INSOLVENCY LAWS IN INDIA INCLUDING CORPORATE INSOLVENCY

1. Introduction – Insolvency, bankruptcy, corporate restructuring, winding up, dissolution
2. Origin and Object of Insolvency laws
3. Committees on Insolvency
4. International scenario of laws on insolvency
5. UNICTRAL Laws on insolvency
6. Overview of laws relating to insolvency of individuals and unincorporated entities
7. Overview of laws relating to corporate insolvency
8. Overview of laws relating to winding up and dissolution of Limited Liability Partnerships
9. Insolvency and SARFAESI
10. Insolvency and Recovery of Debt Due to Banks
11. Insolvency and SEBI Takeover regulations
12. Insolvency and Corporate Restructuring including Mergers and Acquisitions
13. Insolvency, winding up and dissolution
14. Process of recovery of debts in India
15. Institutional machinery under various laws
16. Professional opportunities in Insolvency

1.0 INTRODUCTION

Insolvency

Insolvency is when an individual, corporation, or other organization cannot meet its financial obligations for paying debts as they are due. Insolvency can occur when certain things happen, some of which may include: poor cash management, increase in cash expenses, or decrease in cash flow.

A finding of insolvency is important, as specific rights are enabled for the creditor to exercise against the insolvent individual or organization. For example, outstanding debts may be paid off by liquidating assets of the insolvent party. Prior to proceedings, it is common for the insolvent entity to meet with the creditor in order to attempt to arrange an alternative payment method.

It is possible that a business may be "insolvent" in cash flow, yet still solvent on the balance sheet. These cases may involve illiquid assets, which help the balance sheet's solvency but not the cash flows. This can also work the other way around with negative net assets (balance sheet insolvency), yet a positive cash flow. In this case, the flow of cash is simply enough to pay off debts, despite the fact that the business has more liabilities than assets.

Bankruptcy

Bankruptcy is not exactly the same as insolvency. Technically, bankruptcy occurs when a court has determined insolvency, and given legal orders for it to be resolved.

Bankruptcy is a determination of insolvency made by a court of law with resulting legal orders intended to resolve the insolvency.

Insolvency describes a situation where the debtor is unable to meet his/her obligations. Bankruptcy is a legal maneuver in which an insolvent debtor seeks relief.

Reasons behind insolvency

The main reasons behind insolvency are primarily poor management and financial constraints. This is much more prevalent in smaller companies. Specifically, the reasons are:

- Market – Company did not recognize the need for change
- Bad debts – obviously money owed by customers
- Management – failure to acquire adequate skills, imprudent accounting, lack of information systems
- Finance – loss of long term finance, over gearing or lack of cash flow
- Knock on effect – i.e. from other insolvencies
- Other – for example excessive overheads etc

It is however observed that the larger the company, the better the chance of survival and of receiving remedial treatment and of paying creditors.

<u>Insolvency Laws in India</u>

Under the Constitution of India 'Bankruptcy & Insolvency' is Entry 9 in List III - Concurrent List, (Article 246 –Seventh Schedule to the Constitution) i.e. both Center and State Governments can make laws relating to this subject.

In India the process of winding up of companies is regulated by the Companies Act and is under the supervision of the court. Although article 19 (1)(g) of the Constitution of India gives freedom to practice any profession or to carry on any occupation, trade or business to the citizens of India, there are restrictions on closure of any industrial undertaking. Such restriction is justified on the ground that it is in public interest to prevent unemployment. As a result of such policy there is a freedom to undertake any industrial activity, but there is no freedom to exit.

In the process of deregulation and liberalization number of restrictions on undertaking industrial activity has been withdrawn and relaxed. There is a need to take the process of liberalization a step further and recognize that so long as a company is acting in the interest of shareholders and otherwise observing the law of the land it should have the freedom to manage its affairs, merge, amalgamate, restructure and reorganize or otherwise plan its affairs as it considers best in the interest of the stakeholders. Interference by the Government or court or any tribunal should only be in the event of any detriment to the shareholders or under the Competition Act to prevent monopolies or restrictive trade practices. While undertaking reforms in the Insolvency Laws there is a need to change the focus from strict regulation of the activities of companies to granting freedom to the industry in conducting its business activities and lay down norms for protection of interest of stakeholders.

Insolvency Laws for Individuals and Corporates

In India the term insolvency has not been defined anywhere, but still the word is commonly used to describe the process of insolvency. The stream of insolvency laws in India can be segregated under three heads:

1. Pre-Insolvency Workouts

   Pre-insolvency Work-out Schemes include:

   • Companies Act, 1956 (Sections 391 to 396)

   • The Sick Industrial Companies (Special Provisions) Act, 1985

   • Corporate Debt Restructuring Scheme

   • Asset Reconstruction under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI)

   • RBI Guidelines on Special Mention Accounts.

2. Insolvency of individuals and unincorporated entities

   This deals with individuals and partnership firms going insolvent. The consequence of this personal insolvency is declaration of insolvency and incapacity to contract. It is governed by Provincial Insolvency Act, 1920 and Presidency Towns Insolvency Act, 1909.

3. Corporate Insolvency

   This deals with corporates going insolvent. The consequence is usually winding up of the company under the Companies Act, 1956.

4. Insolvency of incorporated associations and other incorporated bodies

   This deals with insolvency of bodies like co-operative societies and body corporates incorporated under certain legislations.

There are certain common principles to corporate as well as individual insolvency. In any insolvency it is a grounded principle that all creditors must be treated equally. The only exception to this rule is that – preferential creditors are paid out in preference to ordinary creditors and secured creditors get priority next to preferential creditors.

Present nature of Insolvency Process in India

1. Insolvency/ Liquidation process essentially encompasses aspects of recovery, revival, reconstruction and winding up and therefore the process has to be seen in a holistic manner with all such aspects in sight.
2. No Separate Unified Insolvency Code covering all the above aspects in one place is present. Therefore the process is complicated, time consuming and ineffective.
3. The present Legal and procedural framework relating to Corporate Insolvency apart from several other special provisions like debt recovery laws, is laid out by 4 major legislations, namely:

   - Companies Act 1956
   - Sick Industrial Companies (Special Provisions) Act, 1985 [SICA]
   - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) Act, 2002 also known as the Securitization Act

- Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDB Act)
  [Debt Recovery Tribunals are set up under this Act]

Provisions with regard to insolvency of individuals and unincorporated bodies

The Presidency Towns Insolvency Act, 1909 and Provisional Insolvency Act, 1920 are two major enactments that deal with personal insolvency and have parallel provisions and their substantial content is also similar but the two differ in respect of their territorial jurisdiction. While Presidency Towns Insolvency Act, 1909 applies in Presidency towns namely, Kolkata, Mumbai and Chennai, Provincial Insolvency Act, 1920 applies to all provinces of India. These two Acts are applicable to individuals as well as to sole proprietorships and partnership firms.

The Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 exhaustively lays down as to what are the acts of insolvency, the powers of Courts to adjudicate a person as insolvent, restriction on the jurisdiction of the Court annulment of adjudication proceedings, consequences of an order of adjudication, submissions of proposal for composition in satisfaction of debts or for scheme of arrangement of the affairs of the insolvent, conditions in which composition and schemes of arrangement are approved by the Court, control over the person and property of insolvent, discharge of insolvent, administration and distribution of the property of the insolvent, Properties which would be available for payment of debts, realization of the insolvent property, appointments, duties, powers and functions of Official Assignee and other insolvency related procedural matters.

A debtor is supposed to have committed an act of insolvency in the following cases:

(a) If, in the States or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally;

(b) If, in the States or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors;

(c) If, in the States or elsewhere, he makes any transfer of his property or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent;

(d) If, with intent to defeat or delay his creditors,--

(i) he departs or remains out of the States,

(ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,

(iii) he secludes himself so as to deprive his creditors of the means of communicating with him;

(e) If any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money;

(f) If he petitions to be adjudged an insolvent;

(g) If he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts;

(h) If he is imprisoned in execution of the decree of any Court for the payment of money

For example – If an individual has assets worth Rupees 50 crores and liabilities worth Rupees 5 crores, he will be considered insolvent if he refuses to discharge his liabilities in spite of having assets more than his liabilities. The main criteria for a person to be adjudged insolvent is that he should suspend or refuse payment to his debtors irrespective of whether he has the money to repay his debtors.

Provisions with regard to Corporate Insolvency

- Part VII consisting of Sections 425 to 560 of the Companies Act, 1956 makes provisions deals with modes of winding up, cases in which the company may be wound up by the Court, consequences of winding up order appointment, powers, duties and functions of the Official Liquidators, committee of inspection, voluntary winding up of a company, a members winding up, a creditors winding up, winding up subject to the supervision of the Court, effect on winding up of antecedent and other transactions, etc.

- If Company is unable to pay its debt – discretionary power with Court to wind up the company [sec 433]
- If Company having become a “sick company” – mandatory reference to BIFR [SICA, proposed to be replaced by sec. 424A of Companies (second amendment)Act 2002]
- If Default in terms of repayment of debentures: appointment of receiver.

- Compromise and arrangement with creditors and members – sec 391-4 of Companies Act 1956: Apart from the lengthy and time consuming winding up procedure, all the companies liable to be wound up under the Companies Act may resort to the alternative of compromise or arrangement. The Court may make orders to enforce these remedies and where a meeting of creditors or class of creditors or members or any class of members is called upon, certain disclosures shall be made. The orders passed by the Courts include transfer of property to another company and to facilitate amalgamation, merger and demergers..
- Reduction of capital –sec 100. Even reduction of capital to the extent that the capital is lost, or capital is in surplus is permitted.
- Striking off the name of a defunct company – sec. 560

Insolvency of incorporated associations and other incorporated bodies

There are other categories of companies incorporated under various specific statutes, including public sector banks and insurance companies are to go by liquidation and reconstruction process in accordance with government regulatory process and such are more of administrative in nature.

Enforcement of security interests

"Security interest" means right, title and interest of any kind whatsoever upon property created in favour of any secured creditor and includes any mortgage, charge, hypothecation or assignment. Enforcement of security interests, and enforcement of claims of special creditors is dealt with by several statues in India, including the SARFAESI Act, 2002 in case of secured creditors being banks, Recovery of Debts due to Banks & Financial Institutions Act 1993 in case creditors being banks or financial institutions, and State Finance Corporations Act, 1951 in case of creditors being State Finance Corporations, etc.

Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights mentioned below:

(a) Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

(b) Take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) Appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

Stacking order of priorities

The debts due as workmen's dues and the claims of the secured creditors sacrificed to workmen have an overriding preferential claim or priority to all debts. The debts payable shall be paid in full unless the assets are insufficient to meet them in which case they shall abate in equal proportions.

In the dying stages of winding up proceedings, there is stacking of priorities running from the secured creditors from out of their assets securing their claims, subject to the claims of the workmen, further, the costs and expenses of winding up under Section 530 (6), then, the preferential creditors under Section 530 (1), the floating charge holders and the unsecured creditors.

There are other statutory preferential payments for taxes, revenues and cess, wages or salary for past due prior to winding up or for period not exceeding 4 months when there is a continuing employment for the beneficial winding up and for provident fund, pension and other claims.

Rules of insolvency for valuation of annuities and contingent liabilities as are prescribed by the Provincial Insolvency Act and the Presidency Town Insolvency Act continue to apply.

Also, any transfer of property, delivery of goods, payment, execution or other act relating to the property made, taken or done by or against the company within six months prior to commencement of winding up be deemed a fraudulent preference.

Corporate restructuring

Just like a person requires treatment to treat his disease, a sick company also requires some form of treatment to overcome its problem of debts. This treatment may be in the form of restructuring of a company.

Restructuring is the corporate management term for the act of reorganizing the legal, ownership, operational, or other structures of a company for the purpose of making it more profitable, or better organized for its present needs. Alternate reasons for restructuring include a change of ownership or ownership structure, demerger, or a response to a crisis or major change in the business such as bankruptcy, repositioning, or buyout. Restructuring may also be described as corporate restructuring, debt restructuring and financial restructuring.

In fact, the basic idea behind corporate restructuring and insolvency is to "save companies, preserve businesses and improve returns".

Compromises & Arrangements

Apart from the lengthy and time consuming winding up procedure, all the companies liable to be wound up under the Companies Act may resort to the alternative of compromise or arrangement. The Court may make orders to enforce these remedies and where a meeting of creditors or class of creditors or members or any class of members is called upon, certain disclosures shall be made. The orders passed by the Courts include transfer of property to another company and to facilitate amalgamation, merger and demergers. Even reduction of capital to the extent that the capital is lost, or capital is in surplus is permitted.

2.0 ORIGIN AND OBJECT OF INSOLVENCY LAWS

Introduction

The principal focus of modern insolvency legislation and business debt restructuring practices is not the liquidation and elimination of insolvent entities but on the remodeling of the financial and organizational structure of debtors experiencing financial distress so as to permit the rehabilitation and continuation of their business. In some jurisdictions, it is an offence under the insolvency laws for a corporation to continue in business while insolvent. In others (like the United States with its Chapter 11 provisions), the business may continue under a declared protective arrangement while alternative options to achieve recovery are worked out.

Ultimately the basic objective of insolvency laws is the distribution of the effects of a debtor in the most expeditious, equal and economical mode and liberation of his person from the demands of his creditors when he has made a full surrender of his property.

Origin of concept of bankruptcy

The Ponte Vecchio, literally *Old Bridge*, is a famous medieval bridge over the Arno, in Florence, Italy, noted for having shops (mainly jewelers) built along it. Presumably first erected in Roman times, it was originally made of wood. After being destroyed by a flood in 1333 it was rebuilt in 1345, this time in stone. It always hosted shops and merchants (legend says this was originally due to a tax exemption), which displayed their goods on a table after authorisation of the Bargello (a sort of a lord mayor, a magistrate and a police authority). It is said that the economic concept of bankruptcy originated here: when a merchant could not pay his debts, the table on which he exposed (the "banca") was physically broken ("rotta") by soldiers, and this practice was called "bancarotta" (broken table). Not having a table anymore, the merchant was not able to sell anything more to anyone.

Philip II of Spain had to declare four state bankruptcies in 1557, 1560, 1575 and 1596. Spain became the first sovereign nation in history to declare bankruptcy.

The characteristic discharge of debts was introduced to Anglo-American bankruptcy with the statute of 4 Anne ch. 17 in 1705, where the discharge of unpayable debts was offered as a reward to bankrupts who cooperated in the gathering of assets to pay what could be paid.

Bankruptcy is also documented in the Far East. According to al-Maqrizi, the Yassa of Genghis Khan contained a provision that mandated the death penalty for anyone who became bankrupt three times.

Object of insolvency law

The law of insolvency is a social legislation which has been enacted to provide respite and relief to the honest debtors who due to any unfortunate or unforeseen circumstances become incapable of paying back their debts. Its object is also of securing distribution of a debtor's estate among his creditors equitably and thereafter to release him under certain conditions from liability in respect of his debts and obligations.

In the case of Yenamulla Malludora vs P.Seetharatnam (AIR 1966 SC 918), Supreme Court of India observed, 'The object of the law of insolvency is to seize the property of an insolvent before he can squander it and to distribute it amongst his creditors. It is however not every debtor who has borrowed beyond his assets or even one whose property is attached in execution of his debts, who can be subjected to such control. The jurisdiction of the Court commences when certain acts take place which are known as acts of insolvency and which give a right to his creditor to apply to the Court for his adjudication as an investment.'

3.0 COMMITTEES ON INSOLVENCY

1) **Shri. T. Tiwari Committee**

   In the year 1981, the Reserve Bank of India, deeply concerned over the issue of alarming increase in the incidence of industrial sickness which was resulting in loss of production, loss of employment, loss of government revenue and unnecessary blocking of huge funds advanced by the banks and financial institutions to the industrial undertakings, constituted a committee under the chairmanship of Shri. T. Tiwari, Chairman, Industrial Reconstruction Corporation of India to look into the causes of industrial sickness, to assess the depth of the problem and to suggest remedial measures. Following the recommendations of the Tiwari Committee, the Government of India enacted the Sick Industrial Companies (Special Provisions) Act, 1985, (SICA) in order to provide for timely detection of sickness in industrial companies and for expeditious determination of the preventive, ameliorative, remedial and other measures and for enforcement of the measures. Although, the object of the Act was laudable, the Act was factually misused by the erring promoters' to defeat the object of the Act. Due to such inherent defects of SICA and again, for some unexplained reasons, BIFR failed to fulfill the purpose and mandate as envisaged therein.

2) Justice V.B. Balakrishna Eradi Committee

Then came the Justice V.B. Balakrishna Eradi Committee Report in 1999 recommending, inter alia, setting up of a National Company Law Tribunal (NCLT in short) to be vested with the functions and power with regard to rehabilitation and revival of sick industrial companies, a mandate presently entrusted with BIFR under SICA and forming of a liquidation committee consisting of creditors of the company in the lines of Section 141 of the Insolvency Act, 1986 of UK to assist the Liquidator and by adopting the necessary principles enunciated under International Monetary Fund's propagated norms for 'Orderly and Effective' insolvency procedures. The statement (financial) of affair, which took the most time, is now to be filed, in case of voluntary winding up, along with the winding up application, and in case of an involuntary proceeding, at the time of the first defense. The liquidation program is bound to be time bound.

3) N L Mitra Committee

In 2001 came the Report of the Advisory Group on Bankruptcy Laws, called the N L Mitra Committee appointed by the RBI which made several recommendations on bankruptcy law reforms, the first among which was consolidation of bankruptcy laws into a separate code. However, no legislative steps have still been taken in this regard.

4) JJ Irani Committee

Then the JJ Irani Committee Report in 2005 was formulated to review the laws concerning liquidation and restructuring of the companies recommended several revisions to the Companies Act, more particularly for a transparent and globally acceptable insolvency and restructuring procedures, in short. The Committee has proposed significant changes in the law to make the restructuring and liquidation process speedy, efficient and effective. Recommendations are directed at restoring the eroded confidence of key stakeholders in the insolvency system while balancing their interest. According to the report, "it is important that the basic principles guiding the operation of corporate entities from registration to winding up or liquidation should be available in a single, comprehensive, centrally administered framework".

4.0 INTERNATIONAL SCENARIO OF LAWS ON INSOLVENCY

A) Corporate Insolvency in United States

1. Introduction:

A person is considered to be insolvent when the party has ceased to pay its debts in the ordinary course of business, or cannot pay its debts as they become due, or is insolvent within the meaning of the Bankruptcy Code. The United States has established insolvency regimes which aim to protect the insolvent individual or company from the creditors, and balance their respective interests. The largest bankruptcy in U.S. history occurred on September 15, 2008, when Lehman Brothers Holdings Inc. filed for Chapter 11 protection with more than USD$639 billion in assets. The 20 largest corporate bankruptcies are as follows.

Company	Bankruptcy Date	Total Assets Pre-Bankruptcy
Lehman Brothers Holdings, Inc.	9/15/2008	$691,063,000,000
Washington Mutual	9/26/2008	$327,913,000,000
Worldcom, Inc.	7/21/2002	$103,914,000,000

General Motors	6/1/2009	$82,290,000,000
Enron Corp.	12/02/2001	$65,503,000,000
Conseco, Inc.	12/17/2002	$61,392,000,000
Chrysler	4/30/2009	$39,300,000,000
Thornburg Mortgage	5/01/2009	$36,521,000,000
Pacific Gas and Electric Co.	4/06/2001	$36,152,000,000
Texaco	4/12/1987	$34,940,000,000
Financial Corp of America	9/09/1988	$33,864,000,000
Refco	10/17/2005	$33,333,000,000
IndyMac Bancorp	7/31/2008	$32,734,000,000
Global Crossing	1/28/2002	$30,185,000,000
Bank of New England	1/07/1991	$29,773,000,000
General Growth Properties	4/16/2009	$29,557,000,000
Lyondell Chemical	1/06/2009	$27,392,000,000
Calpine	12/20/2005	$27,216,000,000

New Century Financial	4/02/2007	$26,147,000,000
UAL Corporation	12/09/2002	$25,197,000,000
Delta Air Lines	9/14/2005	$21,801,000,000

2. Laws for Bankruptcy in U.S

Bankruptcy in the United States is permitted by the United States Constitution (Article 1, Section 8, Clause 4) which authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States." Congress has exercised this authority several times since 1801, most recently by adopting the Bankruptcy Reform Act of 1978, codified in Title 11 of the United States Code, commonly referred to as the Bankruptcy Code ("Code"). The Code has been amended several times since 1978, most recently in 2005 through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 or BAPCPA. Some law relevant to bankruptcy is found in other parts of the United States Code. For example, bankruptcy crimes are found in Title 18 of the United States Code (Crimes), tax implications of bankruptcy are found in Title 26 of the United States Code (Internal Revenue Code), and the creation and jurisdiction of bankruptcy courts are found in Title 28 of the United States Code (Judiciary and Judicial procedure).

While bankruptcy cases are filed in United States Bankruptcy Court (units of the United States District Courts), and federal law governs procedure in bankruptcy cases, state laws are often applied when determining property rights.

3. Relevant chapters in Bankruptcy Code

Entities seeking relief under the Bankruptcy Code may file a petition for relief under a number of different chapters of the Code, depending on circumstances. Title 11 contains nine chapters, six of which provide for the filing of a petition whereas the other three chapters provide rules to govern those petitions. Bankruptcy cases are typically referred to by the chapter under which the petition is filed. These chapters are detailed below.

Chapter 1--	General Provisions
Chapter 3—	Case Administration
Chapter 5—	Creditors, The Debtor, And The Estate
Chapter 7—	Liquidation
Chapter 9—	Adjustment Of Debts Of A Municipality
Chapter 11—	Reorganization
Chapter 12—	Adjustment Of Debts Of A Family Farmer Or Fisherman With Regular Annual Income
Chapter 13—	Adjustment Of Debts Of An Individual With Regular Income
Chapter 15—	Ancillary And Other Cross-Border Cases

A petition for bankruptcy can be filed under chapters 7, 9, 11, 12, 13 and 15. Chapter 7 bankruptcy petitions are most popular and can be used by both individual and corporate for filing liquidation petition. However, chapter 11 and 13 are for reconstruction rather than liquidation. Chapter 11 is rarely used by individuals. Chapter 9 is only for municipalities whereas chapter 12 is for family farmers and fishers. Chapter 15 is for cross border bankruptcy.

4. Chapter 7 of Title 11

Chapter 7 of the Title 11 of the United States Code (Bankruptcy Code) governs the process of liquidation under the bankruptcy laws of the United States. (In contrast, Chapters 11 and 13 govern the process of *reorganization* of a debtor in bankruptcy). Chapter 7 is the most common form of bankruptcy in the United States

For businesses

When a troubled business is badly in debt and unable to service that debt or pay its creditors, it may file (or be forced by its creditors to file) for bankruptcy in a federal court under Chapter 7. A Chapter 7 filing means that the business ceases operations unless continued by the Chapter 7 Trustee. A Chapter 7 Trustee is appointed almost immediately. The Trustee generally sells all the assets and distributes the proceeds to the creditors.

This may or may not mean that all employees will lose their jobs. When a very large company enters Chapter 7 bankruptcy, entire divisions of the company may be sold intact to other companies during the liquidation.

Fully-secured creditors, such as collateralized bondholders or mortgage lenders, have a legally-enforceable right to the collateral securing their loans or to the equivalent value, a right which cannot be defeated by bankruptcy. A creditor is fully secured if the value of the collateral for its loan to the debtor equals or exceeds the amount of the debt. For this reason, however, fully-secured creditors are not entitled to participate in any distribution of liquidated assets that the bankruptcy trustee might make.

In a Chapter 7 case, a corporation or partnership does not receive a bankruptcy discharge —instead, the entity is dissolved. Only an individual can receive a Chapter 7 discharge (see 11 U.S.C. § 727(a)(1)). Once all assets of the corporate or partnership debtor have been fully administered, the case is closed. The debts of the corporation or partnership theoretically continue to exist until applicable statutory periods of limitations expire.

For individuals

Individuals who reside, have a place of business, or own property in the United States may file for bankruptcy in a federal court under Chapter 7 ("straight bankruptcy", or liquidation). Chapter 7, as with other bankruptcy chapters, is not available to individuals who have had bankruptcy cases dismissed within the prior 180 days under specified circumstances.

In a Chapter 7 bankruptcy, the individual is allowed to keep certain exempt property. Most liens, however (such as real estate mortgages and security interests for car loans), survive. The value of property that can be claimed as exempt varies from state to state. Other assets, if any, are sold (*liquidated*) by the interim trustee to repay creditors. Many types of unsecured debt are legally discharged by the bankruptcy proceeding, but there are various types of debt that are not discharged in a Chapter 7. Common exceptions to discharge include child support, income taxes less than 3 years old and property taxes, student loans (unless the debtor prevails in a difficult-to-win adversary proceeding brought to determine the dischargeability of the student loan), and fines and restitution imposed by a court for any crimes committed by the debtor. Spousal support and property settlements through divorce arelikewise not covered by a bankruptcy filing. Despite their potential non-dischargeability, all debts must be listed on bankruptcy schedules.

Bankruptcy discharge stays on the individual's credit report for up to 10 years for most purposes. This may make credit less available and/or terms less favorable, although high debt can have the same effect. That must be balanced against the removal of actual debt from the filer's record by the bankruptcy, which tends to improve creditworthiness. Consumer credit and creditworthiness is a complex subject, however. Future ability to obtain credit is dependent on multiple factors and difficult to predict.

Another aspect to consider is whether the debtor can avoid a challenge by the United States Trustee to his or her Chapter 7 filing as *abusive*. One factor in considering whether the U.S. Trustee can prevail in a challenge to the debtor's Chapter 7 filing is whether the debtor can otherwise afford to repay some or all of his debts out of disposable income in the five year time frame provided by Chapter 13. If so, then the U.S. Trustee may succeed in preventing the debtor from receiving a discharge under Chapter 7, effectively forcing the debtor into Chapter 13.

It is widely held amongst bankruptcy practitioners that the U.S. Trustee has become much more aggressive in recent times in pursuing (what the U.S. Trustee believes to be) *abusive* Chapter 7 filings. Through these activities the U.S. Trustee has achieved a regulatory system that Congress and most creditor-friendly commentors have consistently espoused, i.e., a formal means test for Chapter 7. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has clarified this area of concern by making changes to the U.S. Bankruptcy Code that include, along with many other reforms, language imposing a means test for Chapter 7 cases.

Creditworthiness and the likelihood of receiving a Chapter 7 discharge are only a few of many issues to be considered in determining whether to file bankruptcy. The importance of the effects of bankruptcy on creditworthiness is sometimes overemphasized because by the time most debtors are ready to file for bankruptcy their credit score is already ruined.

Methods of filing for bankruptcy

Federal bankruptcy forms

Functionally, templates are more or less the computer based equivalent of paper bankruptcy forms. The official Federal bankruptcy forms prescribed in the Federal Bankruptcy Rules come as Microsoft Word and Adobe Acrobat formatted templates where each bankruptcy form is represented by a Word or Acrobat file. While these forms are electronic in nature and reside on a computer, they do not contain intelligence that would guide the debtor. The debtor still has to fill in each bankruptcy form separately as they would with paper forms and the debtor still has to grapple with the complexity of bankruptcy law.

Bankruptcy software

In bankruptcy software, the debtor interacts with the software through a web page and is shielded from the actual bankruptcy forms and from the intricacies of bankruptcy law. The debtor responds to questions in an interview setting, much like with tax programs such as TurboTax or automated documents made through HotDocs. The debtor enters names and addresses, a list of their creditors and assets and other financial information and the software generates all the court-ready forms and delivers them to the debtor via email or a download link. The accuracy of the forms is nevertheless imperfect, as it is difficult for software to ensure that the debtor understands what has to be disclosed, what the exemptions for their state are, whether they qualify for said exemptions, and whether expenses included on the means test are allowable.

Bankruptcy preparer

An alternative to do it yourself is the online full-service chapter 7 bankruptcy preparer or online paralegal. This method appeals to those who cannot afford the high cost of bankruptcy attorneys and at the same time do not want the hassle and uncertainty of document templates and software. Bankruptcy preparers fill this need. The bankruptcy forms are prepared by trained individuals rather than by debtor themselves. However, having a preparer or paralegal prepare the petition does not guarantee compliance with all applicable laws, or that maximum advantage exemptions. Preparers and paralegals cannot offer legal advice. As with online bankruptcy software, debtors submit their bankruptcy information through a simple web page interface. Rather than having some software automatically generate the forms, trained paralegals use the information to prepare the document and then deliver them to the debtor. Bankruptcy petition preparers are not licensed to practice law and are not able to provide legal advice. Bankruptcy trustees may scrutinize these petitions more closely, and ensure that paralegals did not offer legal advice. The BAPCPA provides more stringent guidelines for petition preparers to follow to better protect the consumer.

Bankruptcy attorney

A bankruptcy attorney can advise the consumer on when the best time to file is, whether they qualify for a chapter 7 or need to file a chapter 13, ensure that all requirements are fulfilled so that the bankruptcy will go smoothly, and whether the debtor's assets will be safe if they file. With expanded requirements of the BAPCPA bankruptcy act of 2005, filing a personal chapter 7 bankruptcy is complicated. Many attorneys that used to practice bankruptcy in addition to their other fields, have stopped doing so due to the additional reqirements, liability and work involved. After the petition is filed, the attorney can provide other services.

2005 bankruptcy law revision

On October 17, 2005 the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) went into effect. This legislation was the biggest reform to the bankruptcy laws since 1978. The legislation was enacted after years of lobbying efforts by banks and lending institutions and was intended to prevent abuses of the bankruptcy laws.

The changes to Chapter 7 were extensive.

Means test

The most noteworthy change brought by the 2005 BAPCPA amendments occurred within 11 U.S.C. § 707(b). The amendments effectively subject most debtors who have an income, as calculated by the Code, above the debtor's state's median income to an income based test. This test is referred to as the "means test." The means test provides for a finding of abuse if the debtor's income is higher than a specified portion of their debts. If a presumption of abuse is found under the means test, it may only be rebutted in the case of "special circumstances." Debtors whose income is below the state's median income are not subject to the means test.

Notably, the Code calculated income may be higher or lower than the debtor's actual income at the time of filing for bankruptcy. This has led some commentators to refer to the bankruptcy code’s “current monthly income” as “presumed income.” If the debtor's debt is not primarily consumer debt, then the means test is inapplicable.

Credit counseling

Another major change to the law enacted by BAPCPA deals with eligibility. §109(h) provides that a debtor will no longer be eligible to file under either chapter 7 or chapter 13 unless within 180 days prior to filing the debtor received an “individual or group briefing” from a nonprofit budget and credit counseling agency approved by the United States trustee or bankruptcy administrator.

The new legislation also requires that all individual debtors in either chapter 7 or chapter 13 complete an "instructional course concerning personal financial management." If a chapter 7 debtor does not complete the course, this constitutes grounds for denial of discharge pursuant to new §727(a)(11). The financial management program is experimental and the effectiveness of the program is to be studied for 18 months. Theoretically, if the educational courses prove to be ineffective, the requirement may disappear.

Applicability of exemptions

BAPCPA attempted to eliminate the perceived "forum shopping" by changing the rules on claiming exemptions. Under BAPCPA, a debtor who has moved from one state to another within two years of filing (730 days) the bankruptcy case must use exemptions from the place of the debtor's domicile for the majority of the 180 day time period preceding the two years (730 days) before the filing [§522(b)(3)]. If the new residency requirement would render the debtor ineligible for any exemption, then the debtor can choose the federal exemptions.

BAPCPA also "capped" the amount of a homestead exemption that a debtor can claim in bankruptcy, despite state exemption statutes. Also, there is a "cap" placed upon the homestead exemption in situations where the debtor, within 1215 days (about 3 years and 4 months) preceding the bankruptcy case added value to a homestead. The provision provides that "any value in excess of $125,000" added to a homestead cannot be exempted. The only exception is if the value was transferred from another homestead within the same state or if the homestead is the principal residence of a family farmer (§522(p)). This "cap" would apply in situations where a debtor has purchased a new homestead in a different state, or where the debtor has increased the value to his/her homestead (presumably through a remodeling or addition).

Lien avoidance

Some types of liens may be avoided through a chapter 7 bankruptcy case. However, BAPCPA limited the ability of debtors to avoid liens through bankruptcy. The definition of “household goods” was changed limiting “electronic equipment” to one radio, one television, one VCR, and one personal computer with related equipment. The definition now excludes works of art not created by the debtor or a relative of the debtor, jewelry worth more than $500 (except wedding rings), and motor vehicles (§521(f)(1)(B)). Prior to BAPCPA, the definition of household goods was broader so that more items could have been included, including more than one television, VCR, radio, etc…

Other changes

- Decreased the number and type of debts that could be discharged in bankruptcy. Decreased limits for discharge of debts incurred discharging luxury goods. Expanded the scope of student loans not dischargeable without "undue hardship."

