CHAPTER 8

REFORMS BROUGHT IN THE INSOLVENCY REGIME OF INDIA
CHAPTER-8

REFORMS BROUGHT IN THE INSOLVENCY REGIME OF INDIA

This chapter shall deal with:

- Reforms suggested by the Eradi Committee
- Benefits of NCLT
- Reforms brought under the new Companies Act, 2013
- Reforms brought under IBC, 2016
- Incorporating UNCITRAL model on cross-border insolvency in India
- E-governance in Company Regulation

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REFORMS SUGGESTED BY ERADI COMMITTEE

In my previous chapters I have already dealt with the reforms suggested by the Eradi Committee. Here I shall briefly mention them.

- Repeal of SICA
- To set up a National Tribunal for revival of Companies and winding-up of companies. The jurisdiction and powers presently exercised by Company Law Board under the Companies Act, 1956 in future shall be exercised by the proposed Tribunal.
- National Tribunal to be entrusted with the same power and jurisdiction to order the winding-up of companies as presently conferred on the High Court under Part VII of the Companies Act, 1956 (Sections 436 - 559). Once the said powers and jurisdiction are transferred to the National Tribunal, the High Court will cease to have jurisdiction in those matters.

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599 Supra n.145
600 Eradi committee Report of High Level Committee on Law Relating to Insolvency and Winding Up of Companies; Available at: <http://reports.mca.gov.in/Reports/24-Eradi%20committee%20report%20on%20law%20relating%20to%20insolvency%20and%20winding%20up%20of%20Companies,%202000.pdf> accessed on 24th November 2016
601 Ibid.
THE BENEFITS OF NCLT

It was on June 01, 2016, that the Ministry of Corporate Affairs (MCA) published a notification relating to the formation of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) with effect from the June 01, 2016. The formation of the NCLT and NCLAT are in exercise of the powers which is granted by Sections 408 and 410 respectively of the Companies Act, 2013. The National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) will be formed as specialized Quasi Judicial Bodies which will have professional approach, and will have the following advantageous effects:

- NCLT can be called as a jumbo Tribunal for the reason that it will merge the corporate jurisdiction of the followings adjudicating bodies:

  1. Company Law Board
  3. The Appellate Authority for Industrial and Financial Reconstruction
  4. Jurisdiction and powers relating to winding up restructuring and other such provisions, vested in the High Courts.

- The formation of NCLT will help in reducing backlog of winding up cases and cut down the period of winding-up process.
- With the creation of the NCLT and NCLAT, the Company Law Board under the Companies Act, 1956 and BIFR would be dissolved. As a result of their establishment, the multiplicity of litigation filed before various courts or quasi-judicial bodies or forums can be avoided.

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603 Ibid.
605 Supra n.602
The Speedy disposal of cases will save time, energy and money of the parties concerned. Therefore, undue hardships will be reduced if not completely eradicated.

NCLT will reduce burden on the High Court. Also, appeal from NCLAT will lie to the Supreme Court being the apex authority and not the High Court.

The government attempted to include these recommendations in the Companies Amendment Act, 2002, but the same has not been notified. However the New Companies Act 2013 includes almost all the recommendations of Eradi Committee.

REFORMS BROUGHT BY THE COMPANIES ACT, 2013

In my previous chapters I have already dealt with the various provisions of the Companies Act, 2013, which have been introduced which are likely to make the liquidation process more fast, efficient and less rigid. These provisions of the Companies Act 2013 are preventive in nature as they will make the management of the company transparent and accountable and thus may prevent the company from becoming sick and getting pushed into liquidation.

Here I shall briefly mention them.

CORPORATE SOCIAL RESPONSIBILITY

India has become the first country in the world to make CSR a statutory requirement by mandating specified companies to spend at least two percent of its average net profits made in the preceding three financial years on government approved categories of CSR. This move is expected to go a long way in improving the social welfare of the country and is heralded as a significant corporate governance move. The Companies Act 1956, did not mandate a corporate entity to spend on Corporate Social Responsibility activities and consequently, there was no need to form a Corporate Social Responsibility Committee. The 2013 Act provides that every company having net worth Rs. 500 crore or more, or a turnover of Rs. 1000 crore or more or a net profit of rupees five crore or more during any financial year should constitute a Corporate Social Responsibility Committee of the Board, which shall consist of at least three directors (one of which should be an independent director) that would

http://taxguru.in/company-law/national-company-law-tribunal.html#sthash.gSfMvFL0.dpuf

Companies Act, 2013 available at mca.gov.in

Section 135 of Companies Act, 2013
devise, recommend, and monitor CSR activities, and the amounts spent on such activities, to the rest of the board. The committee shall prepare a report detain the CSR activities undertaken and if not, the reasons for failure to comply.

CLASS ACTION SUIT

Though there were provisions for oppression and mismanagement, there is no express recognition of class action suits in Companies Act, 1956. Indian corporate laws were not equipped to deal with the aftermath of scandals i.e. compensating the aggrieved investors. However, Clause 245 of the Companies Act, 2013 expressly provides for class action suits and Clause 125 provides for re-imbursement of expenses incurred in class action suits from the Investor Education and Protection Fund. Class action suits, allow a requisite number of members or depositors with common interest, in a matter, to file an application in the National Company Law Tribunal (‘NCLT’) against the company or its management or its auditors or a section of its shareholders for damages or compensation if they are of the view that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to their interest. This will empower minority shareholders and protect their interests. However, to prevent misuse of this provision would be a challenge.

