

REPORT OF
THE HIGH LEVEL COMMITTEE

ON

LAW RELATING TO INSOLVENCY

AND

WINDING UP OF COMPANIES

2000

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CHAIRMAN & MEMBERS OF THE HIGH LEVEL COMMITTEE

CHAIRMAN

Shri Justice V. Balakrishna Eradi, CHAIRMAN	Chairman Ravi & Beas Tribunal, Retd. Judge, Supreme Court of India 8, Teen Murti Marg, New Delhi-110011.
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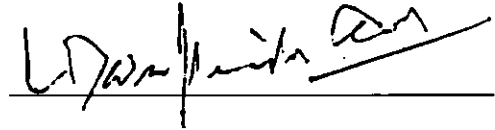
MEMBERS (ALPHABETICALLY)

Sh. Subodh Bhargava. MEMBER	Confederation of Indian Industries, 23, Institutional Area, Lodhi Road, NEW DELHI-110003
Sh. V.K. Bhasin, MEMBER	Joint Secrerary & Legislative Counsel, Ministry of Law, Justice and Company Affairs, Shastri Bhavan, 4th Floor, A Wing, New Delhi.
Sh. U.P. Mathur, MEMBER	Advocate, C-62/B, Pocket C, Sidhartha Extension, New Delhi-110014
Prof. C.G. Raghavan, MEMBER	Former Dean, Professor and Head of the Deptt. of Law, Nagpur University, Nagpur -- Deep, 130, Shankar Nagar, NAGPUR-440010
Sh. S. Ramaiah, MEMBER	Advocate and Chairman, Copyright Board, former Law Secretary, Govt. of India A-9/10, Vasant Vihar, New Delhi-110 057.
Sh. G.M. Ramamurthy MEMBER	Chief General Manager (Legal) Industrial Development Bank of India, IDBI Towers, Cuffe Parade, Mumbai-400005
Sh. A.V. Sambasiva Rao MEMBER	Advocate, Vice President, All India Bhartiya Majdoor Sangh, H. No. 10-1-27, Travellor Bungalow Road, VISAKHAPATNAM - 530003
Sh. Shardul Shroff, MEMBER	Advocate, 13, Abul Fazal Road, Bengali Market, NEW DELHI-110001
Sh. S.B. Mathur, MEMBER SECRETARY	Director, Inspection and Investigation, Department of Company Affairs, Ministry of Law, Justice and Company Affairs Shastri Bhavan, 5th Floor, A Wing, New Delhi.

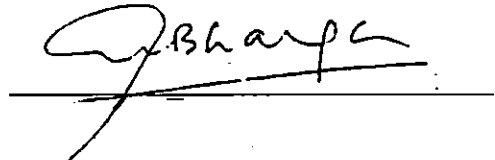
**APPROVAL OF MEMBERS OF THE HIGH LEVEL COMMITTEE
ON LAW RELATING TO INSOLVENCY OF COMPANIES**

(ALPHABETICAL ORDER)

1. Shri Justice V. Balakrishna Eradi
Chairman



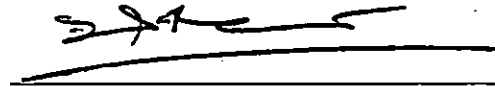
2. Shri Subodh Bhargava
Member



3. Shri V. K. Bhasin
Member



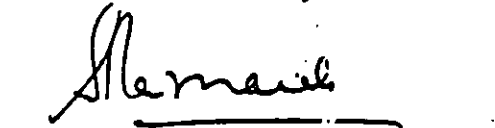
4. Shri U. P. Mathur
Member



5. Pror. C. G. Raghavan
Member



6. Shri S. Ramaiah
Member



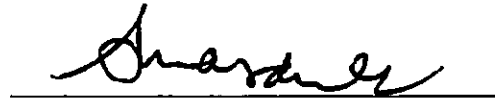
7. Shri G. M. Ramamurthy
Member



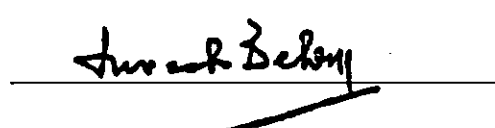
8. Shri A. V. Sambasiva Rao
Member



9. Shri Shradul Shroff
Member



10. Shri S. B. Mathur
Member Secretary



No:1/13/99-CL-V
Government of India
Ministry of Law, Justice and Company Affairs
Department of Company Affairs

5th Floor, A wing, Shastri Bhavan,
New Delhi-110 001
Dated 22nd October, 99

ORDER

SUBJECT : Constitution of a Committee on Law relating to insolvency of companies

The Government has decided to constitute a Committee consisting of experts to examine the existing law relating to winding up proceedings of companies in order to remodel it in line with the latest developments and innovations in the corporate law and governance and to suggest reforms in the procedure at various stages followed in the insolvency proceedings of companies to avoid unnecessary delays in tune with the international practice in this field.

2. This Committee would examine and make recommendations with regard to:-
- (a) the desirability of changes in existing law relating to winding up of companies so as to achieve more transparency and avoid delays in the final liquidation of the companies.
 - (b) the mechanism through which the management of companies will be conducted after the winding up of order is issued and the authority which will supervise timely completion of proceedings.
 - (c) the rules of winding up and adjudication of insolvency of companies.
 - (d) the manner in which the assets of the companies are brought to sale and the proceeds are distributed efficiently and
 - (e) a self-contained note on winding up of companies having regard to the Sick Industrial Companies (Special Provision) Act, 1985 and the Securities Contracts (Regulations) Act, 1956 with a view to creating confidence in the mind of investors, creditors, labour and other shareholders.
3. The Committee will consist of:-
- (1) Shri Justice V. Balakrishna Eradi,
* Retired Judge of Supreme Court --- Chairman.
 - (2) Shri S. Ramaiah, former Secretary,
Legislative Department --- Member.
 - (3) Shri Subodh Bhargava,
Nominee of CII --- Member

- (4) Prof. C.G. Raghavan, former Dean,
Professor & Head of the Department of Law,
Nagpur University --- Member
- (5) Shri A.V. Sambhashiva Rao, Advocate,
Vice-President, All India Bhartiya Majdoor Sangh --- Member
- (6) Shri V.K. Bhasin, Legislative Counsel --- Member
- (7) Shri G.M. Ramamurthy, Chief General
Manager (Legal), IDBI --- Member
- (8) Shri U.P. Mathur, Advocate --- Member
- (9) Shri Shardul Shroff, Advocate, Delhi --- Member
- (10) Shri S.B. Mathur, Director (Inspection &
Investigation), Department of Company Affairs --- Member Secretary

4. The Committee would function under the Chairman and would devise its own Procedure of working under guidance of Chairman. The Committee may consult other Experts in the field as may be considered necessary. The Committee will also consult Law Commission and incorporate their views in the Report to be submitted to the Government.
5. The Committee will submit its report within a period of three months** from the date of its first meeting.
6. Secretariat assistance to the Committee will be provided by Department of Company Affairs.

Sd/-
(R.D. Joshi)
Joint Secretary to the Govt. of India

Copy to:-

1. All Members of the Committee
2. M(LJ&CA)/MOS(LJ&CA)
3. All Officers in Department of Company Affairs.

* Shri Justice V. Balakrishna Eradi, retired Judge, Supreme Court of India, was substituted for Shri Justice K.S. Paripoornan, retired Judge, Supreme Court of India vide Department of Company Affairs's Corrigendum No: 1/13/99-CL-V dated 6 December, 1999

** The term of the Committee was extended for 'within a period of six months from the date of its first meeting' and further till 31st July, 2000 vide Corrigendum No: 1/13/99-CL-V dated 6 December, 1999 and corrigendum of even number dated 20 July, 2000 respectively.

No. 1/13/99-CL-V
Government of India
Ministry of Law, Justice & Company Affairs
Department of Company Affairs

Shastri Bhawan, 5th Floor, A-Wing,
New Delhi-110 001.
Dated : 20th July, 2000

ORDER

Subject : High Level Committee on Law relating to Insolvency of Companies

In Partial modification of this Department Order of even number dated 22.10.99, read with Corrigendum of even number dated 6.12.99, the tenure of the "High Level committee on Law relating to Insolvency of Companies" is extended till 31st July, 2000.

2. All other items and conditions mentioned in Orders dated 22.10.99 and 6.12.99 shall remain unchanged.



(R.N. Vaswani)

Under Secretary to the Government of India
Tel. No. 338 9622

To

1. The Chairman and Members of the Committee.
2. Shri S.B. Mathur , DII and Member Secretary of the Committee.
3. PS to Minister for Law, Justice & Company Affairs.
4. PS to Minister of State for Law, Justice & Company Affairs.
5. All Officers in Department of Company Affairs.
6. General/Cash/Budget Section.
7. Spare Copies - 15

PREFACE

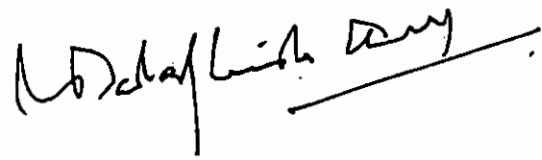
The latest development and innovations in corporate laws require that the Companies Act, 1956 and other relevant laws relating to winding up of companies should be remodeled in tune with the International practices in this field. The High Level Committee on Law relating to Insolvency of Companies has, therefore, examined not only the Companies Act, 1956 but also the other relevant laws having a bearing on the subject such as Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), Recovery of Debts due to Banks and Financial Institutions Act, 1993 and the recommendations of the United Nations and International Monetary Fund report - "Orderly and Effective Insolvency Procedures- Key Issues". The differences in national laws and procedure have important consequences in case of enterprises with assets and liabilities in different countries. With globalisation of the trade and opening up of the economy, the issues relating to Cross-border Insolvencies have become increasingly important and, therefore, the Committee also considered UNCITRAL Model Law on Cross-Border Insolvency which was adopted by United Nations in General Assembly by the resolution dated 15th December, 1997 and this Committee is convinced that a fair and international harmonized legislation on Cross-Border Insolvency needs to be adopted.

2. The Department of Company Affairs had given a mandate to the Committee to examine and make recommendations with regard to desirable changes in existing law on winding up of companies so as to achieve more transparency and avoid delays in final liquidation of companies. At the same time, the Committee was requested to give a self contained note on winding up of companies having regard to Sick Industrial Companies (Special Provisions) Act, 1985 and Securities Contracts (Regulation) Act, 1956 with a view to create confidence in the minds of creditors, labour and the shareholders.
3. Considering international practices in this regard, the Committee recognized that the law of insolvency should not only provide for quick disposal of assets but in Indian economic scene, it should first look at the possibilities of rehabilitation and revival of companies.

4. The Committee noted that there are at present three different agencies namely, the High Courts, which have powers to order winding up of companies under the provisions of the Companies Act, 1956; secondly, the Company Law Board set up under section 10E of the Companies Act, 1956 to exercise powers conferred on it by the Act or the powers of the Central Government delegated to it and finally, Board for Industrial and Financial Reconstruction (BIFR) which deals with the references relating to rehabilitation and revival of companies.
5. The High Courts are not able to devote exclusive attention to winding up cases which is essential to conclude the winding up of companies quickly. The experiment with BIFR for speedy revival of companies has also not been encouraging.
6. Hence there is a need for establishing a National Tribunal as a specialized agency to deal with matters relating to rehabilitation, revival and winding up of companies. With a view to avoiding multiplicity of fora, the National Tribunal should be conferred with jurisdiction and powers to deal with matters under Companies Act, 1956 presently exercised by the Company Law Board; jurisdiction, power and authority relating to winding up of companies vested with High Courts and power to consider rehabilitation and revival of companies presently vested in the BIFR. This suggestion of the Committee will involve amending the provisions of Part VII of Companies Act, 1956 besides repeal of Sick Industrial Companies (Special Provisions) Act, 1985 and amending section 10E of the Companies Act relating to the present Company Law Board. All the existing cases pending with the High Courts and the Company Law Board may be transferred to the Tribunal and the pending references before BIFR/AAFIR shall abate.
7. In the above general framework, the Committee has considered carefully the adoption of the UNCITRAL Model Law as approved by United Nations in the Companies Act itself to deal with all cases of "Cross-Border Insolvency".
8. The Committee has also considered that the principles enunciated under legal frame work of "Orderly and Effective Procedure" recommended by IMF be incorporated in the Companies Act.

9. In addition, the Committee has made various other recommendations with a view to make the provisions relating to filing of the balance sheet and annual returns more effective by making non-filing of such documents for the last three years as an additional ground for winding up. This will certainly ensure better corporate governance.
10. Further, the Committee has considered laws on Corporate Insolvency prevailing in industrially advanced countries and considered it appropriate to recommend that the Administrative Order Procedure on the lines of UK Insolvency Act, 1986 be adopted and the Government should maintain a panel of professional insolvency practitioners to introduce an element of professionalism in winding up of companies.
11. A unique recommendation which the Committee debated seriously related to establishment of a Fund for revival and rehabilitation of companies and also for preservation and protection of assets of the company during winding up. This measure will take care of the interest of all stake holders particularly the labour.
12. As Chairman of the Committee, I wish to express my appreciation and acknowledge the contribution and efforts made by the Members for the deliberations on various issues which came up before the Committee.
13. I am happy to report that in all the matters, the decisions of the Committee were taken by consensus.
14. Before I conclude, I must point out that the Committee had in-principle decided to concentrate its efforts on insolvency of companies, though insolvency of individuals at time have linkage with the insolvency of companies.
15. The Committee was fortunate to receive suggestions from almost all the Chambers of Industry and Commerce, Banks and financial institutions, professionals, individuals, investor groups and Bar Associations which were of great value, during its deliberations. I would like to express my thanks to the Department of Company Affairs which provided the secretarial support. In particular, I would like to mention the dedicated effort put in by Shri S.B. Mathur, Member Secretary and Shri R.N. Vaswani, Under Secretary and staff members in the Department of Company Affairs.

16. It is my hope and that of the Committee that this report will contribute to the birth of an effective Corporate Insolvency Law which will subserve the interest of the corporate world.

A handwritten signature in black ink, appearing to read "V. Balakrishana Eradi", written over a horizontal line.

JUSTICE V. BALAKRISHANA ERADI
CHAIRMAN

NEW DELHI
31ST JULY, 2000

CHAPTER-1

INTRODUCTION

- 1.1 The Companies Act, 1956 provides for law relating to corporate insolvency and inter-alia contains the provisions of winding up of companies in part VII (Sections 425 to 590). The existing Act provides for four kinds of winding up namely:-
- (i) Members' voluntary winding up;
 - (ii) Creditors' voluntary winding up;
 - (iii) Winding up by court;
 - (iv) Winding up subject to supervision of Court.
- 1.2 The Central Government constituted a High Level Committee on Law Relating to Insolvency of Companies consisting of experts to examine the existing laws relating to winding up proceedings of companies in order to remodel it in line with the latest developments and innovations in corporate laws and governance and to suggest reforms in the procedure on various stages followed in the insolvency proceedings of companies so as to avoid unnecessary delays in tune with the international practice in this field.
- 1.3 The Committee consisted of the following:-
- (i) Shri Justice V. Balakrishna Eradi, Retired Judge Supreme Court of India, Chairman
 - (ii) Shri S. Ramaiah, former Secretary , Legislative Department, Member
 - (iii) Shri Subodh Bhargava, Nominee of CII, Member
 - (iv) Prof. C.G. Raghvan, former Dean , Prof. & Head of the Department of Law, Nagpur University Nagpur, Member
 - (v) Shri A.V. Sambhashiva Rao, Advocate, Vice President, All India Bhartiya Majdoor Sangh, Member
 - (vi) Shri V.K. Bhasin, Legislative Counsel, Legislative Department, Member
 - (vii) Shri G.M. Ramamurthy, Chief General Manager (Legal) IDBI, Member
 - (viii) Shri U.P. Mathur, Advocate, Member

- (ix) Shri Shardul Shroff, Advocate, Member
- (x) Shri S.B. Mathur, Director (Inspection & Investigation) Deptt. of Company Affairs, Member Secretary.

1.4 The Committee was asked to examine and make recommendations with regard to:-

- (a) the desirability of changes in existing law relating to winding up of companies so as to achieve more transparency and avoid delays in the final liquidation of the companies;
- (b) the mechanism through which the management of companies will be conducted after the winding up order is issued and the authority which will supervise timely completion of proceedings;
- (c) the rules of winding up and adjudication of insolvency of companies;
- (d) the manner in which the assets of the companies are brought to sale and the proceeds are distributed efficiently ; and
- (e) a self-contained law on winding up of companies having regard to the Sick Industrial Companies (Special Provisions) Act, 1985 and the Securities Contracts (Regulation) Act, 1956 with a view to creating confidence in the minds of investors, creditors, labour and shareholders.