- Increase the amount of time required between bankruptcy filings.[6]

- Limited the duration of the automatic stay, particularly for debtors who had filed within one year of a previous bankruptcy. Automatic stay may be extended at the discretion of the court.

- BAPCPA limited the applicability of the automatic stay in eviction proceedings. The stay does not stop an eviction proceeding if the landlord has already obtained a judgment of possession prior to the bankruptcy case being filed, §362(b)(22). The stay also would not apply in a situation where the eviction is based on “endangerment” of the rented property or “illegal use of controlled substances” on the property, §362(b)(23).

- BAPCPA enacts a provision that protects creditors from monetary penalties for violating the stay if the debtor did not give “effective” notice pursuant to §342, [§342(g)]. The new notice provisions require the debtor to give notice of the bankruptcy to the creditor at an “address filed by the creditor with the court,” or “at an address stated in two communications from the creditor to the debtor within 90 days of the filing of the bankruptcy case.

5. **Chapter 9: Reorganization for municipalities**

History

Chapter 9, Title 11 of the United States Code is a chapter of the United States Bankruptcy Code, available exclusively to municipalities and assists them in the restructuring of debts. Most famously, Chapter 9 was used by Orange County, California in 1994 to adjust its debts. Previous to the creation of Chapter 9 bankruptcy the only remedy when a municipality was unable to pay its creditors was for the creditors to pursue an action of mandamus, and compel the municipality to raise taxes. During the Great Depression this approach proved impossible so in 1934 the Bankruptcy Act was amended to extend to municipalities. The 1934 Amendment was declared unconstitutional in *Ashton v. Cameron County Water District*, however a similar act was passed again by Congress in 1937 and codified as Chapter X of the Bankruptcy Act (later re-designated as Chapter IX). Chapter IX was largely unchanged until it was amended in 1976 in response to New York City's financial crisis. The changes made in 1976 were adopted nearly identically in the modern 1978 Bankruptcy Code as Chapter 9.

To prevent overlap Chapter 11, 11 USC § 101(41), of the US Bankruptcy code defines the term "person" to exclude many so called "governmental units" as defined in 11 USC § 101(27). Since 1937, there have been fewer than 600 municipal bankruptcies.

While in many ways similar to other forms of bankruptcy reorganization (Chapters 11, 12, and 13), Chapter 9 has some unique characteristics. Because municipalities are entities of State governments, the power of Congress to adjust their debts through bankruptcy is limited considerably by the 10th Amendment. Municipalities' ability to re-write collective bargaining agreements are much easier than in a corporate Chapter 11 bankruptcy and can trump state labor protections allowing cities to renegotiate unsustainable pension or other benefits packages negotiated in flush times.

Reorganization under Chapter 11

Chapter 11 is a chapter of the United States Bankruptcy Code, which permits reorganization under the bankruptcy laws of the United States. Chapter 11 bankruptcy is available to every business, whether organized as a corporation or sole proprietorship, and to individuals, although it is most prominently used by corporate entities. In contrast, Chapter 7 governs the process of a liquidation bankruptcy, while Chapter 13 provides a reorganization process for the majority of private individuals.

When a business is unable to service its debt or pay its creditors, the business or its creditors can file with a federal bankruptcy court for protection under either Chapter 7 or Chapter 11.

In Chapter 7 the business ceases operations, a trustee sells all of its assets, and then distributes the proceeds to its creditors. Any residual amount is returned to the owners of the company. In Chapter 11, in most instances the debtor remains in control of its business operations as a *debtor in possession*, and is subject to the oversight and jurisdiction of the court.

Salient Features of Chapter 11 bankruptcy

Chapter 11 bankruptcy retains many of the features present in all, or most bankruptcy proceedings in the United States. It also provides additional tools for debtors as well. Most importantly, 11 U.S.C. § 1108 empowers the trustee to operate the debtor's business. In Chapter 11, unless appointed for cause, the debtor acts as trustee of the business.

Bankruptcy affords the debtor in possession a number of mechanisms to restructure its business. A debtor in possession can acquire financing and loans on favorable terms by giving new lenders first priority on the business' earnings. The court may also permit the debtor in possession to reject and cancel contracts. Debtors are also protected from other litigation against the business through the imposition of an automatic stay. While the automatic stay is in place, most litigation against the debtor is stayed, or put on hold, until it can be resolved in bankruptcy court, or resumed in its original venue.

If the business's debts exceed its assets, the bankruptcy restructuring results in the company's owners being left with nothing; instead, the owners' rights and interests are ended and the company's creditors are left with ownership of the newly reorganized company.

All creditors are entitled to be heard by the court. The court is ultimately responsible for determining whether the proposed plan of reorganization complies with the bankruptcy law.

The chapter 11 plan

Chapter 11 is reorganization, as opposed to liquidation. Debtors may "emerge" from a Chapter 11 bankruptcy within a few months or within several years, depending on the size and complexity of the bankruptcy. The Bankruptcy Code accomplishes this objective through the use of a bankruptcy plan. With some exceptions, the plan may be proposed by any party in interest.[3] Interested creditors then vote for a plan. Upon its confirmation, the plan becomes binding and identifies the treatment of debts and operations of the business for the duration of the plan.

Debtors in Chapter 11 have the exclusive right to propose a plan of reorganization for a period of time (in most cases 120 days). After that time has elapsed, creditors may also propose plans. Plans must satisfy a number of criteria in order to be "confirmed" by the bankruptcy court. Among other things, creditors must vote to approve the plan of reorganization. If a plan cannot be confirmed, the court may either convert the case to a liquidation under Chapter 7, or, if in the best interests of the creditors and the estate, the case may be dismissed resulting in a return to the status quo before bankruptcy. If the case is dismissed, creditors will look to nonbankruptcy law in order to satisfy their claims.

Automatic stay

As with other forms of bankruptcy, petitions filed under Chapter 11 invoke the automatic stay of § 362. The automatic stay requires all creditors to cease collection attempts, and makes post-petition debt collection void. Under some circumstances, creditors or the United States Trustee can ask the court to convert the case to a liquidation under Chapter 7, or to appoint a trustee to manage the debtor's business. The court will grant a motion to convert to Chapter 7 or appoint a trustee if either of these actions is in the best interest of all creditors. Sometimes a company will liquidate under Chapter 11, in which the pre-existing management may be able to help get a higher price for divisions or other assets than a Chapter 7 liquidation would be likely to achieve. Appointment of a trustee requires some wrongdoing or gross mismanagement on the part of existing management, and is relatively rare.

Executory contracts

Some contracts, known as executory contracts, may be rejected if canceling them would be financially favorable to the company and its creditors. Such contracts may include labor union contracts, supply or operating contracts (with both vendors and customers), and real estate leases. The standard feature of executory contracts is that each party to the contract has duties remaining under the contract. In the event of a rejection, the remaining parties to the contract become unsecured creditors of the debtor.

Priority

Chapter 11 follows the same priority scheme as other bankruptcy chapters. The priority structure is defined primarily by § 507 of the Bankruptcy Code (11 U.S.C. § 507.)

As a general rule secured creditors—creditors who have a security interest, or collateral, in the debtor's property—will be paid before unsecured creditors. Unsecured creditors' claims are prioritized by § 507. For instance the claims of suppliers of products or employees of a company may be paid before other unsecured creditors are paid. Each priority level must be paid in full before the next lowest priority level may receive payment.

Stock

If the company's stock is publicly traded, a Chapter 11 filing generally causes it to be delisted from its primary stock exchange if listed on the New York Stock Exchange, the American Stock Exchange, or the NASDAQ. On the NASDAQ the identifying fifth letter "Q" at the end of a stock symbol indicates the company is in bankruptcy (formerly the "Q" was placed in front of the pre-existing stock symbol; a celebrated example was Penn Central, whose symbol was originally "PC" and became "QPC" after the company filed Chapter 11 in 1970). Many stocks that are delisted quickly resume listing as over-the-counter (OTC) stocks. In the overwhelming majority of cases, the Chapter 11 plan, when confirmed, terminates the shares of the company, rendering shares valueless.

Individuals may file Chapter 11, but due to the complexity and expense of the proceeding, this option is rarely chosen by debtors who are eligible for Chapter 7 or Chapter 13 relief.

Rationale

In enacting Chapter 11 of the Bankruptcy code, Congress concluded that it is sometimes the case that the value of a business is greater if sold or reorganized as a going concern than the value of the sum of its parts if the business's assets were to be sold off individually. It follows that it may be more economically efficient to allow a troubled company to continue running, cancel some of its debts, and give ownership of the newly reorganized company to the creditors whose debts were canceled. Alternatively, the business can be sold as a going concern with the net proceeds of the sale distributed to creditors ratably in accordance with statutory priorities. In this way, jobs may be saved, the (previously mismanaged) engine of profitability which is the business is maintained (presumably under better management) rather than being dismantled, and, as a proponent of a chapter 11 plan is required to demonstrate as a precursor to plan confirmation, the business's creditors end up with more money than they would in a Chapter 7 liquidation.

Criticism

Some critics have claimed that Chapter 11 bankruptcy is excessively lenient in giving a needless "escape hatch" to the incompetent management of a failing company, damaging the efficiency of the economy as a whole and allowing poor managers to continue managing. It is unusual for the management of a company in Chapter 11 to be fired, as it is usually assumed that the present management team knows far more about the company and its customers than would a new set of management. These critics note that in Europe, bankruptcy law is far less lenient for failing companies.

Another efficiency criticism is that a company undergoing Chapter 11 bankruptcy is effectively operating under the "protection" of the court until it emerges, in some cases giving the bankrupt company a great advantage against its competitors, distorting the market and harming more competitive businesses. Where a key market participant (or more than one) goes into Chapter 11, it can also result in significant over-capacity in the industry. The most-cited recent example is the airline industry in the United States; in 2006 over half the industry's seating capacity was on airlines that were in Chapter 11. These airlines were able to stop making debt payments, freeing up cash to expand routes or weather a price war against competitors — all with the bankruptcy court's approval. This is especially important in the airline industry as fixed capital costs for the airplanes (and the debt on those costs) make up such a large part of the airlines' expenditures.

Others criticize the process on the basis that, by forestalling the creditors' rights to enforce their security in the event of non-payment; it reduces the economic value of collateral in the United States, and thereby increases the cost of secured lending. However, studies on the subject seem to reach different conclusions on the extent of this, or indeed whether it is in fact the case at all in practice.

6. Bankruptcy of family farmers and fisherman

In early periods, there was no provision specifically for farmers in Bankruptcy Laws of United States. The 1898 Bankruptcy Act contained no special provisions for farmers, except that farmers were immune from an involuntary bankruptcy petition. Section 75 was enacted by the Bankruptcy Act of 1933 and provided specific provisions for farmers. However many of these provisions were limited in scope, and ultimately required the voluntary cooperation of mortgagors and creditors. In addition, Section 75, as it was originally conceived, was a temporary measure. It was scheduled to expire on March 3, 1938. However, the scope of Section 75 was expanded, providing for stronger protections available to farmers operating under bankruptcy protection. These changes too were initially temporary, however they were extended a number of times until they ultimately expired on March 31, 1949

Chapter 12 was added to the Bankruptcy Code in 1986 by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986. Its effective date was November 26, 1986. The Act was to originally expire on October 1, 1993, however it was extended a number of times without expiring until it was made permanent by the 2005 BAPCPA

Chapter 12 provides additional benefits compared to chapter 13 or chapter 11. These benefits include higher debt ceiling amounts, compared to chapter 13, and more advantageous exemptions

7. Reorganization for Individuals: Chapter 13

Chapter 13 ***bankruptcy*** filing is a way for individuals in the ***United States*** to undergo a financial ***reorganization*** supervised by a federal ***bankruptcy court***. The ***Bankruptcy Code*** anticipates the goal of Chapter 13 as enabling income-receiving debtors a debtor rehabilitation provided they fulfill a court-approved plan. Compare the goal of Chapter 13 with the relief contemplated in ***Chapter 7*** that offers immediate, complete relief of many oppressive debt. An individual who is badly in debt can file for bankruptcy either under Chapter 7 (liquidation, or straight bankruptcy), under Chapter 13 (reorganization), Chapter 12 (family farmer reorganization), or under Chapter 11.

Debtors may also be forced into bankruptcy by creditors in the case of an involuntary bankruptcy, but only under Chapters 7 or 11. However, in most instances the debtor may choose under which chapter to file. The debtor may also choose to convert to another chapter from a 7 or 11 when forced into an involuntary bankruptcy

The debtor's financial characteristics and the type of relief sought plays a tremendous role in the choice of chapters. In some cases the debtor simply cannot file under Chapter 13, as he or she lacks the disposable income necessary to fund a viable Chapter 13 plan (see below). Furthermore, Section 109(e) of Title 11, United States Code sets forth debt limits for individuals to be eligible to file under Chapter 13 the debt limits for filing Chapter 13 of unsecured debts of less than $336,900.00 and secured debts of less than $1,010,650.00. These debt limits are subject to annual cost of living increases and represent values updated through April 1, 2007.

Under Chapter 13, the debtor proposes a plan to pay his creditors over a 3- to 5-year period. This written plan details all of the transactions (and their durations) that will occur, and repayment according to the plan must begin within thirty to forty-five days after the case has started. During this period, his creditors cannot attempt to collect on the individual's previously incurred debt except through the bankruptcy court. In general, the individual gets to keep his property, and his creditors end up with less money than they are owed.

Disadvantages

The disadvantage of filing for personal bankruptcy is that, under the Fair Credit Reporting Act, a record of this stays on the individual's credit report for up to 10 years. During the pendency of a Chapter 13 case the debtor is not permitted to obtain additional credit without the permission of the bankruptcy court. Moreover, creditors may not be willing to risk lending money to such an individual. However, this disadvantage is not unique to Chapter 13; it may also apply to individuals currently in a Chapter 11 case, Chapter 12 case or those who are in or have recently been in a Chapter 7 case.

Advantages

The advantages of Chapter 13 over Chapter 7 include: the ability to stop foreclosures although a foreclosure would be reinstated upon completion of the bankruptcy; to achieve a *super discharge* of debts of kinds not dischargeable under Chapter 7; to *value collateral*; to bifurcate the security interest of creditors in certain property that creditors are either charging too much interest for, or are over-secured, or both, and leading to a *cram down* modification of the debt; to prevent collection activities against non-filing co-signers (*co-debtors*) during the life of the case.

The Chapter 13 plan

A *Chapter 13 plan* is a document filed with or shortly after a debtor's Chapter 13 bankruptcy petition.

The plan details the treatment of debts, liens, and the secured status of assets and liabilities owned or owed by the debtor in regard to his bankruptcy petition. In order for plans to take effect, it must meet a number of requirements. These are specified in § 1325 and include:

- providing that unsecured creditors will receive at least as much through the chapter 13 plan as they would in a chapter 7 liquidation
- either not be objected to, repay all creditors in full, or commit all of the debtor's disposable income to the Chapter 13 plan for at least three years (or five years for a debtor who makes an above median income)

8. Cross Border Bankruptcy: Chapter 15

Under Chapter 15 a representative of a corporate bankruptcy (insolvency) proceeding outside the U.S. can obtain access to the United States courts. It allows cooperation between the United States courts and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases. The law provides solutions to problems which arise in connection with cross-border bankruptcy, allowing US courts to issue subpoenas, orders to turn over assets, the issuance of stays on pending actions, and orders of other types as circumstances dictate. The ancillary proceeding permitted under Chapter 15 is often a more efficient and less costly alternative to initiating an independent bankruptcy proceeding in the United States. It also avoids the conflicts which could arise between the jurisdictions involved in two independent bankruptcy proceedings initiated in connection with the same debtor. Chapter 15 also establishes mechanisms for the cooperation between US and foreign courts and representatives regarding proceedings which involve the same debtor

Discretionary assistance

Whether the US courts will extend the "additional assistance" sought in connection with a foreign proceeding under Chapter 15 is a matter of discretion.

The main consideration the US courts will take into account in making this decision is whether the laws of the foreign jurisdiction in connection with which the additional assistance is sought violate the laws or public policy of the United States and if the foreign courts conduct their proceedings according to basic rules of procedural fairness.

Among other factors the US courts will consider how the foreign jurisdiction treats creditors, whether it prevents the fraudulent transfer of debtor's property, if US creditors are protected against prejudice in the processing of their claims there, and the manner in which assets are distributed.

The court may conduct an evidentiary hearing, including the hearing of expert testimony, to determine whether the proceedings of the foreign forum are sufficiently just to grant the assistance requested.

B) INFORMATION ABOUT UNITED KINGDOM'S INSOLVENCY MATTERS

1. Introduction:

The Insolvency Act, 1986 deals the insolvency of individuals and companies. The Act is divided into three groups and 14 Schedules as follows:

a. Group 1: Company Insolvency
b. Group 2: Insolvency of Individuals
c. Group 3: Miscellaneous Matters Bearing on both Company & Individual Insolvency
d. Schedules

Further the Group 1 is divided in 7 parts as follows:

Part I - Company Voluntary Arrangements
Part II - Administration Orders
Part III - Receivership

- Chapter I - Receivers and Managers (England and Wales)
- Chapter II - Receivers (Scotland)
- Chapter III - Receivers Powers in Great Britain as a whole

Part IV - Winding Up of Companies Registered Under the Companies Acts

- Chapter I - Preliminary
- Chapter II - Voluntary Winding Up (Introductory and General)
- Chapter III - Members Voluntary Winding Up
- Chapter IV - Creditor' 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

Part V - Winding Up Unregistered Companies
Part VI - Miscellaneous Provisions applying to Companies which are Insolvent or in Liquidation
Part VII - Interpretation for first group of parts

Further the Group 2 is divided in 4 parts as follows:

Part VIII - Individual Voluntary Arrangements
Part IX - Bankruptcy

- Chapter I - Bankruptcy Petitions - Bankruptcy Orders
- Chapter II - Protection of Bankrupt's Estate and Investigation of his Affairs
- Chapter III - Trustees in Bankruptcy
- Chapter IV - Administration by Trustee
- Chapter V - Effect of Bankruptcy on certain rights, transactions etc
- Chapter VI - Bankruptcy Offences
- Chapter VII - Powers of Court in Bankruptcy

Part X - Individual Insolvency: General Provisions
Part XI - Interpretation for second group of parts

Further the Group 3 is divided in 8 parts as follows:

Part XII - Preferential debts in company and individual insolvency
Part XIII - Insolvency Practitioners and their qualifications
Part XIV - Public Administration
Part XV - Subordinate Legislation

Part XVI - Provisions against debt avoidance (England and Wales Only)

Part XVII - Miscellaneous and General

Part XVIII - Interpretation

Part XIX - Final Provisions

Schedules:

Schedule 1. Powers of administrator of administrative receiver

Schedule 2. Powers of a Scottish receiver (additional to those conferred on him by the instrument of charge

Schedule 3. Orders in course of winding up pronounced in vacation (Scotland)

Schedule 4. Powers of liquidator in a winding up

Schedule 5. Powers of trustee in Bankruptcy

Schedule 6. Categories of Preferential debts

Schedule 7. Insolvency Pracritioners Tribunal

Schedule 8. Privisions capable of inclusion in company insolvency rules

Schedule 9. Privisions capable of inclusion in individual insolvency rules

Schedule 10. Punishment of offences under this Act

Schedule 11. Transitional provisions and savings

Schedule 12. Enactments Repealed

Schedule 13. Consequential amendments to Companies Act 1985

Schedule 14. Consequential amendments to other enactments

2. Discussion on Parts:

Part 1: Company Voluntary Arrangements:

A. Proposal:

1. The directors of the Company may take a proposal to the company or its creditors for scheme of arrangements of its debts referred to as “Voluntary Arrangement”. The proposal provides for some person to act in relation to voluntary arragment either as a trustee or other for supervising its implementation.

2. Such a proposal can also be made by:

a. by administrator, where the administration is in force.

b. by liquidator , where the company is being wound up.

3. Where the nominee is not the administrator or liquidator, a nominee shall be appointed by the Court and within 28 days shall submit his report stating that:

a. whether meeting of company and of its creditors shall be summoned,

b. the date, time & venue of such meeting.

4. The nominee shall have the following documents from the proposer:

a. a document setting out the terms of the proposed voluntary arrangement.

b. a statement of company’s affairs,

c. particulars of its creditors and other liabilities and assets as may be prescribed,

d. such other information as may be prescribed

5. Where the nominee fails to submit the report as required, he shall be replaced by another person.

6. the persons to be summoned for the meeting under this section are every creditor of the company.

B. Consideration & Implementation of Proposal:

1. Each of the meeting shall be conducted in accordance with the rules. The meeting shall decide whether to approve the proposed voluntary arrangement, with or without modification.

2. The modification shall not include any proposal which ceases to be a proposal for voluntary arrangement. Also the meeting shall not approve any proposal or modification which affects the rights of a secured creditor of the company to enforce his security, except with the concurrence of the creditors.

3. After the conclusion of the meeting, the chairman of the meeting shall report the result of the meeting to the court and shall give a notice of the meeting to such person as prescribed.

C. Effect of Approval:

1. This section has effect where each of the meetings summoned approves for the proposed voluntary arrangement either with the same modifications or without modifications. The approved voluntary arrangement:

   a. takes effect as if made by the company at the creditor's meeting,

   b. binds every person who in accordance with the rules.

2. If the company is being wound up, the Court may do both or any of the following:

   a. by order, stay all the proceedings in the winding up or discharge the administration orders,

   b. give such directions with respect to the conduct of the winding up or the administration as it thinks appropriate for facilitating the implementation of the approved voluntary arrangement.

D. Challenge of Decision:

1. An application to the court may be made by any of the following persons, on any of the following grounds:

a. that the voluntary arrangement approved at the meeting unfairly prejudices the interest of a creditor, member or contributory of the company,

b. that there has material irregularity at or in relation to either of the meetings.

2. The following person shall apply:

a. a person entitled to vote at the meeting,

b. the nominee or any person who has replaced him,

c. if the company is being wound up or an administrator order is in force, the liquidator or and administrator.

3. An application made under this section shall not be made after the end of 28 days beginning from the date on which the report has been made to the Court.

4. Where the Court is satisfied as to either of the grounds mentioned above it may direct the following:

a. revoke or suspend the approvals given by the meetings,

b. give the directions to any person for summoning of further meetings to consider the revised proposal.

5. The court can also give such supplemental directions as it may think fit.

E. Implementation of Proposal:

1. This section applies where a voluntary arrangement approved by the meeting has taken effect.

2. If any of the company's creditor or any other person is dissatisfied by any act, omission or decision of the supervisor, he may apply to the court and on application the Court may:

a. confirm, reverse or modify any act of the supervisor.

b. give him directions.

c. make such other orders as it thinks fit.

Part 2: Administration Orders:

A. Power of Court to make an Order:

1. Subject to this section, if the court-

(a) is satisfied that a company is or is likely to become unable to pay its debts &

(b) considers that the making of an order under this section would be likely to achieve one or more of the purposes mentioned below, the court may make an administration order in relation to the company.

2. An administration order is an order directing that, during the period for which the order is in force, the affairs, business and property of the company shall be managed by a person (" the administrator") appointed for the purpose by the court.

3. *The purposes for which an administration order my 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 Part1;

(c) the sanctioning under section 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, nor where it is an insurance company.

5. For the purposes of a petition presented by the Bank of England alone or together with any other party an authorised institution or former authorised institutition within the

meaning of the Banking Act 1987 which defaults in an obligation to pay any sum due shall be deemed to be unable to pay its debts.

B. Application for Order:

1. An application to the court for an administration order shall be by petition presented either by the company or the directors, or by the Bank of England or by a creditor or creditors or by the clerk of a magistrates' court or by all or any of these parties, together or separately.

2. Where a petition is presented to the court-

   (a) notice of the petition shall be given &

   (b) the petition shall not be withdrawn except with the leave of the court.

3. On hearing any petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order that it thinks fit.

C. Effect of Application:

1. During the period beginning with the presentation of a petition for an administration order and ending with the making of such an order or the dismissal of the petition-

   (a) no resolution may be passed or order made for the winding up of the company;

   (b) no steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire-purchase agreement, except with the leave of the court and subject to such terms as the court may impose; and

   (c) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company and its property except with the leave of the court and subject to such terms as aforesaid.

D. Appointment of Administrator & Powers:

1. The administrator of a company shall be appointed by the administration order.

2. If the vacancy occurs by death, resignation or otherwise in the office of the administrator, the court may by order fill the vacancy.

3. 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) to remove directors of the company and to appoint any person to be director of it, whether to fill a vacancy or otherwise, and

(c) to call any meeting of the members or creditors of the company.

4. In exercising his powers the administrator is deemed to act as the company's agent.

5. The administrator of a company may dispose of or otherwise exercise his powers in relation to *any property* of the company which is subject to a security, as if the property were not subject to the security.

E. General duties:

1. The administrator of a company shall, on his appointment, take into his custody or under his control all the property to which the company is or appears to be entitled.

2. The administrator shall manage the affairs, business and property of the company-

(a) at any time before proposals have been approved in accordance with any directions given by the court, and

(b) at any time after proposals have been so approved, in accordance with those proposals as from time to time revised, whether by him or a predecessor of his.

3. The administrator shall summons a meeting of the company's creditors if-

(a) he is requested, in accordance with the rules, to do so by one-tenth, in value , of the company's creditors, or

(b) he is directed to do so by the court.

F. Information to be given by administrator:

1. Where an administration order has been made, the administrator shall-

(a) forthwith send to the company and publish in the prescribed manner a notice of the order, and

(b) within 28 days after the making of the order, unless the court otherwise directs, send such notice to all creditors of the company (so far as he is aware of their addresses).

2. Where an administration order has been made, the administrator shall also, within 14 days after the making of the order, send an *office copy of the order to the registrar of companies* and to such persons as may be prescribed.

3. If the administrator without reasonable excuse fails to comply with this section, he is liable to a fine.

G. Statement of affairs to be submitted to administrator:

1. Where an administration order has been made, the administrator shall forthwith require some or all of the persons mentioned below to make out and submit to him a statement in the prescribed form as to the affairs of the company relating to :

(a) particulars of the company's assets, debts and liabilities;

(b) the names and addresses of its creditors;

(c) the securities held by them respectively;

(d) the dates when the securities were respectively given; and

(e) such further or other information as may be prescribed.

2. The persons referred are-

(a) those who are or have been officers of the company;

(b) those who have been part in the company's formation at any time within one year before the date of the administration order;

(c) those who are in the company's employment

3. The statement shall be submitted within 21 days beginning with the day after that on which the prescribed notice of requirement is given to them by administrator.

4. If a person without reasonable excuse fails to comply with any obligation imposed under this section, he is liable to a fine and, for continued contravention, to a daily default fine.

H. Statement of proposals:

1. Where an administration order has been made, the Statement of administrator shall, within 3 months after the making of the order-

(a) be send to the ROC, the Bank of England and to all creditors a statement of his proposals for achieving the purpose specified in the order, and

(b) lay a copy of the statement before a meeting of the company's creditors summoned for the purpose on not less than 14 days' notice.

(c) send a copy or publish a copy of the statement to all members of the company,

2. If the administrator without reasonable excuse fails to comply with this section, he is liable to a fine.

I. Consideration of proposals by creditors' meeting:

1. A meeting of creditors summoned shall decide whether to approve the administrator's proposals. The meeting may approve the approvals with modifications, but shall not do so unless the administrator consents to each modification.

2. After the conclusion of the meeting in accordance with the rules, the administrator shall report the result of the meeting to the court and shall give notice of that result to the registrar of companies and to such persons as may be prescribed.

3. If a report is given to the court that the meeting had *declined* to approve the administrator's proposals (with or without modifications), the court may by order discharge the administration order and make such consequential provision as it thinks fit, or adjourn the hearing conditionally or unconditionally, or make an interim order.

4. Where the administration order is discharged, the administrator shall, within 14 days after the making of the order effecting the discharge, send an office copy of that order to the registrar of companies.

5. If the administrator without reasonable excuse fails to comply he is liable to a fine.

J. Approval of Proposal / Substantial revisions:

1. This applies where-

(a) proposals have been approved, and

(b) the administrator proposes to make revisions of those proposals which appear to him to be substantial.

2. The administrator shall-

(a) send to all creditors of the company (so far as he is aware of their addresses) a statement in the prescribed form of his proposed revisions, and

(b) lay a copy of the statement before a meeting of the company's creditors summoned for the purpose on not less that 14 days' notice; and he shall not make the proposed revisions unless they are approved by the meeting.

(c) send a copy of the statement to all members of the company, or

3. The meeting of creditors may approve the proposed revisions with modifications, but shall not do so unless the administrator consents to each modification.

K. Disqualification:

1. A body corporate is not qualified for appointment as receiver of the property of a company, and any body corporate which acts as such a receiver is liable to a fine.

2. If a person being an undischarged bankrupt, acts as receiver or manager of the property of a company on behalf of debenture holders, he is liable to imprisonment or a fine, or both.

This does not apply to a receiver or a manager acting under an appointment made by the court.

L. Agency & Liability of Contracts:

1. The administrative receiver of a company;

   (a) is deemed to be the company's agent, unless and until the company goes into liquidation;

   (b) is personally liable on any contract entered into by him in the carrying out of his functions &

   (c) is entitled in respect of that liability to an indemnity out of those assets of the company.

2. The administrative receiver is not to be taken to have adopted a contract of employment by reason of anything done or omitted to be done within 14 days after his appointment.

3. A liability under a contract of employment is a qualifying liability if-

   (a) it is a liability to pay a sum by way of wages or salary or contribution to an occupational pension scheme,

   (b) it is incurred while the administrative receiver is in office, and

   (c) it is in respect of services rendered wholly or partly after the adoption of the contract.

M. Vacation of Office:

1. An administrative receiver of a company may at any time be removed from office by order of the court (but not otherwise) and may resign his office by giving notice of his resignation in the prescribed manner to such persons as may be prescribed.

2. An administrative receiver shall vacate office if he ceases to be qualified to act as an insolvency practitioner in relation to the company.

3. Where at any time an administrative receiver vacates office;

(a) his remuneration and any expenses properly incurred by him, and

(b) any indemnity to which he is entitled out of the assets of the company, shall be charged on and paid out of any property of the company which is in his custody or under his control at that *time in priority* to any security held by the person by or on whose behalf he was appointed.

4. Where an administrative receiver vacates office otherwise than by death, he shall, within 14 days after his vacation of office, send a notice to that effect to the registrar of companies.

5. If an administrative receiver without reasonable excuse fails to comply with the above provision, he is liable to a fine.

C) CORPORATE INSOLVENCY LAWS IN AUSTRALIA

1. Introduction:

Insolvencies are inevitable in any modern economy. They occur in healthy and poor economic conditions, perhaps more so in the former case than when an economy is in decline. And when an economy goes into decline, or interest rate rise, or property values fall, there will be those whose business or domestic situations likewise falters. Insolvency law is there to deal with those inevitable outcomes, to give protection to the insolvent from its creditors while the administration proceeds, to assist in the recovery of assets and money for the benefit of the creditors so that they may at least recoup some of their financial losses, and to ensure at least some level of inquiry is made into the circumstances of the financial failure.

2. Australia Legislative Scheme:

In Australia, as in England, there has always been separate legislation dealing with the personal insolvency on one hand and the corporate insolvency on the other. In 1988 the Harmer Report considered the possibility of recommending whether the law affecting both individual and corporate insolvency should be integrated into one piece of legislation, but ultimately it did not think that the issue was of major significance. In the United Kingdom, the 1982 Report of the Insolvency Law review Committee, *Insolvency Laws and Practice* (commonly known as "the Cork Report") recommended the adoption in the United Kingdom of Unified Insolvency legislation. Ultimately the *Insolvency Act, 1986 (UK)* was enacted and this encompasses both types of insolvency administrations, including corporate restructuring. However Australia and New Zealand, continue to maintain separate legislations.

Those part of law which deals with the insolvency of individuals will focus on the *Bankruptcy Act 1966* on the Bankruptcy Regulations 1996 which deals primarily with matters of practice, and on the Federal Court (Bankruptcy) Rules 2005 and the Federal Magistrate Court (Bankruptcy) Rules 2006 in so far as they apply to bankruptcy proceedings. The material discussing corporate insolvency considers the *Corporations Act 2001*, the Corporations Regulations 2001 and the standard Courts' Corporation Rules. These Rules deal with conduct of the corporation matters, including insolvency matters, in all courts exercising corporate insolvency jurisdiction – for example the Federal Court (Corporations) Rules 2000 and the Supreme Court (Corporations) (WA) Rules 2004 – and are now in a fairly standard form applicable to each of those State and Federal Courts.