MAKING INSTALLATION OF WHISTLEBLOWER MECHANISM COMPULSORY

Till date, the Companies Act, 1956 contained no guidelines for protection of whistleblowers. Looking at the growing number of scams in the country and international legislations in place, it is imperative that India also has a well laid out whistleblower mechanism in place. The 2013 Act fills this gap and provides every listed company or such class or classes of companies, as may be prescribed, shall establish a vigil mechanism for directors and employees to report about the authentic concerns in such fashion as may be prescribed. This vigil device will lend a helping hand in providing sufficient safeguards against oppression and victimization of persons who use such method and make provision for direct access to the chairperson of the Audit Committee in extraordinary cases.

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609 Sec 177 (9) of the Companies Act, 2013
E-GOVERNANCE INITIATIVES

In order to ensure good governance and participation of all shareholders in voting matters, the 2013 Act specifically recognises electronic voting by members. Participation in Board meeting through video conferencing has been recognised. The e-governance has provided registration of companies on-line, maintenance of documents of companies in electronic form and allows inspection of documents of companies on the net which has made the entire process faster and compatible.

SFIO

Statutory recognition was granted to SFIO the moment, the new Companies Act, 2013 was enacted. In the new Companies Act, 2013, powers such as treating the investigation reports filed by SFIO officers as a report filed by a Police Officer, powers to issue letter of requests in cases involving companies having business / interests outside the country, powers to arrest the suspected etc. are provided. The Companies Act 1956 did not have any provision relating to investigation/collection of evidence in such cases where the transactions and persons were based outside India. Other investigating agencies like CBI and Enforcement Directorate have got these powers. Wherever required, the matters of international ramifications were referred to CBI and / or Enforcement Directorate and both these agencies were looking into the issue of defaulting companies abroad.

CLEAR DEFINITION OF FRAUD AND STRINGENT PUNISHMENT

Before the new Companies Act, 2013 came into existence; fraud was largely regarded as a broad legal concept. The term is not new; the old Act already provides punishment for fraud in various sections but the new Act has come with more specific and clear provisions relating to fraud and fraud reporting. The scope and coverage of fraud is very wide within the new Companies Act, and unlike Companies Act, 1956 the Companies Act, 2013 provides similar punishment for all type of frauds. The clear definition of fraud and stringent punishment as provided under Companies Act 2013, will help in improving corporate governance, protecting the interest of minority shareholders and making it difficult for companies to hide illegal transactions or commit fraud. Considering the large number of corporate frauds that are emerging in India today, the old Act was surely inadequate in dealing with this grave

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610 The Fraud provisionisin force w.e.f. 12th September, 2013 and Fraud Reporting provisions are brought in force w.e.f. 01st April, 2014 under the Companies Act, 2013.
situation. Hence, it is believed that the new provisions of the Companies Act, 2013 would bridge the gap between increasing corporate frauds and the statutory regime. The new Act is the welcome improvement if the same is implemented appropriately.

Therefore we can say the new Companies Act, 2013 is landmark legislation by the government. Many of its provisions like corporate social responsibility, One Person Company, whistle blower, class action suit, rotation of auditors, SFIO etc, will have wide implications and bring in greater transparency and accountability in the working of the company and at the same time, minimise the incidents of corporate frauds. It is required by the new regime that the Companies and stakeholders should start evaluating their position vis-à-vis and make strategies accordingly. The Act is progressive in nature and is at par with the best international practices. However, the effectiveness of this legislation, like all other, will depend on its implementation. The Ministry of Corporate Affairs should issue circulars and clarifications to ensure smooth implementation of the provisions. The true value of Corporate Governance lies beyond compliance and so the law should be followed not just in letter but in spirit for its proper execution.

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REVOLUTIONARY REFORMS BROUGHT BY INSOLVENCY AND BANKRUPTCY CODE, 2016

The Insolvency and Bankruptcy Code 2016, is expected to address the problem of dealing with multiple laws for anyone wanting to do business in India. The present government has realised that the ease of doing business is not only about convenient entry into the market but also providing easy exit and restricting debt. In my previous chapters I have already extensively analysed the Insolvency and Bankruptcy Code, 2016, which is a revolutionary piece of legislature. Here I shall briefly mention the reforms brought by this Code.

- The Insolvency and Bankruptcy Code, 20I6, is one of the most progressive, dynamic, radical and modern-day statutes in contemporary times. This Code will be gladly received by creditors, investors and debtors alike. The distinctive features of the Code being streamlining of procedures, simplification of the insolvency process and fast-tracking of recovery will provide a form which is likely to result in an affirmative effect on India’s lending climate. The Insolvency and Bankruptcy Code, 20I6, assures to bring about far-reaching reforms with creditor insolvency resolution as its pivot. The Code intends to achieve early recognition of financial failure and making the most of the asset value of insolvent companies.

- The new code will replace existing bankruptcy laws and cover individuals, companies, limited liability partnerships and partnership firms. It will bring about an array of reforms in the insolvency regime in India and would become the overarching legislation to deal with corporate insolvency. It will also assist creditors recover loans faster. So there will be faster recovery of debts. Presently, it takes more than four years to resolve a case of bankruptcy in India, according to the World Bank. The code seeks to reduce this time to less than a year. The Code prescribes the time limit for procedures at every stage to ensure a result in 180 days. It also has provisions for force majeure and one time extension of 90 days in certain circumstances. There is also a fast track option with a 90-day limit and a single extension of 45 days if needed. Today, it’s not only important to have a law to ensure repayment of debt but also to ensure timely repayment.
The Code has suggested the creation of a new class of insolvency professionals that will specialize in helping sick companies. It also provides for creation of information utilities that will collate all information about debtors to prevent serial defaulters from misusing the system. The Code proposes to set up the Insolvency and Bankruptcy Board of India (IBBI) to act as a regulator of these utilities and professionals.\textsuperscript{612}

- It also proposes to use the existing infrastructure of National Company Law Tribunals (NCLT) and Debt Recovery Tribunals (DRT) to address corporate insolvency and individual insolvency, respectively.

