quickening the issue of the procedure recommended;

(c) A special bench of the High Court will be able to bring multidimensional knowledge necessary for restructuring/reorganization and bankruptcy proceedings; and

(d) A special bench shall add validity of action in all renegotiated proposals and on the failure of restructuring process, quicken the insolvency proceedings.

3. **This Group recommends a Trustee to be appointed by the Court from empanelled professional chartered accountant firms, consultants, financial institutions and law firms** for (i) managing the company as a going concern, (ii) initiating the process of negotiation for time based restructuring of the company and (iii) failing which, initiate insolvency proceedings to wind up the company and dissolve its affair. The broad features of the arrangement will be :

(a) The remuneration of the Trustee shall be incentive - compatible.
(b) Trustee can appoint financial advisers, managers, liquidators, auctioneers etc., to help the Trustee in its functions but the remuneration of these experts are to be borne by the Trustee and not the company.
(c) The company shall continue to be responsible to meet its usual business prime cost and other overhead expenses.
(d) The trustee shall be empowered to run the affairs and place only periodical reports to the court for further instructions.
(e) Any petition objecting any conditions/settlement contained in the Report can only be filed in the court after such periodical report is placed and within the time specified by the court. The court shall settle those disputes on continuous day-to-day hearing within a time frame.
(f) The Trustee shall be appointed immediately on the filing of the bankruptcy petition, if it is filed by the Debtor Company itself.
(g) If the petition is filed by as creditor or creditors, the petition is allowed on the *Prima facie* proof that the company failed to meet the claim as stipulated under section 434 of the Companies Act. (Some of the members of the Group preferred the test of Non-Performing Assets i.e., failure to pay two demands consecutively as perthe guideline of the Reserve Bank of India, but most of the members of this Group preferred the test of trigger as laid down in section 433 (e) read with section 434)

4. The road map of the bankruptcy proceedings shall be as follows:
(1) Application for initiating bankruptcy proceedings ;
(2) Appointment of Trustee : empowerment of the trustee - like power of trustee to supersede the Board; operational and functional independence; accountability to the Court including the power of the court to remove trustee in case of mismanagement; relationship with current management; monitoring or substitution; day-to-day operation etc. -
(3) Time bound restructuring/reorganization plan :
- Who should submit;
- Procedure of acceptance : 75% holding and 50% of the number present in the meeting;
- Mechanism to sell off;
- Pro-active initiative of the trustee.
(4) Number of time bound attempts for restructuring :
(5) Decision to go for insolvency and winding up; and
(6) Strategies for realization and distribution.

II. Bankruptcy proceeding for Banks and financial institutions :
1. Bankruptcy proceedings against banks and financial institutions have a very special significance especially for two purposes. Firstly, it affects the domain of the monetary system and management and financial stability, and secondly, they come under the regulatory purview of the Central Bank to protect the integrity, efficiency and soundness of the institutions. The functions of the

Central bank to act as the lender of the last resort has also to be kept in view, in respect of these institutions.

2. This special position was discussed in detail and it was also noted that in several developed countries there is a separate bankruptcy code for banks and financial institutions.
3. The separate and distinct responsibility of the Reserve Bank of India as the central bank was discussed in detail. Basically, the bankruptcy proceedings have to start in the case of the Banks and financial institutions only after the statutory moratorium period of six months followed by another six months if that is needed.
4. Protection of depositors' interest is one of the cardinal principles in the core of the commercial banking and hence must be highlighted during the process of the bankruptcy proceedings, as well. The protection of depositor's interest has to be ensured either through deposit insurance protection taken by the banks and financial institutions or by insurance taken by the depositors. It is suggested that deposit insurance premia must be risk-based, which shall give a market signal to the depositors about the credit quality of the banks and financial institutions.
5. After detailed deliberations the Group came to the conclusion that the same law and procedure and the same court system can conveniently handle the bankruptcy proceedings in the case of banks and financial institutions, as well excepting that the Trustee needs to be appointed in consultation with the RBI and form an approved panel prepared in consultation with the RBI. The Trustee shall be responsible of the upkeep of assets and preparation of final list of liabilities during the statuary and declarative moratorium. Besides, the restructuring plans submitted by any party or at the initiative of the Trustee are to be considered in consultation with the RBI. The court shall at all stages consult the RBI for smooth and effective bankruptcy operation.

III. Bankruptcy proceedings of PSU and Government Companies shall also be proceeded under the same procedure and authority mutatis mutandis

IV. This Group also recommends that while drafting the substantive and procedural rule of bankruptcy, international standards for both national and cross-border insolvency must be taken into consideration and based on Indian situation, the same can be suitably incorporated.

Part- II
Report of The Advisory Group on Bankruptcy Laws

Chapter I

Constitution and proceedings of the Committee

1. *Introduction*

For the sake of convenience, the Volume one of the Report of the Committee is divided into three parts. The first part deals with the constitution of the Advisory Committee on Bankruptcy, the terms of reference of the Committee, and the objects of and the

methodology followed by the Committee and summary of the proceedings of the meetings. The second part deals with the work done by the Committee so far. The third part is an annexe that contains some research papers submitted by the members of the Committee. The first four Chapters of the Volume I of the Report of the Advisory Group are included in this Interim Report. The proceedings of all the three meetings of the Advisory Group have been summarised in this Report.

2. *Constitution of an Advisory Committee on Bankruptcy:*
The Governor of the Reserve Bank of India constituted a Standing Committee on International Financial Standards and Codes with the objectives of identifying and monitoring developments in global standards and codes pertaining to various segments of the financial system, considering all aspects of applicability of such standards and codes to the Indian financial system, chalking out the desirable road map for aligning Indian standards and practices in the light of evolving international practices, periodically reviewing the status and progress with regard to codes and practices, and making available this report to all concerned organisations in public and private sector (Office memorandum of the Governor, RBI dated December 8, 1999). The Standing Committee in its meeting held at New Delhi on January 13, 2000 decided to constitute non official Advisory Groups in ten major subject areas encompassing 43 different standards/codes in this regard one of the subject area identified is "Bankruptcy Laws". Accordingly and Advisory Group/Committee was constituted with effect from February 8, 2000 with the following members:

1. Dr. N. L. Mitra, (Chairman), Director, National Law School of India University, Bangalore;
2. Shri. Bimal Kumar Chatterjee, Senior Advocate, Bar-at-Law, Calcutta;
3. Shri. H. Banerjee, Official Liquidator, Government of India, Chennai;
4. Shri. Cyril Shroff, Solicitor, Mumbai;
5. Dr. T.C.A. Anant, Delhi School of Economics, Delhi;
6. Shri. S. Krishnaswamy, FCA, Former Chairman of the Institute of Chartered Accountants, Bangalore;
7. Dr. Shubhashis Gangopadhyay, Indian Statistical Institute, New Delhi;
8. Shri. K. Kanagasabapathy, (Convenor), Advisor in Charge, Monetary Policy Department, Reserve Bank of India; and
9. Dr. R. Kannan, (Convenor), Advisor, Department of Economic Analysis and policy are the convenors of the Advisory Group.

The committee in its first meeting, co-opted Shri. S. H. Bhojani, Deputy Managing Director, ICICI as its member. The committee also requested Shri. N.V. Deshpande, Principal Legal Advisor, Reserve Bank of India to be the special invitee and attend all meetings of the Advisory Group and enrich it with his active participation in the deliberations, which he kindly accepted. The Committee also invited Shri M. S. Verma, Chairman, Telecom Regulatory Authority of India, and Dr. R. H. Patil, National Stock Exchange to participate in its deliberations.

3. The terms of reference of the Advisory Group

The terms of reference of the Advisory Committee are as follows:

(1) To study present status of applicability and relevance and compliance of relevant standards and codes;
(2) To review the feasibility of compliance and the time frame over which this could be achieved given the prevailing legal and institutional practices;
(3) To compare the levels of adherence in India, vis-à-vis in industrialised and also emerging economies particularly to understand India's position and prioritise actions on some of the important codes and standards;
(4) To advise a course of action for achieving the best practices appropriate to us ; and
(5) To help sensitise the public opinion on the above matters through the reports.

The relevant codes stated in the first point include:

(1) Convention on Insolvency Procedures (European Union, November 1995);
(2) UNICTRAL Model Law on Cross Border Insolvency (United Nations Commission on International Trade Law (UNICTRAL), May 1997); and
(3) Cross-Border Insolvency Concordat [International Bar Association's Insolvency and Creditors Rights Committee (Committee J)]

4. First meeting of the Committee at Bangalore:

The first meeting of the Committee was held during May 13-14, 2000 spread over two days in four sessions in which the meeting deliberated on the objective of the study, methodology to be followed and allotment of tasks amongst the members, if necessary.

(a) Initial remark of the Deputy Governor: The first meeting of the committee was addressed by Dr. Y.V. Reddy, Deputy Governor, Reserve Bank of India who brought out the background of setting up of the Standing Committee on International Financial Standards and Codes. He, in particular, mentioned the role of G-7 and G-20 meetings and commitments made at the national level to bring about adherence to international best practices and codes in different areas which would ultimately integrate the national system with the international body. He also pointed out that the financial stability forum has identified 43 different codes in which international best practices are proposed so as to bring a standard in the development of national system according to those codes. He emphasised the need for setting up of the expert group to enquire into the consequences of India’s both ongoing reform programme and the need for a consolidated law for bankruptcy to replace the existing laws. He opined that the bankruptcy laws could be studied under two heads: laws existing in India and cross border insolvency issues. The first meeting spread over two days, examined various objective goals and methodology of the study. Among the goals, the committee decided to deal with the whole issue, inter alia, with the following goals in view, viz., develop comprehensive corporate bankruptcy code; introduction of responsive financial restructuring system with establishment of professional corporate doctors; adoption of international accounting standards and transparency; installation of effective liquidation methods; maximisation of values in insolvency proceedings and development of cross- border insolvency in consonance with the UNCITRAL model law. In so far as the methodology is concerned, the Committee decided to resort to, presentation of papers on various aspects by expert members and others; comparative analysis of national, international and some of the developed

countries' law on the issue; critical analysis of case law, national and of other major countries; and case study on various problematic issues.

(b) Objective of the enquiry: Following the broad outline explained by the Deputy Governor, the Committee discussed at length regarding the objective to be achieved by the Committee. The Committee shall highlight the importance of having a whole-some bankruptcy policy of the country which shall be reflected into an efficient bankruptcy law and practice that would facilitate efficient servicing of the need of the corporations requiring timely intervention of restructuring and a very efficient exit system which maximises the protection of the interest of the creditors and the investors with quick liquidation procedure and well laid down game rule for dispensation of the claims. With that aim in view the Committee discussed the following bounds (a) Corporate bankruptcy to be emphasised by the Committee; (b) integrating bankruptcy law with insolvency situation and cross border insolvency; (c) need for following an international accounting standard for achieving transparency; and (d) an efficient liquidation method.

(c) Methodology to be followed: The methodology to be followed by the Committee was deliberated in detail because the Committee wanted to derive the benefit from the reports of the other committees on the issue. It was also discussed that the Committee is also to develop a basic jurisprudence on the system of bankruptcy so that policy issues can be thread-bare compared with the major bankruptcy system of the other countries and can be suitably critiqued and appropriately adapted to suit Indian condition. In their individual responses members reflected upon various issues pertaining to the existing framework amongst which the inadequacies of the present system with respect to the liquidation proceedings were highlighted. An integrated approach that would take into consideration both national and international issues on insolvency in the lines of the UNCITRAL model was suggested. The idea of introducing a professional service as corporate doctors to emerge to deal with various deficiency symptoms and promptly suggesting financial and managerial restructuring necessary for the interest of the corporation. The Committee at this stage looked into various provisions of the Sick Companies (Special Provisions) Act and found the present top-down model of BIFR-focus treatment is absolutely unsuitable for protecting the interest of the investment. Such a top-down bureaucratic model with the present 'late-treatment syndrome' only helps unscrupulous promoters. The methodology of the deliberations to be followed was designed as follows: (a) A banking and investment industry based analytical paper is to be prepared by Mr. S.H.Bhojani, Mr. H Banerjee and Mr. N.V.Deshpande following the long tradition of case study method that sensitises the members for formulating and evaluating the basic principles involved; (b) Preparing various comparative analysis of law and practice in major economies and also international standards prescribed by various bodies. Dr.T.C.A.Anant, Professor S.Gangopadhyay, Mr. K Krisnaswamy and Bimal Chatterjee were requested to prepare papers on various issue based concepts. The Chairman was given the power to request experts from outside to either make presentation or submit papers; (c) national seminar/workshop may be organised by the committee in order to generate information about the best practices to be followed in the industry; and (d) publication of occasional papers in print media as also in the Reserve

Bank of India web site so that a critique can be obtained from the wider section of the interested people.