1.5 In order to elicit the views of the organisation and persons conversant with the subject, the Committee decided to circulate a questionnaire consisting of 26 questions among the Bar Associations, Chambers of Commerce, Professional Bodies/Associations and the officers of the Department including Official Liquidators for their comments.

1.6 The Committee received responses to the questionnaire from Chambers of Commerce (ASSOCHAM, CII, Indian Merchant Chamber of Commerce, Mumbai and Bombay Chamber of Commerce) and from Financial Institutions etc. (IDBI, ICICI, RBI and Indian Banks Association). The learned members of Bar Association at Mumbai, Chennai, Delhi also responded to the Questionnaire. The Asian Development Bank also responded to the Questionnaire.

1.7 The whole issue of law relating to corporate insolvency has been viewed not only keeping in view the provisions of the Companies Act but also the other relevant laws having a bearing on the subject such as Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts due to Banks and Financial Institutions Act, 1993, etc. The Committee has also taken into consideration the position relating to the

impact of the winding up of companies not only on the equity holders but also on creditors, (secured and unsecured) labour and public.

- 1.8 The attention of the Committee had also been drawn to the fact that the Indian economy has been opened up for investment by foreign creditors and internationally, the Indian corporates have also made investment in companies outside. Therefore, in making the recommendations, the Committee has also deliberated upon the issues relating to Cross-Border Insolvency. In this context, the Committee has been guided by the "UNCITRAL Model Law on Cross- Border Insolvency" drafted by the United Nations. It has also taken note of the views expressed by the International Monetary Fund on key issues relating to "Orderly and Effective Insolvency Procedures".
- 1.9 The working of the Board for Industrial and Financial Reconstruction and all relevant issues relating to the revival of companies in an expeditious manner under the Sick Industrial Companies (Special Provisions) Act, 1985 have been some of the key areas on which the attention of the Committee was focussed. Keeping in view the importance of the subject of financial revival of companies, the Committee has devoted a separate chapter keeping in view the international concern for corporate rehabilitation procedures.
- 1.10 In drawing up of its report, the Committee functioned under the able guidance of Justice Shri V. Balakrishna Eradi, the Chairman. Besides, it consulted experts in the field of corporate laws and have incorporated their views in the report. The Committee had been provided effective assistance and cooperation by Dr. P.L. Sanjeev Reddy, Secretary, Department of Company Affairs and by Shri S.B. Mathur, Director, Inspection & Investigation, who is its Member Secretary.
- 1.11 Within the time constraints of submitting the report by 31st July, 2000 the Committee decided to only formulate its recommendations. It felt that the drafting of the law should be left to the experts of the Legislative Department in Government.

OBJECTIVE :

- 1.12 The main objective of the Committee was to present its views on a suitable law about corporate insolvency and to give such proposals as expedite the winding up of companies. Considering the Indian milieu, the Committee felt that in case it is possible to revive the companies financially, the law should enable the establishment of an expert agency to go into the revival of companies so that they can be nursed back to health and generate employment for labour.

- 1.13 The Committee has noted the great contrast in winding up procedure in India and foreign countries. It shows that there are inordinate delays in winding up of companies in India. This fact alone mars the possibility of rapid use of productive assets lying dormant throughout the country. The Committee strongly felt that the winding up procedures must be such as would radically expedite the sale of assets and, therefore, recommends the adoption of the international trend in law relating to corporate bankruptcy, namely, sell the assets first as quickly as possible and relegate to a later stage the adjudication of claims and distribution of proceeds. The Committee's approach and objective has, therefore, been to recommend a structural time bound approach of winding up.
- 1.14 The success of the new winding up procedures recommended would depend to a large extent on the Court/Tribunal maintaining a clear distinction between asset sale on one hand and misfeasance and malfeasance proceedings on the other. Undoubtedly, misfeasance and malfeasance should be detected and punished, but it should not be at the expense of delaying the sale and reuse of valuable productive assets.
- 1.15 The Committee has also noted that the Official Liquidators attached with the High Courts are totally handicapped because of absence of adequate and competent manpower, absence of latest office equipments and technologies. Therefore, while the Committee has considered the question of appointment of professionals as the liquidators from a panel to be prepared by the Government, it would strongly recommend that an in depth assessment of manpower and financial resources required by the office of Official Liquidators is an immediate necessity. The Government should take early action to depute a special team to make a report of the actual man power and financial resources required for revamping the offices of Official Liquidators.

THE PLAN OF THE REPORT :

- 1.16 In most part, the report is structured treating the company as a composite organic entity consisting of not only the monetary inputs provided by the equity holders and creditors but also the creditors and the public resources in the form of infrastructure provided by the Central Government.
- 1.17 Chapter 1 deals with the original compass in which an Indian company operates and explains the scope of the report, the present system of winding up and the manner in which the Committee has dealt with the issues referred to. Chapter 2 deals with the methodology adopted by the Committee, the statistical data and information

gathered by the committee and the relevant basic premise of its findings. Chapter 3 deals with key dimensions of working of the offices of Official Liquidators and problems confronted by them and other bodies. Chapter 4 analyses the suggestions received by the Committee. Chapter 5 of the report deals with the issue of revival of sick companies and linkages between Companies Act, 1956 and Sick Industrial Companies (Special Provisions) Act, 1985. Chapter 6 deals with the interface of Indian Corporate Insolvency Law with the issues relating to Cross Border Insolvency and the Model Insolvency Laws suggested by International Monetary Fund and International Financial agencies. Chapter 7 deals with the summary and conclusions of the Committee.

- 1.18 It may be noted that this report contains the views of the Committee. It is neither exhaustive nor does it purport to incorporate changes to be included in a Draft Bill on Insolvency Laws. The report only emphasizes on the important changes and the Committee expects that those who are concerned, will examine its recommendations keeping in view the other related issues while drafting the Bill.

CHAPTER 2

METHODOLOGY ADOPTED BY THE COMMITTEE AND BASIC PREMISE OF THE REPORT

- 2.1 The Committee at the initial stages of deliberations itself had decided upon certain key steps to ensure that the matters referred to it can be discussed with a wide cross-section of persons and bodies connected with winding up /revival of companies and their views are incorporated suitably in its Report.
- 2.2 The conclusions of a committee of this nature of course should be based on reliable data. It was therefore, decided that the secretariat of the Committee should collect primary as well as secondary data relevant to the matters in focus to analyse the problem in all its aspects.
- 2.3 The Committee directed all the Official Liquidators to submit the data of age-analysis of companies being wound up under their charge. This data has been presented in Chapter-3 (Table-I)
- 2.4 The Committee also drew upon the data submitted to it by CII and BIFR relating to Sick Industrial Companies which made reference to BIFR for their revival. The Committee had the opportunity to discuss the data with the members of BIFR and it has relied upon about the accuracy of the same on basis of submission made to it at the time of hearing.
- 2.5 The Committee had the benefit of hearing presentation by Senior Officers of Ministry of Labour, Department of Banking, Members of BIFR, Reserve Bank of India, IDBI, ICICI, IBA. The Committee also heard the submissions of CII, ASSOCHAM, Southern India Chambers of Commerce, IMC, Bombay, Bombay Mercantile Chamber and other bodies of trade and commerce.
- 2.6 As already stated in the introductory chapter, the Committee also circulated the questionnaire to elicit the views of various experts, organisations, bar councils and trade and chambers of commerce, the professional institutes and other bodies whose views were material to arrive at the conclusions.
- 2.7 The Committee is of the view that the consideration of the individual insolvency laws namely, the Presidency Towns and Provincial insolvency enactments referred

to in the Companies Act in the Chapters on winding up is outside the scope of the work assigned to the Committee and as such its recommendations should be confined only to Corporate Insolvency under the Companies Act, 1956. Further, the Committee also considered that the Companies Act, 1956 should continue to be a comprehensive law in regard to companies and Part VII on the subject of winding up should be appropriately amended or modified rather than drafting a separate law on insolvency.

- 2.8 The Committee has formulated its recommendations on the basic premise that the jurisdiction, power and authority relating to winding up of companies shall be vested in a National Tribunal instead of in the High Court as at present. The composition of the Tribunal and powers to be exercised by it are detailed in Chapter 5. In addition, proposed Tribunal shall also have power to consider rehabilitation and revival of companies, a mandate presently entrusted to BIFR. Further, the jurisdiction and the powers presently exercised by Company Law Board under the Companies Act in future shall be exercised by the proposed Tribunal. The above recommendation has been prompted by a desire to avoid multiplicity of authorities.
- 2.9 In regard to issues of Cross - Border or laws of trans-border insolvency, the Committee has perused with advantage the report of the International Monetary Fund (IMF) and the provisions of UNCITRAL MODEL LAW on the subject. In chapter 6 the Committee has recommended that part VII of the Companies Act, 1956 should be suitably amended to incorporate provisions of the MODEL LAW which are relevant.

CHAPTER-3

KEY DIMENSIONS OF WORKING OF THE OFFICES OF THE OFFICIAL LIQUIDATORS AND PROBLEMS CONFRONTED BY THEM.

- 3.1 Under the scheme of the Companies Act, 1956 (Part VII), in case of a company wound up by the High Court (i.e. compulsory winding up), the Official Liquidator (OL) becomes its liquidator (section 449). The court is not empowered to appoint any person other than the OL attached to each High Court. OL is appointed by the Central Government in terms of section 448 and all matters relating to winding up of companies wound up by court are administered by him under the supervision, control and direction of the court. OLs, Deputy Official Liquidators (Dy. OLs) and Assistant Official Liquidators (AOLs), belonging to Indian Company Law Service (Legal and Accounts branches) are appointed by the Department of Company Affairs in the Ministry of Law, Justice & Company Affairs depending upon the workload in each office.
- 3.2 Over the years with the growth of corporate sector in India, corporate mortality has also grown and OLs have been over-burdened with a large number of companies, in liquidation, under their charge as is evident from the statistics given in para 3.3. (Table I).
- 3.3 The winding up process is a long drawn affair and before a company is finally dissolved with the sanction of the court, it takes years in obtaining the Statement of Affairs, books of account and records and assets, realisation of debts and sale of assets, settlement of list of creditors and contributories, distribution of assets to creditors, members etc. In the process, substantial corporate assets remain under the control of OLs unrealised and undistributed. The dimension of the problem may be demonstrated in terms of age-wise pendency of companies in Court's winding up under the charge of OLs in the country as per the following table:-

TABLE I

AGEWISE CLASSIFICATION OF COMPANIES UNDER WINDING UP (As on 31.12.1999)

	0-5 YEARS	5-10 YEARS	10-15 YEARS	15-20 YEARS	20-25 YEARS	25 YEARS AND ABOVE	TOTAL
NORTHERN REGION *	259	130	86	56	47	66	644
EASTERN REGION	126	77	83	73	71	293	723
SOUTHERN REGION	325	212	89	68	51	78	823
WESTERN REGION	355	184	224	124	82	36	1005
TOTAL	1065	603	482	321	251	473	3195

* As on 31.3.1999

3.4 The Committee, on the basis of representations made orally as well as in writing by OLs, Regional Directors, various organisations and other institutions have identified some of the important areas which has resulted in delays in speedy finalisation and dissolution of companies.

3.5 Delay in filing of Statement of Affairs

Although under section 454, the Statement of Affairs is required to be filed by ex-directors and officers of the company within 21 days of the order of winding up (or appointment of Provisional Liquidator, if any), the same is not filed with OL for years in most of the cases. For example, OL, Mumbai has reported that in not more than 5% cases, the Statement of Affairs had been filed. In practice, either the ex-directors are not available or they disown their responsibility and plead ignorance about the precise details of the assets and liabilities of the company on the date of winding up order. In case of default, OL has no option except to file prosecutions before the High Court against the delinquent directors under section 454 (5)/(5A). As per extant provisions, OL has to satisfy the court that the accused ex-directors/officers have committed the default 'without reasonable cause' and at times it may be difficult for OL to discharge the burden placed on him by the statute.

Statement of Affairs is the main document to enable the OL to ascertain the nature

and extent of the assets, debts and creditors of the company. Any delay in filing this document hampers the various stages in winding up, like sale of assets, realisation of debts, settlement of list of creditors etc.

3.6 Delay in handing over up-dated books of account and records:

OL cannot discharge his duties properly and efficiently unless he is able to go through the books of account and records of the company to verify and identify the assets, book debts and liabilities of the company. The books of account including bills, vouchers, agreements etc. forms the basis for recovery of debts, misfeasance proceedings, settlement of list of creditors and contributories apart from other proceedings during the course of winding up. In most of the cases, the books are not written upto the date of winding up order and pertain to a very old period which does not serve the purpose. Sometimes, the ex-directors deliberately delay in handing over the records to ensure that no action is taken by OL. In case of deadlock amongst the directors or in-fight between two groups of directors, the responsibility for the possession of records is passed on from one director to another. Very often, OL has to reconstruct the record and complete the books of account and get the accounts audited.

3.7 In the event the books of account and records are not handed over, OL has to take recourse under section 468 in seeking direction from the court to the ex-directors to produce the record or approach the Chief Presidency Magistrate or District Magistrate under section 456 (1 A) for taking possession thereof from the concerned officer.

3.8 The reasons for non-maintenance of books of account upto the date of winding up order are not far to seek. There is always a time-lag of more than one year between the presentation of petition for winding up and the date on which the company is wound up by the court. During the intervening period and even earlier in case of a company which has stopped its operations, the company staff starts leaving and there is no body left to maintain, up-date and preserve the records. In fact, since the records are not complete and not updated, the ex-directors are unable to submit the Statement of Affairs to the OL in time.

Delay in realisation of debts

- 3.9 Realisation of debts is an important part of the duty of OL, lest these become time-barred. Under section 458A, the period from the date of commencement of winding up (date of presentation of winding-up petition) to the date on which winding up order is made and a further period of one year is excluded for purposes of limitation under Limitation Act, 1963. In the absence of the Statement of Affairs and updated records of the company, OL finds it difficult to ascertain full particulars of the debtors and supporting evidence thereof. However, based on the available record OL initially issues notices to the debtors for payment, and for one reason or other in many cases, these notices could not be served or the debtors dispute the claim.
- 3.10 In case payment is not made by the debtors, OL has no option except to file claims under section 446 before the High Court. These cases are decided by the court after following the procedure prescribed under the Code of Civil Procedure. OL has no discretion in the matter of filing claims for purposes of debt recovery and if directed by Company Judge, cases have to be filed even for recovery of small debts of, say, Rs. 150/-. In the matter of M/s Sahara Deposits & Investment (India) Limited, OL, Delhi filed over 12,000 cases against the debtors. Disposal of these cases take a very long time and some times in a particular case, the legal expenses incurred far exceed the actual realization. OL has to produce evidence in support of the claims which may not always be available and the ex-directors generally do not come forward to assist the OL to realize the debts.
- 3.11 In case OL is able to obtain decree (including ex-parte decree) from the court, it takes substantial time to execute the decree against the judgement debtor for want of the whereabouts and particulars of the immovable properties, if any, owned by him. In many cases, the decrees remain unexecuted in spite of best efforts made in this behalf.

Delay in taking over the possession and sale of assets.

- 3.12 The task of taking over the possession of movable and immovable properties and assets of the company by OL is equally difficult. Very often, the registered office is not traceable particularly in case of chit fund and non-banking financial companies. In many cases, the lease-hold or tenancy rights in favour of the company are transferred in a clandestine manner and claims and counter-claims in respect thereof are left to be decided by the court.
- 3.13 In case of industrial companies, the assets are generally mortgaged with the secured

creditors who remain outside the winding up proceedings and insist for the possession being handed over to the Court Receiver by seeking leave of the company court under sections 446, 453 and 537. In some cases, certain parties are appointed by the court as agent for running the factory or for using the assets of the company on agency basis on a compensation fixed by the court and such arrangement continues for years. OL, Mumbai has reported that in respect of at least four industrial companies under his charge, it has taken about 15 to 20 years for the court receiver to finally dispose of the assets. The position is slightly different in case of assets charged in favour of State Finance Corporation (SFC), in as much as, though the Corporation opts to remain outside the winding up proceedings as a secured creditor, no receiver is appointed and sale of assets is made jointly by the OL and SFC under the orders of the court. However, in each case where the secured creditor is involved, priorities for payment of their dues are decided in terms of section 529A.

- 3.14 In case of the assets take over by OL, the valuer is appointed to value the assets of the company which serves the purpose of reserve price below which the assets may not be sold. Immovable assets are disposed of by inviting offers through press advertisement and the movable assets are generally sold by public auction by OL himself or through an approved auctioneer. In each case, OL has to seek approval of the court at every stage.
- 3.15 In case, the possession of assets is not handed over by the ex-directors / officers, OL has to take recourse to court proceedings under section 468 or approach the Chief Presidency Magistrate / District Magistrate under section 456 (1 A) as the case may be.

Non - availability of funds.