- One of the unique features of the Code is to establish an information utility for collection of all authentic information at one place. It is a new concept in India that will facilitate one to check the information before investing. It will consequently ensure one’s investment is secured. The function of the Information utility will be to gather, assemble, accumulate, validate and disseminate financial information in order to facilitate insolvency, liquidation & bankruptcy.\textsuperscript{613}

- The Insolvency and Bankruptcy Code 2016, has the mechanism to address ‘cross-border insolvency’ by means of entering into ‘bilateral agreements’ with other nations. It also has provisions that will help in completing the insolvency resolution process in a time bound manner.

- The period within which the bankruptcy applications could be filed will now be reduced from six months to three months.

- In order to protect workers’ interests, the code has provisions to ensure that the workers’ salaries for up to 24 months will get first priority in case of liquidation of assets of a company, ahead of secured creditors.

\textsuperscript{612} REPORT OF THE JOINT COMMITTEE ON THE INSOLVENCY AND BANKRUPTCY CODE, 2015 (sixteenth lok sabha); Available at:\textsuperscript{613} \url{http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf} accessed on 19\textsuperscript{th} October,2016

BETTER WORKING OF COMPANY LAW THROUGH E-GOVERNANCE

In this age of well-developed information technology and telecommunications, the Electronic Governance of all business-related activities, administrative activities, and managerial functions of the corporate world, can certainly be very convenient, efficient, transparent, and fully accountable and responsible. Therefore, undoubtedly, e-governance in the corporate sector is a crucial and vital requirement in every nation of the world and without doubt India as well. In the present scenario of cutthroat corporate competition, e-governance should be an essential part of Indian economy as it would help in achieving greater transparency and accountability in the corporate sector. E-governance is absolutely necessary and valuable for the fast progressing and highly influential Indian economy.

THE MCA-21 Initiative of the Ministry of Company Affairs facilitating e-filing of documents under Indian Company Law is commendable in many ways. First, this is perhaps the first time a government in independent India has moved swiftly to put in place a mechanism that is imaginative, technologically savvy and stakeholder friendly. In a record time of 60 weeks, the MCA-21 Initiative has gone live. Second, there is a good public-private partnership between the Ministry and Tata Consultancy Services (TCS) whereby the latter will man the front offices of all Registrar of Companies (ROC) offices throughout the country enabling easy stabilisation of e-filing of documents under company law. And lastly, on the payment of prescribed fees, inspection of any document related to a company which is allowed under company law can now be done online from anywhere.

This initiative was the launch pad to deliver round about hundred services to citizens electronically extending over the whole Companies Act of 1956. These services are provided in easy, uncomplicated, effortless and protected manner through (Ministry of Corporate Affairs) MCA portal. The leading portal under the Government of India to use the Digital Identity of the users is ‘MCA 21’. It is this project which is the first successful Mission Mode Project under the National e-Governance Plan and has received the Prime Minister’s Award for outstanding performance in Public Administration.614

614 [http://www.gktoday.in/what-is-mca21/](http://www.gktoday.in/what-is-mca21/) accessed on 21st may, 2017
ROLE FOR E-GOVERNANCE

A major factor for the absence of transparency, accountability and effectiveness in company law administration in India is corruption in RoC offices and in the central bureaucracy in charge of company law. While e-filing will reduce public interface with RoC offices thereby minimising the scope for corruption, unless comprehensive e-governance embracing all aspects of company law administration is introduced, rule of law for the corporate sector will remain a distant dream. MCA-21 should be used imaginatively as a stepping stone for total e-governance. While e-filing of mortgages is possible today, it should be possible to secure a certificate of registration of mortgages through e-filing with a marginal change in the law. The approvals under the company law should be available through e-filing in one or two months. Wherever approvals are delayed or denied, clear reasons for the same should be posted on the ministry website. The plea of confidentiality to deny such information should be made very rarely. These are some instances to demonstrate the extent of reducing corruption through e-governance and making administration of company more transparent, accountable and efficacious.

E-governance in the office of ROCs

E-Governance consists of the application of e-enabled facility and strength in the government functioning in mass-contact with the subjects more economically, transparently and efficiently through improved delivery of its services in a cost effective manner in an automated system. Various governments abroad have put in place e-Service Delivery systems for the benefit of their subjects in various segments, including the corporate segment.615

The Ministry of Corporate Affairs (MCA), in 2006, through MCA-21 Project, as a major e-governance initiative declared in the interest of the key stakeholders of the companies, that all the documents to be filed with ROC shall be through e-filing. The major benefits of this project are as follows.616

- Incorporation of companies on-line
- Simplified and easy mode of Forms/Returns

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616 Ibid.
- Registration as well as verification of charges anytime and from anywhere
- Inspection of public documents of companies anytime and from anywhere
- Enhanced service level fulfillment and customer relationship building
- Total transparency through e-governance.