3. Recent legislative changes:

A. Bankruptcy legislation:

In recent years there have been substantial changes to the law as it relates to the insolvency of both individuals and companies. The changes to bankruptcy laws have often been in response to a particular issue or case, such as the bankruptcy of Alan Bond, or the superannuation decision in *Cook v Benson*. The major changes have been through the following legislation:

— The Bankruptcy Amendment Act 1991 introduced wide-ranging amendments which, among other things, tightened control over bankrupts and gave trustees in bankruptcy greater investigative and recovery powers. The Act was perceived by many as being aimed at the "high flyers" who appeared to be abusing the process of bankruptcy. Certainly the Act was introduced after much publicity surrounding the activities of well-known bankrupts, including Bond.

— The Bankruptcy Legislation Amendment Act 1996 completely changed aspects of bankruptcy administration in abolishing the office of Registrar of Bankruptcy and providing for debtors' petitions to be presented by debtors to the Official Receiver; it revised the void able transaction provisions of the Act (ss 120–122) which permit trustees to challenge transactions entered into prior to bankruptcy; and introduced debt agreements as a new form of administration under Pt IX of the Act.

— The Bankruptcy Legislation Amendment Act 2002 introduced changes that gave Official Receivers a discretion to reject a debtor's petition where an abuse of the bankruptcy system was apparent; abolished early discharge from bankruptcy; strengthened the objection-to-discharge provisions; and raised by 50% the then current income threshold for debt agreements, to allow and encourage many more debtors to choose this particular alternative to bankruptcy.

— The Bankruptcy Legislation Amendment Act 2004 was mainly concerned with revising Pt X of the Act, introducing personal insolvency agreements. Comparable changes were made to postbankruptcy compositions and schemes of arrangements. The

Act also introduced performance standards for trustees who conduct administrations under the Act.

— The *Bankruptcy and Family Law Legislation Amendment Act 2005* dealt with the significant interaction that occurs between bankruptcy and family law, enabling concurrent bankruptcy and family law issues to be heard together to ensure that all the relevant issues are dealt with at the same time. It also sought to clarify the competing rights and interests of the creditors and the non-bankrupt spouse where bankruptcy and family law issues co-exist. In particular, the non-bankrupt spouse has the right to pursue claims against vested bankruptcy property. That has been a significant change to the law in this area.

— The *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* strengthened the ability of trustees to recover property, including property acquired by a third party prior to bankruptcy using the bankrupt's resources and from which the bankrupt had derived a benefit.

— The *Bankruptcy Legislation Amendment (Debt Agreements) Act 2007* introduced enhanced regulation of debt agreement administrators, providing means for dealing with default by the debtor; and generally sought to simplify, streamline and clarify a range of provisions to improve the operation of the debt agreement regime.

— The *Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2006* allows trustees to recover superannuation contributions made prior to bankruptcy with the intention to defeat creditors. These are applicable to contributions made on or after 28 July 2006. An Official Receiver may issue notices to freeze a contributor's interest in a superannuation fund or to recover void contributions. This responded to the High Court's decision against the trustee's right of recovery in *Cook v Benson*.9 As to the courts, the establishment of the Federal Magistrates Court in 2000, with full jurisdiction under the *Bankruptcy Act* to the same extent as the Federal Court, has been a major development with the majority of all bankruptcy matters now filed in that court.10 There is also new jurisdiction of the Family Court in bankruptcy. The Federal Court of Australia nevertheless remains as the superior court with responsibility for the more complex issues in bankruptcy and the development of bankruptcy law.

B. Corporate legislation:

Corporate insolvency changes are not as extensive, largely because substantial and well drawn changes, based on the Harmer Report, were introduced in 1993. The changes in the last decades have been:

— *Corporate Law Reform Act 1992* (Cth) introduced the substantial amendments to corporate insolvency laws referred to, which were largely a response to the Harmer Report. The changes then introduced have provided the core of our present laws, with any later amendments or proposals largely refining them.

— The *Company Law Review Act 1998* was aimed at core company law issues and not at corporate insolvency, but the statute did amend many of the provisions in the law which regulates liquidations and company deregistration.

— The *Corporate Law Economic Reform Program Act 1999* again changed some of the provisions affecting insolvency law.

— As we have explained, the introduction around 2000 of standard Corporations Rules for the federal and State courts has allowed corporations proceedings to be handled in the same way in whatever local jurisdiction the case is heard.

D) China

Name of Regulator: Ministry of Commerce

Website link:

http://english.mofcom.gov.cn/

Key Legislation

- Law of the People's Republic of China on Enterprise Bankruptcy (for Trial Implementation) 1986
- New law has been drafted by not yet adopted by National People's Congress.
- Civil Procedures Law of 1982 (Chapter 19 Bankruptcy Procedures for Legal-Person Enterprises, amended 1991)

Insolvency Procedures

The 1986 Enterprise Bankruptcy Law applies only to state-owned enterprises. Approval of the relevant department in charge has first to be obtained before bankruptcy proceedings against an enterprise can be initiated under this law.

Enterprises that have legal person status are subject to the insolvency provisions found in Ch 19 of the Civil Procedure Law, which will have effect where the provisions of the 1986 Enterprise Bankruptcy Law do not apply and where the provisions of the 1986 Enterprise Bankruptcy Law are in conflict with the Civil Procedure Law.

The Draft Bankruptcy Law deals with the insolvency or bankruptcy of (a) enterprise legal persons, (b) partnership enterprises, (c) sole proprietorships and (d) other economic organisations established under the law. There are special provisions for state-owned enterprises. The law does not directly apply to non-business (consumer) bankruptcies.

The test of insolvency is the inability to pay debts and this can be deemed if the debtor ceases payment.

There are three types of insolvency procedures in the new draft law:

- Liquidation
- Reorganisation
- Composition

Commencement of a bankruptcy case is by application and acceptance by the people's courts. A judge appoints an administrator and a moratorium applies barring further civil recovery action by the creditors.Repayment priorities in the draft law mirror those in the 1986 Enterprise Bankruptcy Law and the Civil Procedure Law.

Under the new draft law the department in charge of state-owned enterprises must still consent to the initiation of bankruptcy proceedings against those enterprises.

Government

Departments in charge of state owned enterprises must give consent to the commencement of bankruptcy proceedings against those premises.

Private sector practitioners

Courts appoint private sector practitioners to be administrators and liquidators under the new draft law.The insolvency profession is still in a process of development in the People's Republic of China. At the present time there is no system of registration or licensing of practitioners.

Court

Judges are becoming more experienced in dealing with bankruptcy cases. There is no bankruptcy specialisation in the courts system. The People's courts deal with all bankruptcy cases.

E) Canada

Name of Regulator: Office of the Superintendent of Bankruptcy

Website : www.osb-bsf.ic.gc.ca

Key Legislation

- Bankruptcy and Insolvency Act (BIA)
- Companies' Creditors Arrangement Act (CCAA)
- Winding-up and Restructuring Act (WURA)
- Bankruptcy and Insolvency General rules
- Orderly Payment of Debts Regulations

Insolvency Procedures

The Bankruptcy and Insolvency Act (BIA) provides a legislative framework for the liquidation of the assets of an insolvent individual, corporation or partnership, and the distribution of the proceeds in a fair and orderly way among the creditors. It provides for the appointment of a trustee to take charge of the assets, sell them and distribute the proceeds. Alternatively, the Act provides ways for insolvent businesses or consumer debtors to avoid bankruptcy by negotiation arrangements with their creditors for the compromise of their debts and the reorganization of their financial affairs.

The Companies' Creditors Arrangement Act (CCAA) provides a legislative framework for the reorganization of insolvent corporate debtors. It enables an insolvent company to seek a court order staying its creditors from taking action against it while it negotiates an arrangement with them for the rescheduling or compromise of its debts.

The Winding-up and Restructuring Act (WURA), provides an alternative framework to the BIA for the liquidation and distribution of an insolvent corporation's assets among its creditors. It is the only legislative vehicle available for the liquidation of major financial institutions, including banks, insurance companies and trust and loan companies, none of which can be liquidated under the BIA.

F) Singapore

Name of Regulator: Insolvency & Public Trustee's Office

Website : www.minlaw.gov.sg/ipto

Key Legislation

Singapore's bankruptcy law and corporate insolvency law are governed by the Bankruptcy Act (Chapter 20) and the Companies Act (Chapter 50) respectively.

The Bankruptcy Act, which came into force on 15 July 1995, aims to reduce the instances where parties resort to bankruptcy proceedings and encourage the settlement of claims through voluntary arrangements.

Insolvency Procedures

Personal Insolvency

Bankruptcy is commenced only at the instigation of creditors. It is costly and can only apply when the debt owed is in excess of $10 000.

Alternatives to bankruptcy:

- Private Arrangements
- The debtor may apply to the court to make a proposal for voluntary arrangements
- A creditor can seek recovery of a debt through a court order or judgement
- Alternative dispute resolution in court

Corporate Insolvency Procedures

Corporate insolvency procedures available under the Company Act:

Part VII – Arrangements and reconstruction

Part VIII – Receivers and managers

Part VIIIA – Judicial management

Part X – Winding-Up (Voluntary and by the court)

The Official Receiver is responsible for the overall regulation and supervision of bankruptcy and corporate insolvency law, and administers the vast majority of bankruptcy cases and corporate insolvency in Singapore. The Official Receiver heads the Insolvency and Public Trustee's Office within the Ministry of Law.

Only a handful of bankruptcy cases are administered by private trustees, either by a solicitor or a certified public accountant. Private sector practitioners who act as liquidators are approved by the Minister for a three-year period.

The High Court of Singapore has the power to make a bankruptcy order/winding up order after considering whether the debtor/company is in a position to pay the debt. The High Court also annuls bankruptcy orders and issues warrants of arrest against bankrupts. The Subordinate courts hear prosecution proceedings for alleged bankruptcy offences such as the non-filing of Statement of Affairs.

G) South Africa

In South Africa, owners of businesses that had at any stage traded insolvently (i.e. that had a balance-sheet insolvency) become personally liable for the business' debts. Trading insolvently is often regarded as normal business practice in South Africa, as long as the business is able to fulfil its debt obligations when they fall due.

Name of Regulator:
Masters of the High Court
Website link:
www.doj.gov.za/master/m_main.htm

South Africa has adopted the UNCITRAL Model Law on cross-border insolvency as the Cross-Border Insolvency Act 42 of 2000.

An Act aimed at covering the insolvency of all types of entities - private individuals, companies, close corporations, and partnerships - is under consideration.

Key Legislation

- Companies Act 61 of 1973, Chapter XIV; to be replaced some time after 7 April 2010 by the Companies Act 71 of 2008
- Close Corporations Act 69 of 1984, Chapter IX
- Insolvency Act 24 of 1936

Insolvency Procedures

Personal Insolvency Procedures

Bankruptcy proceedings of individuals are currently provided for in the Insolvency Act 1936. A debtor or his/her agent may petition to the court for the debtor's bankruptcy or a creditor may petition. Creditors vote for the trustee. The Master of the Court or a magistrate presides at the meeting. The trustee must provide security for the proper performance of his or her duties and the cost of the provision of this security is a cost of the administration. Remuneration of the trustee is taxed by the Master. A debtor can also offer a composition to his\her creditors. The Insolvency Act also provides for the bankruptcy of debtors who are members of a partnership or who are spouses.

Corporate Insolvency Procedures

Liquidation (members' voluntary, creditors' voluntary and court windings up) of companies and close corporations and judicial management of companies are available in the law of South Africa. The statutes were partly based on English legislation.

Role played by Government

The South African insolvency system is supervised by the Court and the Master of the High Court. The Master of the High Court supervises the administration of insolvent estates.

Role played by private sector practitioners

Private sector practitioners may act as trustees, liquidators or judicial managers. It is up to the Master of the High Court and creditors to decide which practitioners are appointed to particular matters. There are persons who are disqualified from taking on appointments in general or specific appointments but the general criterion is that the practitioner is regarded by the Master of the High Court as a 'fit and proper' person.

The insolvency profession is still developing in South Africa and does not at present enjoy statutory recognition.

Role played by the Court

The court has a general supervising role in bankruptcy proceedings as well as making bankruptcy orders. The court can review decisions by the Master of the High Court.

Creditors

Creditors can at a meeting vote for the appointment of a practitioner and give directions regarding the administration of a matter. There is no formal provision for creditors' committees.

5.0 UNCITRAL LAWS ON INSOLVENCY

Introduction

The United Nations Commission on International Trade Law (UNCITRAL) (established in 1966) is a subsidiary body of the General Assembly of the United Nations with the general mandate to further the progressive harmonization and unification of the law of international trade. UNCITRAL has since prepared a wide range of conventions, model laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade. UNCITRAL meets once a year, typically in summer, alternatively in New York and in Vienna.

UNCITRAL texts are initiated, drafted, and adopted by the United Nations Commission on International Trade Law, a body made up of 60 elected member States representing different geographic regions. Participants in the drafting process include the member States of the Commission and other States (referred to as "observer States"), as well as interested international inter-governmental organizations ("IGO's") and non-governmental organizations ("NGO's").

As is the case with most subsidiary bodies of the General Assembly, which is composed of all States members of the United Nations, membership in UNCITRAL is limited to a smaller number of States, so as to facilitate the deliberations. UNCITRAL was originally composed of 29 States; its membership was expanded in 1973 to 36 States and again in 2004 to 60 States. The membership is representative of the various geographic regions and the principal economic and legal systems of the world. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years.

UNCITRAL Model Law on Cross-Border Insolvency

Adopted by UNCITRAL on 30 May 1997, the Model Law is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several significant ways, including: foreign assistance for an insolvency proceeding taking place in the enacting State; foreign representative's access to courts of the enacting State; recognition of foreign proceedings; cross-border cooperation; and coordination of concurrent proceedings.

Scope of the Model Law –

It applies to foreign proceedings “relating to insolvency” where:

- the purpose of the proceedings is the reorganization or liquidation of the debtor
- the proceedings are collective
- assets and affairs of the debtor are subject to court control or supervision (art. 2)

• certain entities can be excluded (Art. 1)

Examples of entities excluded are generally those subject to specialized regulatory regimes:

• Banking and insurance institutions

• Financial and investment institutions

• Commodity exchange members

• Brokerage companies and traders

• Consumers

UNCITRAL Legislative Guide on Insolvency Law

Adopted by UNCITRAL on 25 June 2004, the purpose of the Legislative Guide is to assist the establishment of an efficient and effective legal framework to address the financial difficulty of debtors. It is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. The advice provided in the Legislative Guide aims at achieving a balance between the need to address the debtor's financial difficulty as quickly and efficiently as possible and the interests of the various parties directly concerned with that financial difficulty, principally creditors and other parties with a stake in the debtor's business, as well as public policy concerns. The Legislative Guide addresses the issues central to an effective and efficient insolvency law and assists the reader to evaluate different approaches available and to choose the one most suitable in the national or local context.

UNCITRAL Practice Guide on Cross Border Insolvency Cooperation

Adopted by UNCITRAL on 1 July 2009, the Practice Guide provides information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases. The information is based upon a description of collected experience and practice, focusing on the use and negotiation of cross-border agreements. It provides an analysis of more than 39 agreements, ranging from written agreements approved by courts to oral arrangement between parties to the proceedings that have been entered into over the last decade or so. The Practice Guide is not intended to be prescriptive, but rather to illustrate how the resolution of issues and conflicts that might arise in cross-border insolvency cases could be facilitated by cross-border cooperation, in particular the use of such agreements, tailored to meet the specific needs of each case and the particular requirements of applicable law. The Practice Guide includes a number of sample clauses to illustrate how different issues have been, or might be, addressed - they are not intended to serve as model provisions for direct incorporation into a cross-border agreement. It also includes summaries of the cases in which the cross-border agreements that form the basis of the analysis were used.

INSOLVENCY OF NON-CORPORATES

Law of insolvency is basically a social legislation that has been enacted to provide respite and relief to the honest debtors who due to any unfortunate or unforeseen circumstances become incapable of paying back their debts. Its object is also of securing distribution of a debtor’s estate among his creditors equitably and thereafter to release him under certain conditions from liability in respect of his debts and obligations.

The Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 are two major enactments that deal with personal insolvency and have parallel provisions and their substantial content is also similar but the two differ in respect of their territorial jurisdiction. While Presidency Towns Insolvency Act, 1909 applies in Presidency towns namely, Kolkata, Mumbai and Chennai, Provincial Insolvency Act, 1920 applies to all provinces of India. These two Acts are applicable to individuals as well as to sole proprietorships and partnership firms and are not applicable to corporations or against any association or company registered under any enactment. Section 107 of The Presidency Towns Insolvency Act, 1909 and Section 8 of The Provincial Insolvency act, 1920 specifically prohibits any insolvency petition against any against any corporation or against any association or company registered under any enactment for the time being in force.

The Presidency Towns Insolvency Act, 1909 consists of 127 sections and 2 schedules.

The Provincial Insolvency Act, 1920 consists of 83 sections and 2 schedules.

Persons who can be adjudged insolvent

The law has prescribed the category of persons who can be declared insolvent by court.

- Any person who is capable of entering into a contract (i.e., who has attained the age of majority and is of sound mind and is not disqualified from contracting by any law) can be adjudged insolvent provided he is a debtor and he has committed an act of insolvency. Since a minor is not competent to contract, he cannot therefore, be adjudged insolvent under any circumstances.

- If the debtor is a lunatic, he can be adjudged insolvent for the debts contracted by him when he was sane.

- A minor partner in a firm cannot be adjudged an insolvent but his share in the property of the firm is, however, liable for the debts of the firm.

- A partnership firm may be adjudged insolvent in the name of the firm when each of the partners has committed an act of insolvency or a joint act of insolvency.

- A deceased person cannot be adjudged an insolvent on any proceedings initiated after his death.

- A foreigner in India may be adjudged insolvent if he is a debtor and has committed an act of insolvency.

- In case of a Hindu joint family, when all the members are personally liable on a joint debt and have committed a joint act of insolvency, the members of the Hindu joint family can be adjudged insolvent.

Background of insolvency law in India

Before the British came to India, there was no insolvency law in India. The Indian regulation that dealt with insolvency law was initially found in Government of India Act, 1800.

In 1828, a statute was passed which marked the beginning of special insolvency legislation in India and the statute applied to Presidency towns namely Bombay, Madras and Calcutta. It was originally meant to be in force for a period of four years but was extended till 1843. In 1848 another statute of insolvency law namely the Indian Insolvency Act, 1848 was passed which made a distinction between traders and non-traders. Insolvency jurisdiction under the statute was transferred to High Courts. Its jurisdiction was also limited to presidency towns. In 1909 the present Presidency Towns Insolvency Act, 1909 was passed.

Insolvency law in mofussil/districts was made in 1877 by incorporating the rules of insolvency in Chapter 20 of the Code of Civil Procedure, 1877. Jurisdiction in relation to insolvency matters was given to District Courts. These rules were modified by Chapter 20 of the Code of Civil Procedure, 1882. Later on the Provincial Insolvency Act, 1907 was passed which was repealed by present Provincial Insolvency Act, 1920.

Insolvency of sole proprietorship

The owner of a sole proprietorship is not a separate legal entity from the business of the sole proprietorship. So the laws governing bankrupt individuals also govern insolvent sole proprietorships. Individuals can file a petition for their own bankruptcy or a court may declare them bankrupt if they are unable to pay their debts.

Insolvency of Partnership firm

Each of the partners is jointly and severally liable for the debts of the partnership. On dissolution of a partnership, the assets of the partnership have to be first applied towards the repayment of debts of the partnership to third parties. If the assets are not sufficient to repay the debts, the creditors may take proceedings against the partners. According to Section 41 of the Indian Partnership Act, 1932 a partnership will be dissolved if all but one of the partners becomes insolvent.

Insolvency proceedings

A person does not become insolvent just by the fact that he is a debtor and is unable to pay his debts. He also does not become insolvent just because his liabilities are more than his assets. It is necessary to initiate insolvency proceedings against him and get an adjudication order against him under the law of insolvency.

Insolvency proceedings can only be initiated against a person who is a debtor under the provisions of the Act of 1920 or who is a debtor under the provisions of the Act of 1909. According to Section 2(b) of Act of 1909 and Section 2(a) of Act of 1920, debtor includes a judgment-debtor. Judgment debtor is a person who has suffered a decree against him that is against whom a decree has been passed.

The debt to be recovered from the debtor has to be a provable debt which includes all debts and liabilities, whether present or future, certain or contingent provided the obligation for which they became due was incurred before the date of adjudication. The claims which are not capable of being fairly estimated or demands in the nature of unliquidated damages are not provable debts. However demands in the nature of unliquidated damages arising by reason of a contract or breach of trust are provable. (Sec.46 of Act of 1909 and Sec.34 of Act of 1920)

The commission of an act of insolvency by the debtor is a pre-condition for filing insolvency petition. There are 8 acts of insolvency out of which six are voluntary and two are involuntary. (Sec.9 of the Act of 1909 and Sec.6 of Act of 1920). By an amendment in 1978, non-compliance to an insolvency notice given by a creditor has also been added as an act of insolvency. A debtor is supposed to have committed an act of insolvency in the following cases:

(a) If, in the States or elsewhere, he makes a transfer of all or substantially all his property to a third person for the benefit of his creditors generally;

(b) If, in the States or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors;

(c) If, in the States or elsewhere, he makes any transfer of his property or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent;

(d) If, with intent to defeat or delay his creditors,--

(i) he departs or remains out of the States,

(ii) he departs from his dwelling-house or usual place of business or otherwise absents himself,

(iii) he secludes himself so as to deprive his creditors of the means of communicating with him;

(e) If any of his property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money;

(f) If he petitions to be adjudged an insolvent;

(g) If he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts;

(h) If he is imprisoned in execution of the decree of any Court for the payment of money

Filing of Insolvency Petition

After the commission of an act of insolvency, insolvency proceedings can be initiated by filing an insolvency petition either by a creditor or by the debtor.

If the creditor wants to file a petition against his debtor, he has to prove that an act of insolvency has been committed and also that the amount of debt due from the debtor is five hundred rupees or more. He can file it only within three months of commission of the act of insolvency. (Sec.12 of Act of 1909 and Sec.9 of Act of 1920)

Even a debtor can present an insolvency petition against himself. Filing of such a petition by the debtor is one of the enumerated acts of insolvency and the creditors also can file an insolvency petition against him on the basis of a debtor's petition. For filing an insolvency petition against himself, the debtor has to prove any of these three conditions, namely his debts amount to five hundred rupees or he has been arrested and imprisoned in execution of the decree of any court for the payment of money or an order of attachment in execution of such a decree has been made and is subsisting against his property. (Sec.14 of Act of 1909 and Sec.10 of Act of 1920)

No petition, whether presented by a debtor or by a creditor, should be withdrawn without the leave of the Court.

When two or more insolvency petitions are presented against the same debtor or where separate petitions are presented against joint debtors, the Court may consolidate the proceedings of any of them, on such terms as the Court may think fit.

Jurisdiction for filing Insolvency Petition

Insolvency jurisdiction under Section 3 of the Presidency Towns Insolvency Act, 1909 vests in the High Courts at Kolkata, Madras and Bombay.

Insolvency jurisdiction under Section 3 of the Provincial Insolvency Act, 1920 vests in District Courts but the State Government may, by notification in the Official Gazette, invest any Court subordinate to a District Court with jurisdiction in any class of cases, and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court.

Powers of the Insolvency Court

Section 4 of the Act of 1920 confers complete and full powers on the insolvency court to decide all questions of title or priority or of any nature, whatsoever, which may arise in any case of insolvency.

Section 7 of the Act of 1909 also invests Insolvency Courts with the same power as are given under the Act of 1920 but the questions of title are not mentioned in Section 7 but the Court has power to decide all questions whether of law or fact. Under Section 8, the Court has the power to rescind, review or vary any of its own orders.

Contents of Insolvency Petition

Section 13 of the Act of 1920 deals with the particulars to be mentioned in the insolvency petition. Every insolvency petition presented by a debtor should contain the following particulars, namely:--

(a) a statement that the debtor is unable to pay his debts;

(b) the place where he ordinarily resides or carries on business or personally works for gain, or, if he has been arrested or imprisoned, the place where he is in custody;

(c) the Court (if any) by whose order he has been arrested or imprisoned, or by which an order has been made for the attachment of his property, together with particulars of the decree in respect of which any such order has been made;

(d) the amount and particulars of all pecuniary claims against him, together with the names and residences of his creditors so far as they are known to, or can by the exercise of reasonable care and diligence be ascertained by, him;

(e) the amount and particulars of all his property, together with-- (i) a specification of the value of all such property not consisting of money; (ii) the place or places at which any such property is to be found; and (iii) a declaration of his willingness to place at the disposal of the Court all such property save in so far as it includes such particulars (not being his books of account) as are exempted by the Code of Civil Procedure, 1908, (5 of 1908), or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree;

(f) a statement whether the debtor has on any previous occasion filed a petition to be adjudged an insolvent, and (where such a petition has been filed)-- (i) if such petition has been dismissed, the reasons for such dismissal, or 77 (ii) if the debtor has been adjudged an insolvent, concise particulars of the insolvency, including a statement whether any previous adjudication has been annulled and, if so, the grounds therefor.

Every insolvency petition presented by a creditor or creditors should set forth the particulars mentioned above and should also specify (a) the act of insolvency committed by such debtor, together with the date of its commission; and (b) the amount and particulars of his or their pecuniary claim or claims against such debtor.

Proceedings on admission of Insolvency Petition

According to Sec.20 of the Act of 1920, when the Court makes an order of admission of the creditor’s petition, it may and in the case of admitting the debtor’s petition, the Court shall appoint an interim receiver of the debtor’s property and direct him to take immediate possession.

Section 16 of the Act of 1909 contains similar provisions, only difference being that there is no distinction between creditor’s petition and debtor’s petition and it is at the Court’s discretion to appoint an interim receiver at the time of admission of petition or at any subsequent stage before adjudication.

Dismissal of Debtor’s / Creditor’s petition

Under Sec.25 of the Act of 1920, the Court may dismiss the creditor’s petition for insolvency if it is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or for any other sufficient cause. In case of a petition presented by a debtor, the Court may dismiss the petition if it is not satisfied of his right to present the petition. Similar procedure is prescribed under Sec.13 & 15 of the Act of 1909.

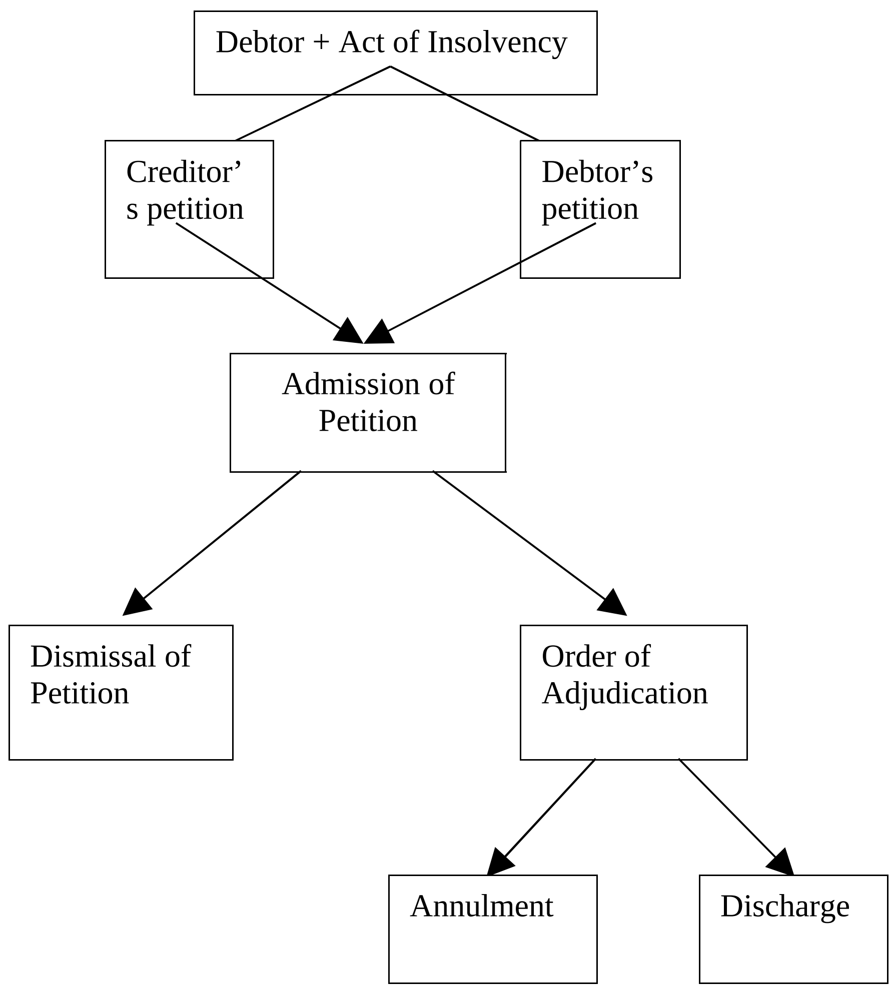
Order of Adjudication

If the Court does not dismiss the petition, it should make an order of adjudication and specify in that order, the period within which the debtor should apply for discharge. The order of adjudication is passed under Sec.13 & 15 of the Act of 1909 and under Sec.27 of the Act of 1920. The order of adjudication should be published in the Official Gazette as per Sec.20 of the Act of 1909 and Sec.30 of the Act of 1920.

Proceedings subsequent to the Order of Adjudication

The effects of an order of adjudication are enumerated under Sec.17 of the Act of 1909 and Sec.28 of the Act of 1920. The effects are that the property of the insolvent vests in the Court or official receiver / assignee and will become divisible among his creditors. There are certain classes of properties that shall not be vested. The order of adjudication also places an embargo on the creditors that they shall not have any remedy against the property of the insolvent in respect of the debt provable in insolvency. They are also not permitted to commence any suit or other legal proceeding except with the leave of Court and on such terms as the Court may impose. This bar does not apply to criminal proceedings. Under Sec.18 of the Act of 1909, the Court is authorized to stay any suit or other proceedings pending against the debtor before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court. The court is also authorized to stay any insolvency proceedings pending against the debtor in any court subject to the superintendence of the Court. On an application by the insolvent, the Court can make an order for protection of the insolvent from arrest or detention for any debt to which the order of adjudication applies.

Solvency Proceedings from Commencement to Termination



7.0 OVERVIEW OF LAWS RELATING TO CORPORATE INSOLVENCY

Indian Corporate Insolvency Law – Present Scenario

The issue of corporate insolvency has attained great significance with the globalization of economy. A need has been felt for bringing about reforms in the sphere of law of insolvency. The basic objectives of corporate insolvency are:

- to restore the debtor company to profitable trading where it is practicable;
- to maximize the return to creditors as a whole where the company itself cannot be saved;
- to establish a fair and equitable system for the ranking of claims and the distribution of assets among creditors, involving a redistribution of rights;
- to provide a mechanism by which the causes of failure can be identified and those guilty of mismanagement brought to book;
- placement of the assets of the company under external control;
- substitution of collective action for individual pursuits;
- avoidance of certain transactions and fraudulent conveyances, dissolution and winding up etc.

There is no single comprehensive and integrated policy on corporate insolvency in India comparable with the Chapter 11 or Chapter 7 bankruptcy code in the US. There are three major legislative Acts namely Companies Act, 1956, Sick Industrial Companies (Special Provisions) Act, 1985 (SICA in short) and The Securitisation, Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI in short) and several special provisions, which provide procedural guidance on the liquidation or reorganization process. As a result, four different agencies, the High Courts, the

Company Law Board, the Board for Industrial and Financial Reconstruction (BIFR), and the Debt Recovery Tribunals (DRTs), have overlapping jurisdiction, which creates systemic delays and complexities in the process.

The Presidency Towns Insolvency Act, 1909 and The Provincial Insolvency act, 1920 is applicable only to individuals, sole proprietorships and partnership firms. Section 107 of The Presidency Towns Insolvency Act, 1909 and Section 8 of The Provincial Insolvency act, 1920 specifically prohibits any insolvency petition against any against any corporation or against any association or company registered under any enactment for the time being in force.

In the context of corporate laws, the word ‘insolvency’ has neither been used nor defined. However Sec.433 (e) of the Companies Act, 1956 covers a company, which is ‘unable to pay its debts’, and thus constitutes a ground for winding up of the company. Inability to pay its debts would be a case where, a company’s entire capital is lost in heavy losses and no accounts are prepared and filed and no business is done for one year. In such circumstances, the registrar of companies makes out a case of inability to pay debts. These debts however, would only include debts, incurred after the legal incorporation of the company. Inability to pay debts has even been amplified in Sec.434 of the Companies Act, 1956 wherein, a creditor with a due of Rs. 500 or more serves a demand by registered post and the company neglects to pay, secure or compound the same in three weeks, in cases where the execution of a decree returned unsatisfied and also where the court is otherwise satisfied that the company is unable to pay its debts.