(d) Strategy: The committee decided upon formulating a national policy on bankruptcy and draft a comprehensive and illustrative legislation. In view of the fact that another Committee is also looking to the drafting of the law on bankruptcy it would be strategically necessary that certain interim suggestions recommending specific amendments to the provisions of existing bankruptcy laws, which are most urgent and necessary, be made. As such, the meeting discussed about some of the immediate issues in which immediate amendment is needed in related laws. The meeting authorised Mr. Bhojani to place in the next meeting such suggestions so that immediate action can be taken on these suggestions. However, the Committee discussed the following issues for immediate intervention:

1) Most of the delays in settling the claims of the stakeholders can be avoided, if during the winding up proceeding, the company courts perform in the dual role of a civil and company court.
2) It was also proposed that instead of liquidators handling the claims of stakeholders, reputed firms of chartered accountants/auditors can be appointed to decide on and compute the claims of all the stakeholders in a time bound scheme whereas the liquidator may represent the interest of the state and the labour. The firm should submit the final statement to the court and the stakeholders would be permitted to contest only on principal amount and not on computation.
3) The role of the official liquidator who is at present ill-equipped to settle the claims and to judge the restructuring, if any, should be restricted only for the purpose of realising the assets and distributing the same.
4) It was agreed that there should be definite cut-off date for any labour claim. The interest on the claim should also be specified and all the items admissible on different heads of labour law should be brought out on the balance sheet. The claim of the labour should be quantified on that specified cut-off date.
5) The group also discussed and agreed upon the need for inducing more professional inputs to the process of valuation of company's assets specifically in the context of the secured creditor going for the sale of his securities, outside the winding up.

The need for bringing commercial norms, in particular, in public auction, which are ‘incentive compatible’ has been discussed and it was felt that the same be followed in the sale of the assets of the company. With regard to exit policy, the group opined that there must be a well-balanced approach in India towards exit policy. Empowering the official liquidator with more powers was also considered, wherein he would be able to call the stakeholders meeting and to proceed according to the resolution passed in such meetings subject only to the final submission of report to the court. Then, within a very short span of time, say six months, the liquidator would be able to complete the liquidation process. The group discussed exit policy under two heads: the voluntary dimension and the compulsory dimension. Emphasis was also made on the view that the policy should build up confidence and on the basis of voting rules according to stakes. Exit policy, in

conclusion, was held to include reconstruction wherever it is possible and quick exit if reconstruction is not possible. The group in general felt that the exit policy should not become an avenue for dishonest persons for siphoning of the money and escaping with the booty.

5. Second meeting held at Mumbai

The second meeting held during August 12-13,2000 first took up matters of immediate importance so that suggestions on those issues could be communicated to the Ministry of Law immediately. As per the decision of the earlier meeting Mr. S.H.Bhojani submitted two papers, one on the rights of stakeholders in winding up proceedings and another on comparison on bankruptcy laws on various countries. Both these papers highlight immediate issues to be considered while considering the New Bill on Companies Act. The Committee considered those papers which are also given in the annexe, and recommended the following to be forwarded to the Ministry of Law and also to the Ministry of Finance immediately :

(i) Proposal for constitution of the sale committee to look to the interest of the stakeholders instead of the liquidator looking into their interest. The Committee shall get the securities valued by independent valuers and invite bid within 15 days from the date of constitution of the committee. The Committee shall finalise the bid and approach the winding up court for orders within 30 days. The details of the functional responsibility is given as follows:

(ii) Provision has to include for quality disclosure to creditors, employees and other stakeholders and customers so that each stakeholder may take appropriate decision.

(iii) Changing the criteria of the definition of sick company excluding the condition of minimum period of existence after registration and replacing the concept of net worth with inability meet debt to a public financial institution or state-level institution or a scheduled bank and irregularity in meeting obligation of cash credit, working capital or like credit (This is, what is known as Cash Test, the first symptom of weakness in a corporate identity).

(iv) The definition of net worth in the SICA is to be replaced with a definition of secured creditors, such as, “secured creditors, shall mean, for the purposes of the Act, public financial institutions, scheduled banks or state-level institutions or any such institutions or entities as the Union Government may by notification specify.” Some members feel that such a definition can be constitutionally questioned. The better definition is that “secured creditors means creditors who have provided any loan or extended any credit facility against which the debtor created any security interest extending exclusive or priority right to realise the amount of debt including the accumulated interest as agreed upon out of the realisable proceeds of the asset thus put into collateral against which the security interest is fastened, in the event of failure of the debtor to pay his debt according to the terms of the contract of the debt, irrespective of the fact that the collateral remains with the creditor or the debtor.”

(v) The Chairperson of the BIFR should have proficiencies in financial and investment matters.

(vi) BIFR must have benches.

(vii)The Act should clearly specify as regards the circumstances when the benefits of the Act cease to be available to an industrial company, say for example, after curing

of all defaults to the secured creditors and regularisation of cash credit or other arrangements; or expiry of the period specified in a scheme framed , or when according to the Board the company is to wound up.

(viii) The Board may have the power of making regulation.

(ix) The process of preparation of inventory must be time bound.

The meeting also observed that the Chairman may send the suggestions already discussed in the first of the Committee along with the above immediate suggestion to the Ministry of Law. A special reference can also be made of the following points:

1. Section 23 (3) of the SICA should be made inapplicable. One objection raised against this was that the removal of it may not help in preventing the illegal sale of assets. This was countered by arguing that the problems involved in bringing injunction and registration under liquidation mainly because of section 22(3). Finally it was agreed that the section 22(3) of the Act be suspended till SICA is repealed;
2. Section 446 of the Companies Act relating to leave of the court should be made inapplicable. On this point there was an objection on the ground that section 446 is not mandatory one and it is in the nature of permission. Hence, it need not be removed;
3. A provision had to be made in the interim report for restructuring. The objection as to whether the restructuring envisaged in the interim report would lead to the formation of another BIFR was countered by providing for a system of referee in the interim period to deal with liquidation;
4. A professional body of liquidators shall be appointed for the expeditious disposal of winding up cases.

All Papers prepared by the members were then presented and critically discussed. The following issues suggested in the papers were taken up:

(a) A separate Bankruptcy Code was suggested for all corporations which has also to include the option and procedure of restructuring in line with the Chapter XI proceedings of the US Code. There may be a need for a separate bankruptcy system for the banking and financial institutions because of the special situations to be faced in such occasion. The Code must have three degree tests and consequential procedure at each step, namely, anticipatory liquidity test, liquidity test and asset test. Based upon the test the procedure and the custody issues are required to be determined. The other alternative tests are ‘going concern’ and ‘non-going concern’ tests. There must be clear indicators for each of these tests. Some members felt that NPA being the burning problem, therefore, bankruptcy should attend to the insolvency issues of corporate debt and an exit policy and there should be an objective liquidity test like asset transformation into NPA on two consecutive defaults. For that reason there must be a requirement of disclosure of quality information. It was also felt necessary to inter-weave all connected laws in the comprehensive Code. The Committee also agreed that the bankruptcy should be viewed in a comprehensive manner and the Committee should

recommend repeal of SICA and winding up BIFR and merge into a Comprehensive System.

(b) In order to design an efficient Bankruptcy Code the problem of asymmetric information was considered to be addressed by efficient pooling of information and sharing of the same among all stakeholders. Based on the efficiency rule, information must be available to achieve both ex-ante and ex-post efficiency because both were important for the system to provide incentives for restructuring and maximising the value of assets for distribution respectively. It was also argued at this stage that transparent and definite information about labour dues must be made available on the basis of a stipulated definite date.

(c) It is necessary to have a separate Bankruptcy Court in each High Court to be presided over by a Judge sufficiently having prior knowledge in the financial sector management. It was discussed at this point that the procedure should not merely be a judicial process but must have the advantage of adversarial system with professionalism.

(d) There was a debate between the debtor-friendly and creditor-friendly system. Some members cautioned that due to imperfect market in India, the country must have creditor friendly bankruptcy code in view of the importance of the credit system of India specially at the present context. But it was also argued that a better harmony would be needed in the substantive and procedural prescriptions.

(e) The role of criminal elements like frauds and consequential demand for the substitution of management of debtor companies by creditors, were also an issue to be covered in the code. It was agreed that the compensation and punishment should act as deterrents specially referring to deliberate acts. Fraudulent preference has to be covered effectively in the act though financial fraud is an offence beyond the parameter of bankruptcy code.

The Committee decided to prepare a detailed road map on the basis of which the comprehensive code would be drafted. A going concern may first start with a financial problem, which a corporate doctor is quite competent to diagnose. Financial Institutions may be required to act as the certified corporate doctors. Once a corporation faces any financial problem the promoters/management may take the help of the corporate doctor. The incentive for going to corporate doctor at an early stage must be empowering, whereas the punishment for not going to the corporate doctor must be deterrent. At such a stage the restructuring is done with the debtor in the helm of affairs. But once the NPA stage is reached the debtor may not be kept at the control to try for restructuring of the corporation. Finally, as soon as it is apparent that the assets are unable to meet the liability, there must be a fast track of winding up with professional application to maximise the return on selling the assets and maximise the satisfaction of the creditors. An appropriate strict and efficient legal regime has to facilitate the whole process.

6. Third meeting held at Mumbai

The third meeting held on 1st and 2nd of December, 2000 at Mumbai deliberated upon the Volume I of the Report of the Advisory Group. Upon a suggestion from a member of the Group in the portion dealing with terminological confusion, in page 14, of the present Status Report the Committee decided to incorporate the conceptual confusion regarding the objective of Bankruptcy. The economic objectives that make Bankruptcy Law distinct, are 'value maximisation', 'facility for renegotiations for restructuring', and 'fast track liquidation keeping in view the objective of value maximisation'. It was agreed that these economic objectives would be specially mentioned in the long explanatory title or preamble to the Bankruptcy Code.

While discussing the paper on "issues in bankruptcy in India", the Group indicated that the value maximisation approach has to be carefully specified keeping in view the "shareholders' value maximisation" principle highlighted by Corporate law. Bankruptcy law has to emphasize asset maximisation and maximisation of asset realisation for the interest of the entire society.

The meeting observed that though the establishment of a profession of Corporate Doctor to properly and timely diagnose the corporate ailment is very important but the issue is related to Corporate Governance for which there is another Advisory Group to look into, this Group should not take up this item. However a note on the issue may be referred to the appropriate Group.

The Group had the opportunity and privilege to critically study the Report on Law relating to Insolvency and Winding up of Companies submitted by Justice Eradi Committee. The Group also noted that the Union Government was proposing amendments to Companies Act to legislate on some of the recommendations of the Committee. In that context the Group decided to submit an **interim report** immediately so that the Government could also be aware that this Group is working on the bankruptcy issue which would have implication on some of the recommendation of the Justice Eradi Committee. Mr. Deshpande was of the view that the first four chapters of the First volume of the Report of the Group along with the immediate recommendations may form part of the Interim Report of the Group. The Group accepted this suggestion. Accordingly it was decided that the first four chapters of the Volume I of the Report with the recommendation finalised so far be incorporated in the Interim recommendation.