MCA-21 consists of two phases. The first phase covering the Ministry of Corporate Affairs Headquarters, the Regional Directors and all the ROCs, while the second phase to be taken up later would cover the OL, CLB/tribunals/courts etc. in the first phase all the documents have been e-formatted and filed online. All the existing forms set out pursuant to rule 3 in Annexure A to the companies central Rules and Forms, 1956, have been revised and re-engineered to be computer compatible, with a few more forms added to cover statutory documents figuring under the various schedules of the Act to be e-filed as attachments, to make up 65 e-forms, with the addition of instructions to fill each one of them, and posted on the website. 617

The documents taken on record by the ROC come into public domain under MCA-21 instantly, and online inspection and obtaining copies of the same, against payment of prescribed fee, is facilitated to be fast and easy.

**Scheme for improving the functioning of the office of OLs and extension of e-governance to the process of liquidation** 618

In India, liquidation and winding up of companies, takes place under the Companies Act, 1956 which provides for detailed statutory requirements and procedures to be followed in case of winding up and liquidation of companies. This process takes place under the supervision and direction of the High Courts and constitutes the substantive element of the insolvency process with regard to the companies. Some other aspects relating to the insolvency process affecting companies take place under different Acts and before different fora for example SICA1985, BIFR. None the less, the statutory framework under the companies Act provides the major component of ‘the exit route’ to be adopted by the companies after closing down, by addressing the concerns of all stakeholders. 619

Following are some of the reasons which adversely affect the exit route of companies and lead to delay and low recovery rates in winding up/closure of business :-

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618 Ibid
619 Indian Institute of Corporate Affairs, Corporate Insolvency and Liquidation, Module VII, (2010). pp-449-483
Multiplicity of legislations and adjudicating for rehabilitation, Recovery of debts, asset reconstruction, liquidation and winding up etc.

The rehabilitation process under SICA 1985 which often precedes liquidation and winding up of a company is a time consuming process resulting in loss of value of business and its assets.

The provisions of the Companies Act, 1956 in respect of winding up of companies do not provide for time bound actions in respect of winding up/closure of business.

The High Courts being already flooded court cases of various types sometimes find it difficult to devote adequate time and attention to insolvency processes. There is also a constraint in availability of judges.

There are no specialized courts for dealing with the matters relating to companies hence the process takes longer time.

Inadequate administrative and infrastructural support available with various OLs who are functioning under the direction and control of, various High Courts for the purpose of liquidation of companies also is another reason for slow pace of winding up in India.620

The liquidation process conducted by the official Liquidator may be summarized as follows:621

a. Taking possession of the assets of the company under liquidation by the OL;
b. Taking over possession of the assets of the company, administration and guardianship of the same;
c. Invitation and filing of claims from the creditors and employees.
d. Filing of claims against the debtors for the realization of the debts due to the company;
e. Disposal by sale of movable and immovable assets of the company;
f. Adjudication of claims and determining the method of settlement of creditors and employees
g. Institution of criminal complaints and misfeasance proceedings against the former directors of the company for their acts and omissions and /or breach of trust where warranted;
h. Payment to the creditors in settlement of their claims as per statutory priority of claims;

620 Indian Institute of Corporate Affairs, Corporate Insolvency and Liquidation, Module VII, (2010).pp-449-483
621 Ibid.
i. Settlement to contributories wherever necessary and payment of return of capital where the company’s asset exceeding its liability.

j. Carrying out all filings and making submissions to the courts and to the ROCs office as may be necessary

k. Dissolution of the company under section 481 of the Companies Act, 1956

The total number of cases of liquidation of the companies in the country is estimated to be above 6000. Even a small sized OL office handles a few hundred cases of liquidation. Given the nature of process of liquidation and winding up of companies, the legislative, administrative and e-governance aspects of the process need to be relooked at in a comprehensive manner. Piecemeal measures are likely to deliver the desired results.\textsuperscript{622}

The issue of addressing statutory framework to enable reform of the process associated with liquidation and winding up of companies has been sought to be addressed by the ministry of Corporate Affairs through legislative action. The Companies Second Amendment Act, 2002 recognized the difficulties associated with conduct of insolvency process under different statutes and different fora. It took note that among the factors causing delay in handling of insolvency process was the existence of a separate forum for rehabilitation of sick industrial companies under SICA, 1985 which resulted in unduly long time to be taken in addressing revival issues with excessive protection to Debtor Company\textsuperscript{623}. There was also a need for a single specialized forum which could deal with the process of insolvency comprehensively from rehabilitation to winding up as appropriate. The said Amendment Act therefore provides for the establishment of NCLT and NCLAT inter alia, as a single forum to address insolvency issues from rehabilitation of companies to their liquidation and winding up. Simultaneously, the jurisdiction of BIFR with regard to rehabilitation of companies and the High Courts with regard to liquidation and winding up was transferred to NCLT&NCLAT. Separately a comprehensive revision of Companies Act, 1956 was undertaken to address, inter alia, the issues related to insolvency of companies on the model recommended by the UNCITRAL\textsuperscript{624} and by providing of NCLT\textsuperscript{625} as a unified multidisciplinary forum to conduct the process in time bound manner. The companies Bill 2012 which incorporate the above principles have already been passed in the Lok Sabha and Rajra Sabha and has gone for president’s assent.\textsuperscript{626}

\textsuperscript{622} Supra n.3
\textsuperscript{623} Supra n.3
\textsuperscript{624} THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE AND LAW
\textsuperscript{625} NATIONAL COMPANY LAW TRIBUNAL
\textsuperscript{626} Supra n.57
To improve the functioning of the OLs offices, a project on record management and computerization of records in OL offices was introduced in 2006 in the four metro offices. This project which is under implementation, envisages updating of the statutory records required to be maintained by the official liquidators, the records of companies under liquidation and the claims filed by the creditors; updating of accounts of liquidation of companies and preparation and updating of relevant cash books; preparation of registers of assets and inventories arrangement for proper safe keeping of records etc.  