Basic Scheme of Corporate Insolvency Law

Corporate insolvency seeks to serve several objectives. First and foremost, insolvency is not necessarily to be viewed with indignation. There is a basic difference between a consumer going insolvent and a corporate going insolvent. In the former case, insolvency might be the result of extravagance but in case of business ventures, especially, corporations, unless wrongful trading or misfeasance is established on the part of those running the show, it is presumably a case of a genuine business failure.

Secondly, in case of individual insolvency, there is no question of reorganization or resurrection of the insolvent. In case of corporates, the first issue that any insolvency regime must confront is if it would be in the larger interest to reorganize and restructure the business to make it work, or is it to be taken into liquidation.

Corporate bankruptcies today are far more than mere claims of creditors: many of them are substantial power houses that their removal from the scene might affect many; including workers, consumers and even the whole system might be at stake.
As corporates have become increasingly more concentric, corporate bankruptcy has become a social rather than a mere commercial issue.

Corporate bankruptcy must be distinguished from another connected issue: enforcement of security interests by creditors. In case of secured lending, most legal systems allow a secured lender the right to enforce security interest. In most countries, this is so, even if the debtor were in bankruptcy. This is based on the premise that the claim of a secured creditor is primarily against the security and collaterally against the company. It is open for the secured creditor to relinquish his security interest and prove for his debt before the bankruptcy court. While the enforcement of security interest by a secured creditor is an individual pursuit, a bankruptcy proceeding is a collective process. The key distinction here is: in case of a bankruptcy, all creditors, including the secured creditors who choose to relinquish security interest and prove their debt, are to be paid equitably and ratably through an external agency, namely, the liquidator. This agency is bound to abide by rules of fair play and parity, and most significantly, take care of interests of some interest groups such as workers and preferential creditors. Individual pursuits by creditors may be totally insensitive to claims of other creditors, particularly unsecured creditors and workers.

Reform of Indian Corporate Insolvency Laws

India should have a comprehensive Corporate Insolvency law to facilitate revival of companies for both, domestic and cross-border insolvencies. It would be a good idea to adopt certain principles of Chapter 11 of the U.S. Bankruptcy Code as also UNCITRAL

Model law on cross-border insolvency. Recommendations made by the Irani Committee need to be implemented. The focus should be on the revival of companies rather than their liquidation. The present SICA has proved to be grossly inadequate to revive viable units. Moreover, it covers only industries covered by Schedule 1 of IDR Act, 1951 and as a result vital industries in services sector like telecom, media, advertising, NBFCs, etc are out of the purview of the Act.

Rehabilitation under SICA

When an entrepreneur is unable to grow profitably and expand the business on a sustained basis, he may have to take a decision of either restructuring its organization or closing it. Thus, he may either revive the company if it is potentially viable or ensure the closure of an unviable unit so as to release the investments locked up in such units for productive use elsewhere.

Sick industries are those industries which make losses that are more or less permanent and are not likely to be eliminated easily. In the normal course, such units would close down or would undergo extensive restructuring to eliminate the operations or activities that are particularly unprofitable. To deal with such a problem, Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was enacted. It aimed to detect industrial sickness and provide for speedy remedial measures. Hence, a quasi-judicial body called Board for Industrial and Financial Reconstruction (BIFR) was set up which expedited the process of revival of potentially viable units or closure of unviable units.

The Sick Industrial Companies (Special Provisions) Act, 1985 pertains to the industries specified in the First Schedule to the Industries (Development and Regulation) Act, 1951, (IDR Act) subject to the exceptions specified in the Act.

Objective of SICA

The basic rationale of enacting The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was to determine sickness in the industrial units. It also aimed at expediting the revival of potentially viable units so as to make the investments in such units profitable. At the same time, to ensure the closure of unviable units so as to release the investments locked up in such units for productive use elsewhere.

The objectives of SICA are:

- ✓ Timely detection of sick and potentially sick companies.
- ✓ Speedy determination by a body of experts of the preventive, remedial and other measures which need to be taken with respect to such companies.
- ✓ The expeditious enforcement of the measures so determined and for all matters connected therewith or incidental thereto.

The important provisions of SICA were:-

- It provided for the constitution of two quasi-judicial bodies, that is, Board for Industrial and Financial Reconstruction (BIFR) and Appellate Authority for Industrial and Financial Reconstruction (AAIFR). BIFR was set up as an apex board to tackle industrial sickness and was entrusted with the work of taking appropriate measures for revival and rehabilitation of potentially sick undertakings and for liquidation of non-viable companies. While, AAIFR was constituted for hearing the appeals against the orders of the BIFR.

- BIFR would make an inquiry as it may deem fit for determining whether any industrial company had become sick, under the following conditions:-

  - ➢ If the Board of Directors of a sick industrial company made a reference to the BIFR for determination of the remedial measures with respect to their company. Such reference was to be made within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year at the end of which the company had become sick. For filing the reference, the Board of Directors must have sufficient reasons to form the opinion that the company had become sick; or

- On receiving such information (reference) with respect to a sick company or upon its own knowledge as to the financial condition of a company. Such a reference to the board may be made by:- (i) The Central Government; (ii) The Reserve Bank of India; (iii) State Governments; (iv) Public financial institutions; (v) State level institutions; or (vi) Scheduled banks.

However, such a reference shall not be made in respect of any industrial company by :- (i) the Government of any State, unless all or any of the industrial undertakings (belonging to such a company) were situated in that State; (ii) a public financial institution or a State level institution or a scheduled bank, unless it had, by reason of any financial assistance or obligation rendered by it or undertaken by it, interest in such a company.

The Board may order any operating agency to enquire into the matter and complete the inquiry as expeditiously as possible.

- If the Board deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company, it may appoint one or more persons as special director(s) of the company for safeguarding the financial and other interests of the company. The appointment of a special director shall be valid and effective notwithstanding anything to the contrary contained in the Companies Act, 1956 or in any other law for the time being in force or in the memorandum and articles of association or any other instrument relating to the industrial company.

- Any special director so appointed shall :- (i) hold office during the pleasure of the Board and may be removed or substituted by any person by order in writing by the Board; (ii) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto; (iii) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement; (iv) not be liable to be prosecuted under any law for anything, done or omitted to be done in good faith in the discharge of his duties in relation to the sick industrial company.

- If after making an inquiry, the Board is satisfied that the company has become sick, it shall, after considering all the relevant facts and circumstances of the case, may take either of the following decisions:-

  - If the Board decides that it is practicable, it shall, by order in writing and subject to such restrictions or conditions as may be specified in the order, give such time to the company as it may deem fit to make its net worth exceed the accumulated losses.

  - If the Board decides that it is not practicable for the sick company to make its net worth exceed the accumulated losses within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures in relation to the said company, it may, as soon as may be, by order in writing, direct any operating agency specified in the order to prepare a scheme providing for such measures in relation to that company. The measures may include:-

a. The financial reconstruction of the sick industrial company;

b. The proper management of the sick industrial company by change in or takeover of the management of the company;
c. The amalgamation of the sick industrial company with any other company (transferee company), or any other company with the sick industrial company (transferee company);

d. The sale or lease of a part or whole of the sick industrial company;
e. Such other preventive, ameliorative and remedial measures as may be appropriate;
f. Such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified above.

- If the Board is of the opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court. The High Court shall, on the basis of the opinion of the Board, order winding-up of the sick industrial company in accordance with the provisions of the Companies Act, 1956.
- Where in respect of an industrial company, an inquiry is pending, or any scheme referred is under preparation or consideration or a sanctioned scheme is under implementation, then no proceedings for the winding-up of the industrial company or for execution, distress or the like against any of the properties of the industrial company shall be made. Also, no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans, or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.
- Also with respect to the above conditions, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising there under before

the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board.

- However, such declaration shall not be made for a period exceeding two years, which may be extended by one year at a time so that the total period shall not exceed seven years in the aggregate.
- Under the Act, whosoever violates its provisions or any scheme or any order of the Board or of the Appellate Authority, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to a fine. No court shall take cognizance of any offence mentioned except on a complaint in writing of the secretary or any such other officer of the Board or the Appellate Authority or any such officer of an operating agency as may be authorised in this behalf by the Board or the Appellate Authority.

SICA 1985 after being amended twice, first in 1991and later in 1998, was repealed and replaced by Sick Industrial Companies (Special Provisions) Repeal Act,2003. The new Act diluted some of the provisions of SICA and plugged certain loopholes. It aimed not only to combat industrial sickness but also to reduce the same by ensuring that companies do not view declaration of sickness as an escapist route from legal provisions after the failure of the project or similar other reasons and thereby gain access to various benefits or concessions from financial institutions. Under it, the Board for Industrial and Financial Reconstruction (BIFR) and Appellate Authority for Industrial and Financial Reconstruction (AAIFR) were dissolved and replaced by National Company Law Tribunal (NCLT) and National Law Appellate Tribunal (NCLAT) respectively.

Provisions under Companies Bill 2009

Revival and Rehabilitation of Sick Companies- Chapter XIX

- Provision has been made for determination of sickness of a company. Where company has fail to meet the demand of secured creditors representing 50% or more of the total amount outstanding, it will be regarded as sick company.(Clause 229 of Companies Bill, 2008)

- Interim administrator can be appointed by the Tribunal for management of the company. (Clause 231 of Companies Bill, 2008)
- Appointment of Committee of Creditors. (Clause 232 of Companies Bill, 2008)
- Tribunal to appoint interim company administrator from a panel consisting of advocates, CS, CA,ICWA or other professional upon such terms and conditions as may be specified by Tribunal [Clause 234(1)]
- Powers and duties of company administrator have been enumerated in Clause 235 of Companies Bill, 2008.
- Scheme of revival and rehabilitation should be prepared by the company administrator. (Clause 236 of Companies Bill, 2008)
- If the Scheme is not approved by the creditors of the company, then the Tribunal can order winding up of the company upon submission of report by the company administrator. (Clause 240 of Companies Bill, 2008)

Winding up- Chapter XX

- Company Liquidator will be a person appointed from a panel of professional firms or bodies corporate or may be a body corporate consisting of such professionals and having at least ten year's experience in company matters. (Clause 232 of Companies Bill, 2008) It does not include a whole-time or a part-time officer appointed by the Central Government as the liquidator.
- The Tribunal is empowered to recover any loss or damage from the liquidator for loss or damage caused to the company due to fraud or misfeasance or failure to exercise due care and diligence in the performance of his powers and functions. (Clause 251(3) of Companies Bill, 2008)
- The jurisdiction of the Tribunal with regard to winding up of a company has been given under Clause 255 of Companies Bill, 2008.

- Submission of report by Company Liquidator to the Tribunal. (Clause 256 of Companies Bill, 2008)
- The promoters, directors, officers and employees, past and present, of the company should extend full co-operation to the Company Liquidator. Failure to do so will result in imprisonment/fine. (Clause 259 of Companies Bill, 2008)
- Provision has been made for obligations of directors and managers in case of limited company, whose liability is unlimited. (Clause 261 of Companies Bill, 2008)
- The Company liquidator should submit quarterly reports to the Tribunal with regard to the progress of the winding up of the company. (Clause 263 of Companies Bill, 2008)
- Apart from company liquidators, provision has been made for appointment of Official Liquidators. (Clause 334 of Companies Bill, 2008)
- Winding up of company having assets of book value not exceeding one crore rupees may be done through summary procedure. (Clause 336 of Companies Bill, 2008)

8.0 Overview of laws relating to winding up and dissolution of Limited Liability Partnerships

A Limited Liability Partnership (LLP) is viewed as an alternative corporate business vehicle in which the liability of its partners is limited to the extent of their capital contribution or as agreed as per the Limited Liability Partnership Agreement.
The primary intention of LLP is that its external structure should mirror that of the limited company but in terms of conduct of internal affairs it would be similar to traditional partnership.

Winding Up and Dissolution of Limited Liability Partnership

At present there are no set rules or procedures prescribed on the basis of which the LLP may be wound up.

Section 65 of the LPP Act 2008, provides that the Central Government may make Rules for the provision in relation to winding up and dissolution of LLP. The Central Government had placed on its website (www.mca.gov.in), The Concept LLP (Winding up and Dissolution) Rules. The Rules were open for comments till 12th January, 2009.
The Ministry of Corporate Affairs has issued the draft rules in respect of the procedure to be followed for winding up of the LLP but the same has not been notified yet.

The winding up of a limited liability partnership may be of the following types:

1. Voluntary Winding Up; or
2. Winding Up by the Tribunal (National Company Law Tribunal)
3. Petition by Central Government to the Tribunal

Voluntary Winding up:

Under this, the partners may between themselves decide to stop and wind up the operations of the LLP.

Winding up by the Tribunal

A limited liability partnership may be wound up by the Tribunal, — .

(a) if the limited liability partnership decides that limited liability partnership be wound up by the Tribunal;

(b) if for a period of more than six months, the number of partners of the limited liability partnership is reduced below two;

(c) if the limited liability partnership is unable to pay its debts;

(d) if the limited liability partnership has acted against the interests of the sovereignty and integrity of India, the security of the State or public order;

(e) if the limited liability partnership has made a default in filing with the Registrar the Statement of Account and Solvency or annual return for any five consecutive financial years;

(f) if the Tribunal is of the opinion that it is just and equitable that the limited liability partnership be wound up.

Petition by Central Government to the Tribunal

Under Section 51 of the LLP Act 2008, If any limited liability partnership, in respect of which the Central Government has appointed Inspector(s) to investigate its affairs, is liable to be wound up under this Act or any other law for the time being in force, and it appears to the Central Government from the Inspector's Report that it is expedient to do so by reason of such circumstances:

(i) that the business of the limited liability partnership is being conducted with an intent to defraud its creditors, partners or any other person, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive or unfairly prejudicial to some or any of its partners, or that the limited liability partnership was formed for any fraudulent or unlawful purpose; or

(ii) that the affairs of the limited liability partnership are not being conducted in accordance with the provisions of the LLP Act 2008.

, the Central Government may, unless the limited liability partnership is already being wound up by the Tribunal, cause to be presented to the Tribunal by any person authorised by the Central Government in this behalf, a petition for the winding up of the limited liability partnership on the ground that it is just and equitable that it should be wound up.

The Concept LLP (Winding up and Dissolution) Rules

Although, the Concept LLP (Winding Up and Dissolution) Rules, have not been notified as yet, a brief on some of the important provisions under the these draft Rules is given below:

1. The Concept LLP (Winding up and Dissolution) Rules contain 310 Rules.

2., Nothing in the rules shall affect the operation of any rules framed under the Banking Companies Act, 1949 or the Insurance Act, 1938, or other Special Acts relating to any class of LLPs and these Rules shall apply to such LLPs subject to the Rules, if any, made under the special Acts. (Rule 309 of the Concept Rules)

3. Wherever no rules/proceedings/procedures/forms have been made or prescribed relating to any matter of winding up or otherwise, the Companies (Court) Rules, 1959 shall be applicable with suitable modifications. (Rule 310 of the Concept Rules)

4. The Concept Rules provide for Two Modes of Winding Up: The winding up of a Limited Liability Partnership (LLP) may be either-

a. by the Tribunal, or

b. voluntary

<u>Provisions relating to Voluntary Winding Up under the Concept LLP (Winding Up and Dissolution) Rules</u>

The provisions relating to Voluntary Winding Up are contained in Rule 2 to Rule 20 under the Concept LLP (winding up and Dissolution) Rules and they are reproduced below:

<u>"2. Circumstances in which LLP may be wound up voluntarily</u>

A LLP may be wound up voluntarily if the LLP passes a resolution with approval of at least three fourth (in number) of total number of partners, requiring the LLP to be wound up voluntarily. A copy of resolution shall be filed with the Registrar within 30 days of passing up such resolution in Form No__ prescribed in Appendix II.

If the LLP has creditors, whether secured or unsecured, then such winding up shall not take place unless approval of such creditors takes place in pursuance of rule 4.

<u>3. Declaration of solvency in case of proposal to wind up voluntarily.</u>

(1) Where it is proposed to wind up a LLP voluntarily, the majority of its designated partner (being not less than two) shall make a declaration verified by an affidavit to the effect that the LLP has no debt or that it will be able to pay its debts in full from the proceeds of assets sold in voluntary winding up.

(2) A declaration made as aforesaid shall have no effect for the purposes of the Act and these rules, unless —

(a) it is made within 15 days immediately preceding the date of the passing of the resolution for winding up the LLP and it is delivered to the Registrar for registration before that date;

(b) it contains a declaration that the LLP is not being wound up to defraud any person or persons;

(c) it is accompanied by a statement of assets and liabilities prepared in accordance with the provisions of the Act, on the Statement of Account and Solvency of the LLP for the period commencing from the date up to which the last such account was prepared and ending with the latest practicable date immediately before the making of the declaration duly attested by at least two designated partners; and

(d) where there are any assets of the LLP, it is accompanied by a report of the valuation of the assets of the LLP prepared by a registered valuer on the panel of Central Government.

(3) The LLP or its designated partners may repay any dues of the creditors or satisfy the claims of creditors in any manner, before any declaration is made by designated partners under sub-rule (2) above.

4. Meeting of creditors.

(1) In case the LLP has creditors, secured or otherwise, the LLP shall, before taking any action for winding up of the LLP, also seek approval of such creditors and shall forward them, by registered post and any other electronic mean like email or website a copy of declaration under rule 3, the estimated amount of the claims due to each of the creditor and an offer for creditors to accept such claims.

(2) The creditors would be given one month's time to give LLP their opinion in respect of voluntary winding up proposed by the LLP or acceptance of offer made under sub-rule(1).

(3) Where two-thirds in value of creditors of the LLP referred to in sub-rule (1) consent that-

(a) it is in the interest of all parties that the LLP be wound up voluntarily by partners, the LLP shall be wound up voluntarily by partners; or

(b) the LLP will not be able to pay for its debts in full from the proceeds of assets to be sold in voluntary winding up and propose that the LLP shall be wound up voluntarily by creditors, the LLP shall be wound up voluntarily by creditors; or

(c) the LLP will not be able to pay for its debts in full from the proceeds of assets to be sold in voluntary winding up and propose that it will be in interest of all parties if the LLP is wound up under the supervision of the Tribunal, the LLP shall within fourteen days thereafter file an application before the Tribunal.

Provided that in case the LLP pays the dues of creditors to their satisfaction, action under clause (b) or clause (c), as the case may be, shall not be necessary.

(4) Notice of any decision of creditors in pursuance of this rule shall be given by the LLP to the Registrar within fifteen days from the date of consent referred to at sub-rule (3) in Form no __as prescribed in Appendix II.

5. Publication of resolution to wind up voluntarily.

Where a LLP has resolved for voluntary winding up and consent of creditors under clause (b) of sub-rule (3) of rule 4 is received, it shall within fourteen days of the receipt of creditors' consent give notice of the resolution by advertisement in some newspaper circulating in the district where the registered office or the principal office of the LLP is situated.

6. Commencement of voluntary winding up and filling up statement of affairs.

(1) A voluntary winding up shall be deemed to commence on the date of passing of the resolution for voluntary winding up under rule 2.

(2) The provisions of Rule 24(3) shall, so far as may be, apply to the voluntary winding up as they apply to the winding up by the Tribunal except that the reference to –

a) the Tribunal shall be omitted

b) the liquidator or the provisional liquidator shall be construed as reference to the LLP liquidator, and

c) the "relevant date" shall be construed as reference to the date of commencement of the winding up.

7. Appointment and removal of LLP Liquidator (voluntary Liquidator).

(1) The LLP shall within 30 days of

(a) passing of resolution under rule (2), in case LLP has no creditors, or

(b) filing of resolution pursuant to sub-rule (4) of rule 4, in case it has creditors

as the case may be, with the consent of majority of partners through resolution, appoint a voluntary Liquidator as "LLP Liquidator" from the panel maintained by the Central Government for the purpose of winding up its affairs and distributing the assets of the LLP and recommend the fee to be paid to the LLP Liquidator.

(2) Where the creditors have given consent under clause (b) or (c) of sub-rule (3) of rule 4, the appointment of LLP Liquidator under this rule shall be effective only after it is approved by 2/3rd majority of creditors in value of the LLP:

Provided that where such creditors do not approve the appointment LLP Liquidator proposed to be appointed by LLP, creditors shall appoint another LLP Liquidator from the panel prepared by the Central Government with 2/3rd majority of creditors in value of the LLP and recommend the fee to be paid to the LLP Liquidator.

(3) If the creditors and the partners appoint different LLP Liquidators, the LLP Liquidator appointed by creditors shall be the LLP Liquidator. If the creditors neither approve the LLP Liquidator appointed by partners nor appoint any other LLP Liquidator, the LLP Liquidator appointed by the partners shall be the LLP Liquidator.

(4)If from any cause whatever, there is no LLP liquidator acting, the Tribunal may appoint any person from the penal as a LLP liquidator on such fees.

(5) The Tribunal may on cause shown remove a LLP liquidator and appoint any other person from the panel, as a LLP liquidator on such fees in place of the removed LLP liquidator; or the Tribunal may also appoint or remove a LLP liquidator on the application made by the Registrar in this behalf;

Provided that the Tribunal may give a reasonable opportunity of hearing to the LLP liquidator being removed.

(6) On appointment as LLP Liquidator, such liquidator shall file a declaration in the Form no__ as prescribed in Appendix II disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the LLP and the creditors and such obligation shall continue throughout the term of his or its appointment.

8. Fill-up vacancy in office of LLP Liquidator.

(1) A LLP Liquidator appointed under rule 7 may be removed by the LLP where his appointment has been made by the LLP and, by the creditors, where the appointment is approved or made by such creditors.

(2) Where a LLP Liquidator is sought to be removed under this rule, he shall be given a notice in writing stating the grounds of removal from his office by the LLP or the creditors, as the case may be.

(3) Where three-fourth partners of the LLP or three-fourth of creditors in value, as the case may be, after consideration of the reply, if any, filed by the LLP Liquidator, in their meeting decide to remove the LLP Liquidator, he shall vacate his office.

(4) If a vacancy occurs by death, resignation, removal or otherwise in the office of any LLP Liquidator appointed under rule 7, the LLP or the creditors, as the case may be, fill the vacancy in the manner specified in rule 7.

9. Notice of appointment of LLP Liquidator to be given to Registrar.

The LLP shall give notice to the Registrar of the appointment or changes etc. of a LLP Liquidator along with the name and particulars of the LLP Liquidator, and of the name of the LLP Liquidator appointed to fill every such vacancy within ten days of such appointment or changes etc. in Form no___ as prescribed in Appendix II.

10. Designated partners and other partners power to cease on appointment of LLP Liquidator.

On the appointment of a LLP Liquidator, all the powers of the of designated partners and other partners, if any, shall cease, except for the purpose of giving notice of such appointment of the LLP Liquidator to the Registrar.

11. Duties of LLP Liquidator in voluntary winding up.

(1) The LLP Liquidator shall perform such functions and discharge such duties as determined from time to time by the LLP or the creditors, as the case may be.

(2) The LLP Liquidator shall settle the list of creditors or partners, which shall be prima facie evidence of the liability of the persons named therein to be partners.

(3) The LLP Liquidator shall obtain approval of partners or creditors of LLP, as the case may be, for any purpose he may consider necessary.

(4) The LLP Liquidator shall maintain regular and proper books of accounts in form and manner prescribed in Part V and the partners and creditors and any officer authorised by the Central Government may inspect such books of accounts.

(5)The LLP Liquidator shall pay the debts of the LLP and shall adjust the rights of the partners among themselves.

(6) The LLP Liquidator shall observe due care and diligence in the discharge of his duties.

12. Appointment of committees.

The partners or the creditors, as the case may be, may appoint such committees as considered appropriate to supervise the voluntary liquidation and assist the LLP Liquidator in discharging his or its functions.

13. LLP Liquidator to submit report on progress of winding up.

The LLP Liquidator shall report quarterly on the progress of winding up of the LLP in form and manner prescribed in Part V to the partners and creditors, as the case may be.

14. Report of LLP Liquidator to Tribunal for examination of persons.

(1) Where a report alongwith sufficient evidence is received from the LLP Liquidator that a fraud materially affecting the rights of partners or creditors or interests of LLP or public has been committed by any person in respect of the LLP, the Tribunal may, without prejudice to the continuation of process of winding up under these rules, order for investigation under section 43 and on consideration of the report of such investigation, the Tribunal may pass such order and give such directions as it may consider necessary including the direction that such person shall attend before the Tribunal on a day appointed by it for that purpose and be examined as to the promotion or formation or the conduct of the business of the LLP or as to his conduct and dealings as officer thereof or otherwise.

Provided that in a situation where the fraud is reported against any person other than a partner or designated partner of the LLP, the LLP Liquidator, before sending a report under this rule to the Tribunal, may intimate the partners and include their views in the report to the Tribunal.

(2) Without prejudice to power of Tribunal to make any order under sub rule (1), the Tribunal shall have power to transfer the winding up proceedings from voluntary winding up to compulsory winding up by tribunal.

(3) The provisions relating to powers to order public examinations of partners designated partners, officers etc., shall apply mutatis mutandis in relation to any examination directed under sub-rule (1).

15. Dissolution of LLP.

(1) As soon as the affairs of a LLP are fully wound up, the LLP Liquidator shall prepare a report, final winding up accounts and explanations, in the form no_____ prescribed in Appendix II, of the winding up showing that the property and assets of the LLP have been disposed of and its debt fully discharged or discharged to the satisfaction of the creditors and thereafter seek approval of the partners or the creditors of the LLP, as the case may be, on the said report and the final winding up accounts and explanation in the meeting of partners or creditors.

Provided that approval under this rule may be sought by circulation in physical form or electronic form.

Provided that in case of circulation of any clarification or further/supplementary information is required by the partners, or the creditors, the same shall be sought by them within 30 days of the date of such circulation and such further/supplementary information shall be provided by the LLP Liquidator within 30 days of receipt of such requests.

Explanation:- Mode of circulation may be in accordance with rule 15 of LLP Rules and Forms 200_.

(2) If two thirds in number, of partners or, two thirds in value, if creditors as the case may be, after considering the report, accounts and explanations of the LLP Liquidator are satisfied that the LLP shall be wound up, they shall pass a resolution, within 30 days of receipt of such report, accounts etc., for its dissolution in the case of meeting or within 30 days of receipt of such circulation or further information which ever is later in the case of circulation.

Provided that in case the requisite number of partners or value of creditors, as the case may be, are not able to decide on the approval of the report of LLP Liquidator, the matter may be referred to Tribunal under rule 19 for an order, and order of the Tribunal on the matter shall be binding on all parties.

(3) Within two weeks after the receipt of approval under sub-rule (2), the LLP Liquidator shall-

(a) send to the Registrar –

(i) a copy of report , accounts and explanations mentioned in sub rule 1;

(ii) a brief return in respect of each meeting of partners or creditors held during winding up proceedings indicating the resolutions passed in such meetings ; and

(b) file an application along with his report under sub-rule (1) in manner prescribed in Part V before the Tribunal for passing an order of dissolution of the LLP.

(4) If the Tribunal is satisfied, after considering the report of the LLP Liquidator that the process of winding up has been duly followed, the Tribunal shall pass an order dissolving the LLP within sixty days of the receipt of the application under sub-rule (3).

(5) The LLP Liquidator shall file a copy of the order under sub-rule (4) with the Registrar within thirty day in Form no____as prescribed in Appendix II.

(6) The Registrar, on receiving the copy of the order passed by the Tribunal under sub-rule (4), shall forthwith publish a notice in the Official Gazette that the LLP is dissolved.
(7) In the event affairs of the LLP are not fully wound up within a period of one year from the date of commencement of voluntary winding up, LLP Liquidator shall file an application before the Tribunal explaining the reasons thereof and seek appropriate directions.

<u>16. LLP Liquidator to accept contribution, etc., as consideration for sale of property of LLP.</u>

(1) Where a LLP (the transferor LLP) is proposed to be, or is in the course of being, wound up voluntarily and the whole or any part of its business or property is proposed to be transferred or sold to any other body corporate (the transferee body corporate), the LLP Liquidator of the transferor LLP may, with the sanction of a resolution of the transferor LLP (passed by at least three fourth majority of partners) conferring on him either a general authority or an authority in respect of any particular arrangement,-
(a) receive, by way of compensation wholly or in part for the transfer or sale, cash, shares, securities, policies, or other like interests in the transferee body corporate, for distribution among the partners of the transferor LLP; or
(b) enter into any other arrangement whereby the partners of the transferor LLP may, in lieu of receiving cash, shares, securities, policies or other like interest or in addition thereto, participate in the profits of, or receive any other benefit from, the transferee body corporate:
Provided that no such arrangement shall be entered into without the consent of the secured creditors.
(2) Any transfer, sale or other arrangement in pursuance of this rule shall be binding on all the partners of the transferor LLP.
(3) Any partner of the transferor LLP who did not vote in favour of the resolution and expressed his dissent therefrom in writing addressed to the LLP Liquidator and left at the registered office of the LLP within seven days after the passing of the resolution, may

require the liquidator to purchase his interest at a price to be determined by agreement or the registered valuer.

(4) If the LLP Liquidator elects to purchase such partner's interest, the purchase money, raised by him in such manner as may be determined by a resolution passed by three fourth majority of partners, shall be paid before the LLP is dissolved.

17. Distribution of property of LLP.

Subject to the provisions of the Act and these rules as to overriding preferential payments, the assets of a LLP shall, on its winding up, be applied in satisfaction of its liabilities pari passu and, subject to such application, shall, unless the LLP Agreement otherwise provide, be distributed among the partners according to their rights and interests in the LLP.

18. Arrangement between LLP and creditors

Any arrangement entered into between a LLP about to be ,or in the course of being wound up and its creditors by 3/4th majority of partners of LLP and the 3/4th majority of creditors in value shall be binding, provided that the said arrangement is presented before the Tribunal within three weeks from the date of approval by the LLP and the creditors and further approved by the Tribunal.

19. Apply to Tribunal to have questions determined, etc.

(1) The LLP Liquidator or any partner or creditor may apply to the Tribunal—

(a) to determine any question arising in the course of the winding up of a LLP; or

(b) to exercise as respects the enforcing of calls for contribution, the staying of proceedings or any other matter, all or any of the powers which the Tribunal might exercise if the LLP were being wound up by the Tribunal.

(2) The LLP Liquidator or any creditor or partner may apply to the Tribunal for an order setting aside any attachment, distress or execution put into force against the estate or effects of the LLP after the commencement of the winding up.
(3) The Tribunal, if satisfied on an application under sub-rule (1) or sub-rule (2) that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may allow the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks fit.
(4) A copy of an order staying the proceedings in the winding up, made under this rule, shall forthwith be forwarded by the LLP, or otherwise as may be prescribed, to the Registrar, who shall make a minute of the order in his books relating to the LLP.

20. Costs of voluntary winding up.

All costs, charges and expenses properly incurred in the winding up, including the fee of the LLP Liquidator, shall, subject to the rights of secured creditors, if any, and workmen be payable out of the assets of the LLP in priority to all other claims."

Provisions relating to Winding Up by the Tribunal under the Concept LLP (Winding Up and Dissolution) Rules

The provisions relating to Winding Up by the Tribunal are contained in Rule 21 to Rule 45 under the Concept LLP (winding up and Dissolution) Rules and they are reproduced below:

"21. Inability to pay debts

A LLP shall be deemed to be unable to pay its debts,—
(a) if a creditor, by assignment or otherwise, to whom the LLP is indebted for an amount exceeding one lakh rupees then due, has served on the LLP, by causing it to be delivered at its registered office, by registered post or otherwise, a demand requiring the

LLP to pay the amount so due and the LLP has failed to pay the sum within twenty one days after the receipt of such demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor;

(b) if any execution or other process issued on a decree or order of any court or tribunal in favour of a creditor of the LLP is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Tribunal that the LLP is unable to pay its debts, and, in determining whether a LLP is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the LLP.

22. Petition for winding up.

(1) A petition to the Tribunal for the winding up of a LLP shall be presented by-

(a) the LLP or any of its partner or partners,

(b) any secured creditor or creditors, including any contingent or prospective creditor or creditors,

(c) the Registrar,

(d) any person authorised by the Central Government in that behalf,

(e) in a case falling under section 51 of the Act , by the Central Government or

(f) in a case falling under clause (d) of section 64, by the Central Government or a State Government.

(2) A partner shall be entitled to present a petition for the winding up of a LLP, notwithstanding that he may have paid his full contribution, or that the LLP may have no assets at all or may have no surplus assets left for distribution among the partners after the satisfaction of its liabilities.