- 3.16 In respect of many companies under his charge, OL does not have the funds to meet the routine expenses incurred for preserving the assets by appointing security guards, or even for issuing advertisement for sale of assets or for inviting claims from creditors. OL has also to bear litigation expenses apart from travelling expenses of staff particularly in case of the companies having outstation offices/branches. The ex-directors, secured creditor or the petitioner in winding up petition are generally reluctant to provide funds to OL. In this connection, it may be stated that although there is a provision under Rule 292 of the Companies (Court) Rules, 1959 empowering OL to incur necessary expenses out of Adhoc permanent advance provided by the Central Government with the leave of the court, the same is either not available or is not adequate. In the absence of funds at the disposal of OL, the winding up process is delayed.

Delay in settlement of list of creditors

- 3.17 On realization of assets, OL has to proceed with the payment to creditors as per priorities set out in sections 529, 529A and 530. For the purpose, list of creditors is prepared by OL and settled by court as per procedure prescribed under Rules 147 to 179 of the Companies (Court) Rules, 1959. Individual notices are given to all the creditors as per records and Statement of Affairs and general notice is published in newspapers for inviting claims from creditors. The claims lodged by the creditors within the prescribed period alongwith proof by way of affidavit are scrutinized by OL and are either admitted in full or in part or rejected in full or in part. An aggrieved creditor may prefer an appeal before the court against the decision of OL.
- 3.18 The claims of creditors are investigated by OL based on the records of the company which are generally incomplete. In the absence of proper record, difficulty arises in settling the claim particularly of workers covered by the varied nature of workmens dues' as defined in section 529 (3) (b). It is generally observed in the case of industrial companies that inflated claims are filed by Trade unions on behalf of workmen and the claims rejected by OL are contested in court.
- 3.19 The creditors who have failed to lodge their claims within the prescribed period generally apply to the court even after 10-12 years seeking direction to OL to adjudicate their claims. Normally the court is inclined to grant the leave in the interest of the creditors and as a result, it takes a long time to finally settle the list.

Delay in the settlement of the list of contributories and payment of calls.

- 3.20 A contributory, being a past or present member, is liable to contribute to the assets of the company, in liquidation, to the extent of unpaid amount on his partly paid up shares in the event the realized assets are not sufficient to pay off the creditors. The list of contributories is prepared by OL and settled by court under section 467 and unpaid calls are made by OL with the sanction of the court. This exercise is time consuming particularly in view of delay in payment of calls by the contributories or their legal heirs brought on record.

Delay in finalisation of Income Tax proceedings.

- 3.21 Income Tax dues are preferential claims under section 530. Under section 178 of the Income Tax Act, 1961, Income Tax Officer is empowered to notify to OL the amount which would be sufficient to provide for taxes and to set aside the said amount before payment is made to other creditors.

3.22 The pending income tax assessments relating to the period prior to the date of winding up order are handled by OL and where necessary, appeals are filed by him. He has also to contest the appeal, if any, filed by the Income Tax Department against the Company. OL has also to file return in respect of income of the company during the course of winding up by way of interest earned on investment of its surplus funds in his hands. The income tax assessments and appeals take their own time.

Delay in disposal of misfeasance proceedings

3.23 Under section 543 (3), misfeasance proceedings may be filed by OL against the delinquent directors and others within 5 years from the date of the order of winding up. This requires investigation of the books of account and records of the company and to collect evidence in support of the case. It is generally noticed that OLs file misfeasance proceedings in all the cases, as a matter of course, within the limitation period. A large number of these cases are pending in court for more than 5-10 years.

Long drawn court proceedings.

3.24 Multiplicity of court proceedings is the main reason for abnormal delay in dissolution of companies. The proceedings are filed by OL under sections 446, 454, 468 and 542/543 for non-submission of Statement of Affairs, non production of books of account and assets as also realization of debts and misfeasance proceedings. Similarly, the settlement of list of creditors and contributories take a long time. Disposal of suits or claims filed by the company or against the company in which OL is always a party, take a very long time.

3.25 Normally, there is a company court with one Company Judge in each High Court and it is not possible for the court to cope with the work relating to companies under liquidation. Apart from company matters, the court also attends to other cases in the High Court. The orders passed by Company Judge are appealable under section 483. Normal delays and adjournments sought in court proceedings further aggravate the problem and unless all the pending cases are not finally disposed of, OL cannot move the court for dissolution of a company.

Powers of the Official Liquidator.

3.26 Under section 457, OL can exercise the powers with the sanction and subject to the control of the court. Any creditor or contributory may apply to the court with respect to the exercise of any such power. Elaborate procedure has been prescribed under the Companies (Court) Rules, 1959 relating to Statement of Affairs (Rules 124-134),

Preliminary Report (Rules 135-139), Settlement of list of creditors (Rules 147-179), Settlement of list of contributories and payment of calls (Rules 180-196, 235 - 242), examination under section 477/478 (Rule 243-259), Misfeasance proceedings under sections 542 and 543 (Rules 260-262), Disclaimer of property under section 535 (Rules 263-269), Compromise and abandonment of claims (Rules 270-271), Sale of assets (Rules 272-274), Declaration of dividend (payment to creditors) and return of capital to contributories (Rules 275-280), dissolution (Rules 281-285), Maintenance of Registers and books by OL (Rules 286-292), Investment of surplus funds (Rules 293-297), Half yearly and yearly Accounts and audit (Rules 298-311), Unclaimed dividend and undistributed assets (Rules 335-338).

- 3.27 It is significant to note that under the Act and the aforesaid Companies (Court) Rules made by Hon'ble Supreme Court, after consulting the High Courts under section 643, OL has to seek sanction of the Court at each and every stage during the course of winding up proceedings. For the purpose, OL has to submit reports from time to time for consideration of the Company Judge on the administrative as well as judicial side. This entails delays due to normal court proceedings. In contrast, by and large, there is hardly any interference by the court in case of companies under voluntary winding up.

Inadequate staff

- 3.28 OLs are over burdened with the abnormal increase in the number of Companies under their charge, over the years. However, the offices have been provided with skeleton staff consisting of Officers and Assistants by the Central Government which is highly inadequate. No additional staff has been provided by the Central Government in these offices during the last two decades.
- 3.29 In order to augment the staff strength, OLs have appointed, with the sanction of the court, a few employees who are paid out of the funds of the companies in liquidation. The Company paid staff generally consists of low paid employees to attend to routine jobs and with the passage of time, their number has increased far in excess of Government staff. Company paid staff is not amenable to the discipline of the Government servants which has created administrative problems.
- 3.30 Apart from the paucity of qualified, competent and trained staff, OLs have not been provided with modern infrastructure facilities and in absence thereof, they are unable to cope with the increased work load and are unable to discharge their duties efficiently.

Report of OL under sections 394, 497 and 509

3.31 OL is also required to make a report to the court in respect of dissolution of transferor company without winding up in respect of a scheme of reconstruction and amalgamation under section 394 and in respect of dissolution of companies in case of members and creditors voluntary winding up under sections 497 and 509. For the purpose, OL has to scrutinize the books of account and papers of the company. This is an additional work undertaken by OLs in respect of companies which are not wound up by court and not under their charge.

Appointment of OL in companies under Voluntary Winding up

3.32 The court is empowered to appoint OL as liquidator or Joint Liquidator of a company in voluntary winding up subject to the supervision of the court under sections 515 and 522-527. In such cases, OL acts as voluntary liquidator of the company.

CHAPTER 4

SUMMARY OF SUGGESTIONS RECEIVED BY THE COMMITTEE

- 4.1 The Committee issued a Questionnaire on issues relating to the insolvency of Companies. The Questionnaire consisted of three parts. Part -A related to various issues connected with modes of winding up, the choice of appropriate forum for expediting winding up, the problems connected with offices of Official Liquidator(OL) and other related matters. Part-B of the Questionnaire was connected with the manner in which the Board for Industrial and Financial Reconstruction (BIFR) should be re-organised to expedite the reference made to the High Courts for winding up of sick companies which cannot be revived. Part-C of the Questionnaire dealt with the provisions to be incorporated in Insolvency Law in the context of Cross-border Insolvency and manner in which the interest of a company incorporated outside India can be taken care of. Part-C also invited suggestions on measures for expediting the winding up in view of the development of international trade and commerce.
- 4.2 The Questionnaire had been circulated to all the Official Liquidators attached with various High Courts, Regional Directors of Department of Company Affairs, Bar Councils, Chambers of Commerce & Industry and other corporate law experts. The Committee received numerous responses from many organisations and persons. The position of the responses on various issues is summed up as follows:-

MODES OF WINDING UP :

- 4.3 There are three modes of winding up :
- (i) Winding up by the Court (or compulsory winding up);
 - (ii) Voluntary winding up (by creditors or members); and
 - (iii) Winding up subject to supervision of Court.

A majority of the persons responding on the issue favoured that the existing system of winding up in three different categories should continue, whereas 16 persons stated that the winding up subject to supervision of Court should not be continued. The following reasons were indicated :

- (a) Winding up, being highly technical and legal and involving right of third parties, there should be only one mode, namely, winding up by Court.
- (b) There is hardly any matter which is referred for winding up subject to supervision

of the High Court under section 425. The entire procedure is redundant. Compulsory winding up would take care of winding up subject to supervision of the Court.

- (c) Need to rationalize the winding up by court was covered by winding up subject to supervision of Court. Hence there should be winding up by the Court and voluntary winding up only.
- (d) The mode of winding up subject to supervision of Court be done away with for the sake of simplification.

4.4 On the question whether there should be any pecuniary jurisdiction limit linked with the paid up capital or assets for filing a petition for winding up of a company, as per responses given, no body was generally in favour of fixing any such limit. In regard to supervision of voluntary winding up of companies by Court, it was suggested that interference of the court may be necessary only in case of mis-conduct on the part of the Voluntary liquidator and not in a routine manner.

MONETARY LIMIT UNDER SECTION 434 (1) (a)

4.5 Under Section 434, a company shall be deemed to be unable to pay its debts in terms of section 433 (1) (e) if the company defaults in payment of a sum exceeding Rs. 500/- on demand being made in this behalf by the creditor. A majority of responses favoured increase in the monetary limit of Rs. 500/- from Rs. 10,000 to Rs. 5 lakhs. Others felt that the present limit be maintained in the interest of small creditors, particularly the depositors.

JURISDICTION OF COURT

4.6 As per existing provisions, High Courts have exclusive jurisdiction to deal with the winding up companies. Normally there is a Company Judge in each High Court to deal with Company matters. A majority of responses have suggested that the jurisdiction be continued to be vested in High Courts with Special Bench of the Court and where necessary, more number of Judges be appointed to deal with such cases. It was mentioned that Company Judges are periodically rotated (after six months) and this hinders the disposal of cases. The company matters be heard on day to day basis, to avoid delays.

4.7 Generally, the suggestion that the jurisdiction of the Courts be statutorily conferred on the Company Law Board did not find favour at this stage when the CLB does not have adequate Members, Benches at all the seats of the High Courts, and infrastructure

to deal with multiplicity of proceedings involved in matters relating to winding up.

GROUND OF WINDING UP

4.8 Under Section 433, there are six grounds on which a company may be wound up by Court. Based on the responses received, generally it was felt that there is no need to specify additional grounds and the existing grounds are sufficient, which have stood the test of time. The existing just and equitable clause (f) is quite comprehensive to deal with all situations. It was, however, suggested that clause (f) be made more specific as in the recent past even financially sound companies faced winding up due to rivalry between groups of shareholders or directors. Suggestion was also made that a company which does not file the Annual returns and annual accounts for 2-3 years may be liable to be wound up.

TRANSFER OF WINDING UP PROCEEDINGS

4.9 Under section 435, High courts are vested with the power to transfer winding up proceedings to District Courts. However, in practice, there is hardly any case where any such transfer is made. On the question whether transfer of winding up proceedings be made by the Court to Company Law Board instead of District Court, the majority of the responses have suggested to retain the existing provision or to delete this provision which has not served any useful purpose.

FILING OF STATEMENT OF AFFAIRS WITH THE PETITION FOR WINDING UP BY THE COMPANY ITSELF.

4.10 Under section 454, the Statement of Affairs containing particulars of the assets and liabilities is required to be filed within 21 days from the date of winding up order or the date of appointment of Provisional Liquidator. As stated in Chapter-3, the same is either not filed or filed after an inordinate delay by ex-directors and this is one of the main reasons which delays the winding up process. In that context, a suggestion was made by the Committee as to whether it may be made obligatory for a company filing the petition for its winding up to submit the Statement of Affairs alongwith the petition. Almost all the persons have agreed with the suggestion. A suggestion was made that the Company also should file the Statement of Affairs alongwith its reply to the winding up petition filed by any creditor etc. along with details of assets and their location.

PROTECTION OF ASSETS DURING PENDENCY OF WINDING UP PETITION

4.11 During the pendency of the winding up petition before the court, the assets of the company remain in the hands of the directors. In that context, a question was posed

by the Committee as to whether a provision be made to make it obligatory for the court to protect the assets during the pendency of the petition and whether a fund be created for protection of assets. The suggestion has been agreed to by almost all the persons. Those who have answered this question in the negative have only suggested that on an application made the court may pass appropriate orders to protect the assets or appoint Provisional Liquidator under section 450. It is also stated that sufficient safeguard already exists under section 536 (2) to avoid any fraudulent transfer. It was also brought to the notice of the Committee that courts normally pass interim orders of injunction restraining the company and its directors from alienating or transferring the assets. In spite of this, it was generally felt that there is a need for specific provision in the Act to make it obligatory for courts to protect the assets. A fund may be created to protect the assets of companies going into liquidation and a specific percentage of profits of companies be transferred to such a fund. Money spent out of the fund for providing security to the company under winding up should be reimbursed out of funds of the company when realized.

- 4.12 It is normally observed that there is a substantial time lag between the date of presentation of the petition for winding up and the date of winding up order. It also takes time before the formal order of winding up is sent to the Official Liquidator under section 444. In the meantime, the valuable assets of the company may be frittered away or dissipated. In reply to the question as to whether any time limit should be prescribed for disposal of winding up petitions and issue of formal winding up order, most of the responses received answered in the affirmative. Those who have not favoured with the idea of fixed time frame have stated that any prescription of time limit for courts may amount to interference in the jurisdiction of the court as well as its inherent powers. If time limit fixed for disposal of the winding up petition, the chances of re-starting the company may not be possible and a running company may be forced to close down. It was pointed out that courts usually allow time to the company to pay off the creditors and ensure that the instalments fixed for purpose are finally paid and this results in delay in disposal of such petitions. There is, however no justification of any delay in serving the order of the court on the OL under section 444.

PRESCRIBED TIME LIMIT FOR COMPLETION OF EACH STEP BY OL

- 4.13 There is abnormal delay in the winding up proceedings due to delay in non-submission of Statement of Affairs and production of books of account and records and assets of the company by the ex-directors, as also delay in sale of assets, realization of debts, settlement of list of creditors and contributories and disbursement of assets by way

of dividend to creditors and return of capital to the contributories or members. It was, therefore, suggested by the Committee that while passing the order for winding up of the company, the court may specify time limit for each step so that winding up process is completed within a fixed time frame.

- 4.14 A majority of responses have stated that such a time limit be fixed by the Court. This will obviate the need for seeking orders of the court for each step by the OL. The court may fix the time frame after hearing the company and with the assistance of the Liquidator. At present, OL has to obtain orders of the court for all his actions and once these time limits are fixed it will require necessary changes in the law as well as the rules. Sometimes, it may not be possible to anticipate the problems faced in the implementation of each step and the OL will have to approach the court for extending the time limit (s).

APPOINTMENT OF OL OR PRIVATE LIQUIDATOR

- 4.15 Under section 449, on a winding up order being made in respect of a company, the OL shall, by virtue of his office, become the liquidator of the company. The court has no power to appoint any person as liquidator other than the OL. A suggestion was, therefore, made by the Committee as to whether the present system of appointing OLs should continue or should the court in the alternative appoint private liquidators; if so, what should be the qualifications, terms and conditions of such appointment and whether this should also apply to voluntary liquidators.

- 4.16 A majority of the responses have supported the suggestion to empower the court also to appoint private liquidators who are professionals like Advocates, Chartered Accountants, Company Secretaries etc. having adequate practicing experience of say 10 years with suitable infrastructure. Such professionals may also be required to pass a qualifying examination. It was also suggested that the private liquidator may be a partnership firm or even a body corporate with professionals. This will require amendment in section 513. Such appointments should be made taking into account the value of assets involved, guarantee provided by private liquidator and his expertise. Such private liquidators be drawn from a panel approved by the Central Government and/or the High Courts. On the other hand, the idea of appointment of private liquidators was opposed on the ground that this concept is fraught with danger in the absence of their accountability, continuity and responsibility and will not take off without proper infrastructure with them.