While the Central government would be pursuing the resolution of legal issues surrounding the companies Amendment Act, 2002 and the constitution of NCLT, it may be mentioned that even after the establishment of NCLT, the role of the OLs will not diminish. The OLs would be providing liquidation services even under the new structure particularly to small companies whose assets would not justify engagement of private insolvency practitioners. The activities of OLs and their records would need to be computerized in the first phase. This would enable a smooth transition to the e-governance phase. Presently on going through the data furnished by the OL offices, it is seen that the OLs have not been able to maintain statutory registers, central cash books and company wise cash books and registers of companies put under liquidation up to date, which are all paper based records as at present. Unless the records with the OLs are digitized and the status thereof made up to date and computerized, it would be difficult to move the e-governance stage.

OL offices need to be modernized both in terms of layout as well as by introducing modern office equipments as in case of Registrars of Companies (ROCs). While modernizing the offices of ROCs, apart from introduction of e-governance on a system wide basis accompanied by induction of suitable hardware and software, the entire business as well as the organization of the office was restructured so as to provide new working environment o the ROCs and their staff. This was also accompanied by a significant capacity building effort that enabled transaction from the paper based physical filing mode to the interactive, online e-governance mode.

E-governance would however, be a more complex process which will have to take in its ambit the interface between the stakeholder, the OL and the adjudicatory forum. Therefore e-governance will also be taken up as a distant project separate from other legislative and

627 Supra n.3
628 Indian Institute of Corporate Affairs, Corporate Insolvency and Liquidation, Module VII, (2010).pp-449-483
629 Ibid
administrative measures. However, computerization would facilitate introduction of e-governance.

The key benefit expected from project would be as follows: 630

a. Access to all data and records pertaining to liquidation of companies by the concerned stakeholders.
b. Transparency in the conduct of the liquidation and winding up proceeding timely and comprehensive information dissemination.
c. Operational improvement in discharge of various statutory functions of OLs.
d. Proper and comprehensive compliance with the statutory process relating to liquidation and winding up.
e. Maximization of the value of the proceeds obtained by disposal of the debtor estate and distribution to the creditors.
f. Speedy disposal of winding up process.

Computerization and e-governance of the functioning of the Official Liquidator. 631

The liquidation process typically involves a large number of tasks. From the stand point of designing a solution for automation, the following processes would need to be considered:

a. Taking possession of the assets of the company under liquidation by the official liquidator as part of liquidation process.
b. Filing of claims against the debtors for realization of the debts due to the company.
c. Sale of movable and immovable assets of the company
d. Institution of criminal complaints and misfeasance and/or breach of trust
e. Invitation of claims from the creditors and employees
f. Adjudication of claims and determining the method of settlement to creditors and employees
g. Payments to creditors by way of dividends.
h. Settlement to contributories wherever necessary and payment of return of capital where the company’s assets exceeded its liability.

630 Indian Institute of Corporate Affairs, Corporate Insolvency and Liquidation, Module VII, (2010).pp-449-483
631 ibid
i. Carrying out all the filings and making submissions to the Honorable Courts and to the ROC officers as may be necessary.

j. Dissolution of the company under section 481 of the Companies Act, 1956.

    Considering the needs of automation, a holistic approach to OL computerization would cover four distant aspects:

I. Administration and guardianship of assets pertaining to companies under liquidation
II. Conduct of the process of company liquidation
III. Meeting with statutory obligation- primarily related to Courts and ROC
IV. Establishment functions related to the OL offices.

The proposed OL automation should effectively address the needs of the following key stakeholders:

a. Creditors
b. Employees and other associates of the company
c. Other Government Statutory Agencies
d. Courts and Statutory bodies
e. Shareholders of the company.

The automation exercise mentioned in para above entails holistic coverage of OL operations. The size of automated solution is quite vast and translates into a huge quantum of effort. It would, therefore be necessary, to further breakdown the proposed automation in smaller components. As such, the scope of work involved could be classified into two categories. They are:

a. Automation
b. E-governance

Automation would involve functions related to the administration matters of the companies under liquidation. This would include Enterprise Resource Planning (ERP) software would be required by the OL to manage the company under liquidation. Besides General Ledger and Financial Accounting, the functionality would consist of a variety of software modules that would be able to cater to the areas such as asset

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633 Ibid.
management and control, auctioning, settlements etc. incidentally, management of the OL’s establishment would also have pretty similar functional needs and it may be relevant to develop an ERP software package to be used for this purpose also.\textsuperscript{634}

E-governance part relates to the interfaces that would need to be built to address the remaining items in the scope. These would typically consist of the requirements of the OL to maintain transparency in their dealings, interface to the courts and other regulators as may be required. These interfaces would be deriving their inputs from the back office operations, which would need to be developed and honed for providing the data input needed for the e-governance interfaces. While a parallel strategy could be followed for the e-governance part, it would be more useful to consider the e-governance part as the next level of maturity upon after the implementation of the automation, that would serve as building blocks.