(3) The Registrar shall be entitled to present a petition for winding up on any of the grounds specified in section 64 except on the ground specified in clause (e) of that section.

Provided that the Registrar shall not present a petition on the ground that the LLP is unable to pay its debts unless it appears to him either from the financial condition of the LLP as disclosed in its Statement of Account and Solvency or from the report of an inspector appointed under section 43 that the LLP is unable to pay its debts:

Provided further that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition:

Provided also that the Central Government shall not accord its sanction under the preceding proviso, unless the LLP concerned has been given a reasonable opportunity of making representations.

(4) A petition filed by the LLP or any of its partners or partner for winding up before the Tribunal shall be admitted only if accompanied by a statement of affairs in form and manner prescribed in Part V.

(5) Before a petition for winding up of a LLP presented by a contingent or prospective creditor is admitted, the leave of the Tribunal shall be obtained for the admission of the petition and such leave shall not be granted, unless in the opinion of the Tribunal there is a prima facie case for the winding up of the LLP and until such security for costs has been given as the Tribunal thinks reasonable.

<u>23. Powers of Tribunal.</u>

(1) The Tribunal may, on receipt of a petition for winding up under rule 22 pass any of the following orders, namely:-

(a)dismiss it, with or without costs;

(b)make any interim order as it thinks fit;

(c) to direct the action on the scheme of revival or rehabilitation of the LLP;;

(d) appoint a ‘Liquidator’ as provisional liquidator of the LLP till the making of a winding up order;

(e) make an order for the winding up of the LLP with or without costs; or

(f) any other order as it thinks fit:

Provided that an order under this sub-rule shall be made within ninety days from the date of presentation of the petition:

Provided further that before appointing a provisional liquidator under clause (c), the Tribunal shall give notice to the LLP and afford a reasonable opportunity to it to make its representations, if any, unless for special reasons to be recorded in writing, the Tribunal thinks fit to dispense with such notice:

Provided also that the Tribunal shall not refuse to make a winding up order on the ground only that the assets of the LLP have been mortgaged for an amount equal to or in excess of those assets, or that the LLP has no assets.

(2) Where a petition is presented on the ground that it is just and equitable that the LLP should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the LLP wound up instead of pursuing that other remedy.

(3)Where a provisional liquidator is appointed by the Tribunal, the Tribunal may limit and restrict his powers and duties by the order appointing him or by a subsequent order, but otherwise he shall have the same powers and duties as a liquidator.

24. Directions for filing statement of affairs.

(1) Where a petition for winding up is filed before the Tribunal by any person other than the LLP, the Tribunal shall, if satisfied that a prima facie case for winding up of the LLP is made out, by an order direct the LLP to file its objections along with a statement of its affairs in form and manner prescribed in Part V within thirty days of the order:

Provided that the Tribunal may direct the petitioner to deposit such security for costs as it may consider reasonable as a precondition to issue directions to the LLP.

(2) Notwithstanding any other liability, a LLP which fails to file the statement of affairs as referred to in sub-rule (1), shall forfeit the right to oppose the petition.

(3) Where the Tribunal has made a winding up order or appointed provisional liquidator, unless the Tribunal in its direction otherwise orders, there shall be made out and filed with the Liquidator or provisional Liquidator as the case may be , a Statement as to affairs of LLP in the form and manner as prescribed in Part V, within 21 days from relevant date or within such extended time not exceeding two months (including the time of 21 days) from the date as the Liquidator or the provisional Liquidator or the Tribunal may for specific reasons appoint in this rule.

The expression’ relevant date’ means, in a case where a provisional Liquidator is appointed, the date of his appointment, and in a case where no such appointment is made, the date of the winding up order.

(4) The partners and other officers, past and present, of the LLP in respect of which a petition for winding up is made under rule shall ensure that the accounts of the LLP are completed and audited (unless audit is exempted) up to the date of the order and submitted to the Tribunal at the cost of the LLP.

(5) The partners and other officers, past and present, of the LLP are responsible for complete the accounts, its audit and submit the statement of affairs with the Tribunal or the provisional Liquidator or the Liquidator as the case may be.

<u>25. ‘Liquidators’ and their appointments.</u>

(1) For the purposes of winding up of a LLP by the Tribunal or for the purpose of appointment of provisional Liquidator, there shall be a ‘Liquidator’ who shall be either an ‘official Liquidator’ or a Liquidator appointed by an order of the Tribunal from the panel maintain by the Central Government. In the absence of any such order the official Liquidator shall become or act as ‘Liquidator’.

(2) For the purpose of appointment of the provisional liquidator or the Liquidator from the panel, the Central Government shall maintain a panel consisting of the names of practicing chartered accountants, advocates, practicing company secretaries, practicing cost and works accountants or firms or bodies corporate having chartered accountants, advocates, company secretaries, cost and works accountants and such other professionals as may be notified by the Central Government or from a firm or a body corporate of persons having a combination of such professionals as may be notified by Central Govt and having at least ten years’ experience in company/LLP matters and such other qualifications as may be notified by the Central Govt and any terms and conditions including security for the purpose.

(3) The Central Government may remove the name of any person or firm or body corporate from the panel maintained under sub-rule (2) on the grounds of misconduct, fraud, misfeasance, breach of duties or professional incompetence:

Provided that the Central Government before removing him or it from panel shall give him or it a reasonable opportunity of being heard.

(4) The terms and conditions of appointment of a liquidator from panel and the fee payable to him shall be specified by the Tribunal on the basis of task required to be performed, experience, qualification and size of the LLP.

(5) On appointment as provisional liquidator or Liquidator from panel, such liquidator shall file a declaration in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the Tribunal and such obligation shall continue throughout the term of his or its appointment.

(6)While passing a winding up order, the Tribunal may appoint a provisional liquidator, if any, appointed under clause (c) of sub-rule (1) of rule 23, as the Liquidator for the conduct of the proceedings for the winding up of the LLP.

(7) A Liquidator shall be described by the style of "The Liquidator" of the particular LLP in respect of which he or it acts and not by his or its name.

26. Removal and replacement of liquidator etc,.

(1) The Tribunal may, on a reasonable cause being shown and for reasons to be recorded in writing, remove the provisional liquidator or the Liquidator, appointed from the panel, as liquidator or provisional liquidator of the LLP on any of the following grounds, namely:-

(a) misconduct,

(b) fraud or misfeasance,

(c) professional incompetence or failure to exercise due care and diligence in performance of the powers and functions;

(d) inability to act as liquidator,

(e) conflict of interest or lack of independence during the term of his appointment that would justify removal.

(2) In the event of death, resignation or removal of the liquidator under this rule, the Tribunal may transfer the work assigned to him to another Liquidator for reasons to be recorded in writing.

(3) Where the Tribunal is of the opinion that any liquidator under this rule is responsible for causing any loss or damage to the LLP due to fraud or misfeasance or failure to exercise due care and diligence in the performance of his powers and functions, the Tribunal may recover or cause to be recovered such loss or damage from the liquidator and pass such other orders as it may think fit.

(4) The Tribunal shall, before passing any order under this rule, provide a reasonable opportunity of hearing to the liquidator.

<u>27. Winding up order to be communicated to the liquidator and the Registrar.</u>

(1) Where the Tribunal makes an order for the winding up of a LLP, it shall, within a period not exceeding fifteen days from the date of passing of the order, cause intimation thereof to be sent to the Liquidator and the Registrar in Form no ___prescribed in Appendix II.

(2)On receipt of the copy of the winding up order, the Registrar shall make an endorsement to that effect in his records relating to the LLP and notify in the Official Gazette that such an order has been made.

(3) On receipt of the winding up order by the liquidator, a copy of the order shall be sent to the registered office of the LLP at its registered office by registered post and serve notice to the partners, designated partners, officers, employees past and present including CEO, CFO and auditors and secured creditors, if any, within 15 days of receipt of the order through any mode defined in Rule 15 of the LLP Rules and Forms 200__ for the purpose of custody of the property, effects, actionable claims, books of accounts or other documents.

(4)The winding up order shall be deemed to be a notice of discharge to the officers, employees and workmen of the LLP, except when the business of the LLP is continued.

<u>28. No requirement of filing joint petition</u>

28. An order of winding up a LLP shall operate in favour of all the creditors and all the partners and there will not be any requirement of filing joint petition of a creditor and a partner.

29. Jurisdiction of Tribunal.

The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of,-

(a) any suit or proceeding by or against the LLP ;

(b) any claim made by or against the LLP, including claims by or against any of its branches in India ;

(c) any application made under sections 60-62 of the Act;

(d) any scheme submitted under any law for rehabilitation or revival of LLP;

(e) any question of priorities or any other question whatsoever, whether of law or fact, which may

relate to or arise in the course of the winding up of the LLP ,

Whether such suit or proceeding has been instituted or such claim or question has arisen or arises or such application has been made or such scheme has been submitted, before or after the winding up order is made.

30. Submission of report by Liquidator.

(1) Where the Tribunal has made a winding up order or appointed a Liquidator, such Liquidator shall, within sixty days from the order, submit to the Tribunal, a report containing the following particulars, namely:-

(a) the nature and details of the assets of the LLP including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the LLP:

Provided that the valuation of the assets shall be obtained from registered valuers for this purpose;

(b) amount of contribution received and outstanding from partners;

(c) the existing and contingent liabilities of the LLP including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and in the case of secured debts, particulars of the securities given, whether by the LLP or an officer thereof, their value and the dates on which they were given;
(d) the debts due to the LLP and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof;
(e) guarantees, if any, extended by the LLP;
(f) list of partners and dues if any payable by them and details of any outstanding contributions;
(g) details of trade marks and intellectual properties, if any, owned by the LLP;
(h) details of subsisting contracts, joint ventures and collaborations, if any;
(i) details of other LLPs or companies etc in which LLP has any stake;
(j) details of legal cases filed by or against the LLP;
(k) scheme of revival or rehabilitation of LLP, if any, and
(l) any other information which the Tribunal may direct or the Liquidator may consider necessary to include.
(2) The Liquidator shall include in his report the manner in which the LLP was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any officer of the LLP in relation to the LLP since the formation thereof and any other matters which, in his opinion, it is desirable to bring to the notice of the Tribunal.
(3) The Liquidator shall also make a report on the viability of the business of the LLP or the steps which, in his opinion, are necessary for maximizing the value of the assets of the LLP.
(4) The Liquidator may also, if he thinks fit, make any further report or reports.
(5) Any person describing himself in writing to be a creditor or a partner of the LLP shall be entitled by himself or by his agent at all reasonable times to inspect the report submitted in accordance with this rule and take copies thereof or extracts there from on payment of the prescribed fee.

31. Directions of Tribunal on report of Liquidator.

(1) The Tribunal shall, on consideration of report of Liquidator, subject to these Rules, fix a time limit within which the entire proceedings shall be completed and the LLP dissolved:

Provided that the Tribunal may, if it is of the opinion, at any stage of the proceedings, or on examination of the reports submitted to it by the Liquidator and after hearing the Liquidator, creditors or partners, that it will not be advantageous or economical to continue the proceedings, reduce the time limit within which the entire proceedings shall be completed and the LLP dissolved.

Provided further that in the event any such individual proceedings or activity to be completed by the liquidator or his agent for which the time is fixed under these rules; in the opinion of the liquidator which can not be completed within such time, Tribunal, after satisfying itself, on an application of the liquidator, may extend the time, not exceeding upto further 30 days.

(2) The Tribunal may, on examination of the reports submitted to it by the Liquidator and after hearing the Liquidator, creditors or partners, order sale of the LLP as a going concern or its assets or part thereof:

Provided that the Tribunal may, where it considers fit, appoint a Sale Committee comprising such creditors, partners and officers or employees of the LLP as the Tribunal may decide to assist the Liquidator in sale under this sub-rule.

Provided further that where the Tribunal is of the opinion that an LLP can be revived or rehabilitated, it may, direct that a scheme of Arrangement for the purposes may be drawn up within 90 days and direct further action in accordance with procedure for such schemes prescribed under section 60.

(3) Where a report is received from the Liquidator or the Central Government or any person that a fraud has been committed in respect of the LLP, the Tribunal shall, without prejudice to the process of winding up, order for investigation under section 43, and on consideration of the report of such investigation it may pass order and give such directions as it may think appropriate.

(4)The Tribunal may order such steps as may be necessary to protect, preserve or enhance the value of the assets of the LLP.

(5)Tribunal may pass such other order or give such other directions as it considers fit.

32. Custody of LLP's properties.

(1) Where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator shall, on the order of the Tribunal, forthwith take into his custody or under his control all the property, effects and actionable claims to which the LLP is or appears to be entitled to and take such steps and measures, as may be necessary, to protect and preserve the properties of the LLP.

(2) Notwithstanding anything contained in sub-rule (1), all the property and effects of the LLP shall be deemed to be in the custody of the Tribunal from the date of the order for the winding up of the LLP.

(3) Notwithstanding anything contained in Rule33, on an application by the Liquidator or the provisional Liquidator as the case may be, the Tribunal may, require any partner and any trustee, receiver, banker, agent, officer or other employee of the LLP or any other person, to pay, deliver, surrender or transfer forthwith, or within such time as the Tribunal directs, to the Liquidator or the provisional Liquidator as the case may be, any money, property or books and papers in his custody or under his control to which the LLP is prima facie entitled.

(4)For the purpose of enabling the Liquidator or the provisional Liquidator, as the case maybe, to take into his custody or under his control any property, effects or actionable claims to which the LLP is or appears to be entitled, on an application by the Liquidator or the provision Liquidator as the case may be the Tribunal may, direct Chief Presidency Magistrate or the District Magistrate to take possession of such property, effects, actionable claims, books of accounts or other documents and delivered the possession thereof to the Liquidator or the provision Liquidator.

33. Partners, officers, employees etc to discover and deliver property, books etc and to cooperate with Liquidator.

(1). The partners, designated partners, officers and employees, past and present including CEO and CFO of the LLP shall discover all the property, effects, actionable claims, books of accounts or other documents and deliver the possession thereof to the liquidator or the provisional liquidator within 60 days of the relevant date as defined in Rule 24.
(2) The partners, designated partners, officers and employees, past and present, including CEO and CFO and auditors shall extend full cooperation to the Liquidator in discharge of his functions and duties.

34. Settlement of list of partners and application of assets.

(1) As soon as may be after the passing of a winding up order by the Tribunal, the Tribunal shall settle a list of partners, cause rectification of register of partners in all cases where rectification is required in pursuance of the Act and these rules and shall cause the assets of the LLP to be applied for the discharge of its liability:
Provided that where it appears to the Tribunal that it would not be necessary to make calls for further contributions on partners or adjust the rights of partners, the Tribunal may dispense with the settlement of a list of partners.
(2) In settling the list of partners, the Tribunal shall distinguish between those who are partners in their own right and those who are partners as being representatives of, or liable for the debts of, others.
(3) While settling the list of partners, the Tribunal shall include every present and past partner who shall be liable to contribute to the assets of the LLP to an amount sufficient for payment of the debts and liabilities and the costs, charges and expenses of winding up, and for the adjustment of
the rights of the partners among themselves, subject to the following conditions, namely:-
(a) a past partner shall not be liable to contribute if he has ceased to be a partner for the preceding one year or more before the commencement of the winding up;
(b) a past partner shall not be liable to contribute in respect of any debt or liability of the LLP contracted after he ceased to be a partner;

(c) no past partner shall be liable to contribute unless it appears to the Tribunal that the present partners are unable to satisfy the contributions required to be made by them in pursuance of this Act;
(d) no contribution shall be required from any past or present partner exceeding the amount, if any, unpaid in respect of contribution of which he is liable as such partner.

35. Committee of inspection.

(1) The Tribunal may, while passing an order of winding up of a LLP, direct that there shall be, a committee of inspection for the LLP to advise the Liquidator and to report to the Tribunal on such matters as the Tribunal may direct.
(2) A committee of inspection appointed by the Tribunal shall consist of not more than twelve members, being creditors and partners of the LLP or such other persons in such proportion as the Tribunal may, keeping in view the circumstances of the LLP under liquidation, direct.
(3) The Liquidator shall convene a meeting of creditors and partners, as ascertained from the books and documents of the LLP within thirty days from the date of order of winding up for enabling the Tribunal to determine the persons who may be members of the committee of inspection.
(4) The committee of inspection shall have the right to inspect the books of accounts and other documents, assets and properties of the LLP under liquidation at a reasonable time.
(5) The provisions relating to the convening of the meetings, the procedure to be followed thereat and other matters relating to conduct of business by the committee shall be as prescribed in Part V.
(6) The meeting of committee of inspection shall be chaired by the Liquidator.

36. Submission of periodical reports to the Tribunal.

(1) The Liquidator shall make periodical reports to the Tribunal and in any case make a report at the end of each quarter with respect to the progress of the winding up of the LLP in form and manner prescribed in Part V.

(2) The Tribunal may, on an application by the Liquidator, review the orders made by it and make such modifications as it thinks fit.

37. Duties of Liquidator.

(1) Subject to directions by the Tribunal, if any, in this regard, the Liquidator in a winding up by the Tribunal shall have the duties-

(a) to carry on the business of the LLP so far as may be necessary for the beneficial winding up of the LLP;

(b) to do all acts and to execute, in the name and on behalf of the LLP, all deeds, receipts, and other documents, and for that purpose, to use, when necessary, the LLP's seal, if there is one;

(c) to sell the immovable and movable property and actionable claims of the LLP by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels;

(d) to inspect the records and returns of the LLP on the files of the Registrar or any other authority;

(e) to prove rank and claim in the insolvency of any partner for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

(f) to draw, accept, make and endorse any bill of exchange, hundi or promissory note in the name and on behalf of the LLP, with the same effect with respect to the liability of the LLP as if the bill, hundi, or note had been drawn, accepted, made or endorsed by or on behalf of the LLP in the course of its business;

(g) to take out, in his official name, letters of administration to any deceased partner, and to do in his official name any other act necessary for obtaining payment of any money due from a partner or his estate which cannot be conveniently done in the name of the LLP, and in all such cases, the money due shall, for the purpose of enabling the Liquidator to take out the letters of administration or recover the money, be deemed to be due to the Liquidator himself;

(h) to do all such other acts and things as may be necessary for the winding up of the LLP and distribution of its assets;

(i) to apply to the Tribunal for such orders or directions as may be necessary for the winding up of the LLP.

(j) to appoint security guards, out of the panel maintained, with the approval of the Tribunal, by the liquidator or as per the directions given by the Tribunal in this regard, to protect the property of the LLP taken into his custody and to make out an inventory of the assets in consultation with secured creditors or after giving them notice;

(k) to appoint, as the case may be, valuers, chartered surveyors or chartered accountants, from the panel maintained, with the approval of the Tribunal, by the Liquidator, or as per the directions given by the Tribunal in this regard, to assess the value of the LLP's assets within fifteen days after taking into custody of property, assets and effects or actionable claims, in consultation with secured creditors or after giving them notice;

(l) to give an advertisement, inviting bids for sale of the assets of the LLP, within fifteen days from the date of receiving valuation report from the valuer, chartered surveyors or chartered accountants referred to in clause (k), as the case may be.

(m) to issue a notice requiring any of the persons mentioned in rule 23 submit and verify a statement of the affairs of the LLP and such notice shall be served by the liquidator.

(n) to apply to the Tribunal for an order directing any person who, in his opinion, is competent to furnish a statement of the affairs and such person shall for the said purpose be served a notice by the liquidator in the manner as may be prescribed.

(o) to call any person for recording any statement for the purpose of investigating the affairs of the LLP is being wound up and it shall be the duty of every such person to attend to the liquidator at such time and place as the liquidator may appoint and give the liquidator all information which he may require and answer all such questions relating to winding up of LLP as may be put to him by the liquidator.

(p) to maintain a separate bank account for each LLP under his charge for depositing the sale proceeds of the assets and recovery of debts of each LLP; and

(q) to maintain proper books of account in respect of all receipts and payments made by him in respect of each LLP and submit half-yearly return of receipts and payments to the Tribunal.

(2) Every bidder shall, in response to advertisement referred to in clause (l) of sub-rule (1), deposit, his offer in the manner as may be prescribed by the Tribunal with Liquidator or provisional liquidator, as the case may be, within forty-five days from the date of the advertisement and the liquidator or provisional liquidator shall permit inspection of property and assets in respect of which bids were invited:

Provided that such bid may be withdrawn within three days before the last day of closing of the bid:

Provided further that the inspection of property shall be open for not more than five days before closing of the bid.

(3) The advertisement inviting bids shall contain the following details, namely:-

(a) name, address of registered office of the LLP its branch offices, factories and plants and the place where assets of the LLP kept and available for sale;

(b) last date for submitting bids which shall not exceed ninety days from the date of advertisement;

(c) time during which the premises of the LLP shall remain open for inspection;

(d) the last date for withdrawing the bid;

(e) financial guarantee which shall not be less than one-half of the value of the bid;

(f) validity period of the bids;

(g) place and date of opening of the bids in public;

(h) reserve price and earnest money to be deposited along with the bid;

(i) any other terms and conditions of sale which may be prescribed.

(4) The liquidator or the provisional liquidator as the case may be shall file his report before the Tribunal on the outcome of the bid within 15 days from the last date of the closing of the bid.

(5) The performance of duties by the Liquidator under this rule shall be subject to the overall control of the Tribunal; and any creditor or partner may apply to the Tribunal with respect to the performance or proposed performance of any of the duties conferred by this rule.

(6) Notwithstanding the provisions of sub-rule (1) to (5), the Liquidator shall perform such duties as the Tribunal may specify in this behalf.

<u>38. Provision for professional assistance to Liquidator.</u>

(1) The Liquidator may, with the sanction of the Tribunal, appoint one or more practicing chartered accountants or practicing company secretaries or practicing cost accountants or legal practitioners or such other professionals or experts as may be necessary to assist him in the performance of his duties and functions under the Act.

(2) Any person appointed under this rule shall disclose forthwith to the Tribunal in the form no___as prescribed in Appendix II any conflict of interest or lack of independence in respect of his appointment.

<u>39. Exercise and control of Liquidator's powers and duties.</u>

(1) The Liquidator shall, in the administration of the assets of the LLP and the distribution thereof among its creditors, have regard to any directions which may be given by the resolution of the creditors or partners or the committee of inspection.

(2) Any directions given by the creditors or partners shall, in case of conflict, be deemed to b overridden by any directions given by the committee of inspection.

(3) The Liquidator—

(a) may summon meetings of the creditors or partners, whenever he thinks fit, for the purpose of ascertaining their wishes; and

(b) shall summon such meetings at such times, as the creditors or partners, as the case may be, may, by resolution, direct, or whenever requested in writing to do so by not less than one-tenth in value of the creditors or partners, as the case may be.

(4) Any person aggrieved by any act or decision of the Liquidator may apply to the Tribunal, and the Tribunal may confirm, reverse or modify the act or decision complained of and make such further order as it thinks just in the circumstances.

<u>40. Books to be kept by Liquidator.</u>

(1) The Liquidator shall keep proper books in a manner prescribed in which he shall cause entries or minutes to be made of proceedings at meetings and of such other matters prescribed in Part V.

(2) Any creditor or partner may, subject to the control of the Tribunal, inspect any such books, personally or through his agent.

<u>41. Audit of Liquidator's accounts .</u>

(1) The Liquidator shall maintain proper and regular books of accounts including accounts of receipts and payments made by him in the form and manner specified in Part V.

(2) The LLP Liquidator shall during his tenure of office, present within 60 days to the Tribunal half yearly accounts (i.e. on 30th June and 31st December) of the receipts and payments as such in Form no____prescribed in Appendix II in duplicate, which shall be verified by a declaration.

(3) The Tribunal shall cause the accounts to be audited in such manner as it thinks fit, and for the purpose of the audit, the Liquidator shall furnish the Tribunal with such vouchers and information as the Tribunal may require, and the Tribunal may, at any time, require the production of, and inspect, any books of accounts kept by the Liquidator.

(4) When the accounts of the LLP have been audited, one copy thereof shall be filed by the Liquidator with the Tribunal, and the other copy shall be delivered to the Registrar in Form no___prescribed in Appendix II and it shall be open to inspection by any creditor, partner or person interested.

(5) The Liquidator shall cause the accounts when audited or a summary thereof to be printed, and shall send a printed copy of the accounts or summary thereof by post to every creditor and every partner:

Provided that the Tribunal may dispense with the compliance of the provisions of this sub-rule if it deems fit.

<u>42. Payment of debts by partner and extent of set-off.</u>

(1) The Tribunal may, at any time after passing of a winding up order, pass an order requiring any partner for the time being on the list of partners to pay, in the manner directed by the order, any money due to the LLP, from him or from the estate of the person whom he represents, exclusive of any money payable by him or the estate by virtue of any call for contribution in pursuance of the Act or these rules.

(2) In the case of any LLP when all the creditors have been paid in full, any money due on any account whatever to a partner from the LLP may be allowed to him by way of set-off against any subsequent call for contribution.

<u>43. To make calls.</u>

43. The Tribunal may, at any time after the passing of a winding up order, and either before or after it has ascertained the sufficiency of the assets of the LLP,-

(a) make calls for contribution on all or any of the partners for the time being on the list of the partners, to the extent of their liability, for payment of any money which the Tribunal considers necessary to satisfy the debts and liabilities of the LLP, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the partners among themselves; and

(b) make an order for payment of any calls so made.

<u>44. Adjustment of rights of partners.</u>

The Tribunal shall adjust the rights of the partners among themselves and distribute any surplus among the persons entitled thereto.

<u>45. Control of Central Government over official liquidator as liquidator</u>

(1)The Central Government shall take cognizance of the conduct of official liquidator as liquidators of LLPs which are being wound up by the Tribunal and if a liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by the Act and these Rules or otherwise, with respect to the performance of his duties or if any complaint is made to the Central Government by any creditor or partner in regard thereto, the Central Government shall inquire into the matter and take such action thereon as it may think expedient.

(2) The Central Government may at any time, for the purpose of inquiry apply to the Tribunal to examine such liquidator or any other person on oath concerning winding up.

(3)The Central Government may also direct a local investigation to be made of the books and vouchers of such liquidators."

Provisions applicable to every Mode of Winding Up under the Concept LLP (Winding Up and Dissolution) Rules

Some provisions are applicable to every Mode of Winding Up and these are contained in Rule 46 to Rule 64 under the Concept LLP (winding up and Dissolution) Rules.

The Forms to Concept LLP (Winding up and Dissolution) Rules

The Proposed Forms to be prescribed under Concept Limited Liability Partnership (Winding Up and Dissolution) Rules were placed on the website of the Ministry of Corporate Affairs and were available for comments till 23/01/2009. The draft contains 112 Forms; however they have not been notified as yet.

9.0 INSOLVENCY AND SARFAESI ACT, 2002

Introduction

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (here-in-after referred to as The Securitisation Act) has been enacted with an intention to strengthen the creditors rights through foreclosure and enforcement of securities by the banks and financial institutions by conferring on the creditors the right to seize the secured asset and sell of the same in order to recover dues promptly bypassing the costly and very time consuming legal process through courts.

The Securitisation Act empowers the banks and FIs to move on its own against a borrower whose assets are secured, and who has made some kind of default in repayment of the same. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law . Thus after complying with the statutory provisions in the said act the banks can:

- Take possession of the secured assets of the borrower. This includes the right to transfer by way of lease, assignment or sale of the same for realization of the secured debt.
- Take over the management of the secured asset including the right to transfer by way of lease, assignment or sale of the same for realization of the secured debt.
- Appoint any person to manage the secured asset.

The Securitisation Act contains 41 sections in 6 Chapters and a Schedule. Chapter 1 contains 2 sections dealing with the applicability of the Securitisation Act and definitions of various terms. Chapter 2 contains 10 sections providing for regulation of securitisation and reconstruction of financial assets of banks and financial institutions, setting up of securitisation and reconstruction companies and matters related thereto. Chapter 3 contains 9 sections providing for the enforcement of security interest and allied and incidental matters. Chapter 4 contains 7 sections providing for the establishment of a Central Registry, registration of securitisation, reconstruction and security interest transactions and matters related thereto. Chapter 5 contains 4 sections providing for offences, penalties and punishments. Chapter 6 contains 10 sections providing for routine legal issues.

<u>Important provisions of the Act</u>

Incorporation and registration of Special Purpose Companies -

The Securitisation Act proposes to securitise and reconstruct the financial assets through two special purpose vehicles viz. 'Securitisation Company ('SCO')' and 'Reconstruction Company (RCO)'. SCO and RCO ought to be a company incorporated under the Companies Act, 1956 having securitisation and asset reconstruction respectively as main object. The Securitisation Act requires compulsory registration of SCO and RCO under the Securitisation Act before commencing its business. Further a minimum financial stability requirement is also provided by requiring SCO and RCO to possess owned fund of Rs.2 crore or up to 15% of the total financial assets acquired or to be acquired. The RBI has the power to specify the rate of owned fund from time to time. Different rates can be prescribed for different classes of SCO and RCO.

The Act deals with three aspects.

1. Enforcement of Security Interest by secured creditor (Banks/Financial Institutions)
2. Transfer of non- performing assets to Asset Reconstruction Company, which will then dispose of those assets and realize the proceeds.
3. To provide a legal framework for securitisation of assets.

Enforcement of Security Interest -

Under the Act security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provision of this Act. (*Notwithstanding anything contained in section 69 or section 69(A) of the Transfer of Property Act, 1882)*

<u>Section 13(2)</u>

Where any borrower, who is under a liability to a secured creditor under a security under a security agreement, makes any default in repayment of secured debt or any installment thereof , and his account in respect of such debt is classified by the secured creditor as non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor with in sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4)

(4). In case the borrower fails to discharge his liability in full within the period specified in sub-section(2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for releasing the secured asset.

(b).take over the management of the assets of the borrower including the right to transfer by way of lease, assignment or sale for releasing the secured asset.

(c). appoint any person to manage the secured assets the possession of which has been taken over by the secured creditor.

(d). require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money any money is due or may become due to the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt.

Under section 69 of Transfer of Property Act, mortgagee can take possession of mortgaged property and sale the same without intervention of Court only in case of English mortgage. In addition mortgagee can take possession of mortgaged property where there is a specific provision in mortgage deed and the mortgaged property is situated in towns of Kolkata, Chennai or Mumbai. In other cases possession can be taken only with the intervention of court. Therefore till now Banks/Financial Institutions had to enforce their security through court. This was a very slow and time-consuming process.

(English Mortgage is where mortgagor binds himself to repay the mortgaged money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer the property to the mortgagor upon payment of the mortgage money as agreed.)

Under the SARFAESI Act, if a loan becomes a non-performing asset (“NPA”) i.e. if a borrower is in default in respect of payment of interest or any instalment of the principal, beyond a period of 90 days of such amount becoming due then secured creditors are entitled to enforce the security interest created in their favour in accordance with the provisions of the SARFAESI Act. The secured creditors are required to give the borrower a notice of 60 days describing the default and the measures proposed to be taken. The borrower is given an opportunity to make representations to the secured creditors and the secured creditor may, after giving reasons for rejecting the representations of the borrower, take measures referred to in Section 13(4) of the SARFAESI Act, such as taking over possession of the secured assets or taking over the management of the business of the borrower etc., without the intervention of courts to enforce its security interest.

According to Section 2 (o) of the Act, Non Performing Asset means an asset or account of a borrower which has been classified by the bank or financial institution as sub-standard doubtful or loss asset.-

a) In case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to the asset classifications issued by such authority or body;

b) In any other case, in accordance with the directions or guidelines relating to assets classifications issued by the reserve bank.

Exception to the Securitisation Act (Sec.31)

The provisions of this Act will not apply to--

(a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 (9 of

1872; or the Sale of Goods Act, 1930 (3 of 1930) or any other law for the time being in force;

(b) a pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872 (9 of 1872);

(c) creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934 (24 of 1934);

(d) creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958);

(e) any conditional sale, hire-purchase or lease or any other contract in which no security interest has been created;

(f) any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930 (3 of 1930);

(g) any properties not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act) or sale under the first proviso to sub-section (1) of section 60 of the Code of Civil Procedure, 1908 (5 of 1908);

(h) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;

(i) any security interest created in agricultural land;

(j) any case in which the amount due is less than twenty per cent of the principal amount and interest thereon.

10.0 Insolvency and Recovery of Debt Due to Banks

Keeping in line with the international trends on helping financial institutions recover their bad Debt quickly and efficiently, the Government of India constituted Debt Recovery Tribunals. . **The Debts Recovery Tribunal Act-** Recovery of Debts Due to Banks and Financial Institutions Act, 1993 **has been established by the Government of India under an Act of Parliament for expeditious adjudication and recovery of debts due to banks and financial institutions. The Debts Recovery Tribunal is also the appellate authority for appeals filed against the proceedings initiated by secured creditors under the Securatisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act.**

There are 33 Debt Recovery Tribunals and five Debt Recovery Appellate Tribunals across the country

Background

Banks and financial institutions have been experiencing considerable difficulties in recovering loans and enforcement of securities charge with them. The procedure for recovery of debts due to the banks and financial institutions, was slow and resulted in a significant portion of the funds being blocked.