The meeting devoted considerable period of time to determine the trigger point for application of procedure of bankruptcy. After thorough discussions the following two were short-listed for trigger situation:

(a) Inability to pay debts as stipulated in Section 434 read with Sec.433(e) of the Companies Act; and
(b) committing two consecutive defaults in payment as stipulated by the RBI for measuring a Non Performing Asset.

Most of the members were in favour of the principle laid down in Section 434 of the Companies Act.

The Group made a particular reference to para 6.17 of Justice Eradi Committee Report relating to the requirement of recognising the prescribed criteria by IMF for the bankruptcy regime, viz., allocation of risks in a predictable manner and value maximisation. The Group also referred to the recommendations of the Committee in para 7.1 pertaining to the necessity of viewing the whole issue of bankruptcy in the context of Part VII of the Companies Act, relevant provisions of Sick Industrial (Reconstruction) Companies Act (SICA) and the Debt Recovery Tribunal Act (DRT) Act. The Group endorsed the view and proposes that the same be done with a comprehensive Bankruptcy Code.

The meeting proposed some basic principles for determining the forum for the bankruptcy. These are, (1) the proposed forum must be within the framework of the Constitution of India so that no constitutional amendment is required; (2) there shall be a single forum so as to avoid forum shopping and delaying the procedure; (3) the system must be based on more professionalism not necessarily insisting on the multi-disciplinary tribunal; and (4) the system is to be based on voluntarily seeking restructuring and renegotiations.

The Group preferred to have a whole time designated bench in each High Court to operate in a state as the Corporate Bankruptcy Court in a state in the entire bankruptcy proceedings including the stages of renegotiations and restructuring. Involvement of the High Court at each stage shall also strengthen the entire system of renegotiations, restructuring and in the event of need a fast track winding up on account of insolvency. The Group is of opinion that 15 days would be enough to allow the petition for bankruptcy in case the management submits the petition and in the event a creditor/s file the petition 45 days would be enough to scrutinise and allow the petition by the designated Bench of the High Court. The Group is of opinion that the bankruptcy proceedings can have a time frame at each stage.

The debate was on the necessity to have an administrator or trustees to deal with bankruptcy proceedings. In that connection the Group proposed to have the institution of professional trustees who can be appointed by the court to carry through the entire responsibility either directly or through its officials. The Group strongly felt that instead of an Administrator or a liquidator, the asset realisation and maximisation should be left to some professional bodies. Those professional bodies can assume the character of a Trustee. The Group also felt that the powers and functions of the trustee should be well defined by the bankruptcy court itself. When the management of the company approaches the bankruptcy court for preventing the creditors' action, as a rule, the trustee should be appointed immediately to take charge of the assets and properties of the company and its day to day operation. Dr. Anant felt that the trustee can retain the management at his choice or change the chief executive alone but retaining the Board of Directors or may replace the whole Board with the permission of the Court. If the creditors move the court for the bankruptcy proceedings, the Trustee be appointed as soon as the petition is allowed by the court. A petition wrongly made without any substance in the trigger action is an offence in many states including in US. There is no reason why such an intentional

petition made with an objective of harassing the debtor should not be treated as an offence. The meeting suggested such a wrongful act to be treated as an offence.

It was also suggested that there should be time frame as the guideline for conducting the bankruptcy proceedings efficiently to maximise the value of assets. Such a time frame can be used only as a guideline and the court may amend the guideline on case to case basis. The suggested time frame is as follows :

(i) In the initiation of the bankruptcy proceedings by the debtor the court shall appoint the Trustee immediately.

(ii) In the case of creditors moving the petition the court shall decide the Admissibility of the petition on a prima facie evidence of the existence of trigger situation within 45 days.

(iii) Once the petition is admitted , the court shall appoint the Trustee within 15 days thereafter.

(iv) If the petition is rejected the court shall decide on the proceeding against the petitioner for the offence committed for intentionally harassing the debtor within 15 days.

(v) It shall be the immediate duty of the trustee to take all assets and properties of the company and make a final assessment about the assets and liabilities of the company. The statement of realisable asset and liabilities to be paid is to be submitted before the court within a month after taking the charge of the company.

(vi) The trustee has to check the option of restructuring on voluntary basis. The debtor, or creditors or any third party may submit the scheme for restructuring or even the trustee himself prepare a scheme and seek support. Such scheme may be submitted within 90 days. The trustee can decide on the scheme and seek approval of the court. The scheme for restructuring be called by way of public notice.

(vii) If no scheme materialises with in 90 days or such extended time by the court regard being had to the nature of the case, the trustee should take steps within 90 days thereafter for winding up of the company either by sale of the entire company or partly or on the basis of itemized assets and distribute the proceeds to the claimants on the basis of the priority of the claims, piecemeal.

(viii) The liquidation proceedings should be completed at the earliest by the trustee.

In the second day's meeting for familiarizing the special invitees, the Chairman explained the previous day's deliberations and stated that the Group is unanimous in its decision to recommend for a comprehensive and separate Bankruptcy Code to deal with the issues connected with bankruptcy in the corporate sector instead of tinkering with Company Law provisions for winding up. Both restructuring and liquidation are part of the comprehensive bankruptcy code.

Reacting to the discussions, Shri Verma explained the process followed in Korea, which has got a strong element of voluntary restructuring outside the legal framework, and posed the question why the Group has recommended for bringing both the voluntary and legal process within the same legal framework. Dr. Mitra appreciated Mr. Verma's suggestion but, however, observed that though the restructuring is essentially a contractual process, yet it contains an element of legal process also. Dr. Anand pointed out that it is not the court but the trustee who is having expertise in the field, will be leading the restructuring.

The group also felt that the norms of accreditation should also be spelt out and the Registrars of the concerned High Court can keep the list of registered bodies empowered to act as Trustees. The Trustee can be any body corporate or even a firm of professionals like Chartered Accountants. As regards the empowerment of the Trustees the group felt that he should not approach the Court for each and every occasion and he should be given a free hand to proceed with the restructuring if 75% of the stakeholders and simple majority of the members present in the voting are according sanction to the scheme. In that case Trustee should give adequate notice to the parties interested about the meeting. There should also be a provision in the code that any contest on the notice should be registered in the same Court within a fortnight.

The group also felt any challenge to the Trustee’s decision through Court of Law will jeoparadise the functioning of the Trustee. Therefore, there should be only limited grounds for appeal and that should be specified in the code itself. The Trustee should have the powers to appoint financial advisors/managers/assessors/liquidators/auctioneers for his assistance and the payment may be met out of his remuneration.

The group discussed upon the paper presented by Shri Deshpande on bankruptcy laws as applicable to banks. In his paper Shri Deshpande advocated for a separate chapter or even an act in dealing with the bankruptcy of banks. To avoid the depletion of funds in the case of banks, moratorium should be imposed at the first instance. Since DICGC is the body corporate for protecting the interest of the depositors, he felt that DICGC can be appointed as liquidator or trustee. However, the group felt that for banks and financial institutions, bankruptcy related chapter can be included in the bankruptcy code itself giving a separate treatment. They also felt instead of DICGC any other bank or even NBFC which is not having contrary interest can be appointed as Trustee to the bankruptcy proceedings of banks. The group also felt the DICGC premium should be properly priced. The group was of the view that the power of moratorium should be vested with the regulator.

Before the concluding the meeting the group discussed about cross border issues relating to insolvency. The Chairman requested the members to forward their comments as regards the principles/articles contained in J. Committee Report and Unicitral Modal Law with a view to decide its adaptability in the Indian Legal System. The group felt that these principles/articles can be incorporated in our system only after making a conscious choice.

Chapter II

THE PRESENT STATUS REPORT

Introduction:

India does not have a comprehensive policy or law on bankruptcy. Individuals are declared insolvent in the event of individuals' inability to meet his/her total liability. A Corporation may be wound up if it becomes incompetent to pay for its debt. Even in the case of individuals there are two Insolvency Acts, one for the presidency towns and other for the rest of the country, the former is The presidency-Towns Insolvency Act, 1909 and the later is The Provincial Insolvency Act, 1920. As a matter of fact, the first Indian Insolvency Act was promulgated in 1848. It was formulated in the same line as of the contemporary British Act. Thereafter, there were several attempt to amend or replace the Act but nothing did happen before the Provincial Act was passed in 1907 followed by the Presidency-Town Act passed in 1909. The 1907 Act was replaced in 1920. Provisions of both the statutes are similar. Of course, the Presidency-Towns Act contains provision for official assignee, procedure of the court in details and limitation provisions. Both these statutes exclude corporations from insolvency proceedings to be conducted under these statutes (Sec.8 of the Provincial Act and Sec.107 of the Presidency-Towns Act). Bankruptcy and Insolvency is specified in the entry 9 of the List III – Concurrent List of the Seventh Schedule (under Article 246) of the Constitution of India. Both the statutes were amended over a dozen times by Union and State legislatures. Some of the common features of these statutes are, prescription for acts of insolvency (Sec.9 of the 1909 Act, Sec.6 of 1920 Act); petition procedure and adjudication (Sec.10 –29; Sec 90-100 of 1909 Act; Sec 7 – 34 of 1920 Act); administration of properties (Sec 46-76 of 1909 Act; Sec.45-67 of 1920 Act) and discharge of the insolvent (Sec.38-45 of 1909 Act, Sec.41-44 of 1920 Act). Both the statutes prescribed certain offences and attached criminal liability for some acts of the debtor. Offences are: undischarged insolvent obtaining credit, criminal liability after discharge or composition. An insolvent has several disqualifications as well. These provisions are almost identical.

Terminological confusion

There is a deep- rooted confusion in the meaning and content of several terms used, in this context, sometimes interchangeably. These terms are: bankruptcy, insolvency, liquidation, dissolution. During pre-independent period India never used the word, 'bankruptcy' in its legal system. Insolvency was used for denoting an individual or a firm not able to meet the liability. In the case of a company, the system included winding up and dissolution. Bankruptcy and insolvency, both these words are used in the Constitution of India. But there was no statute or regulation legislated upon bankruptcy. If bankruptcy denotes a condition of inability to meet a demand of a creditor, bankruptcy is dependent upon the cash test. If the liquidity position is bad, so much so, that the debtor is unable to meet the call of a creditor, the debtor is said to be bankrupt. That the asset value is sufficient to meet the liability ultimately, is no reasoning to argue against bankruptcy. On the other hand, insolvency is a condition when a person is apparently, unable to meet entirely the liability from the realisation of entire asset. This is therefore, is known as asset test. Presently in the law and practice, there is no such difference in the

use of these words. The Article of Dr.N.L.Mitra reproduced in the annex explains clearly such terminological confusions and explained the situation. A wholesome bankruptcy policy and the road-map shall certainly include both the situation and the tests mentioned above. The difference between the two situation is that there is a possibility of reconstitution or restructuring between the two situation and the resultant two tests. The Committee has recognised the confusion prevailing on the economic objectives of Bankruptcy system requires clarity. The economic objective that make bankruptcy law distinct, or "value maximisation", "facility for renegotiations for restructuring", and "fast track liquidation keeping in view of the economic objective of value maximisation"

Corporate Bankruptcy

There is no policy on the corporate bankruptcy system in India. Restructuring is a genuine treatment of corporate financial ailment. The following are the legal provision for corporate restructuring and the manner in which the same is to be made presently:

(a) Reduction of share capital: The need for capital reduction may arise due to many reasons, such as, accumulation of trading losses; incurring heavy capital expenses and assets of reduced or doubtful value, now commonly understood as Non Performing Assets. As a result , the original capital may either have become lost or a company may find that it has more resources than it can profitably employ. In either case a corporate doctor shall advise capital reduction with a view to adjust the relation between capital and assets of the corporation [In re. Indian National Press (Indore) Ltd. (1989) 66 Com.Cases 387, at 392(MP)]. The Supreme Court of India summed up the procedure for such reduction as prescribed in Section 100 –104 of the Companies Act in Punjab Distilleries India Ltd. V. CIT [(1965) 35 Com.Cases 541 at 544 as follows:

(i) there is power given in the articles to reduce the capital;
(ii) there will be a special resolution by the general body of a company for reduction of capital in the manner envisaged in the scheme for reduction;
(iii) the company will file an application in the court for an order confirming the reduction of the capital;
(iv) creditors are to be notified about the proposal for reduction and filing of the petition to the court for confirmation and settlement of list of objecting creditors;
(v) after the confirmation of the court to the proposal for reduction , it will be registered by the Registrar of the Companies;
(vi) the Registrar shall certify the substitution of the corresponding part of the memorandum of association; and
(vii) implementing the scheme of the reduction.