Automation of the OL operation would involve, inter alia, the mitigation or elimination of the following problems that are generally observed in the OL operation:\textsuperscript{635}

\begin{itemize}
  \item[a.] Inconsistencies and redundancies inherent in the OL operations due to tolerance processes;
  \item[b.] Lack of coordination and communication amongst various stakeholders;
  \item[c.] Fragmented activities on performance of core tasks such as inviting claims, asset classification, inventory management, auctioning and registration;
  \item[d.] Difficulty in assessing data and records, including their consistency;
  \item[e.] Ineffective management of the movable and immovable assets of the company under liquidation;
  \item[f.] Non-optional paper forms (about 20 in numbers) that are used at various stages during the company dissolution;
  \item[g.] Lack of responsiveness in the follow-up action after the High Court has orders for dissolution;
  \item[h.] No close monitoring and follow up on all judicial matters;
  \item[i.] Difficulty and lack of efficiency in compliance of statutory requirements;
  \item[j.] Unproductive end-to-end process for adjudication claims; and
  \item[k.] Delayed turnaround in the settlement of claims to the creditors and employees, including the, interface with the banks.
\end{itemize}

\textsuperscript{634} Supra n. 225
\textsuperscript{635} Supra n. 225
MAJOR E-GOVERNANCE PROVISIONS UNDER COMPANIES ACT 2013

(A) Maintenance, Security, and Inspection of Books and Records in Electronic Form

With regard to the account keeping and maintenance of records and books related with the business activities of a company, and the well-rounded security and efficient and transparent inspection of these documents, the Companies Act, 2013 has the much needed provisions, recommendations and suggestions. These far-sighted and practical provisions and recommendations are mentioned in the Section 120 of the Indian Companies Act of 2013, and the Companies (Management and Administration) Rules of 2014. The Section 120 provides that a corporate entity must keep a safe account of all business and management related documents, records, registers, minutes, etc., if possible in the electronic forms, in such a way that these could easily be inspected or reproduced whenever required. In addition to this, the Rules extending between Rule 27 to Rule 29 of the Indian Companies (Management and Administration) Rules of 2014, further make many things clear in this context.

According to Rule 27, every listed company, or any other company with 1000 or more shareholders and security holders, must maintain all its secretarial records and documents preferably [but not mandatorily in the electronic form. The Ministry of Corporate Affairs [MCA] vide its Notification dated 24th July, 2014, has substituted the word ‘shall’ by the word ‘may’ in Rule 27 of Companies (Management and Administration) Rules of 2014, and thereby, the task of maintaining such records strictly in the electronic form has been made optional, for time being. However, it will be wise to convert these data and records to the electronic form [from the physical form] as quickly as possible.

The Rule 28 dictates that the MD, CS, or any other Director or Officer of the company shall be made responsible for proper and safe keeping of all records and documents of the company in electronic or physical form.

While the Rule 29 provides provision for inspection of all electronic records and reproduction of these as per requirements, the charge for any such reproduction shall not be more than ten rupees per page.
(B) Service of Documents (Section-20)

This advocates that every presentation, submission, or despatch of company-related documents should preferably be made through electronic means, to the concerned officials, shareholders, or the Registrar.

(C) Notice of Meetings

The notices of the Board Meetings and the General Meetings, are also to be sent by electronic means and in the prescribed manner, as are described in the Section 173(3), and Section 101, respectively. Also, the Rule 18 of the Indian Companies Rules of 2014 recommends that a record of any failed transmissions of such notices and subsequent re-sending of these, must be retained by the company as “Proof of Sending”. Notices to shareholders, directors, or auditors regarding electronic voting on a resolution and participation in a general meeting, may also be published on the website of the company. In addition to presenting all details about the concerned meeting, the company has also to clearly mention that the facility of voting through electronic means is available. More information about the sending of notices for general meetings and the electronic voting, is provided in the sections below.

(D) Payment of Dividend

As per Section 123, any dividend payable in cash, can also be remitted in any electronic mode to the entitled shareholders, besides being paid by Cheques or Warrant.

(E) Admissibility of Certain Documents as Evidence

Any document reproduced from returns, or any document related with the administration, management, or business activities of a company formally filed with the Registrar on paper or in electronic form and duly authenticated by the Registrar, shall be admissible to any proceedings of the company, without any further proof or production of the original documents as evidence.

(F) Voting Through Electronic Means [Electronic Voting System]

Voting through electronic means at the general meetings of a company, is one of the highly significant provisions introduced by the new Indian Companies Act of 2013, to support e-
management and governance. Section 108, New Revised Clause 35B of the Listing Agreement of SEBI, and the Rule 20 of the Companies (Management and Administration) Rules of 2014, all emphasize that every listed company or a moderately big company with at least 1000 shareholders, should utilize preferably the facility of voting electronically by the shareholders and members at the general meetings of the company, for passing any resolution (Ordinary/Special).

However, the Ministry of Corporate Affairs [MCA, Govt. of India] vide its Circular dated 17th June, 2014, thoughtfully and liberally decided not to treat the specified provisions for voting through electronic means [electronic voting system], as mandatory till December 31, 2014.

‘Swift Electronic Voting’ provides certain special benefits to both the company and the shareholders, provided it is fully secured and unbiased. Some of the most significant and outstanding advantages of electronic voting are: ---

- It is Fast and Cost-Effective
- Full Authenticity
- Reduces Paperwork and Eliminates the Need of Storing the Physical Ballot Papers
- Quick and Accurate Counting of Votes
- Votes are not Delayed or Lost in Transit
- Voting from Everywhere in any time
- Increased Efficiency and Transparency

**Processes To Be Followed by the Company for Electronic Voting**

A public limited company which opts for providing the electronic voting facility to its shareholders and members, with a view to make the task of voting faster, cost-effective, and transparent, on any resolution, now has to follow the following provisions and processes: ---

- Such a company is essentially required to send notices to its all shareholders, members, directors, or auditors as per the Section 101, through electronic or postal means, for the purpose of voting on any certain resolution electronically. The company should publish on its website, notices regarding invitation for such a voting
to all its members. The provision given in the Rule-18 is also applicable for such notices which are sent electronically.