In 1981, a Committee under the Chairmanship of Shri T. Tiwari had examined the legal and other difficulties faced by banks and financial institutions and suggested remedial measures including changes in law. The Tiwari Committee had also suggested setting up of Special Tribunals for recovery of dues of the banks and financial institutions by following a summary procedure. The setting up of Special Tribunals was done to ll not only fulfill a long-felt need, but also was an important step in the implementation of the Report of Narasimham Committee.

During this time (September, 1990) more than fifteen lakhs of cases filed were by the public sector banks and about 304 cases filed by the financial institutions were pending in various courts, recovery of debts involved more than Rs.5622 crores in dues of Public Sector Banks and about Rs.391 crores of dues of the financial institutions.

The locking up of such huge amount of public money in litigation prevents proper utilisation and recycling of the funds for the development of the country.

The Committee on the Financial System headed by Shri M. Narasimham has considered the setting up of the Special Tribunals with special powers for adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector reforms. An urgent need was, therefore, felt to work out a suitable mechanism through which the dues to the banks and financial institutions could be realized without delay.

The Recovery of Debts Due to Banks and Financial Institutions Act, 1993

The objective of the Act was to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental to it.

Scope

The provisions of this Act shall not apply where the amount of debt due to any bank or financial institution or to a consortium of banks or financial institutions is less then ten lakh rupees or such other amount, being not less than one lakh rupees.

Key Definitions

(1) "Appellate Tribunal" means an Appellate Tribunal established under sub-section (1) of Section 8;

(2) "application" means an application made to a Tribunal under Section.19;

(3) "appointed day", in relation to a Tribunal or an Appellate Tribunal, means the date on which such Tribunal is established under subsection of Section 3 or, as the case may be, sub-section (1) of Section 8;

(4) "bank" means—

   (i) banking company;

   (ii) a corresponding new bank;

   (iii) State Bank of India;

   (iv) a subsidiary bank; or

   (v) a Regional Rural Bank;

(5) "banking company" shall have the meaning assigned to it in clause (c) of section 5 of the Banking Regulation Act, 1949 ;

(6) "corresponding new bank" shall have the meaning assigned to it in clause (da) of section 5 of the Banking Regulation Act, 1949 ;

(7) "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank of a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application;]

(8) "financial institution" means—

(i) a public financial institution within the meaning of Section 4A of the Companies Act, 1956 (1 of 1956);

(ii) such other institution as the Central Government may, having regard to its business activity and the area of its operation in India by notification, specify;

Establishment of Tribunal

(1) Under the act, the Central Government would establish one or more Tribunals, to be known as the Debts Recovery Tribunal, to exercise the jurisdiction, powers and authority conferred on such Tribunal .

(2) The Central Government shall also specify, the areas within which the Tribunal may exercise jurisdiction for entertaining and deciding the applications filed before it.[Section 3]

Procedure

Application to the Tribunal

(1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or

(c) the cause of action, wholly or in party, arises.

(2) Where a bank or a financial institution, which has to recover its debt from any person, has filed an application to the Tribunal under subsection (1) and against the same person another bank or financial institution also has claim to recover its debt, then, the later bank or financial institution may join the applicant bank or financial institution at any stage of

the proceedings, before the final order is passed, by making an application to that Tribunal.

(3) Every application under sub-section (1) or sub-section (2) shall be in such form and accompanied by such documents or other evidence and by such fee as may be prescribed:
Provided that the fee may be prescribed having regard to the amount of debt to be recovered:
Provided further that nothing contained in this sub-section relating to fee shall apply to cases transferred to the Tribunal under sub-section (1) of section 31.

(4) On receipt of the application under sub-section (1) or sub-section (2), the Tribunal shall issue summons requiring the defendant to show cause within thirty days of the service of summons as to why the relief prayed for should not be granted.
(5) The defendant shall, at or before the first hearing or within such time as the Tribunal may permit, present a written statement of his defence.

(6) Where the defendant claims to set-off against the applicant's demand any ascertained sum of money legally recoverable by him from such applicant, the defendant may, at the first hearing of the application, but not afterwards unless permitted by the Tribunal, present a written statement containing the particulars of the debt sought to be set-off.

(7) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Tribunal to pass a final order in respect both of the original claim and of the set-off.

(8) A defendant in an application may, in addition to his right of pleading a set-off under sub-section (6), set up, by way of counter-claim against the claim of the applicant, any right or claim in respect of a cause of action accruing to the defendant against the applicant either before or afterthe filing of the application but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.

(9) A counter-claim under sub-section (8) shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.

(10) The applicant shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Tribunal.

(11) Where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not be disposed of by way of counter-claim but in an independent action, the applicant may, at any time before issues are settled in relation to the counter-claim, apply to the Tribunal for an order that such counter-claim may be excluded, and the Tribunal may, on the hearing of such application, make such order as it thinks fit.

(12) The Tribunal may make an interim order (whether by way of injunction or stay or attachment) against the defendant to debar him from transferring, alienating or otherwise dealing with, or disposing of, any property and assets belonging to him without the prior permission of the Tribunal.

(13) (A) Where, at any stage of the proceedings, the Tribunal is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay or frustrate the execution of any order for the recovery of debt that may be passed against him,--

(i) is about to dispose of the whole or any part of his property; or

(ii) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Tribunal; or

(iii) is likely to cause any damage or mischief to the property or affect its value by misuse or creating third party interest,

the Tribunal may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Tribunal, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the certificate for the recovery of the debt, or to appear and show cause why he should not furnish security.

(B) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Tribunal, the Tribunal may order the attachment of the whole or such portion of the properties claimed by the applicant as the properties secured in his favour or otherwise owned by the defendant as appears sufficient to satisfy any certificate for the recovery of debt.

(14) The applicant shall, unless the Tribunal otherwise directs, specify the property required to be attached and the estimated value thereof.

(15) The Tribunal may also in the order direct the conditional attachment of the whole or any portion of the property specified under subsection (14).

(16) If an order of attachment is made without complying with the provisions of sub-section (13), such attachment shall be void.

(17) In the case of disobedience of an order made by the Tribunal under sub-sections (12), (13) and (18) or breach of any of the terms on which the order was made, the Tribunal may order the properties of the person guilty of such disobedience or breach to be attached an may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Tribunal directs his release

(18) Where it appears to the Tribunal to be just and convenient, the Tribunal may, by order—

(a) appoint a receiver of any property, whether before or after grant of certificate for recovery of debt;

(b) remove any person from the possession or custody of the property;

(c) commit the same to he possession, custody or management of the receiver;

(d) confer upon the receiver all such powers, as to bringing and defending suits in the courts or filing and defending application before the Tribunal and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Tribunal thinks fit; and

(e) appoint a Commissioner for preparation of an inventory of the properties of the defendant or for the sale thereof.

(19) Where a certificate of recovery is issued against a company registered under the Companies Act, 1956 (1 of 1956) the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of section 529A of the
Companies Act, 1956 and to pay the surplus, if any, to the company.

(20) The Tribunal may, after giving the applicant and the defendant an opportunity of being heard, pass such interim or final order, including the order for payment of interest from the date on or before which payment of the amount is found due up to the date of realization or actual payment, on the application as it thinks fit to meet the ends of justice.

(21) The Tribunal shall send a copy of every order passed by it to the applicant and the defendant.

(22) The Presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate.

(23) Where the Tribunal, which has issued a certificate of recovery, is satisfied that the property is situated within the local limits of the jurisdiction of two or more Tribunals, it may send the copies of the certificate of recovery for execution to such other Tribunals where the property is
situated:

Provided that in a case where the Tribunal to which the certificate of recovery is sent for execution finds that it has no jurisdiction to comply with the certificate of recovery, it shall return the same to the Tribunal which has issued it.

(24) The application made to the Tribunal under sub-section (1) or sub-section (2) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the application finally within one hundred and eighty days from the date of receipt of the application.

(25) The Tribunal may made such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice.]

Filing of application under Debts Recovery Tribunal (Procedure) Rules, 1993

4. Procedure for filing applications

(1) The application u/s 19 or sec. 31A, or u/s. 30(1) of the Act may be presented as nearly as possible in Form-I, Form-II and Form-III respectively annexed to these rules by the applicant in person or by his agent or by a duly authorised legal practitioner to the Registrar of the Bench within whose jurisdiction his case falls or shall be sent by registered post addressed to the Registrar.

(2) An application sent by post under sub-rule (1) shall be deemed to have been presented to the Registrar the day on which it was received in the office of the Registrar.

(3) The application under sub-rule (1) shall be presented in two sets in a paper book along with an empty file size envelope bearing full address of the defendants and where the number of defendant is more than one, then sufficient number of extra paper-books together with empty file size envelopes bearing full address of each of the respondents shall be furnished by the applicant.

5. Presentation and scrutiny of applications

(1) The Registrar, or, as the case may be, the officer authorised by him, shall endorse on every application the date on which it is presented or deemed to have been presented under Rule 4 and shall sign endorsement.

(2) If on scrutiny, the application is found to be in order, it shall be duly registered and given a serial number.

(3) If the application, on scrutiny, is found to be defective and the defect noticed is formal in nature, the Registrar may allow the party to rectify the same in his presence and if the said defect is not formal in nature, the Registrar, may allow the applicant such time to rectify the defect as he may deem fit.

(4) If the concerned applicant fails to rectify the defect within the time allowed in sub-rule (3), the Registrar may by order and for reasons to be recorded in writing, decline to register the application.

(5) An appeal against the order of the Registrar under sub-rule (4) shall be made within 15 days of the making of such order to the Presiding Officer concerned in chamber whose decision thereon shall be final.

5A. Review

(1) Any party considering itself aggrieved by an order made by the Tribunal on account of some mistake or error apparent on the face of the record desires to obtain a review of the order made against him, may apply for a review of the order to the Tribunal which had made the order.

(2) No application for review shall be made after the expiry of a period of sixty days from the date of the order and no such application shall be entertained unless it is accompanied by an affidavit verifying the application..

(3) Where it appears to the Tribunal that there is no sufficient ground for a review, it shall reject the application but where the Tribunal is of opinion that the application for review should be granted, shall grant the same:

PROVIDED that no such application shall be granted without previous notice to the opposite party to enable him to appear and to be heard in support of the order, a review of which is applied for.

6. Place of filing application

The application shall be filed by the applicant with the Registrar within whose jurisdiction--

(a) the applicant is functioning as a bank or financial institution, as the case may be, for the time being, or

(b) the defendant, or each of the defendants where there are more than one, at the time of making application, actually or voluntarily resides, or carries on business, or personally works for gain, or

(c) any of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain, or

(d) the cause of action, wholly or in part, arises.

7. Application fee

(1) Every appliction under section 19(1), or section 19(2), or section 19(8), or section 30(1) of the Act, or interlocutory application or application for review of decision of the Tribunal shall be accompanied by a fee provided in the sub-rule (2) and such fee may be remitted through a crossed Bank Demand Draft drawn on a bank or Indian Postal Order in favour of the Registrar of the Tribunal and payable at the place where the Tribunal is situated.

(2) The amount of fee payable shall be as follows--

TABLE

Sl No.	*Nature of Application*	*Amount of Fee payable*

1.	Application for recovery of debts due under section 19(1) or section 19(2) of the Act (a) Where amount of debt due is Rs. 10 lakhs (b) Where the amount of debt due is above Rs. 10 lakhs	Rs. 12 000/- Rs. 12 000/- plus Rs. 1 000/- for every one lakh rupees of debt due or part thereof in excess of Rs. 10/- lakhs subject to a maximum of Rs. 1 50 000/-
2.	Application to counter claim under section 19(8) of the Act-- (a) Where the amount of claim made is upto Rs. 10 lakhs (b) Where the amount of claim made is above Rs. 10 lakhs	Rs. 12 000/- Rs. 12 000/- plus Rs. 1 000/- for every one lakh rupees or part thereof in excess of Rs. 10 lakhs subject to a maximum of Rs. 1 50 000/-.
3.	Application for Review including review application in respect of the counter claim (a) against an interim order (b) against a final order excluding review for correction of clerical or arithmetical mistakes	Rs. 125/- -50% of fee payable at rates as applicable on the applications under section 19(1) or 19(8) of the Act subject to a maximum of Rs. 15 000/-
4.	Application for interlocutory order	Rs. 250/-
5.	Appeals against orders of the	

	Recovery Officer If the amount appealed against is (i) less than Rs. 10 lakhs (ii) Rs. 10 lakhs or more but less than Rs. 30 lakhs (iii) Rs. 30 lakhs or more	 Rs. 12 000/- Rs. 20 000/- Rs. 30 000
6.	Vakalatnama	Rs. 5/-

8. Contents of application

(1) Every application filed under rule 4 shall set forth concisely under distinct heads, the grounds for such application and such grounds shall be numbered consecutively and shall be typed in double space on one side of the paper.

(2) It shall not be necessary to present separate applications to seek interim order of direction if in the original application the same is prayed for.

9. Documents to accompany the application under section 19 or section 31-A of the Act

(1) An application under section 19 or section 31-A shall be accompanied by a paper book containing,--

(i) a statement showing details of the debt due from a defendant and circumstances under which such debt has become due; and shall also disclose details of the case and decision in that case which is sought to be reviewed;

(ii) all documents relied upon by the applicant and those mentioned in the application;

(iii) details of the crossed demand draft or crossed Indian Postal Order representing the application fee;

(2) The documents referred to in sub-rule (1) shall be neatly typed in double space on one side of the paper, duly attested by a senior officer of the bank, or financial institution, as the case may be, and numbered accordingly.

(3) Where the parties to the suit or proceedings are being represented by an agent, documents authorising him to act as such agent shall also be appended to the application:

PROVIDED that where an application is filed by legal practitioner, it shall be accompanied by a duly executed Vakalatnama.

20. Appeal to the Appellate Tribunal.—

(1) Save as provided in subsection (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.

(2) No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made, or deemed to have been made, by the Tribunal is received by him and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Tribunal.

(6) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

21. Deposit of amount of debt due, on filing appeal.—Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal <u>seventy-five per cent</u> of the amount of debt so due from him as determined by the Tribunal under section 19:

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section

23. Right to legal representation and Presenting Officer.—(1) A bank or a financial institution making an application to a Tribunal or an appeal to an Appellate Tribunal may authorize one or more legal practitioners or any of its officers to act as Presenting Officers and every person so authorized by it may present its case before the Tribunal or the Appellate Tribunal.

(2) The defendant may either appear in person or authorize one or more legal practitioners or any of his or its officers to present his or its case before the Tribunal or the Appellate Tribunal.

24. Limitation.—The provisions of the Limitation Act, 1963 , shall, as far as may be, apply to an application made to a Tribunal

25. Modes of recovery of debts.—The Recovery Officer shall, on receipt of the copy of the certificate under sub-section (7) of section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:--

(a) attachment and sale of the movable or immovable property of the defendant;

(b) arrest of the defendant and his detention in prison;

(c) appointing a receiver for the management of the movable or immovable properties of the defendant.

Organisation

Each Debt Recovery Tribunal is presided over by a Presiding Officer. The Presiding Officer is generally a judge of the rank of Dist. & Sessions Judge. A Presiding Officer of a Debt Recovery Tribunal is assisted by a number of officers of other ranks, but none of them need necessarily have a judicial back ground. Therefore, the Presiding Officer of a Debt Recovery Tribunal is the sole judicial authority to hear and pass any judicial order.

Each Debt Recovery Tribunal has two Recovery Officers. The work amongst the Recovery Officers is allocated by the Presiding Officer. Though a Recovery Officer need not be a judicial Officer, but the orders passed by a Recovery Officer are judicial in nature, and are appealable before the Presiding Officer of the Tribunal.

The Debt Recovery Tribunal are governed by provisions of the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, also popularly called as the RDB Act. Rules have been framed and notified under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

After the enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act (SRFAESI Act or SRFAESIA for short) borrowers could become first applicants before the Debt Recovery Tribunal. Earlier only lenders could be applicants.

The Debt Recovery Tribunal are fully empowered to pass comprehensive orders like in

Civil Courts. The Tribunal can hear cross suits, counter claims and allow set offs. However, they cannot hear claims of damages or deficiency of services or breach of contract or criminal negligence on the part of the lenders.

The Debt Recovery Tribunal can appoint Receivers, Commissioners, pass ex-parte ordes, ad-interim orders, interim orders apart from powers to Review its own decision and hear appeals against orders passed by the Recovery Officers of the Tribunal.

The recording of evidence by Debt Recovery Tribunal is some what unique. All evidences are taken by way of an affidavit. Cross examination is allowed only on reqeust by the defense, and that too if the Tribunal feels that such a cross examination is in the interest of justice. Friviolous cross examination may be denied. There are a number of other unique features in the proceedings before the Debt Recovery Tribunal all aimed at expediting the proceedings.

Location and jurisdiction

The Debt Recovery Tribunal are located across the country. Some cities have more than one Debt Recovery Tribunal located therein. New Delhi and Mumbai have three Debt Recovery Tribunal. Chennai and Kolkata have two Debt Recovery Tribunal each. One Debt Recovery Tribunal each has been constituted at Ahmdabad, Allahabad, Arungabad, Bangalore, Chandigrah, Coimbatore, Cuttack, Ernakulam, Guwahati, Hydrabad, Jabalpur, Jaipur, Lucknow, Nagpur, Patna, Pune, Ranchi and Vishakapatnam. Depending upon the number of cases a Debt Recovery Tribunal is constituted.

There are a number of States that do not have a Debt Recovery Tribunal. The Banks & Financial Institutions and other parties in these States have to go to Debt Recovery Tribunal located in other states having jurisdiction over there area. Thus the territorial jurisdiction of some Debt Recovery Tribunal is very vast. For example, the Debt Recovery Tribunal located in Guwahati has jurisdiction over all the seven North Eastern States. Similarly, the territorial jurisdiction of the Debt Recovery Tribunal located at

Chandhigarh too has a very wide jurisdiction over the States of Punjab, Harayana, Chandhigarh.

The setting up of a Debt Recovery Tribunal is dependant upon the volume of cases. Higher the number of cases within a territorial area, more Debt Recovery Tribunal would be set up.

The details of the Tribunal constituted as of now are as under

<u>Debt Recovery Appellate Tribunal Allahabad</u>:-

The Tribunal has been constituted vide notification GSR No: 5(E) dated 3-1-2001 . The territorial jusrisdiction of the Hon`ble Tribunal covers Over Debt Recovery Tribunal Allahabad, Debt Recovery Tribunal Lucknow and Debt Recovery Tribunal Jabalpur.

<u>Debt Recovery Appellate Tribunal Chennai</u>:-

The Tribunal has been constituted vide notification GSR No: 134(E) 17-2-2000 . The territorial jusrisdiction of the Hon`ble Tribunal covers Over Debt Recovery Tribunal Bangalore, Debt Recovery Tribunal Chennai-1, Debt Recovery Tribunal Chennai-2, Debt Recovery Tribunal chennai-3, Debt Recovery Tribunal Coimbatore, Debt Recovery Tribunal Hyderabad, Debt Recovery Tribunal Vishakapatnam, Debt Recovery Tribunal Ernakulam and Debt Recovery Tribunal Madurai.

<u>Debt Recovery Appellate Tribunal Delhi</u>:-

The Tribunal has been constituted vide notification GSR No: 498(E) 26-5-2000 . The territorial jusrisdiction of the Hon`ble Tribunal covers Over Debt Recovery Tribunal Chandhigarh, Debt Recovery Tribunal Delhi-1, Debt Recovery Tribunal Delhi-2, Debt Recovery Tribunal Delhi-3, and Debt Recovery Tribunal Jaipur.

<u>Debt Recovery Appellate Tribunal Kolkata</u>:-

The Tribunal has been constituted vide notification GSR No: 257(E) 24-3-2000 . The territorial jusrisdiction of the Hon`ble Tribunal covers Over Debt Recovery Tribunal Cuttak, Debt Recovery Tribunal Guwahati, Debt Recovery Tribunal Patna, Debt Recovery Tribunal Kolkata-1, Debt Recovery Tribunal Kolkata-2, Debt Recovery Tribunal Kolkata-3, and Debt Recovery Tribunal Ranchi.

Debt Recovery Appellate Tribunal Mumbai:-

The Tribunal has been constituted vide notification GSR No: 654(E) 17-7-1994 . The territorial jusrisdiction of the Hon`ble Tribunal covers over Debt Recovery Tribunal Ahmedabad, Debt Recovery Tribunal Aurangabad, Debt Recovery Tribunal Mumbai-1, Debt Recovery Tribunal Mumbai-2, Debt Recovery Tribunal Mumbai-3, Debt Recovery Tribunal Nagpur and Debt Recovery Tribunal Pune.

Debt Recovery Tribunal - 1 Ahmedabad:-

The Tribunal has been constituted vide notification GSR No: 88 (E) dated 21.12.1994. The territorial jusrisdiction of the Hon`ble Tribunal covers State of Gujarat and Union Territories of Dadra & Nagar Haveli, Daman & Diu.

Debt Recovery Tribunal - 2 Ahmedabad:-

The DRT-2 Ahmedabad has been constituted by the Central Government.

Debt Recovery Tribunal Allahabad:-

The Tribunal has been constituted vide notification GSR No: 274 (E) dated 31.03.2000 . The territorial jusrisdiction of the Hon`ble Tribunal covers Allahabad, Auraiya, Azamgarh, Ballia, Banda, Basti, Budan, Chandauli, Chitrakut, Deoria, Etah, Etawah, Farrukahabad, Fatehpur, Firozabad, Ghazipur, Gorakhpur, Hamirpur, Jalaun, Jaunpur, Jhansi, Kanauj, Kanpur (Rural), Kanpur (Urban), Kaushambi, Kushinagar, Lalitpur, Haharajganj, Mahoba, Mainpuri, Mau, Mirzapur, Sant Kabir Nagar, Sant Ravi Das Nagar, Sidharthnagar, Sonbhadra, Varnasi districts of Uttar Pradesh & any other area in State of Uttar Pradesh not covered within the jurisdiction of DRTs at Lucknow & Allahabad.

Debt Recovery Tribunal Aurangabad:-

The Tribunal has been constituted vide notification GSR No: 909 (E) dated 7.12.2000. The territorial jusrisdiction of the Hon`ble Tribunal covers Aurangabad, Nanded, Jalna, Beed, Parbhani, Hingoli, Dharashiv, Latur, Ahmadnagar, Jalgaon, Dhule, Nandurbar and Nashik districts of Maharashtra state.

Debt Recovery Tribunal Bangalore:-

The Tribunal has been constituted vide notification GSR No: 832 (E) dated 30.11.1994 . The territorial jusrisdiction of the Hon`ble Tribunal covers State of Karnataka .

Debt Recovery Tribunal Chandhigarh:-

The Tribunal has been constituted vide notification GSR No: 258 (E) dated 24.3.2000. The territorial jusrisdiction of the Hon`ble Tribunal covers Himachal Pradesh, Punjab, Haryana and Chandigarh.

Debt Recovery Tribunal - 1 Chennai:-

The Tribunal has been constituted vide notification GSR No: 508 (E) dated 04.11.96. The territorial jusrisdiction of the Hon`ble Tribunal covers Area under Egmore-Nungambakkam and Mylapore-Triplicane Taluk limits of Chennai and Union Territory of Pondicherry.

Debt Recovery Tribunal - 2 Chennai:-

The Tribunal has been constituted vide notification GSR No: 258 (E) dated 29.03.2001. The territorial jusrisdiction of the Hon`ble Tribunal covers Areas Under Tondiarpet and Mambalam - Guindy Taluk limits of Chennai.

Debt Recovery Tribunal - 3 Chennai:-

DRT-3 Chennai was eastablished vide GSR No. 15(E) dated the 9th January, 2007. The territorial jusrisdiction of the Hon`ble Tribunal covers Areas under Perambur-Purasawalkam Taluk limits of Chennai and Districts of Kanchipuram, Tiruvallur, Vellore, Villupuram, Cuddalore, Tiruvannamali, Pudukottai, Thanjavur, Thiruvarur, Nagapattinam, Perambulur and Charmapuri in the State of Tamil Nadu.

Debt Recovery Tribunal Coimbatore:-

The Tribunal has been constituted vide notification GSR No: 221 (E) dated 22.3.2002. The territorial jusrisdiction of the Hon`ble Tribunal covers Districts of Coimbatore and Nilgiris in the State of Tamil Nadu.

Debt Recovery Tribunal Cuttak:-

The Tribunal has been constituted vide notification GSR No: 946 (E) dated 29.12.2000. The territorial jusrisdiction of the Hon`ble Tribunal covers State of Orissa.

Debt Recovery Tribunal Ernakulam:-

The Tribunal has been constituted vide notification GSR No: 397 (E) dated 4.10.1999. The territorial jusrisdiction of the Hon`ble Tribunal covers State of Kerala & Lakshadweep.

Debt Recovery Tribunal Guwahati:-

The Tribunal has been constituted vide notification GSR No: 7 (E) dated 7.1.1997. The territorial jusrisdiction of the Hon`ble Tribunal covers Assam and other North Eastern States and Sikkim.

Debt Recovery Tribunal Hyderabad:-

The Tribunal has been constituted vide notification GSR No: 647 (E) dated 21.9.1999. The territorial jusrisdiction of the Hon`ble Tribunal covers Adilabad, Anantapur, Chittoor, Cuddapah, Hyderabad, Kurnool, Khammam, Karim Nagar, Mehbubnagar, Medak, Nalgonda, Nizamabad, Rangareddi, & Warangal districts of Andhra Pradesh and remaining areas of Andhra Pradesh not covered in the jurisdiction of DRT Vishakhapatnam.

Debt Recovery Tribunal Jabalpur:-

The Tribunal has been constituted vide notification GSR No: 181 (E) dated 7.4.1998. The territorial jusrisdiction of the Hon`ble Tribunal covers States of Madhya Pradesh and Chhattisgarh.

<u>Debt Recovery Tribunal Jaipur</u>:-

The Tribunal has been constituted vide notification GSR No: 655 (E) dated 30.8.1994. The territorial jusrisdiction of the Hon`ble Tribunal covers State of Rajasthan.

<u>Debt Recovery Tribunal-1 Kolkata</u>:-

The Tribunal has been constituted vide notification GSR No: 416 (E) dated 27.4.1999. The territorial jusrisdiction of the Hon`ble Tribunal covers Kolkata city covering the areas of the following police station:-Hare Street, Park Street, Shakespeare Sarani, Bowbazar, Muchipara, Taltolla, Hastings, North Port.

<u>Debt Recovery Tribunal-2 Kolkata</u>:-

The Tribunal has been constituted vide notification GSR No: 270 (E) dated 20.4.2001. The territorial jusrisdiction of the Hon`ble Tribunal covers Al districts of West Bengal (except Kolkata City) and Andaman & Nicobar Islands

<u>Debt Recovery Tribunal-3 Kolkata</u>:-

The Tribunal has been constituted vide notification GSR No: 84 (E) dated 6.2.2002. The territorial jusrisdiction of the Hon`ble Tribunal covers Kolkata City covering the areas of the following police station:- Shyampukur, Jorabagan, Burtolla, Burrabazar, Posta, Jorasanko, Amherst Street and areas of any other police station which may be created in future in Kolkata City.

<u>Debt Recovery Tribunal Lucknow</u>:-

The Tribunal has been constituted vide notification GSR No: 71 (E) dated 31.1.2002 . The territorial jusrisdiction of the Hon`ble Tribunal covers Ambedkar Nagar, Aligarh, Agra, Barabanki, Balrampur, Bahraich, Bareilly, Bijnor, Bulandshahr, Baghpat, Faizabad, Ghaziabad, Gonda, Gautam Budh Nagar, Hathras, Hardoi, Jyotiba Phule Nagar, Lucknow, Lakhimpur, Meerut, Moradabad, Muzafffarnagar, Mathura, Pratapgarh, Pilibhit, Rampur, Rae Bareilly, Sharanpur, Shahajahanpur, Sitapur, Shravasti, Sultanpur, Unnao districts of Uttar Pradesh & State of Uttaranchal.

<u>Debt Recovery Tribunal Madurai</u>:-

The Tribunal has been constituted vide notification G.S.R 15(E) dated the 9th January, 2007. The territorial jusrisdiction of the Hon`ble Tribunal covers Districts of Madurai, Kanyakumari, Tirunelveli, Tuticorin, Virudhunagar, Sivaganga, Ramnad, Theni, Erode, Salem, Namakkal, Trichy, Karur and Dindigul in the State of Tamil Nadu.

<u>Debt Recovery Tribunal-1 Mumbai</u>:-

The Tribunal has been constituted vide notification GSR No: 524 (E) dated 16.7.1999. The territorial jusrisdiction of the Hon`ble Tribunal covers City Area of A Ward as defined by Mumbai Municipal Coropration bounded as below excluding areas of Nariman Point :- East : Dock area, Ballard Estate, Shahid Bhagat Singh Road, P.Demello Road West :Marine Drive North : Anandilal Poddar Marg, Lokmanya Tilak Marg South : Colaba.

<u>Debt Recovery Tribunal-2 Mumbai</u>:-

The Tribunal has been constituted vide notification GSR No: 945(E) dated 29.12.2000. The territorial jusrisdiction of the Hon`ble Tribunal covers Nariman Point in A ward bounded as south : Arabian Sea & Nathalal Parekh Marg West : Dorabjee Tata Road North : Madam Cama Road East : Maharshi Karve Road and B ward to G Ward ie; excluding the areas of jurisdiction of Mumbai DRT No.1 and excluding Suburban & extended suburban areas of Greater Bombay.

<u>Debt Recovery Tribunal-3 Mumbai</u>:-

The Tribunal has been constituted vide notification GSR No: 945(E) dated 29.12.2000. The territorial jusrisdiction of the Hon`ble Tribunal covers Areas of H Ward to T Ward ie; Suburban & extended Suburban areas of Greater Bombay and districts of Thane, Raigad, Ratnagiri and Sindhudurg in Maharashtra state and the state of Goa and any other areas of Mumbai not covered by Mumbai DRT No.1 & Mumbai DRT No.2.

<u>Debt Recovery Tribunal Nagpur</u>:-

The Tribunal has been constituted vide notification GSR(E) 945 dated 29-12-2000. The territorial jusrisdiction of the Hon`ble Tribunal covers Nagpur, Bhandara, Gondiya, Amravati, Chandrapur, Yavatmal, Gadchiroli, Akola, Buldhana, Washim & Wardha districts of Marashtra State.

<u>Debt Recovery Tribunal-1 New Delhi</u>:-

The Tribunal has been constituted vide notification GSR No: 653 (E) dated 5.7.1994. The territorial jusrisdiction of the Hon`ble Tribunal covers South Delhi District Hauz Khas, Malviya Nagar, Mehrauli, Defence Colony, Lodhi Colony, Kotla Mubarakpur, Lajpat Nagar, Srinivas Puri, Hazrat Nizamuddin, Greater Kailash, Chitranjan Park, Ambedkar Nagar, Kalkaji, Badarpur, Okhla, any other police station which may be existing or created in future in this area.

<u>Debt Recovery Tribunal-2 New Delhi</u>:-

The Tribunal has been constituted vide notification GSR No: 947 (E) dated 29.12.2000. The territorial jusrisdiction of the Hon`ble Tribunal covers New Delhi DistrictParliament Street, Mandir Marg, Connaught Place , Tilak Marg, Chanakya Puri, Tughlak Road, any other police station which may be existing or created in future in this area.

<u>Debt Recovery Tribunal-3 New Delhi</u>:-

The Tribunal has been constituted vide notification GSR No: 48 (E) dated 18.1.2002. The territorial jusrisdiction of the Hon`ble Tribunal covers Central Delhi District :Darya Gunj, Chandni Mahal, Jama Masjid, Kamala Market, Hauz Quazi, I.P.Estate, Pahar Gunj, D.B.G.Road, Nabi Karim, Karol Bagh, Prasad Nagar, Rajinder Nagar, andy other police station which may be existing or created in future in this area North East Delhi District : Seelam Pur, Gokal Puri, Bhajan Pura, Shahdara, Welcome Colony, Manasaravor Park, Seema Puri, Nand Nagri, any other police station which may be existing or created in future in this area. East Delhi District Kalayan Puri, Trilok Puri, Vivk Vihar, Anand Vihar, Preet Vihar , Shakar Pur, Gandhi Nagar, Krishna Nagar, Geeta Colony, any other police station which may be existing or created in future in this area. North Delhi District : Civil Lines, Timarpur, Roop Nagar, Maurice Nagar Colony, Subzi Mandi, Pratap Nagar, Sarai Rohilla, Bara Hindu Rao, Sadar Bazar, Kashmere Gate, Kotwali, Lahori Gate, Town Hall (Chandni Chowk), any other police station which may be existing or created in future in this areaWest Delhi District Patel Nagar, Anand Parbat , Moti Nagar , Tilak Nagar, Janak Puri, Vikas Puri, Punjabi Bagh, Paschim Vihar, Nangloi, Rajouri Garden, Hari Nagar, Kirti Nagar, any other police station which may be existing or created in future in this areaNorth West Delhi District Sultan Puri, Mangol Puri, Kanjahanwala, Ashok Vihar, Saraswati Vihar, Keshav Puram, Shalimar Bagh, Jahangir Puri, Rohini, Narela, Samaipur Badli, Ali Pur, Mukerjee Nagar, Adarsh Nagar, Model Town, any other police station which may be existing or created in future in this area.