- 4.17 In regard to companies under voluntary winding up, it was generally suggested that

the existing practice to appoint any person as liquidator by the company and/or creditors be continued.

- 4.18 On the point as to whether the court be empowered to transfer existing winding up proceedings from the OL to proposed private liquidators, a majority of responses agreed with this view. On the other hand, it was pointed out that any provision made for appointment of private liquidators should not apply to existing proceedings and once the OL is appointed as liquidator, there should not be any transfer of the proceedings to the private liquidator. On the contrary, there should also be a provision in the Act to transfer the winding proceedings from private liquidator to OL, if deemed fit by the court.

UPDATING OF BOOKS OF ACCOUNT AND AUDIT

- 4.19 One of the reasons which lead to delays in winding up is that the books of account are incomplete and not up-dated upto the date of winding up order and are unaudited, in the absence of which the OL finds it difficult to rely on the same. The majority of responses supported the suggestion that there should be a specific provision for ensuring that books of account are completed and got audited up to the date of winding up order by the ex-directors of the company and expenses be met out of the assets of the company. On the other hand, it has been suggested that if the Provisional Liquidator is appointed before the company is ordered to be wound up, the directors may not have any locus-standi to interfere into the affairs of the company as all the properties and books of account will be in the possession of the Provisional Liquidator. In that case, the audit be arranged by the Provisional Liquidator and the Ex-Directors should be made liable to provide all assistance and clarifications to the OL and the auditor.

PRELIMINARY REPORT FILED BY OL

- 4.20 Under Section 455, a preliminary report is required to be submitted to the court by OL not later than 6 months from the date of winding up order with regard to the assets and liabilities of the company, the causes for the failure of the company and whether further enquiry is desirable relating to the promotion or failure of the company or the conduct of its business. The court is also empowered to extend the period for submission of this report. A majority of the responses have suggested that the period of 6 months prescribed under the Act be reduced to say one to three months depending on the size of the company. On the other hand, it is stated that the period to be specified is meaningless as until and unless the Statement of Affairs is not filed by ex-directors, OL cannot file the preliminary report. Similarly, the preliminary report can be submitted after the books of account and the required information is furnished to the OL by the

ex-Directors and in many cases, the same is not forthcoming. It was, therefore, suggested that the existing period of 6 months is a reasonable period, but it should be strictly enforced.

POWERS OF THE LIQUIDATOR UNDER SECTION 457

4.21 Under sub-section (1) of section 457, the liquidator can exercise his powers with the sanction of the court. These powers are to defend any legal proceedings in the name of the company; to carry on the business of the company for its beneficial winding up; to sell the assets of the company by public auction or private contract; to raise on the security of the assets of the company any money; and to do other things as may be necessary for winding up the company and distribution of its assets. The liquidator may, however, exercise certain powers without the sanction of the court under sub-section (2) thereof, namely, to execute in the name of the company any deed or receipt or document; to inspect the record of the company kept with the Registrar of Companies; to prove any claim in case of insolvency of any contributory; to draw and accept any bill of exchange etc. in the name of the company; to take out letter of administration to any deceased contributory; and to appoint an agent to do any business which the liquidator is unable to do himself. In terms of sub-section (3) the liquidator shall exercise all his powers subject to the control of the court and any creditor or contributory may represent to the court with regard to exercise of any power by the liquidator. In substance, the OL cannot exercise any power without the interference of the court and for the purpose, he has to seek formal orders of the court for each step.

4.22 The Committee enquired as to whether the liquidator be required to seek sanction of the court for each and every action or he should be required to approach the court for certain important specified matters and whether the reports of OL be disposed of by courts in a summary manner. A majority of responses have agreed with the suggestion. It is stated that the liquidator is the best judge to decide what is necessary for him to do and he may be allowed to take decisions independently without seeking sanction of the court for every step, which is time consuming. Experience shows that in almost all cases where OL has approached the court under section 457 for exercise of any power, the court has granted such permission after hearing the liquidator. It is stated that Rules should clearly spell out the duties, powers and procedures and the OL need not approach the court for routine functions, like steps taken to protect the assets of the company by appointing security guards, appointment of valuer and auctioneer, issuing advertisement for sale of assets; settlement of list of creditors and contributories; inviting claims from creditors; appointment of professionals like

Advocates, Chartered Accountants etc. for attending to the legal cases, preparation of accounts, audit and attending to income tax matters, investigation of claims and for deciding to file misfeasance proceedings; incurring day to day expenses in winding up etc. OL should only seek sanction of the court for confirmation of sale of assets and for distribution of the assets. The present system of the liquidator seeking court's directions even for small matters not only causes delay in winding up but also wastes more valuable time of the court.

SALE OF ASSETS WITHOUT DELAY

- 4.23 It is the primary duty of the OL to sell the assets as soon as the possession thereof is handed over to him, except where there is some litigation going on in relation thereto. Under section 457(1) (c), OL may, with the sanction of the court, sell the immovable and movable assets and actionable claims of the company by public auction or private contract or sell the same in parcels. Under Companies (Court) Rules, 1959 every sale shall be held by the OL or if the Judge so directs, by an agent or an auctioneer approved by the court and subject to such terms and conditions as may be approved by the court; and all sales shall be made by public auction or by inviting tenders, or in such manner as the Judge may direct (Rule 273). The Committee sought the suggestions to expedite sale of assets. It is suggested that the court should fix up a time frame for sale of assets through auctioneers. A suggestion has also been made that instead of the assets being sold in piece meal and separately (e.g. furniture, plant and machinery and land), all the assets be sold en-block where necessary, to avoid delays.
- 4.24 On the question whether there should be two distinct aspects of liquidation-(i) Asset sale and (ii) Distribution of proceeds, most of the responses have agreed with the suggestion, and answered in affirmative. The two aspects are quite distinct to each other and urgent efforts be made for the sale of assets, as in the absence of proceeds from sale of assets, no distribution amongst the creditors is possible.

PRIORITY UNDER SECTIONS 529, 529 A AND 530

- 4.25 Distribution of assets by way of payment to the creditors is governed by the provisions of section 529, 529 A and 530. The secured debts and workmen's dues are paid in priority and rank pari passu with such dues under section 529 A. Certain debts payable to the Government and wages to the workers are preferential payments under section 530 subject to the provisions of section 529 A. The other unsecured debts are paid only when there is any surplus after payment of preferential claims. In this context, suggestions were invited in regard to priorities for distribution to the creditors of various categories particularly, with regard to recognition of the right of secured

creditor to remain outside the winding up proceedings and whether the workers should have a right to be heard in winding up proceedings considering the fact that they have pari passu rights.

4.26 Generally, it is stated in reply to the questionnaire that the existing provisions adequately safeguard the interest of the creditors and workers. Secured creditors should have priority but should not remain outside the winding up proceedings and they may be given the right to organize sale of the charged assets with the approval of the court. Another view was that the secured creditor should be kept out of winding up proceedings allowing the specific security at their disposal to the extent of their dues. This will simplify the procedure and also save time and avoidable workload of the liquidator. The rights of secured creditors should be preserved and protected notwithstanding any law made by the Central or State Legislature. A suggestion has also been made that a certain percentage of sale proceeds be reserved for payment to unsecured creditors (like depositors), as otherwise they get nothing.

4.27 In National Textile Workers' Union V. Ramakrishnan (P.R.) (1983) 53 Com cases 184; AIR 1983 SC 75, the Supreme Court (by a majority of 3 to 2) held that the workers would be entitled to be heard in the matter of a petition to wind up a company as interveners and not as parties. The Court further held that after the winding up order was made, the workers could appeal against it, but once the order became final, the workers could not participate in any further proceedings in the course of winding up. In response to the questionnaire it has been suggested that workers need not have a right to be heard in a winding up petition since they have got pari passu right under the law. It is also stated that whenever the workers have appeared, the hearing has become very lengthy. It has also been suggested that to take care of workers' dues, Government may consider a scheme on the lines of " Deposit insurance scheme".

SIMPLIFICATION OF COMPANIES (COURT) RULES, 1959

4.28 In regard to the suggestions with regard to simplification of Companies (Court) Rules, 1959, generally it has been agreed that Rules require reconsideration and simplification in the matter of fixing of time frame, limiting the judicial intervention, speeding up of realization of assets etc. The Rules will be required to be amended based on changes made in the Act.

The National Tribunal shall have power to regulate its own procedure and these rules will replace Companies (Court) Rules, 1959.

PROCEDURE FOR PAYMENT TO CREDITORS ETC.

4.29 In the questionnaire, various suggestions relating to payment to creditors were invited. The views expressed in reply to the questionnaire, in general are as under;

- (i) In regard to the procedure of payments to the creditors etc. the committee is of the view that payments may be made to the creditor in instalments as and when the assets, are realised in part, rather than waiting for all the assets to be realised.
- (ii) The liquidator may appoint Advocates/Chartered Accountants/Company Secretaries for verification of claims of the creditors. On the other hand, it has been suggested that this would increase the cost of winding up and cause further delay. Instead, the liquidator and his office should verify the claims.
- (iii) Interest may not be provided on funds advanced by the secured creditors for preservation and protection of assets and instead, the expenses incurred in this behalf be treated as cost and expenses of winding up. On the other hand, it has been urged that the money provided by the secured creditors has a cost factor and, therefore, they should be allowed interest on the money so provided and paid out of the sale proceeds without waiting for payment of dividend to the creditors.

The committee is of the view that an explicit provision need be made in the Companies Act giving a right to the secured creditors to file proof of debt with the liquidator without surrendering his status as a secured creditor and get the dividend in accordance with the priority to which he is entitled.

- (iv) There is no prohibition under the Act for a creditor to file his claim with the liquidator where he has already filed a suit for recovery of debt. On the other hand, it has been stated that for continuation of suit filed by a creditor, permission of the court is required under section 446 and in such an eventuality, the question of filing proof of debt does not arise since the liquidator (being one of the parties in the suit, representing the company) will have to take notice of the court order, if any, passed.

The liquidator should determine the amounts due to various creditors as on the date of winding up order to ascertain the proportion in which the assets realized shall be distributed in terms of sections 529, 529 A and 530.

- (v) Secured creditors may not be paid interest after the date of winding up as in the case of other creditors. However, payment of future interest will depend upon the decree passed by the court, if any. It would be expedient in the interest of the company if the charged assets are sold as early as possible with the permission

of the court.

- (vi) The liquidator will have to recognize inter-se priority among the secured creditors and distribute the sale proceeds in their order of inter-se priority.
- (vii) The liquidator should take notice of charges registered with the Registrar of Companies and may insist for certificate of registration/modification of charge.
- (viii) The liquidator should take action, civil as well as criminal, against the persons who have pilfered the assets during the pendency of winding up proceedings.
- (ix) The liquidator must take steps to obtain vacant possession of the properties of the company in the custody of its officers/employees after winding up order. For the purpose, the liquidator should be empowered to carry out eviction under the Public Premises (Eviction of Unauthorized Occupant) Act, 1971 and fix fair rent against their claims, if any. Distribution of dividend to the creditors/members who are in possession of company's properties should be withheld till possession is handed over to the liquidator.

PROVISIONS APPLICABLE TO SICK INDUSTRIAL COMPANIES

- 4.30 Under section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985, BIFR may record and forward its opinion to the concerned High Court that it is just and equitable that the sick industrial company should be wound up. Thereafter, the High Court shall order winding up of the company and proceed under the provisions of the Companies Act, 1956. The High Court may also appoint an officer of the Operating Agency if consent is given in this behalf.
- 4.31 It has been generally suggested that BIFR should not be empowered to appoint the liquidator to avoid multiplicity of proceedings. On the other hand, it has been suggested that BIFR may be empowered to appoint the liquidator, as referring the matter to the Company Court by it is a mere formality and delays the final outcome. Another view was that BIFR should not only be empowered to order winding up and appoint the liquidator but also conduct the winding up proceedings.
- 4.32 It has been suggested that, by change of law, BIFR may furnish a report on the state of affairs of the company to enable expediting the winding up by the court. The forms prescribed under SICA may also be required to give additional information to facilitate the liquidator in case the company is ultimately wound up.

FOREIGN CREDITORS

4.33 It is generally suggested that there is no need for making any special provision to protect the interest of foreign investors and they should be treated at par with the Indian creditors. Allowing the foreign creditors to prove their claims must only be on reciprocal basis as per judgment reported in AIR 1955 SC 590. It means that the country to which a foreign creditor belongs must allow the Indian creditors to prove their claims in winding up proceedings before their courts. Subject to the above judgment, if the loan stated to have been given by the foreign creditor is for operations of the company in India the foreign creditor be allowed to prove his claim. That also must be restricted to the credit extended in India and not in any other place outside the country.

SPECIFIC SUGGESTIONS IN VIEW OF THE PRESENT DEVELOPMENT OF INTERNATIONAL TRADE AND COMMERCE

4.34 It is suggested that a provision may be made to constitute a Liquidation committee consisting of creditors of the company on the lines of section 141 of the Insolvency Act, 1986 of UK to assist the liquidator. It is more democratic as creditors are being involved in the matter in which they have sufficient interest. They will also co-operate with the liquidator in speedy settlement of claims or creditors.

4.35 It is suggested that if a person other than Official Liquidator is appointed, as suggested, and if the said liquidator is given a time frame for various steps to be taken by him and for sale of assets then the winding up proceedings will be expedited. Proper infrastructure be provided to the liquidator's office to expedite liquidation proceedings.

OTHER SUGGESTIONS

4.36 During the course of presentation and oral submissions made before the Committee by individuals, institutions like RBI, IDBI, ICICI, Indian Banks Association and Chambers of Commerce and Industry like CII, ASSOCHAM, Indian Merchant Chamber etc., the following suggestions were made to expedite winding up proceedings and to streamline the legal requirements:-

- (1) Law relating to fraudulent preference as contemplated under section 531 should be made more stringent to provide that the persons and entities in whose favour fraudulent preference has been made should compensate the company.
- (2) The committee considered the suggestions made that dues of all employees whether covered under Industrial Disputes Act, 1947 or not should have priority

under section 529A of the Companies Act. The committee is of the view that it should include dues of all employees of the company under winding up.

- (3) Different types of companies like Non-Banking Financial Companies (NBFCs) have peculiar problems in winding up and there should be separate enactment for dealing with such companies as suggested by the Reserve Bank of India.
- (4) Section 217 may be amended to provide that the Board's Report shall also state about the dues of the workmen. This will facilitate the liquidator for ascertaining the dues of the workers on the date of the winding up.
- (5) The court may be empowered to appoint an administrator on the petition of any creditor for recovery of the dues and during the pendency of winding up petition on the lines of Insolvency Law in U.K in order to preserve and protect the assets as also for sale of assets.
- (6) Once an order for winding up is made or a Provisional Liquidator is appointed, section 446 comes into play requiring leave of the winding up court, to continue the pending proceedings or for initiation of proceedings against the company in liquidation. Leave under section 446 should not be granted by court as a matter of course to continue proceedings in courts other than the winding up court, unless substantial progress has been made in the pending case.
- (7) There is a necessity to avoid multiplicity of authority in trying to obtain possession of the assets of the company in winding up. Only the liquidator should effect the sale of the assets. In case before appointment of liquidator, the steps taken by a creditor for sale of assets had reached an advanced stage; such efforts could be permitted to be continued in association with the liquidator.
- (8) It is necessary to make an explicit provision giving a right to the secured creditor to file proof of debt with the liquidator without surrendering his status as a secured creditor and get the dividend in accordance with the priority to which he is entitled.
- (9) Secured creditors' right to interest on the moneys lent and advanced by them be preserved. It is prudent to work out the proportion of distribution amongst the secured creditors on the basis of amounts due to them as on the date of winding up. However, as the distribution of dividend takes inordinately a long time, they should not be deprived of interest; nor the payment of interest be postponed till the payment of the dues of all creditors. The creditors should be categorized as secured, preferential and unsecured creditors and each category should get in full before the creditors in the next category are paid dividend.