- Any such notice must explicitly inform the procedure and manner for voting electronically, time schedule for voting, logging information [login ID], and measures and techniques for casting one’s vote conveniently and fully securely.

- The company is legally required to publish a self-illustrative advertisement regarding the sent notice of voting and general meeting, in the most popular newspaper in the concerned areas, at least five days before the beginning of the voting period, in order to ensure participation of all members of the company in the voting process. Such an advertisement should include the following matters-objectives of the general meeting; the date of completion of sending of notices by company; the date and time of the commencement and ending of voting through the electronic mode only; any agency for offering information about the meeting; any responsible person or agency for receiving grievances connected with electronic voting; etc.

- The process of casting votes electronically shall remain open for at least one full working day, and a maximum of three days. The closing date of voting must fall before the date of pertinent general meeting by three clear days. Depending upon the receipt of sufficient votes, any resolution is deemed to be passed on the predetermined date for the general meeting.

- A shareholder [holding shares in physical or dematerialized form] is entitled to cast a vote on any specific resolution only once, he is not legally permitted to change his opinion subsequently. Again, casting of a vote is not allowed after the end of voting period.

- To scrutinize the electronic voting process in an unbiased, fair, and transparent manner, the Board of Directors shall appoint an independent, dignified and expert scrutinizer, who is not an employee of the company. Well-versed in the system of e-voting, such a scrutinizer shall present his impartial and judicious report [in favor of or against the resolution] to the Chairman of the company, within a period of three working days counted from the closing date of e-voting period. Any such scrutinizer may avail support of one or more persons or witnesses [who are not in employment of
the company], for performing scrutiny blamelessly. This Scrutinizer may be a practicing Chartered Accountant, a Company Secretary, a Costs Accountant, or an Advocate. The final result of the voting, along with the scrutinizer’s report is to be necessarily published on the website of the company, within two days of passing of the specified resolution at the relevant general meeting of shareholders and members. The scrutinizer is also responsible for maintaining a register of detailed information about each shareholder, the number of shares held by him, the nominal value of shares, his reaction to the voting, and certain other valuable pieces of information regarding the shareholders, in interest of the company.

Keeping all the above provisions relating to e-governance, stipulated by the new company law of India, the Companies Act of 2013, we can say that it comprehensively cover all areas of activities of a company, especially the public limited companies, and are definitely classic for making all crucial tasks of a company, which includes the proper maintenance and inspection of documents, conducting efficient business activities, corporate easy, efficient and cost-effective, amply transparent, and fully accountable and trustworthy and flawless corporate administration and management. Actually, such ingenious and bright provisions for highly efficient and transparent e-governance were imperative in the thriving corporate world of India, in order to equip it for prospering fast in today’s intensely competitive national and international businesses in all economic sectors. E-Governance or Electronic Governance is basically proper and efficient utilization of the technologies of the information technology and telecommunications, for performing various functions and activities by an organization. Such use of Information and Communication Technologies [ICTs] can preferably be made at all levels of a business corporation also, in order to obtain faster and more efficient business activities, greater customer satisfaction, more accountable and transparent corporate administration and management, better profits and satisfaction of the shareholders, and the best possible progress and growth of the corporation. Keeping all these highly significant facts and business scenarios, the Government of India has rightly enacted and implemented the provisions relating to e-governance in the corporate sector of the country, in the new Companies Act of 2013.
INCORPORATING UNCITRAL MODEL ON CROSS-BORDER INSOLVENCY IN INDIA

The Indian legal regime on insolvency and bankruptcy has long been criticised for being cumbersome, long drawn out, creditor unfriendly and fragmented across multiple pieces of legislation. The Indian Insolvency and Bankruptcy Code, 2016 (Code), which came into effect on May 28 2016, seeks to address the lacuna in the present regime and provide a consolidated framework for the insolvency of companies, limited and unlimited liability partnerships, and individuals. While the Code is being hailed for providing a mechanism for time-bound recovery of dues from insolvent debtors in India and for contributing to the ease of doing business in India, whether it would prove effective in dealing with cross-border insolvency is debatable.  

The escalating globalization has resulted in the downpour of cross-border investment activity. In such a situation, the problem of insolvency can have global ramifications. The cross-border issues includes Indian financial firms having claims upon defaulting firms which are global, or global financial persons having claims upon Indian defaulting firms. There has always been a favourable argument for providing a mechanism for synchronization and collaboration between courts and insolvency authorities of various nations such as administrators/liquidators, in order to avoid conflict of laws of different countries and to preserve, safeguard and to make the most of the debtor’s assets. At the end of the day, an efficient system of cross-border insolvency laws will make strong worldwide trade and investment.

Here, I would like to talk about the concept of cross-border insolvency in the light of the Insolvency and Bankruptcy Code, 2016, the device offered by the Code to address cross-border insolvency, and the gaps that is required to be filled to make cross-border insolvency provisions more efficient and successful.

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WHAT IS CROSS-BORDER INSOLVENCY?

When a company having assets, business operations or creditors in more than one country, faces financial distress, then in such a situation cross-border insolvency comes into picture. Such cases of cross-border insolvency involve one or a combination of three situations. First, the insolvent company may have a number of foreign creditors who want to ensure that their rights are protected even though they may not be based in the country where the insolvency resolution is taking place. Second, an insolvent company may have assets located in another jurisdiction, which its creditors may want to access as part of the insolvency proceedings. Finally, insolvency proceedings with respect to the same debtor may be commenced and ongoing in more than one country. The last situation is particularly common when corporate groups face financial difficulties and proceedings against different legal entities within the group are commenced in different jurisdictions.