Debt Recovery Tribunal Patna:-

The Tribunal has been constituted vide notification GSR No: 325(E) dated 24-1-1997. The territorial jusrisdiction of the Hon`ble Tribunal covers State of Bihar.

Debt Recovery Tribunal Pune:-

The Tribunal has been constituted vide notification GSR No: 884 (E) dated 17-12-2001. The territorial jusrisdiction of the Hon`ble Tribunal covers Pune, Satara, Sangli, Kolhapur & Solapur districts of Marashtra State and any other area/district of Marashtra State not included in Mumbai DRT No. 1, Mumbai DRT No. 2 and Mumbai DRT No. 3 and DRTs at Aurangabad and DRT at Nagpur .

Debt Recovery Tribunal Visakhapatanam:-

The Tribunal has been constituted vide notification GSR No: 112(E) dated 26-2-2002. The territorial jusrisdiction of the Hon`ble Tribunal covers East Godavari, West Godavari, Guntur, Kirshna, Nellore, Praksam, Srikakulam, Vizianagaram & Vishakapatnam districts of Andhra Pradesh.

Debt Recovery Tribunal Ranchi:-

The Tribunal has been constituted vide notification GSR No: 113 (E) dated 26-2-2002.

The territorial jusrisdiction of the Hon`ble Tribunal covers State of Jharkhand.

Appeal

APPEAL TO DEBT RECOVERY TRIBUNAL (DRT)

Any person aggrieved by any measure taken by secured creditor or his authorised officer may file an appeal to Debts Recovery Tribunal, within 45 days from date on which such measure was taken. i.e. action of taking possession of asset, takeover of management of business of borrower, appointing person to manage secured asset etc. is taken by the creditor.

When a borrower files an appeal, the appeal cannot be entertained unless; the borrower deposits 75% of the amount claimed in the notice by secured creditor. The DRT can waive or reduce the amount required to be deposited. The amount is not required to be deposited at the time of filing appeal, but appeal will not be heard till the amount is deposited. The borrower while filing the appeal should also file an application requesting the Debt Recovery Tribunal to admit the appeal without deposit of any amount. It the DRT orders partial deposit of the amount and the same is not deposited, appeal can be dismissed.

The 75% deposit is only required if the appeal is filed by the borrower. If some other aggrieved person (e.g. guarantor, shareholder) files it the deposit is not required.

DEBT RECOVERY APPELATE TRIBUNAL

If a person is aggrieved by the order of the DRT, it can file an appeal to the Appellate Tribunal within 30 days from date of receipt of the DRT order.

If the DRT or Appellate Tribunal holds that possession of assets by the secured creditor was wrongful and directs the secured creditor to return asset to concerned borrower, the borrower shall be entitled to compensation and costs as may be determined by DRT or Appellate tribunal.

The Tribunal can also direct return of asset, if the secured creditor had already sold or transferred the asset to a third party.

11.0 INSOLVENCY AND TAKEOVER

Takeover Code

Restructuring in its literal sense means, “changing the basic structure of”. Every company big or small has a basic capital structure as far as its share capital is concerned which is approved by its Memorandum of Association. This structure of a company cannot be changed before the company has actually gone through certain procedures of law.

One way of restructuring is by way of Merger and Amalgamation and Takeovers are quite often taken as a prelude to the mergers.

Broadly speaking Takeover refers to the acquisition of one company by another company. Corporates generally embark on acquisition (takeover) of another company and then take steps to merge or amalgamate the acquired company or merge or amalgamate with the acquired companies and in the process also demerge certain undertakings. Takeover can be either friendly which is done by a mutual agreement between two companies or it can be hostile.

Evolution of Takeover Law in India

The concept of M&As was not very popular in India till as recently as 1990s mainly due to the existing regulatory provisions. However, with the policy of liberalization and economic reforms adopted by the government, the competition became international in character and the ’size’ and ’core competence’ became the buzzwords for the Corporate India.

The corporate sector increasingly resorted to M&As due to significant gains they entail in terms of synergy, economies of scale, better financial and marketing advantages, diversification and reduced earnings volatility, improved inventory management, increase in domestic market share, and above all capturing fast growing markets abroad.

Since such a restructuring exercise should promote fair competition for the overall benefits of shareholders and consumers, regulations were thought to be necessary to govern this exercise.

Legislations aimed at regulating takeovers:

1. The first attempt at regulating takeovers was made in a limited way by incorporating Clause 40 in the Listing Agreement, which provided for making a public offer to the shareholders of a company by any person who sought to acquire 25% or more of the voting rights of the company. There was a significant lacuna of the threshold limit of 25 per cent.

2. In 1990 Government of India amended clause. 40 by substituting it with new clauses 40-A and 40-B which lowered the threshold limit from 25 per cent to 10 per cent. The agreement, although well appreciated, had apparent deficiencies.

3. In 1992, the Securities and Exchange Board Of India (SEBI) Act was enacted and pursuant to the power under this act, SEBI enacted the 1994 Regulation. The 1994 Regulations, while based upon the principle laid down under cls. 40-A and 40-B, also introduced some new provisions related to takeovers. Although the Regulation was a positive step in the direction of regulating takeover, the regulation required further refinement so as to make it more comprehensive and equitable.

4. After the notification of the 1994 Regulation, SEBI setup a committee under the Chairmanship of Justice P.N. Bhagwati to review and suggest amendments in the 1994 Regulation with the view of making it more fair and transparent. The committee viewed

that regulation for acquisition of shares and takeover must 'operate principally to ensure fair and equal treatment of all shareholders'. The committee laid down a set of general principle, which must guide the interpretation and operation of the Regulations.

In its report, the committee stated the necessity of a Takeover Code on the following grounds:

- The confidence of retail investors in the capital market is a crucial factor for its development. Therefore, their interest needs to be protected.
- An exit opportunity shall be given to the investors if they do not want to continue with the new management.
- Full and truthful disclosure shall be made of all material information relating to the open offer so as to take an informed decision.
- The acquirer shall ensure the sufficiency of financial resources for the payment of acquisition price to the investors.
- The process of acquisition and mergers shall be completed in a time bound manner.
- Disclosures shall be made of all material transactions at earliest opportunity.

5. The SEBI, therefore, notified the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Guidelines, 1997 (also known as Takeover Code) in February 1997 (20^{th} February 1997), which laid down the rules, which govern corporate takeovers in India.

The 1997 regulations aimed at:

- Investor protection in the take-over process
- Greater transparency
- Fairness and equity of treatment to all investors
- Timeliness and accuracy of disclosure of information to investors

- Prevention of frivolous offers
- Enforcement against violations

6. Amendments in Securities and Exchange Board of India (Substantial Acquistion of Shares and Takeovers) Regulations 1997 till 13.02.2009

Date	Details
13-Feb-2009	Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2009
28-Jan-2009	SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2009
30-Oct-2008	Securities And Exchange Board Of India (Substantial Acquisition Of Shares And Takeovers) (Amendment) Regulations, 2008
31-Mar-2008	SEBI (Payment of Fees) (Amendment) Regulations, 2008
29-May-2007	Securities And Exchange Board Of India (Substantial Acquisition Of Shares And Takeovers) (Amendment) Regulations, 2007
23-Apr-2007	SEBI (Manner of Service of Summons and Notices issued by the Board) (Amendment) Regulations, 2007
21-Aug-2006	Corrigendum to earlier notifications S.O. No.5(E), 28(E) and 779(E) of 2005
21-Aug-2006	Securities And Exchange Board Of India (Substantial Acquisition Of Shares And Takeovers) (Second Amendment) Regulations, 2006
26-May-2006	Securities And Exchange Board Of India (Substantial Acquisition Of Shares And Takeovers) (Amendment) Regulations, 2006
30-Dec-2004	Securities and Exchange Board of India (Substantial Acquistion of Shares and Takeovers)(Second Amendment) Regulations 2004
30-Aug-2004	Securities and Exchange Board of India (Substantial Acquistion of Shares and Takeovers)(Amendment) Regulations 2004
09-Sep-2002	Securities and Exchange Board of India (Substantial Acquistion of Shares and Takeovers)(Second Amendment) Regulations 2002
29-Jan-2002	Securities and Exchange Board of India (Substantial Acquistion of Shares and Takeovers)(Amendment) Regulations 2002
20-Feb-1997	Securities and Exchange Board of India (Substantial Acquistion of Shares and Takeovers) Regulations 1997

Meaning of 'Takeover'

Takeover generally means acquisition of shares, not merely with an intention to invest in the securities of that company but with an intention to acquire control of the company.

In other words, when a person i.e. the acquirer either by himself or along with certain other persons who act in concert with him acquires a substantial quantity of shares to gain control of a company (referred to as the Target Company), a takeover bid is said to have been made. The agreement for acquisition of shares between the acquirer and the persons acting in concert, could be oral or in writing, implicit or explicit.

Kinds of takeovers

Takeovers may be broadly classified into the following three categories:

1. Friendly or negotiated: in this type of takeover, both the parties, the acquirer and the seller, who are normally the persons in control of the company, agree on terms for change of management.

2. Hostile: as opposed to this, a hostile takeover is one where the acquirer purchases shares of the target company from the open market to takeover the management of the target company silently & unilaterally against the wishes of the persons in control.

3. Bail out: a bail out takeover is one where a financially weak company is taken over by a profit making company to bail out the former, as per a Scheme framed by the Lead Institution, which is normally a financial institution.

Categories of takeover

Takeovers can generally be grouped into one of three major categories:

1. Horizontal: A horizontal takeover occurs when the acquirer and the target company are both engaged in the same broad sector of industry or commerce, and are actual or potential market competitors of each other.
Example: TOMCO by HLL

2. Vertical: In a vertical takeover the acquirer and the target company are actual potential suppliers or customers, such as when a motor manufacturer purchases a producer of electrical components.
Example: Reliance Petrochemicals by Reliance Industries Ltd.

3. Conglomerate: A conglomerate or diversifying takeover is the catch-all category, taking place where the acquirer and the target company belong to different sectors of business, and stand in neither a competitive nor a buyer-seller relationship to one another.
Example: Mohta Steel Industries by Vardhaman Spinning Mills Ltd.

Reasons for takeovers

1. Synergistic operating economies
2. Diversification
3. Taxation advantages
4. Growth
5. Managerial motives
6. Acquisition of specific assets
7. increase earnings per share
8. to ward off seasonal or cyclical fluctuations
9. avoid risks of internal start ups of expansion

10. Profit enhancement.

Advantages

1. Economies of scale
2. Synergy
3. Tax savings
4. Growth
5. Diversification
6. Deployment of surplus funds
7. Avoid unhealthy competition
8. Acquisition of patent rights, brand names
9. Higher debt capacity
10. Lower rate of borrowing
11. Reduction in floatation cost

Substantial Acquisition of Shares

Substantial acquisition of shares means the acquisition of various percentages of shareholding in a listed company. The acquirer may or may not have an intention to acquire the control of the company.

A person, who is already in control of the company, may also acquire further shares of the company carrying voting rights, with an intention to consolidate his holding over the company. An acquisition by such persons commonly referred to as promoters, beyond a certain percentage is also substantial acquisition and such acquisitions attract the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (Takeover Code).

Sections 108A to 108H of the Companies Act impose restrictions on acquisition and transfer of shares in all companies (private, public listed or unlisted)
Every acquirer and promoter of a listed company and the listed company itself must comply with these provisions as well as the Takeover Code.

The Takeover Code specifies about three types of disclosures that are required to be made under the circumstances specified:

1. Initial disclosure
2. Annual disclosure
3. Continual disclosure

12.0 INSOLVENCY AND CORPORATE RESTRUCTURING INCLUDING MERGERS AND ACQUISITIONS

Debt Restructuring

Debt restructuring is a significant modification made to the debt, operations or structure of a company. This type of corporate action is usually made when there are significant problems in a company, which are causing some form of financial harm and putting the overall business in jeopardy. The hope is that through restructuring, a company can eliminate financial harm and improve the business.
Guidelines issued by the Reserve Bank of India on restructuring of advances (other than those restructured under a separate set of guidelines issued by the Rural Planning and Credit Department (RPCD) of the RBI on restructuring of advances on account of natural calamities) are divided into the following four categories:
(i) Guidelines on restructuring of advances extended to industrial units.
(ii) Guidelines on restructuring of advances extended to industrial units under the Corporate Debt Restructuring (CDR) Mechanism

(iii) Guidelines on restructuring of advances extended to Small and Medium Enterprises (SME)

(iv) Guidelines on restructuring of all other advances.

Corporate Debt Restructuring Mechanism (CDR)

www.cdrindia.org

The objective of the Corporate Debt Restructuring (CDR) framework is to ensure timely and transparent mechanism for restructuring the corporate debts of viable entities facing problems, outside the purview of BIFR, DRT and other legal proceedings, for the benefit of all concerned. In particular, the framework will aim at preserving viable corporates that are affected by certain internal and external factors and minimize the losses to the creditors and other stakeholders through an orderly and coordinated restructuring programme.

The CDR Mechanism has been designed to facilitate restructuring of advances of borrowers enjoying credit facilities from more than one bank/Financial Institution (FI) in a coordinated manner. The CDR Mechanism is an organizational framework institutionalized for speedy disposal of restructuring proposals of large borrowers availing finance from more than one banks / FIs.

This mechanism will be available to all borrowers engaged in any type of activity subject to the following conditions:

a) The borrowers enjoy credit facilities from more than one bank/FI under multiple banking / syndication / consortium system of lending.

b) The total outstanding (fund-based and non-fund based) exposure is Rs.10 crore or above.

CDR system in the country will have a three tier structure:

- CDR Standing Forum and its Core Group
- CDR Empowered Group
- CDR Cell

SME Debt Restructuring Mechanism

Apart from CDR Mechanism, there exists a much simpler mechanism for restructuring of loans availed by Small and Medium Enterprises (SMEs). Unlike in the case of CDR Mechanism, the operational rules of the mechanism have been left to be formulated by the banks concerned. This mechanism will be applicable to all the borrowers which have funded and non-funded outstanding up to Rs.10 crore under multiple/consortium banking arrangement.

Major elements of this arrangement are as under:

i) Under this mechanism, banks may formulate, with the approval of their Board of Directors, a debt restructuring scheme for SMEs within the prudential norms laid down by RBI. Banks may frame different sets of policies for borrowers belonging to different sectors within the SME if they so desire.

ii) While framing the scheme, banks may ensure that the scheme is simple to comprehend and will, at the minimum, include parameters indicated in these guidelines.

iii) The main plank of the scheme is that the bank with the maximum outstanding may work out the restructuring package, along with the bank having the second largest share.

iv) Banks should work out the restructuring package and implement the same within a maximum period of 90 days from date of receipt of requests.

v) The SME Debt Restructuring Mechanism will be available to all borrowers engaged in any type of activity.

vi) Banks may review the progress in rehabilitation and restructuring of SMEs accounts on a quarterly basis and keep the Board informed.

MERGERS AND ACQUISITIONS

History of Mergers and Acquisitions:

There has been a great history of Mergers and Acquisitions in United States of America during its 1990’s recession period. The activity of Mergers and Acquisitions has taken a sharp rise in 1992 in US. By 1995 the activity had exceeded the number and dollar volume of the previous records set during the mid 1980’s period. In 1990’s the transactions were largely financially motivated. In 1990's the transactions averaged about $77 billion which was five times the average records in last decade. The deals one after the other set new records than the previous ones. The Deals were more strategic in nature than 1980's.

The Mergers and Acquisitions activity was mainly motivated by rapid industrial consolidation, global competition, deregulation, complex and rapidly changing technologies. There were rapid consolidations in cable, telephone, defense and radio industries. The regulators in evaluating the competitive effects of Mergers and Acquisitions researched more towards the potential for improving operational efficiency rather than looking towards the size of transactions. The Financial environment was highly favorable for Mergers and Acquisitions with soaring stock market multiples and relatively low interest rates.

Meaning Of Mergers and Acquisitions:

Acquisition:

Acquisition is a process in which one company acquires controlling ownership interest in another firm or a legal subsidiary of the another firm or selected assets of such other firm. It is a corporate action in which a company buys most, if not all, of the target company's ownership stakes in order to assume control of the target company. Acquisitions are often made as a part of company's growth strategy whereby it is more beneficial to take over an existing firm's operations compared to expanding its own. Acquisitions are often paid in cash or the acquiring company's stock or a combination of both. The Acquisitions can friendly as well as hostile.

Mergers:

Merger is a big part of corporate finance world. Merger can be described as an economic perspective. Merger can be defined as the combining of two or more entities into one through a purchase acquisition or a pooling of the interests. It is generally by offering securities in the acquiring company to the stockholders of one company in exchange for the surrender of their stock. Merger can be said also when two companies become one. The decision of merger is usually mutual between the corporates.

Distinction between Merger and Acquisitions:

Generally Merger and Acquisitions are often uttered in the same breath and also used as synonyms but the terms Merger and Acquisitions mean slightly different.

When one company takes over another and clearly established itself as the new owner, the purchase is called an acquisition. From a legal point of view, the target company ceases to exist, the buyer swallows the business and the buyer's stock continues to be traded. The target company is the company which is being acquired.

Whereas a merger happens when two firms, often of about the same size, agree to go forward as a single new company rather than remain separately owned and operated. In this both companies stocks are surrendered and new company stock is issued in its place. This merger is referred to as “merger of equals” For example, both Daimler-Benz and Chrysler ceased to exist when the two firms merged, and a new company, DaimlerChrysler, was created.

Usually these types of mergers do not occur frequently. It is a situation like one company will buy another and as part of deal’s terms the acquired company can proclaim the action as a merger of equals even if technically it is an acquisition. A purchase deal can also be called as mergers if the top management of the company agrees that joining together is in the best interests of both the companies. The deal can be disagreeable if the target company does not want to be purchased.

A purchase deal is considered as a merger or an acquisition depends on whether the deal is friendly or hostile or depends on how it is announced.

Types of mergers

There are three types of Merger:

1. Horizontal Merger
2. Vertical Merger

3. Conglomerate Merger

Horizontal Merger

When two or more corporate firms dealing in similar lines of activity combine together then Horizontal Merger takes place. The purpose of Horizontal Merger is elimination or reduction in competition, putting an end to price cutting, economies of sale in production research and development, marketing and management, etc.

Vertical Merger

When a firm acquires its 'upstream' from it and or firm's 'down-stream' then Vertical Merger occurs. In the case of 'upstream' type of merger' it extends to the suppliers of raw materials and in the case of 'downstream' type of merger it extends to those firms that sell eventually to the consumer. The purpose of such merger is the lower buying cost of materials, lower distribution costs, assured supplies and market, increasing or creating barriers to entry for potential competitors.

Conglomerate Merger

In marked contrast, Conglomerate Merger is a type of combination which a firm established in one industry combines with another firm in another unrelated industry. Such merger moves for diversification of risk constitutes the rationale

The success of the merger often depends on the combined company’s ability to implement a clear integration plan, quickly.

1. Clear intent: All participants in the merger integration project need to understand the reason and expectations for the merger so that they can direct their energies accordingly.

2. Perseverance: The post-merger integration of two large organizations will take months, if not years, to complete. Long-duration projects are notoriously prone to running out of steam. Can the effort be forcefully sustained in spite of the multitude of other business issues that can be expected to demand attention?

3. Leadership: Like any other project, merger integration needs a full-time leader. But unlike ordinary projects, merger integration is about creating the organization of the future — an executive-level task. Hence, in order to succeed, a merger integration project needs a high-level, full-time executive leader with the authority and accountability for achieving the goals of the merger.

4. Accountability: The merger integration project also needs a team, made up of the best and brightest from both organizations. The creation of the new company cannot be left to those who happen to be available. And those assigned to the project should know clearly how they are accountable.

5. Leverage: Merger integration cannot be contracted out. Advice and assistance can be sought if needed, but the project must be owned and run by the organization itself. Although some specific implementation tasks, once defined, can be contracted out, the design of the future state should be done by those who must live with and manage the results produced — and therefore have the most incentive in getting it right.

6. Coordination: Merger integration involves most aspects of the organization, and no single plan can encompass the myriad details. Hence, planning must be cascaded down and coordinated up. An overall corporate plan must set the targets, timing, and key checkpoints for all divisions. Each division, in turn, must develop a plan covering its departments, and must coordinate the departments' individual detailed plans.

7. Experience: Very large projects, and merger integration projects in particular, are complex undertakings that require specialized expertise to anticipate and avoid common problems. This is not a good time to learn by trial and error. Companies that have this expertise in-house should leverage it in the project team. Companies that don't should bring in an external trusted advisor to guide them through the process.

8. Focus: Like any project, merger integration work should be kept separate from other projects and from ongoing operations. Full-time team members shouldn't have other distractions. There are three reasons for this. First, merger integration is too complex to be handled "as time permits." Second, the merger integration project must not interfere with the ongoing mission-critical operations of the business. Finally, sound project management demands tracking the use of resources against plan, and this cannot be done if the resources are intermixed with other work.

9. Decisiveness: A merger integration project involves designing and implementing the company of the future in a limited amount of time. Many choices will have to be made: from the chart of accounts to the location of the warehouses, from the organizational structure to the choice of systems. Many of these decisions will affect the lives and livelihood of people. Nevertheless, these hard choices need to be made in a timely manner and without regret. Clearly, any delays or revisions will affect the results, costs, or schedule of the overall project.

10. Communication: Communication is the factor that must be kept in mind most vividly. A merger is a project with lots of moving parts, and the most movable parts are the people involved. A communication plan is critical to the robust organizational change program needed to address their concerns, and enlist their involvement and support.

Motives behind M&A

These motives are considered to add shareholder value:

a) Economies of scale: This refers to the fact that the combined company can often reduce duplicate departments or operations, lowering the costs of the company relative to the same revenue stream, thus increasing profit.

b) Increased revenue/Increased Market Share: This motive assumes that the company will be absorbing a major competitor and thus increase its power (by capturing increased market share) to set prices.

c) Cross selling: For example, a bank buying a stock broker could then sell its banking products to the stock broker's customers, while the broker can sign up the bank's customers for brokerage accounts. Or, a manufacturer can acquire and sell complementary products.

d) Synergy: Better use of complementary resources.

e) Taxes: A profitable company can buy a loss maker to use the target's loss as their advantage by reducing their tax liability. In the United States and many other countries, rules are in place to limit the ability of profitable companies to "shop" for loss making companies, limiting the tax motive of an acquiring company.

f) Geographical or other diversification: This is designed to smooth the earnings results of a company, which over the long term smoothen the stock price of a company, giving conservative investors more confidence in investing in the company. However, this does not always deliver value to shareholders (see below).

g) Resource transfer: the interaction of target and acquiring firm resources can create value through either overcoming information asymmetry or by combining scarce resources.

h) Vertical integration: Companies acquire part of a supply chain and benefit from the resources.

i) Increased Market share, which can increase Market power, : In an oligopoly market, increased market share generally allows companies to raise prices. Note that while this may be in the shareholders' interest, it often raises antitrust concerns, and may not be in the public interest.

Procedure for evaluating the decision for mergers and acquisitions

The three important steps involved in the analysis of mergers and acquisitions are

1. Planning
2. Search and Screening
3. Financial Evaluation

Regulations Governing Mergers and Acquisitions

1) Companies Act, 1956

The provisions relating to merger and amalgamation are contained in sections 391 to 396A in Chapter V of Part VI of the Act

Under the said provisions the merging companies have to approach the appropriate High Courts (amended to National Company Tribunal by the Companies (Second Amendment) Act, 2002 but not enforced as yet) for convening a meeting of the shareholders. The shareholders have to pass the scheme of merger approved by a three-fourth majority. The scheme is also required to be approved by the High Court. Section 396 also empowers the central government to recommend mergers or amalgamations of companies in the national interest.

Section 391 gives the Tribunal the power to sanction a compromise or arrangement between a company and its creditors/ members subject to certain conditions

Section 392 gives the power to the Tribunal to enforce and/ or supervise such compromises or arrangements with creditors and members.

Section 393 provides for the availability of the information required by the creditors and members of the concerned company when acceding to such an arrangement.

Section 394 makes provisions for facilitating reconstruction and amalgamation of companies, by making an appropriate application to the Tribunal.

Section 395 gives power and duty to acquire the shares of shareholders dissenting from the scheme or contract approved by the majority

Section 396 deals with the power of the central government to provide for an amalgamation of companies in the national interest. In any scheme of amalgamation, both the amalgamating company or companies and the amalgamated company should comply with the requirements specified in sections 391 to 394 and submit details of all the formalities for consideration of the Tribunal. It is not enough if one of the companies alone fulfils the necessary formalities.

Sections 394, 394A of the Companies Act deal with the procedures and the requirements to be followed in order to effect amalgamations of companies coupled with the provisions relating to the powers of the Tribunal and the central government in the matter of bringing about amalgamations of companies.

Further Sec 108A of the Companies Act, 1956 lays down restrictions on acquisition of shares

Accordingly, no individual, firm, group, constituent of a group, body corporate or bodies corporate under the same management, shall jointly or severally acquire or agree to acquire, whether in his or its own name or in the name of any other person, any equity shares in a public company, or a private company which is a subsidiary of a public company, if the total nominal value of the equity shares intended to be so acquired exceeds, or would, together with the total nominal value of any equity shares already held in the company by such individual, firm, group, constituent of a group, body corporate or bodies corporate under the same management, exceed twenty-five per cent. of the paid-up equity share capital of such company.[Sec 108A(1)]

Section 108B requires a body corporate or a group of bodies corporate under the same management and holding 10 per cent or more of equity shares of a company to notify the central government of any transfer of equity shares. Also, any transfer of equity shares by a body corporate or body's corporate holding 10 per cent or more of the equity capital of a foreign company requires prior approval of the central government before transferring such shares to an Indian citizen or a company established in India. The central government has the power to restrict acquisition or transfers that may result in change in the controlling interest in the company and which is prejudicial to the interest of the company or to the public interest.

2. Competition Act, 2002

The Act regulates the various forms of business combinations through Competition Commission of India. Under the Act, no person or enterprise shall enter into a combination, in the form of an acquisition, merger or amalgamation, which causes or is likely to cause an appreciable adverse effect on competition in the relevant market and such a combination shall be void

3. The SEBI (Substantial Acquisition of Shares and Take-overs) Regulations, 1997 and its subsequent amendments aim at making the take-over process transparent, and also protect the interests of minority shareholders.

4. The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 ('Insider Trading Regulations') prohibits any insider from dealing in securities of the company or to transfer any price sensitivity data to any other person. Insider means a person connected with the company who may have access to price sensitivity data. Under the provisions of the Insider Trading Regulations, SEBI has the power to give directions to hold the transaction in securities as null and void. The SEBI Act also prohibits use or employment of any manipulative or deceptive device in connection with securities.

Other Relevant Securities laws include

a) SEBI (Buyback Of Securities) Regulations, 1998

b) SEBI (Delisting of Securities) Guidelines, 2003

c) SEBI (Disclosure and Investor Protection Guidelines) 2000

d) The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (‘Insider Trading Regulations’)

5. Sector Specific Rules- Merger of enterprises in sectors such as telecom, banking, insurance, electricity etc. are required to comply with the sector specific laws, by-laws, rules and regulations. Mergers of intra circle telecom enterprises are also regulated by the Telecom Regulatory Authority of India (‘TRAI’). Mergers in banking sectors require prior approval of the RBI.

6. Provisions under Companies Bill, 2009

Chapter XV contains provisions on “Compromises, Arrangements And Amalgamations “.

Accordingly,

- Merger and amalgamation of companies will be handled by the National Law Tribunal. (Clause 203 of Companies Bill, 2008) Presently this is handled by the respective High Courts.
- Provisions have been made for merger or amalgamation between two small companies or between a holding company and its wholly-owned subsidiary company. (Clause 204 of Companies Bill, 2008)
- Provision has been made for merger or amalgamation between registered Indian companies and companies incorporated in the jurisdiction of countries notified by the Central Government. (Clause 205 of Companies Bill, 2008)
- Every offer of schemes or contract involving the transfer of shares in the transferor company to the transferee company should be presented to the Registrar for registration. (Clause 209 of Companies Bill, 2008)

- Liability in respect of offences committed by the officers in default, of the transferor company prior to its merger, amalgamation or acquisition will continue after such acquisition, merger or amalgamation. (Clause 211 of Companies Bill, 2008)

7. Exchange Control Regulations

a) Foreign Exchange Management Act,1999
b) Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2000
c) Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000

13.0 INSOLVENCY, WINDING UP AND DISSOLUTION

1. Introduction

It is general law of life that everything that exist will cease to exist some day. So does a company. A legal process causes birth of a company, so is its death. There are several ways in which the existence may be brought to an end. Section 425 of the Companies Act specifies three ways of winding up which are:-

- By the Court
- Voluntary winding up
- Subject to supervision of court

Also a company may be dissolved in the process of amalgamation or reconstruction under section 394 of the Companies Act. In such case the transferor Company get dissolved without going through the process of winding up. Beside this a company can also be dissolved when it is defunct and its name is removed from the register of the company by the registrar in pursuant to section 560 of the Companies Act.

2. Modes of Winding up

2.1 Winding up by the Court

A company may be wound up by the Court in following situations.

- If the company itself, has passed a special resolution in the general meeting to wound up its affairs.
- If there is a default, in holding the statutory meeting or in delivering the statutory report to the Registrar.
- If the company fails to commence it's business within one year from the date of it's incorporation, or suspends it's business for a whole year.
- If the number of members, in a public company is reduced to less than seven, and in case of private company less than two.
- If the company is unable to pay its debts
- If the Court, itself is of the opinion that the company should be wound up.
- If the Company has made a default in filing with the Registrar its balance sheet & profit and loss account or annual return for any 5 consecutive financial years.
- If the company has acted against the sovereignty, integrity of India, the Security of State, friendly relations with foreign state, public order, decency and morality.
- If the Court considers that the Company should be wound up u/s 424 (G).

Who can apply to Court for Winding Up (Sec.439)

Following persons can apply to the Court for winding up:

- The company, in case of passing a special resolution for winding up.
- A creditor, in case of a company's inability to pay debts.
- A contributory or contributories, in case of a failure to hold a statutory meeting or to file a statutory report or in case of reduction of members below the statutory minimum.
- The Registrar, on any ground provided prior approval of the Central Government has been obtained.

- A person authorised by the Central Government, in case of investigation into the business of the company where it appears from the report of the inspector that the affairs of the company have been conducted with intent to defraud its creditors, members or any other.

- By Central or State Government, if the company has acted against the sovereignty, integrity of India, the Security of State, friendly relations with foreign state, public order, decency and morality

The Orders the Court may pass (Sec.443)

The Court may pass any one of the following orders on hearing the winding up petition.

1. Dismiss it, with or without costs
2. Adjourn the hearing conditionally or unconditionally,
3. Make any interim order, as it thinks fit, or
4. Pass an order for winding up of the company with or without costs.

Consequences of Court passing an order for winding up

If the Court is satisfied, that sufficient reasons exist in the petition for winding up, then it will pass a winding up order. Once the winding up order is passed, following consequences follows:

1. Court will send notice within 14 days to registrar and to an official liquidator, to take change of the company. He shall carry out the process of winding up. (sec. 444)
2. The winding up order, shall be applicable on all the creditors and contributories, whether they have filed the winding up petition or not.
3. The company shall relevant particulars, relating to assets, cash in hand, bank balance, liabilities, particulars of creditors etc to the official liquidator. (sec.454)
4. The official liquidator shall within six months, from the date of winding up order, submit a preliminary report to the Court regarding :

- Particulars of Capital
- Cash and negotiable securities
- Liabilities
- Movable and immovable properties
- Unpaid calls, and
- An opinion, whether further inquiry is required or not (Sec.455)

The Central Govt. shall keep a cognizance over the functioning of official liquidator, and may require him to answer any inquiry. (Sec.463)

Stay Order

Where, the Court has passed a winding up order, it may stay the proceedings of winding up, on an application filed by official liquidator, or creditor or any contributory. (Sec.466)

Dissolution of Company (Sec.481)

Finally the Court will order for dissolution of the company, when:

1. the affairs of the company are completely wound up, or
2. the official liquidator is unable to carry on the winding up procedure for want of funds.