- (10) There is no uniformity with regard to ascertaining the dividend entitlement of the secured creditors, having different priorities amongst them. Their inter-se priority should be recognized and, as far as possible, the sale of assets should be effected in convenient lots so that the inter-se rights may be effectively ascertained. The secured creditors should be given priority against the assets on which it has the charge and not on all the assets of the company.
- (11) It should be made compulsory for the company to provide details of assets with the annual return and in case of substantial disposal thereof, (more than ten percent of the gross book value of the assets), a return should be filed with ROC reporting the transaction. This will help in identifying and locating the assets for taking possession by the liquidator. A copy of the details of assets may be supplied to the statutory auditor, which the liquidator can obtain in case of need.
- (12) Gujarat High Court has constituted a sale committee consisting of Official Liquidator, representatives of secured creditors (FIs & Banks) and workers. The Committee finalises the sale procedures, examines the bids and recommends the acceptance of bids. This system is working satisfactorily and hence similar procedure/practice may be adopted in effecting sale of the assets by the liquidator.
- (13) Provisions for revival and rehabilitation of the Companies may be incorporated in the Companies Act on the lines of SICA and SICA be repealed. If there is no scope of revival, proceedings be initiated for winding up without delay.
- (14) The Company Law Board, a quasi-judicial tribunal be conferred the powers of the court with regard to winding up proceedings of a Company after the winding up order is passed by the court. In that context, a suggestion was made that while non-listed companies, in liquidation, be brought under the control of the Company Law Board, the listed companies (which are large sized companies) be continued to be under the control of the court. For the purpose CLB will be required to be strengthened with adequate number of Benches and Members.
- (15) A provision be made so that all assets of the company in liquidation shall be deemed to be vested in the State. In that case liability towards Government dues will be extinguished and realization process will be speeded up. This is being suggested as the State should not realize any revenue in case of an insolvent company in the interest of the creditors and in public interest.
- (16) A separate fund may be created for payments to the workers. This can be done by keeping certain percentage of sale proceeds for this fund. The fund can also be utilized for training the workers for re-deployment.

- (17) An ideal insolvency law must rely as much as possible on the market and as little as possible on Government's and bureaucrats' ideas about what insolvency law should be. The new law should be formed with the objective that the assets of the company must be sold quickly, say within 6 months of the winding up order; assets sale and distribution of proceeds be considered as two separate aspects of liquidation; winding up order should itself prescribe the steps alongwith time frame for each action and professionals be empanelled as company liquidators.
- (18) Sick companies should be identified well in time so that quick remedial action could be taken. The basic criteria should be to quickly restructure those companies which are worth turning around and quickly liquidate those which are beyond redemption. BIFR has not served the purpose for which it was sought to be established under Sick Industrial Companies (Special Provisions) Act, 1985. The concept of " sick industrial company" itself has neither been properly received by the parities involved nor comprehended. It has been used more for preventing recovery and to avail of remissions and concessions rather than any substantial effort made towards the revival of companies. There is substantial delay in the decision making process before BIFR refers the matter to the High Court for winding up of company. It has, therefore, been suggested that the SICA be repealed. If necessary, the powers regarding revival of sick industrial company may be suitably provided in the Companies Act.
- (19) Law should stipulate a time frame for disposal of winding up petitions say 2 months from the date of presentation of the petition.
- (20) Court should take steps to appoint provisional liquidator to take charge of the assets, provide for their security and prevent the stripping of the assets.
- (21) The details of assets alongwith their location should be made a part of the Annual Return and any change in the asset along with their location should be made a part of the Annual Return.
- (22) The claims of creditors may be invited by the liquidator alongwith the advertisement winding up.
- (23) Express provision be made in the Act enabling the Liquidator to declare and distribute interim dividend to the persons entitled.
- (24) Routine courses be conducted to train the staff.

CHAPTER-5

REVIVAL OR WINDING-UP OF COMPANIES - LINKAGES BETWEEN COMPANIES ACT, 1956 (PART VII) AND SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985

Introduction

- 5.1 In this Chapter, an attempt has been made to focus on the linkages that exist between the Sick Industrial Companies (Special Provisions) Act, 1985 and the provisions of the Part-VII Companies Act, 1956 so far as they relate to the winding-up of companies. Committee is of the view that there is a need for setting up a National Tribunal which can address both issues of revival and reconstruction of a company, where appropriate and for ensuring expeditious winding-up of an insolvent company, when it is inevitable.
- 5.2 Corporate wealth is created with the inputs contributed by entrepreneurs, labour, banks and financial institutions and also by the incentives and infrastructure provided by the Government (Central, State Government and Local Bodies). The resources thus generated with great deal of effort often are stashed away by resorting to manipulation and mismanagement or diverting company's resources into unproductive channels through inept and inefficient management causing a financial drain much to the detriment of creditors, investors, workmen and the public. However, the enormity of investment in corporate enterprises requires that if it is possible to evolve a scheme of revival, it should be first attempted and pursued, in preference to winding-up of a company.
- 5.3 Provisions of the Companies Act, 1956**
- At this stage, it would be useful to invite attention to the relevant provisions of the Companies Act.
- 5.4 Arrangement, reconstruction and amalgamation - Sections 391-394 of the Act.**
- Presently, the provisions of the Companies Act do not envisage corporate restructuring beyond what is authorized in terms of Sections 391-394 of the Companies Act which provide for a scheme of compromise, arrangement with creditors or members, reconstruction and amalgamation of companies. It needs to be stated that the expression 'company', as used in these sections means a company liable to be wound-up under the Act. These reconstructionist measures are in common parlance referred to as "M & A Strategy".

5.5 Provisions relating to the winding-up of companies - Part VII, Sections 425 to 559 of the Companies Act

The above provisions deal with the three modes of winding-up of a company viz.

- (i) winding-up by the Court - Chapter II - Sections 433 - 483
- (ii) voluntary winding-up - Chapter III - Sections 484 - 521
- (iii) winding-up subject to the supervision of Court - Chapter IV - Sections 522 to 527 and
- (iv) Chapter V - Sections 528 to 559 contains common provisions applicable to every mode of winding-up.

5.6 From the information gathered by the Committee, it is observed that the average time taken in completing winding-up process of a company under Courts winding up is more than ten years. It has been brought to the attention of the Committee in the many presentations made before it that the High court Judge dealing with company cases is not able to sit on a day-to-day basis and is not in a position to devote the time and energy required for early disposal of winding-up cases. It is for these reasons that the Committee strongly feels that it is necessary to establish a separate National Tribunal, which may exclusively deal with revival/winding-up of companies on a regular and day-to-day basis as such an arrangement would expedite the disposal of winding-up cases.

5.7 Sick Industrial Companies (Special Provisions) Act - Salient Features

It is recognized that references under Sections 391-394 of the Companies Act are the most preferred route to corporate reconstruction, though this does not fall within the purview and scope of the Committee. The case of sick industrial companies, their revival and reconstruction are specially and exclusively dealt with by a separate enactment known as the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). This Act was enacted with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings and to secure the speedy determination by a Board of experts of the preventive, ameliorative and reconstructionist remedies and measures that need to be taken for the revival and rehabilitation of such companies. The Act also provides for the expeditious enforcement of the measures so determined to restore the companies involved to the status of commercial and operational viability. Under this Act, an expert body called the BIFR (Board for Industrial and Financial Reconstruction) is equipped with the powers, jurisdiction and authority to take and implement the decisions with regard to

the preventive, ameliorative and reconstructionist remedial measures to facilitate the revival of sick companies. The scheme of the Act in brief is as follows:

- (i) Sections 15 to 22(A) (Chapter III) provide for References, Inquiries and Schemes and for rehabilitation by giving financial assistance. When revival measures fail, the Board is authorized to recommend to the High Court, the winding-up of the sick industrial company on just and equitable grounds. When the legal steps and measures contemplated by Chapter III are under the consideration of the Board, there is a comprehensive provision in Section 22 of the Act for the suspension of all legal proceedings, suits, contracts etc against the sick industrial company.
- (ii) Sections 23 to 36 deal with proceedings in respect of potentially sick industrial companies, misfeasance, appeals and miscellaneous matters.

The legal criterion of sickness of a company which makes reference to the BIFR mandatory under Section 15 of the Act is provided for in Section 3 (1)(o). According to that provision, a company which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth, is to be regarded as a sick industrial company. Again under Section 23 of the Act, when a company suffers loss of 50% or more of its peak net worth, it is characterized as a potentially sick industrial company.

5.8 Review of the performance of BIFR

5.8.1 The Committee had the benefit of hearing the views of the Union Labour Secretary, Union Banking Secretary and experts representing financial institutions, commercial bodies and Indian Bankers Association on the subject. These organisations and persons have with one voice expressed a clear opinion that the BIFR and AAIFR have not been able to fulfil the purpose and mandate as envisaged under SICA, of providing viable schemes for the revival of sick companies in a reasonable short time frame.

The Committee, at the request of the members of BIFR gave them a hearing. The submissions were made with regard to the status of cases registered with BIFR as on 30th June, 2000 and the Committee was informed that out of 3068 cases referred to the BIFR from 1987 to 2000, all but 1062 cases have been disposed of. Out of the cases disposed of, 264 cases were revived, 375 cases were under negotiation for revival process, 741 cases were recommended for winding up and 626 cases were dismissed as not maintainable.

5.8.2 The detailed year-wise statistics in this regard furnished by BIFR is as under:

Table II
Board for Industrial & Financial Reconstruction
STATUS OF CASES REGISTERED WITH BIFR AS ON 30.6.2000

1	2	3	4	5	6	7
Year of Regn.	Total Cases	Cases under revival	Cases Revived	Winding up recommended	Dismissed	Pending cases
1987	311	55	63	123	53	17
1988	298	40	54	105	86	13
1989	202	40	39	72	35	16
1990	151	24	30	55	23	19
1991	155	27	25	60	30	13
1992	177	48	12	54	42	21
1993	152	24	10	42	61	15
1994	193	48	16	65	34	30
1995	115	18	6	48	21	22
1996	97	10	3	39	17	28
1997	233	24	2	57	26	124
1998	370	17	1	19	61	272
1999	413	-	3	2	113	295
2000	201	-	-	-	24	177
TOTAL	3068	375	264	741	626	1062

5.8.3. It was explained to the Committee that the objective of the SICA is to attempt revival of sick industrial companies in consultation with banks, financial institutions and other secured creditors. A package of rehabilitation of sick industrial companies involves the following steps and each of the steps take roughly the time indicated there against:

(a)	Technico-economic viability study of the sick industrial company:	2-3 months
(b)	Preparation of implementation scheme for rehabilitation with assistance of Operating Agencies :	
	(i) Submission of a proposal by the company for revival :	1 month
	(ii) Draft scheme for rehabilitation :	3-6 months
(c)	Obtaining consent of creditors and parties :	3-6 months
(d)	Notice u/s 19 and final hearing : (including period of notice u/s 19)	3-6 months
	TOTAL	12-22 months

- (e) The Board where feasible, orders amalgamation / merger of sick units with healthy ones.
- (f) If none of the aforesaid strategy is found workable, the sick units are ordered to be wound up.

BIFR has the experience that in about 20% cases, management tries to resort to accounting manipulation or do not come with clean hands and the reference to the Board is dismissed (as per the table, BIFR has dismissed 626 cases out of 3068 cases).

5.8.4 Representatives of BIFR submitted that they are confronted with obstacles in disposing of cases in the absence of independent operating agency to assist them, non-cooperation on the part of secured creditors and delay on the part of secured creditors in communicating agreement to remissions and concessions of debts due to them. In case of public sector undertakings, the concerned Governments do not respond in time to the inquiries regarding revival scheme and do not communicate their consent for winding up where recovery is not viable. Finally, after the reference has been dismissed, courts/AAIFR often refer back the cases which further result in accumulation of pending cases.

- 5.8.5 The BIFR members suggested that the maintainability of the reference to them should be based on the criteria of debt default and 50% of erosion of networth instead of present criteria which is 100% of net worth.
- 5.8.6 It was also suggested that BIFR should be assisted by a Group of experts or an agency to undertake the viability studies and propose revival schemes and suitable funds should be provided to BIFR for conducting such studies.
- 5.8.7 The Committee wanted to know as to why the steps taken by BIFR are sequential and not concurrent, for instance why the applicant making a reference is not required to get a technical feasibility done and attach it along with the reference. Secondly, once it becomes clear that the secured creditors are not willing to make necessary sacrifices by giving concessions about debts due to them, why the BIFR does not order winding up immediately. The response of BIFR was that in the first case, the Act does not have such an obligation on the applicant to attach scheme of revival. As to the second query, they explained that in view of the interest of labour, the BIFR makes endeavour till the last minute to obtain the consent of the secured creditors.

5.9 Desirability of continuance of SICA and BIFR

The above facts and figures speak for themselves and they place a big question mark on the utility of the institution of the BIFR and the SICA. The problem of endemic delays inherent in SICA procedures of revival and reconstruction is to a great extent exacerbated by the large scale abuse of the provisions relating to suspension of legal proceedings, suits and enforcement of contracts and other remedies contained in Section 22 of the Act. The recent decision of the Supreme Court in *Rishabh Agro Industries vs. PNB Capital Services* (2000 AIR SCW 1753) is an illustration of the point under discussion. The other criticism levelled against the BIFR and the provisions of SICA in the course of presentations before the Committee also deserve brief notice:

- (i) The main drawback of the SICA scheme is that it leaves the debtor company in possession of the assets which creates an asymmetry and imbalance between the debtor company and its creditors conferring on the inefficient or inept management an unmerited advantage. Indeed, there are judicial decisions in support of the proposition that the pendency of a reference under section 16 of SICA does not create a legal bar to the sick company disposing off its assets during such pendency (AIR 1995 SC 1484)
- (ii) The debtor in possession allows the promoters to leverage information advantages and to create tailor made delays in the proceedings by taking recourse to the

suspension of legal proceedings under the provisions of Section 22 of the Act.

- (iii) The implementation by the BIFR of the various steps and measures under the scheme sanctioned with reference to Section 18 or 19 of the Act in a sequential rather than concurrent manner is an additional contributory factor leading to long and avoidable delays in the disposal of cases and proceedings.

5.10 Need for a more effective alternative mechanism in place of SICA

For reasons as stated above, it was strongly urged upon the Committee in various representations made to it to consider seriously the possibility of making a recommendation for the replacement of SICA by a reformed and improved statute which would provide for an alternative Tribunal and more effective mechanism for faster revival of sick and potentially sick companies.

5.11 Recovery of Debts due to Banks and Financial Institutions Act, 1993 - Overriding impact of Section 34 of the Act on the winding-up provisions of the Companies Act, 1956

To illustrate the extent of the enormous inroads which recent special statutes have made on Part VII of the Companies Act, the attention of the Committee was drawn to the recent decision of the Supreme Court in Allahabad Bank vs. Canara Bank - 2000 CLC 913 which has stated the legal effect of section 34 of the DRT Act in these words:

- 1) The DRT and the Recovery Officer have exclusive and overriding jurisdiction over the debtor company in liquidation even though the same issues also arise for bankruptcy adjudication pending in the Company Court.
- 2) Proceedings before the DRT cannot be stayed by the Company Court as the RDB Act overrides Sections 442, 446 and 537 of the Companies Act.
- 3) Companies Act is a general statute while the RDB Act is a special statute. Consequently, RDB Act overrides the Companies Act by virtue of the maxim - 'Generalibus specialis Non'derogant'.
- 4) Alternatively, even if both the Acts are treated as special laws, Section 34 of the RDB Act gives overriding effect to the Act over Companies Act, since the RDB Act is the later of the two enactments.

5.12 The effect of the RDB Act as stated by the Supreme Court in the aforesaid judgment is that the non-obstante clause of Section 34 gives an overriding effect in the matter of recovery of claims by banks and financial institutions against defaulting companies in priority and preference to other claims against a company under adjudication in winding-

up proceedings pending before the High Court. This particularly upsets the order of priority provided for in Sections 529, 529A and 530 of the Companies Act. The effect of the Allahabad High Court's judgment is far-reaching and the Committee feels that the imbalance created in the situation can be redressed only by instituting radical reforms in the structure of company insolvency legislation.

5.13 Remedial changes proposed in the structure of Companies Act, 1956

The Committee strongly feels that the provisions of Part VII of the Companies Act, 1956 should be suitably amended by incorporating a non-obstante clause to restore the order of priority of payments to be made to claimants in insolvency of companies as provided in Section 529, 529 A and 530 of the Companies Act. Such a change in the law is necessary to override the effect of the Supreme Court decisions to which we have already referred. The law should provide for notice to all claimants for proving their debts and for classification of the debts to facilitate determination of inter-se order of priority in a fair and equitable manner.

5.14 Test for triggering insolvency proceedings

The Committee has considered the point made before it that erosion of entire net worth of a company is not a satisfactory criterion for triggering action for revival of a sick company as provided for at present under SICA. The Committee therefore recommends that the proposed company insolvency law may provide for a two-way test:

- (i) **Debt Default Criterion:** Where the company is unable to pay its debts in the manner provided for in Section 434(1) of the Companies Act. The existing limit of Rupees 500 is far too low and unrealistic and it may be raised to **Rs. 1 Lakh**. Apart from this debt default criterion as determined under Section 434, the other grounds as envisaged in Section 433 should be retained.
- (ii) **Incipient Sickness:** Erosion in the net worth to the extent of 50% or more should be recognized as a ground for recommending revival and reconstructionist procedures and if they prove to be unavailing, the company should be ordered to be wound-up on just and equitable ground (on lines similar to the provisions contained in Section 20 of SICA).