This type of financial restructuring may be difficult because the Court may give an order to include the word "and reduced" with the name of the company and to continue to provide a standing notice to the public for reducing the capital of the company for the time stipulated in the order through the inclusion of the word as a part of the name.

(b) Compromise or arrangement with the creditors : A company may make a compromise or an arrangement with the creditors under Sec. 391 of the Companies Act. The

arrangement contemplated by the section includes a reorganisation of the share capital of the company. The arrangement under that section is very wide and can take a company out of winding up[In re.Vasant Investment Corporation Ltd. (1982) 52 Com.Cases,139(Bom.)]. The pendency of a winding up petition or even passing of a winding up order does not prevent the court from considering any proper scheme for rescuing the company[In re. Calicut Bank Ltd. (1938) 8 Com.Cases 313(Mad.) or a scheme being considered by the creditors independently in usual course [In re. Bengal National Textile Mills Ltd.(1986) 59 Com Cases 956(Cal)]. The procedure for such compromise or arrangement is as follows:

(i) an application is to be made by the company, or any creditor or any member of the company to the court for an order to be made by the court for holding a meeting;

(ii) If a majority in number of three-fourths in value of the creditors or members, as the case may be , present and voting in person or by proxy agree to any compromise or arrangement, the scheme shall be binding;

(iii) if sanctioned by the court.;

(iv) a certified copy of the order of the court is to be filed with the Registrar.

Where a High Court makes an order, it shall have the power to supervise the carrying out of the compromise or arrangement. Section 394 provides for facilitating reconstruction and amalgamation of companies.

(c) Restructuring under the Sick Industrial Companies(Special Provisions)Act :

A quasi-judicial body is established to secure timely detection of sick and potentially sick industrial companies, the speedy determination by a board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies. This shows that the Act was passed to provide an alternative to companies contemplating winding up, by providing for a preventive mechanism to check the deterioration which might have set it either due to lack of funds, labour problems or some technical problems. The provision under this special Act is only meant for industrial undertakings and not for any other companies. The procedure of restructuring is as follows:

(a) The undertaking must be a sick company meaning thereby that –

i.) a company registered for not less than five years; (ii) at the end of any year its accumulated loss is equal to or exceeding the total paid up capital and free reserve;

(b) The Board of Directors shall within 60 days from the date of finalisation of the audited accounts of the year in which the company has fallen sick, make a reference to the BIFR;

(c) The BIFR may make inquiry into the working of sick industry either by itself or though an operating agency and may appoint one or more persons to be special director of the company for safeguarding the financial and other interests of the company;

(d) The BIFR may make any of the following order: I) If it comes to the conclusion that the company given reasonable time, may give reasonable time to

the company to make its net worth higher than the accumulated loss; or 2) If the above is not possible, the BIFR may direct an operating agency to submit a scheme of reconstruction within 90 days which may concern the financial reconstruction; change in or take over of management; amalgamate with any other company; sale or lease out or rationalisation of management and personnel. 3) The scheme may provide for financial assistance by way of loans, advances or guarantees or relief or concessions or sacrifices from the Central Government. 4) If BIFR comes to the decision that the company cannot be revived, it may record its opinion to recommend winding up on the ground of just and equitable and refer the matter to the appropriate High Court for winding up of the company.

(e) Similar provisions have been incorporated in the case of possible or potential sick companies of at least 4 years standing and loosing fifty percent of its net worth. 1993 Amendment incorporated details about proceedings on report of loss of fifty percent net worth.

Finally, a company goes into winding up for financial reasons through several modes. Section 433 specifies the grounds on which a company may be wound up by the court. Clause (e) of the section specifies one such ground namely, when the company is unable to pay its debts. Inability to pay debts is the most common ground for winding up of a company. The meaning of the term “debt” has been so elaborated by Lindley L.J., "a debt is a sum of money which is now payable or will become payable in the future by reason of present obligation"[1]. In another case [2] it was held, "in order to bring the case within the purview of clause (e) the court must be satisfied in the first instance that, there are in fact debts in the sense that there is a liability of the company in presenti". The Court also rejected as too broad a submission the contention that liabilities which may crystallise in future would also be relevant for the purpose of determining whether the company is unable to pay its debts.

The word debt cannot be extended to include unliquidated damages or an unidentified sum incapable of ascertainment immediately, It must be a definite and ascertained sum. A Company is deemed unable to pay a debt if the company is unable to pay the debt exceeding rupees five hundred after expiry of 3 weeks from the date of issuing of the notice claiming the payment by the creditor. Section 434 deals with the position when a company shall be deemed to be unable to pay its debts. The section deals with the following provisions:

(a) *Statutory Notice*

Firstly, if a creditor to whom the Company owes a sum exceeding Rs. 500 then due, has served on the company a notice demanding payment, and the company neglects to pay or otherwise satisfy him then, such a creditor can approach the court for an order of winding up. The debt must be really due and presently payable. If there is a bona fide and reasonable dispute as to a substantial part of the debt on which the petition is based, winding up will be refused, because, "when a debtor company believes even wrongly that

[1] *Webb* v. *Stenton* [(1883)11QBD 518 CA]

[2] *Registrar of Companies* v. *Kavita Benefit Pvt. Ltd*, 48 Comp. CAS.231

it justified in law to refuse payment, such a refusal cannot be regarded as neglect to pay"[3]. Where a petition to wind up a company is to bring pressure upon the company in order to make it pay the petitioner cheaply and expeditiously, when the company desires to dispute the debt in the civil court, the petition is an abuse of the process of the court and is liable to be dismissed[4].

The effect of a notice under section 434 is to raise a presumption under the statute as to the inability of the company to pay the debt and its consequent insolvency, rendering the company liable to the extreme penalty of losing its existence by being compulsorily wound up by the court. The statutory notice, therefore, is always construed strictly and it must comply with all the requirements of the statute in totality. Here it may be noted that the power of the court to order winding up is discretionary even after the requirements of the notice are complied with. In this connection the following observation of the Supreme Court sums up the law succinctly[5]: " The wishes of the creditor will be tested on the ground whether the case of the persons opposing the winding up is reasonable. Secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well settled that a winding up order is not made on a creditor's petition if it would not benefit him or the company's creditors generally".

(b) *Decreed debt*

A company is deemed as being unable to pay its debts if execution or other process issued on a decree or order of any court in favour of a creditor is returned unsatisfied in whole or in part. This is also a ground on which a creditor can file a petition for winding up. It may be noted here that a creditor may not choose to proceed under this provision and may instead serve a statutory demand under section 434(1)(a).

(c) *Commercial insolvency*

If it is proved to the court that the company is unable to pay its debts, an order for the winding up of a company may be made. It has been held that for obtaining an order for winding up on this ground it should be shown that the company is, "plainly and commercially insolvent, that is to say that its assets and existing liabilities are much as to make the court fully satisfied that the existing and probable assets would be insufficient to meet the existing liabilities"[6]

Here it may be noted that what has to be ascertained is not whether the assets of the company if converted into cash would be sufficient to meet its liabilities, but whether the company is insolvent in a commercial sense, i.e., a perusal of the balance sheet of the company must show that its assets are not sufficient to meet its liabilities. This however is not a rigid formula and the court may refuse to hold the company insolvent on other considerations including that of public interest. Thus we can see that section 434 splits the concept of inability to pay debts under three sub-headings. This however, does not

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[3] *British India Banking Corporation* v. *Sylhet Commercial Bank*, AIR 1949 Ass. 45

[4] *P. Satyarazu* v. *Guntur Cotton Mills*, AIR 1925 Mad. 199

[5] Ray,J. In *M. Gordhandas & Co*. v. *Madhu Woolen Industries(P) Ltd*.,AIR 1971 SC 2600.

[6] In *re Europe Life Insurance Society*, 1869, 9 Equity 122.

mean that these clauses are mutually exclusive. It was held in a case[7] that even if a creditor has obtained a decree, he can claim winding up under any of the other grounds and need not confine himself to the category of decree holders only.

Other modes of winding up - There are other modes of winding up which are voluntary and subject to the supervision of the court. Voluntary winding up of a company may be made as under:

(1) member's voluntary winding up; and
(2) creditors' voluntary winding up.

(1) *Members' voluntary winding up* - A company may go for voluntary winding up by passing a special resolution, submitting a statement of solvency and appointing one or more liquidators for such purpose. The liquidator shall forthwith summon a meeting and prepare a statement of assets and liabilities of the company in order to proceed with the task of winding up proceedings.

(2) *Creditors' voluntary winding up* – If the members of the company resolving to go for voluntary winding up can not submit a certificate of solvency the voluntary winding up procedure is regulated by the creditors with the help of a liquidator or liquidators appointed by the creditors. Both Members' voluntary winding up and creditors' voluntary winding up are cost and time efficient modes of liquidation.

Striking the name off the register - Apart from the aforesaid procedures of exit, there is another easy way of exit according to the provisions of section 560 of the Companies Act, which provides for striking the name of the company off the register. This section provides that where the Register of Companies has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation. This letter should be followed by a reminder and if no answer is received the Registrar shall publish a Notice in the Official Gazette with a view to striking the name of the company off the Register. If the Registrar either receives answer from the company to the effect that the company is not carrying on business or in operation or does not within one month after sending the second letter receive any answer, he may publish in the Official Gazette and send to the company by a Registered Post a notice that on the expiration of three months from the date of that notice the name of the company mentioned therein will be struck off the register and the company will be dissolved unless a cause is shown to the contrary.

Further if in any case where a company is being wound up, the Registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company have been completely wound up and any returns required to be made by the liquidator have not been made for a period of six consecutive months, the Registrar shall publish in the Official Gazette and send to the company or the liquidator, if any, a like notice as is provided in sub-section (3) of section 560.

At the expiry of the time mentioned in the notice referred to in sub-section (3) or (4) of section 560 the Registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Official

[7] *Seethai Mills Ltd*. v. *M.perumalsamy*, (1980) Comp.Cas.422(Mad..).

Gazette and on the publication in the Official Gazette of such notice the company shall stand dissolved.

Winding up by the court - According to section 439 a petition has to be filed for the purposes of winding up by the court. The persons who may file such a petition are the following: (a) the Company; (b) Creditors; (c) Contributories; (d) Registrar and (e) the Central Government. In so far as the first three are concerned the section also says[8] that a petition may be presented by all or any of them, meaning thereby that it is not necessary that petition under section 439 must always be presented by only "one" of them. All or any of them together may present a joint petition on the prescribed grounds.

Conduct of winding up proceedings - Every winding up, whether it be by the Court or a voluntary winding up, is conducted in accordance with set rules and pattern. One of the first acts undertaken in a winding up is the appointment of a Liquidator, who takes under his charge all of the Company's assets and manages the affairs of the Company in a manner which would prove to be the most beneficial to the interests of the creditors, shareholders and the Company itself. Since a Liquidator is required to take into his charge the assets of the Company, he has the right to apply to the Court for recovery of any property of the Company in possession of other person. One of the most important assets of the Company is the 'uncalled capital' of the Company, because as Section 36(2) specifies, "all money payable by any member to the Company ... shall be a debt due from him to the Company". If some amount remains unpaid on the shares of a member, the Liquidator has the power to make a call on those shares. For this purpose, a Liquidator has to draw up a "list of contributories". A contributory is defined under Section 428 as " a person liable to contribute to the assets of a Company in the event of winding up and includes the holders of any shares which are fully paid up". Of these contributories, the Liquidator has to make two lists: List A of the present members and List B of the past members.