Appeal (Sec.483)

An appeal from the decision of Court, will lie before that Court, before whom, appeals lie from any order or decision of the former Court in cases within its ordinary jurisdiction.

2.2 Voluntary Winding Up

A company may , voluntary wind up its affairs, if it is unable to carry on its business, or if it was formed only for a limited purpose, or if it is unable to meet its financial obligation, and etc. A company may voluntary wind up itself, under any of the two modes:

- Members voluntarily winding up
- Creditors voluntarily winding up

A company may voluntarily wind up itself, either by passing:

An ordinary resolution, where the purpose for which the company was formed has completed, or the time limit for which the company was formed, has expired or by way of special resolution

Both types of resolution shall be passed in the general meeting of the company. (Sec.484)

Once the resolution of voluntarily winding up is passed, then the company may be wound up, either through:

- Members voluntarily winding up, or
- Creditors voluntarily winding up

The only difference between the two, is that in case of members voluntarily winding up, Board of Directors have to make a declaration to the effect, that company has no debts. (Sec.488)

2.2.1 Members Voluntarily Winding Up

Directors of the company shall call for a Board of Directors Meeting, and make a declaration of winding up, accompanied by an Affidavit, stating that;

- The company has no debts to pay, or
- The company will repay its debts; if any, within 3 years from the commencement of winding up, as specified in declaration (Sec.488)

Procedure to put a company into member's voluntary winding up

1. Convene a Board Meeting to transact the following business:

(a) Make sure that the company can pay its debts in full within a period of three years if put into liquidation.

(b) Declaration in Form No. 149 under Rule 313 of the Companies (Court) Rules, 1959, and verified by an affidavit, by the Directors sworn before a Judicial Magistrate on non-judicial stamp paper of Rs. 20/-.

(c) Declaration will be accompanied by:

   a. The audited Balance Sheet and Profit & Loss Account commencing from the date of last audited balance sheet and profit and loss account and ending with the latest practicable date before the date of declaration.
   b. A statement of the company's assets and liabilities as at that date; and
   c. A copy of the report of the auditors of the company on the above two documents.

(d) Approve at the meeting the draft resolution for Member's Voluntary Winding up and for appointing Liquidator and fix remuneration and also fix the date, time, place of the general meeting.

2. Copies of item (b) and (c) to be filed and registered with the Registrar at least 5 weeks before the General Meeting

3. Issue notice for the general meeting proposing a Special Resolution, with suitable Explanatory Statement.

4. Hold the General Meeting and pass the Special Resolution for winding up. The winding up commences from the time of passing the resolution.

5. Within ten days of passing of the resolution, file notice with the Registrar Of Companies (ROC) for the appointment of the liquidator after paying the requisite fee.

6. Submit to the liquidator a statement on the company's affairs in Form No.57 in duplicate, duly verified by affidavit in Form No. 58 within twenty-one days of the commencement of winding up.

7. File the Special Resolution passed for winding up with Explanatory statement with the ROC within 30 days of its passing in Form No .23 with requisite fee.

8. Within 14 days of passing the resolution for voluntary winding up, give notice of the resolution by advertisement in the Official Gazette and also in some newspaper circulating both in English and in Tamil, in the district where the registered office of the company is situated.

9. Simultaneously to Step 8, the Liquidator to publish in the Official Gazette the Notice of his appointment in Form No. 151 of Company Court Rules and file with Registrar the Notice of his Appointment in form 152 of Company Court Rules.

10. Simultaneously to Step 8, Liquidator to give notice of his appointment to the concerned Income-tax Officer under Section 178 of IT Act, 1961. No prescribed format for this intimation. Letter would be sufficient.

11. If the liquidator is of the opinion that the company will not be able to pay its debts in full within the period stated in the declaration of solvency, or if the period stated in the declaration of solvency has expired without the debts being paid in full, the liquidator has to summon a meeting of the creditors, and table before the meeting a statement of the assets and liabilities of the company in Form No. 150 of the Companies (Court) Rules, 1959.

12. Where the winding up process continues for more then a year, Liquidator should call a general meeting within 3 month from the end of every year from the date of commencement of winding up, and table before the meeting an account of his acts and dealings along with statement in form No 153 of the Companies (Court) Rules, which should be duly verified in Form 154 of the Company Court Rules.

13. If Step 11 is applicable, the Liquidator to call a meeting of creditors also within 3 months from the end of the year.

14. The Liquidator to file statements in the prescribed manner together with the Audit Report in the prescribed format, with the concerned Registrar of Companies twice in every year, if the liquidation is NOT completed within one year from the commencement of the winding up.

15. Complete the winding up by realising all assets and paying off all liabilities and returning share capital and surplus, if any. **The provisions of sections 426 to 432, 487, 491, 494, 511, 511A, 512, 517 to 520, 528 to 549 and 553 and those of**

rules from Nos.124 to 134 and Nos. 312 to 361 of the Companies (Court) Rules 1959 should also be noted in this respect.

16. As soon as the affairs of the company are fully wound-up, liquidator to prepare his account of the winding up in Form No. 156 of the Companies (Court) Rules 1959 and get the same audited. The audit report should be in the format suggested by ICAI for this purpose.

17. Liquidator to call the final General Meeting by giving notice stating the time, place and object of the meeting, in Form No. 155 of the Companies (Court) Rules, 1959 by advertisement in the official Gazette. The Notice in the gazette to be given not less than one month before the meeting. In addition, the notice should also be published in some newspaper circulating in the district where the registered office of the company is situated.

18. At the meeting, place the accounts prepared under Step 16.

19. At the meeting also pass a special resolution for disposal of the books and papers of the company when the affairs of the company are completely wound up and it is about to be dissolved.

20. Within a week of the final meeting held under Step 17, file the copy of the account with the ROC as well as with the Official Liquidator (OL) and also file a return with both in Form No. 157 of the Companies (Court) Rules 1959. If a quorum is not present at the meeting, file the return in form no. 158 of the Companies (Court) Rules, 1959.

21. File the Special Resolution with the ROC, within 30 days of passing in Form No. 23 after paying the requisite fee.

22. The Registrar of Companies, on receiving the account and the return shall forthwith register them.

23. The OL on receiving the account and the return would make a scrutiny of the books and papers of the Company to ascertain as to whether the affairs of the Company has not been carried on in a manner prejudicial to the interest of its members or public, and makes a report to the concerned High Court. From the date of the submission of the report to the concerned High Court the company is deemed to be dissolved..

2.2.3 Creditors Voluntarily Winding Up

- Where the resolution for winding up has been passed, but the Board of Directors are not in a position to give a declaration on the liability of company, they may call a meeting of creditors, for the purpose of winding up. (Sec.500)
- It is the duty of Board of Directors, to present a full statement of company's affairs, and list of creditors along with their dues, before the meeting of creditors. [Sec.500 (3)]
- Whatever resolution, the company passes in creditor's meeting, shall be given to the Registrar within ten days of its passing. (Sec.501)

Winding up procedure

Company in the general meeting in which resolution for winding up is passed and the creditors in their meeting appoint liquidator. They may either agree on one liquidator, or if two names are suggested, then liquidator appointed by creditor shall act. (Sec.502)

- Any director, member or creditor may approach the Court, for direction that ;
  - Liquidator appointed in general meeting shall act, or
  - He shall act jointly with liquidator appointed by creditor, or
  - Appointing official liquidator, or
  - Some other person to be appointed as liquidator. [Sec.502 (2)]
- The remuneration of liquidator shall be fixed by the creditors, or by the Court. (Sec.504)
- On appointment of liquidator, all the power of Board of Directors shall cease. (Sec.505)
- In case, the winding up procedure, takes more than one year, then he will have to call a general meeting, and meeting of creditors, at the end of each year, and he shall present, a complete account of the procedure, and the status / position of liquidation (Sec.505).

When affairs of the company are fully wound up (Sec.509)

The liquidator shall take the following steps, when affair of the company are fully wound up:

1. Call a general meeting, and meeting of creditors, and lay before it, complete picture of accounts, winding up procedure and how the properties of company are disposed of .
2. The meeting shall be called by advertisement, specifying the time, place and object of the meeting.
3. The liquidator shall send to the Registrar and official liquidator copy of account, within one week after the meeting.
4. If from the report, official liquidator comes to the conclusion, that affairs of the company are not being carried in manner prejudicial to the interest of it' s members or public, then the company shall be deemed to be dissolved, from the date of report to the Court.
5. However, if official liquidator comes to a finding, that affairs have been carried in a manner prejudicial to intent of members or public, then Court may direct the liquidator to investigate further.

Distribution of property of company on voluntarily winding up [both members and creditors voluntarily winding up]

Once the company is fully wound up, and assets of the company sold or distributed, the proceedings collected are utilised to pay off the liabilities. The proceedings so collected shall be utilised to pay off the creditors in equal proportion. Thereafter any money or property left may be distributed among members according to their rights and interests in the company.

2.3 Winding up subject to supervision of court

Winding up subject to supervision of court, is different from "Winding up by court." Here the court only supervises the winding up procedure. Resolution for winding up is passed by members in the general meeting. It is only for some specific reasons, that court may supervise the winding up proceedings. The court may put up some special terms and conditions also.

However, liberty is granted to creditors, contributories or other to apply to court for some relief. (522)

- The court may also appoint liquidators, in addition to already appointed, or remove any such liquidator. The court may also appoint the official liquidator, as a liquidator to fill up the vacancy.

- Liquidator is entitled to do all such things and acts, as he thinks best in the interest of company. He shall enjoy the same powers, as if the company is being wound-up voluntarily.

- The court also may exercise powers to enforce calls made by the liquidators, and such other powers, as if an order has been made for winding up the company altogether by court. (Sec.526)

Priority in disposing liabilities [Sec.529a & 530]

When the company is wound up, by any mode, the liabilities shall be discharged in following priority.

- Workman's dues.
- Debts due to secured creditors, in case of insolvency.
- All , taxes, cesses and rates due from the company to the central government or a state govt.
- All wages and salary of any employee due within four months.
- All holiday remuneration becoming payable to any employee.

All such debts shall be paid in full. If assets are insufficient to meet them, they shall abate in equal proportions.

Money received by liquidator: (Sec.553)

Apart from an official liquidator, every liquidator appointed by company or court to carry on the winding up procedure, shall deposit the money is received by him in a scheduled bank, to the credit of a special bank account opened by him.

3. Winding up of companies other than Registered Companies

Apart from a normal company, registered under the companies Act, 1956 there are other companies as well winding up procedure for these companies are bit different from a company registered under companies Act.

These companies are:

1. Unregistered Companies : (Sec.583)
In simple words, an unregistered company is a company which is not registered or covered under provisions of companies Act, 1956 (Sec.582)

- An unregistered company cannot be wound up voluntarily, or, subject to super vision of court.
- However, the circumstances, in which unregistered company may be wound up, are as follows:
  - If the company, is dissolved, or has ceased to carry on business, or is carrying on business only for the purposes of winding up, it's affairs,
  - If the company is unable to pay its debt
  - If the court is of opinion, that it is just and equitable, that the company should be wound up.
- A creditor, contributory, or company itself by filing a petition, or any person authorised by central government may institute winding up proceedings.
- In respect to other aspects, the same provisions and procedure shall follow, as in winding up of registered company.
- A foreign company, carrying on business in India, which has been dissolved, may be wound up, as unregistered company.

2. Foreign Company

A foreign company is a company which is incorporated outside India, and having a place of business in India.

Winding up of such companies is only limited to the extent of its assets in India. In respect of assets and business carried outside India, Indian courts have no jurisdiction.

- Winding up of a foreign company can only be made through court.
- Even if the company had been dissolved or ceased to exist in the country of its incorporation, winding up order in this country can be made.
- Even if a foreign company has been wound up according to foreign law, the courts in India still protect the Indian Creditors. The surplus assets, after paying the creditors, should be distributed among the share holders equally in the same proportion, as the assets to the total issued and paid up capital.
- Pendency of a foreign liquidation does not affect the jurisdiction to make winding up order. The Assets can be of any nature and do not take to be in the ownership of the company and can come from any Source.
- As, for persons claiming to be creditors, their presence, itself is sufficient. It is not required to be shown, that company carried on business operations from any place of business in India.

3. Government Company

A Govt. company means a company, in which 51% or more of, shares are held by a govt.

company Winding up procedure for a government company registered under the companies Act, 1956, is nearly similar to normal winding up procedure.

However, courts, take interest of public into consideration, and priority is given to them, as a govt. company's main function is to provide services to public.

14.0 PROCESS OF RECOVERY OF DEBTS IN INDIA

Indian legal system encompasses varied legal provisions for recovery of debts by the banks and financial institutions as follows:

- Summary Suits Order XXXVII of the Code of Civil Procedure
- Ordinary Suits for Recovery

- Debt Recovery Tribunal recovery applications filed by banks and financial institutions for debt not less than Rs.10 lakhs.

- Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Securitization Act). In case any bank has charge over specific movable / immovable properties, not being exempt properties under Section 31 of the Act, and where the amount to be recovered is not less Rs.1,00,000/-, the Secured Creditor can enforce the security without intervention of Court. The most expeditious and effective mode of recovery for a Secured Creditor in India.

- Arbitration proceedings for recovery of outstanding amount as under the Arbitration agreement/ clause in the loan documents, in cases where the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) is not applicable.

- Criminal action may also be initiated for prosecution and punishment as per the Indian Penal Code and other laws where debt is also tainted with fraud, cheating, misfeasance etc. in addition to civil proceedings

- Filing of criminal complaint under Section 138 of the Negotiable Instruments Act, 1881 (NI Act) for dishonour of any cheque issued by borrower to the bank in discharge of legally enforceable liability can also be considered to pressurize the borrowers / guarantors to pay the dues of the bank.

- Section 391 of the Companies Act allows a company and its creditors or members, or any class of them, to enter into a ‘compromise’ or a scheme of arrangement under the direction of the courts. Such a compromise or arrangement requires sanction of the court, which directs holding of meeting of creditors or members or class of creditors or members, as the case may be. On agreement of creditors or members present in majority representing three-fourth in value (both the conditions are concurrent and cumulative) of creditors or members, the court may sanction any such compromise or arrangement.

Broad classification of the Debt Work Out Process in India

Amount to be recovered	Procedure
Does not exceed Rs.1,00,000/-	I) Filing simple suit for recovery before Civil Court; II) Filing of summary suit under Order XXXVII of CPC, 1908 III) Filing mortgage suit for foreclosure of mortgage; & IV) Arbitration proceedings if Arbitration Agreement exists.
Exceeds Rs.1,00,000 but does not exceed Rs.10,00,000	In addition to above, in case the security interest has been created in specific movable / immovable property provisions of the Securitization Act may be invoked to re-possess the mortgaged property, without intervention of the Court, and sell the same.
Exceeds Rs.10,00,000	Original Application is to be filed before the DRT for recovery of dues. Civil Court / Arbitrator will not have jurisdiction to entertain such claim.

15.0 INSTITUTIONAL MACHINERY

Insolvency jurisdiction is a special jurisdiction. It is essentially civil in nature and there are separate insolvency courts. The District Courts under the Provincial Insolvency Act have jurisdiction to hear insolvency petitions. The High Court where the High Court has original jurisdiction has got insolvency jurisdiction. The High Court in certain presidency towns like Bombay, Calcutta and Chennai have got the insolvency jurisdiction under the Presidency Towns Insolvency Act. The High Courts of Bombay, Calcutta and Chennai under its original side jurisdiction have specific rules made for determining insolvency matters. The District Court Rules under the Provincial Insolvency Act, therefore, stipulate the rules to be adopted for insolvency proceedings. There are no pecuniary jurisdiction limitations on the District Court under the Provincial Insolvency Acts or on the High Courts of Mumbai, Calcutta and Chennai under the Presidency Town Insolvency Act.

The administrative and judicial machinery with regard to Corporate Insolvency and Restructuring are the High Courts, Ministry of Corporate Affairs, Registrar of Companies, Official Liquidators, Company Law Board, Debt Recovery Tribunal (DRT) and Board for Industrial and Financial Reconstruction (BIFR).

1) **Ministry of Corporate Affairs**

   The Ministry is primarily concerned with administration of the Companies Act, 1956, other allied Acts and rules & regulations framed there-under mainly for regulating the functioning of the corporate sector in accordance with law. The Ministry is also responsible for administering the Competition Act, 2002 which will eventually replace the Monopolies and Restrictive Trade Practices Act, 1969 under which the Monopolies and Restrictive Trade Practices Commission (MRTPC) is functioning. Besides, it exercises supervision over the three professional bodies, namely, Institute of Chartered Accountants of India (ICAI), Institute of Company Secretaries of India (ICSI) and the Institute of Cost and Works Accountants of India (ICWAI) which are constituted under three separate Acts of the Parliament for proper and orderly growth of the professions concerned. The Ministry also has the responsibility of carrying out the functions of the Central Government relating to administration of Partnership Act, 1932, the Companies (Donations to National Funds) Act, 1951 and Societies Registration Act, 1980.

2) **High Court**

High Court is the Court of jurisdiction for handling winding up proceedings under the Companies Act, 1956. The winding up proceedings is administered by the Official liquidator under the supervision of the respective High Court.

3) Official Liquidator

The Official Liquidator is the officer appointed by the Central Government under section 448 of the Companies Act, 1956 for the purpose of administering the winding up proceedings. Sections 448 to 463 of the Companies act, 1956 deals with the overall role of official liquidators in winding up proceedings.

Functionally the Official Liquidator is under the supervision and control of the High Court but administratively is under the control of the Central Government through the Regional Director, Ministry of Company Affairs.

The liquidation proceedings are carried on as per the provisions of Companies Act, 1956 and Companies (Court) Rules, 1959, Companies (Official Liquidator's Accounts) Rules, 1965 and other applicable enactments under the overall supervision, direction, orders and control of the Honorable High Courts.

The Primary function of the Official liquidator is to administrate the assets of companies under liquidation, sale of the assets and realization of all debts of companies in liquidation for the purpose of distributing the same among the various creditors and other shareholders of the companies and to finally dissolve such companies after the affairs are completely concluded. When a company is put to winding up by an order of the High Court, the Official Liquidator attached to the said High Court takes possession of the company’s assets, books of accounts, etc. and liquidates the company as per the further orders of the High Court. The procedure of liquidation is prescribed under the Companies (Court) Rules, 1959.

The powers of the Liquidator in winding up are:

A. In compulsory winding up of a company –

As per section 457(1) of the Companies Act 1956, the liquidator has the following powers with the sanction of court:

- To institute and defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;
- to carry on the business of the company;
- to sell the immovable and movable property and actionable claims of the company by public auction or private contract;
- to raise on the security of assets of the company any money requisite;
- to do all such acts necessary for winding up the affairs of the company and distributing its assets.

As per section 457(2) of the companies act 1956, the liquidator has the following powers without obtaining the sanction of court:

- To do all acts and to execute all deeds, receipts and documents in the name and on behalf of company and to use common seal of the company for that purpose;
- to inspect the records and returns of company;
- to prove, rank and claim in the insolvency of any company;
- to draw, accept, make and endorse any negotiable instruments in the name and on behalf of the company;
- to appoint an agent to do any business which the liquidator is unable to do himself.

B. In winding up subject to the supervision of the Court -

As per section 546 of the Companies act, 1956, the liquidator has the following powers with the sanction of court:

- To pay any classes of creditors in full;
- to make any compromise or arrangement with the creditors to have any claim ascertained;

- to compromise any call, debt or liability.

C. In voluntary winding up of a company -

   Voluntary liquidator may exercise the following powers with the sanction of special resolution in the case of members' voluntary winding up; with the sanction of court or committee of inspection in the case of creditors' voluntary winding up; with the sanction of creditors if there is no such committee:

   - To institute and defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;
   - to carry on the business of the company;
   - to sell the immovable and movable property and actionable claims of the company by public auction or private contract;
   - to raise on the security of assets of the company any money requisite.

The following powers can be exercised by the liquidator without any sanction:

- to do all acts and to execute all deeds ,receipts and documents in the name and on behalf of company and to use common seal of the company for that purpose;
- to inspect the records and returns of company;
- to prove, rank and claim in the insolvency of any company;
- to draw, accept, make and endorse any negotiable instruments in the name and on behalf of the company;
- to appoint an agent to do any business which the liquidator is unable to do himself;
- to exercise the power of court of settling the list of contributories;
- to exercise the power of court of making calls;

- to pay debts of company and adjust the rights of contributories among themselves

4) Registrar of Companies

Registrar of Companies (ROC) appointed under Section 609 of the Companies Act covering the various States and Union Territories are vested with the primary duty of registering companies floated in the respective states and the Union Territories and ensuring that such companies comply with statutory requirements under the Act. These offices function as registry of records, relating to the companies registered with them, which are available for inspection by members of public on payment of the prescribed fee. The Central Government exercises administrative control over these offices through the respective Regional Directors.

5) Debt Recovery Tribunal (DRT)

The Debts Recovery Tribunals have been established by the Government of India under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for expeditious adjudication and recovery of debts due to banks and financial institutions. The Debts Recovery Tribunal is also the appellate authority for appeals filed against the proceedings initiated by secured creditors under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

To keep in line with the international trends on helping financial institutions recover their bad Debts quickly and efficiently, the Government of India has constituted thirty three Debt Recovery Tribunals and five Debt Recovery Appellate Tribunals across the country.

The Debt Recovery Tribunals are governed by provisions of the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, also known as the RDB Act. The Debts Recovery Tribunals (DRT) can hear claims of Banks only if the amount claimed is Rupees Ten lakhs and above.

Each Debt Recovery Tribunal is presided over by a Presiding Officer. The Presiding Officer is generally a judge of the rank of Dist. & Sessions Judge. A Presiding Officer of a Debt Recovery Tribunal is assisted by a number of officers of other ranks, but none of them need necessarily have a judicial back ground. Therefore, the Presiding Officer of a Debt Recovery Tribunal is the sole judicial authority to hear and pass any judicial order.

Each Debt Recovery Tribunal has two Recovery Officers. The work amongst the Recovery Officers is allocated by the Presiding Officer. Though a Recovery Officer need not be a judicial Officer, but the orders passed by a Recovery Officer are judicial in nature, and are appealable before the Presiding Officer of the Tribunal.

The Debt Recovery Tribunal can appoint Receivers, Commissioners, pass ex-parte orders, ad-interim orders, interim orders apart from powers to Review its own decision and hear appeals against orders passed by the Recovery Officers of the Tribunal.

6) **Board for Industrial and Financial Reconstruction (BIFR)**

The Government of India, in order to tackle the problem of industrial sickness, has set up a Board for Industrial and Financial Reconstruction (BIFR), under the purview of Sick Industrial Companies (Special Provisions) Act,1985 (SICA). It has been established as a quasi-judicial body in the Department of Economic Affairs, Ministry of Finance, for revival and rehabilitation of potentially sick undertakings and for closure/liquidation of non-viable and sick industrial companies. This Body was set up in January 1987 and became functional with effect from 15th May 1987.

The appellate authority to hear appeals against the orders of the BIFR is the Appellate Authority for Industrial and Financial Reconstruction (AAIFR). This authority was constituted in April 1987.

16.0 PROFESSIONAL OPPORTUNITIES IN CORPORATE INSOLVENCY AND RESTRUCTURING

Just like a person requires treatment to treat his disease, a sick company also requires some form of treatment to overcome its problem of debts. This treatment may be in the form of restructuring of a company.

Restructuring is the corporate management term for the act of reorganizing the legal, ownership, operational, or other structures of a company for the purpose of making it more profitable, or better organized for its present needs. Alternate reasons for restructuring include a change of ownership or ownership structure, demerger, or a response to a crisis or major change in the business such as bankruptcy, repositioning, or buyout. Restructuring may also be described as corporate restructuring, debt restructuring and financial restructuring.

There are a broad range of opportunities that arise from corporate insolvency and financial restructurings.

1. Spotting and evaluating distressed companies for restructuring and rescue planning.
2. Reviewing the various risks involved in restructuring.
3. Developing risk mitigation strategies.
4. Working out a detailed bankable financial structure of the business.
5. Working out a detailed plan for restructuring the business from all angles.
6. Assessment of distressed assets, cash position, due diligence and turnaround feasibility.
7. Advice on optimum utilization of resources.
8. Drafting insolvency petitions.
9. Representation and registration of sick companies with BIFR.
10. Representation before the Debt Recovery Tribunals.
11. Negotiating settlements.
12. Identifying Areas Of Opportunity for the company.
13. Advisory in relation to a merger or acquisition or takeover.
14. Advisory services to management on an ongoing basis.

17.0 INSOLVENCY REGULATORS AND ASSOCIATIONS

International Association of Insolvency Regulators (IAIR)

www.insolvencyreg.org

The International Association of Insolvency Regulators (IAIR) is an international body that brings together the collective experiences and expertise of government insolvency regulators from jurisdictions around the world.

Insolvency Regulators refer to government and public organizations with insolvency functions. Insolvency Regulation encompasses the regulation of private sector insolvency administrators and oversight of insolvencies administered by these administrators.

The idea of IAIR as a formal body arose from a meeting of government insolvency regulators arranged by the Insolvency & Trustee Service, Australia alongside a World Congress of INSOL International held in Melbourne, Australia in March 1993. IAIR was formally established at a meeting in Hong Kong in November 1995 and attended by representatives from Australia, Hong Kong, India, Jersey, Malaysia, New Zealand, Singapore, United Kingdom and United States of America. This core group became the founding members of IAIR.

Members recognized that effective and efficient procedures for dealing with financial failure are essential for maintaining confidence in financial markets, encouraging enterprise, underpinning investment and economic growth and supporting business and consumer credit; and that, increasingly, insolvencies extend beyond national jurisdictions through the continuing development of international trade and finance. IAIR aims to promote liaison and co-operation and provides a forum for discussion amongst insolvency regulators. The Association thereby contributes to a wider understanding of insolvency issues, procedures and practices and the development of approaches that reflect the different legal, socio-economic, historical, cultural and institutional frameworks of the countries from which members come.
The IAIR Secretariat is situated at Canberra, Australia.

INSOL International - International Association of Restructuring, Insolvency & Bankruptcy Professionals

www.insol.org

INSOL International is a world-wide federation of national associations for accountants and lawyers who specialize in turnaround and insolvency. There are currently 40 Member Associations world-wide with over 9,700 professionals participating as Members of INSOL International.

INSOL with its Member Associations will take the leadership role in international turnaround, insolvency and related credit issues; facilitate the exchange of information and ideas, encourage greater international co-operation and communication amongst the insolvency profession, credit community and related constituencies.

The office of INSOL International is situated at London, UK.

INSOL India

http://www.insolindia.com

INSOL India is an association of the members of the legal fraternity, chartered accountants, company secretaries and other persons, bodies and institutions, desirous of the development, diffusion and advancement of law relating to insolvency and related laws and to provide a forum for national and international participation, debate and awareness in the field of law and policy. INSOL India conducts research, holds seminars, conferences, workshops and discussions for development and growth of the law relating to insolvency and related laws in India and undertakes comparative studies of legal developments in other countries in cooperation with persons, bodies and institutions in different parts of the world.

The Association was formed on September, 27, 1997 under the guidance of Mr. Justice D. P. Wadhwa, then sitting Judge, Supreme Court of India with Mr. Justice Manmohan Sarin elected as first President of the Executive Committee of INSOL India.

The main objects of the Association which is a non-political, non-trading and non-governmental association are:

1. To bring together the members of the legal fraternity in various disciplines of law in India and outside India for closer co-operation, development, understanding and promotion of law, more particularly, law relating to insolvency and related laws;
2. To promote studies, diffusion and advancement of international and comparative law.
3. To act as a forum for the promotion of national participation, debate and awareness in the filed of law and policy.
4. To conduct research, hold seminars and discussions, develop and maintain a library, collect documents relating to the growth and development of laws in India and to undertake comparative studies of legal developments in other countries of the world.
5. To hold workshops, seminars, conferences, discussion and meetings on the subjects relating to jurisprudence and legal practice.
6. To develop contacts and cooperate with various other institutions in different parts of the world.
7. To develop, promote and assist professional bodies and groups involved in the practice of law, administration of Justice and legal education.
8. To undertake any work and to engage in any activity as may be necessary for the purpose of implementation of the objects hereinabove and any other objects that INSOL India may adopt.
9. To use and develop law as a source and an instrument towards social change for development as well as building co-operation among the people.

Global Insolvency

GLOBAL Insolvency is a joint project of the American Bankruptcy Institute and INSOL International. It serves as a comprehensive source of information both on current issues in international insolvency and restructuring law and on the legal framework for insolvency and restructuring around the world. From current commentary and recent filings to international protocols and bankruptcy statutes to advice on cross-border lending, it offers a wide range of information for insolvency practitioners, judges, accountants, trustees and others.

With 10,300 members, the American Bankruptcy Institute is the largest American multi-disciplinary, non-partisan organization dedicated to research and education on matters related to insolvency. It is also the leading American provider of bankruptcy educational programs, produces numerous publications and testifies before Congress. INSOL International is a world-wide federation of national associations for accountants and lawyers who specializes in turnaround and insolvency. There are currently 32 Member Associations world-wide with over 7,700 professionals participating as members of INSOL International.

Global Insolvency Law Database (GILD)

GILD, the Global Insolvency Law Database, is a resource dedicated to all aspects of credit and debt, including debtor and creditor rights, the creation and enforcement of security interests, corporate restructuring, bankruptcy, reorganization and liquidation. At the heart of the World Bank's Insolvency Initiative, GILD is designed to promote understanding and awareness of best practices by presenting information on the latest developments and systems adopted or proposed in countries and regions throughout the world. GILD contains reports on cutting edge innovations, the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, explanatory overviews by experts in the field, and excerpts from relevant legislation.

18.0 Glossary

1. "**Acquisition**" **–** Purchase of controlling interest in a firm, generally through tender offer for the target shares.

2. "**Asset/Liability Risk**" **–** A risk that current obligations/liabilities cannot be met with current assets. A fundamental risk in all organisations, which should manage the risk and maintain liquidity or become insolvent.

3. “**Assets**” are things that one owns which have value in financial terms.

4. “**Asset / Liability Management**” involves a set of techniques to creat value and manage risks in a bank.

5. “**Attachment**” means the property has been taken in judicial custody and cannot be sold or dealt with by the owner. Attachment usually arises by operation of law or by order of a judicial authority.

6. “**Bankruptcy**” is a condition in which a firm (or individual) is unable to meet its (his) obligations and, hence, its (his) assets are surrendered to a court for administration.

7. “**Body Corporate**” or “**corporation**” includes a company incorporated outside India but does not include –

   (a) Corporation sole;

   (b) A co-operative society registered under any law relating to co-operative societies; and

   (c) Any other body corporate (not being a company as defined in this Act, which the Central Government may by notification in the Official Gazette, specify in this behalf. (Sec.2(7) of Companies Act, 1956)

8. “**Company**” means a company formed and registered under this Act or an existing company as defined in clause (ii). (Sec.3(1)(i) of Companies Act, 1956)

9. “**Credit Risk**” is the risk of loss from failure of the counterparty to perform as agreed.

10. "**Creditor**" includes a decree-holder. (Sec.2(a) of Provincial Insolvency Act, 1920)

11. “**Creditworthiness**” is a creditor’s measure of a consumer’s or company’s past and future ability and willingness to repay debts.

12. “**Current assets**” are short terms assets, constantly changing in value, such as stocks, debtors and bank balances.

13. “**Current liabilities**” are short term liabilities, due to be paid in less than one year, such as bank overdrafts, money owed to suppliers and employees.

14. "**Debt**" includes a judgment-debt. (Sec.2(a) of Provincial Insolvency Act, 1920)

15. "**Debtor**" includes a judgment-debtor. (Sec.2(a) of Provincial Insolvency Act, 1920)

16. “**Default**” is generally referred to failure to satisfy an obligation when due

17. “**Foreclosure**” is the proceeding, by a creditor, to regain property or other collateral following a default on mortgage payments.

18. “**Insolvency**” is the state of one who has no property sufficient for the full payment of his debts. (Law Lexicon)

19. “**Liquidate**” means winding up the affairs of the company by ascertaining liabilities and apportioning assets. (Concise Oxford English Dictionary)

20. “**Mortgage**” is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. (Sec.58 of Transfer of Property Act, 1882)

21. "**Property**" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. (Sec.2(d) of Provincial Insolvency Act, 1920)

22. "**Secured creditor**" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor. (Sec.2(e) of Provincial Insolvency Act, 1920)