The Committee, however, is unable to agree that the definition of debt default should be based on the concept of Non Performing Assets (NPA) as defined in the report of the National Task Force Committee. The NPA can also arise due to some temporary liquidity crunch. Moreover, a NPA related debt default criterion may no doubt protect the interests of secured creditors but not those of unsecured creditors and labour. Further, the priority of Government dues also requires to be kept in view while ordering winding-up of a company.

5.15 Need to include Revival/Rehabilitation Plans as an integral part in the structure of Company Insolvency Statute

The effectiveness of SICA, as has been pointed out earlier, has been severely undermined by reason of the enormous delays involved in the disposal of cases by the BIFR. The success rate of revival of sick companies has fallen far too short of the expectations due to several reasons. Instead of attempting large-scale amendments to SICA, it is suggested that the provisions relating to revival and rehabilitation of sick companies contained in that Act (Sections 17, 18 & 19) may be suitably telescoped into the structure of the Companies Act, 1956 itself. The failure of the revival scheme should automatically lead to the winding-up of the company as the next logical and inevitable step. It is further recommended that a company which suffers 50% or more of erosion to its net-worth should be encouraged to submit itself to the revival and reconstruction under the supervision of the Tribunal proposed by committee. The powers and authority of the BIFR should be transferred to the proposed National Tribunal for revival/liquidation of companies. The reference of cases for revival may be made voluntary rather than making it obligatory as at present under Section 15 of SICA.

5.16 CONCLUSION

- (a) Considering the criticisms of the working of the BIFR under SICA, the Committee accepts the suggestion that the SICA should be repealed, but the ameliorative, revival and reconstructionist procedures obtaining under it should be reintegrated in a suitably amended form in the structure of Company Law. These procedures will be similar to the measures for Administration Order Procedure and winding-up which are now provided integrally as part of U.K. Insolvency Act, 1986.
- (b) Article 323B of the Constitution of India should be amended to incorporate the subject of debt recovery, company insolvency including revival and restructuring as additional heads of legislation so as to enable Parliament to set up a National Tribunal for revival of Companies and winding-up of companies. Further the jurisdiction and powers presently exercised by Company Law Board under the Companies Act, 1956 in future shall be exercised by the proposed Tribunal.
- (c) The National Tribunal for revival or winding-up of companies (hereinafter referred to as the National Tribunal) should be headed by a sitting Judge/former judge of the High Court and its Benches should consist of a Judicial Member and a Technical Member.
- (d) The Principal Bench of the National Tribunal should be located at New Delhi and its Benches should be located at the Principal seat of each High Court. The determination of the Number of such Benches would depend upon the sufficiency of the workload. The Central Government may be suitably authorized to set up more such Benches as and when the situation so warrants.

- (e) The National Tribunal should have the power to enquire into the cases of erosion of net-worth by 50% or more and to declare the company as a sick company. To that extent it should also have the power to direct the preparation of a scheme of rehabilitation and revival of such company under its supervision and for ordering financial assistance for such a scheme from Financial institutions/Banks and to direct the continuance of the operations of the company as a going concern interim period.
- (f) National Tribunal should 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. A suitable non-obstante clause should be incorporated in the Companies Act, 1956 so as to give overriding effect to the powers and jurisdiction of the National Tribunal in winding-up matters in the event they should come in conflict with provisions in other Acts.
- (g) The Tribunal should have overriding authority and jurisdiction when decisions of Debt Recovery Tribunals interfere with pending winding-up proceedings.
- (h) National Tribunal should have the authority to regulate its own procedure. Proceedings before the Tribunal shall be deemed to be judicial proceedings for the purpose of section 193 and 228 of the Indian Penal Code.
- (i) National Tribunal should have powers to review its own orders.
- (j) Any party aggrieved by an order passed by the Tribunal may within sixty days of passing of the order prefer an appeal to the Division Bench of the High Court on any substantial question of law.

5.17 Transitory Provisions in New Insolvency Act (Part VII of Companies Act)

- (a) The Committee feels that existing and pending cases under SICA shall abate.
- (b) The winding-up proceedings pending in the High Court under Companies Act, 1956 shall stand transferred to the National Tribunal for expeditious disposal of those cases.

5.18 Encouragement of Voluntary Winding-up

The Committee strongly feels that every effort should be made to encourage the voluntary winding-up of companies. Suitable provisions to that end may be incorporated in the insolvency statute especially where the paid-up capital of an insolvent company is below an amount to be specified by the Central Government. In such cases, the High Court/National Tribunal should have the power to direct the parties to take recourse to voluntary winding-up.

CHAPTER-6

Provisions of Insolvency Law of other countries which may be incorporated in Companies Act, 1956

- 6.1 The Committee had attempted to tabulate and study comparative provisions of insolvency laws in various countries, namely U.K, U.S.A, Singapore and Malasiya. The Committee observed that in matters of winding up, the company law in India closely follows the law in UK on the subject, which, however, is, now, separated from the Companies Act and enacted in the form of the present independent statute, namely, the U.K. Insolvency Act, 1986. The Insolvency Act, 1986 now deals with individual bankruptcy as well as corporate insolvency as an integrated law on the subject.
- 6.2 The Committee considered that, having regard to its terms of reference, it should confine its recommendations to corporate insolvency. Considering similarities in the legal system in Commonwealth jurisdictions, the Committee chose appropriate legal structure for winding up of companies in line with provisions of the U.K insolvency laws similar to the extent suitable to Indian conditions.
- 6.3 The basic aims of corporate insolvency law should be:-
- (a) To protect creditors and allow them to enforce their claims against the company;
 - (b) Balance the interests of competing groups e.g creditors, shareholders, labour and the state;
 - (c) Control or punish directors and officers in default responsible for collapse of the company and financial as well as other types of mismanagement; and
 - (d) To promote the rescue of a company which is capable of being revived and rehabilitated with the pass of an administration Order.
- 6.4 Further, there is also the widely perceived necessity to bring Indian law on corporate Insolvency in tune with globally acceptable practices and procedures.

Insolvency defined

- 6.5 There can be two part test to determine insolvency i.e firstly if according to the company's balance sheet, its liabilities including contingent liabilities, exceed the assets. This test known as the balance sheet test would also embrace companies, which even though they manage to pay their debts as and when they fall due are to be deemed to be insolvent if in the balance sheet their liabilities exceed their assets. Secondly, if the company fails to pay an undisputed debt exceeding an amount specified in the Statute.

It is the duty of the directors to protect the interests of creditors and others and failure to do so may trigger insolvency.

Administration Order Procedure

- 6.6 The UK law on the subject envisages recourse to Administration Order Procedure (AOP) in cases where a company, otherwise liable to be wound up, may be revived and rehabilitated by timely intervention. In practice, however, this procedure should be made available to companies which are likely to lapse into commercial insolvency.
- 6.7 The Cork Committee in UK had recommended that U.K. Law should acknowledge the benefits which may flow from adoption of AOP designed more for corporate rescue rather than for mere assets realisation.
- 6.8 Considering that India's economy is based on labour intensive technologies and there is politico-economic environment which militates against sudden exit policy for corporate sector, the Committee visualised that objectives and methods of corporate insolvency should not be confined to assets realisation only. In Chapter 5, of the report the Committee has, therefore, considered and recommended that law of insolvency should aim first at rehabilitation, failing which only the winding up of a company should be ordered by the proposed Tribunal.
- 6.9 It is therefore, recommended that the proposed Tribunal should have power to direct that during the period when the AOP is in force, the affairs business and the properties of the company shall be managed by an Administrator appointed by the Tribunal. The AOP should be triggered on a petition by creditors (including Financial Institutions) or directors - (pursuant to a resolution duly passed at a general meeting of the Company). In case of creditors the criterion should be that they should represent the creditors to whom the company owes more than 50% of its liabilities under same category. The petitioner-creditor must deposit prescribed amount of security to avoid misuse of this facility. Where there is an extant winding up petition, the petitioners must also be served a notice of application for AOP. Tribunal on hearing such an application should have power to order the appointment of an interim Administrator.
- 6.10 Petitions for AOP should be taken up for hearing immediately and Tribunal should endeavour to dispose of such petitions as early as possible.
- 6.11 In respect of pending winding up cases as on the date of commencement of the new Act, notice of application of AOP should be served on petitioner by the applicant.

6.12 Duties of Administrators should include convening meeting of creditors for discussing and approving of the plan for company administration and execute approved plan in minimum time frame and in accordance with the appointment order issued by the Tribunal. Administrator shall have power to attempt Corporate rescue that presupposes to selling the assets of the company in an efficient manner . If need be, he can seek for an order of the Tribunal to give effect to the scheme. In case of failure of the scheme, Administrator shall report to Tribunal to consider passing of a winding up order of the company.

Insolvency Petitioners

6.13 The Committee also noted the Cork Committee's suggestion to introduce the concept of professional Insolvency Practitioners (IPs) in insolvency proceeding. The Committee also noted that U.K. Insolvency Act, 1986 also provide for utilizing private insolvency practitioners for winding up. The Committee has also received suggestions regarding the appointment of only members of a recognised professional body e.g ICSI, ICAI, ICWA or Advocates and Corporate managers experienced in corporate affairs. A list of such professionals may be drawn up by Central Government and Government may prescribe rules regarding their appointment, qualification etc. The basic idea is to utilize their services for being appointed as Liquidators.

6.14 Remuneration and expenses of Insolvency Practitioner should not exceed 5% of gross realisation made by him. This aspect may be clearly made a part of the order of appointment of Insolvency practitioner. He shall be required to maintain separate bank accounts for depositing sale proceed/recoveries and maintain proper accounts and submit half yearly returns of receipts and payments to the Tribunal. The Tribunal should have power to remove the professional practitioner on sufficient cause being show in addition to their being liable to be proceeded against professional misconduct by their own professional bodies.

6.15 The Committee is, however, not in favour of appointing Administrative Receivers as provided in UK insolvency Act, 1986.

6.16 The consequences of failure of AOP, petition filed by creditors or shareholders of the company, holding at least 10% of Equity shares, should result in triggering compulsory liquidation.

Report of IMF

6.17 The Committee noted that through the Insolvency Law and procedure differ in

important aspects from country to country, the International Monetary Fund (IMF) in its report on "Orderly effective Insolvency Procedure-Key issues" has identified two overall objectives that are generally shared by most systems. They are as follows: "The first objective is allocation of risk among participants in a market economy in a predictable, equitable and transparent manner. The second objective is to protect and maximise value of the benefit of all interested parties (Value maximisation) and the economy in general."

The key policies concerning insolvency Law therefore should strike a balance in achieving above objectives.

- 6.18 The legal frame work in India needs to be strengthened so that it may address to substantive issues listed on page 9 of the Report of IMF under the heading 'Legal frame-work' effectively and in a time bound manner. (Annexure B)

UNCITRAL MODEL LAW

- 6.19 The other immediate concern in the context of Global dimension of the structure of Insolvency in various countries is to consider adoption, fully or partly, of "The UNCITRAL Model Law in Cross-Border Insolvency", as adopted by United Nations General Assembly Resolution 52/158 dated 15th December, 1997. As a member of United Nations, India should implement it. This resolution therefore, has to be implemented by India by making suitable changes. This apart, Committee is of the opinion that the implementation of the Model Law will facilitate International trade.

The Committee is of the opinion that Part VII of the Companies Act, 1956 should be amended to correspond to provisions for Model Law as reproduced below for cross-border insolvency:

- (a) The case of an in bound request for recognition of foreign proceedings.
- (b) An outward-bound request from a court or administrator in the enacting state.
- (c) Coordination proceedings in two or more States and
- (d) Participation of foreign creditors in insolvency proceedings taking place in enacting States.

The Articles contained in the Model Law may be referred to in a substantive provision and provisions themselves may be reproduced as a Schedule to the Companies Act, 1956. The Tribunal should empower to strike an equitable balance between rights of Indian and foreign creditors, particularly in the matter of proof and priorities of their respective claims.

CHAPTER-7

Suggestions and Recommendations of the Committee:

- 7.1 The whole issue of law relating to insolvency of companies should be viewed not only on basis of the existing provisions of Part-VII of the Companies Act, 1956 but also other relevant laws having a bearing on the subject, such as Sick Industrial Companies (Special Provisions) Act, 1985, (SICA), Recovery of Debts due to Banks and Financial Institutions Act, 1993, UNCITRAL Model Law on Cross Border Insolvency approved by United Nations (Annexure A) and International Monetary Fund report on "Orderly and effective Insolvency Procedures" (Annexure B) The Committee, therefore, recommends that the provisions of Part VII of the Companies Act, 1956, be amended to include the provisions for setting up of a National Tribunal which will have,-
- (a) the jurisdiction and power presently exercised by Company Law Board under the Companies Act, 1956;
 - (b) the power to consider rehabilitation and revival of companies - a mandate presently entrusted to BIFR/AAFIR under SICA ;
 - (c) the jurisdiction and power relating to winding up of companies presently vested in the High Courts. In view of above recommendations Article 323B of the Constitution should be amended to set up National Tribunal. SICA should be repealed and the Companies Act, 1956 be amended accordingly.
- 7.2 In continuation with the Committee's recommendation in para 7.1, the Committee recommends that the Tribunal should be headed by a sitting judge or a former judge of a High Court and each of its Benches should consist of a judicial member and a technical member. Tribunal shall have such number of members as may be prescribed by the Central Government.
- 7.2.1 The principal Bench of the Tribunal should be located at New Delhi and its Benches should be located at the principal seats of each High Court.
- 7.2.2 The Central Government may set up more such Benches if so required.
- 7.3 While passing the order for winding up of a company, the Tribunal shall have power to prescribe time limit for each step to be taken by the Liquidator in the course of winding up process. The Tribunal shall also have power to prescribe the time limits for compliance of each step by parties while considering the reference for revival of sick companies.

- 7.4 The Tribunal should be vested with the power to transfer all proceedings from one private liquidator to another "private liquidator" or to the "Official Liquidator", as the circumstances of case may require.
- 7.5 The Tribunal shall have the power to direct the sale of business of the company as a going concern or at its discretion to sell its assets in a piece-meal manner.
- 7.6 There should be two distinct aspects of the liquidation :-
- (i) sale of assets; and
 - (ii) distribution of sale proceeds
- 7.6.1 An all-out effort should be made by the Liquidator for sale of assets of the company promptly as in absence of the receipt of sale proceeds, timely distribution among the creditors.
- 7.7 The pending references before BIFR/AAIFR under SICA should abate in view of repeal of SICA recommendations by the Committee.
- 7.8 However, the winding up proceedings pending in High Courts under Companies Act, 1956 shall stand transferred to National Tribunal for expeditious disposal of those cases.
- 7.9 Part VII of the Companies Act, 1956 should incorporate a new substantive provision to adopt the UNCITRAL Model Law as approved by the United Nations and the Model Law itself may be incorporated as a Schedule to the Companies Act, 1956, which shall apply to all cases of Cross-Border insolvency.
- 7.10 The Companies Act, 1956 should adopt the necessary principles enunciated under the heading "Legal Framework" , "Orderly and Effective Insolvency Procedures - Key issues" on page 9 of the publication of the Legal Department of International Monetary Fund (Annexure B) to bring the provisions of the Companies Act, 1956 in line with international practices.
- 7.11 The Committee is of the view that there is a need to encourage voluntary winding up of companies. To achieve this object, a provision may be made in the Companies Act, 1956 to provide a company having paid-up capital of Rs. 10 lac or more may submit a petition for its winding up in the proposed Tribunal and companies with paid-up capital below that amount must resort to voluntary winding up. Creditors may approach the Tribunal for winding up only if a company defaults in payment of undisputed debts exceeding Rs. 1,00,000 and in other cases of default, creditors voluntary Winding up should be resorted.

- 7.12 The provisions regarding winding up subject to supervision of court may be deleted as such cases will be taken care of by procedure of compulsory winding up by Court.
- 7.13 Tribunal may continue to have jurisdiction for winding up the companies on grounds stated in section 433 but following further grounds may be added therein, namely:-
- (a) a company has failed to file balance sheet and profit and loss accounts and/or annual returns for last three years on due dates;or
 - (b) any action of the company has threatened or is likely to threaten the security or integrity of India. Share holder or the Central Government will be entitled to file the petition under aforesaid grounds.
- 7.14 Provisions of Companies Act, 1956 be expanded to allow petitioners to take recourse to Administrative Order Procedure (Annexure C), on the lines of UK Insolvency Act, 1986. The Committee strongly recommends appointing Insolvency Professionals who are members of Institute of Chartered Accountants of India (ICAI), Institute of Company Secretaries of India (ICSI), Institute of Cost and Work Accountants of India (ICWAI), Bar Councils or corporate managers who are well versed in Corporate management on lines of U.K. Insolvency Act. For this purpose Central Government may maintain a panel of persons who may act as professional Insolvency practitioners subject to their fulfilling of the qualification and experience as may be specified by rules.
- 7.15 The provisions of section 435 of the Companies Act, 1956 empowering courts to transfer winding up cases to District Courts may be deleted .
- 7.16 It should be obligatory for a company filing a winding up petition to submit the Statement of Affairs along with the petition for winding up. In cases where the company opposes winding up petition, it should file Statement of Affairs along with its counter affidavit/reply statement. The Statement of Affairs should be accompanied by latest addresses of directors/company secretary of company, a details of location of assets and their value and debtors and creditors list with complete addresses. This will ensure speedy winding up of the company.
- 7.17 (a) A Fund for revival, rehabilitation of companies and for preservation and protection of assets of companies may be created under the supervision and control of the Government. The Fund shall be maintained and operated by an officer authorised in that behalf by such Government.