Liability of Contributors under List A: List A is drawn up on the basis of the names appearing in the "Register of Members", at the time of commencement of the winding up proceedings. . If a person knowingly allows his name to appear on the register, he is later estopped from denying his liability as a member, i.e., he cannot be permitted to plead that though his name appears on the register he is not in reality a member. Such is the case because, a member's liability during winding up does not arise ex contracta (from a contract) but is ex siege (by virtue of his name appearing on the register). The situation, however, would not be the same if there is a total absence of an element of contract, for example, if shares are allotted to a person without his applying for them. In such situations, the Liquidator cannot place his name on the list of contributories[9].

Here it is important to note that although a member may owe the Company some money on the face value of his shares, he cannot be forced to pay anything until and unless there

[8] Clause(d)

[9] *H.H.Manabendra Shah* v. *Official Liquidator*, (1977) 47 Comp Cas 356(Del)l.

is a Court order to that effect and the Liquidator serves a call notice on the member in accordance with the order[10]. Such an order will be passed by the Court only if it is assured that the financial situation of the Company is so bad that unless such a call is made, the liabilities of the Company cannot be discharged [Section 470(1)]. The Liquidator, however, can make a call on the shares without sanction of the court in case the winding up is voluntary.

Once a valid call is made by the Liquidator, the contributories' liability becomes a statutory debt, i.e., a new liability to pay the unpaid balance commences. In one case,[11] it was observed thus: "It is settled in a long course of decisions that the members of a Company in liquidation are liable in respect of unpaid calls even though the calls were made by the Company before it went into liquidation and the suit of the Company for its realisation had become barred by time. The principle of these decisions is that Section 429 creates a new liability on the shareholders in respect of such calls, which is distinct from and independent of the rights which the Company had against them before the winding up."

Certain other points to be noted in regard with liability of present members:

a) If the list does not include a person's name, he may give notice to the Liquidator to make good the default. If the Liquidator fails to act within 14 days, the Court can issue necessary directions under Section 556.

b) If a contributory dies either before or during winding up proceedings, then his liability automatically passes on to his legal representatives [Section 431].

c) If a contributory is adjudged insolvent, his place is taken by his assignee in insolvency proceedings [Section 431(1)].

d) If the contributory is a Company which is itself in the process of being wound up, the Liquidator of this Company will be the contributory on behalf of the Company.

Liability of Past Members: Under certain specified circumstances even the past members may be held liable as contributories, in accordance with the qualifications and conditions laid down in Section 426 which are the following:

1) If a past member has ceased to be a member for more than a year before the commencement of winding up proceedings, he cannot be made liable;

2) The liability of a past member is limited to only those debts which were incurred by the Company during the period when he was a member that is he cannot be made liable for any debts incurred by the Company after he ceased to be a member;

3) A past member's liability to contribute does not arise unless, in the opinion of the Court, the present members cannot satisfy in full the

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[10] *In re Sonardih Coal Co. Ltd*., AIR 1930 All 617

[11] *Pokhar Mal* v. *Flour and 0i1 Mills Co. Ltd*. [AIR 1934 Lah 10 1 5]

Company's liabilities. Thus, the liability of past members is only secondary, the primary liability being that of the present members.

Unlimited Liability of some Officers: This has been dealt with by section 427. Here it is interesting to note the provisions of section 322 which lays down that even in the case of a limited company the directors or managers are to have an unlimited liability if a specific provision to this effect is present in the Memorandum. Such members are not only liable as an ordinary shareholder in winding up proceedings, but are also required to make additional contribution as if they are members of an unlimited Company. The unlimited liability attaches to both present and past officers but in case of past officers qualifications under Section 426 apply.

Payment of Liabilities by Liquidator: Once the Liquidator makes a call, collects the unpaid call money, converts the assets into cash, determines the value of total available assets and the extent of the Company's debts, his primary duty then becomes the paying off of the liabilities of the Company. Any person having a claim against the Company has the right to claim it from the Liquidator. A secured creditor need not go through the usual channels for claiming his debt since he has the right to realise his security in settlement of his claim, but he is required to compensate the Liquidator for expenses incurred by him in preserving the security from being realised by other creditors. But he has been given an option of relinquishing his security and proving his claim like the other unsecured creditors. Previously, under this scheme, a secured creditor could override the claims of all other creditors, including the legitimate claims of the workmen. But since the Amendment Act of 1985, which amended Section 529, workers' claims are now equated with those of the secured creditors, by providing that the security of every creditor shall be subject to a pari passu charge in favour of the workmen, i.e., whenever a secured creditor wants to enforce his security, the Liquidator shall have the power to represent the workmen in order to enforce the presumed charge in their favour. The amendment Act further added section 529-A providing for payment of the workmen's dues in priority of all other dues, and if the available assets are not sufficient to pay off all the liabilities in full, the payment shall abate in equal proportion. Section 530 which provides for 'preferential payments' has also been made subordinate to the provisions of Section 529-A. Once the Liquidator settles the list of claimants, i.e., persons to whom the Company owes money, he or she is required to start making payments to them out of the available assets in hand.

Preferential Payments: Section 530 of the Companies Act specifies certain payments which have to made on a priority basis. This is a very important provision for the purposes of the present discussion as it brings out the pro-creditor and pro-dispensation bias of the Indian law. The payments to be made first are called 'preferential payments'. They have to be paid in priority to all other debts. These are :

1. All revenues, taxes, cesses and rates due to the Central or a State Government or to a local authority. The amount should have become due and payable within twelve months before the winding up.
2. All wages or salary of any employee, in respect of services rendered to the Company and due for a period of four months only within twelve months before

the winding up and any compensation payable to any workman under Chapter V-A of the Industrial Disputes Act, 1947. The amount is not to exceed one thousand rupees in the case of any one claimant.

3 All secured holiday remuneration becoming payable to any employee on the termination of his employment before, or by the effect of the winding up.

4, All amount due in respect of contributions payable during the twelve months before the winding up, under the Employees' State Insurance Act, 1948 or any other law.

5. All amounts due in respect of any compensation or liability for compensation under the Workmen's Compensation Act, 1923 in respect of death or disablement of any employee of the Company.

6. All sums due to any employee from a provident fund, a pension fund, gratuity fund or any other fund for the welfare of the employees maintained by the Company.

7. The expenses of any investigation held in pursuance of Section 235 or 237 in so far as they are payable by the Company.

After retaining sums necessary for meeting the costs and expenses of winding up, the above debts have to be discharged forthwith to the extent assets are sufficient to meet them. Where the Liquidator carries on business for beneficial winding up, the taxes that become due on the profits are expenses of winding up. The fee payable to a chartered accountant for preparing the statement of affairs is also an expense of winding up. The preferential claims rank equally among themselves and have to be paid in full. But when the assets are Insufficient to meet them, they shall abate in equal proportion. By virtue of the provision in Section 178 of the Income Tax Act, 1961, Income Tax authorities have been claiming preference over other preferential payments. But the Courts have always held that there is nothing in the Income Tax Law which interferes with or abrogates the provisions for priority of debts laid down in Section 530(1)(a) of the Companies Act[12].

Insolvency Laws and Preferential Payments

If a Company is being wound up on grounds of insolvency section 529 becomes applicable providing for application of insolvency laws to the payment of debts of the insolvent Company. Section 46 of the Provincial Insolvency Act, 1920 provides that if there have been mutual dealings between the debtor and the insolvent (creditor), only that amount which remains after giving a set-off can be recovered from the debtor. This right of set-off is also available to insolvent companies regardless of the provisions of See. 530. This apparent conflict between Sections 529 and 530 was attempted to be resolved by the Supreme Court which held[13]:

"It is true that section 530 provides for preferential payments, but the provision cannot in any way detract from full effect being given to section 529 and in fact the only way in which these two sections can be reconciled is by reading them together so as to provide that whenever any creditor seeks to prove his debt, the rule enacted in Section 46 of the

[12]Avtar Singh, *Company Law*, (9th Edition, Lucknow: EBC506-508).

[13] *Official Liquidator* v. *Laxmikutty* ,(1981)3 SCC 321.

Provincial Insolvency Act would apply and only that amount which is ultimately found due from him at the foot of the account in respect of mutual dealings should be recoverable from him and not that the amount recoverable from him should be recovered fully while the amount due to him should rank in payment after the preferential payments. We find that the same view has been taken by the English Courts on the interpretation of the corresponding provisions of the English Companies Act, 1948, and since our Companies Act is modelled largely on the English Companies Act, we do not see any reason why we should take a different view, particularly when that view appears fair and just".

Finally, if any surplus amount is left it is utilised in paying back the shareholders in accordance with their rights, with the 'preference shareholders' being paid off first wherever the articles provide that the preference shareholders would be entitled to their arrears of dividends whether earned, declared or not in the event of winding up. Such a provision would entitle them to claim arrears even if the Company had neither commenced business nor earned any profits[14]. This dividend which is paid to the members is not construed as their income but deemed to be a refund of capital, even in cases where the dividend includes profits earned by the Liquidator [cases where he carries on the Company business for a more beneficial winding up]. If dividends remain unclaimed by either the creditors or contributories for a period of 6 months they should be deposited in the Reserve Bank, from where they can be claimed by any person after obtaining a Court order. If the dividends remain unclaimed for a period bf 15years they merge in the general revenue of the Central Government, but the amount remains available for payment of liabilities which have been subsequently confirmed.

Fraudulent Preference: Under the insolvency laws we have a concept of 'fraudulent transfers' which implies that a transfer or conveyance made by a debtor in favour of some particular creditor with intention to give a preferential treatment to that creditor or to defraud other creditors, such a transfer would be void if made within 3 months of an insolvency petition being presented against him and he is adjudged an insolvent. This concept of 'fraudulent transfers' is present in Company law also under section 531 and states that any transaction with a creditor entered into by a Company in preference of other creditors within six months prior to the date of commencement of winding up is to be deemed a fraudulent preference of its creditors and is accordingly invalid.

But if a Company makes payment to a creditor who is pressurising the Company with a threat of a suit and attachment of property, then such a payment cannot be called 'fraudulent' provided the debt was really due[15]. In the final analysis, whether a transaction

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[14]*Globe Motors Ltd*. v. *Globe United Engg. and Foundry Co. Ltd*., (1975)45 Comp Cas 429 (Del)

[15] In *Official Liquidator* v. *Venkatratnam* [(1966)1 Comp LJ 243 (Andh), one of the creditors of a motor transport company sued the Company for debt and attachment of its buses before delivery of judgement. A compromise decree was passed by the Court, under which three of the Company buses were given to the creditor. A few days later the Company went into liquidation. The Liquidator claimed the buses back on the ground that it was a fraudulent preference of creditors and hence the transfer was invalid. Rejecting the claim the Court said: "If a debtor prefers one creditor to another on account of pressure that is put upon

is fraudulent or not depends entirely on the 'intention of the debtor' and nothing else. Further, under See. 532 a transfer or assignment by a Company of all its properties to a trust/trustee for the benefit of all its creditors is also void.

Voluntary Transfer: Under See. 531 -A, a transfer of property whether movable or immovable or any delivery of goods by the Company within a period of one year prior to the presentation of a winding up petition is void as against the Liquidator, unless the following conditions are satisfied:

a) the transfer/ delivery was made in the usual course of Company business; and
b) the transfer was in favour of a purchaser or encumbrancer in good faith and for real and valuable consideration.

Transfer of Shares: When a Company is undergoing voluntary winding up, any transfer of shares or change in the status of member after commencement of such proceedings is void, unless a prior permission of the Liquidator is taken (See. 536). The same position prevails in case of winding up by Court or under supervision of Court, with the difference that such a transfer is valid if permission of Court is obtained either before or after the making of the transfer. In respect of attachments executions etc., the Liquidator has been given a free hand in deciding what is just, fair or reasonable in all such cases of transfers (either of shares or property), attachment, distress of property or execution put in force without leave of Court, after commencement of winding up. Such transfers can be avoided (See. 537)[16].