Recognition of foreign insolvency proceedings is one of the foremost objectives of any legal regime that seeks to address cross-border insolvency. At present, Indian law recognises foreign judgments and foreign decrees of some reciprocating territories, such as the UK and Singapore (section 13 and 44A of the Code of Civil Procedure, 1908). However, no recognition has been accorded to foreign proceedings, including insolvency-related proceedings, such as reorganisations.

MECHANISM UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

When the Code was introduced into the Indian parliament, it was completely silent on the issue of cross-border insolvency. It is only on the basis of recommendations from the Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015 (Joint Committee) that a mechanism for dealing with cross-border insolvency was incorporated into the Code.

The Joint Parliamentary Committee’s Report introduced two new clauses (Sections 234 and 235) to address these situations. Section 234 states that the Central Government may enter into bilateral agreements with other countries for purposes of enforcing the IBC. Section 235 allows the relevant court or tribunal in India to issue a letter of request to a foreign court or tribunal seeking its assistance in situations where a debtor’s assets may be located abroad. While these two clauses are an acknowledgment of the existence of cross border concerns in
insolvency, they, in essence, postpone consideration of substantive provisions on cross border insolvency to bilateral agreements with other countries.

**Are Bilateral Agreements the Way Forward?**

Bilateral agreements take time to negotiate and need to be negotiated individually with different countries, an extremely laborious process. Cross border insolvency treaties are also difficult to negotiate as different countries have wide variations in their substantive insolvency law regimes. Further, there could well be situations where a country’s bilateral agreement with one country varies substantially from its agreement with another country, which could lead to uncertainties in implementation.

**IMPLEMENTATION AND ISSUES**

The reciprocal arrangement mechanism appears to be aimed more towards reducing judicial red-tape across borders, which is in line with the broader objective of timely recovery of debts under the Code. There seems to have been a conscious attempt to streamline and smoothen the interaction between resolution professionals/liquidators and foreign insolvency administrators and allow for easier access to foreign assets of entities undergoing insolvency in India.\(^{638}\)

However, reciprocal agreements require individual long-drawn-out negotiations with each country, and it may be argued that such an arrangement does not bring about the efficiency that could be achieved by a uniform code of co-operation between various jurisdictions. Vastly differing reciprocal agreements with different countries may complicate insolvency proceedings, particularly the distribution of debtor assets which are located in different countries. Further, the reciprocal agreement mechanism does not address issues relating to co-ordination/recognition of insolvency proceedings commenced in multiple jurisdictions and involving multiple branches of a single entity.\(^{639}\)

Issues relating to cross-border insolvency have previously been examined by the Eradi Committee (2000) and the NL Mitra Committee (2001). In 2000, the high level committee on law relating to the insolvency and winding up of companies (under the chairmanship of Mr Justice V Balakrishna Eradi, retired) suggested an amendment to the provisions of the Companies Act, 1956 to incorporate key provisions of the UNCITRAL Model Law on Cross-

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\(^{638}\) Supra n.636

\(^{639}\) Ibid.
border Insolvency (Model Law), which was adopted by the United Nations through a General Assembly resolution on December 15 1997. The Report of the advisory group on bankruptcy laws (under the chairmanship of Dr NL Mitra) is one of the most detailed studies of India’s cross-border insolvency laws undertaken. This committee recommended adoption of the Model Law in India.640

The Model Law is the most widely accepted blue-print system of laws to effectively deal with cross-border insolvency issues. It attempts to achieve effective co-operation between enacting countries while ensuring the least intrusion into each country’s internal insolvency and bankruptcy laws. Access, recognition, relief and co-operation are the key tenets of the Model Law, by a combined action of which the Model Law ultimately aims for recognition of foreign insolvency proceedings, foreign decisions and access of foreign liquidators/administrators to local court proceedings. Once a foreign proceeding has been recognised in a particular jurisdiction, the Model Law contains provisions, including for (a) suspension of any transfer, encumbrance, disposal of the assets of debtors in that particular jurisdiction; and, (b) entrustment of the assets of debtors in that particular jurisdiction to the foreign administrator (article 19 of the Model Law). There are also provisions dealing with coordination of concurrent proceedings to ensure that there is no inconsistency between a domestic insolvency proceeding and any relief granted in respect of a foreign proceeding sought to be recognised (article 29 of the Model Law). The Model Law has presently been adopted by 41 countries, including the US, Canada, Australia Japan and UK.641

Like every major overhaul of laws that India has seen in recent years, the Code is an ambitious consolidation of India’s insolvency and bankruptcy laws, albeit ripe for challenge. Although India has already begun talks with countries such as the US for entering into reciprocal agreements, opting for reciprocal arrangements instead of adopting the Model Law is a move that is likely to be debated. In fact, even if India were to adopt the Model Law, the Model Law allows for a system where agreements entered into with a country could supersede the provisions of the Model Law.642

To conclude, while the reciprocal agreements mechanism may not serve as a wholesome solution to address cross-border insolvency, the Code as a whole does appear to be a move in the right direction and is likely to bring about an improvement in global perception regarding

640 Ibid.
641 Ibid.
642 Ibid.
ease of doing business in India. Further, given the fact that there has not been an outright rejection of alternative-supplementary methods to address cross-border insolvency issues, the overall state of affairs in India’s insolvency regime now does seem encouraging. 643

643 Ibid.