(b) The Committee favoured the contribution of a specified percentage of turnover to the Fund than of contribution based on profits. The companies, formed and registered after the establishment of proposed Tribunal, shall contribute annually specified percentage (say 0.1%) of their turnover immediately after commencement of business. The companies already existing shall contribute annually from the financial year immediately succeeding the year in which proposed Tribunal is established.

7.18 The Committee is of the view that the winding up order passed by the Tribunal should be made available to the liquidator within a period not exceeding two weeks from the date of passing of the order.

7.19 The directors and officers of the company should be responsible for ensuring that books of account are completed and got audited up to the date of winding up order and submitted to the Tribunal at the cost of company failing which such directors and officers should be subjected to monetary penalty as well as imprisonment.

7.20 The Committee recommends that, the present system of liquidator required to seek the court's directions, even for small matters relating to routine administrative decisions not only causes delay in winding up but also takes valuable time of the court. Therefore, the Committee recommends that the liquidator should not seek the sanction of the court except for important matters such as confirmation of sale of assets and distribution of proceeds realised.

7.21 The Committee is of the view that appropriate legislative action must be taken to ensure that the claims of all employees of a company and its secured creditors are ranked "pari-passu".

7.22 The Committee is of the view that the specific provisions may be made in the Companies Act, 1956 that the liquidator may distribute interim dividend.

7.23 The Committee recommends there should be a two point criteria for determining the maintainability of the reference for revival and rehabilitation of a company to the Tribunal, namely, that the company has suffered erosion of 50% of its net worth or there is a debt default involving a sum of not less than Rs.1 lakh in respect of undisputed debts.

7.24 The reference to the Tribunal for revival by a company should be voluntary. As already stated the jurisdiction of hearing references of revival and rehabilitation of companies will vest in the Tribunal and not BIFR as at present.

7.25 Apart from the paucity of qualified, competent and trained staff, OLs have not been provided with modern infrastructure facilities and in absence thereof, they are unable to cope with the increased work load and are unable to discharge their duties efficiently. Committee is of the view that offices of OLs should be strengthened by appointing qualified , competent and trained staff. In addition computers and other modern facilities be provided in OLs offices.

7.26. The committee is of the view that an explicit provision need be made in the Companies Act giving a right to the secured creditors to file proof of debt with the liquidator without surrendering his status as a secured creditor and get the dividend in accordance with the priority to which he is entitled.

*"My theory of 'trusteeship' is no make-shift,
certainly no camouflage. I am confident that it will
survive all other theories. It has the sanction
of philosophy and religion behind it.
That possessors of wealth have not acted up
to the theory, does not prove its falsity:
it proves the weakness of the wealthy"*

Mahatma Gandhi

-India of My Dream : P.68

UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY**PREAMBLE**

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

CHAPTER I. GENERAL PROVISIONS**Article 1. Scope of application**

1. This Law applies where:
 - (a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
 - (b) Assistance is sought in a foreign State in connection with a proceeding under [identify laws of the enacting State relating to insolvency]; or
 - (c) A foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or
 - (d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of or participating in, a proceeding under [identify laws of the enacting State relating to insolvency].
2. This Law does not apply to a proceeding concerning [designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law].

Article 2. Definitions

For the purposes of this Law:

- (a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- (b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;
- (d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
- (e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
- f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. [Competent court or authority]¹

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts, authority or authorities competent to perform those functions in the enacting State].

1- A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision: Nothing in this Law affects the provisions in force in this State governing the authority of [insert the title of the government-appointed person or body].

Article 5. Authorization of [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to act in a foreign State

A [insert the title of the person or body administering a reorganization or

liquidation under the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law.

Article 6. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Article 7. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to provide additional assistance to a foreign representative under other laws of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

CHAPTER II.

**ACCESS OF FOREIGN REPRESENTATIVES AND
CREDITORS TO COURTS IN THIS STATE**

Article 9. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

Article 10. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

A foreign representative is entitled to apply to commence a proceeding under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding are otherwise met.

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under [identify laws of the enacting State relating to insolvency].

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

1. Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State.
2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims]²

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

1. Whenever under [identify laws of the enacting State relating to insolvency] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

²The enacting State may wish to consider the following alternative wording to replace paragraph 2 of article 13(2):

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].

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2. Such notification shall be made to the foreign creditors individually, unless

the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.

3. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:
 - (a) Indicate a reasonable time period for filing claims and specify the place for their filing;
 - (b) Indicate whether secured creditors need to file their secured claims; and
 - (c) Contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

CHAPTER III.

RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 15. Application for recognition of a foreign proceeding

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
2. An application for recognition shall be accompanied by:
 - (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
 - (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
 - (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.
3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 16. Presumptions concerning recognition

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of

subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.

2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.
3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

Article 17. Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:
 - (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
 - (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
 - (c) The application meets the requirements of paragraph 2 of article 15; and
 - (d) The application has been submitted to the court referred to in article 4.
2. The foreign proceeding shall be recognized:
 - (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.
3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

- (a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and

- (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

- 1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:
 - (a) Staying execution against the debtor's assets;
 - (b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
 - (c) Any relief mentioned in paragraph 1(c), (d) and (g) of article 21.
- 2. [Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]
- 3. Unless extended under paragraph 1 (f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.
- 4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Article 20. Effects of recognition of a foreign main proceeding

- 1. Upon recognition of a foreign proceeding that is a foreign main proceeding,
 - (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
 - (b) Execution against the debtor's assets is stayed; and
 - (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
- 2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension

referred to in paragraph 1 of this article].

3. Paragraph 1 (a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.
4. Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under [identify laws of the enacting State relating to insolvency] or the right to file claims in such a proceeding.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief including:
 - (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20;
 - (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20;
 - (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20;
 - (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
 - (e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
 - (f) Extending relief granted under paragraph 1 of article 19;
 - (g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.
2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution

of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 22. Protection of creditors and other interested persons

1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.
2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.
3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

Article 23. Actions to avoid acts detrimental to creditors

1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation].
2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

Article 24. Intervention by a foreign representative in proceedings in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

CHAPTER IV.
COOPERATION WITH FOREIGN COURTS AND FOREIGN
REPRESENTATIVES

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State].
2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives

1. In matters referred to in article 1, a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.
2. The [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

- (a) Appointment of a person or body to act at the direction of the court;
- (b) Communication of information by any means considered appropriate by the court;
- (c) Coordination of the administration and supervision of the debtor's assets and affairs;
- (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;

- (e) Coordination of concurrent proceedings regarding the same debtor;
- (f) [The enacting State may wish to list additional forms or examples of cooperation].

CHAPTER V.
CONCURRENT PROCEEDINGS

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding

After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

Where a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

- (a) When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,
 - (i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and
 - (ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;
- (b) When the proceeding in this State commences after recognition or after the filing of the application for recognition, of the foreign proceeding,
 - (i) Any relief in effect under article 19 or 21 shall be re-viewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and
 - (ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in this State;

- (c) In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 30. Coordination of more than one foreign proceeding

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

- (a) Any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
- (b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;
- (c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [identify laws of the enacting State relating to insolvency], proof that the debtor is insolvent.

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [identify laws of the enacting State relating to insolvency] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

EXTRACTS FROM CHAPTER 2 OF "ORDERLY & EFFECTIVE INSOLVENCY PROCEDURES - Key Issues."

Legal Framework:

An insolvency law must make policy choices with respect to a number of substantive issues, the most important of which include the following:-

- * It is necessary to identify the debtors that may be subject to insolvency proceedings. Will the general insolvency law apply to all debtors or will certain debtors (e.g., state-owned enterprises) be subject to special insolvency regimes or even insulated from the application of all forms of insolvency procedures?
- * The law must determine when an insolvency proceedings may be commenced (upon illiquidity? Upon insolvency?), who may request commencement, and whether the nature of the commencement criterion should differ depending on who is requesting commencement (i.e., the debtor or the creditor). A related question is whether the law should give the petitioner the option of requesting the initiation of either a liquidation or a rehabilitation procedure. Finally, the law must address the issue of whether the management of the debtor has a specific duty to commence proceedings when the relevant commencement condition has been met.
- * To what extent should a debtor be displaced from the management and control of the enterprise once insolvency proceedings commence? In the case of rehabilitation procedures, some countries have opted for full debtor control (debtor-in-possession), while others have either given a court-appointed administrator full authority or have established some form of power-sharing arrangement between the debtor and the administrator.
- * Will the "stay" that applies to the enforcement of legal remedies by creditors once insolvency proceedings commence also apply to secured creditors and, if so, what type of protection will be afforded to these creditors during the insolvency proceedings?
- * To what extent will the liquidator (in the case of liquidation proceedings) or the administrator (in the case of rehabilitation) have the general authority to interfere with the terms of contracts entered into by the debtor before the proceedings? A related issue of particular importance to financial markets is the extent to which set-

off or netting rights can be suspended by the commencement of the proceeding.

- * How broad will the administrator's powers be with respect to the nullification of transactions and transfers that are fraudulent or otherwise result in the interests or creditors being prejudiced?
- * In the case of rehabilitation procedures, what limitations, if any, are imposed on the contents of the plan? What conditions are required for its approval and effectiveness?
- * With respect to liquidation procedures, how should creditors be ranked for purposes of distributing the proceeds of a liquidation sale?
- * In reorganization procedures, are the interests of the current owners and management to be given weight?

Finally, in addition to these specific issues, a more general issue that must be addressed is whether an insolvency law will effectively modify other substantive laws. For example, will the insolvency law supersede labor laws that afford employees special protection? In the context of the approval of a plan that envisages debt-for-equity conversions or the sale of the enterprise as a going concern, will it supersede provisions of the company law that would otherwise require shareholder approval?

Notwithstanding the variety of substantive issues that must be resolved, insolvency laws are highly procedural in nature. The design of the procedural rules plays a critical role in determining how risk is to be allocated among the various participants in the proceedings. Perhaps the most critical procedural issue relates to the identification of the decision maker. For example, in the case of liquidation proceedings, in what circumstances can the creditors replace the liquidator? In the case of a rehabilitation procedure, should the determination of whether a successful rehabilitation is potentially feasible be made by the creditors, the administrator, the court, or a combination thereof? If a rehabilitation plan is approved by the creditors, can it subsequently be rejected by the court? Conversely, can the court impose a plan that has been rejected by a requisite majority of the creditors? As discussed below, to the extent that the law confers considerable responsibility upon the institutional infrastructure to make key decisions, it is critical that this infrastructure be sufficiently developed.

Institutional Framework:

An insolvency law will need to provide for an institutional framework for its

implementation. Since the adjudication of disputes is a judicial function, insolvency proceedings should be conducted under the authority of a court of law where judges will, at a minimum, be required to adjudicate disputes between the parties on factual issues and, on occasion, render interpretations of the law. The judiciary will only be able to fulfill this function if it is made up of independent judges with particularly high ethical and professional standards.

Moreover, the court will also need to appoint qualified professionals (liquidators and administrators) who are designated to handle key administrative matters (recording, collection and evaluation of the assets and liabilities, management of the enterprise, etc). The availability of an experienced cadre of such professionals with adequate commercial experience is essential to a successful implementation of the law. Among other things, safeguards will need to be in place to ensure that any conflict of interest is avoided between the designated professional and those parties that have an interest in the proceedings.

To perform their tasks, the court and the designated officials will also have to rely on specialists (accountants, appraisers, and auctioneers). They will need to have access to the debtor's books and other relevant information. For a proper discharge of their functions, laws will have to require the keeping of books and the observance of accounting standards by debtors engaged in an independent business activity. Although it is not necessary for such provisions to be contained in the insolvency law itself, they are essential to its implementation.

PART II

ADMINISTRATION ORDERS

MAKING, ETC. OF ADMINISTRATION ORDER

SEC. 8 POWER OF COURT TO MAKE ORDER

- 8(1) [Administration order] Subject to this section, if the court-
- (a) is satisfied that a company is or is likely to become unable to pay its debts (within the meaning given to that expression by section 123 of this Act), and
 - (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.

- 8(2) [Definition] 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.

- 8(3) [Purposes for order] The purposes for whose achievement an administration order may be made are-
- (a) the survival of the company, and the whole or any part of its undertaking, as a going concern;
 - (b) the approval of a voluntary arrangement under Part 1.
 - (c) the sanctioning under section 425 of the Companies Act of a compromise or arrangement between the company 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.

- 8(4) [Where order not to be made] An administration order shall not be made in relation to a company after it has gone into liquidation, nor where it is-
- (a) an insurance company within the meaning of the Insurance Companies Act 1982, or
 - (b) an authorised institution or former authorised institution within the meaning of the Banking Act 1987.

<p>History</p> <p>In s. 8(4) para (b) substituted by Banking act, 1987, s. 108(1) and sch. 6 para 25(1) as from 1 October 1987 (see S. 1 1987 No. 1664 (C.50)); the former para (b) read as follows</p>	<p>"(b) a recognized bank or licensed institution within the meaning of the Banking Act, 1979, or an institution to which sections 16 and 18 of that Act apply as if it were a licensed institution.</p>
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SEC. 9 APPLICATION FOR ORDER

- 9(1) [Application to court] An application to the court for an administration order shall be by petition presented either by the company or the directors, or by a creditor or creditors (including any contingent or prospective creditor or creditors), or by all or any of those parties together or separately.
- 9(2) [On presentation of petition to court] Where a petition is presented to the court-
- (a) notice of the petition shall be given forthwith to any person who has appointed, or is or may be entitled to appoint, an administrative receiver of the company, and to such other persons as may be prescribed, and
 - (b) the petition shall not be withdrawn except with the leave of the court.

Note

For the "other persons" in 5. 9(2)(a), see The Insolvency Rules 1986, r. 2.6.

- 9(3) [Duties of court] Where the court is satisfied that there is an administrative receiver of the company, the court shall dismiss the petition unless it is also satisfied either-
- (a) that the person by whom or on whose behalf the receiver was appointed has consented to the making of the order, or
 - (b) that, if an administration order were made, any security by virtue of which the receiver was appointed would-
 - (i) be liable to be released or discharged under sections 238 to 240 in Part VI (transactions at an undervalue and preferences),
 - (ii) be avoided under section 245 in that Part (avoidance of floating charges), or
 - (iii) be challengeable under section 242 (gratuitous alienations) or 243 (unfair preferences) in that Part, or under any rule of law in Scotland.

9(4) [Court powers on hearing petition] Subject to subsection (3), on hearing a petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit.

9(5) [Extent of interim order] Without prejudice to the generality of subsection (4), an interim order under that subsection may restrict the exercise of any powers of the directors or of the company (whether by reference to the consent of the court or of a person qualified to act as an insolvency practitioner in relation to the company, or otherwise).

SEC. 10 EFFECT OF APPLICATION

10(1) [Limitations] 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 or its property except with the leave of the court and subject to such terms as aforesaid .

10(2) [Where leave not required] Nothing in subsection (1) require the leave of the court-

- (a) for the presentation of a petition for the winding up of the company.
- (b) for the appointment of an administrative receiver of the company, or
- (c) for the carrying out by such a receiver (whenever appointed) of any of his functions.

10(3) [Period in sec. 10(1)] Where

- (a) a petition for an administration Order is presented at a time when there is an administrative receiver of the company, and
- (b) the person by or on whose behalf the receiver was appointed has not consented to the making of the order,

the period mentioned in subsection (1) is deemed not to begin unless and until that person so consents.

10(4)[Hire-purchase agreements] References in this section and the next to hire-purchase agreements include conditional sale agreements, chattel leasing agreements and retention of title agreements.

10(5) [Scotland] In the application of this section and the next to Scotland, references to execution being commenced or continued include references to diligence being carried out or continued, and references to distress being levied shall be omitted.

SEC. 11 EFFECT OF ORDER

11(1) [On making of administration order] On the making of an administration order-

- (a) any petition for the winding up of the company shall be dismissed, and
- (b) any administrative receiver of the company shall vacate office.

11(2) [Vacation of office by receiver] Where an administration order has been made, any receiver of part of the company's property shall vacate office on being required to do so by the administrator.