Proceedings against Delinquent Officers

Once a Company goes in for winding up, the Liquidator takes into his charge all the books and papers of the Company. While going through these books, or during the course of his investigation he may come across information about the underhand dealings of some of the officers. These dealings may be either in their self interest or in connivance with the company defrauding the creditors either in general or at least some of the creditors by giving a preferential treatment to one or more creditors. When the Liquidator comes across these instances he has been given the power under various sections of the Act to prosecute these defaulting/delinquent officers and in some instances he can also

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him, the payment cannot be regarded as a fraudulent preference .... Persons in charge of the management thought that it is profitable to discharge the debts by allotting some of the buses to the creditors".

[16]The effect of this section was seen in *Rajratna Naranbhal Mills* v. *New quality Bobbin Works* [(1973)43 Comp Cas 131 (Guj) where a suit for recovery of debt was filed against the Company by a creditor who also got some shares of the Company attached on the same day. Later, a winding up petition was presented against the Company. After this, but before passing of a final order, a consent decree was passed in execution of which these attached shares were sold and a winding up order was passed later,and the Liquidator sought an order declaring the sale of shares as void and the consequential relief of recovery of the sale proceeds. Under section 537(1) any attachment or sale of a Company property without sanction of Court after commencement of winding up is void. and under See. 441(2), the commencement of winding up is from the time of presentation of petition. In view of these provisions, the Court had no option but to declare the sale void (as it had taken place after commencement of winding up) and the Liquidator entitled to the sale proceeds.

make them pay back to the company the amount which the Company has lost due to their default (be it intentional or unintentional i.e., through negligence). The basic objective of these provisions seem to be that the Directors and other officers of the Company owe a fiduciary duty towards the Company and hence should be held liable when they fail in their duty by not acting in the best interests of the Company, creditors and shareholders. Since a Liquidator takes the overall charge of the Company on his appointment, he is automatically put in a fiduciary position and so is duty bound to prosecute such officers.

International Insolvency in India

The growth of multinationals, operating through several organs such as branches, agencies, franchises, subsidiaries and other forms of collaboration in more than one country, has given rise to the need to harmonise municipal laws of nations with regard to the consequences of insolvency for the operation of their branches, divisions, subsidiaries or agencies situated within a country's territory. The globalisation and opening-up of the economy has given added impetus in India to the need to formulate specific legal measures for protecting Indian creditors.

Under common law and as a general concept insolvency law has followed the principle of situs of the assets of the debtor. Differences exist from country to country in the matter of treatment/recognition of assets. Some US states, such as New York, have for this purpose defined assets as including all transactions booked in New York, irrespective of the situs of the counterparty. In most systems the municipal law allows courts within whose jurisdiction the property of the insolvent party is situated to exercise insolvency jurisdiction.

The following observations made by the Supreme Court of India, in the case of Raja of Vizianagaram v. Official Receiver,[17] clearly bring out the legal position of international insolvencies in India:

> "The Courts of a country dealing with the winding-up of a company can ordinarily deal with the assets within their jurisdiction It is, therefore, necessary that if a company carries on business in countries other than the country in which it is incorporated, the courts of those countries too should be able to conduct winding-up proceedings of its business in their respective countries. Such winding-up of the business in a country other than the country in which the company was incorporated is really an ancillary winding-up of the main company whose winding-up may have already been taken up in that country or may be taken up at the proper time.... ordinarily the winding-up of the company will be proceeded simultaneously in the various countries where it carried on business whenever the business of the company has ceased to be profitable and the company is reduced to a position in which it is not expected to make good its liabilities. It is the company incorporated outside India which is really wound up as an unregistered company in this country. In fact,

[17] AIR 1962 SC 500

there is no separate unregistered company which is being wound up here".

The question before the Supreme Court of India was whether in a winding-up proceeding initiated in India in respect of the business of a foreign company in India, the foreign creditors of that company could prove their claim. The Indian Supreme Court, after examining various precedents under English Law, held that under the provisions of the Indian Companies Act and the general principles, foreign creditors can prove their claims in the winding-up of unregistered companies in India.

The Indian laws concerning insolvency and winding-up closely follow the principles of English common law. The Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 are substantially along the lines of Bankruptcy Act 1914 (repealed). Neither of these two Indian Acts makes any reference to cross-border insolvencies. Thus Indian insolvencies laws do not have any extra-territorial jurisdiction, nor do they recognise the jurisdiction of foreign courts in respect of the branches of foreign banks operating in India. Therefore, if a foreign company is taken into liquidation outside India, its Indian business will be treated as a separate matter and will not be automatically affected unless an application is field before an insolvency court for the winding-up of its branches in India. For example, when BCCI was taken into liquidation and liquidators were appointed by British courts, the Reserve Bank moved the High Court in India to wind up Indian branches of that Bank. The overseas liquidator had filed his claim in respect of BCCI branches in India.

At present, the Committee on Bankruptcy is considering the adoption of UNCITRAL Model Law on Cross-Border Insolvency to equip the Indian law with sufficient provisions to deal with international insolvency. The purpose of the UNCITRAL Model of law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(1) Co-operation between the courts and other competent authorities of India and foreign States involved in cases of cross-border insolvency;
(2) Greater legal certainty for trade and investment;
(3) Fair and efficient administration of cross-border insolvency that protects the interests of all creditors and other interested persons, including the debtor;
(4) Protection and maximisation of the value of the debtor's assets; and
(5) Facilitation of the rescue of financially troubled business, thereby protecting investment and preserving employment.

This model law, if adopted, will radically change the orientation of Indian law and make it suitable for dealing with the challenges arising from globalisation and increasing integration of Indian economy with the world economy.

Sections 13 and 44A of the Civil Procedure Code, 1908 of India contain statutory provisions under which the judgements delivered by the foreign courts of competent jurisdiction in reciprocating territories are treated as conclusive to any matter in dispute

between the same parties. Those provisions, however, contain certain well-recognised exceptions, namely:

(1) Where the judgement has not been pronounced by a court of competent jurisdiction;
(2) Where it has not been given on the merits of the case;
(3) Where it appears, on the face f the proceedings, to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
(4) Where the proceedings in which the judgement was obtained are opposed to natural justice;
(5) Where it has been obtained by fraud; and
(6) Where it sustains a claim founded on a branch of any law in force in India.

Such decrees passed by the courts of the reciprocating territories can be executed in the same manner as if they had been passed by a district court in India. The courts within the Commonwealth of Nations and some other countries have been declared as courts of reciprocating territories by the Central Government of India.

The foregoing consideration of the statutory scenario indicates that the observations made by the Supreme Court in Corromandel Pharmaceutical's case (supra) to the effect that the SICA, 1985 has become out of tune with the economic policies presently pursued in the country and the policy of liberalisation of the economy, and that is not advisable to keep alive inefficient and uneconomic industries alive by injecting public funds, and that the protective umbrella of section 22 with the wide language employed therein is being utilised to encourage unfair practices, have not been taken into consideration in the drafting of SICA, 1997. With the Bill pending consideration in the Lok Sabha, it is the need of the hour that the draftsmen of the statute and the Legislators should attend to the task of removing the lacunae in section 22 in particular, and ensure that the statute is fine-tuned for the purpose it was intended to serve.

Chapter III

Comparative Data

US and INDIA Comparison

Principle	US Bankruptcy Code	Indian legal situation
Penalty for persons who negligently or fraudulently prepare bankruptcy petitions.	Sec. 110 of the US code attaches personal liability to the bankruptcy petition preparer, liable with fine.	No provision.
Separate bankruptcy Court	US has separate bankruptcy court	District Court is the Insolvency Court. There is no separate winding up court according to the Companies Act.

Case administration	Bankruptcy proceedings may commence with debtor filing the petition, or one of the and the debtor's spouse, In involuntary cases, petition filed by all the general partners, in case of partnership, holder of a claim, or by a foreign representative of the estate.	Debtor may file under Sec.14 of Presidency Towns Insolvency Act, Sec.10 of Provincial Insolvency Act and Sec.439 of the Companies Act, the company, any contributory or contributories, the Registrar, creditor or creditors, in financial institutions by the Reserve Bank in involuntary cases.
Ancillary to foreign proceedings	Petition by the foreign representative	No provision
Bankruptcy trustee	Individuals and Corporations can be trustee	In the place of Bankruptcy Trustee at the Centre and State level in US with its appointed Bankruptcy Administrator, India has Official Liquidator in the corporate side and Official Receiver in the case of individual insolvency. .
Meetings of creditors and equity security holders	Trustee to call the meetings and to preside over	The Official Liquidator in the case of corporate winding up by the court under Sec. 433(e) and in the case of voluntary winding up, the liquidator shall convene the meetings. See Sections 495 – 497 of the Companies Act.
Unpaid property	90 days for final distribution , after that trustee stops payment and remaining property presented to the court	Unpaid dividends and undistributed assets to be paid into the company's Liquidation account.
Trustee's power to operate business	Trustee is authorised by the statute unless court otherwise directs. For the purpose Trustee may obtain unsecured credit. If not able to take unsecured credit to operate the business, the court in special circumstances may allow with priority	Liquidator of a Company has the general power to carry on the business of the company so far as may be necessary for the beneficial winding up
Priorities	Determination of secured status Priority among unsecured creditors is also stipulated in Section 507(11USC) serially as priority in the following order: administrative expenses including any estate tax; claims after the case being filed but before the trustee is appointed; workers and employees' claim upto S 4,300 for each; contribution to employees benefit plans; unsecured claims of individuals to the extent of S 1950; debts to spouse; governmental claims; etc.	According to Companies Act, payments are classified into three categories, a) Overriding preferential preference given to workers' claims and secured credit stand pari passu ; b) Preferential payments standing in one line, to government claims, claims of employees up to Rs.20,000 per person; employees' terminal benefits; Employer's liability to contribute employees benefit funds; workmen' compensation; sums due to employees from Pension, Gratuity and other welfare fund; investigation expenses.; c) unsecured creditors standing in one line.
Subordination of claims	Contractual subordination of claims allowed under Sec. 510	Not allowed
Debtor's duties	Detail rules on debtors duties are given in Sec. 521.	No detail rules prescribed in both the Insolvency Acts and in the Companies Act.
Exempted properties	Exemptions on household and other properties are stipulated in Sec. 522.	Sec 60 of Civil Procedure Code provides exemptions. There is a good deal of similarity with US provision with addition of agricultural property
Exemptions to discharge	Liabilities such as tax or taxation, are not covered by discharge of the debtor	No such provision

Effect of discharge	Provided in Sec. 524 of the 11 USC	Many provisions are similar for individual insolvency. There is no provision for discharge of Corporation.
Statutory liens	Trustee may avoid under Sec. 545.	No provision
Fraudulent transfer	Trustee's power to avoid under Sec. 548.	Similar provision exist in Insolvency Acts and in the Companies Act
Set off	Extent of the right to the creditor under Sec. 553.	Similar provision exists
Liquidation	Trusteeship	No provision
Stockbroker liquidation	Detail provision in Subchapter 111 in Sec. 741	No special provision for any financial intermediaries
Commodity broker liquidation	In Subchapter IV	No provision
Adjustment of debts with Municipalities	In Chapter 9	No provision
Reorganisation	In Chapter 11 1. Appointment of Trustee by the court at the request of a party in interest 2. US Trustee shall appoint a committee of creditors of unsecured claims. 3. Committee to have powers to consult with the trustee or debtor in possession, investigate, participate in the plan, request for appointment of Trustee 4. Debtor may file a plan within 120 days after the date of the order for relief 5. Any party in interest including the debtor, the trustee a creditors' committee, a creditor, a equity security interest holders' Committee, an equity security holder, any indenture trustee may file a plan 6. Post petition disclosure and solicitation 7. Acceptance of the plan 8. Confirmation of the plan 9. Implementation of the plan 10. Exemption from the securities laws 11. Special tax provision	Restructuring by capital reduction (Sections 100-102); Power to compromise or make arrangement with creditors and High Court to enforce the compromise (Sections 391-392); provision for amalgamation and reconstruction of companies (Sec. 394). Sick Industrial(Special Provision) Act provides for reconstruction as follows: 1. Board not Trustee 2. Board of Director of the company becoming sick shall refer to the BIFR enquiry into sickness 3. an operating agency shall prepare a scheme to be sanctioned by the BIFR 4. BIFR specifies the operating agency in the order 5. Rehabilitation given by financial assistance

UNITED KINGDOM and INDIA Comparison

Principle	UK Insolvency Act 1986	Indian Legal Situation
Who may propose a voluntary arrangement	**Sec. 1-** **(1) the directors of the company;** (2) the administrator where an administration order is in force; (3) the Liquidator where the company is being wound up.	**S.391-** (1) company; (2) any creditor; (3) member of the company; (4) the Liquidator where the company is being wound up. Under SICA 1985,the company.
Administration orders	**Sec. 8-** (2) Empowers the court to make an administration order, during which the affairs, business and property of the company is managed by the administrator appointed by the court. (3) the purposes for whose achievement an administration order may be made are- (a) the survival of the company, and the whole or any part of its undertaking, as a going concern; (b) the approval of a voluntary arrangement under PartI; (c) the sanctioning under Sec. 425 of the Companies Act of compromise and any such persons as are mentioned in that section; and (d) a more advantageous realisation of the company's assets than would be effected on a winding up; and the order shall specify the purpose or purposes for which it is made. (4) An administration order shall not be made in relation to a company after it has gone into liquidation.	No provision for administration orders or administrators. **Sec. 448-** The Official Liquidator attached to the High Court or the Official Receiver attached to the District court shall conduct the proceedings in winding up. **Sec. 457-** (1) The liquidator in a winding up by the court shall have power, with the sanction of the court, to carry on the business of the company so far as may be necessary for the beneficial winding up of the company.
General powers of the administrator	**Sec. 14-** (1) the administrator of a company- (a) may do all such things as may be necessary for the management of the affairs, business and property of the company, and (b) without prejudice to the generality of paragraph (a), has the powers specified in Schedule 1 of this Act; and in the application of that Schedule of the administrator of a company the words "he" and "him" refer to the administrator. (2) the administrator also has the power- (a) to remove directors of the company and to appoint any person to be director of it, whether to fill a vacancy or otherwise, and (b) to call any meeting of the members or creditors of the company. (3) the administrator may apply to the court for directions in relation to any particular matter arising in connection with the carrying out of his functions.	No provision.

	(4) Any power conferred on the company or its officers, whether by this Act or the Companies Act or by MoA or AoA, which could be exercised in such a way as to interfere with the exercise by the administrator of his powers in not exercisable except with the consent of the administrator. (5) In exercising his powers the administrator is deemed to act as the company's agent. (6) A person dealing with the administrator in good faith and for value is not concerned to inquire whether the administrator is acting within this powers.	

Receivership	**Sec.29-** (2) in this chapter "administrative receiver" means; (a) a receiver or manager of the whole of a company's property appointed by or a behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and one or more other securities; or (b) a person who would be such a receiver or manager but for the appointment of some other person as the receiver of part of the company's property.	No provision.
Cross-border operation of receivership provisions	**Sec. 72-** (1) A receiver appointed under the law of either part of Great Britain in respect of the whole or any part of any property or undertaking of a company and in consequence of the company having created a charge which, as created, was a floating charge may exercise this powers in the other part of Great Britain so far as their exercise in not inconsistent with the law applicable there. (2) In subsection (1) "receiver" includes a manager and a person who is appointed both receiver and manager.	No provision.
Winding up of companies under the Companies Act	**Sections 73 to 219 –** Part IV Chapter I – Preliminary Chapter II – Voluntary Winding Up Chapter III – Members Voluntary Winding Up Chapter IV – Creditor's Voluntary Winding Up Chapter V – Provisions Applying to both kinds of Winding Up Chapter VI – Winding Up by the Court Chapter VII – Liquidators Chapter VIII – Provisions of general application in winding up Chapter IX – Dissolution of companies after winding up Chapter X – Malpractice before and during Liquidation: Penalisation of companies and company officers: Investigations and Prosecutions.	Similar provisions present. Part VII – Sections 425 to 560.
Winding up of unregistered companies	**Sections 220 to 229**	Similar provisions present. Part X – Sections 582 to 590.
Insolvency practitioners	**Section 388 –** (1) a person acts as an insolvency practitioner in relation to a company acting- (a) as its liquidator, administrator or administrative receiver, or (b) as a supervisor of a voluntary arrangement approved by it under Part I. (2) A person acts as an insolvency practitioner in relation to an individual by acting- (a) as his trustee in bankruptcy or interim receiver	No comprehensive definition.

	of his property or as permanent or interim in the sequestration of his estate; or (b) as trustee under a deed which is a deed of arrangement made for the benefit of his creditors or, in Scotland, a trust deed for his creditors; or (c) as supervisor of a voluntary arrangement proposed by him and approved under Part VIII; or (d) in the case of a deceased individual to the administration of whose estate this section applies by virtue of an order under section 421 (application of provisions of this Act to insolvent estates of deceased persons), as administrator of that estate.	

Chapter IV

International Standards and Indian Situation

International Bar Association Section on Business Law Committee J – Insolvency and Creditors' Rights

Principles	**Cross-Border Insolvency Concordat, Committee J**	Corresponding provisions in Indian Law
Principle 1 - single forum	If an entity or individual with cross border connections is the subject of insolvency proceeding a single administrative forum should have primary responsibility for co-ordinating all insolvency proceedings relating to such entity or individual.	A foreign company incorporated outside India, but carrying business in India, may be wound up as an unregistered company, notwithstanding that the body corporate has been dissolved or otherwise ceased to exist as such under or by virtue of the laws of the country under which it was incorporated. To this extent India does follow a multiple authority. But Indian companies having foreign creditors are not distinguished against Indian creditors. In that context Indian law is based on one principal forum. As such there is duality in the Indian Law on corporate insolvency.

Principle 2 – where there is one main forum.	(a) Administration and collection of assets should be co-ordinated by the main forum. (b) After payment of secured claims and privileged claims, as determined by local law, assets in any forum other than in the main forum shall be turned over to the main forum for distribution. (c) Common claims are filed in and distributions are made by the main forum. Common creditors not in the main forum must file claims in the main forum but (to the extent allowable under the procedural rules of the main forum) may file by mail, in their local language and with no formalities other than required under their local insolvency law. (d) The main forum may not discriminate against non-local creditors (e) Filing a claim in the main forum does not subject a creditor to jurisdiction for any purpose, except for claims administration subject to the limitations of principle 8 and except for any offset (under voiding rules or otherwise) up to the amount of the creditor's claim (f) A discharge granted by the main forum should be recognised in any forum.	There is one main forum for administration and collection of assets under Insolvency Acts, called Receiver for proceedings in insolvency (Sec.77 of P.T.I.Act and sec. Of P.I..Act); and Official Liquidator under the Companies Act in case of winding up by the court (Sec.448 of C.A.); and Liquidator in case of voluntary winding up (Sec.489 and Sec 502 of the Companies Act) in so far as companies incorporated in India. There is no discrimination between the foreign creditor and Indian creditor. But in case of foreign companies the operation in India has to be wound up according to law prescribed for unregistered companies. So the positions are follows: (a) Is followed partly; (b) Is partly followed only in the case of companies registered in India. (c) Same as above (d) Followed (e) Followed (f) No clear provision

Principle 3	(a) If there is more than one forum, the official representatives appointed by each forum shall receive notice, and have the right to appear in, all proceedings in any fora. If required in a particular forum, an executor or similar proceeding may be utilised to implement recognition of the official representative. An official representative shall be subject to jurisdiction in all fora for any matter related to the insolvency proceedings, but appearing in a forum shall not subject him/her to jurisdiction for any other purpose in the forum state.	No provision
	(b) To the extent permitted by the procedural rules of a forum, ex parte and interim orders shall permit creditors of another jurisdiction and official representatives appointed by another jurisdiction the right, for a reasonable period of time, to request the court to reconsider the issues covered by such orders.	No provision
	(c) All creditors should have the right to appear in any forum to the same extent as creditors of the forum state, regardless of whether they have filed claims in that particular forum, without subjecting themselves to jurisdiction in that forum (including with respect to recovery against a creditor under voiding rules or otherwise in excess of the creditor's claim).	Followed, provided it is a company incorporated in India, there is only one main forum.
	(d) Information publicity available in any forum shall be publicly available in all fora. To the extent permitted, non-public information available to an official representative shall be shared with other official representatives.	No provision

Principle 4 – **where there is more than one plenary forum and there is no main forum**	(a) Each forum should coordinate with each other, subject in appropriate cases to a governance protocol. (b) Each forum should administer the assets within its jurisdiction, subject to principle 4(f). (c) A claim should be filed in one, and only one, plenary forum, at the election of the holder of the claim. If a claim is filed in more than one plenary forum, distribution must be adjusted so that recovery is not greater than if the claim were filed in only one forum (d) Each plenary forum should apply its own ranking rules for classification of and distribution to secured and privileged claims. (e) Classification of common claims should be co-ordinated among plenary fora. Distributions to common claims should be pro-rata regardless of the forum from which a claim receives a distribution. (f) Estate property should be allocated (after payment of secured and privileged claims) among, or distributions should be made by, plenary fora based upon a pro-rata weighing of claims filed in each forum. Proceed of voiding rules not available in every plenary forum should be Alternative A – Allocated pro-rata among all plenary for a for distribution. Alternative B – Allocated for distribution by the forum which ordered vioding. (g) If the estate is subject to local regulation that involves an important public policy (such as a banking or insurance business), local assets should be used first to satisfy local creditors that are protected by that regulatory scheme (such as bank depositors and insurance policy holders) to the extent provided by that regulatory scheme.	No provision No provision No provision No provision No provision No provision No provision
Principle 5	A limited proceeding shall, after paying secured and privileged claims, as determined by local law, transfer any surplus to the main forum or another appropriate plenary forum.	No provision
Principle 6	Subject to principle 8, the official representatives may employ the administrative rules of any plenary forum in which an insolvency proceeding is pending, even though similar rules are not available in the forum appointing the official representative.	Indian forum rule is only applicable.
Principle 7	Subject to principle 8, the official representatives may exercise voiding rules of any forum.	No provision

Principle 8	(a) Each forum should decide the value and allowability of claims filed before it using a choice of law analysis based upon principles of international law. A creditor's rights to collateral and set-off should also be determined under principles of international law.	No provision.
	(b) Parties are not subject to a forum's substantive rules unless under applicable principles of international law such parties would be subject to the forum's substantive laws in a lawsuit on the same transaction in a non-insolvency proceeding. The substantive and voiding laws of the forum have not greater applicability that the laws of any other nation.	No rule
	(c) Even if the parties are subject to the jurisdiction of the plenary forum, the plenary forum's voiding rules do not apply to transactions that have no significant relationship with the plenary forum.	No provision for any plenary forum
Principle 9	A composition is not barred because not all plenary fora have laws which provide for a composition as opposed to a liquidation, or a composition cannot be accomplished in all plenary for a, as long as the composition can be effected in a non-discriminatory manner.	No provision
Principle 10	To the extent permitted by the substantive law of a forum, courts of that forum will not give effect to acts of state of another jurisdiction used to invalidate otherwise valid pr-insolvency transactions.	No provision

The UNICTRAL Model Law on Cross-border Insolvency.