11(3) [Limitations] During the period for which an administration order is in force-

- (a) no resolution may be passed or order made for the winding up of the company;
- (b) no administrative receiver of the company may be appointed;
- (c) no other 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 consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as the court may impose; and
- (d) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as aforesaid.

11(4) (Where vacation of office under sec. 11(1)(b), (2)] Where at any time an administrative receiver of the company has vacated office under subsection (1)(b), or a receiver of part of the company's property has vacated office under subsection(2)-

- (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 (subject to subsection (3) above) paid out of any property of the company which was 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.

11(5)[Sec. 40, 59] Neither an administrative receiver who vacates office under subsection (1)(b) nor a receiver who vacates office under subsection (2) is required on or after so vacating office to take any steps for the purpose of complying with any duty imposed on him by section 40 or 59 of this Act (duty to pay preferential creditors).

SEC. 12 NOTIFICATION OF ORDER

12(1)(Information in invoices etc.) Every invoice, order for goods or business letter which, at a time when an administration order is in force in relation to a company, is issued by or on behalf of the company or the administrator, being a document on or in which the company's name appears, shall also contain the administrator's name and a statement that the affairs, business and property of the company are being managed by the administrator.

12(2)(Penalty on default] If default is made in complying with this section, the company and any of the following persons who without reasonable excuse authorises or permits the default, namely, the administrator and any officer of the company, is liable to a fine.

ADMINISTRATORS

SEC. 13 Appointment of administrator

13(1)[Appointment] The administrator of a company shall be appointed either by the administration order or by an order under the next subsection.

13(2)[Court may fill vacancy] If a vacancy occurs by death, resignation or otherwise in the office of the administrator, the court may by order fill the vacancy.

13(3)(Application for Sec. 13(2) order] An application for an order under subsection (2) may be made

(a) by any continuing administrator of the company; or

(b) where there is no such administrator, by a creditors' committee established under section 26 below; or

(c) where there is no such administrator and no such committee, by the

company or the directors or by any creditor or creditors of the company.

SEC. 14 GENERAL POWERS

14(1) [Powers of administrator] The administrator of a company-

- (a) may do all such things as may be necessary for the management of the affairs, business and property of the company, and
- (b) without prejudice to the generality of paragraph (a), has the powers specified in Schedule 1 to this Act;

and in the application of that Schedule to the administrator of a company the words "he" and "him" refer to the administrator.

14(2) [Extra powers] The administrator also has power-

- (a) to remove any director of the company and to appoint any person to be a director of it, whether to fill a vacancy or otherwise, and
- (b) to call any meeting of the members or creditors of the company.

14(3) [Application for directions] The administrator may apply to the court for directions in relation to any particular matter arising in connection with the carrying out of his functions.

14(4) [Conflict with other powers] Any power conferred on the company or its officers, whether by this Act or the Companies Act or by the memorandum or articles of association, which could be exercised in such a way as to interfere with the exercise by the administrator of his powers is not exercisable except with the consent of the administrator, which may be given either generally or in relation to particular cases.

14(5) [Administrator agent] in exercising his powers the administrator is deemed to act as the company's agent.

14(6) [Third party] A person dealing with the administrator in good faith and for value is not concerned to inquire whether the administrator is acting within his powers.

SEC. 15 POWER TO DEAL WITH CHARGED PROPERTY, ETC.

15(1) [Power of disposal etc.] 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 to which this subsection applies as if the property were not subject to the security.

15(2) [Court orders, on application by administrator] Where, on an application by

the administrator, the court is satisfied that the disposal (with or without other assets) of-

- (a) any property of the company subject to a security to which this subsection applies, or
- (b) any goods in the possession of the company under a hire-purchase agreement,

would be likely to promote the purpose or one or more of the purposes specified in the administration order, the court may by order authorise the administrator to dispose of the property as if it were not subject to the security or to dispose of the goods as if all rights of the owner under the hire-purchase agreement were vested in the company.

15(3) [Application of sec. 15(1), (2)] Subsection (1) applies to any security which, as created, was a floating charge; and subsection (2) applies to any other security.

15(4) [Effect of security where property disposed of] Where property is disposed of under subsection (1), the holder of the security has the same priority in respect of any property of the company directly or indirectly representing the property disposed of as he would have had in respect of the property subject to the security.

15(5) [Conditions for sec. 15(2) order] It shall be a condition of an order under subsection (2) that-

- (a) the net proceeds of the disposal, and
- (b) where those proceeds are less than such amount as may be determined by the court to be the net amount which would be realised on a sale of the property or goods in the open market by a willing vendor, such sums as may be required to make good the deficiency,

shall be applied towards discharging the sums secured by the security or payable under the hire-purchase agreement.

15(6) [Where sec. 15(5) condition re two or more securities] Where a condition imposed in pursuance of subsection (5) relates to two or more securities, that condition requires the net proceeds of the disposal and, where paragraph (b) of that subsection applies, the sums mentioned in that paragraph to be applied towards discharging the sums secured by those securities in the order of their priorities.

15(7) [Copy of sec. 15(2) order to registrar] An office copy of an order under subsection (2) shall, within 14 days after the making of the order, be sent by the administrator to the registrar of companies.

15(8) [Non-compliance with sec. 15(7)] If the administrator without reasonable excuse fails to comply with subsection (7), he is liable to a fine and, for continued contravention, to a daily default fine.

15(9) [Interpretation] References in this section to hire-purchase agreements include conditional sale agreements, chattel leasing agreements and retention of title agreements.

SEC. 16 OPERATION OF SEC. 15 IN SCOTLAND

16(1)[Administrator's duty] Where property is disposed of under section 15 in its application to Scotland, the administrator shall grant to the disponee an appropriate document of transfer or conveyance of the property, and-

(a) that document, or

(b) where any recording, intimation or registration of the document is a legal requirement for completion of title to the property, that recording, intimation or registration,

has the effect of disencumbering the property of or, as the case may be, freeing the property from the security.

16(2) [Disposal of goods on hire-purchase etc.] Where goods in the possession of the company under a hire-purchase agreement. conditional sale agreement. chattel leasing agreement or retention of title agreement are disposed of under section 15 in its application to Scotland, the disposal has the effect of extinguishing, as against the disponee, all rights of the owner of the goods under the agreement.

SEC. 17 GENERAL DUTIES

17(1) [Control of company property) 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.

17(2)[Management of affairs, etc.) The administrator shall manage the affairs, business and property of the company-

(a) at any time before proposals have been approved (with or without modifications) under section 24 below, 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.

17(3)[Summoning of creditors meeting] The administrator shall summon 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.

Note

For the rules relevant for S. 17(3), see The Insolvency Rules 1986, r. 2.21ff.

SEC. 18 DISCHARGE OR VARIATION OF ADMINISTRATION ORDER

18(1)[Application to court by administrator] The administrator of a company may at any time apply to the court for the administration order to be discharged, or to be varied so as to specify an additional purpose.

18(2)[Duty to make application] The administrator shall make an application under this section if-

- (a) it appears to him that the purpose or each of the purposes specified in the order either has been achieved or is incapable of achievement, or
- (b) he is required to do so by a meeting of the company's creditors summoned for the purpose in accordance with the rules.

18(3)[Court order] On the hearing of an application under this section, the court may by order discharge or vary the administration order and make such consequential provision as it thinks fit, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order it thinks fit.

18(4)[Copy of order to registrar] Where the administration order is discharged or varied the administrator shall, within 14 days after the making of the order effecting the discharge or variation, send an office copy of that order to the registrar of companies.

18(5)[Non-compliance with sec. 18(4)] If the administrator without reasonable excuse fails to comply with subsection (4), he is liable to a fine and, for continued contravention, to a daily default fine.

SEC. 19 VACATION OF OFFICE

19(1)[Removal or resignation] The administrator of a company may at any time be removed from office by order of the court and may, in the prescribed circumstances, resign his office by giving notice of his resignation to the court.

Note

For the prescribed circumstances, see The Insolvency Rules 1986, r. 2.53.

19(2) [Vacation of office, etc.] The administrator shall vacate office if-

- (a) he ceases to be qualified to act as an insolvency practitioner in relation to the company, or
- (b) the administration order is discharged.

19(3)[Ceasing to be administrator] Where at any time a person ceases to be administrator, the next two subsections apply.

19(4)[Remuneration and expenses] His remuneration and any expenses properly incurred by him 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 to which section 15(1) then applies.

19(5)[Debts or liabilities] Any sums payable in respect of debts or liabilities incurred, while he was administrator, under contracts entered into or contracts of employment adopted by him or a predecessor of his in the carrying out of his or the predecessor's functions shall be charged on and paid out of any such property as is mentioned in subsection (4) in priority to any charge arising under that subsection.

For this purpose, the administrator 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.

SEC. 20 RELEASE OF ADMINISTRATOR

20(1)[Time of release] A person who has ceased to be the administrator of a company has his release with effect from the following time, that is to say-

- (a) in the case of a person who has died, the time at which notice is given to the court in accordance with the rules that he has ceased to hold office;
- (b) in any other case, such time as the court may determine.

Note

The relevant rule for 5. 20(1)(a) is The Insolvency Rules 1986, r. 2.54.

20(2) [Discharge from liability, etc.] Where a person has his release under this section,

he is, with effect from the time specified above, discharged from all liability both in respect of acts or omissions of his in the administration and otherwise in relation to his conduct as administrator.

20(3)[Sec. 212] However, nothing in this section prevents the exercise, in relation to a person who has had his release as above, of the court's powers under section 212 in Chapter X of Part IV (summary remedy against delinquent directors, liquidators, etc.).

ASCERTAINMENT AND INVESTIGATION OF COMPANY'S AFFAIRS

SEC. 21 Information to be given by administrator

21(1)[Duties of administrator] 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 a notice to all creditors of the company (so far as he is aware of their addresses).

21(2) [Copy of order to registrar] 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 other persons as may be prescribed.

Note

See The Insolvency Rules 1986 r.2.10.

21(3)[Penalty for non-compliance] If the administrator without reasonable excuse fails to comply with this section, he is liable to a fine and, for continued contravention, to a daily default fine.

SEC.22 STATEMENT OF AFFAIRS TO BE SUBMITTED TO ADMINISTRATOR

22(1)[Duty of administrator] 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.

Note

See The Insolvency Rules 1986 r.2.11.

22(2)[Contents of statement] The statement shall be verified by affidavit by the persons required to submit it and shall show-

- (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.

22(3)[Persons in sec. 22(1)] The persons referred to in subsection (1) are -

- (a) those who are or have been officers of the company;
- (b) those who have taken 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 or have been in its employment within that year, and are in the administrator's opinion capable of giving the information required;
- (d) those who are or have been within that year officers of or in the employment of a company which is, or within that year was, an officer of the company.

In this subsection " employment" includes employment under a contract for services.

22(4)[Time for submitting statement] Where any persons are required under this section to submit a statement of affairs to the administrator, they shall do so (subject to the next subsection) before the end of the period of 21 days beginning with the day after that on which the prescribed notice of the requirement is given to them by the administrator.

22(5) [Powers re release, extension of time] The administrator, if he thinks fit, may-

- (a) at any time release a person from an obligation imposed on him under subsection (1) or (2), or
- (b) either when giving notice under subsection (4) or subsequently, extend the period so mentioned;

and where the administrator has refused to exercise a power conferred by this subsection, the court, if it thinks fit, may exercise it.

22(6)[Penalty for non-compliance] 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.

ADMINISTRATOR'S PROPOSAL

SECT. 23 STATEMENT OF PROPOSALS

23(1)[Duties of administrator] Where an administration order has been made the administrator shall, within 3 months (or such longer period as the court may allow) after the making of the order-

- (a) send to the registrar of companies and (so far as he is aware of their addresses) to all creditors a statement of his proposals for achieving the purpose or purposes 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.

23(2)[Copies of statement] The administrator shall also, within 3 months (or such longer period as the court may allow) after the making of the order, either-

- (a) send a copy of the statement (so far as he is aware of their addresses) to all members of the company, or
- (b) publish in the prescribed manner a notice stating an address to which members of the company should write for copies of the statement to be sent to them free of charge.

Note

See The Insolvency Rules 1986, r.2.17.

23(3)[penalty for non-compliance] If the administrator without reasonable excuse fails to comply with this section, he is liable to a fine and for continued contravention to a daily default fine.

SEC. 24 CONSIDERATION OF PROPOSALS BY CREDITORS' MEETING

24(1)[Creditors' meeting to decide] a meeting of creditors summoned under section 23 shall decide whether to approve the administrator's proposals.

24(2) [approval, modifications] The meeting may approve the proposals with modifications, but shall not do so unless the administrator consents to each modification.

24(3) [Meeting in accordance with rules] Subject as above, the meeting shall be conducted in accordance with the rules.

Note:

See the Insolvency Rules 1986 r. 2 19ff.

24(4)[Report and notice by administrator] after the conclusion of the meeting 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.

Note:

See The Insolvency Rules 1986 r. 2.30

24(5)[If meeting does not approve] If a report is given to the Court under subsection (4) that the meeting has declined to approve the administrator's proposal (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 all an interim order or any other order that it thinks fit.

24(6)[Where administration order discharged] Where the administration order is discharged, the administrator shall, within 14 days after the making the order effecting the discharge, send an office copy of that order to the registrar of companies.

24(7)[Penalty for non-compliance] If the administrator without reasonable excuse fails to comply with subsection (6), he is liable to a fine and, for continued contravention, to a daily default fine.

SEC. 25 APPROVAL OF SUBSTANTIAL REVISIONS

25(1) [Application] This section applies where-

- (a) proposals have been approved (with or without modifications) under section 24, and
- (b) the administrator proposes to make revisions of those proposals which appear to him substantial.

25(2) [Duties of administrator] 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 than 14 days' notice;

and he shall not make the proposed revisions unless they are approved by the meeting.

25(3) [Copies of statement] The administrator shall also either-

(a) send a copy of the statement (so far as he is aware of their addresses) to all members of the company, or

(b) publish in the prescribed manner a notice stating an address to which members of the company should write for copies of the statement to be sent to them free of charge.

25(4)[Approval, modifications] The meeting of creditors may approve the proposed revisions with modifications, but shall not do so unless the administrator consents to each modification.

25(5)[Meeting in accordance with rules] Subject as above, the meeting shall be conducted in accordance with the rules.

25(6)[Notification to registrar, et al.] After the conclusion of the meeting in accordance with the rules, the administrator shall give notice of the result of the meeting to the registrar of companies and to such persons as may be prescribed.

MISCELLANEOUS

SEC. 26 Creditors' committee

26(1)[Meeting may establish committee] Where a meeting of creditors summoned under section 23 has approved the administrator's proposals (with or without modifications), the meeting may, if it thinks fit, establish a committee ("the creditors' committee") to exercise the functions conferred on it by or under this Act. 26(2) [Committee may summon administrator] If such a committee is established, the committee may, on giving not less than 7 days' notice, require the administrator to attend before it at any reasonable time and furnish it with such information relating to the carrying out of his functions as it may reasonably require.

SEC. 27 PROTECTION OF INTERESTS OF CREDITORS AND MEMBERS

27(1)[Application by creditor or member] At any time when an administration order is in force, a creditor or member of the company may apply to the court by petition for an order under this section on the ground-

- (a) that the company's affairs, business and property are being or have been managed by the administrator in a manner which is unfairly prejudicial to the interests of its creditors or members generally, or of some part of its creditors or members (including at least himself), or
- (b) that any actual or proposed act or omission of the administrator is or would be so prejudicial.

27(2)[Court order] On an application for an order under this section the court may, subject as follows, make such order as it thinks fit for giving relief in respect of the matters complained of, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit.

27(3)[Limits of order] An order under this section shall not prejudice or prevent-

- (a) the implementation of a voluntary arrangement approved under section 4 in Part I, or any compromise or arrangement sanctioned under section 425 of the Companies Act; or
- (b) where the application for the order was made more than 28 days after the approval of any proposals or revised proposals under section 24 or 25, the implementation of those proposals or revised proposals.

27(4) [Contents of order] Subject as above an order under this section may in particular -

- (a) regulate the future management by the administrator of the company's affairs, business and property;
- (b) require the administrator to refrain from doing or continuing an act complained of by the petitioner, or to do an act which the petitioner had complained he has omitted to do;
- (c) require the summoning of a meeting of creditors or members for the purpose of considering such matters as the court may direct;
- (d) discharge the administration order and make such consequential provision as the court thinks fit.

27(5)[Sec 15, 16) Nothing in section 15 or 16 is to be taken as prejudicing applications to the court under this section

27(6)[Copy of discharge order to registrar] 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; and if without reasonable excuse he fails to comply with this subsection, he is liable to a fine and for continued contravention, to a daily default fine.

$$50 + 12 + 3 + 16 = 81 + 4 = 85$$