Principle	UNCITRAL Model Law on Cross Border Insolvency	Corresponding provisions in Indian Law
Article 1 - Scope of Application.	The law applies where: (1) Assistance is sought in this state by a foreign court or a foreign representative in connection with a foreign proceeding; or	Indian Insolvency Acts, both provincial and presidency towns acts do not have any reference to cross border insolvency. The Companies Act also does not have any provision for similar type of corporate insolvency perhaps because cross border insolvency were not needed in a closed legal system. However, according to section 13 of the Civil Procedure Code, a foreign judgement shall be conclusive as to any matter directly adjudicated upon between the same parties or between parties they or any of them claim litigating under the same title. There is a presumption as to the foreign judgement under section 14. Therefore, on obtaining a foreign judgement assistance can be sought in the state by a party to implement the same in India if necessary. There is also a similar provision for enforcing a foreign award under Foreign Awards (Recognition and Enforcement) Act 1961.
	(2) Assistance is sought in a foreign state in connection with a proceeding under the insolvency laws of the enacting state; or	No provision
	(3) A foreign proceeding and a proceeding under the insolvency laws of the enacting state in respect of the same debtor are taking place concurrently; or	No provision
	(4) Creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participating in, a proceeding under the insolvency laws of the enacting State.	Creditors in general under the Companies Act have the right to proceed for compulsory winding up under section 433(e) read with section 434 as well as under section 499.
	This law does not apply to proceeding concerning any types of entities, such as banks or insurance companies, which the Enacting state may subject to special insolvency regime.	Separate provision for insolvency of banking companies is provided in the Banking (Regulation) Act, 1949.
Article 2 – Definitions		
Article 3 – International Obligations of this State	To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirement of the treaty or agreement prevail.	

Article 4 – Competent court or authority	The functions relating to recognition of foreign proceedings and co-operation with foreign courts shall be performed by the courts competent to perform those functions in the enacting State.	No provision.
Article 5 – Administrator/ Liquidator can act in foreign state	The act authorises the person or body administering a reorganisation or liquidation under the law of the enacting State to act in a foreign State on behalf of the proceeding under the laws of insolvency of the enacting State as permitted by the applicable foreign law.	There is a general provision in the Companies Act authorising the liquidator to represent the company in all matters that may be necessary for winding up the company which may include to act in a foreign state on behalf of the proceeding under the laws of insolvency of that state.
Article 6 - Public policy exception	Nothing in this Law prevents the court from refusing to take an action governed by this Law if action would be manifestly contrary to the public policy of the enacting State.	No provision.
Article 7 – Additional assistance under other laws	Nothing in this law limits the power of the court or a person or a body administering a reorganisation or liquidation under the law of the enacting State to provide additional assistance to a foreign representative under other laws of enacting State.	No provision.
Article 8 – Interpretation	In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.	
Article 9 - Right of direct access	A foreign representative is entitled to apply directly to a court in the enacting State.	The court has the general power to permit appearance under section 32 of the Advocates Act 1961.
Article 10 - Limited Jurisdiction	The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.	No provision.
Article 11 – Application by a foreign representative to commence proceeding under the insolvency law of the enacting State.	A foreign representative is entitled to apply to commence a proceeding under the State law if the conditions for commencing such a proceeding are otherwise met.	No provision.
Article 12 – Participation of a foreign representative in a proceeding under the insolvency law of the enacting State.	Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under the State insolvency law.	No provision.

Article 13 – Access of foreign creditors to a proceeding under the insolvency law of the enacting State.	(1) foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under the State insolvency law as creditors in this State. (2) this article does not affect the ranking of claims in a proceeding under the State insolvency law except that the claims of foreign creditors shall not be ranked lower than general non-preference claims	There is no discrimination between foreign and Indian creditor under the Indian Companies Act.
Article 14 – Notification of foreign creditors	Whenever under the State insolvency law notice is to be given to creditors in this State, such notification shall also be given to the known creditors that so not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.	No clear provision.
Article 15 - Application for recognition of a foreign proceeding	A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.	No provision.
Article 16 – Presumptions concerning recognition	The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised.	
Articles 17 & 18 – Recognition of a foreign proceeding	Decision to recognise a foreign proceeding if it follows the conditions mentioned in the above Articles.	No provision.
Article 19 – Relief that may be granted upon application for recognition of a foreign proceeding	The court may grant relief of a provisional nature upon application for recognition of a foreign proceeding, where relief is urgently needed to protect the assets of the debtor or the interests of the creditor.	No provision
Article 20 - Effect of recognition of a foreign main proceeding.	Upon the recognition of a foreign proceeding, the individual actions concerning the debtor's assets is stayed, the execution against the debtor's assets is stayed and the right to transfer any assets of the debtor is suspended.	No provision
Article 21 – Relief that may be granted upon recognition of a foreign proceeding.	Upon recognition of a foreign proceeding, where it is necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief.	No provision.

Article 22 - **Protection of creditors and other interested persons**	In granting or denying the above relief the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.	No provision.
Article 23 - **Actions to avoid acts detrimental to creditors**	**(1) upon recognition of a foreign proceeding, the foreign representative has standing to initiate the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganisation or liquidation.** **(2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.**	Fraudulent preference favouring some creditors to others is not permitted under the Insolvency Acts under sections 44 and 56 of the Presidency towns insolvency act,
Article 24 – **Intervention by a foreign representative in proceedings in this State.**	**Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.**	
Articles 25 to 27 - Co-operation with foreign courts and foreign representatives.	There shall be co-operation and direct communication between a court of this State and foreign courts or foreign representatives.	No provision.
Article 28 – Commencement of a proceeding.	After recognition of a foreign main proceeding, a proceeding under the State insolvency laws may be commenced only if the debtor has assets in this State, the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State.	No provision.
Article 29 – Co-ordination of proceedings	Where a foreign proceeding and a proceeding under the State insolvency law are taking place concurrently regarding the same debtor, the court shall seek co-operation and co-ordination under articles 25, 26, and 27.	No provision.

Article 30 – **Co-ordination of more than one foreign proceeding.**	In matters referred to in article 1, in respect of more than one foreign proceedings regarding the same debtor, the court shall seek co-operation and co-ordination under articles 25, 26 and 27.	No provision.
Article 31 – presumption of insolvency based on recognition of a foreign main proceeding.	In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under the State insolvency laws, proof that the debtor is insolvent.	No provision.
Article 32 – Rule of payment in concurrent proceeding.	Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under the State insolvency law regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.	

EC Directive on Finality in Payment and Securities Settlement System.

	EC Directive on Finality in Payment and Securities Settlement Systems	**Corresponding provisions in the Indian Law**
Article 1 -Application of the Directive	The provisions of the Directive shall apply to: (a) any system as defined in article 2 (a) , governed by the law of a Member State and operating in any currency, the ECU or in various currencies which the system converts one against another; (b) any participant in such a system; (c) collateral security provided in connection with: - participation in a system; or - operations of the central banks of the Member States in their functions as central banks.	Not applicable
Article 3 to 5 - Netting and Transfer Orders (1)transfer orders and netting shall be legally enforceable; (2) no law, rule etc, on the setting aside of contracts concluded before the beginning of insolvency proceeding shall lead to the unwinding of a netting; (3) moment of entry of a	**Article 3:** (1) transfer orders and netting shall be legally enforceable and, even in the event of insolvency proceedings against a participant, shall be binding on third parties, provided that transfer orders were entered into a system before the moment of opening of such insolvency proceedings are defined in Article 6 (1). (2) No law, regulation, rule or practice on the setting aside of contracts and transactions concluded before the moment of opening of insolvency proceeding, as defined in Article 6(1) shall lead to the unwinding of a netting. (3) The moment of entry of a transfer order into a	Transfer orders and netting is possible though there is no clear provision for netting No provision

transfer order shall be defined by the rules of that system.	system shall be defined by the rules of that system. If there are conditions laid down in the national law governing the system as to the moment of entry, the rules of that system must be in accordance with such conditions.	No provision
Initiation	**Article 4:** Member States may provide that the opening of insolvency proceeding against a participant shall not prevent funds or securities available on the settlement account of that participant from being used to fulfil that participant's obligations in the system on the day of the opening of the insolvency proceedings. Furthermore, Member States may also provide that such a participant's credit facility connected to the system be used against available, existing collateral security to fulfil that participant's obligations in the system.	No provision
A transfer order may not be revoked by a participant or by a third party.	**Article 5 –** A transfer order may not be revoked by a participant in a system, not by a third party, from the moment defined by the rules of that system.	No provision, but common law principle of Mareva Injunction may stand in the way of transfer.
Article 6 to 8 (1) Insolvency is said to have begun when the relevant judicial/administrative authority gives its decision. (2) Such decision shall be notified to the appropriate authority chosen by the Member State. (3) The member state shall soon notify other member states	**Article 6 –** (1) For the purpose of this Directive, the moment of opening of insolvency proceedings shall be the moment when the relevant judicial or administrative authority handed down its decision. (2) When the decision has been taken in accordance with paragraph 1, the relevant judicial or administrative authority shall immediately notify that decision to the appropriate authority chosen by its Member State. (3) The Member State referred to in paragraph 2 shall immediately notify other Member States.	Same is the law No clear provision Not applicable.

Insolvency proceedings shall not have retroactive effects.	Article 7 – **Insolvency proceedings shall not have retroactive effects on the rights and obligations of a participant arising from, or in connection with, its participation in a system earlier that the moment of opening of such proceedings as defined in Article 6(1).**	Same is the ruls
The law governing the system shall determine the rights and obligations of a participant arising from the participation.	Article 8 - **In the event of insolvency proceedings being opened against a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing that system.**	Same is the practice
Insulation of the rights of the holders of collateral security from the effects of the insolvency of the provider	Article 9 – (1) the rights of : - a participant to collateral security provided to it in connection with a system, and - central banks of the Member States or the future European central bank to collateral security provided to them, shall not be affected by insolvency proceedings against the participant or counter-party to central banks of the Member States or the future European central bank which provided the collateral security. Such collateral security may be realised for the satisfaction of these rights. (2) where securities (including rights in securities) are provided as collateral security to participants and/or central banks of the Member States or the future European central bank as described in paragraph 1, and their right (or that or any nominee, agent or third party acting on their behalf) with respect to the securities is legally recorded on a register, account or centralised deposit system located in a Member State, the determination of the rights of such entities as holders of collateral security in relation to those securities shall be governed by the law of that Member State.	Rule regarding the collateral security is similar
Article 10 Members states shall specify and notify the systems which shall be included in the scope of this directive. The system shall indicate to the Member state the participants in the system. Member states may impose supervision on systems. Anyone with a legitimate interest may require an instruction to inform him of the system and	**Member states shall specify the systems which are to be included in the scope of this directive and shall notify them to the Commission and inform the Commission of the authorities they have chosen in accordance with article 6(2).** The system shall indicate to the Member state whose law is applicable the participants in the system, including any possible indirect participants, as well as any change in them. In addition to the indication provided for in the subparagraph, Member States may impose supervision or authorisation requirement on systems which fall under their jurisdiction. Anyone with a legitimate interest may require an instruction to inform him of the systems in which it participates and to provide information about the main rules governing the functioning of those	No provision

provide information about the governing rules.	systems.	
Article 11 (1) Member states shall comply with this Directive by making appropriate laws, regulations, etc. (2) Member state shall communicate the text of the provisions to the Commission	**(1) Member states shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before [*18 months after the publication of this Directive in the Official Journal of the European Committees*]. They shall forthwith inform the Commission thereof. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.** (2) Member states shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive. In this Communication, Member States shall provide a table of correspondence showing the national provisions which exist or are introduced in respect of each Article of this Directive.	Not applicable
Article 12 Commission shall present a report to the European Parliament.	**No later than three years after the date mentioned in Article 11(1), the Commission shall present a report to the European Parliament and the Council on the application of this Directive, accompanied where appropriate by proposals for its revision.**	Not applicable
Article 13 When the Directive shall come into force	**This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.**	Not applicable
Article 14 Directive addressed to the Member States.	**This Directive is addressed to the Member States.**	Not applicable.